9. COMPANY LAW

Dan W **PUCHNIAK**
BA (Manitoba), LLB (Victoria), LLM and LLD (Kyushu);
Barrister and Solicitor (Ontario);
Associate Professor, Faculty of Law, National University of Singapore.

TAN Cheng Han SC
LLB (National University of Singapore), LLM (Cambridge);
Advocate and Solicitor (Singapore);
Professor, Faculty of Law, National University of Singapore.

Lifting the corporate veil

9.1 It is trite law that a company is an entity separate from its shareholders and management. This is to facilitate entrepreneurial activities that underpin market economies. Shareholders can invest in companies, and directors and senior managers can manage companies, without fear that they will by virtue of this alone be held liable for the debts and other obligations of such companies. Not allowing such segregation of risk would dampen the ability of companies to raise capital and cause managers of companies to be overly conservative in business decisions. Accordingly, a company's separate personality is one of the fundamental aspects of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"). This being the case, the courts are naturally reluctant to depart from this principle.

9.2 There are exceptional occasions though where the courts at common law have equated the shareholders or directors of a company with the company for limited purposes. This does not mean that the company is not a separate person. It means that because of extraordinary circumstances, certain acts, debts or obligations of the company are also treated as those of some or all of the shareholders or directors of such a company. When this is done, it is usual to say that the corporate veil has been pierced or lifted. A common justification is that the company was a mere sham or façade. Such metaphors unfortunately do not tell us much about the principle underlying such veil piercing or lifting. Accordingly, it has been suggested by the authors in previous editions that the use of such metaphors is unhelpful in explaining why the separate personality of a company is not given effect to. The authors have suggested that when the corporate veil is lifted, the courts do so either because the company has been used for an illegitimate purpose thereby abusing the privilege of incorporation, or the company was never intended to be the real party to the act or transaction in question (*eg*, where the company was interposed merely as a matter of convenience and was never intended to play a real or substantive role). In the latter situation, the company is sometimes referred to as a mere corporate name, see *Asteroid Maritime Co Ltd v The Owners of the Ship or Vessel "Saudi Al Jubail"* [1987] SGHC 71. It has also been suggested that the courts are expressing this idea when they say that the corporate veil should be lifted because the company is the *alter ego* of a shareholder or director. Such an approach would require courts to explain more clearly why corporate personality was being disregarded without resort to the use of vague terms such as "sham" or "façade".

9.3 In the UK, there has been a recent Supreme Court decision that has steered the law somewhat in this direction. In *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1, Lord Sumption, delivering the leading judgment, eschewed the use of metaphors such as "sham" or "façade". His Lordship said instead that the corporate veil may be pierced if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing. Two justifications for such veil piercing were identified as the "concealment principle" and the "evasion principle". The former was not considered as a real case of veil lifting because the mere concealment of the real parties to a transaction would not prevent the court from identifying them and this did not involve disregarding the corporate entity. As for the latter, it arose if there was a legal right against the person in control of the company which existed independently of the company's involvement, and a company was interposed so that the separate legal personality of the company would defeat the right or frustrate its enforcement. In such circumstances, the corporate veil could be pierced to prevent the abuse of the separate legal personality of a company and that it may be an abuse to use it to evade the law or to frustrate its enforcement. This was a limited principle of English law which applied when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evaded or enforcement of which he deliberately frustrated by interposing a company under his control.

9.4 This important Supreme Court decision that places abuse of the corporate form as the basis for veil lifting was somewhat foreshadowed by Stephen Chong J (as he then was) in *Tjong Very Sumito v Chan Sing En* [2012] 3 SLR 953 ("*Tjong Very Sumito*") where his Honour (citing *Walter Woon on Company Law* (Sweet & Maxwell, 3rd Ed, 2009) at paras 2.51–2.52 and 2.57) said that there are, in general, two justifications for the corporate veil to be pierced at common law. These are that the evidence showed that the company was not in fact a separate entity, and where the corporate form has been abused to further an improper purpose.

