9. COMPANY LAW

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Lifting the corporate veil

9.1 By allowing companies to be incorporated through the mechanism of registration, the law arguably helped to facilitate the entrepreneurial spirit that has underpinned market economies. This development has been adopted in many parts of the world and even in "socialist market" economies like China and Vietnam. Through the mechanism of registration, companies are recognised as separate legal entities capable of entering into contracts in their own names and assuming rights and liabilities separate from their members. This has allowed individuals to invest in companies without risking their entire fortunes and this in turn has facilitated fund raising from members of the public and the development of stock exchanges. For such reasons, courts are reluctant to ignore the separate personality of companies unless there is a compelling reason to do so such as an abuse of the corporate form to commit fraud or engage in other wrongdoing.

9.2 Yet the nature of the wrongdoing must be borne in mind. It may be that the directors of a delivery company are aware that its employees occasionally park the company's vehicles illegally when making deliveries. If an accident ensues as a result of a vehicle that was parked illegally, is the separate personality of the company to be ignored because of such wrongdoing with the consequence that the directors of the company are held personally liable for any loss or damage to the injured party? Arguably this goes too far as the company was not principally engaged in a fraudulent or wrongful cause of conduct that was a material end in itself. It is not unknown for business enterprises to fall foul of the law and it would be a significant inroad into the doctrine of separate personality for the corporate veil to be lifted simply on this basis. Something more is necessary. In many cases where the company's separate personality was ignored because of fraudulent or other wrongful acts, the acts in question have been the substantive object to which the company was engaged. This is not to say that this is the only instance in which the veil can be lifted where fraud or wrongdoing are involved. A particular statute may, for example, expressly provide for separate personality to be ignored whatever the circumstances of the contravention. It is fair to say though that this is a very relevant factor to take into consideration.

9.3 Such an approach is consistent with *Zim Integrated Shipping Services Ltd v Dafni Igal* [2010] 2 SLR 426 ("*Zim Integrated Shipping Services*") where Lai Siu Chiu J refused to ignore the companies' separate personality because of alleged false declarations to various statutory agencies that gave the impression that one of the defendants was being paid for consultancy work, or because of a wrong statement as to the date when the freight forwarding business commenced. If these matters were indications of the companies being used to perpetrate fraud or other wrongdoings on third parties, the conclusion may have been different but her Honour did not find this so on the facts.

Breach of fiduciary duty

9.4 Although a company is regarded as a person in its own right, this is, in truth, a legal fiction that is intended to serve the policy objective of providing a business vehicle capable of insulating members of the company from personal liability. The "person" that is the company is one that is not capable of thinking or doing anything for itself. It can only act through others. As such, a company is an extremely vulnerable entity that requires protection from persons who may be in a position to take advantage of the company's vulnerability. The law relating to fiduciaries is the principal way in which companies are so protected. Fiduciary obligations are imposed to discourage the fiduciary from taking undue advantage of another person who is in a vulnerable position *vis-à-vis* the fiduciary. The fiduciary is obliged to act in the best interests of the person she owes the duty to. The fiduciary must prefer the other person's interests over her own which is a departure from the general rule that in commercial matters a person is entitled to be self-interested as long as there is no fraud or illegality involved.

9.5 In so far as companies are concerned, the paradigm fiduciary is the company director as the management of companies is typically vested in the board as a whole. Beyond the directors of the company, other officers or employees of the company who have agency powers to bind the company are also fiduciaries by virtue of the relationship between the agent-officer/employee and the corporate principal. In addition, regardless of whether officers or employees have agency powers, if they have substantial authority within the company to direct its operations, such employees may also be regarded as fiduciaries by virtue of the responsibilities entrusted to them.

9.6 In *Tan Hup Thye v Refco (Singapore) Pte Ltd* [2010] 3 SLR 426, Judith Prakash J held that a resolution passed by the defendant company's board approving bonus payments to the defendant's employees totalling $6,485,094 (including $1,412,759 to the plaintiff who was a director of the defendant and was party to the passing of the resolution) should be invalidated. In arriving at this decision, Prakash J had regard to Art 83 of the company's articles which stated that a director "shall not vote in respect of any contract or proposed contract with the company in which he is interested, or any matter arising thereout, and if he does so vote his vote shall not be counted". Her Honour said that, as the plaintiff was interested in the matter being voted upon, he was prohibited from voting on his bonus pursuant to Art 83 of the company's articles and, since in the event he did vote, that vote should not have been counted. As a *quorum* of two directors was necessary and the plaintiff's vote could not be counted, the resolution was invalid given that only one other director attended the meeting that passed the resolution.

