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# SOME CURRENT ISSUES IN SINGAPORE CORPORATE LAW*

As a leading commercial and financial centre, it is unsurprising that there should be a regular stream of corporate law cases that reach the Singapore courts. This has led to a rich jurisprudence in the field of company law. At the same time, and understandably, the cases have also given rise to unresolved issues, and on occasion conclusions have been arrived at that have resulted in the creation of new problems. This article will attempt to highlight some of the more current (beginning from 2010) issues of difficulty and contention. At the same time, possible solutions will be suggested.

**TAN** Cheng Han SC
*LLB (National University of Singapore), LLM (Cambridge);*
*Advocate and Solicitor (Singapore);*
*Dean and Chair Professor of Commercial Law,*
*City University of Hong Kong.*

## I. Piercing the corporate veil

1 Until recently, Singapore courts (as well as other courts in the common law world) have approached questions of veil piercing in the traditional way, namely through the use of somewhat unhelpful and ambiguous metaphors such as "*alter ego*", "sham" and "façade" notwithstanding longstanding criticism of such an approach.[1] It has been suggested instead that the separate personality of companies should be disregarded only when there has been improper use of the corporate vehicle or an abuse of the corporate form, and courts should over time provide guidance on what constitutes impropriety or abuse for such purpose.[2] Singapore courts have for a long time been resistant to this suggestion. Prior to the important UK Supreme Court decision of *Prest v Petrodel*[3] ("*Prest*") the only Singapore decision that endorsed the

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1 For example, see Tan Cheng Han, "Piercing the Separate Personality of the Company: A Matter of Policy?" [1999] SingJLS 531.

2 Tan Cheng Han, "Piercing the Separate Personality of the Company: A Matter of Policy?" [1999] SingJLS 531; *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Rev 3rd Ed, 2009) at para 2.51.

3 [2013] 3 WLR 1.

idea of abuse as the touchstone for veil piercing was *Tjong Very Sumito v Chan Sing En*[4] where Steven Chong J (as he then was) said:[5]

> Courts will, in exceptional cases, be willing to pierce the corporate veil to impose personal liability on the company's controllers. While there is as yet no single test to determine whether the corporate veil should be pierced in any particular case, there are, in general, two justifications for doing so at common law – first, where the evidence shows that the company is not *in fact* a separate entity;[6] and second, where the corporate form has been abused to further an improper purpose (*Walter Woon on Company Law* (Tan Cheng Han, SC gen ed) … at para 2.51–2.52, 2.57). [emphasis in original]

This statement of the law is similar to the approach in *Prest*, where Lord Sumption expressed the view that the concept of abuse underpinned veil piercing and such abuse was made out by what his Lordship referred to as the principles of "evasion" and "concealment" (even if Lord Sumption did not think that concealment was a true case of veil piercing).[7]

2 On appeal from Chong J's decision, the Court of Appeal approached veil piercing in the more traditional manner, saying that the corporate veil could be lifted either on the *alter ego* ground or the sham/façade ground. Both grounds were distinct and the *alter ego* ground arose where the company was carrying on the business of its controller.[8] The court did not refer to *Prest*, probably because the decision in *Prest* was not handed down when the appeal in *Alwie Handoyo v Tjong Very Sumito*[9] was argued.[10]

3 A number of High Court decisions have since cited *Prest* without expressing any reservations about abuse being the underlying basis for veil piercing.[11] For example, it was observed in *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd*[12] that "[t]here is, nevertheless, a general thread that runs through all the authorities in support of the

4 [2012] 3 SLR 953; [2012] SGHC 125.
5 *Tjong Very Sumito v Chan Sing En* [2012] SGHC 125 at [67].
6 What this means is that the company was run as a mere extension of its controllers' affairs, *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Rev 3rd Ed, 2009) at para 2.51.
7 *Prest v Petrodel* [2013] 3 WLR 1 at [28].
8 *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 at [96].
9 [2013] 4 SLR 308.
10 See also *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 at [133].
11 For example, see *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [95]–[96]; *Simgood Pte Ltd v MLC Shipbuilding Sdn Bhd* [2016] 1 SLR 1129 at [198]–[199]; and *Max Master Holdings Ltd v Taufik Surya Dharma* [2016] SGHC 147 at [136].
12 [2014] 4 SLR 832.

piercing of the corporate veil: the presence of abuse".[13] And more recently the Court of Appeal in *Goh Chan Peng v Beyonics Technology Ltd*[14] stated that in general "piercing the veil is justified by abuse of the corporate form or if it is necessary for the veil to be lifted to give effect to a legislative provision".[15]

4 Although these judicial statements appear to regard abuse as the foundational basis for veil piercing,[16] it will be recalled that *Alwie Handoyo v Tjong Very Sumito* recognised the *alter ego* ground as a distinct justification for ignoring separate personality. This very point arose in *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd*[17] where Vinodh Coomaraswamy J considered himself bound to recognise *alter ego* as a separate and independent ground for veil piercing unlike the current position in England as established in *Prest* where no such ground was recognised.[18] Accordingly, the idea of abuse in Singapore would appear only to encompass what used to be regarded as the sham and façade ground which Lord Sumption in *Prest* reformulated as the concealment and evasion principles.[19]

5 How then should the law in this area be further developed or reconciled? The following is suggested.

6 First, leaving aside piercing in the context of legislation which is a matter of statutory interpretation, the concept of abuse of corporate personality as a judicial means to disregard separate personality is a principled one that should be adopted as a general principle.[20]

7 Second, where the evasion principle is engaged, there is clearly abuse of a company's separate personality because a person in control of a company is seeking to defeat rights that third parties have against him through the interposition of such company.

8 Third, it is suggested that the *alter ego* ground under Singapore law is similar to the concealment principle in *Prest* as well as to what Chong J meant when he made reference to "the evidence show[ing] that

13 *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [95].
14 [2017] 2 SLR 592.
15 *Goh Chan Peng v Beyonics Technology Ltd* [2017] 2 SLR 592 at [75].
16 This is consistent with the approach in many other common law as well as civil law countries: see Tan Cheng-Han, Jiangyu Wang & Christian Hofmann, "Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives" (2019) 16 Berkeley Bus LJ 140.
17 [2018] SGHC 264.
18 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 at [136]–[137].
19 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 at [133]–[137].
20 Tan Cheng Han, "Veil Piercing: A Fresh Start" [2015] JBL 20 at 27–31.

the company is not in fact a separate entity".[21] Any supposed distinction between the Singapore and English approaches is terminological rather than conceptual. The confusion in language has arisen because Lord Sumption in *Prest* saw the terms "sham" and "façade", used traditionally as the means to justify veil piercing, as protean terms that describe concealment and evasion cases. Crucially, however, the concealment principle did not in his view really involve piercing the corporate veil at all. This was because interposing a company to conceal the identity of the real actors to a transaction would not deter the courts from identifying them. The court would not be disregarding corporate personality but simply discovering the true state of affairs which the corporate structure is attempting to hide.[22] Seen in this light, the concealment principle is similar to the *alter ego* ground under Singapore law.[23] This ground is premised on the company carrying on the business of its controller.[24] If a company is carrying on the business of its controller, the controller is the true party to the transaction and the apparent involvement of the company is merely concealing such fact.

9 There are a number of examples of this such as *Asteroid Maritime Co Ltd v The owners of the ship or vessel "Saudi al Jubail"*[25] where Lai Kew Chai J found that the company that purportedly owned a ship which had been arrested was a mere corporate name[26] that the principal shareholder of the company had abused as a cover for his own trading and ship-owning activities. Accordingly, the ship was rightly arrested even though its corporate owner was not indebted to the arresting party. Trust reasoning was also used because Lai J found additionally that the company, not being the true owner, would merely have held the ship on trust for the real owner. Similarly, in *Gencor ACP v Dalby*,[27] the court found the controller of a company to be the *alter ego* of that company because the company had no sales force, technical team or other employees capable of carrying on any business. Its only function was to make and receive payments. Given this, it could be said that the company was merely carrying on the business of its controller since it was not able to carry on any business itself.

10 Seen in this light, concealment and *alter ego* cases are arrived at not because the corporate vehicle has been abused but because the

21 *Tjong Very Sumito v Chan Sing En* [2012] SGHC 125 at [67].
22 *Prest v Petrodel* [2013] 3 WLR 1 at [28].
23 Tan Cheng Han, "Veil Piercing: A Fresh Start" [2015] JBL 20 at 25.
24 *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 at [96]; *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 at [131].
25 [1987] SGHC 71.
26 See also *Adams v Cape Industries Ltd* [1990] Ch 433 in relation to Cape Industries' Liechtenstein entity, Associated Mineral Corporation.
27 [2000] All ER (D) 1067.

corporate vehicle is not the true or real party to the underlying transaction. Some analogy can be seen with what Diplock LJ described as sham contracts intended to give the appearance of rights and obligations different from those which the contracting parties actually intend.[28] This is contrasted with cases where the intention of the controller is for the corporate vehicle to engage in the transaction because the controller wishes to use the company to get around legal obligations the controller is already under, such as where a controller causes a corporate vehicle to engage in business which the controller could not himself be involved in because of a non-compete clause with his previous employer.[29] Accordingly, to the extent that *Prest* and *Alwie Handoyo v Tjong Very Sumito* regard concealment and *alter ego* respectively[30] as falling somewhat outside the abuse of corporate personality, they are consistent with each other.[31]

11 In summary, Singapore law now recognises abuse as the foundational principle for veil piercing of which evasion is an example,[32] but the *alter ego*/concealment ground does not (strictly speaking) fall within veil piercing although the net effect is the same in that a third party may look beyond the company to another person standing behind it.

