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9. COMPANY LAW

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Separate personality and veil-piercing

9.1 It is trite law that a company has a legal personality distinct from that of its shareholders, including other companies in a corporate group. This was reiterated in *Goh Chan Peng v Beyonics Technology Ltd*[1] ("*Goh Chan Peng*"), where the Court of Appeal held that a holding company could not claim for the loss suffered by its subsidiary even if consolidated accounts were prepared for the whole group. The court reiterated that the single economic entity concept was not recognised in Singapore company law. It was difficult to reconcile this concept with the restrictive approach to veil-piercing, which is justified by abuse of the corporate form or to give effect to a legislative provision. This latter statement is very significant as it appears to be the first time the Court of Appeal has endorsed the principle of abuse of the corporate form as the basis for not giving effect to corporate personality.[2] This approach is to be warmly welcomed in contrast to the unhelpful reliance in earlier cases on metaphors such as "sham" and "alter ego", and it remains to be seen how the courts will now develop the veil-piercing doctrine.

1 [2017] 2 SLR 592.
2 See Tan Cheng Han, "Piercing the Separate Personality of the Company: A Matter of Policy?" [1999] Sing JLS 531.

Shadow and *de facto* directors

9.2 In *Parakou Shipping Pte Ltd v Liu Cheng Chan*,[3] Chua Lee Ming J reiterated the tests used to determine if persons not formally appointed to a board should be regarded as directors because they were either shadow or *de facto* directors. The former relates to a person on whose instructions the directors or a majority of the directors of a corporation are accustomed to act. There must be a discernible pattern of compliance with the shadow director's instructions; occasional departures from the pattern will not affect the finding of shadow directorship. There is no requirement that the shadow director's directions or instructions must extend over the whole field of the company's corporate activities. On this basis, a director who had formally resigned from the board was found to be a shadow director because he continued to be a key decision-maker whose directions were sought.

9.3 A *de facto* director is one who is not formally appointed as a director but in fact acts as a director by exercising the powers and discharging the functions of a director. It was alleged that the president and vice-president were *de facto* directors by virtue of the substantial authority they held in the company's affairs. The court, with respect, rightly held that this was not sufficient to establish that they were directors given that as senior executives, they were responsible for the day-to-day management and operations of the company. What they had done appeared to fall within the authority of such senior executives.

9.4 A similar approach was taken in *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd*[4] ("*Sakae Holdings*"), where it was alleged that two of the defendants had remained directors – either shadow or *de facto* – following their resignation. Judith Prakash JA found that one of the defendants could, and did exercise, unilateral control over key areas of decision-making in the company, and that the company's sole remaining director relied heavily on his directions. Her Honour thus rightly held that "this was a classic case of shadow directorship".[5] As to the other defendant, Prakash JA found that there was insufficient evidence to make a *prima facie* case that the defendant had exerted sufficient control over the company's affairs to establish that he was a *de facto* or shadow director after his formal resignation as director.

3 [2017] SGHC 15.
4 [2017] SGHC 73.
5 *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd* [2017] SGHC 73 at [42].

Directors' duties

9.5 Fiduciary obligations are imposed on persons such as directors to deter such persons from taking advantage of potentially vulnerable third parties who rely on these fiduciaries. Companies, who are artificial persons wholly reliant on their human agents, fall into this class of vulnerable persons. Yet, notwithstanding the prophylactic intent behind fiduciary obligations, cases involving breaches of fiduciary duty on the part of directors are legion and a number of such cases came before the courts in 2017.

9.6 In *Goh Chan Peng*, the Court of Appeal affirmed the decision of the High Court below that the company's former chief executive officer ("CEO") and director had breached his fiduciary duty to the company by, *inter alia*, diverting business to a competitor. In determining if a director had not acted in the best interests of the company, the court would adopt both a subjective and objective test. The subjective test depended on whether the director had acted in what he (and not what the court) thought was in the best interests of the company. The objective test related to the court's assessment of whether an intelligent and honest man could have reasonably believed that the transactions were for the benefit of the company. The subjective belief of the director was therefore not wholly determinative and had to be assessed against the objective test. Given the diversion of the company's business and the receipt of payments by the former CEO for this, it could not be said that there was any objective basis for thinking that he was acting in the best interests of the company. A director who places himself in such a position of conflict[6] cannot be permitted to assert that his actions were *bona fide* or thought to be in the best interests of the company. The payments to him also constituted bribes or secret commissions and were also in breach of the no-profit rule relating to fiduciaries. Given the circumstances, it was clear the former CEO had not acted honestly or reasonably, or that it would be fair that he be excused for his breaches under s 391 of the Companies Act.[7]

6 A different type of conflict can arise where a person is a director of more than one company. While such a situation would not in itself usually give rise to a conflict because in most cases, the other appointments would have been disclosed and approved, a conflict can arise together with a breach of the duty of loyalty if such person deliberately preferred the interest of one company over others: see *Bamian Investments Pte Ltd v Lo Haw* [2017] SGHC 166.

