9. COMPANY LAW

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Lifting the corporate veil

9.1 The authors have in previous editions of this work commented on the unsatisfactory state of the law in this area. While the courts' discretion to ignore the separate personality of a corporate vehicle for limited purposes in exceptional circumstances is well-established, the use of metaphors such as "façade" and "sham" in this context has led to a lack of clarity over when such an exercise should take place. In *Prest v Petrodel Resources Ltd*[1] ("*Prest*"), the UK Supreme Court analysed the issue in some detail. Lord Sumption, who delivered the leading judgment, concluded that veil-lifting is justified where a company's separate legal personality is being abused for the purpose of some relevant wrongdoing. Having framed the principle, thus, his Lordship stated that there are two further distinct principles that are at play when considering veil-lifting, namely, the "concealment principle" and the "evasion principle". The former is not a true case of veil-lifting as the courts are only identifying the real parties to a transaction. As such, Lord Sumption concluded that the only real case of corporate personality being disregarded arises where the evasion principle applies, namely, if there is a legal right against a person in control of a company, and a company is interposed with the goal of defeating such right or frustrating its enforcement.

9.2 It seems somewhat contradictory that the broad basis for veil-lifting premised on abuse of the corporate form is ultimately reduced to the narrow category of "evasion" cases. Accordingly, the majority of the judges in *Prest* declined to foreclose other possible situations that may justify veil-lifting. One of the authors has welcomed the principle of

1 [2013] 2 AC 415.

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abuse as the underlying basis for lifting the corporate veil though not the restrictive manner in which Lord Sumption sought to apply it.[2]

9.3 In *Simgood Pte Ltd v MLC Shipbuilding Sdn Bhd*,[3] Vinodh Coomaraswamy J said it was unnecessary for him to decide if Lord Sumption's position should represent the law in Singapore as no such arguments were canvassed before him. On the facts, he found that there was no concealment of the real actors to the transactions in question. It is completely legitimate for business people to organise companies such that any liability incurred by the company will rest only with the company and not with its owners. The companies in the group were small companies with few directors. The people in charge of the companies were substantially the same. To expect a clear demarcation between companies in all matters will be unrealistic and does not mean that the companies are operated as one single entity so as to be able to treat all the companies as if they are one and the same.

9.4 In relation to the allegation that there was an abuse of the corporate form, his Honour held that changing the number of a vessel's hull, which allowed one of the companies to postpone its repayment obligations of the DBS loan, did not mean there was a relevant abuse. Such an act did not relate to the way in which the companies were incorporated, managed, or operated. There was no suggestion that the companies in the group were incorporated purely for the purpose of perpetrating the sham or to change the number of the vessel's hull in order to postpone one of the group company's repayment obligation under the DBS loan facility. With respect, this is clearly correct. It is not every wrongdoing that will give rise to veil-lifting. If this was the case, the protection offered by the corporate structure would be significantly diminished. Where abuse of the corporate form is relied upon, the wrongdoing must be a substantial reason for the incorporation of the company or the company must have been used substantially for the purpose of perpetrating a wrong or an act that is against public policy.

9.5 An appeal to the Court of Appeal was dismissed.[4]

2 See Tan Cheng Han, "Veil Piercing – A Fresh Start" [2015] JBL 20.
3 [2016] 1 SLR 1129.
4 See *Simgood Pte Ltd v MLC Barging Pte Ltd* [2016] SGCA 46.

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Memorandum of association

9.6 Section 39(1) of the Companies Act[5] ("Act") used to provide that subject to the Act:

> [T]he [memorandum and articles] shall when registered bind the company and the members thereof to the same extent as if [they] respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the [memorandum and of the articles].

Since January 2016, the memorandum and articles ("M&A") have been replaced by the corporate "constitution". Cases involving this provision are rare because non-trivial breaches of the M&A or constitution may either be presumptively validated under s 392(2) of the Act, or ratified by the board or the shareholders in a general meeting. Serious breaches are likely to give rise to actions for oppression or lead to derivative actions, which will usually be more effective in addressing the underlying issues.

9.7 In *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd*,[6] the plaintiff, which was not a member of the company, sought to enforce the M&A against the company. This was an unusual application given the language of s 39(1) of the Act, which clearly applies only to the company and its members. Indeed, in jurisdictions such as the UK, the courts have construed equivalent provisions narrowly such that even in relation to a member, the provision in the memorandum and articles must relate to a right that the member is seeking to enforce *qua* member. In other words, provisions that do not affect a member in his capacity as a member cannot be enforced by such member, for instance, a provision in the corporate constitution that *A* shall be appointed as the company's solicitor.

9.8 It was, therefore, unsurprising that Judith Prakash J (as she then was) dismissed this aspect of the plaintiff's claim (although the plaintiff succeeded on another basis). Her Honour was not persuaded that a distinction should be drawn between companies limited by guarantee (as the defendant company was) and companies with a share capital.

9.9 What is interesting is the following *dictum* from Prakash J,[7] referring to some outflanking of the "*qua* member" requirement that "these cases may now be explained on the basis that a member has a

5 Cap 50, 2006 Rev Ed.

6 [2016] 2 SLR 366.

7 *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2016] 2 SLR 366 at [47].