28 *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802.

29 *Gilford Motor Co Ltd v Horne* [1933] Ch 935.

30 Though as suggested they mean the same thing.

31 See also Yeo Hwee Ying & Ruth Yeo, "Revisiting the *Alter Ego* Exception in Corporate Veil Piercing" (2015) 27 SAcLJ 177 where the learned authors argue that the *alter ego* exception set out by the Court of Appeal in *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 ought not to be viewed as a separate veil piercing ground. Instead, it is probably best understood in one of four alternative ways, namely: (a) as a technique of attribution; (b) as being explained under the principle of agency; (c) as being subsumed within the concealment principle (as suggested in this article); or (d) as being explained by alternative approaches such as personal tortious liability. It is suggested respectfully that the approach taken in *Alwie Handoyo v Tjong Very Sumito* makes it difficult to support alternatives (a), (b) and (d), and the authors themselves seem to hint at a preference for (c) at 205–206, para 67.

32 It remains an open question whether there are any grounds beyond evasion that may justify veil piercing. Lord Sumption did not think so but the majority of the judges *in Prest v Petrodel* [2013] 3 WLR 1 preferred to leave the matter open. This issue has not been addressed by Singapore courts. It has been suggested that there is no reason why veil piercing should be limited to situations involving evasion as the concept of abuse is potentially broader: see Tan Cheng Han, "Veil Piercing: A Fresh Start" [2015] JBL 20.

## II. Contractual effect of the corporate constitution

12 Section 39(1) of the Companies Act[33] ("the Act") states that:

> … the constitution of a company[34] shall when registered bind the company and the members thereof to the same extent as if it 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 constitution.

This provision is the basis for regarding the corporate constitution as a statutory contract binding on the members *inter se* as well as between the company and its members.

13 Although s 39(1) literally construed suggests that all the provisions of the corporate constitution should be enforceable by members, the courts have limited its potential breadth by introducing the "*qua*-member rule" which has been stated thus:[35]

> … that no right purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as for instance, as solicitor, promotor, director, can be enforced against the company; and … that articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively.

An example of the operation of the *qua*-member rule may be found in *Browne v La Trinidad*[36] where prior to the formation of a company the plaintiff entered into an agreement with a trustee for the intended company that the plaintiff would be a director and could not be removed before a certain date. A general meeting having been convened to remove the plaintiff who was also a shareholder, the court, treating the agreement as embodied in the articles, held that there was no contract with the company preventing the plaintiff from being removed as a director. Cases like *Browne v La Trinidad* were considered by Astbury J in *Hickman v Kent or Romney Marsh Sheep-Breeders' Association*[37] as supporting the proposition that whether a person is a shareholder or not, such person cannot enforce provisions in the articles that purport to give rights in some capacity other than that as a

33 Cap 50, 2006 Rev Ed.

34 Prior to the amendment in 2014 *vide* the Companies (Amendment) Act 2014 (Act 36 of 2014) which came into effect on 3 January 2016, the subsection referred to "memorandum and articles of association". These documents have been replaced by the corporate constitution.

35 *Hickman v Kent or Romney Marsh Sheep-Breeders' Association* [1915] 1 Ch 881 at 900.

36 (1887) 37 Ch D 1.

37 [1915] 1 Ch 881.

shareholder. Such rights are not part of the general regulations of the company applicable alike to all shareholders.[38]

14 Notwithstanding the *qua*-member rule, there have been some cases where the courts have indirectly enforced non-member rights through the grant of injunctive relief. In *Pulbrook v Richmond Consolidated Mining Co*[39] it was held that a shareholder-director who was improperly and without cause excluded from the board was entitled to an order restraining the other board members from excluding him. Similarly, in *Quin & Axtens Ltd v Salmon*,[40] a shareholder-director who had a right under the articles to veto certain management decisions successfully obtained an injunction to restrain the company from acting on certain resolutions notwithstanding the shareholder-director's objections. Although the specific issue relating to the breadth of the English equivalent of s 39(1) was not argued, it has been suggested that a shareholder can require his company to act in accordance with the articles and such right may be enforced by way of injunction even if this will indirectly lead to the protection of a right granted to him in some other capacity such as a director.[41]

15 In *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd*[42] Judith Prakash J (as she then was) made the following *obiter* statement:[43]

> The State calls in aid that the *Hickman* principles have 'given rise to much academic debate' and 'may not be wholly desirable' (*Walter Woon on Company Law* (Tan Cheng Han SC gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) ('*Walter Woon*') at paras 4.50–4.52) and have been outflanked by cases which have let members enforce rights afforded to it in other capacities. In my view, these do not bring the State very far. Those cases (and the corresponding comments in *Walter Woon*) relate to the second principle in *Hickman* (which states that a member may only enforce a right in the M&A *qua* member). In any event, these cases may now be explained on the basis that a member has a right to require the company to act in accordance with

38 *Hickman v Kent or Romney Marsh Sheep-Breeders' Association* [1915] 1 Ch 881 at 896–897.

39 (1878) 9 Ch D 610.

40 [1909] AC 442.

41 Kenneth W Wedderburn, "Shareholders' Rights and the Rule in *Foss v Harbottle*" (1957) 15 Camb LJ 194. A more conventional way of understanding the decision is that the board resolution was invalid because it did not meet the requirements set out in the company's articles, and the shareholders could not interfere with a decision that was for the board to make.

42 [2016] 2 SLR 366.

43 *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2016] 2 SLR 366 at [47].

> its M&A even if the result would be indirectly to protect a right given to him in another capacity.

The final sentence of the paragraph cited provides some affirmation in Singapore for the proposition that a member has a right as member to compel a company to comply with its constitution.

16 While such an approach is attractive, it effectively renders the *qua*-member rule ineffective in which case the better position may be to overrule it completely. However, the *qua*-member rule continues to be recognised not only in England but other common law jurisdictions as well. In addition, it is suggested that the rule is not without utility. While in practice most corporate constitutions have a high degree of similarity, in principle there is almost no limit to what can be included in one. Accordingly, there may be provisions in the constitution that clearly relate to the corporate entity only and fall outside the remit of its members,[44] for example, because the powers in relation to certain matters that affect the company are to be exercised by the board of directors.[45]

17 What is objectionable is therefore not the *qua*-member rule itself but the manner in which it has been construed. It is suggested that even if s 39(1) had been raised and was relevant, *Pulbrook v Richmond Consolidated Mining Co* and *Quin & Axtens Ltd v Salmon* should be decided similarly, and on the basis that there was no infringement of the *qua*-member rule. This is because a person may have agreed to become a member of a company on the basis of certain provisions in the corporate constitution, such as the right to be a director or the right as a director or shareholder to veto certain management decisions. Such provisions offer considerable protection to a member who might otherwise not have been prepared to invest in a company as a minority shareholder. They are commonplace in certain situations such as where a company is used as a joint venture vehicle and it is provided in the constitution that both the majority and minority shareholders shall have equal representation on the board. Clauses such as these should be objectively construed in the circumstances as a right given to a member in his capacity as a member. Accordingly, a case such as *Browne v La Trinidad* should be decided differently. It is perhaps relevant also that

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44 In which case the rule in *Foss v Harbottle* (1843) 2 Hare 461 would apply to preclude a personal action by a member.

45 Such as whether or the extent to which a company's lien over its shares should be exercised under reg 13 of the First Schedule to the Companies (Model Constitutions) Regulations 2015 (S 833/2015), and where the business of a company is to be managed by or under the direction or supervision of the directors under reg 77(1) of the First Schedule to the said Regulations.

such provisions have not attracted adverse comments when they have fallen under consideration by the courts in Singapore.[46]

18 Also relevant is s 216 of the Act which premises relief for "oppression" where there has been conduct "oppressive to one or more of the members … or in disregard of his or their interests as members" or "unfairly discriminates against or is otherwise prejudicial to one of more of the members". In *Tan Choon Yong v Goh Jon Keat*,[47] Tan Lee Meng J said that for the purpose of s 216 the alleged oppressive act "must affect a member in his capacity as member".[48] Notwithstanding this, case law is clear that where a member has been removed from his position as a director of the company, this can amount to conduct falling within s 216 of the Act.[49] This provides further support for a broader conception of the *qua*-member rule at common law.

