8. COMPANY LAW

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Lifting the corporate veil

8.1 One fundamental aspect of corporate law both in common law and civil law countries is the general recognition that a corporate entity is a separate legal person from its shareholders, management, and related companies. This doctrine of the company's separate personality facilitates investment and helps to reduce the cost of capital.

8.2 This approach has been affirmed again in *PP v Lew Syn Pau* [2006] 4 SLR 210. In that case, the principal issue was whether the prohibition against a company directly or indirectly providing financial assistance for the purchase of its own shares was breached. The financial assistance in question was provided by a subsidiary and one argument advanced by the Prosecution was that the act of the subsidiary should be attributed to the company. Sundaresh Menon JC did not accept this. His Honour said that the mere fact that companies were part of a group did not by itself justify any lifting of the corporate veil to ignore the separate personalities of the companies within the group. In the present case, his Honour found that the subsidiary was a *bona fide* company established years before the transaction in question for perfectly valid and legitimate tax reasons. The subsidiary was not a sham or façade. It was incorporated in Mauritius for good commercial reasons and the group had been run in this way for years.

8.3 There is little doubt that this aspect of the decision is correct. It has been argued elsewhere by this author that at the heart of the cases where the corporate veil has been lifted, the courts have felt that the corporate form has been abused to further an improper purpose, and not for a *bona fide* commercial transaction: see Tan Cheng Han, "Piercing the Separate Personality of the Company: A Matter of Policy?" [1999] Sing JLS 531. On Menon JC's findings, this was plainly not the case.

Shares

8.4 *Guan Soon Development Pte Ltd v Yeo Gek Lang Susie* [2006] 3 SLR 387 was a case involving pre-emption rights and the transmission of shares upon the death of a shareholder. Essentially, the deceased's shares in the appellant company were transmitted to his estate. The deceased's widow, the first respondent, was the administratrix of the deceased's estate. The shares held by the deceased were distributed to the respondents (the deceased's widow and children) according to the provisions of the Intestate Succession Act (Cap 146, 1985 Rev Ed). The respondents successfully applied to the High Court for an order compelling the appellant to register them as shareholders on the ground that the appellant's articles of association had been amended resulting in the addition of a new article (Art 31A). Article 31A stated that the members' right of pre-emption would not apply in respect of any "transfer" of shares following the death of a member where the deceased's shares were transferred to, *inter alia*, "such person(s) who shall become entitled to a share in consequence of the death of the member in accordance with the applicable laws of intestacy".

8.5 The appellant argued that the respondents were not allowed to rely on Art 31A as it was part of the amendments to the appellant's articles of association made after the death of the deceased. The appellant relied on a minute of its directors' meeting with a statement to the effect that the amendments were not intended to apply to deaths of members occurring before the amendments ("the qualifying statement"). The appellant also argued that even if Art 31A were read without the qualifying statement, it would still not apply to the shares that were distributed to the third, fourth and fifth respondents as it applied only to transfers and not to transmissions of shares.

8.6 The Court of Appeal dismissed the claim. Chan Sek Keong CJ, delivering the judgment of the court, said that Art 31A did not stipulate the time from which it was to apply and accordingly, the amendment took place from the day it was made. Furthermore, the text of Art 31A had been filed with the Registry of Companies without the qualifying statement and it was this version of Art 31A that was subsequently incorporated in the appellant's memorandum and articles of association. It was also important to note that when the company first sent out its notice of annual general meeting, the attached text of Art 31A did not contain the qualifying statement. As such, it would have been improper for the company to change the text of Art 31A and approve it at the shareholders' meeting without giving prior notification to the administratrix who did not attend the meeting.

8.7 The effect of Art 31A was to exclude the pre-emption rights under Art 28 of the Articles in respect of any transfer of shares following the death of any member, upon a "transfer" in the situations prescribed in Art 31A. It was arguable that the shareholders must have understood the expression "transfer" in Art 28 to apply to a transmission of the shares of a deceased member under a testamentary disposition or otherwise by operation of law and also to a transfer by an administrator to a beneficiary. Accordingly, the effect of Art 31A was that, on the basis that Art 28 applied to transmissions of shares, it removed the pre-emption right of members against beneficiaries of the deceased member's shares arising from an intestacy.

