9. COMPANY LAW

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Lifting the corporate veil

9.1 In *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832, the issue of corporate veil piercing was raised in the context of a discovery application. The plaintiff had obtained an arbitral award against another company but enforcement proceedings against this company were ineffectual. The plaintiff then wished to commence proceedings against the defendant on the basis that the defendant and the other company were part of a single economic entity. The plaintiff sought pre-action discovery against the defendant to enable the plaintiff to formulate its claim.

9.2 The application was dismissed. Lee Kim Shin JC considered the application to be unviable. On the single economic entity issue, his Honour said that he was not persuaded that a concept of single economic entity existed at common law, or at any rate under Singapore law. With respect, this must be correct. Groups of companies are only too common and in the absence of exceptional circumstances, there is no justification for denying the benefits of incorporation to companies that wish to operate through subsidiaries.

9.3 As to what exceptional circumstances might justify a departure from the general principle that each company is a separate entity, the court followed the approach in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 and identified abuse of the corporate personality as the underlying basis for the corporate veil to be lifted. Such an approach is to be welcomed as courts have traditionally invoked metaphors such as "sham" or "façade" to justify veil piercing. It has been argued that the use of metaphors is unhelpful as it does not provide sufficient clarity when courts depart from the general principle or a principled basis that can be used as a starting point for analysis; and that the proper basis for disregarding separate personality must lie in the abuse of the corporate form: see Tan Cheng Han, "Piercing the Separate Personality of the

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Company: A Matter of Policy?" [1999] Sing JLS 531 and Tan Cheng Han, "Veil Piercing: A Fresh Start" [2015] JBL 20. In this case, there was no allegation of abuse or impropriety against the defendant or the other company; therefore, the court came to the view that veil lifting would not be appropriate.

Attribution

9.4 At law a company is an entity separate from its shareholders and management. Nevertheless, while a company is accorded legal status, it is an artificial construct that must depend on human individuals to function. Similarly, where it is necessary to ascribe a state of mind to a company, for example, in the context of criminal law, the question that arises is which individual or group of individuals' knowledge or intent is to be attributed to the company.

9.5 The starting point in any such inquiry is to look at the primary rules of attribution which are generally to be found in the corporate constitution or implied by company law. Thus, s 157A(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") provides that the "business of a company shall be managed by or under the direction of the directors". A similar clause is also usually found in constitutions of Singapore incorporated companies. This being the case, if the board of directors of a company is aware of certain acts being performed by employees or agents of such company, knowledge of such acts will almost inevitably be attributed to the company.

9.6 In addition to these primary rules of attribution, there are general rules of attribution that apply not only to companies but to other business organisations and individuals. These are the rules of agency, which include the doctrine of apparent authority that is founded on estoppel, and vicarious liability. Through these general rules of attribution, the acts and knowledge of a distinct person – the agent or employee – can be attributed to a company (or other principal or employer) with resultant legal consequences.

9.7 The law may also need to fashion special rules of attribution where, although the primary and general rules are inapplicable, the courts are of the view that a substantive rule of law is applicable to companies. In such a case, it is a matter of interpretation or construction of the relevant rule which person's act, knowledge, or state of mind was, for the purpose of the rule, to be attributed to the company. These rules of attribution were set out by Lord Hoffmann in the Privy Council decision of *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 and adopted by the Court of Appeal in *Ho Kang Pang v Scintronix Corp Ltd* [2014] 3 SLR 329 ("*Ho Kang Pang*").

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9.8 One issue that has troubled the courts is the appropriate application of these rules of attribution when the company has itself been the victim of fraudulent activity by a person whose knowledge would under these rules have been attributed to the company. Where the fraudster is being sued by the company as a result of the fraudster's acts, it would be inequitable to allow the fraudster to rely on the rules of attribution to deny the company's claim on the basis that the company knew all along and consented to the fraudulent acts, or that the *ex turpi causa* rule applied to disentitle the company to bring a claim as the company's claim was founded on an immoral or illegal act.

9.9 This issue arose in *Ho Kang Pang*. The appellant, who was a former director and chief executive officer of the company, submitted that the company was precluded from claiming against him for alleged breaches of fiduciary duty, namely the payment of bribes to a third party to secure business for the company, because his acts were authorised by the company or because the principle of *ex turpi causa non oritur actio* was engaged. This argument was rightly rejected. The court found that the payments were not authorised and, following the approach in England, expressed the view that where the company was itself the victim of an agent's or employee's dishonesty it would not generally be sensible or realistic to attribute knowledge to the company concerned, if attribution would have the effect of defeating the right of the company to recover from a dishonest agent or employee.