9.5 This more principled approach to veil piercing has been applied further in two High Court decisions. The first is *Cavenagh Investment*

Pte Ltd v Kaushik Rajiv [2013] 2 SLR 543. One of the defences in the case was that the plaintiff should be vicariously liable for the deceit perpetrated by the fraudster. As the fraudster was not an employee of the plaintiff but an employee of another company in the group, it was submitted that the corporate veil between the plaintiff and such other company should be lifted such that the fraudster could also be considered an employee of the plaintiff. This argument was rejected as Chan Seng Onn J did not feel that the facts warranted veil piercing. As a starting point, businesspeople are entitled to structure their businesses under distinct corporate entities. Just as "one-ship" companies were well known, there was nothing wrong in the present case of different companies within the group holding different properties. There was nothing *prima facie* illegal about such arrangements. His Honour said that in the absence of compelling reasons such as the existence of fraud or serious abuse of the corporate form, the courts would be slow to treat companies in the same group as one legal entity merely because it would be convenient for a claimant's claim to do so.

9.6 In the second case, *Dynasty Line Ltd v Sia Sukamto* [2013] 4 SLR 253, Lai Siu Chiu J also accepted the two justifications for veil piercing that *Tjong Very Sumito* referred to. Her Honour then declined to lift the corporate veil as she was of the view that there had been no attempt to use the plaintiff company to evade any obligations undertaken by a third party to the defendant. The third party was not using the plaintiff company to evade any existing contractual duty that the third party may owe to the defendant. There was, in other words, no abuse of the corporate form.

Loans to directors, ratification of otherwise wrongful acts and shareholders' entitlement to use their voting rights for their own interests

9.7 Section 162 of the Act sets out a general prohibition against companies (other than an exempt private company) extending loans to directors of such companies or to companies which by virtue of s 6 of the Act are deemed to be related to the lending companies. One of the issues that arose in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter* [2013] 1 SLR 374 concerned whether, assuming that there was a breach of s 162(1) of the Act, the plaintiff company could recover the profits which its former directors had received from the proceeds of the loan. In principle, the answer should be yes except that in the present case the former directors had in their capacity as members of the company assented to themselves retaining the benefits of the loan. The question was, therefore, whether shareholders of a company could lawfully waive a company's right to recover such profits.

9.8 The basis of the plaintiff's claim was founded on the former directors being constructive trustees of the profits, such profits being the plaintiff's property or derived from the use of the plaintiff's property. In such circumstances, the Court of Appeal saw no reason why the shareholders of the plaintiff at the material time could not waive the recovery of the profits from the former directors. It could not be said that by not causing the plaintiff to commence proceedings against themselves, the shareholders had been negligent in waiving the plaintiff's claim, nor could the shareholders be said to have acted fraudulently *vis-à-vis* the plaintiff or any creditor given that the plaintiff was solvent at the material time. In deciding as shareholders to waive the plaintiff's rights to recover the profits, the former directors were not trustees for the plaintiff or for one another. They were entitled to make decisions in their own selfish interests, satisfying their own particular wishes and prejudices, and without any personal obligation to consider or act in the best interests of the plaintiff or other shareholders. The court concluded that in the absence of any factor that would disqualify shareholders from ratifying unauthorised or unlawful acts of directors, it saw no reason why a company may not waive any claims it may have against its directors for any kind of liability where the company was solvent. With respect, this approach is clearly correct as shareholders who act as such do not owe fiduciary duties to their companies regardless of whether they are concurrently directors.

9.9 The Court of Appeal, however, appeared to imply that if the plaintiff's claim had been premised on the loan being *ultra vires* in the sense that the plaintiff had no power to make such loan, such an unlawful loan would not be capable of ratification. With respect, it is suggested that such position does not take into consideration s 25 of the Act. While it is true that under common law *ultra vires* transactions could not be ratified (indeed the court cited *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246), the *ultra vires* doctrine has been abolished in Singapore by virtue of s 25 of the Act which states in sub-s (1) that "no act … shall be invalid by reason only of the fact that the company was without capacity or power to do such act". Accordingly, assuming that a company has objects clauses, and such objects clauses do not contain a power to lend money, where directors authorise a loan such act is not *ultra vires* but amounts at most to a breach of fiduciary duty or an act outside authority. Such acts can be ratified assuming the company is solvent and therefore no creditors' rights are affected.

Articles of association

9.10 Section 39(1) of the Act provides that the memorandum and articles of association of a company shall when registered bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and the articles. Thus, under the Act, the company is regarded as being in a contractual relationship with its members and so too are the members as between themselves.

9.11 There are differences between this statutory contract and contracts under common law. For example, it has been held that a member may only enforce those provisions of the articles that affect such member in his capacity as a member. The statutory contract may also not be rectified for mutual mistake given that the Act contains specific provisions as to how amendments may be made to the corporate constitution.