## IIII. Procedural irregularities

19 Corporate law generally takes a fairly relaxed attitude towards procedural irregularities *simpliciter*. One reason for this is the rule in *Foss v Harbottle*[50] since some procedural irregularities may be wrongs committed against the company to which only the company is the proper plaintiff. But this is only a partial reason because the rule in *Foss v Harbottle* would not apply where a member's personal right under the constitution has been infringed.[51] Another reason is that access to the courts is a public good and should not be used frivolously. As such, if an irregularity does not lead to any real prejudice because the matter relates to something that the majority could have done, there being no doubt over the will of the majority, it would be meaningless to invalidate the act complained of because the majority could simply reconvene the meeting properly and pass the same resolutions.[52] Conversely, if the majority was unhappy about the outcome of the irregularity, there would be nothing to stop them from reversing the decision through a properly constituted meeting. There seems little point in resolving such

46 For example, see *Sum Hong Kum v Li Pin Industries Pte Ltd* [1996] 1 SLR(R) 529.
47 [2009] 3 SLR(R) 840.
48 *Tan Choon Yong v Goh Jon Keat* [2009] 3 SLR(R) 840 at [34]. It is clear from the context that the words "oppressive act" were used to refer generally to the different types of conduct that may fall within the ambit of s 216 of the Companies Act (Cap 50, 2006 Rev Ed).
49 For example, see *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745; *Eng Gee Seng v Quek Choon Teck* [2010] 1 SLR 241; and *Thio Syn Kym Wendy v Thio Syn Pyn* [2018] 2 SLR 788.
50 (1843) 2 Hare 461.
51 *Cf*, however, Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at para 05.023.
52 *MacDougall v Gardiner* (1875) 1 Ch D 13 at 25–26.

disputes through the courts when effective means of self-help are available.

20 In addition to the common law cases, s 392(2) of the Act states that a proceeding under the Act:

> … is not invalidated by reason of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.

Section 392(1) provides that in general a reference to a procedural irregularity "includes" a reference to the absence of a quorum at a meeting of a corporation and a defect, irregularity or deficiency of notice or time. Section 392 is a very useful provision that presumptively validates proceedings notwithstanding the existence of procedural irregularities unless it can be shown by the applicant that substantial injustice exists.

21 One point of confusion, however, relates to the distinction between procedural and substantive irregularities that was recognised in *Thio Keng Poon v Thio Syn Pyn*[53] ("*Thio Keng Poon*"). In that case it was argued, *inter alia*, that Art 88(c) of the company's articles of association had not been complied with. The article provided that the office of director shall be vacated if "he shall be requested to vacate office by all the other Directors, they pass a resolution that he has been so requested and by reason thereof has vacated his office". The Court of Appeal held that non-compliance with this article was not merely a procedural irregularity but constituted a substantive irregularity. In the circumstances, s 392(2) did not apply and the director's removal was invalid.

22 It is suggested respectfully that the distinction in *Thio Keng Poon* between procedural and substantive irregularities was not warranted in the circumstances.[54] In *Thio Keng Poon* the Court of Appeal relied on *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd*[55] ("*Cordiant*") where the court had said:[56]

> The decisions in *Industrial Equity* and *Scullion* provide a useful guide to how problems arising out of irregularities at meetings may be

53 [2010] 3 SLR 143.

54 *Cf*, however, Alexander Loke Fay Hoong, "Rights Duties and the Validation of Irregularities" (2011) 23 SAcLJ 838.

55 [2005] NSWSC 1005.

56 *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* [2005] NSWSC 1005 at [97].

> resolved as a matter of fairness and practicality. A wrongful denial of a shareholder's statutory right to vote at a meeting is a denial of a substantive right and is not a 'procedural irregularity' within the scope of s 1322(2) at all.

While it is true that in *Scullion v Family Planning Association of Queensland*[57] ("*Scullion*") Ryan J said that any "restriction on the right of members to appoint a proxy to attend and vote at a meeting is a matter which affects an important substantial right of members",[58] the court later said that the "wrongful rejection of the proxy votes at the meeting was … a procedural irregularity" which did not cause injustice because it would have made no difference to the outcome.[59] Accordingly, the court declared that the election of the office bearers was not invalid by reason of any failure to comply with the relevant corporate legislation or the constituent documents of the company.[60]

23 Furthermore, in *Integrated Medical Technologies Ltd v Macel Nominees Pty Ltd*[61] Bryson J said:[62]

> … a procedural irregularity is no less an irregularity and no less procedural if it affects an important substantial right of members, and it is in the nature of procedure and of irregularities to do so, as well as to have effects on other rights, including rights which are not important and rights which are not substantial.

It is suggested that such an approach is to be preferred. Section 392(2) already stipulates that where procedural irregularities have caused substantial injustice the proceeding in question may be invalidated. It therefore seems more desirable to have a broader understanding of what amounts to a procedural irregularity. A narrow definition of procedural irregularity would simply give rise to a broader universe of substantive irregularities which are not presumptively validated even where no possible injustice could have been caused.[63] This would seem to be a retrograde step from the common law position discussed previously. Where there is no substantial injustice it will in most cases be because

57 (1985) 10 ACLR 249.

58 *Scullion v Family Planning Association of Queensland* (1985) 10 ACLR 249 at 253–254.

59 *Scullion v Family Planning Association of Queensland* (1985) 10 ACLR 249 at 255.

60 See also *Industrial Equity Ltd v New Redhead Estate* [1969] 1 NSWLR 565.

61 (1998) 13 ACLR 110.

62 *Integrated Medical Technologies Ltd v Macel Nominees Pty Ltd* (1998) 13 ACLR 110 at 119.

63 Indeed, in *Thio Keng Poon v Thio Syn Pyn* [2010] 3 SLR 143 and *Scullion v Family Planning Association of Queensland* (1985) 10 ACLR 249 the courts concluded that even if the irregularities were to be regarded as procedural, there was substantial injustice.

the majority is in a position to procure the outcome notwithstanding the objections of the minority.[64]

24 *Scullion* in turn referred to *Re Freehouse Ptd Ltd*[65] ("*Freehouse*") where it was held that the failure to give any notice of a procedure designed to amend the articles of association, which meant that 50% of the shareholders had no knowledge of the amendment, was not a procedural irregularity for the purposes of s 1322(2) of the Australian Corporations Act 2001 which is the Australian equivalent of s 392(2) of the Act. In *Freehouse*, the failure to give notice was deliberate, and arguably s 392(3) implicitly excludes acts or omissions that were intended to leave other members ignorant of a meeting. However, in *Thio Keng Poon* the Court of Appeal did not agree that s 392(2) was inapplicable whenever non-compliance was deliberate.[66]

25 Beyond the authorities that *Cordiant* relied on, another difficulty with the case is its basis for the purported distinction between the two types of irregularities. According to the court, the cases regarding the distinction between a substantive law or rule and a procedural law or rule provide some guidance. The following passage from *John Pheiffer Pty Ltd v Rogerson*[67] ("*John Pheiffer*") was cited:[68]

> … matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure. Or to adopt the formulation put forward by Mason CJ in *McKain*, 'rules which are directed to governing or regulating the mode or conduct of court proceedings' are procedural and all other provisions or rules are to be classified as substantive.

*John Pheiffer* was a case principally concerned with choice of law rules and the distinction between substantive law and procedural law. In conflict of laws, a court applies its own procedural laws to cases being litigated before it and may ignore the procedural laws of other jurisdictions. Thus where a plaintiff suffered damage in one jurisdiction but sues in another, a question can arise whether a restriction found in the first jurisdiction but not in the second applies to the case in question. If the restriction relates to a procedural matter, the court in the second jurisdiction is not bound by the restriction.

64 Leaving aside any question of oppression under s 216 of the Companies Act (Cap 50, 2006 Rev Ed), which is a separate issue.
65 (1997) 26 ACSR 662.
66 *Thio Keng Poon v Thio Syn Pyn* [2010] 3 SLR 143 at [58].
67 (2000) 203 CLR 503.
68 *John Pheiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [99].

26 Presumably, this distinction between substantive and procedural law may be analogised with substantive rights and procedural rights under s 392 of the Act. Thus, a right to attend meetings and to vote would be regarded as substantive rights while the right to receive proper notice is a procedural right. The former cannot be validated under s 392 while the latter can. However, this distinction in the context of s 392 makes little sense. Before a member can exercise rights as a member, such member must be given sufficient information to exercise such rights. The giving of proper notice is therefore essential to a member being able to attend meetings and exercise his right to vote. This would suggest that a deliberate act of not giving notice to a member should be regarded as a substantive irregularity since this effectively deprives the member of the right to attend the meeting and vote. However, *Thio Keng Poon* rejected this. This being the case, why should such a situation be a lesser evil compared to a case where a member does receive proper notice but his vote is improperly excluded as a result of an honest mistake by the chairperson of the meeting? After all it is clear that "proceeding" under s 392(2) refers also to "meeting"[69] and mistakes at meetings can lead to votes being excluded. It would mean further that if a member with, say, 1% of the voting rights was wrongly excluded from voting, this would render the proceeding invalid even though the effect is *de minimis* because the vast majority of members voted in favour of the resolution.

27 In developing the distinction the court said that what is a procedural irregularity will be ascertained by first determining what is "the thing to be done" which the procedure is to regulate. If there is an irregularity which changes the substance of "the thing to be done", the irregularity will be substantive, while an irregularity that merely departs from the prescribed manner in which the thing is to be done without changing the substance of the thing is procedural.[70] This is somewhat question begging. As the court went on to say, in the case of a shareholder meeting, if one defines "the thing to be done" as the putting of a resolution to the vote of shareholders at a meeting, an irregularity that denies some an effective vote has not changed the substance of the thing to be done since a meeting has been held and a resolution has been put. What has occurred was merely an irregularity in the voting procedure. However, if one defines "the thing to be done" more narrowly as putting a resolution to the vote of all shareholders present in person or by proxy at a meeting and entitled to vote, excluding some

69 *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* [2005] NSWSC 1005 at [87].