9.7 In addition to reliance on Art 83, Prakash J also held that the resolution was substantively not in the best interests of the company. Her Honour agreed that a resolution in favour of the payment of bonuses to employees could be in the best interests of the company, especially where the employees had a contractual right to bonuses, or to retain employees, but felt that in the circumstances of the present case the plaintiff could not be said to have acted for the good of the company. In arriving at this view, she took into consideration that the defendant company's shareholders had expressly instructed the plaintiff not to make any payment of bonus and that there was no room to discuss the issue as the defendant company's ultimate shareholder would not approve the payment. There were at the time steps being taken for the sale of the defendant company's business and a clause in the acquisition agreement provided that each of the parties would not "make any commitments to pay on or after the Closing Date any bonuses or other benefits to employees of the Business other than in the ordinary course of business". The defendant was thereby under a contractual obligation not to pay bonuses to its employees except in the ordinary course of business. The resolution in question was not passed in the ordinary course of business as the general policy of the defendant was to declare and pay bonuses only after the end of its financial year. At the time of the resolution, the financial year had not ended yet. Thus, the passing of the resolution, if it created an obligation to pay bonuses to the employees of the defendant, would cause the defendant to be in breach of the acquisition agreement. Accordingly, by procuring the passing of the resolution, the plaintiff was not acting in the interests of the defendant.

9.8 The principles relating to the need for directors to act in the best interests of the company are also illustrated in *Swiss Butchery Pte Ltd v Huber Ernst* [2010] 3 SLR 813 ("*Swiss Butchery*"). In that case, Woo Bih Li J reiterated that the courts will not interfere with management decisions that are arrived at *bona fide* even if the decisions turned out to be bad ones commercially. However, a director should not place himself in a position where his duty and his interest may conflict. Summarising the position, his Honour said (*Swiss Butchery* at [12]):

> It is thus clear that while the court will not question a management decision which was exercised in a *bona fide* manner, anyone who owes a fiduciary duty is not allowed to enter into transactions in which he has a personal interest conflicting with the interest of those whom he is bound to protect. More particularly, a director is not allowed to make use of information obtained while he was a director of the company in question or to exploit a maturing business opportunity of the company for his own personal purposes and profit. Any profit so obtained will be subject to a constructive trust in favour of the company.

9.9 Woo J held that the duty was breached in the instant case because the former director and another former senior employee had diverted the company's wholesale and production operations to another company that they had established. It is clear that where a director or other fiduciary diverts business opportunities to himself that should have been the province of the party the duty is owed to, the director or other fiduciary is in breach of duty. Where the directors of a company have wrongfully diverted business belonging to the company to another company, the latter company will be liable to account for the profits to the first company. Accordingly, the business vehicles used for the usurpation of business from the plaintiff company were liable to account for the profits they had made to the plaintiff.

Meetings

9.10 The articles of association of a company regulate the internal procedures of the company. While compliance with the articles is important, non-compliance does not necessarily render corporate actions invalid if no substantial injustice has been caused by the procedural irregularity. For example, the mere fact that slightly shorter notice of a meeting has been given does not cause any real injustice if the notice was in fact received by all members or directors sufficiently early for them to attend the meeting if they wished to. The rationale for this position, which is embodied in s 392 of the Companies Act (Cap 50, 2006 Rev Ed), is to prevent procedural irregularities that do not cause any injustice from invalidating acts taken by the company given that those who conduct business through corporate vehicles may not be legally trained and therefore mistakes in procedure can take place.

9.11 In *Thio Keng Poon v Thio Syn Pyn* [2010] 3 SLR 143 ("*Thio Keng Poon*"), Chao Hick Tin JA (delivering the judgment of the Court of Appeal) held that s 392 of the Companies Act (Cap 50, 2006 Rev Ed) was applicable even if the procedural irregularity was not due to inadvertence. It should not be the case that the moment non-compliance was deliberate a proceeding under the Companies Act would be void even if the procedural irregularity was relatively minor. As Chao J said, some requirements which are not complied with may be so trivial that the parties have deliberately decided to overlook it and if in such a case the court is compelled to hold the proceeding to be invalid because the non-compliance was not due to inadvertence, that would seriously undermine the utility of the statutory provision. Ultimately it is the significance and the materiality of the non-compliance that should be decisive. Only if it is shown that the non-compliance has caused substantial injustice or prejudice to an interested party should the proceeding be held to be invalid by the court.