Directors

8.8 *Golden Harvest Films Distribution (Pte) Ltd v Golden Village Multiplex Pte Ltd* [2007] 1 SLR 940 is an interesting case involving nominee directors of a joint venture company. Under the terms of the joint venture agreement, each of the two conglomerates to the joint venture nominated three directors to the board of directors of the joint venture company ("the Board"), with a total of six nominated directors. If there was a deadlock in relation to any decision by the Board, the chairman would, under the articles of the respondent joint venture company, have the casting vote.

8.9 The catalyst for the proceedings began when a warrant to act was given by the respondent's managing director to a firm of lawyers, authorising the law firm to act on the respondent's behalf in a claim against the appellant which was part of the joint venture conglomerate that was from Hong Kong, the other conglomerate joint venturer being from Australia. There was also a claim against the listed holding company of the appellant as the second defendant. The respondent required a resolution of its board of directors to ratify this warrant to act. The directors nominated to the Board by the party to the joint venture belonging to the Hong Kong conglomerate objected to a director nominated by the party to the joint venture belonging to the Australian conglomerate being appointed as chairman of the meeting of the Board held to ratify the warrant to act ("the Board meeting"). These directors who were nominated by the party to the joint venture belonging to the Hong Kong conglomerate ultimately walked out of the Board meeting. The remaining three directors continued with the Board meeting and passed the resolution.

8.10 As there was no impediment to the meeting continuing even after the walkout, the first question that fell to be answered was whether the appointment of the chairman was irregular. It was held by the Court of

Appeal that the appointment was regular. Delivering the judgment of the court, Andrew Phang Boon Leong JA said, that as amongst the parties to the joint venture, cl 5.1 of the shareholders' agreement gave the other joint venture party the right to appoint the chairman of the Board. While this clause had not yet been incorporated into the articles of association, the clause itself was contractually binding amongst the parties as there was nothing to suggest that it ought not to be enforced.

8.11 Phang JA went on to observe that the conduct of the Hong Kong conglomerate nominee directors in resiling from the contractual obligations of the shareholders they represented in the respondent raised serious issues not only of the standard of corporate governance in a joint venture company, but also of a possible breach of directors' duties *vis-à-vis* the respondent. Indeed such an observation is rightly and timely made. It is only too easy for nominee directors to forget that they ultimately owe their duty to the company that they are a director of and not the party nominating them. Often there will be a convergence of interest but where this is not the case, their duty and loyalty lie first with the former and not with the nominating party. If they are directors of both companies and there is an irreconcilable conflict between both, it may well be that the best course is to recuse themselves from any further role in the decision-making process as the next case to be discussed suggests.

8.12 Arising out of the facts in *Golden Harvest Films Distribution (Pte) Ltd v Golden Village Multiplex Pte Ltd*, the plaintiff company in *Golden Village Multiplex Pte Ltd v Phoon Chiong Kit* [2006] 2 SLR 307 brought a claim against one of the directors who walked out of the meeting alleging breach of fiduciary duty on his part. In allowing the reliefs claimed by the plaintiff, Lai Siu Chiu J said that the statutory duties of a director under s 157(1) of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act") were not in derogation of the common law and equitable rules. There were two principles that were applicable. First, a director had to act in what he honestly considered to be the company's interest, and not the interests of some other person or body. Second, there was the equitable rule that a fiduciary could not place himself in a position where his duty to the company and his personal interests might conflict. Every company was a separate legal entity and for companies within a group, a director was not entitled to sacrifice the interest of a particular company as against another company within the group. The test was whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.

8.13 The defendant was in breach of his fiduciary duty in openly siding with a company that the plaintiff company was suing. The defendant was a director of both companies and it was wrong for him to side with one litigant over another. The defendant's statutory duties under s 157(2) of the Act as well as his fiduciary duties at common law prohibited the defendant from using, for the benefit of the company being sued to the detriment of the plaintiff, the confidential information he gained from his attendance at meetings of the board of directors of the plaintiff and/or gleaned from the plaintiff's correspondence. The defendant could not subordinate the interests of the plaintiff to those of the other company in a situation where their interests were in obvious conflict. He should have refrained from acting for or against the interests of either the plaintiff or the other party to the suit.