70 *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* [2005] NSWSC 1005 at [103]. See also *Thio Keng Poon v Thio Syn Pyn* [2010] 3 SLR 143 at [66] and *Lim Koh Wah v Lim Boh Yong* [2015] 5 SLR 307 at [55]–[58].

shareholders does change the substance of "the thing to be done" so that the irregularity is substantive.[71]

28 This is surely unsatisfactory because the outcome on the same set of facts is dependent on what classification is applied to the facts. Such an elastic approach to judicial decision-making is hardly conducive to business certainty which is important in corporate law. It also adds nothing valuable to the analysis given that even if courts define procedural irregularity broadly, the proceeding can be struck down where substantial injustice can be established.

29 In *Thio Keng Poon*[72] the court also relied on *Wagner v International Health Promotions Pty Ltd*.[73] In this case the court invalidated a resolution because it did not comply with s 436A(1) of the Corporations Act 2001. This provision states that a company may appoint an administrator of the company if the board has resolved to the effect that in the opinion of the directors voting for the resolution the company is insolvent or is likely to become insolvent at some future time, and an administrator should be appointed. The court considered the provision as a substantive matter and a precondition to the appointment of an administrator. The failure to comply with the provision was therefore not a procedural irregularity but one which went to the very underlying statutory basis for the appointment of an administrator. Section 1322 of the Corporations Act 2001 could not cure the failure to comply with a mandatory requirement of the said Act. The decision is clearly correct and very different from *Thio Keng Poon* as s 392(2) and its Australian equivalent cannot justify a failure to comply with substantive law.

30 The court in *Thio Keng Poon* said that Art 88(c) was not of the same genre as those irregularities listed in s 392(1). The notice requirement in the article served two complementary purposes. First, it gave notice to the director in question that his services on the board were no longer appreciated by his co-directors. He would then have to consider his available options. He might well decide to leave voluntarily and resign, thus preserving his dignity. Second, and in the alternative, he might wish to bring it up and appeal to his co-directors and convince them that his remaining on the board would be in the best interests of the company. The failure to serve the director with such a notice would deny him these choices. This could not simply be a matter of procedure. These choices in the court's view must have been the obvious intention

71 *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* [2005] NSWSC 1005 at [105]–[106].

72 *Thio Keng Poon v Thio Syn Pyn* [2010] 3 SLR 143 at [67].

73 (1994) 15 ACSR 419.

behind Art 88(c); otherwise the provision could have simply provided that a director shall cease to be a director upon a resolution being passed by the board or upon the request to resign being made to him by his co-directors and nothing else.

31 While there is force in these arguments, and it is true that Art 88(c) cannot be regarded as a standard form constitutional provision, where a director is liable to lose his office upon a resolution being passed, whether by the shareholders[74] or directors, the requirement for a resolution will usually mean that notice of the meeting and its agenda will be provided to the affected director in advance and who will accordingly have knowledge of the purpose of the meeting. He will therefore be able to try to persuade the shareholders or other directors not to remove him, or he may resign voluntarily. Despite the difference in language, there is no material difference in effect between Art 88(c) and typical constitutional provisions dealing with the removal of directors. Yet it is implicit in the court's judgment that in the latter type of provision the failure to give notice would not be regarded as a substantive irregularity. It should have been no different with Art 88(c).

32 In *Chang Benety v Tang Kin Fei*[75] ("*Chang Benety*") the Court of Appeal reiterated the substantive and procedural irregularity distinction. The court explained that in *Thio Keng Poon* the irregularity gave rise to a "substantive breach", which was not an irregularity of the same genre as that contemplated in s 392(1) of the Act because "it involved a breach of a specific requirement in the articles of association, which clearly specified the procedure for removing a director".[76] While it is not entirely clear, one interpretation of *Chang Benety* is that the Court of Appeal has, contrary to the less restrictive understanding of "procedural irregularity" argued for in this article, gone further than *Thio Keng Poon* in generalising irregularities relating to the removal of directors as substantive since this is a matter almost inevitably specifically provided for in the corporate constitution. The court went on to state that such an irregularity regarding an attempt to remove a director must be contrasted with cases involving a lack of quorum. The latter was only a procedural irregularity.[77]

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74 This is the default provision found in reg 73(1) of the First Schedule to the Companies (Model Constitutions) Regulations 2015 (S 833/2015).

75 [2012] 1 SLR 274.

76 *Chang Benety v Tang Kin Fei* [2012] 1 SLR 274 at [41].

77 *Chang Benety v Tang Kin Fei* [2012] 1 SLR 274 at [42]–[43]. The difficulty with such reasoning is that all irregularities that are linked to non-observance of the corporate constitution would amount to non-compliance with a specified procedure in such constitution. There seems no reason therefore to limit substantive irregularities only to breaches relating to directorial removal. The

(*cont'd on the next page*)

## IV. Directors

33 On the whole the law relating to directors' duties in Singapore is well established and stable. One aspect of it, however, has very recently been thrown into some confusion as a result of apparently contradictory positions taken by the High Court.

34 Section 156(1) of the Act provides that subject to this section every director or chief executive officer of a company who is in any way, whether directly or indirectly, interested in a transaction or proposed transaction with the company shall as soon as is practicable after the relevant facts have come to his knowledge declare the nature of his interest at a meeting of the directors of the company or send a written notice to the company containing details on the nature, character and extent of his interest in the transaction or proposed transaction with the company.[78] A similar provision in s 156(6) requiring disclosure applies in circumstances where a director or chief executive officer holds any office or possesses any property that may create a conflict of interest with the director's or chief executive officer's duties to the company. Section 156(14) states that the section:

> … shall be in addition to and not in derogation of the operation of any rule of law or any provision in the constitution restricting a director or chief executive officer from having any interest in transactions with the company or from holding offices or possessing properties involving duties or interests in conflict with his duties or interests as a director or chief executive officer (as the case may be).

Breach of s 156 is a criminal offence pursuant to s 156(15) of the Act.

35 In *Dayco Products Singapore Pte Ltd v Ong Cheng Aik*[79] ("*Dayco*") the High Court had occasion to discuss s 156 of the Act. The facts are typical of many directorial breaches of fiduciary duty cases involving a director using his position to make secret profits. To the defendant's allegation that he had disclosed his personal interest in the transactions involving the plaintiff company that he was managing

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Singapore cases also seem to suggest that the difference between a procedural and substantive irregularity lies in the perceived severity of the irregularity in question. Some irregularities give rise to substantive breaches while others don't. This makes the distinction between procedural and substantive irregularities, as applied by the courts, somewhat suspect. The severity of the breach should be taken into consideration when determining if there has been substantial injustice and not when determining if there has been a procedural irregularity. What amounts to a procedural irregularity should be determined by its character and not its level of seriousness.

78 The requirements for such declaration are set out in s 156(5) of the Companies Act (Cap 50, 2006 Rev Ed).

79 [2004] 4 SLR(R) 318.

director of because he had informed the person he reported to directly, that is, the vice-president and general manager of the group's European subsidiary, Belinda Ang Saw Ean J said:[80]

> Separately, s 156(1) of the Companies Act (Cap 50, 1994 Rev Ed) and sometimes the articles of a company,[81] permit a director who is interested in a proposed transaction to take the benefit of the transaction if he discloses his interest to the board and takes no part in the decision of the board on the transaction. If the director makes that disclosure and abstains from taking part in the decision, the validity of the transaction is not impaired.
>
> A failure to adequately disclose will render the director accountable to the company for the profits made from the transaction. …

On the other hand, a failure to adequately disclose will render the director accountable to the company for the profits made from the transaction. In *Dayco*, even if disclosure had been made to the vice-president of the European subsidiary, which the court was not convinced of, that was insufficient as it was not made to the board of the plaintiff company.

36 Beyond the actual decision, the passage from the judgment quoted above is extremely important. One of the uncertainties about s 156 is whether compliance with it simply absolves the declarant from criminal liability. The judgment in *Dayco* is that such a declaration can go beyond this; it can have the effect of avoiding any civil consequences as well, *provided the director or chief executive officer does not participate in the ensuing discussion leading to the decision in question*. This result should be warmly welcomed. As a general rule, powers of management are vested with the board of directors.[82] Where one of their own is interested in a transaction or proposed transaction with the company, it should be open to the rest of the board to make an informed decision to proceed with the transaction if they are of the view that such a transaction is in the best interests of the company. There is no necessity to seek shareholders' approval as this is a matter for management. Such transactions can be in the best interests of the company, for example, where a company wishes to contract with another company that one of its directors is a substantial shareholder of because such company is a major supplier of a product the first-mentioned company requires for its business.

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80 *Dayco Products Singapore Pte Ltd (in liquidation) v Ong Cheng Aik* [2004] 4 SLR(R) 318 at [14]–[15].

