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EFFECTING COMPULSORY ACQUISITION VIA THE AMALGAMATION PROCEDURE IN SINGAPORE

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Sections 215A to 215J of the *Companies Act* were enacted to facilitate the amalgamation or merger of Singapore companies. These provisions also enable an acquiror to achieve full ownership of the target company by indirectly buying out the shares held by minority shareholders, even if such shareholders have voted against the amalgamation at the shareholders' meeting. This author argues that the amalgamation procedure, as compared with the other forms of compulsory acquisition, may have the unintended effect of unduly favouring the majority shareholders at the expense of the minority shareholders. The problem is partially mitigated by the fact that the provisions allow for shareholders to apply to the court for relief if the amalgamation would lead to unfair prejudice. Alternatively, shareholders may bring a petition under section 216 of the *Companies Act*, on the ground that the amalgamation is oppressive, unfairly discriminatory or otherwise prejudicial to their interests. This article explores the circumstances in which the court would intervene and it is argued that the basis of any intervention is to ensure that the requisite shareholder approval is fairly obtained.

I. INTRODUCTION

Compulsory acquisition refers to the process whereby an acquiror may obtain ownership or control of 100% of a target company even where not all the shareholders of the target company have assented to the sale of their shares to the acquiror. The underlying rationale is that as long as there is the requisite high degree of shareholder approval or assent to the proposed acquisition of a target company, the acquiror should be able to compulsorily acquire the remaining shares held by dissenting shareholders. This kind of transaction requires the reconciliation of the role of the majority shareholder approval as the norm of corporate transaction with the notion that shareholders have expectations of continued participation in the companies that they have invested in until such time they have sold their shares or until the companies are wound up, and such expectations may not be arbitrarily defeated.

Many jurisdictions, including Singapore, have recognised that there are significant benefits in allowing an acquiror to own the whole of the target company. Under the

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Singapore *Companies Act* ("*Companies Act*"),[1] an acquiror may acquire all of the shares of a target company by either using the compulsory acquisition or squeeze-out"[2] process under section 215(1) of the *Companies Act* ("section 215 acquisition") or a court-sanctioned scheme of arrangement under section 210 of the *Companies Act* ("section 210 scheme"). In the case of an acquisition of shares pursuant to the section 210 scheme, the companies may also utilise the scheme of amalgamation under section 212 of the *Companies Act* pursuant to which the court orders that the undertaking of the target company be transferred to the acquiror.

With effect from 30 January 2006, the *Companies (Amendment) Act 2005* came into force. This legislation introduces sections 215A to 215J of the *Companies Act*, which permit a new method of facilitating the amalgamation or merger of Singapore companies, implementing the recommendation made in the *Report of the Company Legislation and Regulatory Framework Committee* ("*CLRFC Report*")[3] in 2002. Unlike the scheme of amalgamation under section 212, the amalgamation procedure in sections 215A to 215J does not require court sanction and nor does it require a section 210 scheme to be undertaken.[4]

Sections 215A to 215J are drafted based on sections 188 to 194A of the draft New Zealand *Companies Act*.[5] The new amalgamation procedure enables the acquiror and the target company to amalgamate and continue as one company, which may be the acquiror, the target company or even a new company. Shareholders of an amalgamating company will receive either cash or securities as consideration for

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1 *Companies Act* (Cap. 50, 2006 Rev. Ed. Sing.). Unless otherwise specified, all references to "*Companies Act*" are to this statute.

2 The term "squeeze-out" right is commonly used in the UK to describe the compulsory purchase right under the English equivalent of section 215 of the *Companies Act*. See *Companies Act 2006* (U.K.), c. 46, Part 28, ch. 3 [UK *Companies Act 2006*] entitled "'squeeze-out' and 'sell-out'". There is also a corresponding "sell-out" right pursuant to the *Companies Act*, section 215(3), which entitles a minority shareholder to compel an acquiror to acquire his shares following a take-over offer once the acquirior holds 90% of the shares of the target company. This right enables a residual minority shareholder to dispose his shares to the offeror at the specified price, which is the same price as the take-over offer, even if the offeror has not chosen to exercise his rights to compulsorily acquire the remaining shares.

3 Sing., Company Legislation and Regulatory Framework Committee, *Report of the Company Legislation and Regulatory Framework Committee* (Singapore, October 2002) [*CLRFC Report*] at ch. 5, para. 6. The Company Legislation and Regulatory Framework Committee [CLRFC] was appointed by the Ministry of Finance, the Attorney-General's Chambers and the Monetary Authority of Singapore [MAS] in December 1999. The CLRFC's terms of reference were "to undertake a comprehensive and coherent review of our company law and regulatory framework and recommend a modern company law and regulatory framework for Singapore which accords with global standards and which will promote a competitive economy." The members of the CLRFC comprised mainly persons who are in the private sector and with wide ranging experience and expertise.

4 The *CLRFC Report* pointed out that the process under section 212 was rarely invoked due to the restrictive interpretation of the courts: see *CLRFC Report*, *supra* note 3 at para. 6.1.

5 For the draft of the New Zealand *Companies Act*, see N.Z., Law Commission, *Company Law Reform: Transition and Revision* (Report No. 16) (Wellington, New Zealand, September 1990), Appendix [*New Zealand Law Commission Report*]. The provisions relating to amalgamation are now found in the *Companies Act 1993*, N.Z., 1993/105 [NZ *Companies Act 1993*], Part 13. The *CLRFC Report* also considered the merger process under the Delaware *General Corporations Law* (Title 8, Chapter 1, Subchapter IX, Merger, Consolidation or Conversion).

the amalgamation. This concept of amalgamation procedure, which is also found in Canada,[6] has no direct equivalent under English[7] or Australian company law.[8]

The amalgamation procedure not only allows an acquiror to achieve full control or ownership of the target company, but also to effect a buy-out of all of the shares held by the target company, even if not all the shareholders consent to the acquisition. An acquiror wishing to achieve full control of a target company may amalgamate with the target company and designate that it (the acquiror) is the surviving entity.[9] Pursuant to the amalgamation, the assets and liabilities of the target company will be transferred to the acquiror and the target company ceases to exist as a legal entity. All shareholders in the target company (excluding the acquiror if it is also a shareholder) will receive from the acquiror either cash or securities in the amalgamated company, as specified in the amalgamation proposal. The result is that the acquiror will hold all of the assets and liabilities of the target company and the shareholders of the target company will be bought out with either cash or securities in the amalgamated company.

Unlike the New Zealand[10] and Canadian[11] corporations legislation which confer appraisal rights on dissenting shareholders, minority shareholders of a Singapore company objecting to the amalgamation do not have the equivalent of such rights. Appraisal rights would have otherwise conferred an additional layer of protection on the minority shareholders as these rights ensure that they are able to exit their investment at fair value, which is determined independently.[12] Instead, minority

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6 *Canada Business Corporations Act*, R.S. C. 1985, c. C-44, sections 181 to 186.

7 In the United Kingdom, the Steering Group led a comprehensive review of company law between 1998 and 2001 and in conjunction with such review, it considered whether there was a need for a statutory merger process that did not involve the court and concluded that there was no immediate need to introduce such a procedure. The reasons included: (1) a statutory merger would involve the transfer of liabilities which would raise issues relating to third party rights and protection of creditors; and (2) a statutory merger involving public companies would be subject to the information and reporting requirements of the EC, *Third Company Law Directive* 78/855[1978] O.J.L 295/36 and compliance with such requirements may be onerous. These informational and reporting requirements include a directors' report and an expert's report on the merger. See U.K., The Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Final Report* (URN 01/942) (26 July 2001) at vol. 1 paras. 13.14-8.

8 *Cf.* the recommendation by Australian Companies and Securities Advisory Committee, *Corporate Groups: Final Report* (May 2000) at ch. 5 [ACSAC *Corporate Groups Report*] to have a statutory merger procedure, based on the New Zealand model.

9 It is also possible for the acquiror and the target company to amalgamate and form a new holding company.

10 Under the NZ *Companies Act 1993*, sections 106 read with 110 and 111, if the shareholders approve the amalgamation of the company and a dissenting shareholder requires the company to purchase his shares, the board of the company has the following options: (1) it purchases the shares, (2) it finds a third party to purchase the shares, (3) it rescinds the resolution and does not proceed with the amalgamation or (4) it applies to the High Court for an exemption order on certain specified grounds.

11 *Canadian Business Corporations Act*, section 190 provides for appraisal rights for dissenting shareholders upon the occurrence of, *inter alia*, an amalgamation. Dissenting shareholders are entitled to demand a fair value of their shares from the corporation. In the absence of agreement, the fair value will be determined by the court.

12 There was no explanation given in the *CLRFC Report* as to why appraisal rights were not adopted even though the recommended provisions relating to amalgamation were based on the draft of the NZ *Companies Act* (contained in the *New Zealand Law Commission Report*), which had rights of appraisal. See *New Zealand Law Commission Report*, *supra* note 5 at 184-7. This author suggests that the reason could be the fact appraisal rights would not be consistent with the restrictions on which reductions of capital are permitted if such remedy were to allow the company to buy out the shares of

shareholders may, in certain circumstances, under section 215H, apply to the court for relief on the ground of unfair prejudice. The important practical question raised is whether the court should intervene to defeat the wishes of majority shareholders. This article argues that the amalgamation procedure, as compared with the section 215 acquisition and the section 210 scheme, may have titled the balance too far in the interests of the majority, at the expense of the minority, shareholders.[13] In this context, section 215H assumes special importance and it is submitted that the court in exercising its discretion under section 215H, should draw guidance from established case law on the other types of compulsory acquisition process.

In reviewing sections 215A to 215J, this author also discusses the impact of the *Singapore Code on Take-overs and Mergers* ("*Take-over Code*"), which regulates, *inter alia*, take-over offers (including amalgamations) for listed companies and certain unlisted public companies.[14] The *Take-over Code* is administered and enforced by Securities Industry Council ("Council"), rather than by the courts.[15] Even though breach of the *Take-over Code* does not give rise to criminal proceedings, the *Take-over Code* is important as for all intents and purposes, market participants regard themselves as being bound by the *Take-over Code*, breach of which may result in serious consequences for them.[16] Further, as discussed below, the case law demonstrates that some of the core principles in the *Take-over Code* may have been imported to general law and would apply even for non-*Take-over Code* companies.