9.10 The position might be different if the case involved a claim by a third party against the company. As against such a third party, the company cannot be seen as merely a victim but will be regarded as a perpetrator if the rules of attribution apply. Thus, the rules of attribution would operate differently depending on the factual matrix. A company defendant being sued by the victim of a fraud perpetrated by the board of the defendant company would not be allowed to disclaim the board's acts, but would be able to if the company was the plaintiff in a claim against its former errant directors.

9.11 The court went on to say that the case in question did not involve a one-shareholder company but a publicly listed one. This was probably a reference to the UK Supreme Court decision of *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391 ("*Stone & Rolls*"). The issue before the court was whether the insolvent company could bring a claim against its auditors for negligence in failing to detect the controller's dishonest activities. The defendant auditors argued that as the controller's fraudulent acts should be attributed to the company, the defendants could rely on the *ex turpi causa* principle to defeat the claim as the company would have to rely on its wrongdoing to establish its claim. The company's response to this was that it was a victim of the fraudulent acts of its controller and it would not be logical to attribute

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such acts to a company where the company was itself the victim of the controller's fraud. The rules of attribution did not apply in such situations.

9.12 On the facts of the case, a majority of the Supreme Court held that no exception to attribution was made out. The real victims of the fraud were the creditor banks that had been induced to pay large sums to the company. Lords Walker and Brown based their decision on the fact that the claimant was a one-man company. Where the controller was the embodiment of the company it could not be said that the company was not the fraudster but only a secondary victim. Being a one-man company, there was no one else who could, if he or she knew of the fraud, have taken steps to prevent it. Since the only person who could have been told about the fraud, or from whom the fraud could be concealed, already knew about it, there was no one else to whom disclosure or concealment could take place. There was, therefore, no reason for the normal rules of attribution not to apply.

9.13 The Court of Appeal, therefore, seems to have endorsed the idea that where a company is essentially controlled by a single person, and such company subsequently brings a claim against a third party, the controller's fraud will be attributed to the company such that the company is also treated as a fraudster. While this may be an acceptable approach in some cases, its proper application depends on whether the issue in question has been properly characterised. This is illustrated by the *Stone & Rolls* decision itself. In all likelihood, the true question before the Supreme Court did not involve attribution at all but instead raised the question of the duty of care owed by auditors to creditors of a company.

9.14 In *Stone & Rolls*, all three judges in the majority made reference (rightly or wrongly) to the duty of care owed by auditors to their clients and not to third parties, such as creditors or potential investors, and this no doubt affected their view of how the rules of attribution should be applied in an *ex turpi causa* situation. The crux of the issue was, therefore, not attribution but the scope of the duty. Where the *only* ultimate beneficiaries of a claim by the company against its auditors would be parties that the auditors owed no duty of care to, thereby precluding a direct action, the effect of such a claim was to enlarge the scope of potential claimants against auditors even if the measure of damages to be awarded to the company may not necessarily correspond to the loss suffered by the claimants. This would undermine the policy considerations underlying the scope of the duty of care of auditors. Given this, it could be said that where this is the consequence of a corporate claim, the courts are entitled to look beyond the company so as to disallow the claim. It would be an abuse or misuse of the company to use it as a means to effectively enlarge the pool of claimants in the

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tort of negligence against a professional firm where the law has clearly set limits to the scope of such duty. The separate personality of the company should, therefore, be disregarded. On such an approach, issues of attribution and the *ex turpi causa* rule would not be relevant.

Corporate organs

9.15 The two corporate organs of a company are the shareholders in general meeting and the board of directors. The acts of these bodies within the scope of their powers constitute the acts of the company within the primary rules of attribution. In relation to the broad division of powers between these two organs, the default rule found in s 157A of the Act leans heavily in favour of the board. In addition to stating that the business of a company shall be managed by or under the direction of the directors, it also provides that the directors may exercise all the powers of a company except any power that the Act or the company's constitution requires the company to exercise in general meeting. The Act reserves very few matters to the general meeting and this is typically also the case for many corporate constitutions. It reflects a view that there should theoretically be a clear division between ownership and management, even if in reality the owners of most companies are also board members. In addition, as was pointed out by Lee Kim Shin JC in *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [2014] 4 SLR 1149 ("*TYC Investment*"), directors are fiduciaries who must act in the best interests of the company while shareholders are generally under no such obligation.