9.12 The court then went on to address the issue of whether the irregularity in question (*ie*, the failure to give a notice to the appellant asking him to resign) was procedural or substantive in nature. It was said that unless the court ruled that the irregularity was a procedural one, s 392(2) could have no application and this would mean that the purported removal of the appellant from the various positions he held in the company would be of no effect. The court said that to determine whether a non-compliance was of a procedural or substantive nature, one must assiduously examine the aim or object of the requirement which was not complied with. The failure to serve upon the appellant a notice to resign, as required by the articles of the company, was not of the same genre as those irregularities listed in s 392(1). As the court saw it, the requirement of such a notice would serve two complementary purposes. First, it gave notice to the director in question that his services on the board were no longer appreciated by his co-directors. He would then have to consider his available options. Second, he might wish to bring it up and appeal to his co-directors and convince them that his remaining on the board would be in the best interests of the company. The failure to serve the appellant with such a notice would deny him these choices. This was not merely a matter of procedure. The giving of these choices to the director in question must have been the intention behind the article in question. Accordingly, the Court of Appeal held that the non-compliance in question was not of a procedural nature and, therefore, s 392(2) could not apply to validate the resolution of the board to remove the appellant from the offices he held in the company.

9.13 In any event, the court went on to hold that there had been substantial injustice caused to the appellant. In determining whether there was substantial injustice, the following principles could be distilled. First, there must be a direct link between the procedural irregularity in question and the injustice suffered. Second, the injustice must be of a substantial nature. In essence, this means that the injustice must be real, rather than theoretical or fanciful. There must, therefore, be some basis or indication on the face of the evidence before the court that the aggrieved party had suffered injustice or would suffer injustice as a result of the procedural irregularity occurring. Third, the aggrieved party must show that there *may* or could have been a different result, if not for the occurrence of the procedural irregularity. In this regard, the aggrieved party did *not* need to show that there would certainly have been a different result if not for the irregularity. All he had to show was that there *may* or *could* have been a different result. The court observed that the evidence raised a distinct possibility that the appellant may not have been removed as a director had he been able to present his case to all the directors of the company. This, in essence, was the substantial injustice or prejudice that the appellant suffered as a direct result of the procedural irregularity occurring.

9.14 It is submitted respectfully that the conclusion reached by the Court of Appeal was correct. However, it is submitted respectfully that the court's view that the irregularity in the present case was not a procedural irregularity is unconvincing. Arguably, not sending a request to the appellant to vacate office in breach of the company's articles ought to be construed as "a defect, irregularity or deficiency of notice" under s 392(1) rather than an irregularity of a different genre from the irregularities listed in that sub-section, which in any event is an inclusive section only. It should not also have been regarded as a different genre of irregularity simply because the failure to comply deprived the appellant of certain options. Any defect or irregularity of notice could have such an effect depending on the circumstances. The consequences of an irregularity should not be crucial in its characterisation. It may be simpler to have treated the irregularity in question as going to process and then assess in the context of the procedural irregularity and the surrounding circumstances whether any substantial injustice was caused. If such an approach had been adopted the decision would still have been the same; the court would have held that there had been a procedural irregularity which had caused substantial injustice and declared the removal of the appellant invalid.

Minority shareholders' remedies

9.15 Over the past several decades, a general consensus has emerged among corporate law scholars around the world that strong legal protection for minority shareholders is necessary to achieve optimal economic performance. At first blush, the logic underlying this consensus makes sense. Most rational investors will not become minority shareholders without adequate legal protection. Stock markets with a dearth of minority shareholders suffer from illiquidity and smaller capital pools which ultimately stifles economic performance. Based on this logic, there has been a consistent trend in the world's leading economies towards providing stronger legal protection for minority shareholders.

9.16 In many respects, Singapore has long been on the cutting-edge of this trend. The first Companies Act (Act 42 of 1967) insightfully defined the oppression remedy more broadly than many other common law jurisdictions by giving the court a wide ambit of authority to protect minority shareholders from commercial unfairness – which has now become the norm throughout the common law world: see, *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 at 229 where the Privy Council, when interpreting the Malaysian equivalent to s 216, held that it was broader than the English or Australian counterparts. 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 actions for oppression: 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 therefore sometimes makes sense to provide a remedy for both in a single action. Based on this rationale, a number of other common law jurisdictions have recently followed in Singapore's footsteps by expanding the scope of their oppression remedies to allow for corporate damages.