II. Overview of Compulsory Acquisition Processes in Singapore

The ability to achieve 100% ownership of a target company is of significant commercial importance to the acquiror.[17] Such ownership eliminates many of the conflicts of

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the dissenting shareholders. The detailed procedures may also be difficult to set out in statutory form. For example, section 110 of the NZ *Companies Act* 1993 was criticised in *National Gas Corporation Holdings v. Infratil 1998 Ltd* [2000] 3 N.Z.L.R. 727 (H.C.) as being too skeletal and lacking in detail; the Law Commission of New Zealand had since proposed certain changes to the minority buy-out rights to include details on how such rights should be exercised. See N.Z., Law Commission, *Minority Buy-outs* (Report No. 74) (Wellington, New Zealand, 2001).

13 This article will not discuss the difficulties relating to a transfer of not only assets but liabilities pursuant to the amalgamation procedure.

14 Monetary Authority of Singapore, *Singapore Code on Take-overs and Mergers*, as revised with effect from 1 April 2007 [*Take-over Code*]. The *Take-over Code* applies to "offers" for, *inter alia*, the following Singapore companies: (1) Singapore listed public companies, whether such companies have a primary listing overseas or in Singapore; and (2) unlisted Singapore public companies with more than 50 shareholders and net tangible assets of S$5 million. In the case of (1), where the Singapore public company has its primary listing overseas, it may apply to Council for a waiver of the application of the *Take-over Code*. Council has a similar discretion to waive the application of the *Take-over Code* in the case of (2). The *Take-over Code* also expressly provides, *inter alia*, that amalgamations are regarded as take-over "offers" and hence are regulated under the *Take-over Code*. Council administers and enforces the *Take-over Code* and is made up of representatives from the government, the MAS and the private sector.

15 *Securities and Futures Act* (Cap. 289, 2006 Rev. Ed. Sing.), section 139(5).

16 Breach of the *Take-over Code* may result in the imposition of sanctions by Council. Sanctions which Council may impose include private reprimands, public censure and, where the breach is flagrant, further action designed to deprive the offender temporarily or permanently of its ability to enjoy the facilities of the securities market: the *Take-over Code*, *supra* note 14 at Introduction, para. 2.

17 See E. Boros, "Compulsory Acquisition of Minority Shareholdings—The Way Forward?" (1998) 16 Company & Securities L.J. 279, where the author conducted a survey on selected Australian companies

interests that an acquiror would have otherwise faced in respect of dealings between itself and the target company.[18] Corporate reorganisations can be undertaken without having regard to the interests of minority shareholders.[19] Administrative costs would also be saved in not having to maintain the infrastructure required for holding shareholder meetings.[20] If acquisition financing is taken out and the lender requires the assets of the target company to be used as security for such financing, complete ownership will eliminate the risk of any shareholder challenge in a white-wash waiver.[21] If an acquiror is only able to acquire complete ownership by agreement of all shareholders, minority shareholders may decide not to accept the offer in the hope of negotiating more favourable terms, even if the price offered is objectively fair.

On the other hand, minority shareholders have invested in the target company, expecting to remain as shareholders and enjoy the upside of their investments, if any, until they choose to sell or until the company is wound up. Compulsory acquisition defeats such expectations. Given that a shareholder has proprietary rights over a share, which is a piece of intangible property to which rights of property are

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carrying out take-overs during the financial year 1995-1996 and the participants of the survey ranked the reasons for undertaking compulsory acquisition of the target company's shares. The reasons were: (1) to reduce administrative costs; (2) to eliminate potential conflicts of interest; (3) to facilitate financial restructuring; (4) tax advantages; (5) to avoid greenmail; (6) to protect of confidential information and (7) to obtain synergies from merging the businesses of the target and the acquiror.

[18] Directors of a company owe a fiduciary duty to their company, including the duty to act in good faith in the interests of the company as a whole. However, where the company is part of a group of companies, these directors may also wish to make decisions and act for the overall benefit of the group. There are instances where the duty of loyalty to act for the benefit of the company is not consistent with the overall economic goals of the whole group. See J. Dine, *The Governance of Corporate Groups* (Cambridge: Cambridge University Press, 2000) at 43-44. For example, a company may wish to provide an interest-free loan to another company within the group or to enter into an agreement providing services to another company within the same group at uncompetitive rates. To resolve the problem that a director may be held to be liable for breach of directors' fiduciary duties in authorising such transactions, unanimous ratification of his actions by shareholders will be is required. Unanimous ratification is but a formality where the company is wholly-owned and is solvent. However, if the company is not wholly-owned, ratification by majority shareholders will not authorise acts that are oppressive to minority shareholders, especially where the resolution is carried because the wrongdoing directors held the majority of the votes: see *e.g.*, *Cook v. Deeks* [1916] 1 A.C. 554 (P.C.). See also ACSAC *Corporate Groups Report*, *supra* note 8 at para. 2.4.

[19] The board of directors of the target company must consider the interests of its shareholders as a whole in deciding whether to engage in any transaction. If the target company is a wholly-owned subsidiary of its parent company, it needs to consider the interests of the parent company and does not need to consider whether its actions are oppressive to the minority shareholders. See G. Hughes, "Compulsory Acquisition of Minority Shareholders' Interests—Still a Tyranny of the Majority?" (2000) 18 Company & Securities L.J. 197.

[20] Savings in administrative costs were cited as reasons for the privatisation transaction in *Gambotto v. WCP*, *infra* note 29 at 420 and in *TNT v. NCSC* (1986) 11 A.C.L.R. 59 (Sup. Ct. Vic.) at 62.

[21] If the acquiror had acquired the shares of the target company, the target company is prohibited from granting security to the acquiror in connection with the loan taken out to acquire such shares because the granting of such security would contravene the prohibition in the *Companies Act*, section 76 on financial assistance. To avoid such prohibition, unless certain exceptions to financial assistance apply, after the completion of the acquisition of the target, a "whitewash" needs to be carried out which complies with the *Companies Act*, sections 76(10) to (14). A "whitewash" resolution requires a special resolution. The exceptions to the prohibition on financial assistance comprise situations where the amount of financial assistance is not more than 10% of the company's paid-up capital and reserves (*Companies Act*, section 76(9A)) and where such financial assistance has, *inter alia*, the unanimous approval of the shareholders (*Companies Act*, section 76(9B)).

attached,[22] it may be argued that such rights only can be alienated with the owner's consent. However company law in Singapore, consistent with many other jurisdictions including United Kingdom, Australia and New Zealand, has rejected the view that ownership of a share is absolutely indefeasible and has permitted compulsory acquisition in order to promote more efficient transactions and to encourage take-over activities.

A. *Methods of Compulsory Acquisition*

An acquiror who wishes to acquire all the shares of a Singapore target company, in circumstances where it is not expected that all the shareholders would consent to the sale, has a number of options set out below.

First, the acquiror may make a take-over offer for the shares of the target company, followed by compulsory acquisition under section 215.[23] The price for such shares may take the form of cash and/or securities. Under section 215(1), in the event that the acquiror receives acceptances pursuant to the offer in respect of not less than 90% of the shares which are the subject-matter of the offer (excluding treasury shares and shares held by, or the nominee of, the acquiror and its related corporations as at the date of the offer[24]), the acquiror will be entitled to give notice to any dissenting shareholder that it desires to acquire his shares. Such a notice can only be sent out if the acceptances necessary to satisfy the 90% condition are received before the end of the period of four months beginning from the date the offer document is posted and no such notice may be given more than two months after the acquiror has received acceptances of the shares which satisfy the requisite threshold. The effect of such a notice is that the acquiror becomes and is bound to acquire those shares on the terms of the offer.

Second, the acquiror may enter into an agreement with the target company for the latter to undertake a section 210 scheme,[25] pursuant to which the shares of such target company are either transferred to the acquiror or cancelled (by way of a capital reduction) and re-issued to the acquiror. Shareholders will receive either cash and/or securities from the acquiror as consideration for the transfer or cancellation of their shares. Under the section 210 scheme, the target company first makes an application to the court for class meetings to be held.[26] Class meetings are then held, at which approval must be obtained from a majority in number representing at least

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22 *Pender v. Lushington* (1877) 6 Ch. D. 70 at 75 *per* Jessel M.R.

23 Statutory provisions in other jurisdictions which are similar to the *Companies Act*, section 215 include (1) the UK *Companies Act 2006*, section 979. Part 28 of the UK *Companies Act 2006* (of which sections 977 and 979 are part of) came into force on 6 April 2007 under the *Companies Act 2006 (Commencement No. 2, Consequential Amendments, Transitional Provisions and Savings) Order 2007* (S.R. 2000/120); (2) the Australian *Corporations Act 2001*, Part 6A.1; and (3) the *New Zealand Takeovers Code Approval Order 2000* [NZ *Takeovers Code*], Part 7.

24 *Infra* note 46 on the meaning of a "related corporation" under the *Companies Act*.

25 Statutory provisions in other jurisdictions which are broadly similar to the *Companies Act*, section 210 include (1) the UK *Companies Act 1985*, Part 13 and the UK *Companies Act* 2006, Part 26 (which is not in force yet); (2) the Australian *Corporations Act 2001* (Cth.), Part 5.1; and (3) the NZ *Companies Act 1993*, Part 15.

26 *Companies Act*, section 210(1).

75% in value of the members or class of members present and voting. It is vital to divide the shareholders into separate classes correctly as each class vote must comply with the voting requirement set out in section 210 before the scheme can be put before the court for approval.[27] Once the requisite resolutions are obtained, a further application is made to the court for sanction[28] and the section 210 scheme takes effect upon registration of the court order approving the scheme with the Registrar of Companies. All shareholders, including those who have voted against the scheme, would be bound.

Third, the acquiror may procure the target company to amend its articles of association to permit the acquiror to expropriate the remaining shares held by minority shareholders. However, this is rarely undertaken in practice as there is some doubt in the case law as to how far the courts will uphold a resolution of the company altering its own articles of association in such a case.[29]

Fourth, where the acquiror is the controlling shareholder of the target company, it may procure that the target company proposes a selective cancellation of all of its shares, other than those held by the acquiror, using any one of the methods of capital reduction prescribed under sections 78A to 78I of the *Companies Act*.[30] Once the minority shareholding is cancelled in return for payment from the target company, the net effect is that the acquiror holds all the shares of the target company. If the selective cancellation of shares is effected as a capital reduction under section 78G of the *Companies Act*, court approval will be required. Selective cancellation of minority shareholding is rarely undertaken without their consent in view of the observations

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[27] See *infra* note 49 and accompanying text on the classification of classes of shareholders.

