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9. COMPANY LAW

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Separate personality and veil piercing

9.1 In *Jhaveri Darsan Jitendra v Salgaocar Anil Vassudeva*[1] the High Court had for the first time to definitively deal with the question of reverse piercing of the corporate veil. Typical veil piercing (or "standard veil piercing", which was the term used by Kannan Ramesh J) takes place when a third party such as a creditor of a company seeks to hold a shareholder or director of that company liable for an obligation owed to such third party *by the company*. Reverse veil piercing on the other hand involves claims by a third party against a person who is also an insider of a company where such third party seeks relief not only against the insider but also against the company. Such reverse piercing is also known as outsider reverse piercing because it is the third party who is seeking veil piercing.

9.2 Another type of reverse veil piercing is where the insider (shareholder or director) seeks to pierce the veil by arguing that the insider and the company are one so as to allow the insider himself to bring a claim against a third party or obtain some other benefit that would otherwise inure to the company alone. A good example as pointed out by Ramesh J was the case of *Macaura v Northern Assurance Co Ltd*[2] where timber that had been sold by the plaintiff to a company

1 [2018] 5 SLR 689.
2 [1925] AC 619.

that he controlled was destroyed in a fire. As the plaintiff had insured the timber in his name after the sale of the timber, he sought to claim under the policy. For the plaintiff to have succeeded, it would have been necessary to identify him with the company so that he could claim under the policy for timber that was not his but the property of the company. As the court dismissed the claim on the basis that the plaintiff did not have an insurable interest in the timber having sold it to the company, any insider reverse piercing that was implicitly sought failed.

9.3 Standard veil piercing and outsider veil piercing share the similar characteristic of being claims brought by third parties against the company and the insider respectively, and it is argued that both the company and the insider are liable even though the obligation is from a strict legal point of view owed by only the company or the insider. Until recently there has been no distinction between both instances. For example, the case of *Gilford Motor Co Ltd v Horne*[3] involved an injunction being granted to both the company and the ex-employee of the plaintiff even though it was only the ex-employee who was subject to the restrictive covenant. The injunction was granted against the company despite the absence of any legal relationship between the plaintiff and the company as the company was being used as a vehicle by the ex-employee to evade his contractual obligation. It is suggested respectfully that caution should be exercised to ensure that the principles relating to such cases do not diverge materially.

9.4 As far as insider reverse piercing is concerned, Ramesh J formed the view that there was little Commonwealth authority to support such type of veil piercing. With respect, his Honour is clearly correct. As a matter of principle, such a notion of veil piercing is also difficult to justify. For instance, it subverts the "proper plaintiff" rule which recognises, as a major exception to the rule, that another person may sue on behalf of the company where there is either a "fraud on the minority" (the common law exception) or where the requirements of s 216A of the Companies Act[4] ("the Act") are met. One of the requirements for both is that the person seeking to sue on behalf of the company must not be in a position to control the company. Insider veil piercing would render this otiose.

9.5 Another significant veil piercing case was *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd*[5] which raised an issue that has not been settled. Although it involved typical outsider piercing, there is in Singapore law an outstanding issue whether in addition to abuse of the

3 [1933] Ch 935.
4 Cap 50, 2006 Rev Ed.
5 [2018] SGHC 264.

corporate form the law also endorses an independent "*alter ego*" ground to pierce the corporate veil. This is because the earlier decision of the Court of Appeal in *Alwie Handoyo v Tjong Very Sumito*[6] ("*Tjong Very Sumito*") held that the *alter ego* ground was separate from that based on sham or façade. The latter ground has been superseded by the concept of abuse as Vinodh Coomaraswamy J noted. However, his Honour considered himself bound to recognise *alter ego* as a separate and independent ground for veil piercing unlike the current position in England as established in *Prest v Petrodel*[7] ("*Prest*") where no such ground was recognised.

9.6 In *Prest*, Lord Sumption expressed the view that the concept of abuse underpinned veil piercing and that such abuse was made out by what he referred to as the principles of "evasion" and "concealment" (even if Lord Sumption did not think that concealment was a true case of veil piercing). *Tjong Very Sumito* was a case decided after *Prest* and although the Singapore Court of Appeal has since accepted the idea of abuse as a basis for veil piercing (for example, see *Goh Chan Peng v Beyonics Technology Ltd*),[8] it has not commented on the relationship between the *alter ego* ground and abuse.

9.7 It has been suggested that "concealment" includes *alter ego*.[9] As accepted by Coomaraswamy J, "*alter ego*" in the Singapore context is made out where the company is carrying on the business of its controller. On this basis, it is consistent with Lord Sumption's concealment principle. If indeed the company is carrying on the business of its controller, the controller is the true party to the transaction and the apparent involvement of the company is merely concealing such fact. Accordingly, it is suggested respectfully that Singapore courts should simply accept abuse of the corporate form as the foundational principle behind veil piercing which may be shown by particular acts such as evasion and concealment.