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right to require the company to act in accordance with its M&A even if the result would be indirectly to protect a right given to him in another capacity". This represents a school of thought that although a member cannot directly enforce a provision that does not affect members in their capacity as members, they may require the company to act in accordance with its constitution, this being a member's right. This, of course, completely undermines the "*qua* member" requirement as it means that a member may potentially, through injunctive relief, cause a company to act in accordance with the entirety of its constitutional provisions whether they affect the member in such capacity or not. The authors are not averse to this as such interpretation could be said to accord better with the literal language of s 39(1) and enhances shareholder rights.

9.10 Having said this, there is an intermediate approach. Such an approach will take into account the context behind the constitutional provision in determining if, on the facts, they give rise to a "*qua* member" right. In other words, a particular provision may have been inserted as an incident of membership or to induce a person to become a member of the company. Such provisions are common and include rights of representation on the board and deadlock rights. The exercise of such rights has been upheld[8] even though they may involve matters of management rather than matters that affect a member in such capacity unless "*qua* member" is understood more broadly.

Directors

9.11 In *Living the Link Pte Ltd v Tan Lay Tin Tina*,[9] Steven Chong J held that the defendants had engaged in activities that amounted to an undue preference. Having come to this finding, his Honour concluded that the defendant director was also in breach of her fiduciary duty to ensure that the company's assets were not misapplied to the prejudice of creditors' interests. This was because when a company is insolvent, or even in a parlous financial position, directors have a fiduciary duty to take into account the interests of the company's creditors when managing the company. This fiduciary duty requires directors to ensure that the company's assets are not dissipated or exploited for their own benefit so as to prejudice creditors. The purpose of this duty mirrors that of the statutory avoidance provisions, although there may be exceptional circumstances where a director may be found to have acted

8 See, *eg*, *Sum Hong Kum v Li Pin Furniture Industries Pte Ltd* [1996] 1 SLR(R) 529; see also *Tang Kin Fei v Chang Benety* [2011] 1 SLR 568 at [39] for Woo Bih Li J's observations.

9 [2016] 3 SLR 621.

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bona fide in the best interests of the company despite having procured an undue preference.

9.12 On the submission that the defendant director should be excused under s 391 of the Act, Chong J said that there was insufficient material to show that she had acted honestly and reasonably in procuring the transactions which were found to be undue preferences. The payment of the rental to the former landlord was late, incomplete, and unrelated to the wrongful transfers. The fact that she had ensured that the claims of the company's other creditors were satisfied was also immaterial, particularly as these were mostly secured creditors who had recourse against her, her husband, and her mother under their personal guarantees and were only paid after exercising their security rights under the respective credit facilities. Finally, his Honour said that the personal losses suffered by the director did not indicate that her actions were honest and reasonable, especially in view of the finding that the transactions were influenced by a desire to prefer the associate companies of which she was a director and the sole shareholder.

9.13 *Beyonics Technology Ltd v Goh Chan Peng*[10] is another case involving an application for relief under s 391 of the Act. The defendant, who had been found in breach of his fiduciary duty to the plaintiff company, submitted that he should be entitled to relief under the said provision. Not surprisingly, Hoo Sheau Peng JC demurred. Having found that he had breached the core duty to act honestly and *bona fide* in the interests of the company, he could not avail himself of the defence under s 391.

9.14 In *Higgins, Danial Patrick v Mulacek, Philippe Emanuel*,[11] the court dealt with the not unfamiliar situation where a director was in a position of conflict and breached his fiduciary duty by preferring his own interests to those of the company. What is of interest was Edmund Leow JC's observation that the director could not avail himself of the corporate opportunity even if the director had come upon the opportunity in another capacity. This is correct on its facts but may have to be suitably qualified in other situations. The director in question was the managing director and the opportunity was something well within the scope of business of the company. Merely because the managing director attended a networking event in another capacity where the opportunity came up did not mean he was absolved from his fiduciary obligation. This must, surely, be right as one of the principal roles of a typical managing director is to develop the company's business in whatever forum he finds himself. It may be less true of non-executive

10 [2016] 4 SLR 472.
11 [2016] 5 SLR 848.

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directors who have their own business interests as long as these business interests are known to the companies of which they are directors.

Accounts

9.15 In *Ezion Holdings Ltd v Teras Cargo Transport Pte Ltd*,[12] the plaintiff as shareholder sought an order under s 203 of the Act for the defendant company to produce its financial statements and accounts for the 2015 financial year, though these had not been prepared or audited. In fact, the last available audited accounts of the defendant were from the financial year ending in 2012. The defendant had also failed to provide audited accounts to the plaintiff for the 2013 and 2014 financial years despite repeated requests. Although Aedit Abdullah JC was sympathetic to the plaintiff's application, his Honour dismissed the application as the language of s 203 only entitles a member to audited financial statements already prepared for the purposes of a general meeting.

Shares

9.16 In *JX Holdings Inc v Singapore Airlines Ltd*,[13] the little known doctrine of "universal succession" fell to be decided in the context of shares, though it can be relevant to other assets and liabilities of a company. Essentially, the doctrine provides that where one corporate entity succeeds to the corporate personality of another, and such succession is recognised by the law of incorporation, the law of the forum will, similarly, recognise not just the changed status of the company but also that the successor company has inherited the rights and liabilities of its predecessor. Where this has taken place, any assets and liabilities that have moved from the predecessor company to the successor company are to be regarded as a "transmission" and not a "transfer". For this reason, a succeeding company may be registered as a shareholder in place of the predecessor company without there being any need for a proper instrument of transfer to be prepared and delivered. Succession may take place even though the succeeding entity receives only part of the assets and liabilities of the predecessor company as long as this is recognised in the law of incorporation.