81 Many law students have over the years expressed the view that the articles of the company must provide for this before a director may take the benefit of an interested transaction. This is clearly incorrect as can be seen from this passage.

82 Companies Act (Cap 50, 2006 Rev Ed) s 157A.

37 Similarly, where there is a potential conflict of interest, the other members of the board may decide if it is in the best interests of the company to allow the potentially conflicted director or chief executive officer to continue holding office notwithstanding the potential conflict. They may do so if they feel that the potential conflict can be managed and do not want to risk losing the services of the director or chief executive officer. Again, this is a management issue. Where the board after due deliberation and with full knowledge wishes the company to transact with a director, or is prepared to allow such a director to continue to hold another office or property that may give rise to a conflict of interest, there is no longer any breach of fiduciary duty if the director transacts with the company or holds such other office or property as long as there has been no relevant change in circumstances.

38 Recently, however, the High Court appeared to come to a different conclusion. In *Traxiar Drilling Partners II Pte Ltd v Dvergsten, Dag Oivind*[83] ("*Traxiar*") the defendant argued that he did not breach the no-conflict rule as he had, pursuant to s 156(5) of the Act, made full disclosure to the board. The court rejected the argument saying:[84]

> A director's statutory obligation to disclose interests to the company's board under s 156 of the CA is independent of the general duty to avoid conflicts of interests stemming from the no-conflict rule and the rule against self-dealing (see also *Corporate Law* at para 09.084 and *Walter Woon on Company Law* at para 8.52). In fact, s 156(14) of the CA expressly provides that s 156 'shall be *in addition to and* ***not in derogation of*** the operation of any rule of law' …. As such, the Defendant's submission conflated the director's statutory obligation to disclose his interests in related entities with the director's obligation to avoid conflicts of interest at general law. If anything, disclosure pursuant to s 156(5) of the CA would only mean that the Defendant would not incur civil and criminal liability under s 156 of the CA which was, in any event, not the Plaintiff's case.
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> Instead, at general law, a breach of the no-conflict rule will be avoided only where there is full disclosure to all the shareholders of all the material facts and shareholders' approval is subsequently obtained (see *Dayco Products Singapore Pte Ltd (in liquidation) v Ong Cheng Aik [2004] 4 SLR 318* at [13], citing with approval the English Court of Appeal's decision in *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2004] 1 BCLC 131 at [65]). This is clearly distinct from the statutory obligation under s 156 of the CA: disclosure under the CA is made to the company's *board of directors* and is governed by the parameters stipulated in s 156 of the CA, while disclosure under

83 [2018] SGHC 14.

84 *Traxiar Drilling Partners II Pte Ltd v Dvergsten, Dag Oivind* [2018] SGHC 14 at [105]–[106].

> general law is to the *shareholders* and full disclosure of all the material facts is required.
>
> [emphasis in italics and bold italics in original]

While it is a plausible view that the no-conflict rule can be avoided only by fully informed shareholder approval, it is suggested that the position in *Dayco* is to be preferred for the reasons already mentioned. Furthermore, the following points may also be made.

39 First, while it is true that directors may seek shareholder approval to waive any potential conflict of interest, and the court in *Traxiar* referred to *Dayco* for this proposition, it did not refer to Ang J's judgment[85] where her Honour clearly saw s 156 as providing an additional means of disclosure to directors that had the effect of precluding civil liability for breach of fiduciary duty. It is therefore not clear if the court in *Traxiar* was aware of such position taken in *Dayco* and disagreed with it, or did not in fact consider the effect of the earlier decision.

40 Second, in *Traxiar* the court appeared to be of the view that disclosure pursuant to s 156(5) would mean the avoidance of civil and criminal liability under s 156 but not civil liability under common law. It is not clear that s 156 intends to impose civil liability but if it does, it may not be sensible to draw a distinction between civil liability under s 156 and such liability under common law. The two ought to be the same; therefore, avoidance of civil liability under s 156 should lead to similar avoidance under common law. Third, while it is suggested that s 156 does not seek to impose civil liability, it is submitted that *Dayco* is correct that the effect of compliance with s 156, followed thereafter by an informed decision made by the other members of the board, is that civil liability may be avoided. This is on the basis, as outlined above,[86] that directors have the power to make management decisions including whether to transact with an interested director. Shareholder approval is therefore not necessary in such circumstances.

41 Finally, such an outcome is consistent with general law and therefore does not contradict s 156(14). In *Queensland Mines Ltd v Hudson*[87] the plaintiff company was initially interested in developing a mine. The defendant, who was at the time the managing director of the plaintiff, obtained the necessary licences to do so. Unfortunately, the plaintiff was in financial difficulties and could not proceed with the

85 *Dayco Products Singapore Pte Ltd v Ong Cheng Aik* [2004] 4 SLR(R) 318 at [14] and [15].

86 See para 37 above.

87 (1987) 18 ALR 1.

project. The defendant resigned his position and, with the full knowledge of the directors of the plaintiff, developed the mines successfully. In a suit by the plaintiff against the defendant for an account of profits, the Privy Council advised that the claim should be dismissed. The managing director had acted with the full knowledge of the plaintiff's directors who had firmly decided they were no longer interested in the mine and must be taken to have assented to the managing director's activities. The issue of whether to exploit the licences was a board matter. Upon the board making its decision, it could be said that either the mining venture was outside the scope of the fiduciary relationship, or the plaintiff gave the defendant the plaintiff's fully informed consent for the defendant to pursue the licences as best he could. The outcome is therefore consistent with the well-known rule in equity expressed in cases such as *Aberdeen Rail Co v Blaikie Brothers*[88] ("*Aberdeen*") that:[89]

> … it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect.

In *Aberdeen* itself there was no disclosure to the board, and proper disclosure together with an informed decision made by the board in the best interests of the company means that the potential conflict no longer exists.

42 The earlier decision of the Canadian Supreme Court in *Peso Silver Mines Ltd v Cropper*[90] ("*Peso Silver Mines*") went further. There the plaintiff company had rejected a corporate opportunity. Such rejection by the board was made in good faith in the interests of the plaintiff for sound business reasons. Subsequently, the defendant who was the plaintiff's managing director was approached by a third party to be part of a group to take up the opportunity the plaintiff had rejected. The defendant did so and the plaintiff subsequently brought a claim alleging breach of fiduciary duty on his part. The claim was dismissed. The approach by the third party to the defendant was not accompanied by any confidential information unavailable to any prospective purchaser, nor did the respondent as director have access to any such information by reason of his office. In addition, when the defendant was approached it was not in his capacity as a director of the plaintiff, but as an individual member of the public whom the third party was seeking to interest as a co-adventurer.

88 [1843–1860] All ER Rep 249.

89 *Aberdeen Rail Co v Blaikie Brothers* [1843–1860] All ER Rep 249 at 252. See also *North-West Transportation Co v Beatty* (1887) 12 App Cas 589 at 593.

90 [1966] SCR 673.

43 It is arguable that this decision goes too far on the facts. While it is a legitimate proposition that a director of a company can, depending on the facts, be approached not as a director but as a mere member of the public[91] and such business opportunity may not amount to a corporate opportunity that such director must bring to the board, it is questionable if this ought to be the case where the opportunity had been brought previously to the board. Although the board may then have rejected the opportunity in good faith, the defendant director included, where such director subsequently sees merit in personally taking up the opportunity, this should be fully disclosed to the board so that the board may reconsider its earlier decision. For one, the reasons for the earlier rejection may no longer be valid or apply with the same force and the board may therefore come to a different decision if it was aware that the opportunity was still extant. Furthermore, even if the circumstances have not changed, the fact that a member of the board sees merit in the opportunity to the point of being willing to invest in it is certainly cause for the board to rethink its earlier decision and it should be given the scope to do so.

44 Notwithstanding these reservations about the correctness of the result in *Peso Silver Mines*, it is clear that under general law a board may in good faith forgo a corporate opportunity and in addition allow one of its own to take advantage of such opportunity so long as such director has made full disclosure and does not seek to unduly influence the decision of the other members of the board.

45 Such a conclusion is not inconsistent with the well-known case of *Regal Hastings Ltd v Gulliver*.[92] Essentially, directors of the plaintiff company wanted to extend the company's sphere of operations by acquiring additional cinemas. Toward this end another company, Amalgamated, was incorporated. The plaintiff invested £2,000 in this company which was the total sum it could find.[93] Four of the five directors of the plaintiff each contributed £500. Another director of Amalgamated, who was not a director of the plaintiff, also contributed £500, while the chairman of the plaintiff found others to invest a further £500, making a total investment of £5,000 in Amalgamated. Subsequently the shares in Amalgamated were sold at substantial profit and the plaintiff sought to recover the profit made by its directors. The

91 See *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126 at 1130 where Lord Wilberforce, delivering the judgment of the Privy Council, said: "A person in his position may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction, or group of transactions, must be looked at."

92 [1967] 2 AC 134.

93 Although it is not clear whether the plaintiff company considered other forms of financing such as a loan or the issue of new shares to existing shareholders.