9.16 Case law recognises though that there are instances where the powers of the board may devolve to the shareholders in general meeting. One instance is where the board is unable to exercise certain powers or cannot function because of a deadlock in its composition. In *TYC Investment*, the court expressed the view, following the Australian decision of *Massey v Wales* [2003] NSWCA 212, that such reserve powers are a matter of implication under a company's constitution on the basis of necessity or business efficacy. As a matter of principle, the underlying rationale of the compact between the shareholders and the company under s 157A of the Companies Act and the statutory contract that is represented by a company's constitution is the subsistence of a board of directors that is both competent and willing to manage the affairs of the company. If this predicate is absent or otherwise incapable of fulfilling its purpose, it does not make sense that the company should be powerless to act simply because of the general rule that powers of management are ordinarily exercisable by the directors alone.

9.17 The court went on to emphasise that if shareholder reserve powers are a matter of implication, their scope should be narrow and

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the express terms of the contract between the shareholders and the directors should be respected as far as possible. The court then went on to distil reserve powers into a set of principles. The first was that reserve powers do not devolve to the shareholders unless the board is unable or unwilling to act. In so far as this principle was concerned, the fact that shareholders disagree with a *bona fide* board decision will not in itself be sufficient, but if directors who are wrongdoers prevent the company from bringing a suit, the requirement is more often than not satisfied.

9.18 Second, if the deadlock in management can be broken in some other way under the company's constitution, the court should refuse to find that the reserve powers of shareholders are triggered. Third, the scope of the reserve powers which can be exercised when triggered depends on the facts of each case, although reserve powers may not be exercised to contravene an express term in a company's articles. The scope should be determined by what is reasonably necessary in the circumstances of the case.

9.19 This exposition is a useful one to which the authors will make three specific points. First, if the basis for reserve powers is that these arise out of the statutory contract that is comprised by the corporate constitution, any reference to directors being parties to such a contract is inaccurate. Under s 39(1) of the Act, the parties to the statutory contract are the company and the members. To the extent that the corporate constitution has vested the powers of management in the board, any shareholder usurpation of such powers may be resisted by the board in so far as the board is an organ of the company which is the party to the statutory contract rather than the board or individual directors as a contracting party.

9.20 Second, in referring to cases involving directorial wrongdoing which necessitate shareholder action as falling within the reserve powers doctrine, the court was probably referring to a very narrow class of cases where the articles of association preclude the removal of directors or the meaningful addition of new directors. The court was not referring to derivative actions which have developed a separate body of rules from the reserve powers doctrine. In derivative actions, the problem with bringing a claim against the wrongdoers arises not only from wrongdoer control of the board but also with the body of shareholders as an organ because the wrongdoing directors also often constitute a majority of the shareholders. Accordingly, in most cases, even if the power to bring proceedings could be exercised by the shareholders in general meeting there would be no difference in the outcome. As such a separate body of rules relating to derivative actions was developed to allow minority shareholders control of corporate proceedings.

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9.21 While the court did appreciate the difference between the two concepts, it was of the view that the existence of derivative actions should not foreclose the possibility of the general meeting exercising reserve powers to commence legal proceedings in the company's name. As such, given the deadlock in management, the shareholders in general meeting had the power to appoint solicitors to determine the rights and obligations of the relevant parties under the divorce settlement agreements that had been entered into between the two principal shareholders who were also the permanent governing directors of the company.

9.22 It must be borne in mind that the articles of association of the company were unusual. Typically, the reserve powers doctrine should not apply if there is a majority of shareholders who are in favour of the company bringing a claim because such shareholders can typically either remove the directors causing the deadlock or appoint additional directors to break the deadlock. It should not be necessary for the shareholders in general meeting to have reserve powers to directly cause the company to commence an action. However, in *TYC Investment*, the articles might have precluded this typical course as neither of the two permanent governing directors could be removed from office, and the articles also appeared to require both directors to agree to any new appointment. Nevertheless, to the extent that this could be indicative of either director having negative control, this would generally be sufficient to allow a derivative action under s 216A of the Act to be engaged if the requirements set out therein are met. Accordingly, it is difficult to see what scope exists for the reserve powers doctrine in this context. Where a derivative action may be commenced by a numerical majority that is acting in good faith and can establish that such an action is in the best interests of the company, it would not appear necessary to allow such a majority to use the general meeting to authorise such a proceeding. It also does, with respect and contrary to the court's view, undermine the preconditions found in s 216A since such cases can fall within its province.