Appointment of directors

9.8 It was pointed out in *The Wellness Group Pte Ltd v Paris Investment Pte Ltd*[10] that it is commonplace for shareholders' and joint venture agreements to contain a provision entitling a shareholder to

6 [2013] 4 SLR 308.
7 [2013] 3 WLR 1.
8 [2017] 2 SLR 592. Other recent cases to this effect are *Ebony Ritz Sdn Bhd v Sumatec Resources Bhd* [2017] SGHC 282 and *Capital Springboard Ltd v Vangard Project Management Pte Ltd* [2018] SGHC 29 (both decisions of George Wei J).
9 Tan Cheng Han, "Veil Piercing: A Fresh Start" [2015] JBL 20.
10 [2018] 2 SLR 973.

nominate or appoint a person to the company's board of directors. In that case there was an implied term in the shareholders' agreement that the majority shareholders could appoint two persons to the board while the minority shareholder could appoint one. A dispute arose over the appointment of the person that the minority shareholder wished to appoint to the board. The Court of Appeal held that the minority shareholder's right to determine who its representative on the board would be was subject to two important caveats: namely, where the necessary elements for a valid appointment were not met (such as the nominee being under a disqualification from acting as a director); and when it is obvious that the nominee is not fit for office or that his appointment would be injurious to the company. It was for the board – to whom the power to appoint was given under the corporate constitution in question – to prove such unsuitability. In the absence of these caveats, there would be no basis for the board to reject the nomination.

9.9 Importantly, the Court of Appeal did not consider the enforcement of such a clause as amounting to a usurpation of the power of the board to appoint directors as given by the corporate constitution. This was, according to Steven Chong JA, because the board was still the appointing body even if it could not appoint whoever it wished if this was inconsistent with a valid nomination. Furthermore, in the shareholders' agreement it had been agreed that the terms of the agreement should prevail over the corporate constitution and the shareholders were obliged to remove any such conflict. Given that the agreement expressed the unanimous will of all the shareholders, there was no reason why it should not be given effect. In addition, such provisions can be specifically enforced. The authors welcome this practical and robust approach. Given that the shareholders' agreement was one entered into by all shareholders, it can be said that their unanimous agreement to the terms operate as a continuing informal resolution to alter the terms of the constitution where there is any inconsistency.

Shadow and *de facto* directors

9.10 In *Parakou Investment Holdings Pte Ltd v Parakou Shipping Pte Ltd*,[11] the Court of Appeal affirmed the decision of the High Court[12] that the test used to determine if persons not formally appointed to a board should be regarded as shadow directors was whether there was a discernible pattern of compliance with the shadow directors'

11 [2018] 1 SLR 271.

12 See *Parakou Shipping Pte Ltd v Liu Cheng Chan* [2017] SGHC 15.

instructions, and occasional departures from the pattern would not detract from this. To the argument that the said shadow director was merely a patriarch the court said that there was no reason why this and being a shadow director should be mutually exclusive. Indeed, the fact that the appellant in question was a patriarch suggested that he had the necessary influence that a shadow director requires.

9.11 On the issue of whether the president and vice-president of the plaintiff were *de facto* directors by virtue of the substantial authority they held in the company's affairs, the Court of Appeal also affirmed the High Court's decision that they were not. Although they were given wide authority to deal with the company's affairs, this came about because the board had passed resolutions to such effect. As their mandate flowed from an act of the board, this was indicative that they did not stand on the same footing as a director. With respect, it is suggested that this is plainly correct. If the plaintiff's argument had been accepted, almost every CEO and many other senior executive officers will by this fact alone be regarded as directors although not formally appointed to the board.

9.12 The touchstone of whether a person who has not been validly appointed to the board of a company is nevertheless a *de facto* director depends, as the Court of Appeal said in *The Wellness Group Pte Ltd v Paris Investment Pte Ltd*,[13] on whether such person has performed the duties of a director and was held out by the company as such. In making any such determination, the court will have regard to factors such as whether the person directed others; committed the company to major obligations; or participated on an equal level in collective decisions by the board. Other factors included whether the company held him out as a director; the extent of information he was privy to; and whether he had to make major decisions. The authors agree with this and the matter will no doubt have to be looked at holistically as many of these factors can be applicable to members of the senior management of companies, especially the CEO who is not appointed as a director. Steven Chong JA also went on to say that *de facto* directorship does not refer to a transitional category of persons who have been nominated as board members though not yet formally appointed. This was because the minority shareholder had argued that by virtue of its nomination of a particular person as its board nominee, such person should be regarded as a *de facto* director.

13 See para 9.8 above.

Directors' duties

9.13 It is clear that while directors generally owe fiduciary obligations only to their companies, in exceptional circumstances such duties may be owed to other persons. One well-established instance is where a company is insolvent or on the brink of insolvency, in which case the directors of such company will owe fiduciary duties to the company's creditors. In *Parakou Investment Holdings Pte Ltd v Parakou Shipping Pte Ltd*,[14] the Court of Appeal held that where directors of an insolvent company had made payments that amounted to an undue preference, this could amount to a breach of their duty to creditors of the company even if the clawback period for undue preferences had expired.

9.14 In *Ho Yew Kong v Sakae Holdings Ltd*,[15] the Court of Appeal took the opportunity to state that the fiduciary duties imposed on directors to act in the best interests of the company, not to make a profit from his fiduciary position, and not to put himself in a position of conflict, are distinct from the duty of care and skill imposed on directors. The latter, unlike the earlier duties, is not imposed to exact loyalty from a director and therefore does not meet the hallmark of a fiduciary obligation. The duty of care and skill is a common law duty and does not originate in equity.

