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# 9. COMPANY LAW

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## I. Corporate veil

9.1 Although the validity of the doctrine of veil piercing is increasingly being challenged in England, it remains the position that while a company is a legal person and therefore separate from its shareholders and directors, the court may in exceptional circumstances pierce the corporate veil and treat a company's shareholders and/or directors as being one and the same with the company for limited purposes. The company does not in such cases lose its legal personality but, in relation to particular transactions or facts, the company and its shareholders and/or directors are treated as being equivalent.

9.2 Unlike English law, the Singapore Court of Appeal has recognised the *alter ego* ground as one instance in which the corporate veil may be pierced.[2] There has been little explanation of this ground, though, and it has been suggested that it can be understood in one of four alternative

1 The authors thank Darrick Poh for able research assistance and Samantha Tang for her comments on earlier drafts.
2 *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308.

ways.[3] In *Commodities Intelligence Centre Pte Ltd v Mako International Trd Pte Ltd*,[4] Lee Seiu Kin J in the General Division of the High Court ("High Court (General Division)") observed that in Singapore the scope of the *alter ego* ground and therefore veil piercing has not been settled. Nevertheless, the consistent view has been that the doctrine should only be applied in limited circumstances. After considering the evidence, his Honour said it was not at all clear that the company was carrying on the personal business of its purported controllers. Accordingly, it would not be appropriate to pierce the corporate veil on the *alter ego* ground.

## II. Directors' duties

9.3 A number of cases on directors' duties arose in the course of the year. Many of them turned on findings of fact.[5] In some instances, such as *Beyonics Asia Pacific Ltd v Goh Chan Peng*[6] and *Cheong Hong Meng David v Sim Irene*,[7] the director preferred the interests of others or himself over those of the company. In another, *OOPA Pte Ltd v Bui Sy Phong*,[8] the facts involved the (unfortunately) fairly typical case of a director who diverted a business opportunity properly belonging to the company to the director or others associated with the director. In this case, Philip Jeyaretnam JC in the High Court (General Division) found that the director had diverted a maturing business opportunity that the company was actively pursuing to another person with whom the director was associated. While the facts found by his Honour lent ample support to the existence of a maturing business opportunity and not merely an idea as contended by the defendant director, it is submitted that in appropriate circumstances, even an idea at the exploratory stage would suffice to preclude a director from developing the idea for the director's own benefit. Indeed, even if a company was unaware of a potential business opportunity, a director who has come to know of such

3 Yeo Hwee Ying & Ruth Yeo, "Revisiting the *Alter Ego* Exception in Corporate Veil Piercing" (2015) 27 SAcLJ 177. One of the four possibilities is that the *alter ego* ground is similar to what was described in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 at [28] as the "concealment" principle. This is the position suggested in Tan Cheng Han SC, "Some Current Issues in Singapore Corporate Law" (2019) 31 SAcLJ 1008.

4 [2022] 5 SLR 837.

5 See, *eg*, *Shandong Qixia Shida Fruits Refrigeration Co, Ltd v Yong Zeng Yuan Pte Ltd* [2022] SGHC 48; *Bit Baltic Investment & Trading Pte Ltd v Wee See Boon* [2022] SGHC 110; *Baker, Samuel Cranage v SPH Interactive Pte Ltd* [2022] SGHC 238; *True Yoga Pte Ltd v Wee Ewe Seng Patrick John* [2022] SGHC 155; *Darco Water Technologies Ltd v Thye Kim Meng* [2022] SGHC 49; and *Dways International Pte Ltd v Lim Seow Hui Ratna Irene* [2022] SGHC 158.

6 [2022] 1 SLR 1.

7 [2022] SGHC 72.

8 [2022] 4 SLR 537.

opportunity may usually not take advantage of it without first bringing it to the company's attention and obtaining the company's fully informed consent to do so.[9]

9.4 A similar breach of fiduciary duty took place in *Wei Fengpin v Raymond Low Tuck Loong*[10] ("*Wei Fengpin*") where the director in question diverted business away from the company and attempted to undercut it. The director attempted to rely on *Tokuhon (Pte) Ltd v Seow Kang Hong*[11] ("*Tokuhon*") to argue that the circumstances justified his acts so that there was no breach of duty. The Court of Appeal firmly rejected this argument, pointing out the exceptional circumstances in *Tokuhon* where the conflict between the shareholders was well known to the outsider and that all the shareholders had divulged confidential information to this third party. This demonstrated that each of the shareholders regarded such conduct as fair game and acceptable. It was the norm in that case but there was no such evidence of such a norm in *Wei Fengpin*. The present case also did not involve any expulsion of the director that might have justified him setting up a competing business to earn a livelihood.

9.5 A less typical instance of breach of fiduciary duty arose in *Lim Oon Kuin v Ocean Tankers (Pte) Ltd*,[12] where the Court of Appeal reiterated the position that where a company's solvency was in question, its directors have a duty to consider the interests of creditors rather than shareholders. It is not necessary for a company to be technically insolvent for this to arise. A strict and technical application of the "going concern" and "balance sheet" tests are of limited utility, and it is sufficient if:[13]

> … the company is in fact financially imperilled at the material time. The purpose of such a broad-based assessment is to prevent errant directors of a company from relying on the technical balance sheet and/or cash flow tests to escape liability for their breaches of duties in relation to the interests of the company's creditors. … '[A]s long as there are reasons to be concerned that the interests of creditors are or would be at risk because of difficult financial circumstances, the directors ignore those interests at their peril'.