9.23 Third, the reference to non-contravention of express terms in a company's articles should be understood loosely. Where the reserve powers doctrine applies, it would almost inevitably be inconsistent with an express term in the articles which vests the power principally with the board. Thus, this caveat is likely to apply only where the articles prohibit the shareholders in general meeting from ever exercising such a power or provides for some other decision-making mechanism in the event the board is unable to exercise the powers in question.

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Directors' duties

9.24 In *Ho Kang Pang* (above, para 9.7), the Court of Appeal acknowledged that while the bribes that were paid to a third party were intended to benefit the company financially (at least in the short term), and a court would generally be slow to interfere with commercial decisions made by directors, a director would not be regarded as having acted *bona fide* in the company's best interests where such director had engaged in dishonest activity. The best interests of a company do not involve only profit maximisation, and certainly is not profit maximisation by any means. It was as much in the interests of the company to have its directors act within their powers and for proper purposes, to obtain full disclosure from its directors, and not to be deceived by its directors. There could be no doubt that a director who caused a company to pay bribes and, therefore, ran the risk of the company being subject to criminal liability was not acting in the company's best interests. This was a risk that no director could honestly believe to be taken in the interest of the company. The court also said that by continuing a highly irregular and improper practice which the director understood had been initiated by the previous management under a different form without inquiring why it was made, whether it would implicate the company, and whether proper sanction had been obtained, the director had failed to exercise the diligence and care that a reasonable director ought to have exercised, this being another aspect of the duty a director owes to his company.

9.25 This decision is a welcome one. It provides a timely reminder that directors ought to take into account what would benefit the company over a longer horizon and that profit maximisation should not be the only focus of corporate boards. It also sets a strong rule that engaging in acts that expose a company to criminal liability will not be regarded as acting in a company's best interests. At the same time, the decision reiterates the importance of directors exercising proper supervision and due diligence in the discharge of their duties instead of blindingly following existing practices.

9.26 In *Airtrust (Singapore) Pte Ltd v Kao Chai-Chau Linda* [2014] 2 SLR 673, the High Court applied the principle laid down by the Court of Appeal in *Yong Kheng Leong v Panweld Trading Pte Ltd* [2013] 1 SLR 173 that if all of a company's shareholders assent to a director's breach of fiduciary duty then there is no need for a formal shareholder resolution to relieve the director from liability. In this case, however, the High Court found that it was unclear whether all of the shareholders had indeed assented. As such, it could not be assumed that the director's liability would be relieved without a formal shareholder resolution.

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9.27 It is noteworthy that the High Court rejected the argument that the assent of all of the shareholders could be assumed based solely on the fact that the case involved a family-run company in which the patriarch, who was the controlling mind of the company, would have suggested to the shareholders to assent. This finding is welcome because failing to require clear evidence of assent would unjustifiably risk relieving a director of liability when in fact such relief may have been opposed by the shareholders had a formal resolution been attempted. It must be remembered that in such cases, if there is any uncertainty as to whether shareholders have assented, a formal resolution can always be passed. As such, there appears to be no downside to applying a strict evidentiary standard for ensuring that shareholders have in fact assented in such cases.

Dividends

9.28 In *Sandz Solutions (Singapore) Pte Ltd v Strategic Worldwide Assets Ltd* [2014] 3 SLR 562, the Court of Appeal had occasion to reiterate the rule that once a dividend has been validly declared, it is a debt owed by the company to its registered shareholders from the date on which it is payable. The mere postponement of payment does not operate to deprive the registered shareholder at the time of the dividend declaration of its right to payment. In relation to an agreement for the sale and purchase of shares, a purchaser's equitable interest in shares in a company that are not registered in the purchaser's name would arise only on the completion of the purchase and the vendor's duty as a trustee of those shares similarly takes effect then. The purchaser's claim to the dividends that had been declared was, therefore, dismissed as the purchaser had not discharged the burden of satisfactorily proving that the sale and purchase of the shares had been completed before the date when the dividends were declared.

