9. COMPANY LAW

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Meetings

9.1 As companies are artificial entities, they can only act through others, notably through their organs or agents. Where a company seeks to do things through its organs, namely, the shareholders in general meeting or the board of directors, it will often be necessary to convene a meeting. Such meetings must comply with the requirements set out in the company's articles of association or the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"). Frequently, there will be quorum requirements set out in the articles and they usually provide that a quorum shall comprise a minimum of two members or directors, as the case may be.

9.2 Where a quorum cannot be obtained, there are two possibilities open to the party that is trying to convene the meeting. The first is to rely on s 182 of the Act which states that where for any reason it is impracticable to call a meeting in any manner in which meetings may be called, a director or member may apply to the court for an order that a meeting be held and conducted in such manner as the court thinks fit, including a direction that one member present in person or by proxy shall be deemed to constitute a meeting. The second is to proceed with an inquorate meeting relying on s 392 of the Act which regards such a meeting as a procedural irregularity which is not invalid unless the court is of the view that substantial injustice has been caused by such irregularity and by order declares the proceeding to be invalid.

9.3 The second course has the benefit of convenience but there is the uncertainty over whether it will be challenged and the outcome of any such challenge. The first course involves court action from the outset but if the court orders the meeting to be held the outcome of the meeting cannot be challenged on the basis of any procedural irregularity.

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9.4 *Lim Yew Ming v Aik Chuan Construction Pte Ltd* [2015] 3 SLR 931 ("*Lim Yew Ming*") involved an application under s 182 of the Act. Essentially, the plaintiff, who held 51.5% of the shares in the company, wanted to convene an extraordinary general meeting ("EGM") to remove the second and fifth defendants as directors of the company. The second to the seventh defendants were all members of the company collectively holding 48.5% of the shares in the company. They had refused to attend two previous EGMs that the plaintiff had attempted to convene with the consequence that no quorum could be obtained.

9.5 The court allowed the application. In its view, impracticability included the inability of a meeting to be conducted because of the absence of a quorum. In addition, there were good reasons for the court to exercise its discretion to allow the meeting to take place as to do otherwise would frustrate the mechanism of decision-making within the company.

9.6 The authors agree that the application was rightly granted on the facts set out by the learned judicial commissioner. The crux of such cases is whether the quorum requirements were intended by the members to confer veto rights. In general, quorum requirements are not equated with veto rights as is implied by s 392 of the Act which provides, *inter alia*, that the absence of a quorum is a procedural irregularity that does not *prima facie* invalidate the meeting unless there is substantial injustice. This means that the absence of a quorum in itself does not cause substantial injustice and this is because quorum requirements do not generally give rise to veto rights. However, where the quorum requirements were specially negotiated and bargained for, and it is clear that the intention behind such quorum requirements was to confer a veto right on members, as was the case in *Chang Benety v Tang Kin Fei* [2012] 1 SLR 274, it has been held that a meeting that proceeded without a valid quorum would be invalidated because substantial injustice would otherwise be caused to the party not attending the meeting.

9.7 It is true of course that there are material differences between ss 182 and 392 as the learned judicial commissioner acknowledged (*Lim Yew Ming* at [45]):

> The distinction between the two requirements under ss 182 and 392 is there because of the different perspectives involved. Section 392 operates *post hoc*. Where an irregularity arises such as a decision taken at an inquorate meeting, the question that is examined is whether a substantial injustice has arisen, because of the conduct of the party proceeding in breach. In contrast, when the court's intervention is sought under s 182, the issue is whether the meeting should be permitted to go ahead, and the prescribed criteria under that section is

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> impracticability. No decision has yet been made; the only question is the holding of the meeting. The decision may yet be influenced by those choosing to attend. They are given that opportunity, slim though it may be at times, and it is for them to decide what to make of it.

Nevertheless, in the context of meetings, there is little merit in adopting materially different approaches depending on whether it is a member or director seeking to call the meeting, or a member or director seeking to invalidate a meeting where a quorum was not present. In both cases, the court should *prima facie* either order the meeting to be held or not invalidate the meeting that was held without a quorum. However, where the quorum requirement was intended to give a shareholder a right to block corporate action, the *prima facie* position is inapplicable and the court should either not allow the meeting to be held or invalidate the proceeding that took place without a valid quorum, as the case may be, and this was acknowledged by the judge: *Lim Yew Ming* at [52].

9.8 In *Lim Yew Ming*, the learned judicial commissioner had also said that while impracticability and the exercise of the court's discretion involved a two-stage approach, there was little to be gained by analysing both matters separately as there would often be an overlap in the matters going to both. A holistic assessment of all the factors going to both elements was therefore a better approach. This was not the position taken in *Naseer Ahmad Akhtar v Suresh Agarwal* [2015] 5 SLR 1032 ("*Naseer Ahmad Akhtar*") where the learned judicial commissioner, while recognising that there may be an overlap between the two elements, said that nevertheless the elements remained distinct and that it was preferable for analytical clarity that they be given separate treatment. It is suggested respectfully that this is the better approach.