9.12 Although it has never previously been decided in Singapore, there is authority in the UK that terms may be implied into articles of association. In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193, the Court of Appeal expressed the view that this was the position in Singapore. The court said that the parties to the appeal had correctly refrained from contending that a term may not be implied into a company's articles of association. The court then formed the view that applying the appropriate test for the implication of contractual terms, this was an appropriate case for a term to be implied into the articles of association.

Breach of fiduciary duty

9.13 A company's directors and other senior management owe fiduciary duties to the company because a company, not being a true person, is in a vulnerable position *vis-à-vis* its directors and senior management. Should there be any wrongdoing against the company by its directors and senior management, the company itself is not in any position to protest. Wrongdoing against the company also ultimately affects its shareholders. As a result of the vulnerability of companies, and by extension shareholders, the law places a potentially onerous positive obligation on directors and senior management to act in the best interests of the company. By extension, this positive obligation also imposes obligations not to do certain things (*eg*, not to enter into a transaction where there may be a conflict of interest between duty to the company and the self-interest of the director or senior manager). Such obligations, known as fiduciary obligations, are imposed to discourage the fiduciary from taking undue advantage of another person who is in a vulnerable position *vis-à-vis* the fiduciary. The fiduciary must prefer the other person's interests over his or her own which is a departure from the general rule that in commercial matters a person is entitled to be self-interested as long as there is no fraud or illegality involved.

9.14 In *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847, the Court of Appeal helpfully laid down two clear rules for how an account of profits flowing from a breach of fiduciary duties owed to a company should be assessed. First, the fiduciary should not be allowed to retain any of the profit derived from the breach of fiduciary duties. In other words, all of the profits that the fiduciary gained from breaching his duties must be handed over to the company in an account of profits. As such, the company may gain a windfall by recovering profits made by the fiduciary that it might not have otherwise been able to earn itself. Citing the celebrated case *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, the Court of Appeal reasoned that such an approach is justified as an account of profit gives effect to the inflexible rule of the Court of Equity that a fiduciary, unless given express permission, is not entitled to make a profit. Second, fiduciaries who breach their duty by making a profit may claim an allowance from the company for the work and skill that they invested to make such a profit – but *only if* they acted in good faith. In addition, the court will only award such an allowance in limited circumstances because "such an award is an exception to the overriding no-conflict and no-profit rules": at [24]. The authors respectfully support the Court of Appeal's strict and clear approach towards fiduciaries who must account for profits made without permission from the company as it provides a valuable deterrent against director misconduct.

Derivative actions

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

9.16 Under normal circumstances, this question is answered easily through the regular corporate decision-making process. Ordinarily, company law vests the board of directors with the power to make management decisions for the company: see, s 157A and Art 73 in Table A of the Act. As the decision to sue is a management decision, the board normally has the power to decide whether the company should sue the directors for breaching their duties. This makes sense because the board normally has the best available information about the company's potential lawsuit and board members are bound by their directors' duties to decide in the interest of the company whether the lawsuit should be pursued.

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

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

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

9.20 The filter developed in Singapore and throughout the Commonwealth has been to require potential shareholder-plaintiffs to convince the court in a preliminary leave application that they should be granted the right to pursue a derivative action. Historically, in order to do this, potential shareholder-plaintiffs have had to establish that the wrongdoing director committed "fraud on the minority" – a concept which has been vexed with ambiguity. To this day, the law in Singapore remains unsettled on the precise criteria that must be proven in order to establish "fraud on the minority": see *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 ("*Sinwa SS*") at [54]–[55]. This ambiguity, combined with other critiques of the fraud on the minority test, inspired Singapore's Parliament in 1993 to create a new statutory procedure in ss 216A and 216B of the Act for shareholders to pursue a derivative action. In the last decade, the UK and most other leading Commonwealth (and many civil law) countries have followed Singapore's lead and similarly provided for a statutory derivative action in their Companies Acts (for more details, see *Derivative Actions in Asia: A Comparative and Functional Approach* (Dan W Puchniak *et al* eds) (Cambridge University Press, 2012) at p 2).