Company charges

9.29 The non-registration of registrable charges occasionally raises difficult questions and *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 ("*Sculptor Finance*") (noted in Wee Meng Seng, "The Avoidance of Unregistered Charge and Extension of Time to Register: *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733" (2014) 26 SAcLJ 750) is an important decision that has clarified an area of uncertainty. In that case, the respondent had subscribed for bonds that were secured by fixed and floating charges over the chargors' assets. One of the chargors was RSM Group Pte Ltd ("RGPL"). The charges went unregistered as the respondent claimed it was unaware of the need to

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register the charges under Singapore law as it did not have advice on Singapore law at the material time. When this was discovered, the respondent applied for an extension of time to register the charges. This was resisted by the appellant, which had taken proceedings against RGPL. Subsequently, on 28 September 2012, the appellant filed a winding-up application against RGPL. Notwithstanding the winding-up application, the High Court granted the application to extend the time for registration of the charge. This order was made subject to two provisos. The first was that in the event that RGPL or another related company was wound up subsequently, its liquidator would be at liberty to apply to set aside the order within 12 weeks of the liquidator's appointment (the Winding-up Proviso). The second proviso was that the extension of time would be without prejudice to the rights of any person claiming any interest in the property charged pursuant to any of the charges if such interest had been acquired before the time of the registration of the relevant charge (the Preservation of Rights Proviso).

9.30 This order was made because the High Court was satisfied that the respondent's omission to register its charges was due to inadvertence, and the court held that it would be just and equitable to grant the relief sought. Although there was a real possibility that RGPL would be wound up, winding up was not inevitable or necessarily imminent. The court also held that even if liquidation was imminent, this did not preclude the granting of the application to extend time. The charges were consequently registered on 16 October 2012 and on 23 October 2012 RGPL was ordered to be placed in liquidation. The appellant appealed against the decision to extend time.

9.31 A previous decision of the Court of Appeal in *Ng Wei Teck Michael v Oversea Chinese Banking Corp Ltd* [1998] 2 SLR 1 ("*Ng Wei Teck*") (noted in Tan Cheng Han, "Unregistered Charges and Unsecured Creditors" (1998) 114 LQR 565 and Lee Eng Beng, "Winding Up Petitions Founded on a *Bona Fide* Disputed Debt" (1998) 10 SAcLJ 241) had held that on the presentation of a winding-up petition, the statutory scheme to preserve the assets of the company for the benefit of the unsecured creditors came into effect. From such time, the unsecured creditors had a beneficial interest in the company's property, which included the subject matter of the unregistered charge. Accordingly, on the presentation of a winding-up petition, an unsecured creditor acquired sufficient interest in the subject matter of the unregistered charge so as to qualify as a "creditor" for the purposes of s 131(1) of the Act.

9.32 In *Sculptor Finance*, the Court of Appeal disagreed with this and held that prior to the onset of liquidation, a chargor cannot object to the enforcement of an unregistered charge. Nor can the unsecured creditors complain because they had no proprietary interest in the company's assets. "Creditor" in s 131(1) means a secured creditor. The holding in

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Ng Wei Teck was incorrect as the statutory trust in a compulsory winding up only arose upon the making of the winding-up order. This aspect of *Sculptor Finance* is to be welcomed. The court's prior decision in *Ng Wei Teck* was against the weight of judicial authority in the UK and furthermore proceeded from a misreading of cases that involved voluntary windings up rather than compulsory winding up. In the former, winding up commences from the passing of the winding-up resolution, unlike the latter where the date of the winding-up order is crucial. Accordingly, the fact that the winding-up application had been filed before the order to extend the time for registration was made did not give the appellant any proprietary interest in RGPL's assets such as to render the appellant a "creditor" within s 131(1) of the Act.

9.33 The court then went on to deal with the appellant's argument that in any event the well-established rule is that the commencement of winding up was a factor militating against the grant of an extension of time to register a charge. On this issue, the court acknowledged the division of judicial opinion. One set of cases has held that if the facts merited a favourable exercise of the court's discretion to extend time (*eg*, because the court was satisfied that the omission was accidental or that it was just and equitable to grant relief (see s 137 of the Act)), the imminence of liquidation was irrelevant. Another line of cases has taken the opposite view. A third approach was to allow the registration to take place subject to provisos such as those made in the present case. The court said that whichever approach was taken the matter was one for the court's discretion and it had not been shown that the judge had exercised his discretion wrongly. By making the order subject to the provisos, the Court of Appeal said the judge had taken an eminently sensible and practical approach. The court, therefore, saw no reason to interfere with his decision. It would appear from this that the Court of Appeal has endorsed the third approach.