9.17 In the present case, Kyodo Oil Co Ltd ("KOL"), a Japanese company, had purchased a number of shares in the defendant in 1986. KOL, subsequently, ceased to exist and its assets and liabilities were,

12 [2016] 5 SLR 226.
13 [2016] 5 SLR 988.

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eventually, vested in the second plaintiff. In 2010, the second plaintiff itself underwent a reorganisation where some of its assets including the shares in the defendant were transferred to the first plaintiff. This was referred to as an "absorption-type company split" where the predecessor company continued to exist with such assets and liabilities which were not absorbed by the successor company. The first plaintiff sought, *inter alia*, the rectification of the defendant's share register so as to register the first plaintiff as a member of the defendant in relation to the shares in question.

9.18 The defendant's position was that ownership of the shares in question had devolved by operation of law to the second plaintiff pursuant to the doctrine of universal succession. However, in relation to the first plaintiff, it was submitted that a transfer rather than a transmission had taken place. As such, a proper instrument of transfer was required and stamp duty should be payable before the first plaintiff could be registered as the owner. Leow JC disagreed and considered that the absorption-type split also involved a passing of the shares by operation of law rather than by way of a transfer. His Honour arrived at this decision on the basis of the sole expert who gave evidence of Japanese law.

9.19 While the actual outcome in itself is dependent on whether the law of incorporation characterises a change of ownership as arising by operation of law, and the court must have regard to such evidence as is before it, the decision is significant because, as the learned judicial commissioner observed, this appeared to be the first time this doctrine has been discussed in Singapore, and accepted.

Just and equitable winding-up

9.20 In *Ting Shwu Ping v Scanone Pte Ltd*[14] (on appeal from *Ting Shwu Ping v Autopack Pte Ltd*),[15] the Court of Appeal had occasion to discuss the newly introduced s 254(2A) of the Act which allows a court, in an application to wind up a company on the just and equitable ground under s 254(1)(*i*) of the Act (as well as under s 254(1)(*f*), where the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatever which appears to be unfair or unjust to other members), to order a shareholder buyout as an alternative to winding up the company when it is just and equitable to make such an order. The decision of the Court of Appeal, delivered by Judith

14 [2017] 1 SLR 95.
15 [2016] 2 SLR 152.

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Prakash JA and which affirmed the decision of the court below, contains a valuable discussion of the principles which should guide a court in approaching just and equitable winding-up in light of the new alternative remedy.

9.21 First, Prakash JA stated that although s 254(2A) does not expressly require that the grounds for ordering a winding-up under s 254(1)(*f*) or s 254(1)(*i*) must be made out before the court can order a buyout, it is clear that s 254(2A) is not intended to be a direct buyout remedy, and the applicants were applying in the first instance for a winding-up. The courts must, therefore, first form the view that the ground in question justifies winding up before being able to provide any remedy. As such, the remedy can only be provided if the ground sought for winding up is made out. With respect, this is clearly correct and one of the authors can confirm that this is the intention of the Steering Committee for Review of the Companies Act as the said author is the member who has suggested this amendment.

9.22 Second, the court gave consideration to what would amount to abuse of process in the context of such winding-up applications. In the court below, Leow JC had found that the applicant was not really seeking a winding-up order but wanted, instead, to be able to exit the companies. This was held to be an abuse of process. The appellant/applicant disputed this on the basis that she was simply seeking a remedy provided under the Act and this could not amount to an abuse. Prakash JA expressed the view that there were three distinct situations in which the abuse of process issue may have to be considered.

9.23 The first circumstance considered would involve an applicant who has no alternative means of seeking a buyout remedy and presents a winding-up petition with the main objective of obtaining such a buyout remedy and not a winding-up order. The court was of the view that an applicant is not necessarily abusing the process of the court by bringing a winding-up petition for the sole or main purpose of obtaining a s 254(2A) remedy. For example, an applicant who is of the view that there may be sufficient grounds for a winding-up order to be made, may also know that the situation is such that it is likely the court will not order the company to be wound up because the company is viable and a winding-up would be undesirable. A winding-up petition in such circumstances cannot be an abuse of process as this is precisely the type of situation that s 254(2A) contemplates.

9.24 The second circumstance considered involves the availability of a remedy under s 216 of the Act which itself provides for a buyout remedy. The court was of the view that an applicant who truly seeks a winding-up order will be justified in presenting a winding-up application even if an alternative remedy under s 216 is available to him

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because a winding-up order under this section is an order of last resort and he will not necessarily obtain a winding-up order under s 216 even if oppression is established. Underlying this is the notion that a shareholder has a right to have recourse to all statutorily available remedies; the pursuit of a winding-up remedy in circumstances where the test for the grant of such an order is met cannot be said to be an abuse of process even if more moderate remedies are available under s 216.

9.25 However, things can be different if a shareholder brings a winding-up application under s 254(1)(*f*) or s 254(1)(*i*) with the primary objective of obtaining a buyout remedy when the s 216 remedy is judged to be available to such shareholder. In this situation, the court may have a basis for inferring that the winding-up application is preferred to a s 216 application because of the desire to harass or pressure the company with the consequences that follow from the presentation of a winding-up petition. However, the abuse of process inquiry should still be a fact-specific one and there ought not to be an automatic assumption that there is an abuse of process from the fact that a share buyout remedy is pursued under s 254(2A) when it could have been pursued under s 216.