9.21 Singapore's statutory derivative action, however, is somewhat idiosyncratic in that it does not currently apply to foreign incorporated companies or companies listed on a Singapore exchange. As such, the common law derivative action – and, in turn, the much criticised fraud on the minority test – still remains very much alive in Singapore: see, *eg*, *Sinwa SS* and *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR(R) 197 ("*Ting Sing Ning*"). This idiosyncrasy, however, will soon be significantly reduced as the Ministry of Finance has announced that the Act will be amended to extend the statutory derivative action to cover all *Singapore-incorporated* companies whether they are listed or unlisted: see *Review of the Singapore Companies Act, Ministry of Finance's Responses to the Report of the Steering Committee for Review of the Companies Act* (3 October 2012) at para 55.

9.22 Unfortunately, however, the proposed amendment does not appear to extend s 216A to foreign incorporated companies. As such, even after the Act is amended it appears that the common law derivative action – and, in turn, the much criticised fraud on the minority test – will still have some relevance as it will be the only avenue for shareholders in foreign incorporated companies to pursue a derivative action in Singapore. It is noteworthy that the possibility of shareholders in foreign incorporated companies wanting to pursue a derivative action is far from remote. In fact, Singapore's two leading cases on the common law derivative action were both brought by shareholders in foreign incorporated companies: see, *eg*, *Sinwa SS* and *Ting Sing Ning*. The authors agree with the Ministry of Finance's recommendation to expand s 216A to all Singapore-incorporated companies as s 216A provides a much better filter than the fraud on the minority test. However, it is suggested that further expanding s 216A to cover all Singapore and foreign incorporated companies would be desirable as it would put to rest the much criticised fraud on the minority test and allow the courts to focus on fine-tuning the s 216A filter.

9.23 Specifically, s 216A requires a complainant – which includes a shareholder or any other person that the court deems to be a proper person – to satisfy three elements before the court will grant leave to pursue a statutory derivative action: (a) the complainant has given 14 days' notice to the company's directors of her intention to bring the derivative action before commencing the application for leave; (b) the complainant pursuing the derivative action is acting in good faith; and, (c) it appears to be *prima facie* in the interests of the company that the derivative action be brought. Although these three elements are much clearer than the fraud on the minority test, courts must still fine-tune these broad principles to create an effective filter that both weeds out abusive, wealth-reducing, derivative actions while at the same time allows legitimate, wealth-maximising, ones to proceed.

9.24 In *Lee Seng Eder v Wee Kim Chwee* [2014] 2 SLR 56 ("*Lee Seng Eder*"), the complainant was a shareholder, former managing director and founder of a company ("Company") who brought an application under s 216A for leave to pursue a derivative action on behalf of the Company against its current directors ("Directors"). The High Court dismissed the application finding that the complainant's failure to give *any* notice to the Directors of his intention to bring a derivative action clearly failed to satisfy the 14 days' prior notice requirement under s 216(3)(*a*) of the Act. In arriving at this decision, Andrew Ang J rejected the complainant's argument that this case was similar to *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 ("*Fong Wai Lyn*"), in which the High Court granted a s 216A leave application in spite of the fact that the complainant gave notice seven days *after* commencing the application (which *prima facie* failed to satisfy the 14 days' *prior* notice requirement). Specifically, Ang J found that this case was "clearly distinguishable from … *Fong Wai Lyn* because notice in that case had been given, albeit belatedly" while in this case no notice was given at all: *Lee Seng Eder* at [8]. His Honour went on to find that under s 216A, the court has no discretion at all to dispense with notice entirely.

9.25 The implication of Ang J's finding is that for a complainant to succeed in a s 216A leave application they must *always*, regardless of the circumstances, provide notice. As such, the court's discretion is limited to determining whether the circumstances in a given case justify a complainant providing *late* notice. It is noteworthy that Ang J's finding alters the general understanding of s 216A as both the learned authors of *Walter Woon on Company Law* (Sweet & Maxwell, 3rd Ed, 2009) and the High Court in *Fong Wai Lyn* (in *obiter*) previously suggested that the court had the discretion to dispense with notice entirely.