In the present case, the Court of Appeal agreed with the court below that various payments had been made at a time when the company was insolvent or near insolvent, or at the very least in a parlous financial

9 *Queensland Mines Ltd v Hudson* [1978] 18 ALR 1, where the facts were that the company had chosen deliberately to forgo the opportunity.
10 [2022] 2 SLR 363.
11 [2003] 4 SLR(R) 414.
12 [2022] 1 SLR 434.
13 *Lim Oon Kuin v Ocean Tankers (Pte) Ltd* [2022] 1 SLR 434 at [12].

position. The directors who approved such payments had therefore breached their fiduciary duties.[14]

9.6 The factor of the company being in a parlous financial state was also relied on in *OP3 International Pte Ltd v Foo Kian Beng*[15] where the High Court (General Division) rejected the argument that the duty for directors to consider the interests of creditors only applied when the company was on the verge of insolvency, a situation that was more severe than being in a parlous financial situation. In determining whether a company is financially parlous, Hoo Sheau Peng J said that a practical and broad assessment of the financial health of the company should be undertaken. In this regard, contingent liabilities can be taken into consideration and the nub of the matter is whether any such liability is reasonably likely to materialise.

## III. Shares

9.7 In *Portcom Pte Ltd v Verrency Group Ltd*,[16] Philip Jeyaretnam JC in the High Court (General Division) opined that, for the purpose of determining if the 90% threshold for s 215(1) of the Companies Act 1967[17] ("the Act") had been reached, the convertible notes that had been issued by the company could not be regarded as units of shares within s 215(8A) of the Act, which defines "shares" as including "units of shares". Section 4(1) of the Act defines the word "unit", in relation to a share, as meaning any right or interest in the share by whatever name called and includes any option to acquire any such right or interest in the share. In the present case, the convertible notes did not have a conversion price. Accordingly, in the absence of a mechanism or formula to fix the conversion price, the convertible notes could not be regarded as an option to acquire a right or interest in a share since in the event of a disagreement the right to convert would not be exercisable. An agreement to agree was not enforceable.

## IV. Wrongs against companies

9.8 In *Bhavin Rashmi Mehta v Chetan Mehta*,[18] Valerie Thean J in the High Court (General Division) reiterated the reasons behind the proper plaintiff rule, also known as the rule in *Foss v Harbottle*,[19] that

14 *Lim Oon Kuin v Ocean Tankers (Pte) Ltd* [2022] 1 SLR 434 at [13].
15 [2022] SGHC 225.
16 [2022] SGHC 97.
17 2020 Rev Ed.
18 [2022] SGHC 173.
19 (1843) 2 Hare 461.

disallows shareholders from bringing claims for wrongs perpetrated against companies. Her Honour then went on to state that in certain circumstances, the Act provides members with personal rights and in such circumstances, the proper plaintiff rule is inapplicable. Two such provisions that were the subject of the present case were ss 399 and 409A of the Act. In the court's view, both provisions were inapplicable to the facts. The provisions do not apply to any case where there is wrongdoing, improper conduct or irregularity in relation to a company. They only apply where such wrongdoing, improper conduct or irregularity contravenes the Act in the manner specified within the provisions. It must be said that this is clear from the language of the provisions. If the provisions were to have the effect contended for by the applicant, clear language must be used because it would effectively sweep away the proper plaintiff rule.

9.9 The applicant also relied on s 39 of the Act, which provides that the corporate constitution is a statutory contract between the company and its shareholders and between the shareholders *inter se*. Thean J held that s 39 of the Act merely states the effect of the corporate constitution and does not impose a statutory obligation to obey its terms. As such, even if the constitution had not been adhered to, there would not have been a contravention of the Act for the purposes of ss 399 and 409A of the Act. It may also be pointed out that if a member of a company wishes to argue that the corporate constitution had not been complied with, the member would only be entitled to relief if they can establish that the constitutional provision in question was one that affected them in their capacity as a member. This is known as the "*qua* member" rule.[20] If the fact of breach and that such breach affected the member in such capacity has been established, they may bring a claim in their personal capacity. There need be no reliance on ss 399 or 409A of the Act to do so.

## V. Oppression

9.10 This segment will introduce two High Court (General Division) judgments that have contributed, through their clarity and soundness, to the maintenance of the utility of s 216 of the Act as the most popular shareholder remedy in Singapore.

9.11 The perception of the oppression remedy as a costly mechanism for remedying has led to the development of a draconian judicial practice by which a claimant's oppression claim would be struck out at the defendant's application if the defendant had made an offer to buy out the claimant's shares that satisfied certain conditions. *Kroll, Daniel v*

20 *Hickman v Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch 881.

*Cyberdyne Tech Exchange Pte Ltd*[21] ("*Kroll*") concerned an oppression defendants' striking-out application brought against an oppression claim after a buyout offer made by the defendants was refused. The claimant shareholder and one-time director commenced the oppression action on the grounds that his shares in the defendant company were wrongfully diluted, and that certain legitimate expectations as a minority shareholder were breached.[22] The claimant sought a declaration of invalidity with respect to resolutions passed at an extraordinary general meeting ("EGM") that diluted his shareholdings and modified his shareholders' rights; restoration of the claimant's shareholdings to the position prior to the EGM and purchase by the defendants (the company and co-shareholders of the claimant) of the restored shareholdings at a price that they would have been worth but for the oppression; or winding up of the defendant company plus monetary compensation.[23]

9.12 After commencement of the lawsuit, the defendant shareholders made proposals to buy out the claimant's shares under two alternative bases of valuation. The claimant rejected the offer and sought disclosure of documents relevant to the defendant company's valuation, but indicated willingness to consider settlement after discovery. Four days after the claimant's rejection of the buyout proposal, the defendants applied to strike out the oppression claim on the basis of the claimant's refusal of the proposal.

9.13 After an extensive survey of relevant English, Hong Kong, and local decisions on post-fair offer striking out of oppression claims,[24] Mavis Chionh Sze Chyi J held that an "offer [that] would give the minority shareholder all that he could reasonably expect to obtain from a minority oppression claim … should generally be accepted".[25] Her Honour stated that it would only be an abuse of process (and hence grounds for striking out)[26] where the rejected offer would have "give[n] the plaintiff all he could reasonably expect to obtain upon succeeding at trial" and "render[ed] the suit *completely unnecessary*" [emphasis in original].[27]

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21 [2022] SGHC 231.