Directors' right to inspect

9.15 In *Mukherjee Amitava v DyStar Global Holdings (Singapore) Pte Ltd*,[16] Sundaresh Menon CJ in the Court of Appeal reiterated that the right of a director to inspect documents within the ambit of s 199 of the Act was an almost presumptive one. A director need not have to demonstrate any particular ground for inspection and it was for the company, if it wished to resist the request, to show that access should not be granted because there was some abuse of process or privilege behind the request, such as when the director intended to use the right to inspect for purposes that were largely unconnected to the discharge of the director's duties.

14 See para 9.10 above.
15 [2018] 2 SLR 333.
16 [2018] 2 SLR 1054.

Oppression remedy

9.16 Until recently, most successful oppression cases under s 216 were in companies that courts deemed to be "quasi-partnerships".[17] In turn, until recently, failing to establish that a company was a "quasi-partnership" was considered to be near-fatal for a plaintiff-shareholder's oppression claim.[18] This has changed.

9.17 Cases involving companies that are *not* quasi-partnerships are becoming increasingly common; oppression claims in such cases often involve a traditional closely held family company dominated by an autocratic patriarch.[19] In such companies, the patriarch normally manages the company in a dictatorial style and is unaccountable to other shareholders, while grooming his eldest son to eventually succeed him.[20] This type of corporate governance environment normally lacks the two most important indicia that Singapore courts have held to be defining features of a quasi-partnership: *mutual* trust and confidence among the petitioner and the shareholders that are the subject of the oppression claim; and, the involvement of such parties in the company's management.[21]

9.18 The authors welcome the court's pragmatic approach of recognising the need for the oppression remedy to extend beyond quasi-partnerships – particularly to autocratic patriarch companies. As such companies are common in Singapore and are at risk of majority shareholder abuse, it is important that their minority shareholders are adequately protected.[22] In this vein, the authors respectfully support the Court of Appeal's decision in *Thio Syn Kym Wendy v Thio Syn Pyn*,[23] which affirmed the High Court's general finding that oppression relief

17 See, *eg*, *Sharikat Logistics Pte Ltd v Ong Boon Chuan* [2014] SGHC 224; *Lim Ah Sia v Tiong Tuang Yeong* [2014] 4 SLR 140; *Spectramed Pte Ltd v Lek Puay Puay* [2011] SGHC 43; *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776; *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745.

18 See, *eg*, *Lim Kok Wah v Lim Boh Yong* [2015] SGHC 211 (relief denied in family company that was not quasi-partnership); *Thio Keng Poon v Thio Syn Pyn* [2010] 3 SLR 143 (relief not granted for oppression petition in family company that was not quasi-partnership).

19 See, *eg*, *Lim Kok Wah v Lim Boh Yong* [2015] SGHC 211; *Thio Syn Kym Wendy v Thio Syn Pyn* [2017] SGHC 169.

20 Samantha S Tang, "Corporate Divorce in Family Companies" [2018] LMCLQ 19 at 24; *Lim Kok Wah v Lim Boh Yong* [2015] SGHC 211 at [114]–[115].

21 *Over & Over Ltd v Bonvest Holdings Ltd* [2010] 2 SLR 776 at [80]; *Lim Ah Sia v Tiong Tuang Yeong* [2014] 4 SLR 140 (quasi-partnership between some but not all of the shareholders); *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at 379; Samantha S Tang, "Corporate Divorce in Family Companies" [2018] LMCLQ 19 at 24.

22 (2015) 16 SAL Ann Rev 255 at 271–274.

23 [2018] 2 SLR 788.

should be granted in the case of an autocratic patriarch company that was held to not be a quasi-partnership.[24]

9.19 The Court of Appeal made three additional findings which have significant implications for the future of oppression in Singapore. First, the decision reaffirmed the High Court's finding – which comports with earlier jurisprudence[25] – that autocratic patriarch companies "would not usually constitute quasi-partnerships because of a lack of *mutual* trust and confidence" among the family shareholders.[26] This confirmation by the Court of Appeal reaffirms that cases involving autocratic patriarch companies will normally fall outside of the quasi-partnership category of cases that has, until recently, dominated the Singapore oppression remedy jurisprudence. It thus suggests that, in such cases, courts will consider different factors or approaches from those that have generally been adopted in the past to determine whether to grant relief for oppression under s 216.

9.20 Second, the Court of Appeal acknowledged *obiter* that even if the parties do not expressly set out their legitimate expectations, there may still be unwritten expectations that regulate shareholder conduct in traditional family companies. In this case, the court identified the particular unwritten expectations as: (a) the corporate controllers not being allowed to expend "corporate resources for personal reasons to punish other family members";[27] and (b) "that any benefits previously agreed upon between the family members should not be arbitrarily reduced or removed".[28] The first unwritten expectation suggests that in traditional family companies there may be some unwritten implied rules or a code of conduct that shareholders may be expected to follow – even though they were never explicitly stated or discussed between the parties. This appears to depart from the suggestion in an earlier case that all unwritten legitimate expectations – even in the case of traditional family companies – must be expressly communicated.[29] As the authors have explained elsewhere, in the context of a traditional family company it may be reasonable for the court to find that there are certain implied legitimate expectations about appropriate conduct by