9.34 It is suggested that such an outcome is not optimal. In the present case, the winding-up application had already been filed and within a relatively short period of time the outcome would have been known. Indeed a winding-up order was made within a month of the application. Given the policy objectives that underlie the requirement for registration of certain company charges, the grant of an extension of time where a company is clearly insolvent or where winding-up proceedings have already commenced would undermine the legislative intent by giving the unregistered chargee an unfair advantage over the general body of unsecured creditors who are entitled to prevent the enforcement of the charge if they procure the timely appointment of a liquidator before the security is realised: Tan Cheng Han, "Unregistered Charges and Unsecured Creditors" (1998) 114 LQR 565 at 567. The proviso that allows the liquidator to challenge the registration does not engage this policy issue as it only allows the liquidator to argue that the

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requirements for granting the extension were not met such that the judge should not have exercised his discretion to extend time: *Re Braemar Investments Ltd* [1989] 1 Ch 54. The policy consideration in issue is different, namely whether the court should even consider such cases given the insolvency of the company or the clear imminence of liquidation.

9.35 This was the reason why in *R v Registrar of Companies, ex parte Central Bank of India* [1986] 1 QB 114 the English Court of Appeal held that an unsecured creditor had *locus standi* to bring proceedings for judicial review to quash a decision of the registrar of companies to accept the late registration of a charge after the presentation of a winding-up application. As the Court of Appeal in *Sculptor Finance* pointed out, this could not have meant that the unsecured creditor was a "creditor" for the purposes of the English equivalent of s 131(1) of the Act as the case involved the issue of standing. This is clearly correct. However, it is submitted that the reason why the English court found that the unsecured creditor had standing was not because he was a "creditor" within such a provision but because of the wider policy considerations that operated when a company became insolvent. Section 131(1) is essentially an avoidance provision within the insolvency framework: Wee Meng Seng, "The Avoidance of Unregistered Charge and Extension of Time to Register: *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733" (2014) 26 SAcLJ 750 at 763, para 30. Another commentator also opines that the power to extend time is "liberally exercised … unless a winding-up petition has been presented or a meeting to pass a resolution for voluntary winding-up has been or is about to be convened": Ewan McKendrick & Roy Goode, *Goode on Commercial Law* (Penguin, 4th Ed, 2010) at p 711. Accordingly, it is respectfully submitted that time for registration should not be extended where a winding-up application has been filed and is pending before the courts. Rather the court should adjourn such an application pending the outcome of the winding-up application subject to a reasonable cap on the time period within which the winding-up application should be disposed of.

The oppression remedy

9.36 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 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

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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.

9.37 In many respects, Singapore has been at the forefront of the trend throughout the Commonwealth of taking an expansive view towards the oppression remedy in order to strengthen minority shareholders' rights: see *Derivative Actions in Asia: A Comparative and Functional Approach* (Dan W Puchniak *et al* eds) (Cambridge University Press, 2012) at pp 323–324, 330 and 348–351. Indeed, as noted by the Privy Council, when the oppression remedy was first introduced into Singapore in the Companies Act 1967 (Act 42 of 1967), 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: see *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 at 229. This proved to be forward looking as the wider ambit of protection provided by Singapore has now become the norm throughout the Commonwealth.

9.38 In a similar vein, in the 1990s, Singapore became one of the first jurisdictions to provide judges with the remedial power to award corporate damages in oppression actions: see *Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] 2 SLR(R) 304 and *Low Peng Boon v Low Janie* [1999] 1 SLR(R) 337. This expansion of judicial authority astutely recognised that oppressive conduct frequently overlaps with breaches of directors' duties and that it is, therefore, economically pragmatic to provide a remedy for both in a single action. Based on this rationale, a number of other Commonwealth jurisdictions have more recently followed in Singapore's footsteps by expanding the scope of their oppression remedies to allow for corporate damages.

9.39 In *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723, the Court of Appeal reaffirmed Singapore's expansive approach towards the oppression remedy, while at the same time helpfully clarifying some limits on it. In this case, the plaintiff was a majority shareholder of a holding company that carried on a business through a corporate group which included its subsidiary companies and a number of other affiliated companies. The defendant was a minority shareholder and the managing director of the holding company and also exercised day-to-day control over the entire corporate group. The plaintiff commenced a s 216 oppression claim against the defendant alleging that he had committed numerous wrongful acts in his management of the corporate group. The High Court allowed the plaintiff's s 216 claim and ordered the defendant to buy out the plaintiff's shares. The Court of Appeal reversed the High Court's decision and in doing so clarified at least three important aspects of the oppression remedy in Singapore.