9.9 As with *Lim Yew Ming*, it was held in *Naseer Ahmad Akhtar* that it was impracticable to conduct an EGM as such a meeting would have been inquorate because of the refusal of the other shareholders to attend. The learned judicial commissioner then went on to say that the fact that the application was being brought by a majority shareholder presented a *prima facie* case for relief under s 182 of the Act as minority shareholders should not ordinarily be allowed to block resolutions that are unfavourable to them. This is because shares are a specie of property and members should be entitled to exercise their voting rights in their own self-interest, a point also made in *Lim Yew Ming*. While this is correct, it is suggested that the better justification is that corporate law is premised on a strong default rule that favours majority rule and this is why s 182 should be applied in a manner that does not usually allow minorities to block the holding of meetings and thereby frustrate the will of the majority.

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9.10 The learned judicial commissioner accepted that if there was an agreement between the shareholders over how control of the company was to be allocated, s 182 could not be used to override such an agreement. She found, however, that there was never any such agreement and accordingly there was nothing to prevent the court from exercising its discretion in favour of the applicant.

9.11 One final aspect of this case that can usefully be noted is that s 182 applications may meet with the rejoinder that the court should not exercise its discretion because of wrongdoing or oppressive conduct on the part of the applicant. Indeed, this allegation was made by the defendants in *Naseer Ahmad Akhtar* and there was also an outstanding oppression action against the applicant. Such allegations are relevant because if they are established, the appropriate course of action may be for the court not to grant the s 182 application. However, it would seem unsatisfactory if s 182 applications developed into full-scale disputes revolving around whether there has been wrongdoing towards the company or oppression against minority shareholders. Such disputes are more appropriately resolved through either s 216A or 216 of the Act. The learned judicial commissioner therefore rightly took the view that short of situations involving clear cases of oppression (and, it is suggested, of wrongdoing against the company), the court should not normally deny the relief sought. The authors agree that this strikes the appropriate balance.

9.12 In *Lim Kok Wah v Lim Boh Yong* [2015] 5 SLR 307 ("*Lim Kok Wah*"), the issues revolved around the applicability of s 392 of the Act. The defendants sought to impugn a board meeting and an EGM on the basis that inadequate notice had been given. Vinodh Coomaraswamy J held that there were procedural irregularities involved in both meetings. In so far as the board meeting was concerned, the one-day notice given was unreasonably short and there was insufficient time for them to attend the meeting. As for the EGM, although the company's articles provided that at least seven days' notice for general meetings had to be given, this contradicted s 177(2) of the Act which provided for not less than 14 days' notice.

9.13 The next question then was whether the procedural irregularities caused any substantial injustice to the defendants. As regards the board meeting, the learned judge was satisfied that substantial injustice had been caused as the defendants could have taken other actions which were likely to have led to a different result. The defendants had submitted, *inter alia*, that if adequate notice had been given, they could have taken steps as the majority shareholders to remove some or all of the plaintiffs from the board or to seek injunctive relief after commencing an oppression claim against the plaintiffs in order to prevent the resolutions being passed.

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9.14 In relation to the EGM, Coomaraswamy J also held that substantial injustice had been caused as the absence of the defendants at the meeting allowed the resolutions to be passed. The combined effect of both procedural irregularities had to be taken into consideration as they led to two of the plaintiffs being elected to the board in the defendants' absence.

Corporate organs

9.15 In *Chan Siew Lee v TYC Investment Pte Ltd* [2015] 5 SLR 409, the Court of Appeal had the occasion to discuss the issue of reserve management powers that the shareholders in general meeting may have. The Court of Appeal agreed with the court below that the doctrine of shareholder reserve powers must be situated in the context of implied terms. Such a power should be implied because of necessity or business efficacy. The authors agree that this is a principled basis for the recognition of such power as an exception to the general default position that the business of the company is managed by the board of directors.

9.16 The Court of Appeal also agreed that as such shareholder powers are a matter of implication, their scope is narrow and arise only where the board is unable or unwilling to act. For example, reserve powers where they arise should ordinarily go no further than what is necessary to break the deadlock in management. As a general rule, the limitation in reserve powers may be found in two cumulative requirements: (a) the dispute must relate to the performance of a *bona fide* obligation owed by the company to a third party; and (b) there is no material suggesting that it will not be in the company's best interest to honour these obligations.

9.17 Given the deadlock at the board, the doctrine would *prima facie* be applicable. However, the deadlock had been brought about because of an agreement between the principal shareholders who used to be husband and wife and which was also made binding on the company. Thus, it was argued that the arrangements were intended to facilitate a deadlock (or veto right) such that certain payments could not be made without the consent of the principal shareholders who were also the directors of the company. Indeed, if this was the intention behind the provisions, the doctrine of reserve powers should not be applicable. However, the Court of Appeal said that whereas the payment clause seemed to have been devised to prevent either party from making payments in their personal interest out of the company's assets, it was invoked by the appellant to refuse various other payments. Given that it was not the purpose of such a clause to prevent *bona fide* payments to third parties, the court allowed most of the payments to be made save

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for the legal fees incurred in relation to a s 216A action against the appellant which the court felt was better determined in the context of those proceedings.