7 Cap 50, 2006 Rev Ed. Another decision where it was held that there was a breach of the no-conflict and no-profit rules was *Nordic International Ltd v Morten Innhaug* [2017] 3 SLR 957. In this case, it was also held that the surreptitious manner in which the defendant acted, with a view to obtain an improper benefit, were factors that militated against granting relief under s 391 of the Companies Act (Cap 50, 2006 Rev Ed).

9.7 The interplay between the subjective and objective tests to determine if there has been a breach of fiduciary duty is sometimes confusing given that the test as formulated appears to lean towards the subjective element while its application in practice may veer towards the objective. This judgment is therefore a most valuable one as the Court of Appeal has indicated that it would favour a more objective approach. Even then, it should be noted that the objective test is not a wide one but contemplates a situation where no reasonable or intelligent person could have reasonably believed that the acts were for the benefit of the company. Thus, in *Von Roll Asia Pte Ltd v Goh Boon Gay*,[8] Chan Seng Onn J said he could not see how a director who had engaged in a conspiracy against his company could be said to have acted honestly in the interest of such company. The director had also made improper use of his position to gain a benefit contrary to s 157(2) of the Companies Act, which had not been disclosed to the company in breach of s 156(1) of the Act. Accordingly, an account of profits was ordered in relation to the secret commission received by the director.

9.8 In *Ong Bee Chew v Ong Shu Lin*[9] ("*Ong Bee Chew*"), Vinodh Coomaraswamy J made some welcome observations on the subjective–objective tests in determining whether there has been a breach of fiduciary duty, two of which deserve elaboration. First, a director who crosses the objective line will be held to have breached his duty to the company and found responsible for the result or potential result of his acts without regard to his subjective intention. Second, part of the justification for this is that the law on directors' duties is also intended to serve a public interest in holding directors to minimum standards of commercial morality in directing a company's affairs even if this minimum standard is a very low baseline in order to avoid unnecessary interference with the central role of the enterprise and of risk-taking in wealth creation. These observations highlight the importance of ensuring that company law does not inadvertently encourage a lowering of standards of governance that will encourage behaviour at odds with the social purpose behind allowing incorporation to increase overall welfare. Too great an emphasis on the subjective aspect of the fiduciary test will only encourage activities that may not be in the public interest.

9.9 No breach of fiduciary duty will arise where a company is incapable, because of legal reasons, of taking advantage of the opportunity in question. This was so decided by Prakash JA in *Sakae Holdings*. The inability, for practical reasons, of a company to take up a corporate opportunity would not exonerate a director who took it for himself. But where there were legal restrictions on what the company

8 [2017] SGHC 82.
9 [2017] SGHC 285.

could do, there would be no breach of fiduciary duty on the part of the directors who engaged in an activity which fell within those restrictions. This was because the activity could not be within the scope of the company's affairs, and no relevant conflict of interest on the part of the directors would have arisen. The sort of legal restrictions included constitutional documents, partnership agreements and shareholders' agreements. Accordingly, where the company's memorandum stated that its main object was to own certain specific properties, and additionally the company was a joint venture that included a partner whose principal business was property investment, it could not have been contemplated that the directors of the company from this partner should in future cease their business or direct all such business to the company.

9.10 In addition to fiduciary obligations, directors owe common law duties to their companies to act with sufficient care, skill and diligence in the discharge of their office. Directors cannot as a general rule abdicate this responsibility by leaving all matters to others without turning their minds adequately to the company's affairs. Of course, what is adequate will depend on all the circumstances (within reasonable limits) it is permissible for directors to delegate specific decision-making and supervision to others. In *Prima Bulkship Pte Ltd v Lim Say Wan*,[10] it was argued that notwithstanding the approval of all the shareholders that certain persons should be the agents for the companies in the purchase of certain vessels, the directors that authorized this and were otherwise not involved in the transactions with the knowledge of the shareholders were nevertheless in breach of their duty of diligence to the companies. Kannan Ramesh JC (as his Honour then was) rejected the submission on the basis, *inter alia*, that the interests of the companies and the shareholders coincided. As such, there was no breach of duty to the companies as the directors had acted in accordance with the wishes of the shareholders.

9.11 It was also argued that the directors were in breach of their duty to creditors of the company given the doubtful solvency of the company with its limited paid-up capital. By allowing the companies to enter into agreements that would necessitate the payment of deposits of a substantial amount when the companies were of doubtful solvency, the directors had breached their fiduciary duty to the creditors to whom the deposits were payable. This argument was respectfully rejected correctly. The creditors in question were not creditors prior to the agreements being entered into so no duty was owed to them at such time. Furthermore, if a debt has arisen with an insolvent company, there are provisions in the Companies Act – ss 339(3) and 340 – that deal with

10 [2017] 3 SLR 839.

wrongful and/or fraudulent trading. It may therefore be thought that the presence of some additional element of wrongdoing or fraud is necessary to fix liability on directors where debts are incurred with companies that are unable to pay at the time of contracting. This was a factor relied on by the learned judicial commissioner. Furthermore, directors do not in general warrant that their companies are financially able to meet their obligations. Provided directors act in good faith, counterparties are also expected to undertake due diligence to satisfy themselves that the companies they are considering contracting with have the necessary resources or assets. If they are not so satisfied, they should either not enter into the transaction or consider some form of security or guarantee from the shareholders or directors of the company. The duty owed to creditors cannot be extended so as to obviate the need for counterparties to perform their own risk assessments.