9.26 The third situation that may involve an abuse of process that was considered by the court is where the company's articles lay clear procedures for a share buyout but the applicant invokes just and equitable winding-up with a view to obtaining the buyout remedy under s 254(2A). To this, the court expressed the view that while it cannot be said that the existence of a procedure for a share buyout in a company's articles automatically, as a matter of law, bars winding-up applications, it does have a significant impact on the court's analysis of whether sufficient cause has been demonstrated to justify a winding-up and on whether the application is, in fact, brought with a collateral purpose such as to amount to an abuse of process.

9.27 Fourth, the Court of Appeal went on to consider what stage of the proceedings the possibility of abuse of process ought to be considered. The trial judge was of the view that the court must determine, as the first stage of a three-stage judicial test for invoking s 254(2A), whether the winding-up application was an abuse of process. The Court of Appeal disagreed with this. It was of the view that if the respondent was convinced that the application was an abuse of process, the respondent should have applied to strike out the application at an early stage. Once an application comes on for hearing, the court must investigate it in full. In doing so, the court must consider not only the grounds of the application but also, where appropriate, whether the applicant has alternative remedies available to him and, if so, why no recourse is had to such remedies and the probable motivation of the

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applicant. If the applicant is shown to have a collateral motive or no reasonable basis to apply under s 254(2A) rather than avail himself of the procedure under the articles, the application will be dismissed, possibly with severely adverse cost consequences.

9.28 The Court of Appeal then went on to consider the merits of the appellant's case on the grounds of winding up. It is not necessary to canvass all the arguments made by the appellant. To the argument that the company was a quasi-partnership, the court rejected the further argument that the company should be dissolved upon the death of one of the members or directors of the company just as a partnership would, in the absence of an agreement to the contrary, dissolve upon the death of any partner. Principles of partnership law were borrowed for some aspects of company law but not everything was imported. In particular, the rule relating to dissolution of partnerships upon the death of a partner has nothing to do with equity and, therefore, is irrelevant to just and equitable winding-up. It may be that the death of one of the shareholders may on its facts give rise to equitable considerations but there should be no such absolute principle. Furthermore, rights under a quasi-partnership generally do not survive the death of a party to the quasi-partnership.

9.29 The appellant also argued that it was unfair that she was unable to extract any value from her shares in the companies as no dividends were paid and she did not receive a salary. The court was of the view that this was *prima facie* unfair but this would be subject to whether the other shareholder was willing to buy the appellant's shares in accordance with the buyout procedure set out in the articles. As he was willing to do so, and there were no legitimate grounds to doubt the mechanism provided for in the articles, the just and equitable ground was not made out.

Derivative actions

9.30 Two of the most basic principles in company law are that a company is a separate legal person and directors owe negligence and fiduciary duties to their company (and not to their company's individual shareholders). As such, when directors breach their duties, it is the company alone, as a separate legal person, that *prima facie* has the right to sue. As companies are fictitious persons, however, they cannot decide to sue on their own and can only act based on the decisions of human beings. Thus, when there is a breach of directors' duties, the question that naturally arises is: who has the power to decide whether the company, as a separate legal person, should sue?

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9.31 Under normal circumstances, this question is answered easily through the regular corporate decision-making process. Ordinarily, company law vests the board of directors with the power to make management decisions for the company.[16] As the decision to sue is a management decision, the board normally has the power to decide whether the company should sue the directors for breaching their duties. This makes sense because the board normally has the best available information about the company's potential lawsuit and board members are bound by their directors' duties to decide, in the interests of the company, whether the lawsuit should be pursued.

9.32 An obvious problem arises, however, when the same directors who breached their duties are the ones who have the power to decide whether the company should sue. In such a case, the normal corporate decision-making process produces an acute conflict of interest as it vests the wrongdoing directors with the power to decide whether the company should, in effect, sue themselves. This acute conflict of interest becomes intractable when the wrongdoing directors are also the controlling shareholders as they can then entrench themselves and, effectively, foreclose the company from suing them for breaching their directors' duties.

9.33 From the time of *Foss v Harbottle*,[17] Commonwealth courts have grappled with this intractable problem. Their solution has been to allow individual shareholders, in circumstances where such an acute conflict of interest arises, to pursue an action for and on behalf of the company against the wrongdoing directors, essentially circumventing the normal corporate decision-making process. These shareholder-driven corporate actions have come to be known as "derivative actions" because the shareholders pursuing them do not seek to enforce their own personal rights, but rather the company's rights (that is, rights "derived" from the company).

9.34 In this light, it is clear that derivative actions are essential for good corporate governance. Indeed, without them, directors' duties would essentially be rendered nugatory for all controlling shareholder-directors and largely ineffective for wrongdoing directors in companies with widely dispersed shareholders. It is, however, equally clear that by allowing a single shareholder to thrust an entire company into potentially harmful litigation, the derivative action presents serious corporate governance risks. These risks are heightened by the fact that individual shareholders do not normally owe any duties to the company,

16 See Companies Act (Cap 50, 2006 Rev Ed) s 157A; Companies (Model Constitutions) Regulations 2015 (S 833/2015) First Sched, Art 77.
17 (1843) 67 ER 189.

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often lack critical information about the company's potential lawsuit, and may be using the derivative action to serve their own interests, which can diverge, sometimes significantly, from the company's interests. It is in this context that common law courts have strived to develop an effective filter that both weeds out abusive, wealth-reducing derivative actions and at the same time allows legitimate, wealth-maximising ones to proceed.