9.18 In addition, it is also noteworthy that the Court of Appeal rejected the argument that the availability of a statutory derivative action under s 216A made it unnecessary to imply any shareholder reserve powers. The Court of Appeal held that although s 216A may in certain circumstances diminish or displace the necessity for implying shareholder reserve powers, the scope of s 216A does not encompass many of the situations that implied shareholder reserve powers are necessary to resolve. As such, in this case, the Court of Appeal found (at [66]) that s 216A was not a bar to the use of implied shareholder reserve powers.

9.19 The authors welcome this authoritative statement from the Court of Appeal as to the proper basis for the reserve powers doctrine. The authors would also raise for future consideration by the court the question on whether the basis should be implication as a matter of law rather than implication in fact. This is because it is suggested that as a general rule, the doctrine of reserve powers exists within all companies except where it has been expressly excluded. While the scope of the reserve power will vary from case to case, the power is generally to be implied pursuant to the statutory contract that binds companies and its members *inter se*. Alternatively, the reserve power could be seen as part of the constitutional division of powers between the board and shareholders in general meeting in the sense that the general meeting in the absence of an effective board "has a residual authority to use the company's powers", presumably as the remaining functioning organ of the company: at [51], citing *Alexander Ward & Co v Samyang Co* [1975] 1 WLR 673 at 679. In any of the above explanations, the reserve power may be construed narrowly.

Directors' right to inspect documents

9.20 In *Lim Kok Leong v Seen Joo Co Pte Ltd* [2015] 1 SLR 688, Tan Siong Thye J (as he then was) noted pertinently that the right of a director to inspect the records of the company under s 199(3) of the Act imposed a mandatory obligation on companies to allow their directors to inspect corporate records. This was a right available to all directors regardless of whether they were active or "sleeping" directors. The company could only refuse to allow inspection if it could establish that allowing the inspection would be detrimental to the interests of the company. This was not established against the plaintiff director.

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9.21 The plaintiff had commenced the application under s 199 of the Act, both against the company and the other directors, and the learned judge held that the right could be invoked against directors of the company also. This is a useful clarification of the interpretation of s 199. In the absence of this decision, the authors would have preferred the contrary view, that is, that the application may only be brought against the company and that the sanction against officers of companies that do not comply is that they may be liable for prosecution under s 199(6) of the Act.

Fraudulent trading

9.22 In *M+W Singapore Pte Ltd v Leow Tet Sin* [2015] 2 SLR 271, Judith Prakash J said that for fraudulent trading under s 340(1) of the Act to be made out, it was necessary that the business of the company had to be carried on with an intent to defraud. It was not sufficient simply to show that individual creditors were defrauded. In any event, the plaintiff knew that the company would continue to incur some indebtedness in the course of completing the project. While the plaintiff did not expect money charged to it to be used to pay other debts, it did not ask about this and was content to rest on its security documentation. It is respectfully suggested that the decision is correct as it would be going too far to regard the wrongful use of charged assets *per se* as amounting to fraudulent trading.

Derivative actions

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

9.24 Under normal circumstances, this question is answered easily through the regular corporate decision-making process. Ordinarily, company law vests the board of directors with the power to make management decisions for the company: see s 157A of the Act and Art 77 of the First Sched of the Companies (Model Constitutions) Regulations 2015 (S 833/2015). As the decision to sue is a management decision, the board normally has the power to decide whether the

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company should sue the directors for breaching their duties. This makes sense because the board normally has the best available information about the company's potential lawsuit and board members are bound by their directors' duties to decide in the interest of the company whether the lawsuit should be pursued.

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

9.26 From the time of *Foss v Harbottle* (1843) 67 ER 189, Commonwealth courts have grappled with this intractable problem. Their solution has been to allow individual shareholders, in circumstances where such an acute conflict of interest arises, to pursue an action for and on behalf of the company against the wrongdoing directors – essentially circumventing the normal corporate decision-making process. These shareholder-driven corporate actions have come to be known as "derivative actions" because the shareholders pursuing them do not seek to enforce their own personal rights, but rather the company's rights (that is, rights "derived" from the company).

9.27 In this light, it is clear that derivative actions are essential for good corporate governance. Indeed, without them, directors' duties would essentially be rendered nugatory for all controlling shareholder-directors and largely ineffective for wrongdoing directors in companies with widely dispersed shareholders. It is, however, equally clear that by allowing a single shareholder to thrust an entire company into potentially harmful litigation, the derivative action presents serious corporate governance risks. These risks are heightened by the fact that individual shareholders do not normally owe any duties to the company, often lack critical information about the company's potential lawsuit and may be using the derivative action to serve their own interests – which can diverge, sometimes significantly, from the company's interests. It is in this context that common law courts have strived to develop an effective filter that both weeds out abusive, wealth-reducing, derivative actions and at the same time allows legitimate, wealth-maximising, ones to proceed.