Ratification

9.12 In *Nordic International Ltd v Morten Innhaug*,[11] Steven Chong J (as his Honour then was) held that there was a distinction between ratification of an unauthorised transaction by a director, and ratification of a breach of duty so as to release such director from the consequences of such breach. As the breaches in question related to the no-conflict and no-profit rules, and such breaches may only be waived *ex post* by the shareholders (given the absence of prior disclosure to, and approval by the board of, the transaction), the decision is with respect correct. Where the circumstances are different, such as in the case of employees who are not directors, a valid ratification of a transaction should as a general rule also absolve the employee from liability for exceeding the employee's authority. It is suggested further that where a director has exceeded his authority, but has not breached any other duty to the company, it should be open to the board to ratify and waive the breach occasioned by the excess of authority so long as the transaction in question is one that is within the board's power to authorise.

Companies struck off the register

9.13 Companies may be struck off either under s 344 or 344A of the Companies Act, the difference being that in the latter, it is precipitated by an application of the company. Under s 344(5), the court may on application allow a company that has been struck off to be restored to the register. Such an equivalent provision is not found in s 344A. Nevertheless, in a pragmatic and useful decision, Audrey Lim JC held

11 [2017] 3 SLR 957.

that s 344(5) is a general provision that also applies to s 344A.[12] This outcome is to be welcomed. There is no logical reason why the court should have the power to allow restoration where a company has been struck off by the Registrar under s 344 where the Registrar believes that the company is not in operation, but not where it has been struck off by the Registrar under s 344A pursuant to an application by the company. In both instances, an error may have been involved and/or not all relevant facts may have been known to the Registrar. In addition, there may also be issues over whether the person purporting to act for the company under s 344A was properly authorised to do so. If such person was not, the application by the company should be invalid. Nevertheless, since the application and striking off took place under s 344A, there would be no power to restore if the power was limited to cases under s 344. To avoid such absurd situations, a purposive interpretation which has been duly provided, is called for.

Attribution

9.14 In *Ong Bee Chew*, the High Court considered the issue of attribution. In particular, the question was whether a wrong done to the company by a director could be attributed to the company even though the wrong was committed with the assent of all the shareholders. Whether attribution takes place depends on the context with the general position being that a company may have attributed to it the wrongdoing of its senior officers where an issue arises between the company and a third party, but that attribution may not necessarily take place in a corporate claim against a wrongdoing officer. This is to prevent a wrongdoer from attributing his wrongdoing and/or knowledge thereof to the company so as to preclude the company from bringing a claim against him.

9.15 However, even where the matter involves a claim against an alleged wrongdoer, where there was unanimous assent by shareholders, it is suggested that, in general, the company is precluded from maintaining a claim against a director or other senior officer for breach of duty. There are *dicta* in Singapore in support of this proposition.[13] The court in a comprehensive judgment in *Ong Bee Chew* held that the converse was nevertheless the better view. It is suggested respectfully that this is incorrect. The basis for non-liability is that the company had full knowledge of the act as a result of the assent of all shareholders. The issue of attribution is not relevant. It does not matter whether the

12 *Re Asia Petan Organisation Pte Ltd* [2018] 3 SLR 435.

13 *Ho Kang Peng v Scintronix Corp Ltd* [2014] 3 SLR 329; *Yong Kheng Leong v Panweld Trading Pte Ltd* [2013] 1 SLR 173.

knowledge of the wrongdoer director is attributed to the company or not because, either way, it is the fully informed consent of all shareholders that operates as a defence against a claim by the company.

9.16 None of the cases relied upon by the court in *Ong Bee Chew* contradict this. For example, *Attorney-General's Reference (No 2 of 1982)*[14] concerned a criminal case (as the court recognised) where the English Court of Appeal held that the existence or otherwise of an offence depended on the language of the statute. It could not be said *a priori* that because the shareholders unanimously consented to the removal of the company's money, this meant that the relevant provision of the English Theft Act 1968[15] could not be made out. The question of honesty or dishonesty under the said provision was a matter for the jury. The case of *Bilta (UK) Ltd v Nazir (No 2)*[16] ("*Bilta*") involved directors who were said to have knowledge that the business of the company was being managed with the intent to defraud creditors and for other fraudulent purposes, and should therefore be ordered under s 213 of the English Insolvency Act 1986[17] to contribute to the company's assets. Lords Toulson and Hodge[18] specifically stated that the fiduciary duties of a director of a company in an insolvency situation were different from that of a director of a solvent company. Lord Neuberger (with whom Lords Clarke and Carnworth agreed) supported this approach.[19] Statements in *Bilta* that a claim may be brought by a company against wrongdoer directors even where they are the only shareholders must therefore be seen in this context. It should also be noted that *Belmont Finance Corp Ltd v Williams Furniture Ltd*[20] was a case involving illegal financial assistance and the judgment does not state that any approval by the body of shareholders of the plaintiff company had been given for such act.