8.14 While her Honour's decision is to be warmly welcomed, it should perhaps be said that there may well be unusual cases where a director may be justified in seemingly acting against the interests of a company, *eg* where the company is bringing a frivolous suit. However, even so, the extent to which the director may oppose such conduct should be temperate and probably would not extend to acts such as disclosure of confidential information.

Irregularities

8.15 Having found in *Golden Harvest Films Distribution (Pte) Ltd v Golden Village Multiplex Pte Ltd* (*supra* para 8.8) that the appointment of the chairman was not irregular, there was no necessity for the Court of Appeal to deal with the issue of whether reliance could have been placed on s 392(2) of the Act to the effect that a proceeding under the Act should not be invalidated by any procedural irregularity unless such irregularity had caused substantial injustice. Nevertheless, the Court of Appeal expressed the view that there was no substantial injustice since the intention of the directors who walked out of the Board meeting and of the appellant in bringing the present proceedings was to deprive the respondent of its opportunity to have its case heard. It was, in short, an attempt to stifle the respondent's cause of action at its root. This, they were not entitled to do for two different and separate reasons: first, on the part of the appellant, it had agreed to allow the other joint venture party's director to chair all directors' meetings, and second, on the part of the Hong Kong conglomerate directors, their primary duty as directors was to protect the interest of the respondent and not that of the appellant.

Minority remedies

8.16 *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR 827 was a case where a minority shareholder of what is commonly referred to as a "quasi-partnership" company petitioned to have the company wound up on the "just and equitable" ground in s 254(1)(*i*) of the Act.

8.17 Essentially, the appellant, who was the minority shareholder, alleged that his older brother, who held the balance of the company's shares, was in breach of his assurance to the appellant that he would buy the appellant out whenever the appellant wanted to exit the company. The trial judge dismissed the petition but on appeal the Court of Appeal allowed the appeal.

8.18 Chan Sek Keong CJ said that whilst a company's memorandum of association would be conclusive evidence of its business *vis-à-vis* third parties, it was not necessarily so as between shareholders such as the present shareholders who had entered into what was substantially a quasi-partnership using a company merely as a vehicle for an agreed object. The inconclusiveness of Evenstar's memorandum of association was *a fortiori* given that Evenstar was initially incorporated as a shelf company.

8.19 In the present case, the mutual trust and confidence necessary between the shareholders for the running of the company had broken down not because of the way the older brother was managing the company but because of his failure to buy the appellant out when the appellant's failing health made it difficult to cope with his work. The older brother not only refused the appellant's request to pull out and made the unreasonable suggestion that the appellant sell his shares in the company to a third party, but he also offered to buy the appellant's shares at an unfair and unreasonable price and on unfair terms.

8.20 The notion of unfairness lay at the heart of the "just and equitable" jurisdiction under s 254(1)(*i*) of the Act. Unfairness could arise in different situations and from different kinds of conduct in different circumstances. It should be noted though that s 254(1)(*i*) did not allow a member to exit from a company at will, nor did it apply to a case where the loss of trust and confidence in the other members was self-induced. In the present case, the brothers' partnership in the company was premised throughout on the fundamental understanding that their association would only continue as long as the appellant was a willing party. The appellant had a legitimate expectation of being bought out by his older brother on reasonable terms if he sought to be bought out. The unfairness flowing from the older brother's

breach of his promise to let the appellant pull out from the company was obvious. It left the appellant trapped in the company and placed him at the mercy of the other shareholder. This was not a case of exit at will but one of exit by right due to the failure of the majority shareholder to live up to his promise to allow the minority shareholder to do so as a condition of their associating in a separate legal entity for a specific object.