9.28 The filter developed in Singapore and throughout the Commonwealth has been to require potential shareholder-plaintiffs to

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convince the court in a preliminary leave application that they should be granted the right to pursue a derivative action. Historically, in order to do this, potential shareholder-plaintiffs had to establish that the wrongdoing director committed "fraud on the minority" – a concept which is vexed with ambiguity and has often made derivative actions inaccessible even for aggrieved minority shareholders. To this day, the law in Singapore remains unsettled on the precise criteria for establishing "fraud on the minority": see *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 ("*Sinwa SS*") at [54]–[55].

9.29 In 1993, the problems with the "fraud on the minority" filter inspired the Singapore Parliament to enact a new statutory procedure – s 216A – which was designed to remove the obstacles created by the common law and, in turn, provide an effective remedy for aggrieved minority shareholders: see *Singapore Parliamentary Debates, Official Report* (14 September 1992) vol 60 at col 231. In the last decade, the UK and most other leading Commonwealth (and many civil law) countries have followed Singapore's lead and similarly provided for a statutory derivative action in their Companies Acts to facilitate the protection of aggrieved minority shareholders: for more details see *Derivative Actions in Asia: A Comparative and Functional Approach* (Dan W Puchniak *et al* eds) (Cambridge University Press, 2012) at p 2.

9.30 Until 2015, however, Singapore's statutory derivative action was idiosyncratic in that it did not apply to foreign-incorporated companies or companies listed on the Singapore stock exchange. As such, the common law derivative action – and, in turn, the much-criticised fraud on the minority test – still remained very much alive in Singapore: see, *eg*, *Sinwa SS* and *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR(R) 197 ("*Ting Sing Ning*"). On 1 July 2015, this idiosyncrasy was significantly reduced when s 146 of the Companies (Amendment) Act 2014 came into effect and thereby extended s 216A to all *Singapore-incorporated* companies – regardless of whether or not they are listed.

9.31 Unfortunately, however, the amendment did not extend s 216A to foreign-incorporated companies. As such, it appears that the common law derivative action – and, in turn, the much-criticised fraud on the minority test – will still have some relevance as it remains the only avenue for shareholders in foreign-incorporated companies to pursue a derivative action in Singapore. It is noteworthy that the possibility of shareholders in foreign-incorporated companies wanting to pursue a derivative action in Singapore is far from remote. In fact, Singapore's two leading cases on the common law derivative action were both brought by shareholders in foreign-incorporated companies: see, *eg*, *Sinwa SS* and *Ting Sing Ning*. As such, although the authors welcome the recent expansion of s 216A to all Singapore-incorporated companies, they respectfully suggest that Parliament should consider extending

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s 216A to cover all Singapore- and foreign-incorporated companies. This would reinforce Singapore's position as an international financial centre, put to rest the much-criticised fraud on the minority test, and allow Singapore's courts to fully focus on fine-tuning the application of s 216A to ensure its effectiveness.

9.32 Under s 216A, there are three requirements that every complainant – which includes a shareholder or any other person the court deems proper – must satisfy before leave will be granted to pursue a statutory derivative action: (a) the complainant must give 14 days' notice to the company's directors of her intention to bring the derivative action before commencing the application for leave; (b) the complainant pursuing the derivative action must be acting in good faith; and (c) it must appear to be *prima facie* in the interests of the company that the derivative action be brought. Although these three requirements are much clearer than the fraud on the minority test, for the s 216A filter to function effectively courts must provide detailed guidance on how each of these three requirements should be applied in practice.

9.33 In *Wong Lee Vui Willie v Li Qingyun* [2016] 1 SLR 696 ("*Wong*"), several acrimonious disputes arose between the company's two 50% shareholders, who were both also directors of the company and joint-signatories of the company's bank account. Spurred by this acrimony, one of the shareholder-directors ("the Complainant") brought an application under s 216A to commence an action on behalf of the company against the other shareholder-director ("the Defendant"). The core allegations supporting the Complainant's application were that the Defendant had mismanaged various aspects of the company and made secret profits at the company's expense.

9.34 The High Court found that the Complainant satisfied the notice and good faith requirements under s 216A. The court, however, rejected the Complainant's s 216A application on the ground that it did not appear to be *prima facie* in the interests of the company for a derivative action to be brought. In arriving at this decision, Aedit Abdullah JC articulated at least four key principles which, in the authors' respectful opinion, provide helpful guidance for effectively applying s 216A.

9.35 First, his Honour confirmed (at [28]) that the "objective of the notice requirement is to allow the company, through its board, to consider whether it wishes to pursue the action, and therefore obviate the need for any application under s 216A". His Honour went on to clarify that to achieve this objective, a contextual approach must be used to determine the precise level of disclosure required for proper notice in each case. The authors respectfully support this approach as the unique facts in every case naturally give rise to varying levels of disclosure that will be required so that the board can make an informed decision about

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whether the company should pursue the proposed action. In this case, the court ultimately found that no greater level of disclosure was required in the notice because the board consisted of the protagonists of the dispute, which left little uncertainty about what the dispute was about.