Oppression remedy

9.17 Before 2017, oppression jurisprudence in Singapore seemed to have settled into a predictable routine. A plaintiff shareholder desirous of relief under s 216 of the Companies Act was required to prove that:[21]

14 [1984] QB 624.
15 c 60.
16 [2015] 2 WLR 1168.
17 c 45.
18 *Bilta (UK) Ltd v Nazir (No 2)* [2015] 2 WLR 1168 at [125]–[130].
19 *Bilta (UK) Ltd v Nazir (No 2)* [2015] 2 WLR 1168 at [18]–[20].
20 [1979] 1 Ch 250.
21 *Thio Syn Kym Wendy v Thio Syn Pyn* [2017] SGHC 169 at [44], citing *Lim Kok Wah v Lim Boh Yong* [2015] 5 SLR 307 at [103]; *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2010] SGHC 268 at [61]; *The Wellness*

(*cont'd on the next page*)

> (a) there are legitimate expectations derived from (i) strict legal rights as found in documents such as the company's constitution or shareholders' agreements; or (ii) informal understandings and assumptions from the parties' interactions and personal relationships in cases of quasi-partnerships; or (iii) informal understandings among shareholders *independent* of whether the company is a quasi-partnership; and
>
> (b) that the conduct complained of is contrary to or has departed from such expectations to the extent that it has become unfair … [emphasis in original]

9.18 The centrality of legitimate expectations and quasi-partnerships to this approach would have reasonably led one to assume that a minority shareholder who failed to establish the existence of either would have virtually no recourse to the oppression remedy and the protection it afforded. However, four recent decisions by the High Court suggest that the ambit of shareholder oppression is sufficiently wide to grant relief to minority shareholders in deserving cases that do not fall squarely within the well-established grounds founded on quasi-partnerships and legitimate expectations.[22] The first three cases involved claims where breaches of director's duties were pleaded as the basis of oppressive conduct against the minority shareholder; the fourth arose in a traditional family company founded and run by an autocratic patriarch that was not, on the facts, a quasi-partnership.

9.19 In *Leong Chee Kin v Ideal Design Studio Pte Ltd*[23] ("*Leong Chee Kin*"), a minority shareholder, who was also a former director of the company, brought an action for oppression under s 216 of the Companies Act against two shareholder-directors, who together owned a majority of the company's shares. The plaintiff based his claim of oppression on three grounds: (a) his removal as a director of the company; (b) his exclusion from the company's management; and (c) the diversion of the company's business to other companies for the defendants' sole benefit.

9.20 The High Court found that the company was not a quasi-partnership as there was no mutual trust and confidence between the parties. In addition, it was held that there were no legitimate expectations that the plaintiff would remain a director or continue in

Group Pte Ltd v OSIM International Ltd [2016] 3 SLR 729 at [181], affirmed with no written grounds.

22 *Leong Chee Kin v Ideal Design Studio Pte Ltd* [2017] SGHC 192; *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd* [2017] SGHC 73; *Tan Eck Hong v Maxz Universal Development Group Pte Ltd* [2017] SGHC 309; *Thio Syn Kym Wendy v Thio Syn Pyn* [2017] SGHC 169.

23 [2017] SGHC 192.

the management of the company. In this context, the majority shareholders' acts of removing the plaintiff as a director and excluding him from management did not amount to oppression – they were simply an exercise of the majority shareholders' legal rights. However, the majority-shareholder-directors' diversion of the company's business to other companies for their sole benefit was held to be oppressive. On this basis, under s 216 of the Companies Act, the High Court ordered the defendants to purchase the plaintiff's shares, with the shares to be valued as if the diversion of the company's property had not occurred.

9.21 With respect, the present authors welcome Coomaraswamy J's decision as it concisely clarifies three points that are congruent with Singapore's pragmatic and expansive approach to protecting minority shareholders.[24] First, it reaffirms that oppression can be founded on a breach of an implied understanding, which gives rise to a legitimate expectation that "those in control of the company will act *bona fide* in the best interests of the company".[25] Relatedly, it clarifies that this implied understanding can exist outside of the context of a quasi-partnership. This reaffirmation is noteworthy as, historically, most successful s 216 of the Companies Act actions for oppression in Singapore have been based on informal understandings in quasi-partnerships.[26] By finding oppression outside of a quasi-partnership based on a breach of an implied understanding,[27] the High Court has potentially unlocked a powerful branch of protection for minority shareholders.

9.22 Second, this decision reaffirms that a successful claim for oppression may be based entirely on breaches of a director's fiduciary duties, if such breaches are evidence of oppression. The decision helpfully clarifies that a section 216 action "will not be an abuse of process just because the oppressive conduct also happens to constitute a wrong to the company".[28] The High Court reasoned that s 216 of the Companies Act may be a more effective remedy than a derivative action in some cases involving breaches of director's duties. This is because s 216 permits the plaintiff to recover the loss in share value resulting

24 See *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 8 at pp 323–324, 348–351 and 364.

25 *Leong Chee Kin v Ideal Design Studio Pte Ltd* [2017] SGHC 192 at [65].