22 These expectations included no unfair dilution; legally and contractually compliant conduct of the company's affairs; fair treatment; share issuances; pre-emption rights; notices and conduct of general meetings; and legally compliant conduct of business: *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [43]–[44].

23 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [46].

24 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [97]–[126].

25 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [127].

26 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [74](a) and [134], citing O 18 r 19(1)(*d*) of the Rules of Court (2014 Rev Ed). On discussion of the current rule in O 9 r 16(1)(*b*) of the Rules of Court 2021, see para 9.18 below.

27 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [134].

9.14 Building on this principle and the cases surveyed, Chionh J laid down a two-stage framework. Stage 1 evaluates, with reference to the guidelines in *O'Neill v Phillips*,[28] whether the offer in question was a "reasonable offer" that the claimant "could be expected to accept".[29] Stage 2 examines whether the claimant was "justified in rejecting that offer" and "choosing to seek relief [under oppression]" instead.[30] The "key consideration" is whether the buyout offer "encompasses all the reliefs sought" which "can reasonably [be] obtain[ed] at trial" by the claimant.[31] It is also necessary for the court to consider if "there are any disputed issues which are more appropriately determined by the court", accepting, for the purposes of this stage, that all allegations pleaded by the claimant "*will* be established" [emphasis in original].[32]

9.15 Applying the framework to the facts, the High Court (General Division) found that the defendants' buyout offer cleared Stage 1 as it provided for: (a) no minority discount and the quantification of the shareholding as claimed by the claimant; (b) criteria by which a qualified assessor may be jointly appointed by the parties; (c) a valuation date and opportunity for parties to suggest considerations applicable to the valuation; (d) equal access by parties to relevant information and to the assessor; and (e) costs arising from the valuation process and the legal proceedings.[33]

9.16 However, in Stage 2, her Honour went on to hold that the offer did not address relevant issues raised by the claimant in his oppression claim such as a purported valuation of the defendant company based on facts after the defendants' proposed valuation date[34] or the claimant's allegations of oppressive conduct occurring before the proposed valuation date.[35] It was further held that (a) the issues of mixed fact and law raised by the suit would be "far more suitably determined by the court, rather than by an appointed assessor" who would not be able to provide an "authoritative determination" of the claims;[36] (b) neither option would be "likely to give [claimant] anything like the benefit he will receive if the dispute were resolved in his favour and the breaches made good or fully allowed for in the purchase price";[37] and (c) the claimant did not possess sufficient

28 [1999] 1 WLR 1092.
29 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [135].
30 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [135].
31 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [135].
32 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [135].
33 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [136].
34 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [138].
35 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [139]–[141].
36 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [142].
37 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [142].

information to "consider the Buyout Offer in a meaningful manner" given that the defendants had refused to produce certain documents prior to completion of discovery.[38] The court accordingly dismissed the relevant portions of the striking-out application.[39]

9.17 There is much to like about the *Kroll* judgment. The authors respectfully agree with the learned judge's characterisation of striking out as a "draconian practice",[40] appropriate only when the oppression claim has become "completely unnecessary". The two-stage framework brings to life the considerations expressed in *O'Neill v Phillips*[41] and subsequent cases for judicial economy while preserving reasonable autonomy for the claimant to decide whether to continue pursuit of their oppression claim, and without committing the error of judicial overreach. In this regard, it is instructive that Chionh J rejected the defendants' proposition that it was the court's role to "wade into the fray and to 'utilise its tools and procedures to resolve any impediment to the petitioner's acceptance of the offer'".[42] It is not for the court to improve upon the defendant's buyout offer or to intervene such that the claimant is compelled to accept; rather, it is for the defendant to address the matters complained of by the claimant in the oppression claim to the claimant's satisfaction – within reason. Many contested issues of fact and law, especially as they pertain to *fault*[43] of one or more parties, are inappropriate for an expert valuer and should be properly reserved to a court (or arbitral tribunal, as the case may be).[44] Otherwise, an oppression defendant who has diverted assets might, without a clear legal finding thereof by an arbiter, exploit the law to benefit twice from their conduct – once by pocketing the proceeds

38 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [143].

39 The defendants succeeded in striking out part of the pleadings (*Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [170]–[173]) but they were not crucial for the survival of the oppression claim.

40 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [67] and [127].

41 See para 9.14 above.

42 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [127].

43 On the distinction between fault and non-fault paradigms in oppression and functionally similar remedies, see generally Alan K Koh, "Shareholder Withdrawal in Close Corporations: An Anglo-German Comparative Analysis" (2022) 22(1) J Corp L Stud 197 and Alan K Koh, *Shareholder Protection in Close Corporations: Theory, Operation, and Application of Shareholder Withdrawal* (Cambridge University Press, 2022).

44 See Alan K Koh, *Shareholder Protection in Close Corporations: Theory, Operation, and Application of Shareholder Withdrawal* (Cambridge University Press, 2022) at pp 42–43 (explaining the function of neutral arbiters that can make binding findings of fact in legally enforceable decisions rendered according to law in situations where findings as to fault affect the precise outcomes of withdrawal (*ie*, oppression) actions).

of the diversion, and again by acquiring the company's shares from the claimant at a depressed value.[45]

9.18 In addressing and dismissing the defendants' argument that the court should proceed to determine share valuation as a preliminary issue rather than a trial on liability and subsequent damages assessment,[46] Chionh J distinguished between the English Civil Procedure Rules 1998[47] regime, which empowers the court "to remove obstacles to an agreement between parties for the valuation and buyout of the shares" as part of its case management powers, and Singapore's Rules of Court[48] ("ROC 2014") regime, which does not confer such active case management powers.[49] Her Honour also expressly declined to opine on whether the position under the current Rules of Court 2021 ("ROC 2021") regime would be any different.[50] *Kroll* thus seemingly left open the issue of whether the fair buyout offer doctrine would change substantially under ROC 2021. The phrase "reasonably expect" used in the *Kroll* judgment – including in Stage 2 of the framework[51] – would also later cause difficulties. Happily, *Kroll*'s loose ends would be quickly resolved in the next case reviewed.