9.35 The filter developed in Singapore and throughout the Commonwealth has been to require potential shareholder-plaintiffs to convince the court in a preliminary leave application that they should be granted the right to pursue a derivative action. Historically, to do this, potential shareholder-plaintiffs had to establish that the wrongdoing director committed "fraud on the minority" – a concept which is vexed with ambiguity and has often made derivative actions inaccessible even for aggrieved minority shareholders. To this day, the law in Singapore remains unsettled on the precise criteria for establishing "fraud on the minority".[18]

9.36 In 1993, the problems with the "fraud on the minority" filter inspired the Singapore Parliament to enact a new statutory procedure – s 216A – which is designed to remove the obstacles created by the common law and, in turn, provide an effective remedy for aggrieved minority shareholders.[19] In the last decade, the UK and most other leading Commonwealth (and many civil law) countries have followed Singapore's lead and, similarly, provided for a statutory derivative action in their companies acts to facilitate the protection of aggrieved minority shareholders.[20]

9.37 Under s 216A, there are three requirements that every complainant, which includes a shareholder or any other person the court deems proper, must satisfy before leave will be granted to pursue a statutory derivative action:

(a) the complainant must give 14 days' notice to the company's directors of his intention to bring the derivative action before commencing the application for leave;

(b) the complainant pursuing the derivative action must be acting in good faith; and

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18 See *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 at [54]–[55].

19 See *Parliamentary Debates, Official Report* (14 September 1992), vol 60 at col 231 (Richard Hu Tsu Tau, Minister for Finance).

20 See *Derivative Actions in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing eds) (Cambridge University Press, 2012) ch 1, at p 2, for more details.

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(c) it must appear to be *prima facie* in the interests of the company that the derivative action is brought.

Although these three requirements are much clearer than the fraud on the minority test, for the s 216A filter to function effectively, courts must provide detailed guidance on how each of these three requirements should be applied in practice.

9.38 In *Petroships Investment Pte Ltd v Wealthplus Pte Ltd*,[21] a 10% minority shareholder alleged that the directors of the company, who were nominees of the company's controlling shareholders, breached their directors' duties by causing the company to enter into wrongful transactions, which benefited the controlling shareholders and other related companies. Based on these allegations, the minority shareholder decided to pursue a s 216A statutory derivative action in the name of the company. In accordance with s 216A(3)(*a*), notice was served on the company's directors, stating that a statutory derivative action would be brought against them unless, within 14 days, they fully explained the impugned transactions or caused the company to commence the necessary legal actions against themselves, the controlling shareholders, and other related companies.

9.39 After the 14-day notice period had expired, the directors had failed to act. In turn, the minority shareholder filed an originating summons to seek leave under s 216A to commence a statutory derivative action. However, prior to the leave application being heard, the controlling shareholders passed a special shareholders' resolution which placed the company into members' voluntary liquidation. The minority shareholder unsuccessfully applied for an injunction to restrain the company from acting on the resolution. Accordingly, the liquidator was appointed.

9.40 The liquidator stated that it would investigate the minority shareholder's allegations, if the shareholders consented. As there was no consensus among the shareholders, the liquidator applied to the High Court for directions. Before the liquidator's application could be heard, however, the controlling shareholders requisitioned an extraordinary general meeting to consider removing the liquidator. To avoid the inevitable, the liquidator resigned and the controlling shareholders passed a resolution to appoint a new liquidator. The new liquidator decided not to pursue the previous liquidator's application and, thus, the application was withdrawn. In turn, the minority shareholder proceeded with its s 216A leave application.

21 [2016] 2 SLR 1022.

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9.41 The High Court denied the leave application on the grounds that the minority shareholder had not established that it was acting in good faith as required by s 216A(3)(*b*), nor that bringing a derivative action appeared to be *prima facie* in the interests of the company as required by s 216A(3)(*c*). The core fact supporting the High Court's finding, with respect to the interests of the company requirement, was that the company was in liquidation at the time of the leave application. Coomaraswamy J observed that when a company is in liquidation, the liquidator – not the board of directors – is empowered under the Act to bring legal proceedings in the name of the company. Therefore, the underlying rationale for bringing a derivative action (that is, to resolve the acute conflict of interest that exists when directors must decide whether the company should sue themselves) largely disappears when a company is in liquidation. Moreover, his Honour reasoned that there are remedies in the Act and at common law that ensure a liquidator does not improperly fail to advance claims on behalf of the company, normally obviating the need for a derivative action once a company is in liquidation.

9.42 The Court of Appeal upheld the High Court's decision, but on different grounds. It found that s 216A is *unavailable* for a company in liquidation. Therefore, the threshold issue in this case was whether s 216A was even applicable in the first place. As the Court of Appeal found that the company was in liquidation at the time the leave application was heard, it opined that it would have been "putting the cart before the horse" to consider whether the elements of s 216A had been satisfied; as such, the appeal was dismissed on the sole ground that s 216A was unavailable as the company "was already in liquidation".[22]

9.43 The authors welcome the Court of Appeal's attempt to establish a clear rule to define the relationship between the statutory derivative action and liquidation. In addition, the authors generally agree with the four reasons articulated by the Court of Appeal, which suggest that s 216A should be unavailable *after* a company is in liquidation. First, an examination of the statutory language used in s 216A clearly suggests that an application for leave to commence a statutory derivative action is only available in the context of a company that is a going concern, and not one in liquidation. Specifically, the express language in s 216A(3)(*a*) states that 14 days' notice must be given "to the *directors* of the company of its intention to apply for leave to commence the action *if the directors* do not bring, diligently prosecute or defend or discontinue the action or arbitration" [emphasis in original].[23] Clearly, the language used in s 216A contemplates a scenario in which directors who are capable of taking

22 *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1022 at [32].
23 *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1022 at [35].