26 See, *eg*, *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776, *Spectramed Pte Ltd v Lek Puay Puay* [2011] SGHC 43 and *Sharikat Logistics Pte Ltd v Ong Boon Chuan* [2014] SGHC 224.

27 See Tan Cheng-Han & Wee Meng-Seng, "Equity, Shareholders and Company Law" in *Equity, Trusts and Commerce* (Paul S Davies & James Penner eds) (Hart Publishing, 2017) at pp 12–17.

28 *Leong Chee Kin v Ideal Design Studio Pte Ltd* [2017] SGHC 192 at [86].

from the breach by receiving a buyout at the pre-breach value and, in turn, to exit the company. By contrast, a successful derivative action provides a remedy to the company for the breach of director's duties and indirectly to the shareholder whose shares theoretically should increase in value. However, unlike oppression, a derivative action provides no avenue for the aggrieved shareholder to exit the company.[29]

9.23 Third, the decision helpfully emphasises that the reflective loss principle is not necessarily offended just because a claim for oppression is used to recover in whole or in part the loss suffered by the company as a result of a breach of directors' duties. In such cases, oppression should not be barred by the rule against reflective loss as long as the policy concerns that underlie the rule – that is, no double recovery and no prejudice to other shareholders – are not contravened. In this case, Coomaraswamy J found that no such policy concerns existed because all of the company's shareholders were parties in the litigation and there were no third-party shareholders whose interest might be affected by valuing the plaintiff's shares in the buyout at the pre-breach value.[30] Such a pragmatic policy-based approach to the reflective loss rule should be applauded. However, it should also be noted that in companies with a large number of shareholders, it is more likely that the policy concerns of the reflective loss rule would arise as not all shareholders would likely be parties to the action. In such cases, a derivative action may be the only remedy available to address breaches of director's duties when the directors are supported by the majority shareholder. This may be less of an issue in listed companies, given that shareholders may simply sell their shares on the stock market.

9.24 The decision in *Leong Chee Kin*, with respect to breaches of director duties, is supported by two other High Court cases.[31] In *Sakae Holdings*, the minority shareholder in a joint venture brought an oppression suit against the other majority shareholder and its associates alleging, *inter alia*, breaches of director's duties. The defendant countered by arguing that these claims were corporate wrongs that were barred under the oppression remedy due to the proper plaintiff rule and reflective loss principle.

29 See *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 1.

30 See Alan K Koh, "Reconstructing the Reflective Loss Principle" (2016) 16 *Journal of Corporate Law Studies* 373 and Pearlie Koh, "The Shareholder's Personal Claim: Allowing Recovery for Reflective Losses" (2011) 23 SAcLJ 863.

31 *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd* [2017] SGHC 73; *Tan Eck Hong v Maxz Universal Development Group Pte Ltd* [2017] SGHC 309.

9.25 Prakash JA held that in so far as the alleged breaches of director's duties involved the defendant obtaining a benefit at the plaintiff shareholder's expense – as was the case where management fees in excess of what the minority shareholder had agreed to were paid to the defendants – there was evidence of oppressive conduct against the plaintiff.[32] Her Honour went on to perform a detailed analysis of each of the alleged incidents of oppression against the plaintiff to determine the extent of the defendants' involvement or lack thereof. Notably, in relation to an unauthorised loan agreement, Prakash JA found that all three defendant directors had acted in breach of their duties, but declined to find that one of them had acted oppressively because "his actions had no real impact on the transaction itself but were simply undertaken in order to disguise [the involvement of one of the other directors, and] they were not oppressive to Sakae as such".[33]

9.26 The granular analysis applied by Prakash JA in *Sakae Holdings* is echoed in *Tan Eck Hong v Maxz Universal Development Group Pte Ltd*[34] ("*Tan Eck Hong*"). In *Tan Eck Hong*, Prakash JA held that two of the defendant director-shareholders were liable to purchase the plaintiff minority shareholder's shares because the defendants' breaches of director's duties were oppressive towards the plaintiff. However, her Honour declined to order reliefs against the other defendant directors in favour of the plaintiff notwithstanding their apparent breaches of director's duties and involvement in the oppressive acts because they neither initiated these acts nor received any direct benefit therefrom.

9.27 These three High Court decisions clearly – and it is respectfully submitted, correctly – distinguished between the conceptually separate issues of breach of director's duties and directors' liability to shareholders in oppression. Directors cannot evade oppression liability by claiming that their breaches of duties were merely corporate wrongs. Defendants in shareholder oppression actions would be well-advised to resist pleading unwarranted blanket corporate/personal wrong defences, and instead focus on whether they had indeed breached their duties, and how any breaches in any event caused no commercial unfairness to the plaintiff. *Sakae Holdings* and *Tan Eck Hong* seem to suggest that so long as the defendant did not personally benefit from their breach of duty, and where there is another more culpable defendant, the former would not necessarily be held personally liable to the plaintiff.