[28] *Companies Act*, section 210(3).

[29] See *Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 656; and *Greenhalgh v. Arderne Cinemas* [1951] Ch. 286. *Cf. Gambotto v. WCP* (1995) 127 A.L.R. 417 (H.C.A.) [*Gambotto v. WCP*]. In *Allen v. Gold Reefs of West Africa*, Lindley M.R. held (at 671) that the power of the shareholders to vote for a particular resolution to amend the constitution of the company must be exercised, not only in the manner required by law, but also "bona fide for the benefit of the company as a whole". The formulation of the test by Lindley M.R. leads to the question as to what it means in respect of an amendment of the articles that is required to be for the "benefit of the company as a whole". This concept of the benefit of the company as a whole is not immediately self-evident. In *Greenhalgh v. Arderne Cinemas*, it was explained (at 291) that the "company as a whole" does not mean the company as a "commercial entity, distinct from the corporators. It means the corporators as a general body". The Court of Appeal further explained that an individual hypothetical shareholder should also be asked whether what is proposed is, in the honest opinion of those who voted in its favour, for that hypothetical shareholder's benefit. If the effect of the amendment is to discriminate between the majority and minority shareholders so as to give the former an advantage of which the latter were deprived, such a resolution was liable to be impeached. In contrast to the English position, the Australian High Court in *Gambotto v. WCP* has rejected the test based on whether a proposed amendment relating to an appropriation of shares was for the benefit of the company as a whole. Instead the amendment can only be effective if the power to amend the constitution is exercised for a proper purpose and the amended provision does not operate oppressively against the minority. For criticism of *Gambotto v. WCP*, see M. J. Whincop "*Gambotto v. WCP Ltd*: An Economic Analysis of Alterations to Articles and Expropriation Articles" (1995) 23 Austl. Bus. L. Rev. 276.

[30] If a court-free capital reduction is desired, *Companies Act*, sections 78B and 78C, which apply to private and public companies respectively, may be used. In such a case, a solvency statement is required to be made by the directors of the company. If a court-sanctioned capital reduction is desired, *Companies Act*, section 78G may be used and it applies to both private and public companies. A solvency statement is not required in such a case.

by the English High Court in *Re Robert Stephen Holdings*.[31] In that case, the court expressed the view that in future cases, selective cancellation of shares should only be obtained with the consent of the minority shareholders' wishes; otherwise, such cancellation should be effected under a scheme of arrangement approved at a separate meeting of the minority shareholders.

The new amalgamation procedure provides yet another method for the acquiror to acquire full control and ownership of the target company. Under sections 215A to 215J, two or more companies may amalgamate and continue as one company, which may be one of the amalgamating companies or a new company.[32] The shares and rights of the amalgamating companies will be converted to the shares and rights provided for in the amalgamation proposal.[33] Accordingly, an acquiror wishing to eliminate minority shareholding in the target company may structure the transaction by amalgamating with the target company and designating the acquiror to be the amalgamated company only. Post-amalgamation, the consequences are:

- All the rights as well as liabilities of the target company will be transferred to and vest in the amalgamated company (which will be the amalgamated acquiror).[34] If the target company has a contract with any third party that is governed by Singapore law, such an agreement will automatically be transferred to the amalgamated company;[35]
- The acquiror survives as the amalgamated company and the target company ceases to exist; and
- Shareholders of the target company will receive either cash or securities as consideration for the amalgamation, as set out in the amalgamation proposal. (However if the acquiror is also a shareholder of the target company, its shares in the target company will be cancelled without payment or provision of any other consideration.[36])

The net effect is that if shareholders of the target company receive cash only from the acquiror, they will be cashed out and will cease to participate in the enterprise of the amalgamated company. If shareholders were to receive shares in the acquiror, they will continue as shareholders in the amalgamated acquiror but there would be

31 *Re Robert Stephen Holdings* [1968] 1 W.L.R. 522. *Cf. Catto v. Ampol* (1989) 15 A.C.L.R. 307 [*Catto v. Ampol*], where the New South Wales Court of Appeal held that under section 123 of the *Companies (NSW) Code 1981*, which corresponded to section 66 of the UK *Companies Act 1948* (which is similar to section 78G of the *Companies Act*), permitted selective cancellation of shares so long as fair compensation was given.

32 It is noted that under sections 215A to 215J, the amalgamating companies must be Singapore companies. Accordingly, if the acquiring entity is not a Singapore company, it would need to incorporate a Singapore company as an acquisition vehicle which will be the amalgamating company.

33 *Companies Act*, section 215G(g).

34 *Ibid*., section 215G.

35 For agreements which are not governed by Singapore law, such agreements will be transferred to third parties automatically if the governing law of such agreements recognise the concept of automatic transfer of rights and liabilities pursuant to an amalgamation. The New Zealand Court of Appeal in *Carter Holt Harvey Ltd v. McKernan* [1998] 3 N.Z.L.R. 403 in interpreting the New Zealand equivalent of section 215G, has held that even personal contracts, which are not regarded as capable of transfer under the New Zealand equivalent of a section 212 scheme of amalgamation, would be transferred to the amalgamated company.

36 *Companies Act*, section 215B(3)(a). These shares will also not be converted into shares of the amalgamated company under section 215B(3)(b).

a dilution of their aggregate voting strength in the amalgamated acquiror. In either case, they will cease to participate in the target company directly.

B. *Amalgamation Process*

1. *Directors' obligations*

The process for effecting the amalgamation is set out in detail in sections 215A to 215J. In considering whether to approve the amalgamation, the board of directors of each amalgamating company (that is, each of the acquiror and the target company) is under the following prescribed obligations:

- The board of each amalgamating company is required to verify that the proposed "amalgamation is in the best interest of the amalgamating company";[37]
- The board of each amalgamating company is required to make a solvency statement in relation to such amalgamating company pursuant to section 215I, that is, a statement by the board that it is of the opinion that there is no ground on which the amalgamating company could be found to be unable to pay its debts as at the date of the statement, and the value of the amalgamating company's assets is not less than the value of the its liabilities (including contingent liabilities) as at the date of the solvency statement; and
- The board of each amalgamating company is required to make a solvency statement to the amalgamated company pursuant to section 215J, that is, a statement by the board that (i) the amalgamated company will be able to pay its debts as they fall due during the 12 months immediately after the date on which the amalgamation is to become effective; and (ii) the value of the amalgamated company's assets will not be less than its liabilities (including contingent liabilities).

For an amalgamation which is not a short-form amalgamation (that is, an amalgamation involving a company and its wholly-owned subsidiaries or between wholly-owned subsidiaries of the same holding company),[38] the acquiror and the target company must despatch an amalgamation proposal[39] to their respective shareholders, together with a copy of the directors' declarations,[40] a statement of any material interests of the directors and such further information and explanation

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[37] *Companies Act*, section 215C(2).

[38] The procedure for amalgamation involving a company and its wholly-owned subsidiaries or between wholly-owned subsidiaries of the same holding company is a simpler procedure which is prescribed under section 215D. This article will focus on amalgamations which are not short form amalgamations.

[39] *Companies Act*, section 215B. The amalgamation proposal sets out, among other things, the terms and conditions of the amalgamation, the share structure of the amalgamated company, a copy of the memorandum of the amalgamated company, the consideration that the holders of the amalgamating company are to receive, payment to be made to any shareholder or director of the target company and details of any arrangement necessary to complete the amalgamation and to provide for the subsequent management and operation of the acquiror.

[40] Pursuant to the *Companies Act*, section 215C(3), a director's declaration is a declaration, by each director who votes in favour of the resolution (which resolves that the amalgamation is in the best interest of the amalgamating company) and the making of the solvency statements, stating that, in his opinion, the amalgamation is in the best interest of the amalgamating company and the conditions for making the solvency statements in relation to the amalgamating company and the amalgamated company are satisfied, and the grounds of his opinion.

as may be necessary to enable a reasonable shareholder to understand the nature and implications for such company and its shareholders of the proposed amalgamation.[41] Advertisement of the proposed amalgamation[42] and notification to the secured creditors are required.[43]

2. *Approvals*

Unless the memorandum of each amalgamating company provides otherwise, the amalgamation requires the approval of the shareholders of each amalgamating company at the general meeting by way of a special resolution, that is, the approval of not less than 75% of members present and voting.[44] The amalgamation also requires the approval of a person if the amalgamation proposal would, if contained in any amendment to the memorandum of an amalgamating company or otherwise proposed in relation to that company, require the approval of that person.[45] Once the requisite approvals are obtained and the specified documents are filed with the Registrar of Companies, notice of amalgamation will be issued and the amalgamation takes effect on the date as shown in such notice.

3. *Comparisons with section 215 acquisition and section 210 scheme*

In comparing the amalgamation with the section 215 acquisition and the section 210 scheme, three preliminary observations are made. First, the amalgamation involves a lower shareholder approval threshold compared to that required for a section 215 acquisition or a section 210 scheme. In the case of a section 215 acquisition, the right only arises if there had been acceptances in respect of 90% of the shares of the target company (excluding treasury shares and excluding shares already held by, or the nominee of, the acquiror or its related corporations[46] as at the date of the offer). In the case of a section 210 scheme, it requires the approval of a *majority in number*, such majority representing at least 75% in value of the members or class of members, present and voting. There is no requirement for a majority in number in the case of the amalgamation.

Second, the amalgamation, as in the case of the section 215 acquisition, does not require the approval of the court. Instead, a dissenting shareholder in each of the amalgamation and the section 215 acquisition has to apply to the court to raise his objection to the transaction in question. Court approval is, however, required for the section 210 scheme. The manner in which the court would exercise its discretion in sanctioning the section 210 scheme is discussed in Part IV below.

Third, the section 215 acquisition can be utilised even if the offer by the acquiror is hostile and rejected by the target company board. An acquisition effected by the

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[41] *Companies Act*, section 215C(4).

[42] *Ibid.*, section 215C(5).

[43] *Ibid.*, section 215C(5).

[44] *Ibid.*, section 215C(1)(a). The requirements for a special resolution are set out in section 184.

[45] *Companies Act*, section 215C(1)(b).