9.17 The statutory derivative action is another illustration of Singapore's position as a leader in the area of minority shareholder rights. In 1993, Parliament implemented a *statutory* derivative action in s 216A of the Companies Act (Cap 50, 2006 Rev Ed) to provide minority shareholders with a more efficient mechanism for pursuing derivative actions. At that time, most other common law jurisdictions (including the UK, Australia, New Zealand and Hong Kong) did not have a statutory derivative action. This made it considerably more difficult for minority shareholders in those jurisdictions to pursue a derivative action because they had to rely on the *common law* derivative action which is fraught with ambiguity. However, over the last two decades, most common law jurisdictions have again followed in Singapore's footsteps by implementing a statutory based derivative action – which has come to be seen as a crucial mechanism for adequately protecting minority shareholder rights.

9.18 We respectfully applaud Parliament and the courts for staying "ahead of the curve" when it comes to protecting minority shareholder rights. That being said, it is important to recognise that stronger legal protection for minority shareholders does not axiomatically result in more efficient corporate governance. At some point, continuing to make minority shareholder rights stronger undoubtedly begins to erode corporate governance efficiency. It is easy to imagine how the constant spectre of shareholder litigation can make directors and officers overly risk adverse. Even worse, over-incentivising minority shareholders to sue can lead to the proliferation of strike suits which ultimately tunnel wealth from companies (and indirectly their shareholders) to disingenuous litigants and profiteering lawyers – which to some extent has been the US experience. The potentially deleterious effects of an excessively vigorous minority shareholder rights regime suggests that the real conundrum is not how to provide stronger protection for minority shareholders but rather how to achieve the *proper balance* between providing adequate minority protection while at the same time limiting frivolous shareholder lawsuits.

9.19 Parliament and the courts have not been blind to the risk of over-incentivising shareholder litigants and have clearly been working towards striking this proper balance. This is evident in Parliament's act of limiting the statutory derivative action in s 216A to unlisted companies. Although there are currently strong arguments for extending the statutory derivative action to all companies (see, for example, Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 2nd Ed, 2007) at 295–297), at the time it was implemented, the limitation was arguably justified as Singapore was stepping into largely uncharted waters. Singapore's progressive but measured approach to shareholders' remedies can also be seen in a number of the court's recent decisions which take pains to strike the difficult balance between adequately protecting minority shareholders while still maintaining the efficient *de facto* company law norm of majority rule.

Oppression under s 216

9.20 In *Over & Over Ltd v Bonvests* [2010] 2 SLR 776 ("*Over & Over*"), the plaintiff and defendant were two family controlled companies that entered into a joint venture agreement to develop and manage a large hotel in Singapore. For the purpose of the joint venture, the plaintiff and defendant companies incorporated another company ("JV Company") in which they respectively owned 30% and 70% of the shares. The JV Company purchased land on Scotts Road and developed and managed a hotel on the land. The hotel was the sole business of the JV Company.

9.21 Under s 216 of the Companies Act (Cap 50, 2006 Rev Ed), the plaintiff claimed that three actions taken by the defendant, during a six-year period after the hotel was built, amounted to oppression: (a) the transfer of JV Company shares by the defendant to its related company which allegedly breached the plaintiff's pre-emptive rights under an oral agreement it had with the defendant; (b) a rights issue in the JV Company orchestrated by the defendant to allegedly dilute the plaintiff's JV Company shares; and (c) several related party transactions which were allegedly undertaken by the defendant in an unfair manner and without proper disclosure. At trial, the judge had rejected all three claims, holding that the plaintiff consented to the share transfer, the rights issue was properly undertaken in order to repay the JV Company's loan and the related party transactions were not unfair. Accordingly, his Honour rendered a decision dismissing the s 216 action for oppression, which was appealed by the plaintiff.

9.22 In a watershed judgment, the Court of Appeal allowed the appeal. It held that the appellant had suffered oppression under s 216 and ordered the respondent to purchase all of the appellant's JV Company shares at fair market value without a minority discount. In arriving at this decision, Judge of Appeal V K Rajah (delivering the judgment of the Court of Appeal) respectfully disagreed with each of the three main findings of the trial judge.

9.23 The Court of Appeal held that the transfer of the JV Company shares in itself amounted to oppression. Justice Rajah reasoned that the share transfer "manifestly and irretrievably altered" the informal nature of the JV Company by transforming it from a private to a semi-public company. This "profound" change caused a "loss of substratum" which, when considered together with the respondent's conduct in securing the transfer, was oppressive. Contrary to the trial judge's finding, the Court of Appeal held that the appellant's consent to the share transfer did not prevent the transfer from being used as evidence in the appellant's s 216 oppression claim. Specifically, Justice Rajah suggested that the importance of the appellant's consent was substantially diminished by the fact that the respondent had made it known that the share transfer would ultimately be carried out with *or without* the appellant's consent.