9.36 Second, his Honour helpfully clarified that this contextual approach for determining the level of disclosure required for notice – which resulted in a minimal level of disclosure in this case – was not in conflict with references in *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*") and *Lee Seng Eder v Wee Kim Chwee* [2014] 2 SLR 56 to the need for strict compliance suggested in the parliamentary debates on the introduction of s 216A. In so concluding, his Honour explained that the parliamentary debates mentioned "strict compliance" in the context of "the need to ensure that there be no abuse or unjustified court proceedings": *Wong* at [29]. As this case involved a deadlocked board, his Honour held that neither of these concerns were engaged.

9.37 The authors respectfully welcome this finding as it serves as a poignant reminder that the three requirements in s 216A should be strictly applied only to the extent that there is a real risk of abuse or unjustified court proceedings. This stands in stark contrast to suggestions that s 216A should be applied in the same strict manner that historically defined the common law approach (see Pearlie Koh, "Of Links and Legal Limits – Good Faith in the Statutory Derivative Action in Singapore" [2015] OUCLJ 225 at 235–236), which prioritised the prevention of frivolous claims over creating an effective remedy for aggrieved minority shareholders (see Paul Davies & Sarah Worthington, *Gower & Davies: Principles of Modern Company Law* (Sweet & Maxwell, 9th Ed, 2012) at para 17-5).

9.38 In this vein, it should be noted that the relevant parliamentary debates make clear that the primary impetus for introducing s 216A was to remove "the obstacles put in the way of such actions by the common law" and "provide more effective remedies for minority shareholders than existed at common law": see *Singapore Parliamentary Debates, Official Report* (14 September 1992) vol 60 at col 231. Indeed, such a facilitative approach towards s 216A appears justified given that there is scant evidence of systematic abuse of the statutory derivative action in the Commonwealth. Conversely, there is evidence that the high cost and risks of bringing a statutory derivative action have limited its effectiveness as a remedy for aggrieved minority shareholders, particularly in the UK: see Andrew Keay, "Assessing and Rethinking the Statutory Scheme for Derivative Actions under the Companies Act 2006" (2016) 16 JCLS 39 at 41.

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9.39 Third, his Honour appeared to accept the Complainant's argument that the good faith requirement in s 216A could be satisfied by providing "proof that there was a valid basis for the claim and that the application had not been brought only for personal motives, without any possible benefit accruing to the company": *Wong* at [6]. His Honour further appeared to accept the Complainant's argument that hostility between the parties was not indicative of a lack of good faith and that the good faith requirement could be satisfied even if the derivative action was pursued in furtherance of the Complainant's self-interest. Ultimately, in this case, after the primary evidence put forward by the Defendant for bad faith was expunged on the basis that it was privileged, the court found that the Complainant had satisfied the s 216A good faith requirement.

9.40 The authors respectfully welcome the clear limits that the court appears to have accepted on the good faith requirement. It seems obvious that the requirement must allow aggrieved minority shareholders to use s 216A to act in their own self-interest. If this were not the case, the statutory derivative action in Singapore would cease to be a remedy that minority shareholders could utilise to protect their interests – which would appear to be contrary to Parliament's intentions: see *Singapore Parliamentary Debates, Official Report* (28 May 1993) vol 61 at col 293. In a similar vein, surely the good faith requirement cannot require complainant-shareholders to be devoid of hostility towards defendant-directors. This would exclude almost all aggrieved minority shareholders – the primary constituency that s 216A was designed to protect – from pursuing a remedy under s 216A.

9.41 Fourth, his Honour helpfully provided a non-exhaustive list of three factors which the court might consider when determining whether the "interests of the company" requirement is satisfied under s 216A: (a) the costs and benefits of the proposed action; (b) the likelihood of success of any action; and (c) the availability of alternative measures: *Wong* at [50]. It was emphasised that when considering these and other possible factors the court should be mindful that complainants are often at an informational disadvantage and that evidence in such a leave application need not be fully tested. Ultimately, in this case, the court found that the allegations made by the Complainant only raised a suspicion that the Defendant might have breached his directors' duties such that bringing a s 216A derivative action did not appear to be *prima facie* in the interests of the company.

9.42 The authors respectfully support his Honour's attempt to identify three non-exhaustive factors for determining whether the "interests of the company" requirement under s 216A is met. It appears that these three factors succinctly capture the primary considerations that are normally relevant in determining whether bringing a s 216A

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derivative action would appear to be *prima facie* in the interests of the company. It should be noted that s 216A only requires the complainant to satisfy the court that the proposed derivative action *appears* to be *prima facie* in the interests of the company. This makes sense as requiring a complainant to prove on a *balance of probabilities* that bringing a derivative action *would* be in the interests of the company would essentially transform s 216A leave applications into full-blown trials – with the absurd result that successful complainants would be granted leave to essentially conduct the same trial all over again.