8.21 The "just and equitable" jurisdiction left room for the courts to impose contemporary standards of corporate responsibility on errant members. Under s 257(1) read with s 254(1)(*i*) of the Act, the court could direct the liquidator to temper the harshness and inequity that might result from a certain course of conduct, and could defer the winding up until parties had been given adequate opportunity to reach a compromise. The winding up of the company was therefore ordered to be stayed for a period of 30 days. If, at the end of that period, the parties were still unable to resolve their disputes amicably, the winding-up order would take immediate effect.

8.22 The Court of Appeal also made the observation that the provisions of the Act did not support any suggestion that the "just and equitable" jurisdiction was necessarily a subset of the "oppression" jurisdiction under s 216 of the Act. The distinct regimes had to be treated as prescribing different grounds to warrant winding up, rather than raising the threshold of the "just and equitable" jurisdiction to allow winding up as a higher order remedy for the more severe "oppression" cases. However, the two regimes did overlap in many situations since they were both predicated on the court's jurisdiction to remedy any form of unfair conduct against a minority shareholder. In such overlapping situations, in order to reconcile the concurrent jurisdictions under the two provisions in a principled manner, the degree of unfairness required to invoke the "just and equitable" jurisdiction had to be as onerous as that required to invoke the "oppression" jurisdiction.

8.23 Chan CJ also expressed the view that even if an applicant could prove facts to justify a winding up order under s 254(1)(*i*) of the Act, he might not necessarily be entitled to such an order under s 216 because a winding up order under the latter section should be a remedy of last resort. Should a malicious shareholder attempt to wind up a company by relying only on s 254(1)(*i*) rather than the more appropriate and moderate remedies available under s 216, such an applicant might risk his action being struck out as vexatious. These observations from Chan CJ are welcome as they provide valuable guidance on the relationship between two major provisions that play an important role in protecting minority shareholders.

8.24 *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR 745 was a case concerning s 216 of the Act. The appellants, the minority shareholders of the first respondent ("Borden"), appealed against the High Court's dismissal of their application to wind up Borden under s 216(1) of the Act. The appellants alleged that the majority shareholders of Borden, namely the second to tenth respondents, had oppressed or disregarded their interests as minority shareholders. Borden was incorporated by six families in 1960 to carry on the business of medicinal and pharmaceutical products. Borden's most successful product was its "Eagle Brand" medicated oil ("the medicated oil"). The founders had intended that each family would be represented on the board of directors by a family member.

8.25 The alleged acts of oppression or disregard of the appellants' interests centred on Borden's dealings with a company set up by the fourth respondent ("Mdm Halim"), a shareholder in Borden, and her son ("Edy Chew") to manufacture and distribute the medicated oil in Indonesia ("PT Eagle"). These acts took place after the first appellant's ("SKL") executive powers were removed at the initiative of Mdm Halim at an extraordinary general meeting of Borden. In his place, the eighth respondent ("Christopher Yeo") and the fifth respondent ("Rachel Chew") became executive directors of Borden.

8.26 Borden subsequently settled an action brought by PT Eagle to nullify Borden's "Eagle Brand" trade mark in Malaysia. This settlement was reached despite Borden having the upper-hand in the trial. In addition, while Borden authorised PT Eagle to use the "Eagle Brand" trade mark in exchange for the payment of royalty, these royalties were not collected. Finally, once Christopher Yeo and Rachel Chew became executive directors of Borden, they did not take any steps to terminate the licence given to PT Eagle, or attempt to collect unpaid royalties from PT Eagle for the sales of Eagle Brand medicated products effected for many years not only in Indonesia, but also in Malaysia, Vietnam and other countries.

8.27 Borden's solicitors found that Mdm Halim had continued to be a commissioner of PT Eagle and her legal role was to supervise and advise the directors in the management of the company. In addition, numerous marks bearing the Eagle device had also been registered by Edy Chew. However, after SKL was removed from his executive position, he could no longer stop PT Eagle from aggressively encroaching upon Borden's commercial interests.

8.28 After the appellants had closed their case at the trial below, defence counsel made a submission of no case to answer. The trial judge, in

dismissing the appellants' claim, held that SKL's testimony failed to establish a *prima facie* case of oppression and that in any case the action was an abuse of process as the appellants had rejected the respondents' offer to buy them out.