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9.40 First, it upheld the High Court's general finding that the mere fact that a shareholder is a majority shareholder does not preclude him from claiming relief under s 216. The Court of Appeal, however, clarified that a majority shareholder would be precluded from claiming relief under s 216 *if* he possessed "the power to exercise self-help by taking control of the company and bringing to an end the prejudicial state of affairs": at [49]. On this basis, the Court of Appeal overturned the High Court's decision by finding that the plaintiff could have exercised "self-help" by using its majority voting power to take control of the holding company's board and then either removing the defendant from the board or causing the company to bring a claim against the defendant for the assets which had been improperly siphoned away from the corporate group. The Court of Appeal's addition of the "self-help" principle is welcome as it would clearly be a waste of time and resources for the court to entertain a s 216 application when a majority shareholder could have simply utilised his controlling power to end or remedy the wrongful conduct. In addition, denying a majority shareholder relief under s 216 based on the "self-help" principle appears to be inherently fair as a majority shareholder who voluntarily chooses not to exercise his controlling power to help himself can hardly claim to have been oppressed in light of his own inaction.

9.41 Second, the Court of Appeal in *obiter* upheld the High Court's general finding that evidence of oppression in a subsidiary company may, in some circumstances, be used as evidence of oppression in the parent company. It further clarified, however, that such evidence may only be used *if* the affairs of the subsidiary affect or impact the parent company. This expansive approach towards oppression is welcome as it sends the clear message that wrongdoers cannot use multiple layers of a corporate structure to create a safe harbour for them to engage in otherwise oppressive behaviour.

9.42 Third, the Court of Appeal took the opportunity to clarify in *obiter* the vexed problem of distinguishing between corporate wrongs and personal wrongs in the context of s 216 oppression claims. It helpfully clarified two points: (a) a s 216 claim cannot be based solely on the existence of corporate wrongs; and (b) it is possible to succeed in a s 216 claim where there are no corporate wrongs at all. The Court of Appeal astutely observed, however, that "in reality, the distinction between personal wrongs and corporate wrongs is rarely clear" (at [62]) and that there are often "concurrent wrongs": at [63] (that is, a single wrongful act – normally a breach of directors' duties – which is both a personal wrong and a corporate wrong). Moreover, the Court of Appeal provided the helpful guidance that a breach of directors' duties (which is *prima facie* a corporate wrong) may be used in a s 216 claim (which is *prima facie* a remedy for personal wrongs) in so far as the breach serves as evidence of the wrongdoer's oppressive behaviour.

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9.43 While this guidance is certainly helpful, the authors suggest a further signpost which, although not a hard-and-fast rule, may help identify situations in which a breach of directors' duties is likely capable of serving as evidence of oppression. A review of the case law suggests that breaches of directors' duties which are capable of supporting a s 216 claim almost never occur in companies with a large number of shareholders. This makes sense as breaches of directors' duties are normally not targeted towards any particular shareholder in such companies, but rather are wrongful acts that disadvantage the company as a whole (that is, they are normally purely corporate wrongs which should be remedied through a derivative action). Conversely, breaches of directors' duties which are capable of supporting a s 216 claim almost always occur in companies with a small number of shareholders. This is because breaches of directors' duties in such companies are often carried out by a controlling shareholder-director and are part of a course of conduct targeted towards disadvantaging a specific minority shareholder (that is, they are often breaches which are evidence of oppressive conduct).

9.44 In *Lim Ah Sia v Tiong Tuang Yeong* [2014] 4 SLR 154, the High Court continued Singapore's expansive approach towards the oppression remedy and helpfully clarified what constitutes a quasi-partnership in the context of a s 216 oppression claim. In this case, the company was initially incorporated by four founding members who were all also employees of the company. Two of the four founding members left the company, leaving the plaintiff and the first defendant as the only directors and founding employees of the company, with each holding 45% of the company's shares. Two other employees, one of whom was the second defendant, each held 5% of the company's shares.

9.45 Trouble began to brew in the company when it lost a critical customer which limited the plaintiff's ability to contribute to the business. As a result, the plaintiff agreed that he would sell his shares to the first defendant and resign as a director, but only after receiving an agreed upon dividend. The first and second defendants, however, used their controlling power to deny the plaintiff the dividend, remove him as a director and exclude him from the company's management. Consequently, the plaintiff brought a s 216 oppression claim.