House of Lords allowed the claim. It is not difficult to see why. Even if it was the case that the plaintiff did not have the means to raise more than the £2,000 that it contributed to Amalgamated, four of the five directors of the plaintiff company took advantage of an opportunity that only came to them by virtue of their directorships. It could therefore not be said that they had been allowed to do so by a disinterested board. The law should be wary of allowing directors of a company to determine solely by themselves that the company does not have the means to embark on a business venture and that upon such determination the directors are freed from their fiduciary obligations. In such a situation the board is no longer the right organ to make this decision and the directors will have to obtain the informed consent of the shareholders in advance.

46 It is nevertheless possible that *Dayco* and *Traxiar* can be reconciled. While the propositions of law relating to this issue in *Traxiar* were broadly framed, it is suggested that the court did not consider all the possible legal avenues. It is certainly true that disclosure *per se* under s 156 of the Act does not put an end to the declarant's fiduciary duty to the company. In this sense the statutory duty to disclose is not coterminous with the fiduciary duty at common law.[94] It is also true that full disclosure to shareholders and their consent in advance can modify the scope of a director's fiduciary obligations. And where there has already been a breach, it would appear that only the shareholders in general meeting may waive such breach.[95] It does not appear that this is a matter only for the board. However, the court in *Traxiar* did not explicitly address those situations where full disclosure by the director has been made pursuant to s 156 of the Act, followed by the board in the exercise of its management power coming to a *bona fide* decision to modify the director's obligations without any interference or influence being exercised by the said director. In such circumstances, the director should not be required to account for any profit resulting from what the board has permitted.[96] In *Traxiar*, on the other hand, it would appear the defendant director only disclosed his interests in the relevant companies without more.[97]

## V. Minority oppression

47 Given the number and regularity of cases where minority oppression is alleged, and the myriad fact patterns that arise, it is not

94 *Hely-Hutchinson v Brayhead* [1968] 1 QB 549 at 594.
95 *Regal Hastings Ltd v Gulliver* [1967] 2 AC 134.
96 *Dayco Products Singapore Pte Ltd v Ong Cheng Aik* [2004] 4 SLR(R) 318 at [14].
97 *Traxiar Drilling Partners II Pte Ltd v Dvergsten, Dag Oivind* [2018] SGHC 14 at [104]–[105].

surprising that some issues still call for further reflection. To begin with, it is suggested that uniting the framework within the concept of equitable considerations will be useful. Currently the courts use different language to describe the type of conduct that will elicit a remedy. One recurring theme revolves around the idea of unfairness and the Court of Appeal has said that "the common thread [under s 216] is some element of unfairness which would justify the invocation of the court's jurisdiction".[98] In the celebrated case of *Re Kong Thai Sawmill (Miri) Sdn Bhd*,[99] Lord Wilberforce expressed it as there being "a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect",[100] and recently the Court of Appeal said that a shareholder relying on s 216 "needs … to demonstrate that the conduct complained of amounts to commercially unfair conduct".[101]

48 Another phrase that is widely used is "legitimate expectations". In *Over & Over Ltd v Bonvests Holdings Ltd*,[102] the Court of Appeal stated that "in deciding whether to grant relief under s 216 of the Companies Act, [the courts] must take into account both the legal rights and the legitimate expectations of members".[103] Such legitimate expectations are derived from:[104]

> (i) strict legal rights as found in documents such as the company's constitution or shareholders' agreements; or (ii) informal understandings and assumptions from the parties' interactions and personal relationships in cases of quasi-partnerships; or (iii) informal understandings among shareholders *independent* of whether the company is a quasi-partnership. [emphasis in original]

98 *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 at [77]. See also *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 at [37].

99 [1978] 2 MLJ 227.

100 *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 at 229. See also *Re Gee Hoe Chan Trading Co Ltd* [1991] 2 SLR(R) 114 at [34]; *Re Tri-Circle Investment Pte Ltd* [1993] 1 SLR(R) 441 at [3]; *Low Peng Boon v Low Janie* [1999] 1 SLR(R) 337 at [43]; and *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 at [77].

101 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [81]. This is similar to what was said in *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 at [81], where the Court of Appeal observed that "[c]ommercial fairness" was "the touchstone by which the court determines whether to grant relief under s 216 of the Companies Act".

102 [2010] 2 SLR 776 at [78].

103 See also *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 19–20; *Eng Gee Seng v Quek Choon Teck* [2010] 1 SLR 241; *Teo Chong Nghee Patrick v Han Cheng Fong* [2014] 3 SLR 595; and *Poh Fu Tek v Lee Shung Guan* [2018] 4 SLR 425.

104 *Thio Syn Kym Wendy v Thio Syn Pyn* [2017] SGHC 169 at [44]. This first instance decision by Judith Prakash JA was largely affirmed on appeal in *Thio Syn Kym Wendy v Thio Syn Pyn* [2018] 2 SLR 788.

This echoes the earlier case of *Eng Gee Seng v Quek Choon Teck*[105] where Chan Seng Onn J said that in the case of an ordinary company, the company's formal documents *prima facie* lay down the basis of the association exhaustively. However, "there can also exist agreements, understandings or promises as between members of an association, which are not in those formal documents, but which may give rise to reasonable or legitimate expectations on the part of minority members".[106]

49 Observations such as these are important. What is unfair is a nebulous concept, especially when unfairness can arise even where the majority has complied with the Act and the company's constitution.[107] As Lord Hoffmann pointed out in *O'Neill v Phillips*,[108] in relation to the then s 459(1) of the UK Companies Act 1989[109] which grants relief to a member of a company where the affairs of the company are being or have been conducted in an "unfairly prejudicial" manner, the concept of fairness must be "applied judicially and the content which it is given by the courts must be based upon rational principles".[110] Similarly, the phrase "legitimate expectations" does not in itself shed any light on why the expectations are legitimate, again especially so when the majority has acted within their strict legal rights.

50 It is therefore necessary to clearly set out what underlies these notions of fairness and legitimate expectations where the majority has acted within what the Act and the corporate constitution seemingly permit. It is suggested that this is to be found in the concept of "equitable considerations".[111] Lord Hoffmann, who used the phrase "legitimate expectation" in *Re Saul D Harrison & Sons plc*,[112] said in *O'Neill v Phillips* that such expectations could only arise as a consequence of the operation of equitable principles and should not be allowed to live a life of its own outside traditional equitable principles.[113] Similarly, the concept of unfairness has to be determined consistently with principles of equity.

105 [2010] 1 SLR 241.
106 *Eng Gee Seng v Quek Choon Teck* [2010] 1 SLR 241 at [10].
107 For example, see *Re Gee Hoe Chan Trading Co Pte Ltd* [1991] 2 SLR(R) 114. See also *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [82].
108 [1999] 1 WLR 1092.
109 c 40.
110 *O'Neill v Phillips* [1999] 1 WLR 1092 at 1098. A number of Singapore cases have cited *O'Neill v Phillips* and these are discussed below.
111 Generally, see Tan Cheng Han & Wee Meng Seng, "Equity, Shareholders and Company Law" in *Equity, Trusts and Commerce* (Paul S Davies & James Penner eds) (Hart Publishing, 2017) at pp 5–17.
112 [1995] 1 BCLC 14 at 19.
113 *O'Neill v Phillips* [1999] 1 WLR 1092 at 1102.

51 It is suggested that the equitable principle that the courts have been applying is that of fraud in equity. This is a broader concept than common law fraud and does not necessarily connote dishonesty.[114] One example of equitable fraud is where a party improperly relies on his or her legal rights[115] as equity will not allow the law to be used as an instrument of fraud. Equity will act *in personam* against the conscience of a defendant to prevent such person from taking inequitable advantage of another.[116] That this is the principle of equity being applied by the courts is clear from *O'Neill v Phillips* where Lord Hoffmann said:[117]

> In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. *One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith.* These principles have, with appropriate modification, been carried over into company law.
>
> The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that *there will be cases in which equitable considerations make it unfair for those conducting the affairs of the*

114 J Dyson Heydon, Mark J Leeming & Peter G Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th Ed, 2015) at para 12-005; Alastair Hudson, *Equity and Trusts* (Routledge, 8th Ed, 2015) at para 1.4.18.

115 J Dyson Heydon, Mark J Leeming & Peter G Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th Ed, 2015) at para 12-050.

116 Alastair Hudson, *Equity and Trusts* (Routledge, 8th Ed, 2015) at paras 1.4.13 and 1.4.18. See also J Dyson Heydon, Mark J Leeming & Peter G Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th Ed, 2015) at para 12-100.

117 *O'Neill v Phillips* [1999] 1 WLR 1092 at 1098–1099. These passages were cited with approval by the Court of Appeal in *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 at [28]; *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745 at [82]; and *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [87]; and the High Court in *Over & Over Ltd v Bonvests Holdings Ltd* [2009] 2 SLR(R) 111 at [82]; *Eng Gee Seng v Quek Choon Teck* [2010] 1 SLR 241 at [16]; *Lim Chee Twang v Chan Shuk Kuen Helina* [2010] 2 SLR 209 at [82]; and *Tan Yong San v Neo Kok Eng* [2011] SGHC 30 at [101].