32 *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd* [2017] SGHC 73 at [72].
33 *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd* [2017] SGHC 73 at [102].
34 [2017] SGHC 309.

9.28 The case of *Thio Syn Kym Wendy v Thio Syn Pyn*[35] ("*Thio Syn Kim Wendy*") involved a shareholder dispute in a family business empire that pitted a brother and two sisters against their mother and two brothers.[36] Prakash JA rejected the plaintiff shareholders' claim that the family companies were quasi-partnerships and that the defendants had unfairly excluded two of the plaintiffs from management. No quasi-partnership could be found on the facts because the family companies had been founded and operated by an autocratic patriarch such that there was no mutual understanding that the plaintiffs were entitled to participate in the company's management. However, her Honour went on to find that two of the defendants had acted oppressively by (a) misusing company resources to pursue a personal vendetta against their father, and (b) inflating their salaries while reducing the remuneration and removing long-standing benefits enjoyed by the plaintiffs. The High Court held that the two defendants were liable to purchase the plaintiffs' shares as it was undesirable for the plaintiffs to remain locked into the family business.

9.29 Prakash JA's decision is a welcome development that addresses a mainstay of Singapore shareholder oppression suits – the traditional family company.[37] Such companies are a poor fit with the well-established concept of the quasi-partnership. If quasi-partnerships are implicitly egalitarian – as the term "partnership" suggests – then traditional family companies are almost by definition authoritarian hierarchies. In Singapore, such companies are typically founded by an autocratic patriarch who enlists his children and siblings (but usually excluding the women) to assist in the family business.[38] Family members involved in the business are customarily organised according to a strict hierarchy with the patriarch at the pinnacle, and all participants are expected to accept the patriarch's authority and decisions unquestioningly, at least until the reins are passed to a designated successor – often the patriarch's eldest son. By contrast, with a quasi-partnership,[39] there may not be a horizontal relationship of mutual trust and confidence between family shareholders and/or directors if their

35 [2017] SGHC 169.

36 The following discussion is a condensed version of Samantha S Tang, "Corporate Divorce in Family Companies" [2018] LMCLQ 19.

37 See *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 8 at pp 361–365.

38 See, *eg*, *Low Janie v Low Peng Boon* [1998] 2 SLR(R) 154 at [2] and [6], *Chow Kwok Chuen v Chow Kwok Chi* [2008] 4 SLR(R) 362 at [31]–[32] and *Lim Kok Wah v Lim Boh Yong* [2015] 5 SLR 307 at [10] and [13].

39 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360.

positions and shareholdings are unilaterally determined by the patriarch,[40] who gives as he takes away.[41]

9.30 Returning to *Thio Syn Kym Wendy*, it is unsurprising that the High Court held that the family business was not a quasi-partnership. Singapore courts have generally resisted classifying traditional family companies as quasi-partnerships,[42] an inclination criticised by the authors in a previous review as "effectively excluding a large swath of Singapore's companies from most of the protection provided by [the oppression remedy] as oppression in Singapore has largely been receptive to cases involving quasi-partnerships".[43] *Thio Syn Kim Wendy* recognised traditional family companies – including the Thio family companies – as a special class of companies distinct from quasi-partnerships, and likely to operate according to a different set of informal understandings. This is implicit in Prakash JA's recognition of "informal understandings among shareholders *independent* of whether the company is a quasi-partnership", and finds support in Singapore jurisprudence.[44]

9.31 Three "informal understandings" arising in *Thio Syn Kym Wendy* discussed in her Honour's well-reasoned judgment may be generalised to traditional family companies. First, while family shareholders are not necessarily entitled to participate in management – as might be the case in a quasi-partnership – they may have an informal understanding on the receipt of some form of financial provision either in the form of employment or dividends from the family business, and that such income will not be arbitrarily reduced or eliminated by the family members in management.[45] Second, there may be an informal understanding between family shareholders that they will not profit at the expense of other family members, as was the case when two of the defendants raised their salaries while removing the plaintiffs' long-standing benefits. Third, the defendants' personal vendetta against the patriarch can be rationalised as oppressive conduct if we accept that there was an informal understanding that Thio family members in management were not permitted to expend corporate resources for

40 See, *eg*, *Lim Kok Wah v Lim Boh Yong* [2015] 5 SLR 307 at [114]–[115].
41 This is a paraphrase of Job 1:21, King James Version from the Bible –"[naked] came I out of my mother's womb, and naked shall I return thither: the Lord gave, and the Lord hath taken away".
42 See, *eg*, *Lim Kok Wah v Lim Boh Yong* [2015] 5 SLR 307 at [114]–[115].
43 (2015) 16 SAL Ann Rev 255 at 273–274, para 9.61.
44 See, *eg*, *Chow Kwok Chuen v Chow Kwok Chi* [2008] 4 SLR(R) 362 at [31].
45 Similar unwritten understandings have been found in family companies from other Commonwealth jurisdictions: see, *eg*, *Thomas v HW Thomas Ltd* [1984] 1 NZLR 686 (NZCA) at 687 (holding that the central objective of the company was to provide employment for the founder's family).