9.43 In *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2015] SGHC 145 ("*Petroships Investments*"), a 10% minority shareholder ("the Complainant") applied under s 216A for leave to bring a derivative action against the company's ("the Company's") directors, its ultimate holding company and other related companies. The core allegation supporting the Complainant's application was that the Company's directors had breached their duties by causing the Company to enter into wrongful transactions. In addition, the Complainant alleged that the Company's ultimate holding company and other related companies had wrongfully benefited from such transactions. After the Complainant served notice as required under s 216A – but prior to the leave application being heard – a special shareholders' resolution was passed which put the Company into members' voluntary liquidation. Ultimately, the liquidator declined to pursue the claims made in the Complainant's s 216A application, which precipitated the need for the application to proceed.

9.44 The Singapore High Court denied the Complainant's s 216A application on the ground that the Complainant was not acting in good faith by seeking to bring the derivative action because its purpose in doing so was to advance its own private interests rather than those of the Company. In addition, his Honour also rejected the application on the ground that the Complainant had failed to establish that bringing a derivative action would appear to be *prima facie* in the interests of the Company. This finding was based on the fact that the Company was in liquidation and, therefore, the liquidators – and not the directors or shareholders – were in the best position to determine whether to bring an action on behalf of the Company. In arriving at this decision, Vinodh Coomaraswamy J articulated at least four key principles which, in the authors' respectful opinion, provide useful guidance.

9.45 First, his Honour reiterated (at [172]) that in a s 216A application the onus is on the complainant to establish good faith. The authors find this clarification helpful as an earlier line of Singapore case law suggested that in some circumstances the court was entitled to assume that the complainant was acting in good faith (that is, there was no onus on the complainant to establish good faith). The Court of

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Appeal in *Ang Thiam Swee* (above, para 9.36) rejected this approach, citing the clear language of the Act and Parliament's concerns with the potential abuse of s 216A. As such, the court's articulation of the general principle that complainants have the onus to establish good faith appears to be on all fours with the Court of Appeal's current position.

9.46 With respect, however, it appears that in this case Coomaraswamy J may have added an additional gloss to the understanding of the burden of proof requirement for establishing good faith under s 216A. After clearly articulating the general principle that the complainant has the onus to establish good faith, his Honour went on to distinguish between what he coined a "tactical burden" as opposed to a "legal burden" of proof. His Honour opined that if a respondent does not put the complainant's good faith in issue then the court can for practical purposes assume that the complainant is acting in good faith. Moreover, if the defendant merely claims that the complainant lacks good faith without providing any evidence supporting such a claim, then it would be legitimate for the court to draw an inference of good faith from a finding that the "interests of the company" requirement under s 216A has been met. In this vein, his Honour held that "the respondent does bear, in a practical sense, a burden on the issue of good faith, but it is only a *tactical* burden" [emphasis in original] and not a "legal burden": *Petroships Investment* at [78].

9.47 From a broad policy perspective, the authors respectfully support this approach towards the good faith requirement in s 216A. Indeed, if a defendant does not put forward any evidence of a lack of good faith, it would not make sense to increase the cost and time of a s 216A application by forcing the complainant – usually an aggrieved minority shareholder – to prove good faith. This rationale would seem to be even stronger in cases where the court is satisfied that a derivative action appears to be *prima facie* in the interests of the company.

9.48 With respect, however, the authors query whether the distinction made between a "tactical burden" and "legal burden" is different enough to not offend the Court of Appeal's clear finding in *Ang Thiam Swee* that "the onus is on the applicant to establish good faith": *Ang Thiam Swee* at [23]. It is suggested that a complainant should, at a minimum, state in the affidavit in support of the application that the complainant is acting in good faith because, for example, the complainant believes that the proposed derivative action is in the interests of the company. If the defendant does not provide any evidence to rebut this and there is nothing else on the record that is suggestive of a lack of good faith, the legal burden may be regarded as established.

9.49 Second, his Honour helpfully derived the following interrelated, but non-exhaustive, two-part test for the s 216A good faith requirement

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from the Court of Appeal's decision in *Ang Thiam Swee*: (a) whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success; and (b) whether the applicant is seeking to bring the derivative action for such a collateral purpose as would amount to an abuse of process. His Honour stressed that in evaluating the second part of the test a distinction must be made between the "purpose" and "motive" of pursuing a s 216A derivative action. In this light, it should be recognised that a complainant may satisfy the good faith requirement even if the derivative action is "motivated by hostility, personal animosity or malice or even by self-interest in maximising the value of its shares so long as its purpose is to advance the interests of the company as a whole": *Petroships Investment* at [82]. In addition, his Honour made it clear that even if the complainant has a collateral purpose, good faith may still be established if the collateral purpose is sufficiently consistent with the purpose of doing justice to the company. However, when the complainant's judgment is so clouded by purely personal considerations that she is essentially abusing s 216A (and, in turn, the company) to achieve her own aims and interests, there will be no good faith.