9.19 *Leong Quee Ching Karen v Lim Soon Huat*[52] ("*Leong Quee Ching Karen*") is a case resolved under the new ROC 2021. The claimant was a shareholder and, until her removal, a director of a family company (a defendant) in which two of her siblings and entities under their control (also defendants) were the other shareholders. The claimant sought either an order for a special audit into the company's accounts and affairs, or a buyout order for her shares by the defendant shareholders after an independent valuer conducted a special audit of the company

45 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [122], quoting *Harborne Road Nominees Ltd v Karvaski* [2011] EWHC 2214 (Ch); [2012] 2 BCLC 420 at [30]. From a strictly financial perspective, in a two-shareholder company it might be tempting to take the view that the oppressor-shareholder, *A*, who gains a personal benefit from diversion of corporate opportunity does not derive a second "benefit" by acquiring the remnants of the company from the victim-shareholder, *B*. However, as compared to a consensual sale and purchase of shares in which shareholder *A* buys out shareholder *B* at a negotiated price, the oppression scenario deprives *B* of the opportunity to bargain for a fair price and creates an additional layer of costs. The mere fact that in oppression *B* is placed at a starting position of disadvantage by *A*'s oppressive act (as opposed to good-faith bargaining) is itself a second, not purely financial, benefit to *A*.

46 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [128]–[133].

47 SI 1998/3132.

48 2014 Rev Ed.

49 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [131].

50 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [131].

51 *Kroll, Daniel v Cyberdyne Tech Exchange Pte Ltd* [2022] SGHC 231 at [127], [134] and [135].

52 [2022] SGHC 309.

to "determine whether there are any matters which need to be taken into account in valuing the claimant's shares" and determined a price.[53] Subsequent to commencement of the oppression claim, a defendant sibling made a buyout offer under which a valuer would be provided information relevant to valuation but without conducting a special audit; this was rejected by the claimant on the basis that it "does not address [the claimant's] concerns about potential mismanagement of [the company] and its subsidiaries".[54]

9.20 The two sibling defendants brought striking-out applications that were dismissed by the assistant registrar and subsequently appealed. The defendants argued that the claimant could seek a special audit only if she alleged "misfeasance, misappropriation or breach of fiduciary duties" in addition to breach of legitimate expectations.[55] One of the defendants also argued that a third stage – previously rejected by Chionh J in *Kroll* under ROC 2014 – under which the court would "utilise its tools and procedures to resolve any impediment to [a claimant's] acceptance of the offer" should be added to the *Kroll* framework under the ROC 2021 regime.[56]

9.21 Following the approach in *Iskandar bin Rahmat v Attorney-General*[57] where the Court of Appeal referred to pre-ROC 2021 cases to interpret the current striking-out regime,[58] Goh Yihan JC similarly drew on older cases in his preliminary analysis of the abuse of process ground for striking out in O 9 r 16(1)(*b*) of ROC 2021.[59] Moving on to the *Kroll* framework, it was contested between the parties as to the proper standard applicable for striking out in the context of a buyout offer. The defendants (that is, the striking-out applicants) argued for a lower threshold whereby an oppression claim should be struck out if "the [buyout offer] gives [the claimant] what [they] could 'reasonably expect' to obtain upon succeeding at trial".[60] The claimant's position was that a claim "should only be struck out if it was 'impossible' (not just 'improbable') for the claimant to obtain [the relief sought]".[61]

53 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [12].
54 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [13(c)].
55 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [19].
56 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [16].
57 [2022] 2 SLR 1018.
58 *Iskandar bin Rahmat v Attorney-General* [2022] 2 SLR 1018 at [17]–[19], referred to in *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [23].
59 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [27]–[28].
60 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [34].
61 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [34].

9.22 Goh JC decisively resolved the matter in favour of the latter. Surveying the relevant cases, including recent English authorities, on striking out in buyout offer contexts, his Honour held that "there is no authority which expressly laid down a 'reasonable expectation' standard over that of the traditional 'plain and obvious' standard".[62] Accordingly, the court dismissed the possibility that the use of "reasonably expect" in *Kroll* heralded a substantive change.[63] To eliminate the mischief raised by the term "reasonably expect", Goh JC restated Stage 2 of the *Kroll* framework as follows:[64]

> If the offer is a reasonable one, was the plaintiff justified in rejecting that offer and choosing to seek relief by bringing a claim for minority oppression? Here, one key consideration is whether the offer encompasses all the reliefs sought in the plaintiff's claim. To determine this, close attention must be paid to the reliefs sought and the onus is on the defendant to show that it is *impossible* (and not just improbable or not reasonably expected) for the plaintiff to obtain the reliefs sought at the end of trial (apart from those already part of the buy-out offer). It is only when the defendant can show this, that the situation would be a *plain and obvious* case for striking out the claim entirely, on the basis that the continued prosecution of his action serves no useful purpose and is an abuse of process … [emphasis in original]

9.23 His Honour made it clear that the court is concerned with "whether a claimant's claim for a specific *relief* pursuant to a claim for minority oppression will be impossible" [emphasis in original], and "whether the buy-out offer has addressed all of the claimant's concerns that prompted the minority oppression action in the first place".[65]