9.26 In the authors' respectful opinion, Ang J's finding is preferable to the previous understanding of s 216A for at least three reasons. First, as his Honour observed, a plain reading of s 216A *does not* provide the court with the discretion to dispense with notice entirely. Such an interpretation is buttressed by the fact that the language in s 216A departs from the equivalent Canadian provision which *does* suggest that the court has the discretion to dispense with notice entirely. In addition, as his Honour noted, a strict interpretation of s 216A comports with Parliament's intention that the strict conditions for granting a s 216A application must be satisfied to prevent its abuse. Second, the cost to the complainant of providing notice is normally minimal, while a failure to provide any notice at all risks needlessly wasting the court's and parties' resources in cases where the company would have commenced an action had notice been provided. Thus, on balance, making notice a requirement in all cases makes economic sense. Third, allowing exceptions to the clear rule that a complainant must always provide notice would require the development of a complex body of case law to determine the precise nature and scope of such exceptions. Making the already complex law governing derivative actions even more complex seems unwarranted, especially considering the relative ease and minimal cost for the complainant to provide notice (at some point) in all cases.

9.27 In *Chan Tong Fan v Chiam Heng Luan Realty Pte Ltd* [2013] SGHC 192 and *Chan Tong Fan v Sloane Court Hotel Pte Ltd* [2013] SGHC 193 ("*Chan Tong Fan*"), the principal complainant in two related s 216A applications was one of ten children of the deceased founders of a family business. The founders had incorporated two related companies to run the family business ("the Companies") and eventually allocated all of their shares in the Companies to their ten children – each of whom subsequently became minority shareholders and four of whom became directors of the Companies. The complainant, who was never made a director and "had always been seen as a troublemaker" by his siblings, brought two applications under s 216A for leave to pursue a derivative action on behalf of each of the Companies against their respective directors (all of whom were his siblings) for breaching their directors' duties.

9.28 Judith Prakash J dismissed one of the complainant's applications in its entirety, finding that: (a) it would not be in the interests of the company to pursue any of the alleged breaches of directors' duties as none of them presented a legitimate or arguable cause of action; and (b) the complainant had failed to establish that he was acting in good faith by seeking to commence a derivative action on behalf of the company. In the other related application, her Honour dismissed all of the complainant's claims on similar grounds, except for one. The one claim for which leave was granted was based on the complainant's allegation that one of the Companies' directors had breached her duties by failing to properly account for corporate income that had been deposited in her personal bank account. With respect to this particular claim, her Honour held that the company had an arguable case and, thus, that pursuing it was in the company's interests. In addition, her Honour found that the complainant had established good faith with respect to this particular claim (but not any of the others) on the basis that he was able to establish that the claim presented the company with "a legitimate cause of action".

9.29 The authors respectfully agree with Prakash J's approach of evaluating whether *each individual claim* in a s 216A application is in the company's interests and then granting or denying leave on a claim-by-claim basis. Indeed, such a claim-by-claim evaluation of the interests of the company requirement acknowledges the reality that within a single s 216A application some of a complainant's claims may be in the company's interests to pursue while others may not. It also relieves the court of the problematic exercise of having to decide whether leave for an *entire* application should be granted when some claims are in the company's interests and others are not. In addition, evaluating the interests of the company requirement on a claim-by-claim basis ensures that when leave is granted, the company's interests are maximised and that leave is not denied merely because the application contains a single errant claim.

9.30 The authors are respectfully more hesitant, however, about whether the court should engage in a claim-by-claim analysis when evaluating the good faith requirement in a s 216A application. To accurately evaluate a complainant's good faith normally requires examining the totality of a complainant's conduct rather than examining a complainant's good faith with respect to each specific claim. Attempting to bifurcate a complainant's good faith into watertight compartments for each claim is normally an exceptionally difficult (if not impossible) task for the court. In addition, it risks making the determination of good faith contingent entirely on whether a particular claim provides "a legitimate cause of action". Indeed, this appears to be how the finding of good faith was decided for the single claim that the High Court granted leave for in this case. Such an approach may be problematic as it appears to run counter to the Court of Appeal's recent finding in *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 which requires that good faith not be reduced to merely an analysis of the legal merits of the complainant's claims.

9.31 In *Teo Seng Hoe v IDV Concepts Pte Ltd* [2013] SGHC 269, the complainant was a co-founder, director and 50% shareholder of a company ("Company") who brought an application under s 216A for leave to pursue a derivative action on behalf of the Company against his co-founder (who was also a director and 50% shareholder of the

Company), the co-founder's wife (who was a senior employee of the Company) and the wife's company (which she allegedly incorporated, with her co-founder-husband's help, to misappropriate the Company's business) ("defendants"). The High Court granted the complainant leave under s 216A to pursue a derivative action on behalf of the Company against the defendants.