9.46 The High Court granted the plaintiff's s 216 oppression claim and ordered the first defendant to buy out the plaintiff's shares. In arriving at this decision, Edmund Leow JC found that the company was a quasi-partnership which, as has been well established, required the court to evaluate the conduct of the defendants using "a stricter yardstick of scrutiny": at [52]. In this context, his Honour made three findings which provide useful guidance for determining when a

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company should be considered to be a quasi-partnership in an oppression claim.

9.47 First, his Honour clarified that the mere fact that a company has a clear corporate structure and hierarchy does not preclude it from being considered a quasi-partnership. If, however, a company is run *solely* by corporate rules, structures and hierarchy, it is unlikely to be a quasi-partnership. With respect, this clarification has logical appeal as even actual partnerships often have clear management structures which in no way detract from their partnership status. Conversely, as quasi-partnerships at their core are based on personal relationships of mutual trust and confidence it would be highly unusual for them to be governed *solely* by formal rules, structures and hierarchies.

9.48 Second, his Honour clarified that a company that was not a quasi-partnership at the time of incorporation could subsequently become a quasi-partnership. This may occur when the nature of the company changes after incorporation such that the remaining shareholders decide to carry on the business based on a new relationship of mutual trust and confidence. This finding is welcome as the authors see no sound policy rationale for denying vulnerable shareholders who develop a personal relationship based on trust and confidence after incorporation the same protection as shareholders who had such a relationship at the time of incorporation. The authors would further suggest that a logical corollary to this principle is that a company may also lose its quasi-partnership status if all of the members agree to transform the company in a way that denudes it of the core features which make it a quasi-partnership (*eg*, if the members decide to take the company public).

9.49 Third, his Honour clarified that a quasi-partnership may be formed on the basis of different quasi-partners playing different roles in the quasi-partnership. Leow JC based this finding on the rationale that even in actual partnerships "some partners may be regarded as being more important than others, whether by reason of seniority, competence or otherwise": at [64]. The authors welcome this approach as it is consistent with the essence of the quasi-partnership which allows its members to freely determine the nature of the understandings and expectations upon which their relationship of mutual trust and confidence exists. Indeed, there seems to be no policy rationale for not allowing quasi-partners to agree to accord different responsibilities and rights to different quasi-partners, as long as this understanding is shared by all of the members.

9.50 In *Teo Chong Nghee Patrick v Han Cheng Fong* [2014] 3 SLR 595, the Court of Appeal provided further guidance regarding what constitutes a quasi-partnership in the context of a s 216 oppression

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claim and in doing so appears to have slightly departed from Singapore's generally expansive view towards the oppression remedy. In this case, the Court of Appeal reversed the High Court's finding that the plaintiff's legitimate expectations had been breached and in turn rejected the plaintiff's s 216 oppression claim. In arriving at its decision, the Court of Appeal reaffirmed the well-settled principle that a quasi-partnership "arises in the context of a relationship of trust and mutual confidence": at [35].

9.51 While the authors welcome the Court of Appeal's reaffirmation of this well-settled principle, with respect, they are somewhat less enthusiastic about the reasoning used to arrive at the finding that a quasi-partnership did not exist in this case. The crux of the Court of Appeal's reasoning for this finding was that this "was not a case of persons who had a close relationship of mutual trust who had come together on the basis of informal understandings and expectations": at [35]. This conclusion appears to have been derived from two facts: (a) the plaintiff was not one of the original founders of the company; and (b) the plaintiff was brought into the company by the original founders for his expertise.

9.52 With respect, however, even in actual partnerships, partners often join at different stages of the partnership and are regularly sought after because of their expertise – neither of which detracts in any way from their status as partners or the firm's status as a partnership. In addition, the fact that the founding members sought out the plaintiff because of his expertise and included him as a shareholder-director who was to be an integral part of the management team suggests that there was a mutual level of trust and confidence. Moreover, the fact that the parties did not use a lawyer to draft the agreement between them further suggests a level of informality in the understandings between the shareholder-directors that is often a hallmark of quasi-partnerships built on a relationship of mutual trust and confidence. Ultimately, however, even if there was a quasi-partnership in this case, the lack of clarity in the agreement between the parties may have prevented any clear legitimate expectations from arising, which would have in turn prevented the plaintiff from succeeding in his s 216 claim (that is, the Court of Appeal's decision would remain unchanged). Indeed, the Court of Appeal found that the written agreement between the shareholder-directors, which was drafted without the aid of a lawyer, was "a piece of legal nonsense devoid of any binding effect": at [23].

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