24 *Thio Syn Kym Wendy v Thio Syn Pyn* [2017] SGHC 169 at [109].
25 See eg *Lim Kok Wah v Lim Boh Yong* [2015] SGHC 211 (relief denied in family company that was not quasi-partnership); *Thio Keng Poon v Thio Syn Pyn* [2010] 3 SLR 143 (relief not granted for oppression petition in family company that was not quasi-partnership).
26 *Thio Syn Kym Wendy v Thio Syn Pyn* [2018] 2 SLR 788 at [28].
27 *Thio Syn Kym Wendy v Thio Syn Pyn* [2018] 2 SLR 788 at [24].
28 *Thio Syn Kym Wendy v Thio Syn Pyn* [2018] 2 SLR 788 at [28].
29 *Thio Keng Poon v Thio Syn Pyn* [2010] 3 SLR 143 at [82] and [86]; (2010) 11 SAL Ann Rev 196 at 208–209.

family shareholders that may not always be explicitly communicated[30] – which appears to be the approach taken by the court in this case.

9.21 Third, the Court of Appeal observed *obiter* that its recognition of unwritten implied rules of conduct in this case "might be perceived by some as a widening conception of what constitutes minority oppression for traditional [autocratic patriarch] family companies".[31] However, the court explicitly left "open the question of whether recognising these unwritten implied expectations establish[ed] a new intermediate ***legal*** standard of conduct applicable to traditional family companies *or* merely constitute[ed] ***factual*** *instances* that do not carry any normative or legal significance as such"[32] [emphasis in italics and bold italics in original]. The court then emphasised that "whether an act constitutes oppression is, in the final analysis, a *fact*-specific inquiry"[33] [emphasis in original]. It further explained that as the parties in this case "were focused on the specific facts (as opposed to the larger legal principles)",[34] the case did not lend itself to determining whether a new legal standard for oppression in the context of traditional family companies should be established.

9.22 With respect, the authors appreciate the Court of Appeal's hesitation to establish a new legal standard for oppression in a case where the parties were focused narrowly on the facts. Indeed, as noted elsewhere, the High Court's well-reasoned decision in this case also did not provide a doctrinal basis for establishing a new legal standard or "code of conduct" for oppression in traditional family companies – which may have also flowed from the fact that the parties were focused narrowly on the facts (and not on larger legal principles).[35] This leaves open an avenue for plaintiff-shareholders in the future to propose a doctrinal and policy-based rationale for establishing a new legal standard or "code of conduct" for autocratic patriarch companies.

9.23 From a doctrinal perspective, establishing a new legal standard or "code of conduct" for autocratic patriarch companies flows from the clear articulation by the court that such companies will not normally be considered quasi-partnerships. As such, they now fall outside of the developed area of jurisprudence that has been used to provide a logical framework for evaluating, filtering, and setting a minimum standard of conduct in most of Singapore's oppression claims. As emphasised by the

30 *Thio Keng Poon v Thio Syn Pyn* [2010] 3 SLR 143 at [82] and [86]; (2010) 11 SAL Ann Rev 196 at 209.
31 *Thio Syn Kym Wendy v Thio Syn Pyn* [2018] 2 SLR 788 at [28].
32 *Thio Syn Kym Wendy v Thio Syn Pyn* [2018] 2 SLR 788 at [28].
33 *Thio Syn Kym Wendy v Thio Syn Pyn* [2018] 2 SLR 788 at [29].
34 *Thio Syn Kym Wendy v Thio Syn Pyn* [2018] 2 SLR 788 at [29].
35 (2017) 18 SAL Ann Rev 247 at 258–261.

Court of Appeal, it is clear that each oppression claim will ultimately be decided on the facts of each case.[36] However, the authors would respectfully suggest that there is a need for a doctrinal framework that responds to the factual realities of Singapore businesses and which continues the successful development of a highly nuanced and effective jurisprudence on oppression by Singapore courts over the past decade.

9.24 From a policy perspective, establishing a clear legal standard or "code of conduct" for traditional family companies is important as such companies are at the core of Singapore's economy, and doing so dovetails with Singapore's desire to be at the cutting-edge of good corporate governance.[37] Also, providing such a "code of conduct" would articulate a minimum standard of behaviour expected in traditional family companies, which would promote certainty and predictability in corporate governance – building blocks of a well-functioning business environment. Finally, as voiced elsewhere, "autocratically governed companies (even those led by respected patriarchs) are a potential source of minority abuse";[38] establishing a "code of conduct" would provide an effective prophylactic against such abuse.

9.25 Minority shareholders who are victims of "commercial unfairness" caused by majority shareholders have a personal remedy in s 216 of the Act. Conversely, s 216A is the means by which minority shareholders may take legal action on behalf of the company against those who have wronged the company in a situation where the company is unable to do so itself due to the inaction of those in control of the company. Conceptually, whereas s 216 redresses personal wrongs to the shareholder, s 216A deals with corporate wrongs to the company. However, in circumstances where the facts disclose both a personal wrong to the shareholder and a corporate wrong to the company, the shareholder is confronted with the dilemma of which one of the two statutory mechanisms should be used to pursue the claims. *Ho Yew Kong v Sakae Holdings Ltd*[39] is the Court of Appeal's attempt at offering an answer to this dilemma.

36 *Thio Syn Kym Wendy v Thio Syn Pyn* [2018] 2 SLR 788 at [29].