9.32 In arriving at its decision, the High Court rejected the defendants' argument that the leave application should be denied merely because the alternative remedy of winding up the Company was available. Citing the Court of Appeal's decision in *Ting Sing Ning* (above, para 9.21), Belinda Ang Saw Ean J held that an alternative remedy should only foreclose the court from granting leave to pursue a derivative action when it provides a remedy that "would be more beneficial" to the company than a derivative action. Her Honour's interpretation of the Court of Appeal's finding in *Ting Sing Ning* is important as previously the High Court in *Sinwa SS* (above, para 9.20), after citing *Ting Sing Ning*, held that an alternative remedy could foreclose the court from granting leave for a derivative action if it provided merely another "real option" (but not necessarily a better option) than a derivative action.

9.33 The authors respectfully prefer the approach taken by Ang J in this case as it appears to better reflect the Court of Appeal's reasoning in *Ting Sing Ning* that an alternative remedy must provide "a better remedy" in order to foreclose the court from granting leave to pursue a derivative action. In addition, her Honour's approach rests on the sound logic that the court should normally have the discretion to select the best available remedy to resolve a case. It also avoids the unsatisfactory result that the court may be forced to order a suboptimal remedy merely because another possible remedy provides a "real option" in a given case.

The oppression remedy

9.34 Section 216 of the Act is the main mechanism in Singapore for protecting minority shareholders against unfair treatment. This mechanism (commonly known as the "oppression remedy") provides a *direct personal* remedy to any member in a company who can establish that they have been treated in a manner that is "commercially unfair". The oppression remedy bolsters the protection of minority shareholders significantly as it provides them with a substantive right (which does not exist at common law) to be treated in a manner that is commercially fair, even if doing so places restrictions on the *de facto* norm of majority rule in companies.

9.35 In many respects, Singapore has been at the forefront of the trend throughout the Commonwealth of taking an expansive view of the oppression remedy in order to strengthen minority shareholders' rights: see *Derivative Actions in Asia: A Comparative and Functional Approach* (Dan W Puchniak *et al* eds) (Cambridge University Press, 2012) at pp 323–324, 330 and 348–351. Indeed, as noted by the Privy Council, when the oppression remedy was first implemented in Singapore in the Companies Act of 1967, it provided the court with a significantly wider ambit to protect minority shareholders from "commercial unfairness" than the equivalent English and Australian provisions at that time: see *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 at 229. This proved to be forward looking as the wider ambit of protection provided by Singapore has now become the norm throughout the Commonwealth.

9.36 In a similar vein, in the 1990s, Singapore became one of the first jurisdictions to provide judges with the remedial power to award corporate damages in oppression actions: see *Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] 2 SLR(R) 304 and *Low Peng Boon v Low Janie* [1999] 1 SLR(R) 337. This expansion of judicial authority astutely recognised that oppressive conduct frequently overlaps with breaches of directors' duties and that it is, therefore, economically pragmatic to provide a remedy for both in a single action. Based on this rationale, a number of other Commonwealth jurisdictions have more recently followed in Singapore's footsteps by expanding the scope of their oppression remedies to allow for corporate damages.

9.37 In *Sim City Technology Ltd v Ng Kek Wee* [2013] SGHC 216, the plaintiff was a company that was a majority shareholder in a holding company ("Holding Company"). The Holding Company, through its subsidiary companies ("Subsidiary Companies") and in co-operation with a number of other companies, was part of a group of companies that carried on a single business ("Corporate Group"). The plaintiff brought an action for oppression under s 216 against the managing director of the Holding Company ("defendant") who, although only a minority shareholder of the Holding Company, managed to exercise effective day-to-day control over it and the Corporate Group. The High Court allowed the plaintiff's s 216 claim and ordered the defendant to return moneys, shares and other properties that he had misappropriated from some of the companies in the Corporate Group. In addition, under s 216, the High Court ordered the defendant to buy out the plaintiff's shares in the Holding Company based on their value *after* the defendant had returned the moneys, shares and other properties to the relevant companies in the Corporate Group.

9.38 The authors respectfully applaud the High Court's decision in this case for three reasons. First, this decision reinforces the trend in Singapore of awarding damages to the company in oppression actions when doing so is economically pragmatic. In this case, Lai Siu Chiu J could have bowed to the pressures of doctrinal purity and required that direct and/or derivative actions be brought for each of the aggrieved companies to recover the damages that they had suffered as a result of the defendant breaching his directors' duties. If the court had made such an order, however, the oppressed plaintiff would have been forced to expend a considerable amount of additional time and resources to achieve exactly the same result as what was ordered ultimately under s 216 by the High Court – unjustifiable solely for doctrinal purity.