[46] Under the *Companies Act*, section 6, a corporation (Company A) is related to another corporation (Company B) if Company A is the holding company of Company B or Company A is a subsidiary of Company B or Company A is a subsidiary of the holding company of Company B.

amalgamation or the section 210 scheme is only possible if the board of the target company supports the acquisition in view of the requirement of the target company to propose the relevant transaction to its shareholders and to obtain their approval.

III. Limitations on Shareholder Power in Compulsory Acquisition

Each method of compulsory acquisition involves an expression of the will of the shareholders, which takes the form of acceptance of the offer (in a section 215 acquisition) or votes cast at the shareholders' meeting (in a section 210 scheme or an amalgamation). The underlying rationale is that shareholders may be bought out if there is a high proportion of assent by the shareholders, which *prima facie* indicates that the price offered for the buy-out is fair. However, enhanced shareholder approval may not always protect the minority shareholders from coercive actions of the majority. Shareholders also do not generally owe fiduciary duties to fellow shareholders and may exercise their votes in any way that they wish.[47] The question remains as to whether the court should intervene to protect the minority shareholders from the abuse of the principle of majority rule. The legislative framework for the section 215 acquisition and section 210 scheme attempts to balance the interests of the majority and minority shareholders in the following specific instances.

First, the shareholdings in the target company held by an acquiror and certain of its affiliates are specifically excluded in determining whether the requisite shareholder approval is obtained. The interests of an acquiror, in its capacity as a shareholder, clearly conflict with the interests of the other shareholders of the target company. As an acquiror, it desires to effect the acquisition at the lowest possible price. The other shareholders, however, would desire to exit from the target company at the highest possible price. If the acquiror is also a controlling shareholder of the target company and purports to use its controlling voting power to force the buy-out of the minority shareholders, such exercise of the power can be particularly coercive. The legislative solution in sections 215 and 210 of the *Companies Act* requires that account be taken only of acceptances or votes of the independent shareholders. While the test of independence is not identical for the sections 215 and 210, a strong indication that the take-over offer or the section 210 scheme (as the case may be) is fair occurs where the requisite majority of shareholders, independent of the acquiror, assent to the acquisition.

An illustrative example follows. Bidco has a 75% shareholding in Targetco and wishes to acquire the balance of its shares. Bidco makes a take-over offer for the Targetco shares that it does not own, intending to utilise the section 215 acquisition process. Under section 215, the 75% shareholding in Targetco held by Bidco as at the date of the offer will not count towards the 90% threshold for obtaining compulsory acquisition.[48] Had Bidco wanted to acquire the balance of the shares of Targetco via a section 210 scheme, Bidco would not be placed in the same "class" of shareholders as the rest of the shareholders for voting purposes or its votes would be discounted

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[47] *North-West Transportation v. Beatty* (1887) 12 App. Cas. 589 (P.C.); *Phillips v. Manufacturers Securities* (1917) 116 L.T. 290 (C.A.).

[48] *Companies Act*, sections 215(1) and 215(9). There is a limited exception where the shares are in fact acquired in the course of the offer by the offeror at a price not exceeding the consideration specified in the terms of the offer or any subsequently revised offer: *ibid.*, section 215(11).

by the court in deciding whether to sanction the scheme, pursuant to *Re Hellenic & General Trust Ltd.*[49] In that case, more than 50% of the shares of Hellenic, the target company, were held by MIT, a wholly-owned subsidiary of the intending acquiror, Hambros. Hellenic petitioned for approval of the scheme to cancel all of its ordinary shares and to issue new shares to Hambros alone; the minority shareholders were to receive cash from Hambros. At the scheme meeting, MIT and others, holding 85% of the issued share capital, voted in favour of the proposal. Templeman J. refused to sanction the scheme as a matter of jurisdiction and as a matter of discretion; it was held that there should have been two classes of shareholders and MIT should not been in the same class as the rest of the shareholders. MIT was in the same community of interest as Hambros because the financial position of MIT would be the same whether the scheme was successful. The court would not exercise its discretion to sanction the scheme if, in the absence of special circumstances, the acquisition could not have succeeded under the UK *Companies Act* 1948, section 209 (which is English equivalent of section 215 of the *Companies Act*), in view of the size of the shareholdings of the dissenting shareholder.

Second, certain types of egregious conduct, if carried out by the acquiror, will either bar it from effecting the compulsory acquisition or will lead to its votes being excluded or discounted for the purposes of determining whether the requisite shareholder approval has been obtained. This occurs where the acquiror purports to offer to certain shareholders preferential terms in order to induce them to tender their shares in acceptance of the offer (or to vote in favour of the transaction) but other shareholders are offered lesser offers. Collateral benefits (excluding *de minimis* collateral benefits), which are offered to certain shareholders only, are controlled using this technique.

A second illustrative example follows. Majorco has a 75% shareholding in Targetco. Bidco desires to acquire all of the shareholding of Targetco and proposes to pay an additional cash consideration to Majorco which is not offered to all other shareholders. If Bidco had made a take-over offer for Targetco on such terms, Bidco would not have been able to invoke section 215 even if it has obtained acceptances of not less than 90% of the offer shares. The terms of Bidco's offer discriminate between Majorco and the rest of the shareholders and consequently, would not be the same in relation to all of the offer shares. Such discrimination would disentitle Bidco from invoking section 215.

If Bidco decides to acquire all of the shares of Targetco via a section 210 scheme and proposes to offer Majorco such preferential terms not offered to the rest of the shareholders, Majorco would have constitute a different class from the rest of shareholders, based on the community of interest test in *Re Hellenic*. In this case, the section 210 scheme would only succeed if, *inter alia*, at the class meeting of the independent shareholders not receiving the additional consideration, approval is obtained from a majority in number representing at least 75% in value of the class present and voting. Majorco's interests clearly differ from the interests of the ordinary independent and objective shareholders.[50]

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49 [1976] 1 W.L.R. 123 (Ch.D.).

50 See e.g., *Re BTR plc* [2000] 1 B.C.L.C. 740 at 747 (C.A.); *Re Industrial Equity (Pacific) Ltd* [1991] 2 H.K.C. 364 (H.C.).

In contrast, these techniques outlined above to control the coercive behaviour majority behaviour are not found in the amalgamation procedure. In the first example, if Bidco acquires Targetco via the amalgamation procedure, based on a literal reading of sections 215A to 215J, Bidco is not prohibited from voting at the general meeting of Targetco convened to approve the amalgamation. Bidco is assured of success in obtaining the requisite approval as it has a 75% shareholding in Targetco. Similarly, in the second example where Majorco is offered collateral benefits not offered to other shareholders, Majorco is not prohibited from voting on the amalgamation. Again, Bidco is assured of success in obtaining the requisite approval if Majorco votes in favour of the amalgamation as the latter has a 75% shareholding in Targetco. In each case, an aggrieved shareholder may only complain to the court that there has been unfair prejudice to such shareholder under section 215H. [51] The absence of protection to minority shareholders is of special concern, even for listed companies in Singapore, because a large proportion of such listed companies are in the control of significant shareholders (including government-lined companies and founding shareholders).[52] Accordingly, quite apart from the lower shareholder approval threshold, sections 215A to 215J may have the unintended effect of unduly favouring the majority shareholders compared with the other types of compulsory acquisition transactions.

It may be argued that the amalgamation procedure affords one particular protection to minority shareholders, not found in the section 215 acquisition, in that the board of each amalgamating company has a statutory duty to verify that the amalgamation is in the best interests of such company. It follows that the support of the board of the target company is vital and any support of the terms of the amalgamation can only occur after the board has undertaken arm's length negotiations with the acquiror. Section 210 is silent on the board's role though it would be expected that, consistent with the board's fiduciary duties, the board must have considered that the scheme is in the interests of the company before proposing such scheme to its shareholders.

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[51] The position appears to be different under the NZ *Companies Act 1993*, section 221(5)(b) which provides that the amalgamation proposal must be approved by the shareholders of each amalgamating company by way of special resolution and if a provision in the amalgamation proposal would, if contained in an amendment to an amalgamation company's constitution or otherwise proposed in relation to that company, require the approval of an "interest group, by a special resolution of that interest group". Pursuant to the definition of "interest group" in the NZ *Companies Act 1993*, section 116, a proposal that distinguishes between holders of a class may constitute different interest groups. It has been observed that interest group approval will be required if holders of the same class of shares are treated differently under the amalgamation proposal, for example where some shareholders receive shares in the amalgamated company and others receive a payment instead of shares. See D. Goddard, "Amalgamations" in A. Beck, N. Campbell & S. McArley *et al.*, eds., *Morison's Company and Securities Law* (Wellington: Butterworths, 1997), para. 46.17. *Cf.* the *Companies Act*, section 215C(1) which provides that in addition to the shareholder approval by special resolution the amalgamation proposal must be approved by any other person, where any provision in the amalgamation proposal would, if contained in any amendment to the memorandum of an amalgamating company or otherwise proposed in relation to that company, require the approval of that person. There is no requirement of obtaining separate approvals of shareholders who have different interests.

[52] See e.g., R. La Porta, F. Lopez-de-Silanes & A. Shleifer did a survey of ownership structures of large publicly traded corporations in 27 wealthy economies (including Singapore) to identify the ultimate controlling shareholders of these corporations and using the 20% definition of control, 30% are family-controlled, 45% are state-controlled, and only 15% are widely-held corporations: "Corporate Ownership Around the World" (1999) LIV *Journal of Finance* 471.

In contrast, in a section 215 acquisition, the target company board has absolutely no veto power over the transaction.