> *company to rely upon their strict legal powers.* Thus, unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.
>
> [emphasis added]

52 The cases have gone on to state that what renders the exercise of strict legal rights contrary to good faith is that such exercise is inconsistent with the shareholders' informal understandings and assumptions.[118] This can potentially arise in the context of any company[119] but most usually in the case of quasi-partnership companies.[120] This quasi-contractual approach that focuses on understandings and agreements short of an enforceable contract was endorsed in *O'Neill v Phillips* where Lord Hoffmann opined that:[121]

> … one useful cross-check in a case like this is to ask whether the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed. Would it conflict with the promises which they appear to have exchanged … In a quasi-partnership company, they will usually be found in the understandings between the members at the time they entered into association. But there may be later promises, by words or conduct, which it would be unfair to allow a member to ignore. Nor is it necessary that such promises should be independently enforceable as a matter of contract. A promise may be binding as a matter of justice and equity although for one reason or another (for example, because in favour of a third party) it would not be enforceable in law.

In *Tomolugen Holdings Ltd v Silica Investors Ltd*,[122] the Court of Appeal also endorsed such an approach.[123] Sundaresh Menon CJ expressed the view that the essence of a claim under s 216 lay in upholding the agreement between the shareholders of a company, regardless of whether the agreement was found in a formal agreement or, in the case of quasi-partnerships, in the legitimate expectations of the shareholders. This is an important observation. The legitimate expectations of the shareholders (and therefore whether conduct by the majority was fair or otherwise) arise ultimately from the agreement between them even though such agreement, express or implied,[124] is informal and

118 See the cases cited in this para below.
119 Even public listed companies where there are exceptional facts: see *Luck Continent Ltd v Cheng Chee Tock Theodore* [2013] 5 HKC 442.
120 *Thio Syn Kym Wendy v Thio Syn Pyn* [2017] SGHC 169 at [44].
121 *O'Neill v Phillips* [1999] 1 WLR 1092 at 1101.
122 [2016] 1 SLR 373.
123 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [88].
124 *Thio Syn Kym Wendy v Thio Syn Pyn* [2018] 2 SLR 788 at [28].

unenforceable as a matter of law, for example, because of a lack of consideration.[125]

53 Accordingly, in the ultimate analysis, it is submitted that where relief under s 216 is to be granted, the circumstances faced by the complainants must be contrary to some express or implied agreement or understanding between the shareholders.[126] This is what lies at the heart of the statutory equitable jurisdiction of the courts to prevent shareholders of companies from taking unfair advantage of their strict legal rights. Equity intervenes because the exercise of such rights amounts to equitable fraud and bad faith given the agreement and understanding between the parties. Such an approach is also consistent with economic theory. Companies enhance investment and entrepreneurship by allowing easy pooling of resources, asset partitioning and limited liability. However, this is conditional on corporate law as a whole providing a proper framework of rules that do not allow majorities to take undue advantage of minorities, thereby providing a degree of confidence that investments will not be easily diminished by sharp practice.[127]

54 If the law relating to minority oppression is understood in these terms, it will provide greater clarity to the proper approach underlying s 216. It will not be necessary, for instance, to find a different basis or rationale on which to ground relief outside the well-known category of quasi-partnership cases. It has been said, for example, that in *Thio Syn Kym Wendy v Thio Syn Pyn*,[128] Judith Prakash JA "seems to have recognised and applied an objective standard of fairness for traditional family companies" that are not quasi-partnerships, and that this could be a renaissance of the code of conduct approach to regulating a prominent subset of companies frequently embroiled in shareholder

125 See also *Eng Gee Seng v Quek Choon Teck* [2010] 1 SLR 241 at [10] where Chan Seng Onn J said:

> [T]here can also exist agreements, understandings or promises as between members of an association, which are not in those formal documents, but which may give rise to reasonable or legitimate expectations on the part of minority members. The onus will then be on the minority members to show that such informal or implied understandings, giving rise to certain expectations, exist. Conduct of the majority which conflicts with such expectations may be challenged for being unfair.

126 See also *Ng Sing King v PSA International Pte Ltd* [2005] 2 SLR(R) 56 at [95] and *Tan Yong San v Neo Kok Eng* [2011] SGHC 30 at [121].

127 Tan Cheng Han & Wee Meng Seng, "Equity, Shareholders and Company Law" in *Equity, Trusts and Commerce* (Paul S Davies & James Penner eds) (Hart Publishing, 2017) at p 16.

128 [2017] SGHC 169.

disputes.[129] And in *Thio Syn Kym Wendy v Thio Syn Pyn* the Court of Appeal made the following observation:[130]

> [Traditional patriarchal family companies] would not usually constitute quasi-partnerships because of a lack of *mutual* trust and confidence, but even if the parties do not expressly set out their legitimate expectations, there may still be unwritten expectations that the family shareholders in management cannot expend corporate resources for personal reasons to punish other family members and that any benefits previously agreed upon between the family members should not be arbitrarily reduced or removed. We leave open the question of whether these expectations establish a new intermediate ***legal*** standard of conduct applicable to traditional family companies or merely constitute ***factual*** *instances* that do not carry any normative or legal significance as such. [emphasis in italics and bold italics in original]

If the essence of the oppression remedy is the factual existence or otherwise of any informal agreement or understanding, whether express or implied, that is contrary to the exercise of the majority's strict legal rights, as is suggested in this article, no new approach or standard is being developed. All the courts are doing is determining, whatever the type of company in question, if the circumstances are different from what the shareholders themselves had previously agreed upon, albeit informally.

55 Although the Court of Appeal left the question open, it went on to emphasise that whether an act constitutes oppression is in the final analysis a fact-specific inquiry. A court must, in each case, examine the relationship between the specific parties and how they have dealt with each other in the past in order to determine whether their conduct constitutes commercial unfairness.[131] By such *dicta* the court has evinced a tentative preference against a new legal standard being set. All that is taking place is a factual inquiry and to this end the court agreed that there was oppression based on two of the three acts that the High Court had relied upon.[132] It is submitted respectfully that this is the better approach. As Andrew Ang J pointed out when commenting on a passage in *Over & Over Ltd v Bonvests Holdings Ltd*:[133]

> I do not think that the Court of Appeal's comments were meant to apply narrowly to situations where quasi-partnerships can be found. It

129 Samantha S Tang, "Corporate Divorce in Family Companies" [2018] LMCLQ 20 at 27.

130 *Thio Syn Kym Wendy v Thio Syn Pyn* [2018] 2 SLR 788 at [28].

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

132 *Thio Syn Kym Wendy v Thio Syn Pyn* [2018] 2 SLR 788 at [13]–[15].

133 [2010] 2 SLR 776 at [85]. See *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2010] SGHC 268 at [61].

> seems to me that courts should always take into consideration all the circumstances surrounding the parties' relationships and any understanding or expectations between them.

56 The use of multiple criteria can occasionally cause confusion as seems to have occurred in *Leong Chee Kin v Ideal Design Studio Pte Ltd*.[134] There the court expressed the view that a minority oppression claim could succeed outside the category of quasi-partnership companies and even without equitable considerations being superimposed as the Act is wide enough to encompass companies of different types. The court then went on to say that:[135]

> … a claim in minority oppression is often more difficult to establish where no equitable considerations are superimposed. This is because in the absence of equitable considerations, the unfairness of a party's conduct must be measured against legitimate expectations arising from the members' legal rights and the company's constitution.

Having found that the company in question was not a quasi-partnership on which equitable considerations could be superimposed, the court proceeded to determine if there were "any legitimate expectations that the plaintiff might have had" which "must emanate from his legal rights and [the company's] constitution".[136] What legitimate expectation in this regard meant was "an agreement – using the term in its broadest sense – between the parties by way of words or conduct which gives rise to an expectation" of the kind alleged and from which the defendants unfairly departed from.[137]

57 Based on what this article has set out earlier, it is suggested respectfully that equitable considerations do not arise only in relation to certain types of companies. It is suggested further that any legitimate expectation that flows from an agreement is the basis for the exercise of the court's discretion under s 216, and that such agreement means that equitable considerations can be superimposed on the company, whether a quasi-partnership company or not.[138] Finally, it is submitted that in the absence of an express or implied informal agreement or understanding between the parties which the majority has disregarded, it will be

134 [2018] 4 SLR 331.

135 *Leong Chee Kin v Ideal Design Studio Pte Ltd* [2018] 4 SLR 331 at [51].

136 *Leong Chee Kin v Ideal Design Studio Pte Ltd* [2018] 4 SLR 331 at [56].

137 *Leong Chee Kin v Ideal Design Studio Pte Ltd* [2018] 4 SLR 331 at [59].