37 Dan W Puchniak & Luh Luh Lan, "Independent Directors in Singapore: Puzzling Compliance Requiring Explanation" (2017) 65 AJCL 265 at 296 (discussing the importance of family companies to Singapore); Meng Seng Wee & Dan W Puchniak, "Derivative Actions in Singapore: Mundanely Non-Asian, Intriguingly Non-American and at the Forefront of the Commonwealth", in *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak *et al* eds) (Cambridge University Press, 2012) at p 324.

38 (2017) 18 SAL Ann Rev 247 at 261.

39 [2018] 2 SLR 333.

9.26 Sakae Holdings Ltd brought a s 216 claim for oppression as the minority shareholder of Griffin Real Estate Investment Holdings Pte Ltd ("GREIH"). The core allegation in Sakae's oppression claim was that one of the directors of GREIH, who was also its indirect controlling shareholder (the "defendant-controlling-shareholder-director" or "DCSD"), caused GREIH to enter into multiple transactions that tunnelled significant wealth from GREIH to other entities controlled by the DCSD.[40]

9.27 The High Court found that Sakae had been oppressed and ordered that GREIH be wound up under s 216.[41] It also made restitution orders that required the DCSD and his accomplices ("the defendants") to pay back GREIH the amounts that it had lost as a result of the wealth tunnelling. These orders were made to ensure Sakae received fair value for its shareholdings on winding up (that is, the value of its shares prior to the defendants' tunnelling efforts).[42] Further, the High Court found that in the course of orchestrating the tunnelling transactions the defendants had breached their fiduciary duties owed to GREIH.[43] Importantly, the High Court rejected the defendants' argument that because the alleged wrongful acts were breaches of directors' duties owed to GREIH that they should be considered "corporate wrongs" and that therefore Sakae's claim could not be pursued under s 216 as it provides a remedy for "personal wrongs" suffered by shareholders (and not wrongs suffered by the company).[44]

9.28 On appeal, the defendants reasserted their claim that Sakae was not entitled to relief under s 216 because its oppression claim was based on "corporate wrongs" done to GREIH (and not "personal wrongs" done to Sakae as a shareholder).[45] They asserted that Sakae should have applied for leave under s 216A to commence a statutory derivative action to address these "corporate wrongs".[46] The Court of Appeal upheld the High Court's finding that the defendants' wrongful behaviour amounted to "personal wrongs" (not "corporate wrongs") and therefore could be properly pursued under s 216.[47]

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40 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [29]–[30].
41 *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd* [2017] SGHC 73 at [293], [316], [319], [322], [329]–[330] and [332].
42 *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd* [2017] SGHC 73 at [316], [319], [322], [329]–[330] and [332].
43 *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd* [2017] SGHC 73 at [52], [79], [101], [127] and [145].
44 *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd* [2017] SGHC 73 at [71]–[72].
45 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [32].
46 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [87].
47 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [127]–[129].

9.29 In arriving at this finding, the Court of Appeal made three helpful observations. First, it acknowledged that the distinction between a "personal wrong" and "corporate wrong" is not always clear.[48] This is compounded by the fact that "corporate wrongs" can be used as evidence of oppression in establishing a s 216 claim.[49] Second, the Legislature inserted the s 216A derivative action into the Companies Act in 1993 to provide minority shareholders with a tool to vindicate "corporate wrongs".[50] Therefore, pre-1993 oppression cases that deal with "corporate wrongs" should "be viewed with circumspection".[51] Third, there is the risk of minority shareholders abusing the s 216 oppression remedy because it can be pursued without the court's leave and it offers a much broader range of remedies than a s 216A derivative action.[52] In turn:[53]

> … the real concern in overlap cases is with plaintiffs improperly seeking to pursue an oppression action when a possible remedy under a statutory derivative action might not only be available but also be more appropriate.

Such abuse is particularly problematic because the s 216A's leave application process provides a "screening device" to ensure its proper invocation – such a "screening device" does not exist in s 216.[54] As such, the Court of Appeal concluded that:[55]

> … the key question to be addressed in overlap cases may be framed in these terms: is a plaintiff who brings an oppression action under s 216, instead of seeking leave to commence a statutory derivative action under s 216A, abusing the process?

9.30 Following these three observations and based on an in-depth survey of Singapore and Commonwealth authorities,[56] the Court of Appeal provided the following "analytical framework" for determining whether a s 216 oppression action – as opposed to a s 216A derivative action – should be allowed to be pursued:[57]

> (a) Injury
>
> (i) What is the real injury that the plaintiff seeks to vindicate?

48 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [115].
49 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [86].
50 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [85] and [115].
51 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [115].
52 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [89]–[90].
53 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [115].
54 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [115].
55 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [116].
56 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [80]–[122].
57 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [116].

(ii) Is that injury distinct from the injury to the company and does it amount to commercial unfairness against the plaintiff?

(b) Remedy

(i) What is the essential remedy that is being sought and is it a remedy that meaningfully vindicates the real injury that the plaintiff has suffered?

(ii) Is it a remedy that can only be obtained under s 216?