9.24 The court went on to address the argument by the defendant that a third stage, in which the court's ability to "[utilise] its tools and procedures to *resolve* any impediment to the [claimant's] acceptance of the offer, to avoid wasted time, costs and judicial resources by a full trial" [emphasis in original],[66] should be added to the *Kroll* framework as part of an active case management approach consistent with the Ideals under ROC 2021. Goh JC declined the invitation to introduce such a stage on the basis that it would not further the *Kroll* framework's purpose, could not be applied in practice and had no legal basis.[67]

9.25 Applying the revised *Kroll* (or, for convenience, "*Kroll–Leong*") framework to the facts, the only issue was whether the buyout offer at

62 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [54].
63 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [39] and [54].
64 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [54].
65 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [56].
66 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [58].
67 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [62]–[64].

issue addressed the claimant's demand for a special audit. The court held that it clearly did not.[68] Goh JC also took pains to distinguish what the claimant sought and what the buyout offer contemplated. The special audit "would be focused on ensuring that the company's affairs are properly conducted", and an exercise in which "the auditor undertakes the task with an inquiring mind".[69] The buyout offer, by contrast, contemplated a mere "comput[ation] of an appropriate value of the shares to be sold" where "the information available to [the valuer] will be very much limited to those relevant to the value", and "the claimant is not entitled to information beyond that needed for a valuation".[70] The offer "does not address the root of the claimant's legitimate expectation that [the defendant company] has been properly managed, and [the claimant's] concomitant right to access the relevant information".[71]

9.26 The court next considered whether the special audit sought by the claimant would be "impossible to obtain".[72] Drawing on Court of Appeal decisions that implicitly recognised the special audit as possible relief under s 216 of the Act,[73] Goh JC held that a special audit is possible as a relief under the oppression remedy.[74] While a mere allegation of breach of legitimate expectations may be an insufficient basis on which a special audit may be sought, allegations of misconduct such as misappropriation or other breaches of fiduciary duties would suffice and were present in the case.[75] Given the nature of the allegations, "which would go towards the pith and marrow of influencing the *actual* price of the shares in a reasonable buy-out offer (free from the misfeasance)", "an expert valuer would ordinarily *not* be in a position to resolve the quagmire of issues for the parties" [emphasis in original].[76] Accordingly, "it would not be just for the aggrieved party to accept the price offered for the shares to be determined by an expert without an authoritative determination of the claim (and which parties may be assisted by a special audit)".[77] The court also took the opportunity[78] to state that the special audit would not run counter to the reflective loss principle as it stands after the Court

68 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [67].
69 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [68].
70 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [68].
71 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [68].
72 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [70].
73 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [79], citing *Teelek Realty Pte Ltd v Ng Tang Hock* [2021] 2 SLR 719 and *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745.
74 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [79].
75 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [86]–[90].
76 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [89].
77 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [89].
78 *Leong Quee Ching Karen v Lim Soon Huat* [2022] SGHC 309 at [91]–[92].

of Appeal decision in *Miao Weiguo v Tendcare Medical Group Holdings Pte Ltd*.[79]

9.27 As the oppression remedy is the single greatest feature and frequently the last – if not only – resort of Anglo-Commonwealth corporate law against commercial misconduct and mischief, the courts should be especially slow to curtail its efficacy. *Leong Quee Ching Karen* is in all material respects a clear, correct, and thus very welcome addition to the *corpus* of oppression jurisprudence in Singapore. Even taking into consideration the stated Ideals of the new procedural regime,[80] the court in *Leong Quee Ching Karen* was properly resolute in resisting any temptation to abdicate its responsibility to adjudicate legitimate disputes of fact and fault. As HHJ Cooke cautioned in *Harborne Road Nominees Ltd v Karvaski*,[81] a case cited and quoted extensively in both *Kroll* and *Leong Quee Ching Karen*, "Lord Hoffmann's remarks [in *O'Neill v Phillips*[82] laying down the fair buyout offer doctrine] were not intended to have the effect of establishing a mechanism for seizure and exclusion".[83] Future attempts at giving the run-around aside, the *Kroll–Leong* framework has for now put to rest most of the frivolous technicalities that have been raised by defendants seeking to deny claimants access to information and their day(s) in court.

## VI. Derivative actions

9.28 A foundational principle of company law is that a company is a separate legal person. As such, when the company has a cause of action, the company alone, as a separate legal person, has the right to decide whether to sue. However, as companies are fictitious persons, they cannot decide whether to sue on their own and can only act through decisions made by human beings. The natural question that arises is: Who has the power to decide whether the company, as a separate legal person, should sue?

9.29 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

79 [2022] 1 SLR 884. See (2021) 22 SAL Ann Rev 203 at 208–209, paras 9.15–9.19 and Samantha S Tang & Alan K Koh, "Reflective Loss and Dishonest Assistance" [2022] LMCLQ 363.

80 Rules of Court 2021 O 3 r 1(2).

81 [2011] EWHC 2214 (Ch); [2012] 2 BCLC 420.

82 See para 9.14 above.

83 *Harborne Road Nominees Ltd v Karvaski* [2011] EWHC 2214 (Ch); [2012] 2 BCLC 420 at [27].

management decisions for the company.[84] As the decision to sue is a management decision, the board normally has the power to decide whether the company should sue. This makes sense because the board is usually positioned to have the best available information about the company's potential lawsuit, and board members are bound by their directors' duties to decide in the best interests of the company whether the lawsuit should be pursued.

9.30 An obvious problem arises, however, when the directors themselves are the target of the company's lawsuit or have another personal interest in the company not suing. In such a case, the normal corporate decision-making process produces an acute conflict of interest. This conflict of interest becomes intractable when the directors are also the company's controlling shareholders as they can then entrench themselves and effectively foreclose the company from commencing a lawsuit which is in the company's best interests to pursue.