9.24 The Court of Appeal further held, contrary to the trial judge's decision, that the rights issue was also in itself sufficient to support the appellant's claim for oppression. Justice Rajah cited the "complete absence of any commercial justification" for the rights issue as evidence of its oppressive nature. In a similar vein, he described the rights issue as an "ill-conceived attempt to dilute the [appellant's] shareholding" in the JV Company. Ultimately, the Court of Appeal held that the rights issue prejudicially forced the appellant to incur the unnecessary expense of infusing extra capital into the JV Company for no valid commercial reason, which was oppressive.

9.25 With respect to the respondent's related party transactions, the Court of Appeal agreed with the trial judge's general finding that the transactions did not in themselves amount to oppression. In fact, Justice Rajah acknowledged that the respondent's related party transactions may have even benefited the JV Company and in turn indirectly benefited the appellant. However, he went on to find that the manner in which the related party transactions were conducted – which included numerous breaches to the JV Company's Articles – reinforced "the perception that the [respondent] had been in the habit of riding roughshod over the [appellant's] interests". As such, the Court of Appeal held that, when viewed "holistically", the related party transactions served to reinforce its finding of oppression.

9.26 The Court of Appeal's specific reasons for allowing the appeal shed light on several discrete issues (*eg*, the effect of consent) that may arise in a s 216 oppression action. However, what makes *Over & Over* a watershed decision are the more general principles that the Court of Appeal sets out for analysing s 216 actions. These principles do not mark a dramatic shift in law but rather clarify at least three key elements for establishing oppression that were previously somewhat ambiguous in the local jurisprudence. In this sense, *Over & Over* is a welcome addition to the shareholders' remedies jurisprudence in Singapore as it creates a solid *local* foundation upon which future advances in this important area of company law can be built.

9.27 First, the Court of Appeal clarifies that "commercial unfairness" is the primary test for determining whether to grant relief for oppression under s 216. Although a plain reading of s 216 suggests that there are four discrete limbs for establishing oppression, Justice Rajah succinctly explains that these four limbs are "not to be read disjunctively" but rather as various articulations of the single "common thread" of commercial unfairness which underlies the entire section. He further emphasises that the single test of commercial unfairness should be applied in all cases regardless of whether the claim involves allegations of a single act or multiple acts of oppression. We respectfully agree with the "single test approach" as it avoids the uncertainty and futility of attempting to draw meaningful distinctions between the four substantially overlapping limbs for oppression articulated in s 216.

9.28 Second, the Court of Appeal provides helpful guidance for determining whether or not a specific behaviour is "commercially unfair". Adopting the approach in *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227, which was cited with approval in *Low Peng Boon v Low Janie* [1999] 1 SLR(R) 337, the Court of Appeal held that commercial unfairness occurs when there is "a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect": *Over & Over* (above, para 9.20) at [77]. We respectively agree with the Court of Appeal adopting this highly contextualised approach for analysing s 216 claims for oppression. Making what "a shareholder is entitled to expect" the linchpin for defining "commercial unfairness" provides judges with the necessary flexibility to determine whether a particular course of behaviour is fair or unfair on a case by case basis. This is important as the *ex post* and fact specific nature of the oppression remedy is far too complex for bright line rules which attempt to universally classify certain types of behaviour as either commercially fair or unfair regardless of the specific context in which they occur.

9.29 Third, the Court of Appeal provides a clear method for determining what "a shareholder is entitled to expect" by directing judges to "take into account both the legal rights and legitimate expectations" of shareholders. Justice Rajah emphasised that normally the legal rights and expectations of shareholders can be easily determined by examining the company's constitution. However, he identified "quasi-partnerships" as a special class of companies in which it is common practice for the legitimate expectations of shareholders *not* to be reduced into writing. In such quasi-partnership companies, informal legitimate expectations often form part of the "conditions of fair play which a shareholder is entitled to expect": *Over & Over* at [77]. In essence, the Court of Appeal's approach for determining what "a shareholder is entitled to expect" is "quasi-contractual" in nature as it ultimately rests upon the agreement (either formally or informally) between the parties. Such a quasi-contractual approach makes sense as it reflects the will of the shareholders and ensures that the terms freely agreed to by both the majority and minority shareholders are protected.