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action to vindicate the company's rights actually exists, which is not the case post-liquidation.

9.44 Second, the Court of Appeal found that the legislative history of s 216A does not suggest an interpretation which is contrary to the section's express statutory language. A thorough review of s 216A's legislative history reveals that the equivalent Canadian provision, which served as a model for s 216A, also does not suggest that a statutory derivative action should be available post-liquidation. Similar to the express language used in s 216A, the equivalent Canadian provision requires notice "to the *directors*"[24] [emphasis in original] as a prerequisite for obtaining leave from the court to pursue a statutory derivative action. Relatedly, the Court of Appeal noted that an influential Canadian government committee viewed the statutory derivative action as an important tool for preventing controlling shareholder abuse. This, along with other aspects of the Canadian legislative history, suggests that "the statutory derivation action was designed as a remedy for a minority shareholder in a *going concern*" [emphasis in original].[25] The Court of Appeal, thus, concluded that the legislative history of s 216A does not indicate that it "was intended to be available as a shareholder's remedy in the context of a company that had been placed in liquidation".[26]

9.45 Third, as there was no Singapore case law directly on point, the Court of Appeal reviewed case law from other Commonwealth jurisdictions. This case law similarly suggests that a statutory derivative action should not normally be allowed when a company is in liquidation. In a similar vein, the Court of Appeal noted that the case law was clear that a *common law* derivative action cannot be brought by a minority shareholder of a company in liquidation.[27] This fact is particularly salient in the Singapore context because, distinct from other Commonwealth jurisdictions, the common law derivative action was not expressly abolished with the introduction of the s 216A statutory derivative action. The Court of Appeal reasoned that if it is impermissible to pursue a common law derivative action when a company is insolvent, the same rule should logically apply to a statutory derivative action; otherwise, different principles would apply to two similar types of actions, which are designed to address similar types of mischief.

24 *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1022 at [42].
25 *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1022 at [46].
26 *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1022 at [56].
27 *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1022 at [64].

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9.46 Fourth, the Court of Appeal noted that preventing minority shareholders from pursuing a s 216A derivative action after a company is in liquidation will not create a regime in which corporate wrongs will go without a remedy. In line with the High Court's reasoning, the Court of Appeal found that liquidators are subject to the court's oversight and that Singapore's liquidation regime has effective remedies to address situations where a liquidator does not fulfil his legal obligations and duties. As such, the rule that s 216A is unavailable when a company is already in liquidation will not provide a safe harbour for corporate wrongdoers.

9.47 Although, for the reasons stated above, the authors welcome the Court of Appeal's articulation of the general rule that s 216A should be unavailable *after* a company is in liquidation, and query whether the rule and supporting reasons are applicable in this particular case. A critical undisputed fact in this case is that notice was given to the company's directors *prior to* the company entering liquidation. In addition, in accordance with s 216A(3)(*a*), after notice was served on the directors, but before the company was in liquidation, the *directors* were given more than 14 days to decide whether the company should pursue the allegations in the notice.

9.48 In the authors' respectful opinion, the statutory language, legislative history, and case law highlighted by the Court of Appeal all strongly suggest that the company must be a going concern *at the time the s 216A(3)(*a*) notice is given to the directors*. It is at this time, that the Act in s 216A(3)(*a*) contemplates that the directors will decide whether the company should take action to vindicate its rights. It is at this time that the director's control over the company's decision to sue is put into direct conflict with their self-interest not to be sued by the company. Thus, it is at this time, that it is crucial for the directors to exist and to have the power to make corporate decisions, which would be impossible if the company was in liquidation as the board of directors would have been dissolved.

9.49 Based on this reasoning, the authors would have preferred that the rule be that s 216A will be available if the company is a going concern *at the time that the s 216A(3)(*a*) notice is served* –which would have made a s 216A statutory derivative action available in this case. The authors respectfully suggest that this rule has the advantage of respecting the express statutory language, legislative history, and case law highlighted by the Court of Appeal while, at the same time, disincentivising controlling-shareholder-directors from using members' voluntary liquidation as a strategic tool to avoid being subject to a

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derivative action after they have been served with notice.[28] It seems clear that the Parliament never intended members' voluntary liquidation to be used by directors to thwart an otherwise valid statutory derivative action pursued by an aggrieved minority shareholder. It should be noted, however, that even if the Court of Appeal did apply the rule suggested by the authors, the ultimate result of the appeal would likely have been the same as the minority shareholder would have had difficulty satisfying the elements of s 216A, even if it was available, for the reasons articulated by the High Court.

9.50 In *Chong Chin Fook v Solomon Alliance Management Pte Ltd*[29] ("*Solomon Alliance*"), the complainant was the sole director, co-founder, and a minority shareholder of the company. The primary defendant was a co-founder and sales agent of the company, who combined with another defendant, held a majority of the shares in the company. The complainant suspected that the defendants were diverting business away from the company for their own personal gain and in breach of the primary defendant's sales agent agreement. The complainant hired a private investigation firm which confirmed his suspicions and obtained a legal opinion that the company had a case against the primary defendant. Accordingly, the complainant, in his capacity as the sole director of the company, caused the company to commence an action against the primary defendant to recover the losses from the alleged diversion of the company's business.