personal reasons to punish other family members for transgressions against the family business.[46] These three informal understandings flow from the implicit guarantee of mutual support and provision that has and arguably continues to prevail in families, at least in Singapore.[47]

9.32 An astute observer might note that Prakash JA neither expressly found that the plaintiffs had proven any of the three informal understandings, nor did her Honour provide any factual or doctrinal basis for her finding. Rather, her Honour seems to have recognised and applied an objective standard of fairness for traditional family companies.[48] The present authors observe that this could be a renaissance of the "code of conduct"[49] approach to regulating a prominent subset of companies frequently embroiled in shareholder disputes. If so, it is a welcome development that would directly address concerns voiced by the authors that "autocratically governed companies (even those led by respected patriarchs) are a potential source of minority abuse".[50] It is consistent with the thesis that the oppression remedy is invoked where the circumstances are "contrary to some express or implied agreement or understanding between the parties (bearing in mind the type of company) and this includes a state of affairs that an objective and reasonable shareholder would not have contemplated at the time the company was established".[51]

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46 This consideration might carry less weight in a company where ownership is split between family and non-family members.

47 This may also be true in other jurisdictions, but is not necessarily reflected specifically in corporate law. In Singapore, this norm has found legislative expression in the Maintenance of Parents Act (Cap 167B, 1996 Rev Ed), which compels adult children to make financial provision for their elderly parents, and also in its family law regime generally.

48 Alternatively, one could argue that Judith Prakash JA applied an "implied expectation" approach, where "circumstances are such that the law would usually regard such an obligation or expectation as implicitly arising between the parties": see Tan Cheng-Han & Wee Meng-Seng, "Equity, Shareholders and Company Law" in *Equity, Trusts and Commerce* (Paul S Davies & James Penner eds) (Hart Publishing, 2017) at p 10.

49 Brenda Hannigan, "Section 459 of the Companies Act 1985 – A Code of Conduct for the Quasi-Partnership?" [1988] LMCLQ 60 at 80 (in the quasi-partnership context).

50 (2015) 16 SAL Ann Rev 255 at 273–274, para 9.61.

51 Tan Cheng-Han & Wee Meng-Seng, "Equity, Shareholders and Company Law" in *Equity, Trusts and Commerce* (Paul S Davies & James Penner eds) (Hart Publishing, 2017) at p 16.

Just and equitable winding-up

9.33 In *Perennial (Capitol) Pte Ltd v Capitol Investment Holdings Pte Ltd*[52] ("*Perennial*"), the parties were equal shareholders in a joint venture to develop several buildings subject to conservation as part of a larger mixed-use development. As the parties were deadlocked over several key business decisions, the plaintiff applied for the company to be wound up under s 254(1)(*i*) of the Companies Act on the basis that there was a loss of mutual trust and confidence in a quasi-partnership. Notably, the plaintiff submitted that a buyout under s 254(2A) should be preferred to a winding-up, as the joint venture remained financially viable.

9.34 Affirming the High Court's decision in *Perennial (Capitol) Pte Ltd v Capitol Investment Holdings*,[53] the Court of Appeal declined to grant relief under s 254(2A) of the Companies Act on the ground that a pre-emption clause was provided in the company's constitution. In particular, the court reasoned that the plaintiff should have used the contractually agreed upon pre-emption clause to exit the company by selling its shares to the plaintiff.[54] Conversely, given that the pre-emption clause was unused, the court was unwilling to exercise its authority under s 254(2A) to order the defendant to sell its shares to the plaintiff.

9.35 The present authors observe that the Court of Appeal appears to have taken a "quasi-contractual"[55] approach to the just and equitable winding-up remedy, especially as it applies to the availability of a share buyout under s 254(2A) of the Companies Act. The Court of Appeal in *Perennial* confirmed, as was the case in *Ting Shwu Ping v Scanone Pte Ltd*,[56] that where an exit mechanism is provided in the company's constitution or a shareholder's agreement, a shareholder who did not attempt to invoke the mechanism would generally be denied relief under s 254(2A). Importantly, the Court of Appeal justified this approach on the basis that where the shareholders have agreed on an exit mechanism *ex ante*, they should attempt to use it. Moreover, when such a mechanism exists and has not been utilised, a shareholder cannot claim that they have been locked into the company as such a mechanism provides a potential avenue for shareholders to exit.

52 [2018] SGCA 11.
53 [2017] SGHC 84.
54 *Perennial (Capitol) Pte Ltd v Capitol Investment Holdings Pte Ltd* [2018] SGCA 11 at [65].
55 Strictly speaking, the corporate constitution is a "quasi-contract" between the company and its members, and between the members *inter se*.
56 [2017] 1 SLR 95.