138 This is on the basis that the majority has acted within its strict legal rights. Needless to say, where the majority has not acted within its legal rights because it has contravened the Act, the corporate constitution or a shareholders' agreement, s 216 of the Companies Act (Cap 50, 2006 Rev Ed) will always be potentially available and no reliance on equitable considerations is necessary.

difficult to justify a finding of oppression.[139] The reliance that the court placed on a Singapore corporate law text does not support the court's propositions.[140]

58 Beyond the proper underlying basis for s 216 of the Act, one other aspect can be usefully discussed, namely the distinction between personal wrongs and corporate wrongs. In *Ng Kek Wee v Sim City Technology Ltd*[141] ("*Sim City*") the Court of Appeal drew a distinction between a wrong done to a company and a personal wrong suffered by a shareholder. While the court recognised that the distinction between the two was rarely clear,[142] and there have been successful claims founded on facts which amounted to a wrong against a company, the court said that it would be wrong to permit s 216 "to be used to vindicate essentially corporate wrongs".[143] This of course raises the issue of what was meant by "essentially corporate wrongs". It also suggests that some acts that are wrongs to the company cannot be prayed in aid of a s 216 action which is premised on protecting the interests of members and not the company. The court, having stated the three wrongs on which the complaint was premised, namely illegal transfers of the shares in two wholly owned subsidiaries, the irregular withdrawal of substantial funds from the bank account of one of the subsidiaries, and the diversion of this subsidiary's business and assets, concluded as follows:[144]

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139 Although the language of s 216 of the Companies Act (Cap 50, 2006 Rev Ed) is potentially broader, as pointed out in Paul L Davies & Sarah Worthington, *Gower's Principles of Modern Company Law* (Sweet & Maxwell, 10th Ed, 2016) at para 20-12, beyond informal arrangements and the linked argument that the controllers have committed breaches of their fiduciary duties, no further, clearly defined categories of unfair prejudice under s 999(4) of the UK Companies Act 2006 (c 46) have been accepted.

140 In *Leong Chee Kin v Ideal Design Studio Pte Ltd* [2018] 4 SLR 331 at [51], the court cited Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) ("*Corporate Law*") at para 11.059. The learned authors there state that s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") was not limited only to quasi-partnership companies but could apply also to public and even listed companies, although a member of a listed company would find it harder to establish the existence of legitimate expectations beyond the company's documents. The context of the paragraph cited as well as the following paragraph from *Corporate Law*, *ie*, para 11.060, makes it clear that the authors use the phrases "legitimate expectations" and "equitable considerations" interchangeably. This is consistent with the position suggested here which is that what underlies the grant of relief under s 216 of the Act in cases where the majority has acted within its strict legal rights is that such conduct is inconsistent with what the parties have agreed, thereby giving rise to equity stepping in to prevent equitable fraud from taking place. It is from these equitable considerations that legitimate expectations arise.

141 [2014] 4 SLR 723.

142 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [62].

143 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [63].

144 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [71].

> We observe that these appear to be corporate wrongs that could have been pursued by the Respondent by way of a derivative action under s 216A of the Companies Act and the Respondent was, in essence, seeking restitution of the amounts thereby siphoned off by the Appellant from Singalab International.

This was *dicta* as the appeal had already been disposed of on another ground and indeed the court said that there was no need to come to a firm landing on the issue.[145]

59 While it is true that s 216 is only intended to remedy matters that affect members, it is submitted respectfully that courts should not draw too rigid a line between corporate and personal wrongs. Indeed, such a distinction is generally irrelevant because many corporate wrongs will be contrary to law[146] and therefore *prima facie* oppressive in and of themselves regardless of equitable considerations. In addition, if it is necessary to establish the existence of equitable considerations, it will not generally be difficult to find an express or implied understanding between the shareholders that no shareholder should commit wrongs of a material nature against the company.[147] There was therefore no reason why the three wrongs alleged could not in principle have constituted acts sufficient to fall within the ambit of s 216. There are also many Singapore cases prior to *Sim City* that have provided a remedy under s 216 on the basis of acts that constituted wrongs against the company.[148]

60 The court cited *Re Charnley Davies Ltd (No 2)*[149] as support for its approach.[150] However, the judgment of Millet J makes it clear that while facts may support a derivative action by a company as well an action under the UK equivalent of s 216, an oppression action was justified where the claimants are relying on the majority's "unlawful conduct as evidence of the manner in which he had conducted the company's affairs for his own benefit and in disregard of their interests as minority shareholders; and they wanted to be bought out". A s 216 action was permissible where the minority "wanted relief from mismanagement" and "not a remedy for misconduct".[151] In other words,

145 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [71].
146 Such as where there has been misappropriation of corporate property.
147 *Lim Chee Twang v Chan Shuk Kuen Helina* [2010] 2 SLR 209 at [105]; *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333.
148 For example, see *Re Kumagai-Zenecon Construction Pte Ltd* [1994] 2 SLR(R) 970 and *Low Peng Boon v Low Janie* [1999] 1 SLR(R) 337 which were referred to in *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [63].
149 [1990] BCLC 760.
150 The court also cited the Canadian decision of *Pappas v Acan Windows Inc* (1991) 2 BLR (2d) 180 as a case that adopted a similar approach to *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760.
151 *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760 at 784.

reliance on wrongs done to the company can found a personal action under s 216 where the minority seeks personal relief rather than relief for the company. *The key distinction is in the relief sought*. The remedy asked for is a strong indication of whether a member is seeking to enforce a personal right given to him under s 216 or attempting to enforce a right that belongs to the company. In *Sim City* it would appear that the claimants were essentially seeking a buyout order though the order in the court below required, *inter alia*, the defendant to make restitution to the company before a buyout of the claimant's shares.[152] It is not clear why this was necessary because the valuation for a buyout can take into account the diminution in value to a company's shares as a result of the oppressive conduct. This seems, however, to have caused the Court of Appeal to characterise the case as one where the claimant was seeking restitution of the amounts siphoned off by the defendant from the company.[153]

61 Given the approach espoused in *Sim City*, it is no surprise that a case should soon arise where an argument was made that s 216 was inapplicable because the oppressive acts relied upon were wrongs done to the company. This was the main issue in *Ho Yew Kong v Sakae Holdings Ltd*[154] and the Court of Appeal took the opportunity to expand on the reasoning in *Sim City*. Given the existence of s 216 and the statutory derivative action in s 216A, the court said that the key question to be addressed in overlap cases is whether a person who brings an oppression action under s 216, instead of seeking leave to commence a statutory derivative action,[155] is abusing the process.[156] In answering this question, the court should bear in mind the kind of remedy being sought, as well as the real injury that the plaintiff seeks to vindicate.[157]

62 In relation to the remedy that is sought, the court said that this was a very important part of the inquiry. The remedies available under ss 216 and 216A are one of the key differences between the two provisions and if the essential remedy sought is one available only under s 216 this is a strong indicator that a claim under such section is not an abuse of the process. This does not mean that a court in a claim under s 216 cannot also grant relief that would be available under s 216A, but this should not be done readily. What is important is the essential remedy that the claimant wants. In particular, the issue is whether the essential remedy sought is a remedy for the company, or a remedy that seeks to bring to an end conduct that is detrimental to a member even if

152 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [27].
153 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [71].
154 [2018] 2 SLR 333.
155 As required under s 216A(2) of the Companies Act (Cap 50, 2006 Rev Ed).
156 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [115].
157 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [116].

remedies in favour of the company are also sought.[158] An example of this might be where the oppressive conduct complained of includes dilution of the plaintiff's interest and non-payment of dividends as well as misappropriation of corporate assets and the plaintiff seeks, *inter alia*, reversal of the dilutive act and an order of restitution in favour of the company. It is submitted respectfully that this is a very helpful clarification of *Sim City*.

63 The court, however, went on to state that focusing solely on the essential remedy was insufficient:[159]

> To properly invoke s 216, the plaintiff would have to identify the real injury which it has suffered and establish that that injury does amount to oppressive conduct against it as a shareholder. In this regard, it will be relevant to examine how the real injury which the plaintiff suffers as a shareholder is distinct from and not merely incidental to the injury which the company suffers. This will also have to be examined in the context of the essential remedy which the plaintiff is seeking and whether that remedy is in fact directed at the real injury which the plaintiff suffers as a shareholder. It follows from this that the mere fact that a given instance of unlawful conduct which is relied on by the plaintiff could also have formed the basis of a statutory derivative action pursued in the company's name will not in itself be a bar to an oppression action under s 216.

Although it will be necessary to identify the conduct complained of and to establish that such conduct amounts to oppression, this will usually be on the basis that the conduct is contrary to law or inconsistent with equitable considerations. Beyond this, it is suggested respectfully that whether the real injury is distinct from and not incidental to any injury caused to the company is unnecessary. Given that wrongs against a company can amount to conduct that affects a member in such capacity, and the determination of this second aspect will in large part depend on the essential remedy sought, this extra component adds little and is liable to lead to unnecessary sophistry by litigants.

64 One final comment about the case can be made. The court said, without deciding the issue, that as a practical matter, the application of the two pairs of questions pertaining to injury and remedy will generally exclude recourse to oppression actions in cases involving publicly or widely held companies because either the essential remedy sought or the real injury complained of will quite likely not bring the case within s 216. This is clearly correct but it is suggested that the better reason is because equitable considerations are unlikely to apply to such companies. Publicly or widely held companies will usually be exclusively

158 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [117]–[119].
159 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [120].

governed by the corporate constitution and other written agreements that are binding on all the shareholders. It would be very unlikely and very difficult to establish the existence of informal understandings in relation to such companies that supplement these documents.

## VI. Conclusion

65 As the needs of commerce become more complex, some of this complexity is reflected in the corporate vehicles that are used by business-people. It is therefore not surprising that corporate law cases in the 2010s regularly raise more difficult issues than in previous times. The courts have coped well with this complexity. This article makes some suggestions as to how certain aspects of the law can be better rationalised, at least from the author's perspective.