9.31 In applying the analytical framework to the facts, the court found that Sakae's oppression claim pertained to "personal wrongs" that were committed against it and were thus claims that were properly pursued under s 216.[58] It also found that the "real injury" which Sakae sought to vindicate was the injury to its investment in the joint venture and the breach of its legitimate expectations as to how the company's affairs generally and its financial investment in GREIH in particular would be managed.[59] Further, the court held that the essential remedy that Sakae sought – a winding up of GREIH or a buyout of Sakae's GREIH shares – offered the only way in which Sakae could exit the joint venture with as little loss as possible and vindicate the real injury it had suffered. It was found that those remedies were only available in an action under s 216.[60]

9.32 In addition, the court held that even though Sakae had asked for orders that a number of the defendants make payment to GREIH, those orders were necessary to ensure a fair value exit for Sakae.[61] Finally, the Court of Appeal overruled the High Court's finding that one of the defendants was liable for oppression under s 216.[62] It found that the defendant director did not breach his fiduciary duties by engaging in misappropriation of money from GREIH, but rather breached his duty of care and skill by negligently failing to make the necessary inquiries in his capacity as a non-executive director about the transactions that resulted in the misappropriation.[63] The Court of Appeal suggested that a director's breach of the duty of care and skill is unlikely to be evidence of oppression under s 216 unless the director benefited from the breach

58 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [124].
59 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [125].
60 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [128]–[129].
61 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [128]–[129].
62 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [132].
63 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [132]–[146].

and/or that the breach of the duty of care and skill was sufficiently serious to amount to commercial unfairness.[64]

9.33 The authors respectfully support the Court of Appeal providing an analytical framework to determine whether a minority shareholder should pursue a s 216 oppression claim or a s 216A derivative action in a given case. This is a significant advancement as now there is a more structured, logical, and rational process for courts to decide this vexed issue, which should increase the consistency and predictability of Singapore's minority shareholders' rights protection regime.

9.34 There are three noteworthy logical inferences derivable from the framework. First, it can be inferred from the framework that the oppression remedy will most often (if not always) only be appropriate in unlisted, closely held, companies.[65] It is unlikely in a listed company that a particular minority shareholder would suffer injury distinct from the other shareholders; rather, the injury suffered would likely be a decrease in share price that injures all shareholders equally. As a result, in listed companies the remedy sought would most likely be to address the decrease in share price by making the company whole again, and thus, a derivative action would be the most appropriate action for obtaining that remedy – at least in theory.[66] This result makes sense as allowing an oppression remedy in such a case would prejudice the minority shareholders who were not parties to the action. However, it should be noted that, to our knowledge, there is not a single reported decision involving a derivative action brought against a director of a listed company in Singapore[67] – even though s 216A was amended over

64 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [147]–[152].

65 It should be noted that oppression petitions involving listed companies have been successful in other Commonwealth jurisdictions. See, *eg*, *Catalyst Fund General Partner I Inc v Hollinger Inc* (2006) 79 OR (3d) 288; *Luck Contintent Ltd v Cheng Chee Tock Theodore* [2013] 4 HKLRD 181; see also discussion in (2015) 16 SAL Ann Rev 255 at 273.

66 Meng Seng Wee & Dan W Puchniak, "Derivative Actions in Singapore: Mundanely Non-Asian, Intriguingly Non-American and at the Forefront of the Commonwealth" in *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak *et al* eds) (Cambridge University Press, 2012) at p 324; Samantha Tang, "Why Do Shareholders Bring Derivative Actions? Clues from a Uniquely Singapore Experiment" Centre for Asian Legal Studies Working Paper (2018). There are empirical studies demonstrating that directors in listed companies are rarely (if ever) sued for breaches of duty in listed companies: see, *eg*, John Armour, "Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment" in *Rationality in Company Law* (John Armour & Jennifer Payne eds) (Hart Publishing, 2009) at pp 84–85 (in the UK); Jennifer Varzaly, "The Enforcement of Directors' Duties in Australia: An Empirical Analysis" (2015) 16 EBOR 281 at 312.

67 Dan W Puchniak & Umakanth Varrotil, "Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm" in *The Law and*

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four years ago to explicitly extend it to Singapore-listed companies.[68] Furthermore, the common law derivative action has always been available, but to the best of our knowledge unused in the context of Singapore-listed companies.[69] This is not in any way a critique of the Court of Appeal's "analytical framework", but rather raises a larger issue about the nature of Singapore's corporate governance regime and whether more should be done to facilitate private enforcement of minority shareholders' rights in listed companies through proper legal means.[70]

9.35 Second, it can be inferred from the framework that, in cases where a controlling-majority-shareholder-director benefits through breaching their directors' duties in a closely held company, a s 216 oppression remedy will likely be appropriate. In such cases, although on a theoretical level the breaches of directors' duties injure only the company, in reality they are normally committed for the purpose of enriching the controlling-shareholder-director at the expense of the minority shareholders.[71] As such, the "real injury" that the plaintiff-minority-shareholders seek to vindicate are their personal injuries, which amount to commercial unfairness. In addition, in such cases, a derivative action is normally an insufficient remedy because even if the action is successful, the damages would be paid back into a company that remains under the control of the wrongdoing director who could prevent any benefits from flowing to the aggrieved minority

Finance of Related Party Transactions (Luca Enriques & Tobias Tröger eds) (Cambridge University Press, forthcoming), citing Samantha Tang, "Why Do Shareholders Bring Derivative Actions? Clues from a Uniquely Singapore Experiment" Centre for Asian Legal Studies Working Paper (2018). In *Chua Swee Kheng v E3 Holdings Ltd* [2015] SGHC 22, the plaintiff shareholder applied for leave *after* the company had been delisted.