9.39 Second, the High Court further reinforced Singapore's pragmatic and expansive approach towards the oppression remedy by rejecting the defendant's argument that the plaintiff's status as a majority shareholder should bar it from succeeding in a s 216 action. In arriving at this finding, Lai J reasoned that the key issue in an oppression claim is whether the oppressive party had "effective control over the affairs of the company" (and not whether they were a majority or minority shareholder). Her Honour's approach astutely recognises the complex reality of business relationships which may, as in this case, sometimes allow a minority shareholder to gain effective control of a company and, thus, to oppress the majority. It is also in line with the *raison d'être* of s 216: preventing non-controlling shareholders from being treated in a manner that is commercially unfair.

9.40 Third, the High Court continued its pragmatic and expansive approach towards the oppression remedy by allowing the plaintiff to use evidence of oppressive behaviour from other Group Companies to establish oppression in the Holding Company (which was the only company in which the plaintiff owned shares). In arriving at this finding, Lai J reasoned that oppressive conduct in the other companies was relevant because the affairs of the other companies had an effect on the affairs of the Holding Company. In particular, her Honour stressed that the affairs in the Subsidiary Companies had a direct effect on the value (or lack thereof) of the Holding Company. This fact justified the principle of separate legal personality giving way to protection for the minority shareholders from commercial unfairness under s 216.

9.41 It is also noteworthy that by allowing a s 216 claim in a holding company to provide an effective remedy for breaches of directors' duties in its subsidiary, the High Court has potentially created a functional solution to a problem that has been addressed in other jurisdictions by the multiple derivative action: controlling shareholders of holding companies abusing their power to wrongfully extract personal benefits from their subsidiaries. The fact that the multiple derivative action has not yet been explicitly accepted in Singapore makes this most recent expansion of s 216 welcome and potentially fills a *lacuna* in Singapore's current shareholders' remedies regime.

9.42 In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193, the Court of Appeal dealt with two related appeals concerning a number of complex contract law and company law issues involving the management of a joint venture company ("JVC"). One of the grounds of relief sought by the JVC's minority shareholders was for a declaration under s 216 that a number of resolutions passed by the JVC's majority shareholder-controlled board be invalidated. The Court of Appeal rejected this claim on the basis that the relief sought by the minority shareholders (*ie*, invalidating the board resolutions) did not provide an "appropriate remedy in this case". In delivering the judgment of the court, Sundaresh Menon CJ reasoned that considering the acrimonious relationship between the parties, granting the relief sought by the minority shareholders would likely result in future disputes between the parties. This would be incongruent with the court's primary objective when exercising its broad discretion under s 216(2): to make such orders as it thinks fit with a view to bringing an end to the dispute between the parties.

9.43 The authors respectfully agree with the Court of Appeal's general approach to how the court should exercise its broad remedial discretion under s 216(2) of the Act. Specifically, it seems to make economic sense for the court to fashion its relief in a way that brings an end to the dispute between the parties. The authors are respectfully more hesitant, however, about the Court of Appeal's finding that a s 216 claim should be rejected solely based on the fact that the remedy sought by the complainant is inappropriate. If the primary objective of the remedial power under s 216(2) is to bring to an end the dispute between the parties, then it would seem to be more effective for the court to fashion its own remedy in cases where the remedy sought is inappropriate. Indeed, there are a number of s 216 cases in which the court has chosen to grant relief but had done so based on a remedy that it crafted rather than by ordering the remedy the complainant sought. This approach is respectfully preferred because it allows the court, with the benefit of the information accumulated at trial, to fashion the most effective remedy to bring to an end the dispute between the parties. In addition, it avoids rejecting claims of oppressed parties based solely on a technical pleading error in the relief sought. In this case, however, it is important to note that even if the Court of Appeal did not reject the claim based on the inappropriateness of the remedy sought, the outcome would have been the same as the court went on to find in *obiter* (*ie*, after rejecting the claim based on the inappropriate nature of the remedy) that there was no oppression in the first place. Accordingly, it is submitted that the Court of Appeal's rejection of the claim based only on the inappropriateness of the remedy being sought ought to be construed in light of this.