9.30 Although we generally support the Court of Appeal's quasi-contractual approach, we respectfully question one of the critical steps identified by Justice Rajah in applying this approach. Justice Rajah suggests that a preliminary step in evaluating a s 216 oppression claim is to determine whether the company in question is a quasi-partnership. As mentioned above, this determination is important because in quasi-partnerships it is more likely that the understandings of shareholders will be informal (rather than formal) in nature. In addition, Justice Rajah suggests that in the context of quasi-partnerships, courts should apply "a stricter yardstick of scrutiny" (*Over & Over* at [83]) because minority shareholders are more vulnerable due to the relative informality of understandings and illiquidity of shares in such companies. Up to this point, we agree with Justice Rajah's approach. However, Justice Rajah goes on to find that in the process of determining whether a company should be classified as a quasi-partnership, the court should *not* consider whether there is a restriction on the transfer of the company's shares ("share transfer restriction"). We respectfully disagree with this point.

9.31 We submit that there are at least three important reasons why the court should consider the existence of a share transfer restriction when determining whether a company is a quasi-partnership. First, a hallmark of the corporate form, which distinguishes it from a general partnership, is that it facilitates the free transfer of an investor's economic interest through the transferability of shares. As such, restricting the transferability of shares removes one of the key distinctions between the corporate form and general partnership which arguably makes a company more "partnership-like". Second, restricting the transferability of shares increases the likelihood that shareholders will base their relationships on informal understandings because there is a greater certainty that all of the shareholders will remain familiar to one another – which is a hallmark of quasi-partnerships. Third, by definition, a restriction on the transferability of shares reduces the liquidity of shares which is a primary reason that Justice Rajah provides for treating quasi-partnerships as a special class of companies in the first place. In sum, as share transfer restrictions make companies more "partnership-like" and support several features that distinguish quasi-partnerships from other companies, we submit that they should be considered by the court in evaluating a company's quasi-partnership status. This is not to say that a "quasi-partnership" company cannot arise in the absence of share transfer restrictions but that the existence of such a restriction is an important factor to be taken into consideration.

9.32 Notwithstanding this, we submit that *Over & Over* generally provides a solid foundation for analysing oppression claims in Singapore. The single test of "commercial unfairness" provides a clear focus for s 216 and frees judges from being shackled by potentially conflicting statutory language. In addition, the Court of Appeal's highly contextual and quasi-contractual approach effectively provides judges with a wide ambit of authority to ensure the equitable protection of minority shareholders. That being said, the inevitable *risk* of providing judges with such a broad ambit of authority is that s 216 may eventually be expanded beyond the efficient protection of minority shareholders and negatively interfere with the efficient *de facto* company law norm of majority rule.

9.33 The Court of Appeal in *Thio Keng Poon* (above, para 9.11) recently demonstrated that it is well aware of the risk of over expanding the remedial scope of s 216. In this case (which was briefly discussed above in relation to s 392), the appellant was the founder, director, managing director and chairman of a number of highly successful companies in the dairy business ("group companies"). Over several years, the appellant transferred his shares in the group companies to his wife and six children for no consideration. The share transfers ultimately resulted in the appellant's wife and children holding a majority of the shares in the group companies. The appellant claimed that the impetus for gifting his shares to his family members was to provide them with an economic stake in the group companies, financial security after his death and to minimise estate duty fees.

9.34 The legal battle between the appellant and his family arose out of an external audit of the group companies which revealed that the appellant had been "double-claiming" for a number of business related travel expenses. The appellant provided an explanation for his "double-claims" and insisted that he had not claimed more than the rules permitted. However, based on the external audit and without any notice to the appellant, the appellant's oldest son called a board meeting at which the appellant was removed from his director, managing director and chairman positions ("management positions"). The appellant's removal from his management positions was ratified at annual general meetings of the group companies in which the appellant's family members exercised their majority voting power.

9.35 The appellant challenged his removal on several grounds including claiming that it amounted to oppression under s 216 of the Companies Act (Cap 50, 2006 Rev Ed). The central argument of the appellant's s 216 claim was that the share transfer to his family members was undertaken based on the informal understanding that he would retain his management positions. According to the appellant, this informal understanding gave rise to a "legitimate expectation" which was breached when he was removed by his family members from his management positions. In turn, the appellant claimed that his family's act of removing him from management amounted to oppression under s 216 of the Act.

9.36 The Court of Appeal, upholding the trial judge's decision, found that there was no evidence of any understanding between the appellant and his family members that the appellant would maintain his management positions after the share transfers. As such, the appellant's s 216 claim for oppression was rejected. In arriving at this decision, Judge of Appeal Chao Hick Tin (delivering the judgment of the Court of Appeal) placed an important limitation on the scope of s 216 by clarifying that a shareholder's *unilateral* belief – even if that belief is reasonable – is insufficient to give rise to a "legitimate expectation". In other words, for a legitimate expectation to arise under s 216 it must be based on an understanding between *all* of the shareholders.