9.50 The authors respectfully support the court's attempt to clearly demarcate the scope and limitations of the s 216A good faith requirement. However, it is worth noting that the use of good faith as a filter for determining whether a shareholder should be allowed to pursue a derivative action has been widely criticised across the Commonwealth: see Arad Reisberg, "Theoretical Reflections on Derivative Actions" (2006) 3 ECFR 69 at 101–103; Dennis Peterson & Matthew Cumming, *Shareholder Remedies in Canada* (LexisNexis, 2nd Ed loose-leaf, 2009) at para 16.39; and Lang Thai & Matthew Berkahn, "Statutory Derivative Actions in Australia and New Zealand: What Can We Learn from Each Other?" (2012) NZULR 370 at 376–379. Indeed, New Zealand and Hong Kong have chosen not to include good faith as an express requirement in their statutory derivative actions, both of which appear to be functioning without systematic abuse: see Lynne Taylor, "The Derivative Action in the Companies Act 1993: An Empirical Study" (2006) 22 NZULR 333 and David C Donald, *A Financial Centre for Two Empires: Hong Kong's Corporate, Securities and Tax Laws in Its Transition from Britain to China* (Cambridge University Press, 2014) at pp 202–203. Moreover, good faith is not a requirement in the UK but only one of several non-exhaustive factors that the court must take into account when determining whether to grant leave: see s 263(3) of the UK Companies Act 2006 (c 46).

9.51 Since Parliament explicitly included good faith as a requirement in s 216A in Singapore, his Honour's attempt to clearly define its scope and limitations is welcome. Indeed, taking this approach may help avoid the potential costs of using such a nebulous concept as a primary filter

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for determining if a complainant should be permitted to pursue a statutory derivative action. It is also in line with a growing body of recent literature that questions the increasing emphasis on the good faith requirement in Singapore: see Alan K Koh, "Searching for Good Faith in Singapore's Derivative Action: Much Ado about Something? *Wong Kai Wah v Wong Kai Yuan*, *Ang Thiam Swee v Low Hian Chor*" (2015) 36 Co Law 207 and Samantha S Tang, "Corporate Avengers Need Not Be Angels: Rethinking Good Faith in the Derivative Action (2016) JCLS (forthcoming). Ultimately, the authors respectfully suggest that Parliament should consider amending s 216A to replace the nebulous good faith requirement with a filter specifically designed to prevent idiosyncratic cases, which are in the interests of the company but nevertheless contrary to broader public policy, from proceeding (*eg*, in cases where the claimant is seeking double recovery, as in *Nurcombe v Nurcombe* [1985] 1 WLR 370).

9.52 Third, his Honour made clear that "once a company is put into liquidation the underlying rationale for a derivative action largely disappears": *Petroships Investment* at [157]. This makes sense since the liquidator is free from the acute conflict of interest situation that wrongdoing directors face, which is the foundational rationale upon which the derivative action has been built. In addition, liquidators are bound by legal duties to realise and distribute the company's assets, which include the power to bring an action in the company's name. Moreover, notwithstanding that the liquidator is an agent of the company, the liquidator acts to further the interests of its creditors who have the greatest interest in its assets: see Wee Meng Seng & Tan Cheng Han, "The Agency of Liquidators and Receivers" in *Agency Law in Commercial Practice* (Busch *et al* eds) (Oxford University Press, 2016) at p 124. To allow another person to bring an action against the company would be to usurp the liquidator's role. Finally, the liquidator is subject to the court's supervision, and there are mechanisms that creditors and shareholders can access to ensure that the liquidator fulfils her duties. As such, the authors respectfully agree with his Honour's finding that the liquidation process will normally obviate the need for the court to allow a derivative action to proceed as it would not be in the interest of the company to do so.

The oppression remedy

9.53 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

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significantly as it provides them with a substantive right (which does not exist at common law) to be treated in a manner that is commercially fair, even if doing so places restrictions on the *de facto* norm of majority rule in companies.

9.54 Historically, 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.

9.55 In *Lim Kok Wah* (above, para 9.12), a dispute arose as a result of a power struggle over a family business between two branches of the family, which were respectively composed of the children of the two wives of the deceased family patriarch who founded the business. Family-member-shareholders of one branch ("the plaintiffs") claimed that the conduct of the family-member-shareholders of the other branch ("the defendants") amounted to oppression. A central argument advanced by the plaintiffs was that the family companies were quasi-partnerships. Therefore, the plaintiffs claimed that the court should look beyond the strict legal rights of the parties to the informal or implied understandings between them, which they argued gave rise to legitimate expectations. On this basis, the plaintiffs claimed that they had legitimate expectations of participation in the management of the family companies and to sharing equally in the companies' profits. Ultimately, the plaintiffs alleged that, among other things, the defendants' acts of removing them from management and drawing an unfair share of the companies' profits amounted to oppression under s 216.