9.31 Since *Foss v Harbottle*,[85] Anglo-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 by circumventing the regular 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).[86] In 1993, with the aim of empowering minority shareholders, Singapore enacted s 216A of the Act and became one of the first countries to provide for a statutory derivative action.[87]

9.32 Under s 216A, there are broadly four requirements that every complainant must satisfy before leave will be granted to pursue a statutory derivative action:

84 Companies Act 1967 (2020 Rev Ed) s 157A.

85 See para 9.8 above.

86 See *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 1 at p 8 for more details.

87 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, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) at p 323; Samantha S Tang, "The Anatomy of Singapore's Statutory Derivative Action: Why Do Shareholders Sue – Or Not?" (2020) 20 J Corp L Stud 327 at 332–337.

(a) The complainant must first have standing to bring the application.

(b) The complainant must give 14 days' notice to the company's directors of their intention to bring the derivative action before commencing the application for leave.

(c) The complainant must show that they are acting in good faith.

(d) It must appear to the court to be *prima facie* in the interests of the company that the derivative action be brought.

9.33 With respect to the first general requirement, a complainant has standing to pursue an application for leave if they: are a member of the company (s 216A(1)(*a*)); the Minister for Finance in a company under investigation (s 216A(1)(*b*)); or "any other person who, in the discretion of the Court, is a proper person to make an application" (s 216A(1)(*c*)). In most s 216A applications, standing is not an issue because most applications are pursued by shareholders who are members of the company and thus fall squarely within s 216A(1)(*a*). However, in the year under review, there were two reported decisions in which complainants pursued s 216A applications despite the fact that they were not members of the company. In both cases, the High Court (General Division) held that the non-member complainants had standing as they were "proper persons" under s 216A(1)(*c*).

9.34 In *Mytsyk, Viktoriia v Med Travel Pte Ltd*[88] ("*Med Travel*"), Mavis Chionh Sze Chyi J had to decide whether a director of a company, who was not a shareholder, fell within the ambit of a "proper person" under s 216A(1)(*c*). In finding that the director had standing as a "proper person", the learned judge reasoned that "applicants who were not shareholders but who wished to invoke s 216A should be able to show some 'financial interest' – or at the very least, an 'interest' – in how the company is being managed".[89] With respect, this makes sense. A person without an interest in how the company is being managed should not have standing to pursue a s 216A derivative action. Providing such a complainant with standing would be a waste of the court's time and company's resources. In *Med Travel*, the complainant was one of two directors who alleged that the other director had breached his director's duties by, among other things, misappropriating and diverting company funds. As such, the complainant was held to have standing given her interest as a director in the management of the company.[90]

88 [2022] 5 SLR 510.
89 *Mytsyk, Viktoriia v Med Travel Pte Ltd* [2022] 5 SLR 510 at [19].
90 *Mytsyk, Viktoriia v Med Travel Pte Ltd* [2022] 5 SLR 510 at [19].

9.35 In *Tan Chun Chuen Malcolm v Beach Hotel Pte Ltd*[91] ("*Malcolm Tan*"), Goh Yihan JC found that a beneficial owner of shares, who was not himself a member, satisfied the standing requirement as he fell within the ambit of a "proper person" under s 216A(1)(*c*). In arriving at his decision, the learned Judicial Commissioner opined that the beneficial owner clearly had a financial interest in the way the affairs of the company were managed and thus should be granted standing as a "proper person" under s 216A(1)(*c*).[92] Goh JC's reasoning dovetails with that of Chionh J's in *Med Travel*, suggesting that the heart of the inquiry when determining if a complainant has standing as a "proper person" is whether they have an interest in the management of the company.

9.36 In *Syed Ibrahim Shaik Mohideen v Wavoo Abdusalam Shahul Hameed*[93] ("*Syed Mohideen*"), Goh Yihan JC in the High Court (General Division) considered two other issues regarding a complainant's standing to pursue an application under s 216A(1). First, the defendants in the case argued that the complainant did not have standing because he was a majority – and not a minority – shareholder. After reviewing the text of s 216A, the relevant local case law, and parliamentary debates highlighting the purpose for enacting s 216A, Goh JC found that "as a matter of law, the plaintiff has the requisite standing to bring an application under s 216A despite being the majority shareholder".[94]

9.37 With respect, the authors agree with this finding. The reason for the derivative action is to provide a procedural mechanism for shareholders to cause a company to pursue an action that is in its interests when the directors have failed to do so. Normally, majority shareholders need not avail themselves of this procedural mechanism because they have the necessary voting rights to replace a recalcitrant board. Indeed, the authors would suggest that if a majority shareholder has the voting power to replace the board, it would not be in the interests of the company to allow the majority shareholder to pursue a derivative action. This is because the majority shareholder could use "self-help" to cause the company to bring the action directly – avoiding the unnecessary time, cost and complexity of a s 216A application.

9.38 However, sometimes majority shareholders lack the voting power to replace the board and therefore cannot use "self-help" to cause the company to pursue a valid claim. This was the case in *Syed Mohideen*

91 [2022] SGHC 187.
92 *Tan Chun Chuen Malcolm v Beach Hotel Pte Ltd* [2022] SGHC 187 at [9]–[10].
93 [2022] SGHC 307.
94 *Syed Ibrahim Shaik Mohideen v Wavoo Abdusalam Shahul Hameed* [2022] SGHC 307 at [29].

where the complainant only owned 48% of the company's shares. In such cases, a majority shareholder has standing to bring a s 216A application as there is nothing in s 216A that explicitly limits it to minority shareholders, and allowing a majority shareholder to pursue a s 216A application in such cases accords with the purpose of the derivative action (that is, to ensure that claims that are in the interests of the company are properly pursued). For completeness, however, the authors suggest that there may have been another possible way of reaching the same result in this case. The very premise of the defendant's argument that the complainant was a majority shareholder was erroneous: a 48% shareholder is not a majority shareholder at all. Therefore, the defendant's assertion that the complainant had no standing because he was a majority shareholder was based on a false premise from the start.