68 Companies (Amendment) Act 2014 (Act 36 of 2014) s 146(*a*). The amended provisions on the statutory derivative action came into force on 1 July 2015: Companies Amendment Act 2014 (Commencement) Notification 2015 (S 354/2015) s 2.

69 Meng Seng Wee & Dan W Puchniak, "Derivative Actions in Singapore: Mundanely Non-Asian, Intriguingly Non-American and at the Forefront of the Commonwealth" in *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak *et al* eds) (Cambridge University Press, 2012) at p 324; Samantha Tang, "Why Do Shareholders Bring Derivative Actions? Clues from a Uniquely Singapore Experiment" Centre for Asian Legal Studies Working Paper (2018).

70 Meng Seng Wee & Dan W Puchniak, "Derivative Actions in Singapore: Mundanely Non-Asian, Intriguingly Non-American and at the Forefront of the Commonwealth" in *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak *et al* eds) (Cambridge University Press, 2012) at pp 354–355.

71 Markus Koehnen, *Oppression and Related Remedies* (Thomson Carswell, 2004) at pp 448–449.

shareholders. Further, in a small closely held company, all of the minority-shareholders would likely be parties to the action, obviating the risk of possible unfairness arising from oppression relief in a given case that excludes one or more aggrieved shareholders. As such, providing an exit remedy for the minority shareholders in a s 216 oppression action would be the only way to effectively vindicate the "real injury".

9.36 Third, it can be inferred from the framework that it is unlikely that a minority shareholder will succeed in an oppression claim solely based on a director's breach of their duty of care and skill.[72] Normally, when a director is negligent, the company is harmed as a whole, and the injury is suffered equally by all shareholders as a result of a decrease in the value of their shares – making the appropriate remedy a derivative action. However, a possible exception to this may be when a controlling-shareholder-director inadvertently benefits from their negligence (for example, their negligence results in the company selling one of its assets to the controlling-shareholder-director at below market value). In such a case, the injury could be seen as uniquely impacting the minority shareholder and serve as evidence of commercial unfairness, which in turn suggests that oppression may be an appropriate remedy. However, in such a case, assuming that the negligent act was the sole basis for the claim, it may be argued that a derivative action would completely remedy the harm done as it would result in the controlling shareholder making the company whole – there would be no need for a buyout or winding up under s 216, provided that the negligence was a one-off act and the parties are willing to continue working together.[73]

9.37 As a final point, the authors respectfully query whether it was necessary for the Court of Appeal to take the position that pre-1993 oppression cases dealing with "corporate wrongs" should "be viewed with circumspection".[74] The rationale supporting this view is that it was only after the implementation of the statutory derivative action in 1993 that there was a viable mechanism available to minority shareholders to vindicate harm they may have (indirectly) suffered through corporate wrongs. However, with respect, one must remain cognisant of the fact that the common law derivative action – which is still very much alive in Singapore and has been applied to foreign incorporated companies[75] –

72 This is consistent with UK jurisprudence: see, *eg*, *Re Saul D Harrison & Sons plc* [1994] BCC 475; [1995] 1 BCLC 14 at 31; *Re Sam Weller & Sons Ltd* (1989) 5 BCC 810; [1990] Ch 682 at 694.

73 However, given the costs and tensions that arise from litigation, this may be more theoretical than realistic.

74 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [115].

75 *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR(R) 197; *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1; (2015) 16 SAL Ann Rev 255 at 263–264. The

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has existed since at least the founding of Singapore. As such, it would seem that pre-1993 cases, while perhaps now being seen in a somewhat different light, should not be doubted in their entirety.

Just and equitable winding up

9.38 *Foo Peow Yong Douglas v ERC Prime II Pte Ltd*[76] ("*Foo Peow Yong*") was a just and equitable winding-up proceeding instituted in the wake of *Ho Yew Kong v Sakae Holdings Ltd* discussed above[77] ("the *Sakae* proceedings"). The winding-up petition involved the following investment vehicles: ERC Prime II ("ERCP II") and Griffin Real Estate Investment Corporation Pte Ltd ("GREIC"), the majority shareholder (parent) of GREIH.[78] In the *Sakae* proceedings, the Court of Appeal had found that the DCSD of GREIH, and his associate (one Ong HB) had, as directors of GREIH, acted oppressively against the minority shareholders of GREIH. The appropriate relief was the winding up of GREIH.[79] Following the *Sakae* proceedings, criminal charges were brought against the DCSD and Ong HB, and Ong HB was disqualified from holding any directorships. As Ong HB was a director of ERCP II and GREIC, one of his associates was appointed as director in his stead.[80] The plaintiff-minority-shareholders applied for a just and equitable winding up of ERCP II and GREIC on the ground that they had lost confidence in the management of these two companies by the associates of the DCSD and Ong HB following the *Sakae* proceedings and related events.[81]

9.39 The Court of Appeal granted the winding-up applications. The court observed that the plaintiffs could not rely on the court's findings in the *Sakae* proceedings to show that the DCSD and Ong HB must have acted in a similarly unfair and oppressive fashion towards the shareholders of ERCP II. The court reasoned that this was the case given that the business of ERCP II was entirely separate and distinct from GREIH.[82] However, the Court of Appeal went on to find that the plaintiffs' loss of confidence in ERCP II's management was justified due to a share option granted by Ong HB during his tenure as director in

authors reserve comment on the validity of this approach as a matter of private international law.