The problem with this protection is that the obligation of the board to consider the "best interest of the amalgamating company" is astonishingly unclear. It can either refer to the shareholders of the amalgamating company or to its other stakeholders, such as its creditors and employees, and the consequences of taking either of the two views can lead to vastly different results.[53] This expression is also unhelpful in providing guidance to the board where the dispute is between shareholders *inter se*, that is, where the interests of the company as a commercial entity and its other stakeholders are not relevant. Using the second illustrative example mentioned above, where Majorco is offered collateral benefits which are not offered to other shareholders, there is clearly a conflict between Majorco and the other shareholders only which does not involve Targetco, and it is not clear as to whose interests should prevail when the board is determining the "best interest" of the company. In addition, the business judgment rule also generally precludes the courts from reviewing of the *bona fide* commercial decisions of the board.[54]

At this juncture, it should be pointed out that the ability to structure compulsory acquisition transactions as amalgamations in order to circumvent the need of independent shareholder approval is severely limited for an acquiror acquiring a target company which is subject to the *Take-over Code*.[55] Even though an amalgamation does not involve a direct acquisition of shares or voting rights of a company, it is in fact regulated as an "offer" under the *Take-over Code*.[56] The *Take-over Code* provides, *inter alia*, that Council will exempt an amalgamation from certain provisions in the *Take-over Code* if certain conditions are satisfied, including the offeror and its concert parties as well as the common substantial shareholders of the amalgamating companies[57] abstaining from voting on the amalgamation.Its practical effect is such that exemptions must be sought from Council by an acquiror in every case in view of the impossibility of an amalgamation to comply with certain provisions in the *Take-over Code*, such as the offer time-table.[58] In granting the exemptions, Council will require the relevant parties to abstain from voting on the amalgamation.

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[53] For a discussion on the possible meanings of "best interests of the amalgamating company", see W. Y. Wan, "The Amalgamation Procedure in Singapore" [2007] 25 Company and Securities L.J. 62 at 64.

[54] *Re Winpac Paper Products Pte Ltd* [2000] 4 S.L.R. 768 (H.C.).

[55] See *supra* note 14 for a list of Singapore companies that are subject to the *Take-over Code*.

[56] The position in New Zealand is different in that it is possible to structure the amalgamation to *avoid* the application of the NZ *Takeovers Code* where out of the two companies that are amalgamating, one of which is not subject to the jurisdiction of the NZ *Takeovers Code* ("code company") and such company ceases to be the surviving entity. In such a case, even if the shareholders receive shares in the non-code company that is the surviving entity, the amalgamation will not result in any person obtaining or controlling shares in the code company. The New Zealand Takeovers Panel has recommended that the loophole be plugged. See Takeovers Panel, *Schemes of Arrangement and Amalgamations Involving Code Companies: Recommendations to the Minister of Commerce* (25 August 2006), paras. 30 and 77. The *Take-over Code* was expressly amended to require the offeror and its concert parties as well as the common substantial shareholders of the merging companies to abstain from voting on the amalgamation.

[57] "Acting in concert" is defined in the *Take-over Code* to mean persons who, "pursuant to an agreement or understanding (whether formal or informal), co-operate, through the acquisition by any of them of shares in a company, to obtain or consolidate effective control of that company". Certain persons are presumed to be acting in concert with each other under the *Take-over Code*. "Substantial shareholders" are persons holding 5% or more interests in the amalgamating companies.

[58] *Take-over Code*, Rules 20.1 (keeping the offer open for a minimum period) and 22 (offer time-table).

It follows that in the first and second illustrative examples mentioned above, if the amalgamation of Targetco is subject to the *Take-over Code*: (1) Bidco, its concert parties and the common substantial shareholders of Bidco and Targetco will be required to abstain from voting on the amalgamation; and (2) Bidco's preferential offer to Majorco would be prohibited under General Principle 3 and Rule 10 of the *Take-over Code* (both of which relate to the requirement that all shareholders of the same class must be treated equally). Amalgamations of non-*Take-over Code* companies continue to be governed under the *Companies Act* only. The issue as to whether the court should nevertheless take into account the *Take-over Code* is discussed in Part (IV) below.

IV. Unfair Prejudice

A. *When is Prejudice Unfair?*

The problem relating to the apparent failure to give sufficient protection to minority shareholders under sections 215A to 215J is partially mitigated by section 215H, which permits a creditor, shareholder or a party to whom an amalgamating company is under an obligation to make an application to the court for relief if the amalgamation would "unfairly prejudice" such person. Section 215H does not prescribe the standard of unfairness. As there is yet no case law on section 215H, it is submitted that guidance may be obtained from the case authorities on the other methods of compulsory acquisition, particularly the section 215 acquisition and the section 210 scheme.

1. *Burden of proof*

Where the amalgamation has been approved by a special resolution of the shareholders at the general meeting, it is submitted that the burden should fall on the relevant shareholder applicant under section 215H to show why the court should grant relief. This is supported by the case law on sections 215 and 210 of the *Companies Act* and their statutory equivalents in other Commonwealth jurisdictions.

The cases interpreting the English equivalent of sections 215 and 210 of the *Companies Act* have held that the burden is on the dissenting shareholder to demonstrate to the court that it ought to exercise its discretion to disallow the compulsory acquisition or the scheme of arrangement from proceeding.[59] In a take-over offer, the court will generally presume that an offer is fair and proper where it has been accepted by shareholders holding 90% the shares in the same class to which the offer relates, in the absence of special circumstances.[60] Similarly, in a scheme of arrangement, which requires court sanction, the English approach[61] is that the court, in considering whether to exercise its discretion to sanction the scheme, will consider whether (1) the provisions of the legislation have been complied with, (2) whether the class was

[59] *Re Hoare & Co* [1933] All E.R. Rep. 105 (Ch.D.); *Re Press Caps* [1949] Ch. 434.

[60] *Re Lifecare International plc* [1990] B.C.L.C. 222 (Ch.D.).

[61] *Re National Bank Ltd* [1966] 1 W.L.R. 819 (Ch.D.); *Re BTR plc* [1999] 2 B.C.L.C. 675 (Ch.D) and on appeal, [2000] 1 B.C.L.C. 740 (C.A.); *Re Abbey National plc* [2005] 2 B.C.L.C. 15 (Ch.D.).

fairly represented by those who attended the meeting, and (3) whether the arrangement is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. The court will not rubber stamp the meeting but will be slow to differ from the meeting, unless the class has not been properly constituted or the meeting has not considered the matter with a view to the interests of the class which it is empowered or "some blot is found in the scheme".[62] The Singapore Court of Appeal takes a similar approach in the context of a scheme of arrangement under section 210 involving creditors.[63]

2. *The two possibilities of unfair prejudice*

Assuming that the relevant procedural requirements of sections 215A to 215J have been complied with, the crucial question remains as to when the court would find that there is unfair prejudice to a shareholder. It is suggested that there are two possible meanings of unfair prejudice:

- The amalgamation is approved by the shareholders at the general meeting via a special resolution but the manner in which the shareholder approval is obtained is procedurally unfair; or
- The price paid to the shareholders in consideration for the amalgamation is substantively unfair as it forces them to sell their shares at a price that does not adequately reflect their investment in the company.

(a) *Unfair procedure*: Procedural unfairness recognises that it is not enough for the amalgamation to be approved by the requisite shareholder approval; such approval must be obtained *fairly*. The complaints made by shareholders that most frequently arise in case law relate to: (1) the inadequacy of information provided to shareholders; (2) the inadequacy of advice provided to shareholders; and (3) the fact that the requisite shareholder approval is obtained by non-independent shareholders.

In relation to (1), it is axiomatic that fair procedure must include the requirement that shareholders are provided with adequate information to enable them to make an informed voting decision on the merits of the amalgamation. Certainly, it is well established at common law that where there is an issue requiring shareholder vote, directors must make full and honest disclosure to shareholders prior to the resolution being put forward to the shareholders for their decision.[64] Further support for this requirement is also found in the English decisions interpreting the statutory equivalent of sections 215[65] and section 210,[66] where the failure to provide full disclosure of relevant information may result in the court denying the compulsory acquisition or refusing to sanction the scheme respectively. The requirement of full disclosure is not only restricted to the specific informational requirements prescribed in the

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[62] *Buckley on the Companies Act*, 14th ed. (London: Butterworths, 1981) vol. 1 at 473-4.

[63] *Daewoo Singapore Pte Ltd v. CEL Tractors Pte Ltd* [2001] 4 S.L.R. 35 at 51, where the Court of Appeal held that the "duty of the court is to consider whether the statutory provisions have been complied with, whether the scheme is fair and reasonable to the creditors as a whole, whether the company and the majority creditors are acting bona fide, and whether the minority is being coerced to promote the interest of the majority".

[64] *E.g. John Crowther Group Ltd v. Carpets International Plc* [1990] B.C.L.C. 460 (Ch.D.).

[65] *E.g. Fiske Nominees v. Dwkya* [2002] E.W.H.C. 770.

[66] *E.g. Re MB Group plc* [1989] B.C.L.C. 672 (Ch.D.).

relevant legislation[67] but requires all relevant information to enable shareholders to make an informed decision. Support for requirement of full disclosure is also found in the Singapore Court of Appeal decision in *Wah Yuen Electrical Engineering v. Singapore Cables Manufacturers Pte Ltd*,[68] though it related to a creditors' scheme of arrangement.

The *Take-over Code* takes the same approach. If the amalgamation is subject to the *Take-over Code*, the board of the target company would be under a duty to ensure that all shareholders receive full information on which they could properly make a decision and no relevant information should be withheld from them.[69] Even if the amalgamation is not governed by the *Take-over Code*, it is submitted that the requirement that shareholders be provided with full information should apply equally. Certainly, the English courts have been willing to use the provisions in the *City Code on Take-overs and Mergers* ("*City Code*")[70] as a guide on what will constitute adequate disclosure by the directors to the shareholders of the target company, even in non-*City Code* transactions.[71]

(2) is more controversial. Under the *Take-over Code*, the board of the target company must advise its shareholders on the offer[72] and assume responsibility for the information and accuracy of the information given to its shareholders.[73] Prior to advising the shareholders, the board must obtain competent independent advice (usually from the independent financial adviser) and such advice must be disclosed to the shareholders.[74] The question is whether the requirement of adequate advice should be imposed in the amalgamation procedure, even in respect of an amalgamation not subject to the *Take-over Code*.

There is some support in the case law for such a requirement. In *Fiske Nominees v. Dwyka,* a decision which involves the English equivalent of section 215 of the *Companies Act*, the English High Court held that the duties of the board included obtaining competent independent advice and making such advice known to its shareholders and these duties may be imposed in appropriate cases involving non-*City Code* transactions.[75] This requirement to obtain and disclose independent advice would have gone further that what is normally required at common law in respect of directors' duties. At common law, directors giving advice to shareholders

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[67] See e.g., in the case of a section 210 scheme, section 211 prescribes that an explanatory statement to be circulated to the shareholders must set out certain disclosures.