9.39 In *Syed Mohideen*, a second issue that arose concerning standing was whether a complainant must continuously maintain the status that qualified them as having standing throughout the proceedings. Stated differently, is there a "continuing requirement" under s 216A(1) that the complainant remains as a member, Minister for Finance, or a "proper person" until the application is heard and decided? The learned Judicial Commissioner held that s 216A does not have a "continuing requirement".[95] Goh JC highlighted several reasons justifying his finding. First, there is nothing in the text of s 216A to suggest a "continuing requirement".[96] Second, the case law is clear that former directors can qualify as "proper persons" and thus have standing under s 216A(1)(*c*). Therefore, with respect to directors, the case law is clear that there is no "continuing requirement".[97] Third, complainants bringing s 216A derivative actions do so based on their knowledge of events that precede the application, not on events that occur after the application is filed. As such, a "continuing requirement" is unwarranted.[98]

9.40 With respect, based on the compelling reasons provided by Goh JC, the authors agree that there is no justification for finding a "continuing requirement" for standing under s 216A. However, the authors caution that granting applicant-members, who sell their shares after commencing a s 216A application, leave to pursue a derivative action presents a risk. Only those who are shareholders *after* the

95 *Syed Ibrahim Shaik Mohideen v Wavoo Abdusalam Shahul Hameed* [2022] SGHC 307 at [19].

96 *Syed Ibrahim Shaik Mohideen v Wavoo Abdusalam Shahul Hameed* [2022] SGHC 307 at [20].

97 *Syed Ibrahim Shaik Mohideen v Wavoo Abdusalam Shahul Hameed* [2022] SGHC 307 at [21].

98 *Syed Ibrahim Shaik Mohideen v Wavoo Abdusalam Shahul Hameed* [2022] SGHC 307 at [22].

derivative action is *decided* can normally benefit financially from a successful derivative action through a *pro rata* increase in the value of their shares (as damages are normally paid to the company and not the shareholders).[99] Conversely, those who cease to be shareholders before the derivative action is heard normally have no possibility of benefiting financially from the action. As such, the court should scrutinise the motives of members who sell their shares after filing a leave application as the risk that they are motivated by schadenfreude, rather than the interests of the company, is heightened. However, s 216A is equipped to address this risk as it requires the complainant to demonstrate that the action is being brought in good faith and in the interest of the company.

9.41 The second general requirement under s 216A is that a complainant must give 14 days' notice to the company's directors of their intention to bring the derivative action before commencing the application for leave. Two issues that arise in terms of the notice requirement are whether the notice provides sufficient particulars about the proposed derivative action and whether it is delivered within the time required. In terms of particulars, in *Malcolm Tan*,[100] Goh JC concisely articulated the general standard for assessing the sufficiency of the notice's particulars: "[T]he contents of the notice must provide the directors with enough detail, such as the facts of alleged relevant incidents that constitute grounds for legal action to be taken out by the company, to enable the directors to make an informed decision on the next course of action."[101]

9.42 The learned Judicial Commissioner also observed in *obiter* that there is no need for *written* notice to be provided under s 216A. However, Goh JC adroitly observed that "given the need for sufficient particulars, it would only suffice in most cases that the notice is written".[102] With respect, this is a helpful practice direction. Written notice, as opposed to oral notice, is more likely to accurately convey information in a format that can be effectively assessed by directors when deciding whether the company should pursue the proposed lawsuit – especially in complex cases. In addition, written notice provides a clear evidentiary record which the complainant can easily provide in a s 216A application. As the complainant in *Malcolm Tan* delivered written notice almost a year prior

99 It is noteworthy that even those who are shareholders after a successful derivative action may not benefit financially as a company's share price may fall even when a derivative action succeeds: see Dan W Puchniak & Masafumi Nakahigashi, "Japan's Love for Derivative Actions: Irrational Behavior and Non-economic Motives as Rational Explanations for Shareholder Litigation" (2012) 45 Vand J Transnat'l L 1 at 19.

100 See para 9.35 above.

101 *Tan Chun Chuen Malcolm v Beach Hotel Pte Ltd* [2022] SGHC 187 at [17].

102 *Tan Chun Chuen Malcolm v Beach Hotel Pte Ltd* [2022] SGHC 187 at [19].

to filing his s 216A application, Goh JC found that, pursuant to a plain reading of s 216A(3)(*a*), the notice requirement had been satisfied.

9.43 However, the learned Judicial Commissioner observed in *obiter* that the gap of almost a year between the complainant providing notice and commencing the application for leave called into question the validity of the notice – which on its face otherwise met the time and substance requirements. Goh JC noted that s 216A(3) does not explicitly prescribe a maximum amount of time after which notice is given that it remains valid. However, the authors respectfully agree with Goh JC's suggestion that an inordinate delay in filing an application after providing notice would seem to undermine the spirit of s 216A(3). It surely cannot be the case that a complainant has an unlimited amount of time after providing notice to commence a leave application. After a substantial amount of time has passed, directors would reasonably assume that no application would be brought despite the notice having been given. It may also indicate that steps were taken that appeared satisfactory to the applicant, at least at the time. Moreover, the passage of a significant amount of time post-notice is likely to result in a change in the company's circumstances, which would require directors to consider the proposed action afresh – suggesting fresh notice should be given. Thus, with respect, the authors agree with Goh JC's observation that a purposive reading of s 216A(3) likely suggests that notice has a "stale-date" or, stated differently, that validity of notice expires after an inordinate amount of time has passed.[103] Complainants should keep this in mind and proceed expeditiously in filing a s 216A application after they have provided notice.