9.37 Applying this principle to the case at hand, Justice Chao noted that the appellant indeed believed that the share transfers were undertaken based on the understanding that his family members would allow him to retain his management positions. Moreover, the appellant's belief appeared to be grounded in the "implicit trust which the appellant had in his wife and children". However, Justice Chao went on to find that the appellant's belief did not amount to a legitimate expectation because it existed only "in the appellant's mind" and "there was no way his family members could have known about it": *Thio Keng Poon* at [34]. In short, the appellant's "unilateral assumption or belief" was not an understanding between *all* of the shareholders and therefore could not be used to support his s 216 oppression claim.

9.38 We respectfully submit that the Court of Appeal's decision to limit the scope of legitimate expectations to understandings between all of the shareholders in a company makes sense. Expanding the scope of legitimate expectations to include the unilateral beliefs of individual shareholders would open a Pandora's Box for the oppression remedy in Singapore – even if those unilateral beliefs were reasonable. Such an expansion would allow an individual shareholder to use s 216 to effectively enforce "secretly held terms" on all other shareholders (*ie*, terms which the other shareholders neither agreed to nor were unaware of). This would introduce a significant amount of uncertainty into shareholder relationships in Singapore which would discourage equity investment. In addition, creating a situation where the enforceable relationship between shareholders is based on what exists solely in the minds of individual shareholders would create an evidentiary nightmare in s 216 oppression cases.

9.39 Our strong support for the Court of Appeal's clear limitation on s 216 claims does, however, give rise to a query about how the limitation was specifically applied in this case. Based on the trial judge's findings, the Court of Appeal held that "the [appellant's] understanding was unspoken and therefore, there was no way his family members could have known about it': *Thio Keng Poon* at [34]. We submit that merely because a shareholder's understanding is "unspoken" does not axiomatically mean that it cannot be known to (or shared by) the other shareholders. In fact, considering business and cultural norms in Singapore, it seems plausible that when a founding patriarch gifts his shares to his family, out of respect for the patriarch, there is an understanding that he will maintain a management position in the company. One could reasonably argue that such an understanding would exist even if it was not specifically articulated to his family members at the time of the share transfer. If such a general unspoken understanding indeed exists in Singapore, then there may have been a legitimate expectation that the appellant not be removed from his management positions. However, even if the court would have found such an unspoken legitimate expectation, it may not have changed the outcome of this case because the appellant's double-claiming behaviour may have ultimately fallen beyond the scope of protection provided by the unspoken legitimate expectation.

Derivative actions

9.40 In addition to grappling with the scope of minority protection under s 216, to achieve the proper balance between minority protection and majority rule, the court has also been fine-tuning its approach towards derivative actions. The need for derivative actions arises out of a conundrum that is inherent in company law. Directors *prima facie* owe their fiduciary and negligence duties directly to the company (not to individual shareholders). In turn, when a director breaches her duty, it is the company (not the shareholders) that has the right to sue. The conundrum arises from the fact that the decision of whether the company will sue is normally a management decision which is made by the board of directors. Thus, the board of directors often decides that the company will not sue for a breach of directors' duties because in practice that would mean the directors effectively deciding to "sue themselves". This conundrum is exacerbated when the directors are also the majority shareholders and therefore are not subject to the threat of being removed from the board.

9.41 The derivative action attempts to solve this company law conundrum by allowing an individual shareholder to bring an action for and on behalf of the company against the directors when they wrongfully decide that the company should not sue. The derivative action is an extraordinary procedural remedy because it allows one legal person (the shareholder) to enforce another legal person's (the company's) legal rights. As such, the common law has long struggled with crafting an appropriate test to determine when shareholders should be allowed to access this extraordinary procedural remedy.

9.42 Throughout the common law world, the seminal case of *Foss v Harbottle* (1843) 2 Hare 461 ("*Foss*") has historically laid down the foundation for this test. At its most basic, the rule in *Foss* establishes that the company (not the shareholders) is the proper plaintiff when harm is done to the company. An exception to the rule in *Foss* occurs when a shareholder can demonstrate that "fraud on the minority" has occurred. When this is the case, the court has the power to grant shareholders the right to bring a common law derivative action.

9.43 The common law derivative action and "fraud on the minority test" have produced a litany of seemingly contradictory decisions and consequently have been subject to considerable criticism throughout the common law world. As mentioned above, in 1993, in response to this criticism, Singapore implemented s 216A of the Companies Act (Cap 50, 2006 Rev Ed) which provides shareholders with an alternative statutory-based mechanism for pursuing a derivative action ("statutory derivative action"). Although the s 216A statutory derivative action is clearly more efficient and shareholder friendly than the common law "fraud on the minority test", s 216A is only available to unlisted companies that are incorporated in Singapore. Therefore, shareholders in listed *or* foreign incorporated companies must still proceed under the common law "fraud on the minority test" to bring a derivative action in Singapore.