[68] [2003] 3 S.L.R. 629 at 638. The Singapore Court of Appeal upheld the refusal to sanction the scheme of arrangement by the High Court, notwithstanding 82.26% of the value of the admitted claims had voted for the scheme of arrangement, on the ground, *inter alia*, that there was no full disclosure on how the related parties' debt were incurred.

[69] General Principle 10 of the *Take-over Code*. This is implemented by all of the informational requirements under the *Take-over Code*, including Rules 8 and 23.

[70] *The City Code on Takeovers and Mergers* (8th ed, 2006) [*City Code*]. The *City Code* applies to, *inter alia*, companies and *Societas Europea* which have their registered offices in the United Kingdom, the Channel Islands or the Isle of Man if any of their securities are admitted to trading on a regulated market in the UK or any stock exchange in the Channel Islands or Isle of Man. It also applies to offers for certain private companies, set out in paragraph 3 of the Introduction to the *City Code*.

[71] See e.g., *Fiske Nominees v. Dwyka*; *supra* note 65 and *infra* note 75 and accompanying text.

[72] *Take-over Code*, Rule 24.1.

[73] *Take-over Code*, Rule 8.3

[74] *Take-over Code*, Rule 7.

[75] The High Court in *Fiske Nominees v. Dwyka* did not identify the precise rule in the *City Code*, but presumably it refers to *City Code*, Rule 3.1 (which is the equivalent of the *Take-over Code*, Rule 7.1).

are only obliged to give advice in good faith and not do so in a tricky and misleading way.[76] The significance of the independent advice[77] is that such advice specifically addresses the merits of the transaction, including the merits of not approving the transaction or accepting an offer. It is suggested that there are merits in imposing a procedural requirement for the target company to obtain independent advice on the amalgamation and to disclose such advice to the shareholders. The requirements to obtain, and to disclose, independent advice, are really part and parcel of allowing the shareholders to make an informed decision on the amalgamation, which is a form of indirect compulsory acquisition.

(3) is the most difficult. As outlined above, the section 215 acquisition and the section 210 scheme have safeguards which exclude the shares tendered or votes cast by non-independent shareholders. Particularly, in determining whether to uphold section 215 acquisitions, the courts have been more vigilant in requiring an offeror to justify the fairness of its offer where the offeror is, in substance, an insider. For example, where the majority shareholders in the target company were in substance the persons making the offer for such company, the onus was on these persons to show that the offer was fair.[78] Information held by an insider offeror which is not made available to all shareholders will also result in the court not disallowing the compulsory acquisition to proceed.[79] These safeguards are not expressly present in sections 215A to 215J. It is submitted that where the resolution relating to the amalgamation would have been defeated had only the votes of independent shareholders been taken into account, the court should ordinarily exercise its discretion under section 215H to grant relief.

Admittedly, the process of determining the independence of shareholders for the purpose of voting in an amalgamation is not always clear-cut. As a starting point, it is useful to draw guidance from the *Take-over Code*. An acquiror and its concert parties which hold shares in the target company clearly will not be independent and

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[76] *Prudential Assurance Co Ltd v. Newman Industries Ltd and others (No. 2)* [1981] Ch. 257 at 295. See *Re A Company* [1986] B.C.L.C. 382 (Ch.D.) where Hoffmann J. held, in the context of section 459 of the UK *Companies Act 1985*, that if directors were required to advise shareholders on the merits of competing bids, in the case of a company which was outside the *City Code*, they must provide sufficient information and advice for the shareholders to reach an informed decision and must refrain from giving misleading advice or exercising their fiduciary duties in ways which would prevent shareholders from being able to make an informed choice.

[77] *Take-over Code*, Rule 7.3 sets out the circumstances where an advisor is not considered independent.

[78] In *Re Bugle Press Ltd* [1961] 1 Ch. 270, the court refused to permit the majority shareholders compulsorily acquiring the shares of the minority where the holders of the majority of the shares in the target company were in substance the persons making the offer for the shares in the target company. Two persons (the controlling shareholders), who themselves held in aggregate 90% of the shares in an target company, set up a company ("J&S"), in which they are the only shareholders, to make an offer for the shares in the target company. J&S offered to acquire the remaining 10% of the shares in the target company held by the minority on the ground that it was clear that the controlling shareholders, who held in aggregate 90% of the issued shares of the target company, would accept offer. In such circumstances, it was held that the onus was on the controlling shareholders to satisfy the court that the offer was fair as there was no independent minority exercising any discretion in the question of whether the offer should be accepted and they were not able to do so.

[79] In *Re Chez Nico (Restaurants) Ltd* [1992] B.C.L.C. 192 (Ch.D.), three of the four bidders were either directors of the target company or solicitor for the target company, failed to disclose material information to the minority shareholders; in particular, the bidders failed to disclose that the target company's financial position was not well reflected in its audited accounts and management accounts that were made available to the outside shareholders.

should abstain from voting at the target company shareholder meeting. Similarly, shareholders of the target company who receive collateral benefits not offered to other shareholders should also be regarded as non-independent and their votes excluded. If the special resolution would not have been passed had the non-independent shareholders abstained from voting, this in itself should be a sufficient ground for the court to find that there has been unfair prejudice under section 215H. It is submitted that the exclusion of votes of shareholders receiving collateral benefits is preferable to an outright ban on any form of collateral benefits. Where full disclosure is made to all the shareholders that only certain shareholders will receive collateral benefits, the rest of the shareholders will surely take into account such inequality in the voting.

Nevertheless, the difficulty remains as to what constitutes collateral benefits receipt of which requires the receiving shareholder to abstain from voting on the amalgamation. An unduly restrictive approach towards collateral benefits can impede genuine transactions entered into at arm's length between an acquiror and certain major shareholders, which have not reduced the price at which the take-over bid succeeds. For example, if the target company seeks to sell to its major shareholder on arm's length, an insignificant (but not *de minimis*) asset which the acquiror does not want and which the target company has otherwise been unable to dispose of, it appears to be unduly restrictive to prevent the acquiror from voting on the amalgamation. The *Take-over Code* recognises that there are some kinds of benefits which do not violate General Principle 3 and Rule 10, such as where a shareholder acquires assets of the target company which the offeror does not want and the terms of such acquisition are fair and reasonable[80] or in a management buy-out where the management shareholder retains an equity interest in the business after the completion of the offer.[81]

In this regard, the approach of the Australian Take-over Panel is instructive. In *Re PowerTel Limited (No. 3)*,[82] the Take-over Panel took the view that the benefit must be considered in the context in which it arises, and not in isolation and only collateral benefits which confer a "net benefit" on one or more shareholders should be regarded as having contravened the reasonable and equal opportunity principle, that underpins the take-over regime in Australia.[83] In determining whether there is a "net benefit", the advantage that is received by a particular target company shareholder must be compared with what all other shareholders receiving in connection with the bid and such advantage received must be compared with what that shareholder has given up; it is only if the advantages of the relevant transaction outweigh the detriments suffered in connection with the transaction that there is a "net benefit". In that case, TVG, the bidder, made a bid on the condition that the major shareholder (WilTel), which was also a creditor of the target company (PowerTel) sold its A$24.3 million debt to TVG for A$1.00. WilTel subsequently made an offer to PowerTel that it would release its debt if the debt condition is waived and PowerTel paid A$10 million for the debt. It was argued that the prospect of securing A$10 million for the debt was an inducement for WilTel to accept TVG's bid. The Take-over Panel held that WilTel did not receive a "net benefit" in accepting the A$10 million repayment

[80] Note 5 to Rule 10 of the *Take-over Code*.
[81] Note 4 to Rule 10 of the *Take-over Code*.
[82] [2003] A.T.P. 28 (Take-over Panel).
[83] Section 602(c) of the Australian *Corporations Act 2001*.

of the debt because at no time did any of parties argued that the debt was worth materially less than A$10 million. It is submitted that only receipt of collateral benefits that result in "net benefits" by certain shareholders should disqualify them from voting.

The requirement of taking into account only the votes of independent shareholders is not a new concept; it is found in the *Listing Manual of Singapore Exchange Securities Trading Limited*[84] and is also not inconsistent with *Northern Counties Securities Ltd v. Jackson & Steeple Ltd*,[85] which establishes that fiduciary duties are not owed by a shareholder to fellow shareholders and a shareholder is free to exercise his rights to vote as he pleases.[86] What is being advocated here is not compelling certain shareholders to vote in a particular way but to limit their ability to vote in certain circumstances where they have interests that are different and over and above the general body of shareholders.

(b) *Substantive unfairness*: Shareholders of the target company may object to the adequacy of consideration received in the amalgamation. Further, if the consideration is in the form of securities in the amalgamated company, minority shareholders may object on the ground that the risk profile of the amalgamated company is significantly different from the target company in which they had originally invested in. It is well established in the cases involving take-over offers followed by compulsory acquisition and schemes of arrangements, the receipt of a high level of acceptances is a significant hurdle for the dissenting shareholder to overcome.[87] The courts have not required the production of an independent valuation which supports the price offered to the minority shareholders. Where there is a reference to the market value of the shares, such reference is usually used to justify the fact that the offer is not unfair, rather than the other way round.[88] In *Re Britoil plc*,[89] it was held that the fact that the target company ascribed a higher value of the shares was not, in itself, sufficient to establish unfairness in the compulsory acquisition. In that case, a minority shareholder argued that the defence document of the target company contained a valuation of 699p. per share and accordingly, it was unfair that the minority shareholders should be forced to sell their shares to the offeror for the offer price of

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[84] For example, the approval of disinterested shareholders is generally required in related party transactions. Under Chapter 9 of the *Listing Manual of Singapore Exchange Securities Trading Limited* (Singapore: Sing. Exchange Ltd., 2002) [*SGX Listing Manual*], in respect of an interested person transaction (that is, a transaction between, *inter alia*, the listed company and its interested person (which includes a controlling shareholder)) that requires the approval of the shareholders of the listed company, the interested person and its "associates" will not be permitted to vote at the shareholders' meeting. See *SGX Listing Manual*, Rule 919. Similar rules exist in the Listing Rules of the UK Listing Authority, Listing Rule 11.1.7 and in Australia, *Corporations Act 2001*, sections 217 to 227. See generally J Hill, "Changes in the Role of the Shareholder", in C. Rickett and R. Grantham (eds), *Corporate Personality in the 20th Century* (Oxford, Hart Publishing, 1998), ch 10.

[85] [1974] 1 W.L.R. 1133 (Ch.D.).