9.44 In *Malcolm Tan*, despite the complainant delaying the filing of his application for almost a year after providing notice, Goh JC decided that the notice requirement was ultimately satisfied. He reasoned that even if the defendants were served with a fresh notice shortly before the complainant filed the leave application, the defendants "would not have used the notice period to make a meaningful evaluation of the plaintiff's complaints".[104] The evidence for this was clear. After notice was given, the defendants were unresponsive to numerous letters from the complainant concerning court hearings and failed to attend three pretrial conferences. Such behaviour was convincing evidence that providing notice afresh would have been futile.[105] As such, there was no justification to strike out the application based on a failure to provide fresh notice.

103 *Tan Chun Chuen Malcolm v Beach Hotel Pte Ltd* [2022] SGHC 187 at [22].
104 *Tan Chun Chuen Malcolm v Beach Hotel Pte Ltd* [2022] SGHC 187 at [23].
105 (2011) 12 SAL Ann Rev 143 at 158–159.

9.45 The third general requirement under s 216A is that a complainant must show that they are acting in good faith. There are two main parts to the "good faith" requirement. First, the complainant "must honestly or reasonably believe that a good cause of action exists for the company to prosecute".[106] Second, a complainant "may be found to be lacking in good faith if it can be demonstrated that he is bringing the derivative action for a collateral purpose".[107] In *Malcolm Tan*, the court found that the complainant had not acted in good faith because no reasonable person could have believed the company had a good cause of action. Moreover, a delay in pursuing the claim from the time the alleged events occurred undermined the complainant's good faith.[108]

9.46 In terms of delay, Goh JC acknowledged that prior case law established that delay in making a s 216A application may not necessarily be evidence of a lack of good faith.[109] He found, however, that *inordinate* delay might indeed be evidence of a lack of good faith.[110] With respect, this must be correct. It is logical for the court to infer some mischief from a complainant's decision to pursue a s 216A application a long time after the relevant events occurred – which was certainly the case in *Malcolm Tan* as the complainant delayed pursuing a s 216A claim for some four years after the alleged events occurred. While inordinate delay should not, in and of itself, be dispositive of a finding of a lack of good faith, it certainly should attract the court's scrutiny concerning the motives driving the application and the complainant's belief in the validity of the company's action itself.

9.47 The fourth general requirement under s 216A is that it must appear to the court to be *prima facie* in the interests of the company that the derivative action be brought. In *Goh Heng Tee v Tiong Hin Engineering Pte Ltd*[111] ("*Heng Tee*"), the alleged wrongdoer was only one of four directors and held 26.6% of the company's shares. As such, Philip Jeyaretnam J in the High Court (General Division) reasoned that if the other directors and shareholders had found the complainant's claim meritorious, a majority of both the board and the shareholders could have caused the company to pursue the claim.[112] Although his Honour found

106 *Jian Li Investment Holdings Pte Ltd v Healthstats International Pte Ltd* [2019] 4 SLR 825 at [42].
107 *Jian Li Investment Holdings Pte Ltd v Healthstats International Pte Ltd* [2019] 4 SLR 825 at [44].
108 *Tan Chun Chuen Malcolm v Beach Hotel Pte Ltd* [2022] SGHC 187 at [26].
109 *Teo Gek Luang v Ng Ai Tiong* [1998] 2 SLR(R) 426.
110 *Tan Chun Chuen Malcolm v Beach Hotel Pte Ltd* [2022] SGHC 187 at [45].
111 [2022] SGHC 34.
112 *Goh Heng Tee v Tiong Hin Engineering Pte Ltd* [2022] SGHC 34 at [19].

that this fact was material but not decisive, he gave it considerable weight in assessing whether the action was in the interests of the company.

9.48 It makes sense to place a significant weight on the majority view of the "innocent shareholders" (that is, the shareholders who are not the alleged wrongdoer or affiliated with the alleged wrongdoer) to assess whether an action is in the interests of the company. In fact, with respect, the authors suggest that the court may go a step further: the view of a majority of the *innocent* shareholders should always be respected by the court in assessing the interests of the company for the purpose of a s 216A application, unless extraordinary circumstances suggest otherwise. The difficulty and risk, however, is in determining which shareholders are truly "innocent". This is particularly true in family companies, which are the subject of a considerable amount of shareholder litigation in Singapore[113] and was the type of company at play in *Heng Tee*. Often, whether a family-member-shareholder is driven by consanguinity or the company's interests is likely to teeter on the edge of indiscernibility.

9.49 A final important question concerning s 216A, which was helpfully elucidated in the case law in the year under review, was: When should the court order cross-examination of the deponent of a supporting affidavit in a s 216A leave application? Goh Yihan JC's decision in *Syed Ibrahim Shaik Mohideen v Wavoo Abdusalam Shahul Hameed*[114] helpfully articulates three guiding principles to answer this question. First, given that the court is not required in s 216A applications to conduct an extensive examination of the evidence, only in exceptional cases will cross-examination be ordered.[115] Second, there must be good reasons, beyond the existence of factual disputes, to allow cross-examination as it is inevitable that such factual disputes will arise in almost every s 216A application.[116] Third, it is exceedingly difficult for the court to exercise its discretion to order cross-examination in s 216A leave applications. With respect, the authors suggest that the high bar set by Goh JC for cross-examination to be permitted in s 216A applications is appropriate. It does not make sense for s 216A leave applications to be turned into mini-trials

113 See *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 8 at p 360.

114 [2022] SGHC 228.

115 *Syed Ibrahim Shaik Mohideen v Wavoo Abdusalam Shahul Hameed* [2022] SGHC 228 at [25].

116 *Syed Ibrahim Shaik Mohideen v Wavoo Abdusalam Shahul Hameed* [2022] SGHC 228 at [29].

involving cross-examinations as the entire purpose of such applications is to determine whether a trial is warranted in the first place.

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