9.51 In response to the company's action, the defendants, in their capacity as the majority shareholders, called an extraordinary general meeting. At the meeting, the complainant was removed from his position as the company's sole director and two new directors were appointed in his place. The first director was the niece of the primary defendant and wife of the lawyer representing the primary defendant in his dispute with the company. The second director had an acrimonious relationship with the complainant and was the head of administration in a company in which the other defendant had an interest. In addition, the primary defendant filed a counterclaim for defamation against the company and joined the complainant as a defendant in the counterclaim. In response, the company issued a third-party notice to the complainant seeking indemnification and/or contribution in respect of the primary defendant's counterclaim. The complainant, in turn, issued a third-party notice against the company seeking indemnification and/or contribution in respect of the primary defendant's counterclaim against him.

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28 See Samantha S Tang & Alan K Koh, "How to Avoid a Derivative Action: A Cautionary Tale from Singapore" [2016] LMCLQ 346 at 349–352.

29 [2017] 1 SLR 348.

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9.52 Fearing that the two new directors would not properly pursue the company's action against the primary defendant, the complainant sought leave under s 216A to take control of the conduct of the company's ongoing action. The High Court dismissed the leave application on the grounds that the complainant was not acting in good faith and that allowing the complainant to have conduct of the action was not *prima facie* in the interests of the company. A foundational fact cited by the High Court for its findings was the conflict of interest that the complainant would have had if he was granted leave because of his ongoing legal dispute with the company. In addition, with respect to the criterion for taking control of an ongoing proceeding under s 216A, the High Court found that the complainant had failed to demonstrate "that the Company was not prosecuting or defending the action with diligence".[30]

9.53 The Court of Appeal allowed the appeal and granted the complainant conditional leave under s 216A to take control of the conduct of the ongoing action. In arriving at its decision, the Court of Appeal made at least three important findings which, in the respectful opinion of the authors, helpfully clarify the requirements for a s 216A leave application. First, the Court of Appeal acknowledged that s 216A proceedings generally involve a fractious atmosphere and that the mere presence of a collateral purpose or evidence of a complainant's vendetta against the target of the derivative action is insufficient to prevent leave from being granted based on a lack of good faith. In the face of evidence of a collateral purpose, however, the complainant must be able to demonstrate that his collateral purpose "was sufficiently consistent with the purpose of doing justice to the Company".[31]

9.54 The authors respectfully welcome the Court of Appeal's reaffirmation that the mere presence of a collateral purpose or evidence of a complainant's vendetta is insufficient to amount to a lack of good faith under s 216A. Surely, the good-faith requirement cannot require complainants to be devoid of hostility towards the target of the derivative action. If this were the case, virtually all aggrieved minority shareholders would be barred from pursuing a statutory derivative action, which would be contrary to the Parliament's intention for s 216A to provide an effective remedy to protect the interests of aggrieved minority shareholders.[32]

30 *Chong Chin Fook v Solomon Alliance Management Pte Ltd* [2017] 1 SLR 348 at [33].

31 *Chong Chin Fook v Solomon Alliance Management Pte Ltd* [2017] 1 SLR 348 at [60].

32 See *Parliamentary Debates, Official Report* (28 May 1993), vol 61 at col 293 (Richard Hu Tsu Tau, Minister for Finance).

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9.55 The Court of Appeal's focus on ensuring that the complainant's purpose is consistent with "doing justice to the company" is also welcome as it confirms the nexus between the good faith and interests of the company requirements in s 216A. Limiting the scope of good faith in this way appears prudent considering the criticism that the good-faith requirement has received in Singapore and across the Commonwealth.[33] The Court of Appeal's approach of limiting the scope of the good-faith requirement is further justified by the fact that the statutory derivative actions in New Zealand and Hong Kong both do not include good faith as an express requirement, yet both appear to function without systematic abuse.[34]

9.56 Second, the Court of Appeal clarified that the legal criterion to intervene in an *ongoing* proceeding under s 216A is that "the complainant has to demonstrate that it was *probable* that the company would not diligently prosecute the action" [emphasis in original].[35] This is distinct from the approach taken by the High Court, which required the complainant to demonstrate an *actual* lack of diligent prosecution by the company. The Court of Appeal further clarified that "the probability that the company would not diligently prosecute the action must be a *real one* as opposed to a mere fanciful or speculative one" [emphasis in original].[36]

9.57 The authors respectfully agree with the Court of Appeal's approach as requiring real – not fanciful or speculative – evidence of the probability that the company would not diligently prosecute ensures that actions that are properly prosecuted will not be unnecessarily disrupted by an unwarranted intervention. Conversely, this approach allows a minority shareholder to intervene before the company has

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33 See Arad Reisberg, "Theoretical Reflections on Derivative Actions: The Representative Problem" (2006) 3 ECFR 69 at 101–103; Dennis Peterson & Matthew Cumming, *Shareholder Remedies in Canada* (LexisNexis, 2nd Ed, 2009) at para 16.39; Lang Thai & Matthew Berkahn, "Statutory Derivative Actions in Australia and New Zealand: What Can We Learn from Each Other?" (2012) NZULR 370 at 376–379; Alan K Koh, "Searching for Good Faith in Singapore's Derivative Action: Much Ado about Something?" (2015) 36 *Company Lawye*r 207; Samantha S Tang, "Corporate Avengers Need Not Be Angels: Rethinking Good Faith in the Derivative Action" (2016) 16 JCLS 471.