9.44 As is the norm in derivative actions cases, in *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1, the plaintiff-shareholder claimed that the defendant-director had breached his fiduciary duty to the company and that the company had wrongfully decided not to sue on the breach. Since the company was not incorporated in Singapore, the plaintiff could not pursue a s 216A statutory derivative action. Therefore, the plaintiff sought leave to bring a common law derivative action which required it to establish that the defendant's actions amounted to "fraud on the minority".

9.45 The High Court dismissed the plaintiff's claim for leave to bring a common law derivative action. In arriving at this decision, Justice Andrew Ang spent a significant amount of time discussing the "fraud on the minority test". However, this entire discussion was *obiter* as Justice Ang ultimately found that, regardless of the outcome of the "fraud on the minority test", leave had to be denied because "another adequate remedy" was available which made the derivative action unnecessary.

9.46 The general principle that the availability of an alternative remedy may effectively foreclose the court from granting leave for a derivative action is on one level straightforward and on another level vexing. We respectfully agree with Justice Ang's finding that the fundamental reason why the derivative action is necessary is that without such an extraordinary remedy "justice would not be done". Therefore, it logically follows that the "necessity of a derivative action" must be established before leave for this extraordinary remedy can be granted. This much is straightforward.

9.47 What is vexing is whether the mere availability of another remedy (*eg*, an action for oppression or just and equitable winding up) axiomatically makes the derivative action unnecessary. In other words, will leave for a derivative action only be granted if there are *no* other available remedies? In this case, Justice Ang seems to agree with the Court of Appeal's finding in *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR(R) 197 ("*Ting Sing Ning*") that the mere availability of another remedy is insufficient to foreclose the court from granting leave for a derivative action.

9.48 However, the Court of Appeal in *Ting Sing Ning* appeared to go one step further than Justice Ang by requiring that the available alternative to a derivative action must be "a better remedy" or "the best solution" before the court would be foreclosed from granting leave to bring a derivative action. While Justice Ang acknowledged that "at first blush" *Ting Sing Ning* appears to require an alternative remedy to provide "the best solution" or "a better remedy", he goes on to find that the language used by the Court of Appeal was "purely rhetorical". As such, in this case, Justice Ang found that an alternative remedy needs to merely provide "a real option" (not "the best solution" or "a better remedy") to the plaintiff-shareholder for it to effectively foreclose the court from granting leave for a derivative action.

9.49 We respectfully prefer the stricter standard that the Court of Appeal suggests in *Ting Sing Ning* over Justice Ang's approach. In our opinion, courts should not be foreclosed from choosing "the best solution" – which is the logical implication of Justice Ang's suggested approach. This holds true even when "the best solution" is an extraordinary remedy like the derivative action. Justice Ang's finding that a shareholder seeking leave to bring a derivative action does so "at little or no risk to himself" (*Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 at [22]) suggests that the derivative action is uniquely at risk for minority shareholder abuse. Indeed, *if* minority shareholders could bring derivative actions "at little or no risk" to themselves, we would agree that derivative actions would be uniquely open to minority abuse – which may justify limiting them whenever another adequate remedy is available (even if the other available remedy was not the best remedy). However, we respectfully suggest that minority shareholders who bring derivative actions do so with risk to themselves. As such, we are of the view that derivative actions do not necessarily present any greater risk for abuse than other shareholders' remedies and therefore should not be foreclosed from being granted unless a *better* remedy is available.

9.50 There are two primary reasons why shareholders who pursue derivative actions face substantial risk. First, minority shareholders who pursue a derivative action are *prima facie* responsible for their own legal fees and are potentially liable for a substantial portion of the legal fees of the defendant if they are unsuccessful in the leave application or derivative action (which was precisely what happened in this case). Second, even if the derivative action succeeds, any financial reward is paid to the company – not the minority shareholder who pursued the action. The only way that minority shareholders can benefit from a derivative action is if the award to the company causes a pro-rata increase in the value of their shares (which econometric evidence has shown is highly uncertain in listed companies). We suspect that the substantial risk that minority shareholders face when pursuing derivative actions is the reason why it is extremely rare for shareholders to pursue derivative actions in almost all jurisdictions. It also suggests that the court should only be foreclosed from granting them when there is a better remedy available. We submit that any wider prohibition would guard against a risk of minority shareholder abuse which may not exist.