8.29 In allowing the appeal, Chan Sek Keong CJ reiterated the well-accepted principle that the courts should be slow to intervene in the management of the affairs of companies since a minority shareholder participates in a corporate entity knowing that decisions are subject to majority rule. What s 216 of the Act enjoins the courts to do is to examine the conduct of majority shareholders to determine whether they have departed from the proper standard of commercial fairness. In a case where a company has the characteristics of a quasi-partnership and its shareholders have agreed to associate on the basis of mutual trust and confidence, the courts will insist upon a high standard of corporate governance that has to be observed by the majority shareholders *vis-à-vis* the minority shareholders.

8.30 In the present case, the evidence produced by SKL showed that the respondents, instead of protecting and promoting the commercial interest of Borden, as was their duty as directors and shareholders, acted in a manner that furthered the commercial interests of PT Eagle in disregard of the commercial interests of Borden. SKL's unrebutted evidence on these matters raised a *prima facie* case of a disregard by the respondents of Borden's interests, and, therefore, also of the appellants' interests as minority shareholders. Removing SKL's executive powers and vesting them in a general manager within such a short time suggested a pre-conceived plan to get rid of SKL as the executive director for reasons which had nothing to do with any failure on the part of SKL to advance the interests of Borden. This unfairly discriminated against SKL, and his being kept entirely out of the affairs of Borden after his removal was oppressive to him.

8.31 From the circumstances, it was also reasonably clear that, as a commercial settlement, Borden had been made to pay a very substantial sum of money to regain a market which had rightfully belonged to it in the first place. Borden was in fact paying PT Eagle to take away and secure Borden's markets. The settlement agreement clearly could not have been in Borden's interest. Accordingly, this was in total disregard of the interests of Borden and therefore in disregard of the interests of the appellants.

8.32 Borden was only the corporate shell behind which real people not only reposed trust and confidence in but also owed duties to one another. Mdm Halim was a shareholder of Borden and, at the same time, a

shareholder of PT Eagle which was controlled by her son. She was instrumental in stripping SKL of his executive powers to prevent him from trying to protect Borden's interests against those of PT Eagle. Mdm Halim's position as commissioner of PT Eagle and her conduct, supported by that of her family members in Borden, was *prima facie* evidence that they had preferred the interests of PT Eagle to those of Borden and this was in disregard of the interests of the appellants as minority shareholders.

8.33 As for the remedy in question, the Court of Appeal did not think that winding up was an appropriate order. The court's discretion under s 216 of the Act should be exercised with a view to bringing to an end or remedying the matters complained of. If the state of affairs in a particular case could be remedied by an order other than winding up, there was no reason for a court to wind up the company. Further, winding up should only be ordered if, having taken into account all the circumstances of the case, it was the best solution for all the parties involved. In general, the courts were not minded to wind up operational and successful companies unless no other remedy was available. The more appropriate remedy would be for the respondents to purchase the appellants' shares, the price of which was to be determined by an independent valuer.

Financial assistance

8.34 A well-known principle in company law is that a company may not render financial assistance to a person to purchase shares in the said company. The rationale of this is to protect the company's assets for the benefit of the creditors of the company. This general prohibition is found in s 76 of the Act. In *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd* [2006] 4 SLR 451, Andrew Phang Boon Leong JA stressed that cases of illegal financial assistance for the acquisition of shares should be distinguished from genuine commercial transactions in which the assistance for the acquisition of shares is a side-effect and not the point of the transactions. Each fact situation must be looked at in its commercial context. His Honour said that in the present proceedings, the transaction concerned was not only a *bona fide* one in the commercial interests of the company from the perspective of diversification of the business of the company concerned but was also one which, taken as a whole, achieved that objective.

8.35 Phang JA went on to opine that notwithstanding what appeared to be weighty arguments that mandated a broad interpretation of s 76(1)(*a*) of the Act that treated the phrases "in connection with" and "for the purpose of" as distinct alternatives, with the former being of broader application than

the latter, it was suggested that such a broad interpretation ought not to be followed. The phrase "in connection with" should, instead, be read narrowly so as to be consistent with the phrase "for the purpose of".