34 See Lynne Taylor, "The Derivative Action in the Companies Act 1993: An Empirical Study" (2006) 22 NZULR 333; see also David C Donald, *A Financial Centre for Two Empires: Hong Kong's Corporate, Securities and Tax Laws in Its Transition from Britain to China* (Cambridge University Press, 2014) ch 5, at pp 202–203.

35 *Chong Chin Fook v Solomon Alliance Management Pte Ltd* [2017] 1 SLR 348 at [72].

36 *Chong Chin Fook v Solomon Alliance Management Pte Ltd* [2017] 1 SLR 348 at [73].

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actually suffered damage from the failure to diligently prosecute a valid action. Such an approach is consistent with the Parliament's intention for s 216A to provide an effective remedy for minority shareholders, and appears justifiable as there is no evidence of systematic abuse of the statutory derivative action in the Commonwealth.[37] In *Solomon Alliance*, the complainant demonstrated that it was probable that the company would not prosecute the action diligently due to the clear conflicts of interest on the part of the two new directors. This was the case even though the company appeared to be diligently conducting the action.

9.58 Third, the Court of Appeal overturned the High Court's finding that it would not be *prima facie* in the interests of the company to grant the complainant leave to pursue a derivative action because the complainant was not the "proper person" to represent the company's interests. The High Court's finding was based on the fact that the complainant faced a claim of contribution and/or indemnification from the company such that a clear conflict of interest would arise if the complainant were given leave to control the conduct of the action. However, the Court of Appeal held that although such a conflict would arise, the broad remedial discretion in s 216A(5) provided the court with the power to place conditions on the leave, which could properly manage such conflicts. In turn, the Court of Appeal granted the complainant leave, but with several conditions designed to mitigate the conflicts of interest.

9.59 With respect, the authors applaud the Court of Appeal's use of its discretion under s 216A(5) to tailor the leave granted in a way that struck an appropriate balance between ensuring that the company's claim was diligently prosecuted, while guarding against the potential unfairness that might have arisen from having a party with a potential conflict of interest take control of the action. We suggest that providing such a tailored remedy is particularly effective in the context of Singapore because it allows its skilful and experienced judiciary to resolve disputes in a way that addresses the complexities of each case.

Oppression remedy

9.60 Section 216 of the Act is the main mechanism in Singapore for protecting minority shareholders against unfair treatment. This mechanism (commonly known as the "oppression remedy") provides a

37 See *Parliamentary Debates, Official Report* (14 September 1992), vol 60 at col 231 (Richard Hu Tsu Tau, Minister for Finance); see also Andrew Keay, "Assessing and Rethinking the Statutory Scheme for Derivative Actions under the Companies Act 2006" (2016) 16 JCLS 39 at 41.

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direct personal remedy to any member in a company who can establish that they have been treated in a manner that is "commercially unfair". The oppression remedy bolsters the protection of minority shareholders significantly as it provides them with a substantive right (which does not exist at common law) to be treated in a manner that is commercially fair, even if doing so places restrictions on the *de facto* norm of majority rule in companies.

9.61 Historically, in many respects, Singapore has been at the forefront of the trend throughout the Commonwealth in taking an expansive view towards the oppression remedy to strengthen minority shareholders' rights.[38] Indeed, as noted by the Privy Council, when the oppression remedy was first introduced in Singapore in the Companies Act 1967,[39] it provided the court with a significantly wider ambit to protect minority shareholders from "commercial unfairness" than the equivalent English and Australian provisions at that time.[40] This proved to be forward-looking as the wider ambit of protection provided by Singapore has now become the norm throughout the Commonwealth.

9.62 In *Koh Keng Chew v Liew Kit Fah*,[41] a dispute arose between the minority shareholders and majority shareholders in a corporate group. The minority shareholders brought an action against the majority shareholders under s 216 claiming minority oppression. Although the majority shareholders did not admit to the allegations of oppression, they agreed to buy out the minority's shares based on the understanding that the relationship of mutual trust and confidence between the parties had broken down. In turn, there was a consent order issued reflecting the agreement between the parties that a buyout should be ordered. However, the minority shareholders sought a court order to buy out the majority's shares (that is, for the court to order a "minority buyout"). As such, the only issue before the court was whether it should order a minority buyout or a majority buyout.

9.63 The High Court found in favour of the majority shareholders and ordered a majority buyout. Chua Lee Ming JC took the opportunity to articulate three helpful guiding principles to determine when the court should order a minority buyout. First, a minority buyout should only be ordered in exceptional situations. Second, such exceptional circumstances may exist when the majority is financially or legally

38 See *Derivative Actions in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing eds) (Cambridge University Press, 2012) ch 8, at pp 323–324, 330 and 348–351.

39 Act 42 of 1967.

40 See *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 at 229.

41 [2016] 4 SLR 1208.

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unable to buy out the minority's shares. Third, such exceptional circumstances may also exist when the majority shareholder is unfit to exercise control of the company, which may be the case where majority control would be damaging to the company or would pose a serious risk to the public.

9.64 With respect, the authors welcome this clear and principled approach for determining when the court should order a minority buyout. The principles are congruent with the policy rationale for s 216, which is not to punish majority shareholders by expropriating their shares, but rather to resolve disputes in a way that is commercially fair. Normally, commercial fairness will be achieved by allowing the majority, who has invested the most and controls the company, to maintain control by buying out the minority's shares at a fair price. However, as correctly observed by the High Court, there are a limited number of exceptional circumstances in which a minority buyout is needed to remedy commercial unfairness. In this case, no such exceptional circumstances were present. Thus, the High Court correctly denied the claim for a minority buyout.

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