[86] A similar approach is taken in *North-West Transportation Co Ltd v. Beatty, supra* note 47 and in *Phillips v. Manufacturers Securities*, *supra* note 47.

[87] *Re Hoare & Co*, *supra* note 59; *Re Press Caps, supra* note 59; *Re Lifecare International plc, supra* note 60; *Re BTR plc, supra* note 61.

[88] See e.g., in *Re Hellenic & General Trust*, Templeman J. considered the parent company's offer to acquire the minority shareholding at a 20% to 25% premium above market value was considered to be more than fair. Ultimately, however, compulsory acquisition was refused in view of the fact that the classes of shareholders were not correctly constituted.

[89] [1990] B.C.C. 70 (C.A.).

500p.[90] The Court of Appeal rejected his argument, reiterating that it was a heavy burden on the dissenting shareholder to show that the terms of the offer were unfair.

The implicit assumption in using the market price of the listed shares in determining the fairness of the offer price is that the courts may have felt that the shares should be adequately valued by the market. However, using the market price of the listed shares as a primary reference point often ignores the fact that an acquiror, which is often a controlling shareholder, can select the best time for making its offer taking into account the share price of the target company at that time and is likely to do so when the share price is at one of its lowest prices.[91] In contrast to the English approach, the Australian courts have been more prepared to look beyond the market price and considered other indicators in determining whether a fair price has been offered.[92]

One argument in favour of reviewing the adequacy of the consideration offered is that the approval of independent shareholders in determining the outcome does not always lead to substantive fairness. Shareholders may decide to vote for the amalgamation for many reasons which may not be linked to their belief that the offer price represents the value of their shareholding. There is some limited support in the case law in Australia for reviewing the substantive fairness of the consideration, although it was in the context of compulsory acquisition effected via an amendment of articles permitting expropriation of shares. In *Gambotto v. WCP*, the Australian High Court, had emphasised that such an amendment would be allowed not only if the process of obtaining such amendment was fair but also if the terms of the expropriation were fair, that is, the price offered for the shares was fair.[93]

In Delaware, one of the methods to eliminate the minority shareholders, also known as "freeze-outs", is to effect a statutory court-free merger between a target company and an acquiror.[94] The case law has established that in such a merger, minority shareholders are required to be afforded protection from the controlling shareholder's potential conflict of interest if such controlling shareholder is seeking to buy out the shares held by minority shareholders and the courts have been willing to examine the substantive fairness of the merger. In *Weinberger v. UOP*,[95] the Supreme Court of Delaware held that in a statutory merger where a controlling

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[90] The board of the target company eventually recommended to the shareholders that the offer at 500p be accepted.

[91] See generally G. Hughes, *supra* note 19.

[92] The New South Wales Supreme Court in each of *Catto v. Ampol, supra* note 31, and in *Nicron Resources v. Catto* (1992) 8 A.C.S.R. 219 had refused to take the market value of the shares as conclusive as to the fair price. In *Catto v. Ampol*, the Supreme Court of New South Wales refused to confirm the capital reduction by reason of the lack of fairness of the consideration. In that case, there was a proposal to return $2.78 to the preference shareholders, which was close to the market price of the preference shares. However, the court took into account the fact that the majority shareholder had earlier offered $4 for the preference shares prior to securing control of the right to appoint the preference share director. In *Nicron Resources v. Catto and others*, it was held that the market price was not indicative of the fair price of 22% of the shares of the company as only a small proportion of the shares in issue were in fact traded.

[93] *Supra* note 29 at 426.

[94] The merger process is prescribed under the Delaware *General Corporation Law*, *supra* note 5.

[95] 457 A. 2d 701 (1983). See generally V. Mitchell, "The US Approach Towards Acquisition of Minority Shares: Have We Anything to Learn?" (1996) 14 Company & Securities L.J. 283 and D.A. Burgman and P.N. Cox, "Reappraising the Role of the Shareholder in the Modern Public Corporation: *Weinberger's* Procedural Approach to Fairness in Freezeouts" [1984] Wisconsin L. Rev. 594.

shareholder stands on both sides of the transaction, the controlling shareholder and its nominee directors will bear the burden of proving the fairness of the transaction. In determining whether the merger and the price paid to the minority shareholders is fair, fair dealing and fair price have to be examined. In the case of fair price, the economic and financial considerations of the proposed merger, including assets, market value, earnings, future prospects and any other elements that affect the intrinsic or inherent value of a company's stock.

However, there are a number of objections to granting relief on the sole ground of substantive unfairness of the consideration offered. First, the reason for the courts' unwillingness to intervene on the ground that the consideration offered is precisely that arguments relating to valuation methodology are inherently more controversial.[96] Second, once substantive fairness is reviewed, the outcomes are less predictable for the parties as it is more difficult whether the consideration payable is fair. It is easier to ascertain whether there has been procedural fairness.

Nevertheless, there may be one instance where it is appropriate for the court to scrutinise the substantive fairness of the consideration in an amalgamation. There is some limited support in a Canadian authority to suggest that there may be unfair and prejudicial conduct if the amalgamation leads to a lender or a quasi-lender being in a contractual relationship with an amalgamated company which is in a materially financially weaker position. In *Palmer v. Carling O'Keefe Breweries of Canada Ltd*,[97] IXL, a wholly-owned subsidiary of Elders (an Australian conglomerate), acquired 100% of common shares of COL (a Canadian brewery company). COL had certain outstanding redeemable preference shares. COL was amalgamated with IXL and COL's wholly-owned subsidiary (COB). IXL had earlier incurred a large acquisition debt of $400 million (Can) to finance the purchase of COL. COL thus combined income generating assets (through COB) and IXL which had the acquisition debt. As a result of the amalgamation, the preference shareholders (who were viewed as quasi-lenders) held shares of a company that had taken on a large acquisition debt without receiving any assets in return.

Elders had arranged a support agreement pursuant to which it agreed to indemnify the lending banks with respect to the debt and the banks agreed to waive their right of recourse against the amalgamated company and look only to Elders for payment. Even though the support agreement resulted in the upgrade of the rating of the preference shares, it was held that the support agreement was not good enough because the preference shareholders were not obliged to accept a claim against an entirely different corporation in place of their investment in COL. The conduct of the directors of COL was held to amount to oppression or unfair prejudice to the preference shareholders under the Canadian equivalent of section 216 of the *Companies Act*.[98] Hence, on that authority, it will be important for an acquiror incurring

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[96] See e.g., *Gambotto v. WCP*, *supra* note 29 at 426, where the majority of the High Court of Australia took the view that market price was not determinative, and other factors should be taken into account. McHugh J. (the minority judgment) was of the view that share markets may not be efficient and cannot be the sole determinant of fair value of the shares, at 434.

[97] (1989) 56 D.L.R. (4th) 128 (Ont. Div. Ct.).

[98] Section 216 of the *Companies Act* allows a member or a debenture holder to apply to the court for an order on the ground that (a) 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 members or debenture holders or in disregard of his interests as members, shareholders or debenture holders of the company, or (b) some act of the

a large acquisition debt to take into account the possibility of a valid challenge under section 215H if it is seeking to amalgamate with a target company by offering securities in the amalgamated company. In such a case, notwithstanding the approval of the amalgamation by special resolution, shareholders receiving securities in the amalgamated acquiror may nevertheless validly complain that post-amalgamation, they end up investing in an entity which is in a materially weaker financial position than the entity they had originally invested in.

3. *Costs*

It is not clear how the court would exercise its discretion in making orders for costs in an application under section 215H. If the general rule that costs follow the event is followed, it would clearly discourage shareholders from making this application as the costs of the litigation are high. Section 215 is silent on the issue of costs though in contrast, under the English equivalent of section 215,[99] costs are generally not awarded against a dissenting shareholder in his petition on "squeeze-out" save in exceptional circumstances.[100] In a section 210 scheme, the English courts have either ordered that the company bears the unsuccessful objectors' costs on the ground that the opposition is not frivolous and their arguments have been helpful to the court or have made no order as to costs.[101] One significant difference between an objection that is raised in a section 210 scheme and a section 215H application is that in the former, the court is required to sanction the scheme anyway and the objectors would not normally have added significantly to the cost of the proceedings. In the latter, an application must be taken out formally, as in the case of a dissenting shareholder's petition under section 215. However, on balance, in view of the fact that the minority shareholders could potentially have their shares compulsorily acquired pursuant to the amalgamation in return for something which they object, it is suggested that they should not be discouraged from making the applications unless they had acted unreasonably in bringing the action. Hence it is suggested that costs should not normally be awarded against a minority shareholder under section 215H unless the proceedings were vexatious or they had been unreasonable in the conduct of proceedings.

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company has been done or is threatened or that some resolution of the members, debenture holders 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 of debenture holders.

[99] *Companies Act 2006*, section 986(5) provides that no order for costs or expenses may be made against a shareholder making such application unless the court is of the view that: (1) the application was unnecessary, improper or vexatious, (2) there has been unreasonable delay in making the application; or (3) there has been unreasonable conduct on the shareholder's part in conducting the proceedings on the application.

[100] It has been noted that it is more advantageous to proceed under a petition on "squeeze-out" than by way of a petition for unfairness or oppression. See P. L. Davies, *Gower and Davies' Principles of Modern Company Law*, 7th ed. (London: Sweet & Maxwell, 2003) at 746.

[101] The effect of a "no order" as to costs means that each party will bear his own costs. The case authorities for the propositions are found in *Re National Bank*, *supra* note 61, and *Re Imperial Tobacco* (unreported, 11 February 1969) respectively. *Re Imperial Tobacco* was cited in *Re AXA Equity and Law Life Assurance Society plc* [2001] 2 B.C.L.C. 447 (Ch. D.). See also G. Morse *et al.*, eds., *Palmer's Company Law*, 25th ed. (London, Sweet & Maxwell, 2006) vol. 2 at para 12.031.1.

B. *Remedy for Unfair Prejudice under Section 215H*

Once the court finds that giving effect to an amalgamation proposal would unfairly prejudice a member or creditor or a person to whom an amalgamating company is under an obligation, section 215H gives the court the power to make such order as it thinks fit in relation to the amalgamation proposal, including (1) directing that effect must not be given to the amalgamation proposal, (2) modifying the amalgamation proposal or (3) directing the amalgamating or its board of directors to reconsider the amalgamation proposal.