8.36 Another case that provides useful guidance on the proper approach to s 76 of the Act is *PP v Lew Syn Pau* [2006] 4 SLR 210 (noted by Michael Ewing-Chow & Hans Tjio, "Providing Assistance for Financial Assistance" [2006] 2 Sing JLS 465). In that case, the first accused, Lew Syn Pau ("Lew"), was accused of abetting the second, Wong Sheung Sze ("Wong"), who was the executive chairman and director of Broadway Industrial Group Ltd ("BIGL"), an investment holding company listed on the Singapore Exchange, to provide financial assistance to a third party, Dick Tan Beng Phiau ("Tan"), for the purchase of shares in BIGL. What happened was that Lew approached Tan to invest in BIGL, with the proceeds to be used to redeem outstanding redeemable preference shares early, which would have saved BIGL the interest payable had the preference shares been redeemed on maturity. Tan set up a private limited company for the purpose of holding the BIGL shares. Unfortunately, Tan informed BIGL that he had difficulties funding the share purchase. This was when Wong suggested a way to assist Tan in his purchase of BIGL shares. The financial assistance was provided through a loan from a subsidiary of BIGL, Compart Asia Pacific Ltd ("Compart"), which was incorporated in Mauritius for valid tax reasons, to Lew, who was a director of Compart. Lew then advanced a slightly smaller sum to Tan to complete the purchase through his wholly-owned private company.

8.37 As a foreign company, Compart did not fall within the ambit of s 76 of the Act. Accordingly, the issue before the court was whether BIGL's roundabout way of providing financial assistance to Tan for the purchase of its own shares constituted "indirect" financial assistance within the meaning of s 76. In this regard, counsel for Lew argued that s 76 should be applicable only to cases that involved a change of control in the company providing assistance. This argument was rejected.

8.38 However, in acquitting the defendants, Sundaresh Menon JC said that it should be noted that the Act did not proscribe the giving of assistance generally. A company might have very good commercial reasons for facilitating the conclusion of an intended acquisition of its shares and it was entitled to exercise efforts to secure that end as long as it did not give financial assistance within the meaning of the proscription in s 76. A common thread that ran through each of the instances of prohibited assistance was that the act in question actually or contingently depleted the assets of the assisting company. The real issue, according to Menon JC, was

whether the assets of the company had in fact been used or been put at risk for the purpose of the intended acquisition. If the answer to this was in the affirmative, then there might be financial assistance in the relevant sense whether or not the risk had materialised and whether or not the actual asset position had diminished.

8.39 In the present case the financial assistance in question took the form of a loan from Compart to Lew and then to Tan. There was no dispute that the money in question belonged to Compart. Since the resources used in the giving of financial assistance were those of Compart and not of BIGL, the financial assistance itself was given by Compart and not by BIGL. Neither could it be said that BIGL "indirectly" provided financial assistance to Tan. The word "indirectly" simply meant that the financial assistance from the prohibited company need not have been given directly to the purchaser; it did not obviate the need for the financial assistance to have come from the company that was prohibited from giving financial assistance. Accordingly, since the assistance originated from the use by Compart of its assets, there was no "indirect" provision of financial assistance by BIGL.

8.40 This is a well-reasoned decision and the clarity of the judgment was such that ultimately no appeal was filed by the Prosecution. Yet it may cause one to wonder if the proscription found in s 76 of the Act may be easily evaded through the use of foreign subsidiaries. The answer is in the negative. It must be borne in mind that the subsidiary in question was a *bona fide* company, established years before the transaction in question, for perfectly valid and legitimate tax reasons. In other words, it was not a sham or façade, nor was it used for an improper purpose. On the other hand, if it had been incorporated to facilitate an eventual transfer of funds from BIGL to Tan, the fact that it was a foreign entity would not have prevented s 76 from being successfully invoked as financial assistance would then have been provided indirectly.