9.56 The High Court dismissed the plaintiffs' s 216 claim for oppression. In arriving at this decision, Coomaraswamy J made at least three important findings that potentially alter the scope of protection provided to minority shareholders in Singapore. First, his Honour suggested (at [102]) that "the starting point in establishing a claim based on minority oppression is not to show unfairness" but instead to "first show that the company in question is subject to equitable considerations". The authors respectfully suggest that this approach

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makes sense in cases such as this one, where the s 216 oppression claim is based on alleged breaches of informal and/or implied expectations that may give rise to a breach of legitimate expectations. Indeed, in such cases, equitable considerations must be invoked for the court to look beyond the confines of the parties' strict legal rights and obligations.

9.57 The authors note, however, that it must be remembered that the Court of Appeal has taken the view that s 216 should provide a remedy in cases where commercial unfairness arises as a result of clear breaches of the company's articles, a shareholders' agreement and/or the Act. There would be no need to resort to equitable considerations or legitimate expectations in such cases. Rather, such clear breaches of the law and/or legal rights fall squarely within the plain language of s 216, which is by definition a statutory – not equitable – remedy. This reasoning flows from the Court of Appeal's finding in *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 ("*Over & Over*") which held that relief under s 216 of the Companies Act flowed from breaches of legitimate expectations *and* legal rights of members: *Over & Over* at [78].

9.58 In this vein, the authors respectfully suggest that his Honour's approach of starting the s 216 inquiry by determining whether a company is subject to equitable considerations should be clearly understood as merely a starting point – but never an endpoint. Even if a company is found to be one in which equitable considerations do not apply, oppression may still be based on commercial unfairness arising from clear breaches of the company's articles, a shareholders' agreement and/or the Companies Act (that is, what is referred to in other Commonwealth jurisdictions as "illegality"). Such cases have come to define a significant body of successful oppression claims in Canada and other jurisdictions in the Commonwealth: see Dennis Peterson & Matthew Cumming, *Shareholder Remedies in Canada* (LexisNexis, 2nd Ed loose-leaf, 2009) at para 17.132. This is consistent with his Honour's observation (*Lim Kok Wah* at [106]) that:

> … if the member fails to show that equitable considerations are superimposed on the company, the measure of commercial unfairness is defined by the parties' legal rights and their legitimate expectations derived from and enshrined in the company's constitution.

9.59 Second, with respect, there appears to be an overlap between the factors used by the High Court to determine whether a company should be subject to equitable considerations and the factors used to determine whether a company is a quasi-partnership. Nevertheless, the High Court also makes it clear that the scope of companies to which equitable considerations may extend goes beyond quasi-partnerships: *Lim Kok Wah* at [106]. The authors respectfully support this view as the history and evolution of oppression throughout the Commonwealth suggest

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that it should be a flexible remedy with broad application. In other Commonwealth jurisdictions, oppression has been used effectively to remedy unfairness suffered by minority shareholders in a wide range of companies aside from quasi-partnership – even in large listed companies: see, for example, *Catalyst Fund General Partner I Inc v Hollinger Inc* (2006) 79 OR (3d) 288 and *Luck Continent Ltd v Cheng Chee Tock Theodore* [2013] 4 HKLRD 181. Although it was not required in this case, the authors would welcome a clear articulation of the main criteria that may be used to determine the types of companies and/or situations in which equitable considerations apply. This would be particularly helpful in cases not involving quasi-partnerships.

9.60 Third, in this case, the High Court held that neither of the family companies was a quasi-partnership. This finding was based largely on the fact that the founder of the companies was found to be an "autocratic patriarch": *Lim Kok Wah* at [111]. He solely decided whom to appoint as a director and when he or she should cease to be a director. In a similar vein, the patriarch's autocratic style created no expectation that anyone would be involved in managing the companies, unless it was at his behest. With respect, the authors agree with the High Court's reasoning that such autocratic behaviour is not indicative of companies built on mutual trust and confidence or the involvement of the shareholders in the management of the companies – which are the two primary key indicia of a quasi-partnership in Singapore. Moreover, in light of the Court of Appeal's narrowing of the indicia of quasi-partnerships in *Over & Over* at [94] (that is, by finding that the restriction on the transition of shares was not an indicia), the High Court's finding that the companies were not quasi-partnerships appears doctrinally sound.

9.61 With respect, however, it also appears that the precedent set by the High Court's finding may have deleterious implications for corporate governance in Singapore. At least anecdotally, a significant portion of companies in Singapore are run by patriarch founders with a penchant for autocratic governance. As such, this precedent may effectively exclude a large swath of Singapore's companies from most of the protection provided by s 216 as oppression in Singapore has largely been receptive to cases involving quasi-partnerships. This would provide reason for concern as most patriarch-governed companies are closely held companies in which minority shareholders have limited exit rights and few legal rights reduced to writing. Further, autocratically governed companies (even those led by respected patriarchs) are a potential source of minority abuse. With respect, the authors suggest that this reinforces the points above (at paras 9.57–9.59) that there may be value in the court expanding the scope of equitable consideration by clearly defining them beyond quasi-partnerships and reinforcing the

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principle that clear breaches of legal rights can give rise to a remedy under s 216 for oppression.

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