There is some ambiguity as to whether the scope of the remedy in (2) would actually permit the court to grant an order to the effect that the company, a shareholder and/or the acquiror purchases the shares from the dissenting minority shareholders at a fair price, irrespective of whether the complaint relates to the failure to ensure procedural fairness in obtaining the shareholder approval or that the consideration price is unfair. In contrast, the NZ *Companies Act*[102] has a separate provision which expressly confers the power on a court to order a buy-out of the dissenting shareholder's shares in an amalgamation as well as other fundamental corporate changes. The *Companies (Amendment) Act 2005* did not incorporate this power when sections 215A to 215J were introduced into the *Companies Act* and the *CLRFC Report* did not explain the rationale for such exclusion.

It is suggested that section 215H should be amended to make it clear that the court has the power to order a buy-out of the dissenting shareholder's shares at fair value by a shareholder, the company and any other appropriate third party. This will give the additional flexibility of being able to order the acquiror to buy out the dissenting shareholder's shares where such dissenting shareholder has demonstrated unfair prejudice under section 215H. The concept of a buy-out of minority shareholdings on terms to be determined by the court is not new; section 215 provides for buy-out rights in the case of compulsory acquisition on judicially-determined terms.[103] Further, the court has to determine the terms of the buy-out of shareholding in the case where the court makes an order pursuant to section 216(2)(d), which is one of the remedies in respect of oppression or disregard of interests under section 216(1).[104] It may be argued that in lieu of a legislative amendment to section 215H, the gap may be filled by the dissenting shareholder applying for relief under section 216. However, there is an ambiguity as to whether it is possible to order a buy-out by a

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[102] Section 110 read with section 106 of the NZ *Companies Act 1993* confers a right to require the company to buy out the shares of minority shareholders who have unsuccessfully opposed a special resolution relating to certain matters, including the approval of an amalgamation proposal.

[103] *Companies Act*, section 215 provides two instances where a buy-out order can be obtained. The first is section 215(1) where notice is given by an offeror who is able to exercise his compulsory acquisition rights, such offeror is bound and entitled to acquire those shares (1) on the terms on which, under the scheme, the shares of the approving shareholders were transferred to the offeror or (2) on such other terms as the court may think fit to order. See *Re Carlton Holdings* [1971] 1 W.L.R. 918 (Ch.D.). Further, pursuant to the *Companies Act*, section 215(3), where the offeror acquires shares, which taken with the shares that the offeror holds, amount to 90% of the shares of the target, a minority shareholder may require the offeror to acquire his shares (i) on the terms on which, under the scheme, the shares of the approving shareholders were transferred to the offeror or (ii) on such other terms as may be agreed or (iii) on such other terms as the court may think fit to order.

[104] See for example the Singapore Court of Appeal decisions in *Yeo Hung Khiang v. Dickson Investment (Singapore) Pte Ltd* [1999] 2 S.L.R. 129 and in *Tullio v. Maoro* [1994] 2 S.L.R. 489.

person who is not a shareholder or the target company under section 216.[105] It is submitted that the better approach is to amend section 215H to make it clear that the court has the power to order a buy-out on terms as the court thinks fit, and such power extends ordering a buy-out to be effected by a shareholder, the company or a third party (including an acquiror).

C. *Remedy for Oppression under Section 216 of the Companies Act*

As an alternative to section 215H of the *Companies Act*, a shareholder objecting to the proposed amalgamation may attempt to bring a petition under section 216, on the ground that the proposed amalgamation is oppressive, is in disregard of such shareholder's interests, or would unfairly discriminates against or is otherwise prejudicial to the interests of such shareholder.[106] The statutory remedy under section 216 is remedially more flexible than under section 215H; the powers of the court under section 216 include directing or prohibiting any act or cancel or vary any transaction or resolution, regulating the conduct of the affairs of the company in future, providing for the purchase of the shares of the company by other members or holders of debentures of the company or by the company itself or the company be wound up. In the case of a purchase of shares by the company, the court may provide for a reduction of the company's capital. The ability to order a buy-out enables the minority shareholders to exit from their investment at a fair price. In contrast, there is some ambiguity as to whether the court may make a buy-out order under section 215H.

In determining what constitutes oppression, unfair discrimination or prejudice within section 216, it was held in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.*[107] a Privy Council decision on appeal from the Federal Court of Malaysia,[108] that there must be a "visible departure from the standards of fair dealing and a violation of fair play which a shareholder is entitled to expect before a case of oppression can be made".[109]

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[105] Under section 216(2)(d), the court may make such order as it thinks fit and the order may "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". The acquiror who is not a shareholder of the company is not one of the persons specified in section 216(2)(d). *Cf.* M. Chew, *Minority Shareholders' Rights and Remedies*, 2nd ed. (Singapore: Butterworths, 2007) at 239 who argues that the court has the power to make orders affecting persons other than those specified in section 216(2)(d).

[106] Statutory provisions which are broadly similar to the *Companies Act*, section 216 include (1) the UK *Companies Act 1985*, sections 459 to 461; (2) the Australian *Corporations Act 2001*, sections 232 to 235; and (3) the NZ *Companies Act 1993*, section 174.

[107] [1978] 2 M.L.J. 227.

[108] The decision was followed in Singapore in *Low Peng Boon v. Low Janie* [1999] 1 S.L.R. 761 (C.A.).

[109] *Per* Lord Wilberforce in *Re Kong Thai Sawmill,* [1978] 2 M.L.J. 227 at 229. See *Lim Swee Khiang v. Borden Co (Pte) Ltd* [2006] SGCA 33 at para. 83, where the Singapore Court of Appeal, following the approach of the House of Lords in *O'Neill v. Phillips* [1999] 1 W.L.R. 1092, held that where the 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 insist on a high standard of corporate governance that must be observed by the majority shareholders. In *O'Neill v. Phillips*, the House of Lords considered the meaning of "unfairly prejudicial" in section 459 of the UK *Companies Act 1985* and held that the concept of fairness may connote a wide discretion on the court but it was not a concept to be judged by reference to subjective notions of fairness. In order to show unfairness under UK *Companies Act 1985*, section 459, there must have been a breach of the terms of an agreement as to how the company's

In the context of an amalgamation procedure, it is suggested that the failure by the majority shareholders to observe procedural fairness relating to the manner in which the shareholder approval is obtained is likely to constitute a departure of "fair play" and hence would constitute oppression or prejudice within section 216. However, if the complaint is not one of procedural unfairness but substantive unfairness (such as the inadequacy of the consideration offered), it is unclear as to whether the courts are willing to find that there has been oppression, disregard of a shareholder's interest or prejudice. Thusfar, most of the case authorities relating to applications under section 216 involve private companies where the petitioning shareholders have claimed that there is some kind of an arrangement that existed among the shareholders which has not been given effect (even though such arrangement may not be a binding agreement)[110] or involve improper payments made by the company to the dominant shareholders, in breach of the capital maintenance rules and/or directors' fiduciary duties.[111] Certainly, the mere fact that the amalgamation procedure is used to eliminate minority shareholders should not, in itself, entitle the petitioner relief given that the *Companies Act* envisages that compulsory acquisition is permitted in certain circumstances. In the absence of any express or implied understanding that such shareholder will continue to remain a shareholder in a company or that such a shareholder will be offered a certain minimum consideration by the majority shareholder if he is bought out, it is submitted that as in the case of section 215H, it is difficult for the shareholder to argue that there has been oppression, disregard of the shareholder's interest or prejudice if at least 75% of the shareholders, present and voting, have agreed to the amalgamation. Similarly, as in the case of section 215H, it would be difficult for a petition involving a listed company to succeed under section 216, although that is not to say that such a petition would never succeed.[112]

Further, the courts will generally not intervene in business decisions which are made by the directors so long as the business decisions are made in good faith and on reasonable grounds.[113] The above suggests that it would be very difficult for the minority shareholder to succeed under section 216 on the ground of substantive unfairness in the consideration that is offered in exchange for him giving up his shares.

V. CONCLUSION

The new amalgamation procedure under sections 215A to 215J introduces a new form of compulsory acquisition, one which allows an acquiror to acquire the business

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affairs are to be conducted or equitable considerations make it unfair for those conducting the affairs of the company to rely on their strict legal rights, such as where such reliance would conflict with the promises that the parties have made, even if such promises are not independently enforceable.

[110] *Ng Sing King v. PSA International Pte Ltd* [2005] SGHC 5.

[111] See e.g., *See Soon Lee v. Gan Cheong Or* [1995] 3 S.L.R. 501 (H.C.); *Low Peng Boon v. Low Janie, supra* note 108.

[112] There is one reported case involving *Companies Act*, section 216 of a listed company: *Tong Keng Meng v. Inno-Pacific Holdings Ltd* [2001] S.L.R. 485. Petitions concerning listed companies have occurred in Australia (see *e.g*. *Re Spargos Mining NL* (1990) 3 A.C.S.R. 1 and *Jenkins v. Enterprise Gold Mines NL* (1992) 6 A.C.S.R. 539) but they relate to transactions involving breaches of fiduciary duties, causing losses to the companies.

[113] *Re Winpac Paper Products Private Limited*, *supra* note 54 at 771, citing *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] A.C. 821 at 832 (P.C.).

undertakings of a target company and to effect a buy-out all of its shares at the same time. This article argues that while the new amalgamation procedure provides a more efficient method of acquiring complete ownership of a target company which does not require the court approval and which imposes a lower shareholder approval requirement, it may have the unintended effect of favouring the majority shareholders at the expense of the minority shareholders. This problem arises because the amalgamation procedure, unlike the other forms of compulsory acquisition, particularly, the section 215 acquisition and the section 210 scheme, does not require non-independent shareholders from voting at the general meeting convened to approve the amalgamation.

In this regard, section 215H is important as it provides protection for, *inter alia*, a shareholder, to apply to the court to resist the amalgamation on the ground of unfair prejudice. It is submitted that, in exercising its discretion under section 215H, the court should seek guidance from the case law relating to the section 215 acquisition and the section 210 scheme. These two methods have attempted to reconcile the role of the majority shareholder approval as the norm in corporate transactions generally and at the same time, recognise the fact that compulsory acquisition should only proceed only if the shareholder approval is fairly obtained. The same balancing of interests is also required in determining whether the court should exercise its discretion under section 215H in granting relief on the ground of unfair prejudice.