9.36 The court went on to reason that when a shareholder has failed to exercise its rights under an exit mechanism agreed to *ex ante*, relief under s 254(1)(*i*) of the Companies Act would only be granted in the exceptional situations where (a) the plaintiff shareholder had a legitimate expectation that his shares would not be valued according to the exit mechanism, (b) the defendant shareholders had acted improperly or in bad faith, or (c) the valuation mechanism was arbitrary or artificial and therefore defective.[57] Requiring the parties to normally abide by the exit mechanism that they agreed to *ex ante* comports with the quasi-contractual approach which has served as a guiding principle for shareholder remedies in Singapore and the Commonwealth – especially in the case of oppression.[58] Relatedly, the Court of Appeal also found that where there is no existing exit mechanism either by agreement or in the company's constitution, a fair buyout offer to the plaintiff will preclude recourse under s 254(1)(*i*); this is also consistent with the position under the law of shareholder oppression.[59]

9.37 The Court of Appeal also set out a clear two-stage test for deciding section 254(1)(*i*) applications. The first stage requires the court to determine whether there are grounds to grant any relief on the basis that it would be just and equitable for the company to be wound up ("the grounds stage"). If and only if the court determines that there are grounds on which relief may be granted should the court then proceed to the second stage, in which the court must consider whether relief should be in the form of a winding-up or buyout under s 254(2A) of the Companies Act ("the relief stage").

9.38 The Court of Appeal's articulation of this two-stage test – which keeps the grounds stage and relief stage conceptually distinct – is appealing for its clarity. However, with respect, this conceptual clarity may unwittingly present a risk in cases involving no-fault deadlocks. The standard for establishing deadlock as a no-fault ground for relief under the just and equitable remedy has traditionally been relatively easy to satisfy. In fact, in this case, the High Court found that such grounds existed on the basis that the parties' relationship had

57 *Perennial (Capitol) Pte Ltd v Capitol Investment Holdings Pte Ltd* [2018] SGCA 11 at [56].

58 Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) at paras 4.031–4.037; Alan K Koh & Samantha S Tang, "Towards a 'Just and Equitable Remedy' for Companies" (2017) 133 LQR 373 at 376; Robin Hollington, *Hollington on Shareholder Rights* (Sweet & Maxwell, 8th Ed, 2017) at paras 7-189–7-199.

59 Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) at paras 4.031–4.037.

"deteriorated to the point where they could no longer see eye to eye"[60] – which, arguably, is the state of affairs in most shareholder disputes.[61]

9.39 Prior to the introduction of the court's discretion to award a buyout under s 254(2A) of the Companies Act, the relatively low standard for establishing a deadlock (that is, "the ground") was tempered by the limitation that the sole remedy the court could order under s 254(1)(*i*) was a winding-up (that is, "the relief").[62] Stated differently, prior to the introduction of s 254(2A), the harshness of the sole remedy of a winding-up raised the bar that a shareholder-plaintiff had to cross before being granted a no-fault exit remedy in the case of a deadlock – as, often, the cure of winding up such companies was seen to be worse than the illness of the deadlock. However, under the current two-part test, where the relief is considered distinct from the remedy, the relatively low bar for deadlock may open the door to potential abuse. There is also the risk that where parties intentionally and advisedly chose not to have an exit mechanism in their constitution or shareholder agreement, the relatively low standard for deadlock and absence of the tempering effect of winding up being the only remedy, may allow parties to have access to a court-enforced no-fault exit mechanism – which would frustrate their deliberate *ex ante* arrangement. With respect, the court should remain cognisant that the benefits of the remedial flexibility of allowing a buyout under s 254(2A) may in some cases require the standard for deadlock created under the previous no buyout regime to be recalibrated.

9.40 To their credit, with respect, Singapore courts appear to be cognisant of the importance of remaining "vigilant to ensure that [the section 254(2A) buyout] is not abused"[63] as they have repeatedly articulated that the same (but, not lower) level of injustice must be proven to obtain relief as previously existed before the introduction of s 254(2A) of the Companies Act.[64] However, what seems to have been overlooked, is that there may be times where an even higher standard might be required in the grounds stage based on potential abuse of the buyout remedy – particularly in cases involving no-fault deadlock consistent with the parties' *ex ante* agreement. Admittedly, this situation does not yet appear to have confronted the court, but it may in the future. Given the state of the law, there is a clear temptation for shareholders who want to exit a viable closely held corporation

60 *Perennial (Capitol) Pte Ltd v Capitol Investment Holdings Pte Ltd* [2017] SGHC 84 at [30].
61 *Pang Yong Hock v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 at [20].
62 *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 at [36].
63 *Ting Shwu Ping v Scanone Pte Ltd* [2017] 1 SLR 95 at [54].
64 *Ting Shwu Ping v Scanone Pte Ltd* [2017] 1 SLR 95 at [58].

deliberately designed not to have an exit mechanism, to claim in the face of a minor dispute that they do not see "eye to eye" with the other shareholder in order to have the court order a no-fault buyout.[65] Acceding to such a claim would conflict with what the parties agreed to *ex ante* in the constitution or shareholder's agreement. This would depart from Singapore's quasi-contractual approach, which has been an effective guiding light in the often-foggy world of shareholder remedies.

65 See *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 at [31]: "[s 254(1)(*i*)] does not apply to a case where the loss of trust and confidence in the other members is self-induced. It cannot be just and equitable to wind up a company just because a minority shareholder feels aggrieved or wishes to exit at will".