76 [2018] 2 SLR 1337.

77 *Foo Peow Yong Douglas v ERC Prime II Pte Ltd* [2018] 2 SLR 1337 at [20] and [42].

78 *Foo Peow Yong Douglas v ERC Prime II Pte Ltd* [2018] 2 SLR 1337 at [4] and [16].

79 See the discussion on *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at paras 9.25–9.37 above.

80 *Foo Peow Yong Douglas v ERC Prime II Pte Ltd* [2018] 2 SLR 1337 at [19]–[20].

81 *Foo Peow Yong Douglas v ERC Prime II Pte Ltd* [2018] 2 SLR 1337 at [33] and [36].

82 *Foo Peow Yong Douglas v ERC Prime II Pte Ltd* [2018] 2 SLR 1337 at [55].

favour of a company controlled by the DCSD, which was clearly unfair and oppressive towards ERCP II's minority shareholders.[83] Even though Ong HB was replaced as a director, the circumstances in which his close associate was appointed as his replacement buttressed the plaintiffs' loss of confidence.[84] Turning to GREIC, the court held that the adverse findings against Ong HB in the *Sakae* proceedings justified the plaintiffs' loss of confidence in management given the close nexus between GREIC and GREIH. The criminal charges brought against the DCSD and Ong HB similarly contributed to the plaintiffs' loss in confidence.[85] As with the ERCP II petition, the appointment of Ong HB's associate as a replacement director did not in any way salve the plaintiff's loss of confidence.[86] Further, the court declined to make a buyout order in favour of the plaintiffs, given that none of the plaintiffs had sought a buyout order, and a significant number of shareholders in ERCP II and GREIC were unrelated to the plaintiffs or the misbehaving directors.[87]

9.40 *Foo Peow Yong Douglas*[88] demonstrates the utility of a flexible approach to the "loss of confidence in management" basis of just and equitable winding up in the context of complex corporate group structures, which are ubiquitous in sophisticated economies such as Singapore's. Where a manager's acts or conduct in one entity within a corporate group is impugned, it is only reasonable for shareholders of other entities in the group to lose confidence in the impugned managers and their associates generally. Business expectations and confidence naturally and inevitably transcend the boundaries of corporate legal personality.

9.41 As such, the authors respectfully applaud the Court of Appeal's pragmatic approach to the GREIC winding-up petition, where managerial misconduct in theoretically separate (but which in reality are closely related) companies is taken into consideration for minority shareholder relief. This is in line with Singapore shareholder oppression jurisprudence in the corporate group context, which takes into account the affairs of related companies in determining whether the minority shareholder has been oppressed.[89] The authors also respectfully agree

83 *Foo Peow Yong Douglas v ERC Prime II Pte Ltd* [2018] 2 SLR 1337 at [50]–[51].
84 *Foo Peow Yong Douglas v ERC Prime II Pte Ltd* [2018] 2 SLR 1337 at [58].
85 *Foo Peow Yong Douglas v ERC Prime II Pte Ltd* [2018] 2 SLR 1337 at [70]–[72].
86 *Foo Peow Yong Douglas v ERC Prime II Pte Ltd* [2018] 2 SLR 1337 at [73].
87 *Foo Peow Yong Douglas v ERC Prime II Pte Ltd* [2018] 2 SLR 1337 at [46].
88 See para 9.38 above.
89 *Lim Chee Twang v Chan Shuk Kuen Helina* [2010] 2 SLR 209; Alan K Koh, "(Non-)Enforcement of Directors' Duties in Corporate Groups" (2018) 81 MLR 673 at 684–685; see also Zhong Xing Tan, "Unfair Prejudice from Beyond,

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with the Court of Appeal's approach to the ERCP II petition, where the court drew a careful distinction between the affairs of GREIH and ERCP II, which appeared to operate as separate businesses. In so far as the business affairs of GREIH had no bearing on the operations of ERCP II, it would not have been reasonable to take into account the *Sakae* proceedings[90] in determining the merits of the ERCP II petition.[91] The winding up of ERCP II was nonetheless justified given the lack of probity in the activities of Ong HB and his associates.[92]

9.42 As to the relevance of a share buyout under s 254(2A), the authors note that the court's decision is amply justified by the fact that none of the plaintiffs sought buyout relief,[93] but are optimistic that Singapore courts will keep an open mind as to the appropriateness of such relief in corporate groups. The authors suggest that s 254(2A) relief may be particularly useful in the corporate group context where winding up a single entity in a complex group structure may have unpredictable and undesirable impact on the overall business operations of the group.[94]

Beyond Unfair Prejudice: Amplifying Minority Protection in Corporate Group Structures" (2014) 14 JCLS 367.

90 See paras 9.25–9.37 above.

91 *Foo Peow Yong Douglas v ERC Prime II Pte Ltd* [2018] 2 SLR 1337 at [55].

92 *Foo Peow Yong Douglas v ERC Prime II Pte Ltd* [2018] 2 SLR 1337 at [50]–[51] and [58].

93 *Foo Peow Yong Douglas v ERC Prime II Pte Ltd* [2018] 2 SLR 1337 at [46].

94 The authors are grateful to Alan K Koh for his helpful feedback on our analysis of the cases on the oppression remedy and just and equitable winding up.