REVERSE OPPRESSION AND THE RESIDUAL NATURE OF THE SHAREHOLDER'S COMMERCIAL UNFAIRNESS REMEDY

The question of whether a majority, rather than a minority, shareholder can access the corporate oppression or commercial unfairness remedy under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) is not a mere technical issue. A deeper examination of this issue reveals the principle upon which access to the s 216 remedy is permitted: whether a shareholder is able to cure oppression through the means of self-help remedies. To this end, building on the recent Singapore Court of Appeal decision of *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723, this article suggests that s 216 is a residual remedy, and offers various justifications to support this. Further, various UK and Commonwealth authorities are harnessed to identify important exceptions to the residual nature of the s 216 remedy: where voting power is insufficient, neutralised, entirely circumvented or irrelevant. Ultimately, while a majority shareholder should only be allowed to claim for relief from "reverse oppression" in rare circumstances, it is suggested that a more nuanced and fact-sensitive inquiry into the *locus* of corporate power is necessitated on the facts of each individual case.

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I. Introduction

1 Can a majority shareholder ever be oppressed by a minority? At first blush, the notion seems paradoxical. On the one hand, literally read, the relevant provision of the Singapore Companies Act[1] governing corporate oppression (or, as Singapore courts have more recently preferred, "commercial unfairness"[2]), s 216, does not appear to preclude a claim for relief by a majority shareholder. The section simply states:

* The author is grateful to Professor Hans Tjio for his invaluable comments on an earlier draft. Any errors or omissions are entirely the author's own.

1 Cap 50, 2006 Rev Ed.

2 See *Over & Over Ltd v Bonvests Holdings Ltd* [2009] 2 SLR(R) 111 at [68]. For ease of reference, this will be referred to as the "s 216 remedy". For completeness, it should be noted that the availability of the s 216 remedy may extend beyond

(*cont'd on the next page*)

> **Personal remedies in cases of oppression or injustice**
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> (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister may apply to the Court for an order under this section on the ground —
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> (*a*) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
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> (*b*) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

As noted by the Singapore Court of Appeal in the recent decision of *Ng Kek Wee v Sim City Technology Ltd* ("*Sim City*"),[3] s 216 "states only that 'any member … of a company' may bring an action for relief under that provision; there is no further requirement that only members who are minority shareholders are so entitled".[4]

2 Yet on the other hand, it seems to have been assumed that only minority shareholders should possess the relevant *locus standi* to bring a s 216 action. In referring to the UK equivalent of the s 216 remedy,[5] one commentator has noted that it "is now firmly established as the remedy from which the minority shareholder derives his principal form of statutory protection, against a background in which majority rule is regarded as fundamental".[6] Indeed, the leading academic and practitioner texts, both locally and overseas,[7] tend to classify the s 216 remedy (or its equivalent legislation in other jurisdictions) as a form of *minority* shareholder protection.

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shareholders to bondholders in certain circumstances; see C L Seah, "Bondholder Rights and the Section 216 Oppression Remedy" [2011] Sing JLS 432.

3 [2014] 4 SLR 723.

4 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [48].

5 This is commonly known in the UK jurisprudence as the "unfair prejudice" remedy. See s 994 of the Companies Act 2006 (c 46) (UK) and its predecessor, s 459 of the Companies Act 1985 (c 6) (UK). For accuracy, the "unfair prejudice" terminology will be adopted where discussing the relevant UK authorities.

6 Robert Goddard, "*Re: Legal Costs Negotiators Ltd*: An Oppressed Majority?" (1999) 20(7) *The Company Lawyer* 241 at 241.

7 See generally, A J Boyle, *Minority Shareholders' Remedies* (Cambridge University Press, 2002); Victor Joffe *et al*, *Minority Shareholders: Law, Practice, and Procedure* (Oxford University Press, 2011); Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 2nd Ed, 2007).

3 In light of the above, it is worthwhile to explore whether a majority shareholder is in fact precluded from invoking the s 216 remedy and, if not so, to identify the circumstances under which the s 216 remedy is available to majority shareholders. This endeavour is important for a number of additional reasons. Firstly, this issue has significant practical import. An entire decision may hinge on this point. In the High Court decision of *Sim City Technology Ltd v Ng Kek Wee*,[8] it was held that the majority shareholder (with a 53.625% shareholding) had made out a case of commercial unfairness against the minority shareholder (with 15% shareholding).[9] On appeal to the Court of Appeal, it is important to note that the minority shareholder (the appellant) did not challenge the High Court's findings of fact[10] (which formed the substantive basis for its decision that there was commercial unfairness). The appeal was allowed primarily on the point of *locus standi* – in that the Court of Appeal found that the majority shareholder was precluded from bringing a s 216 claim[11] (for the particular reasons discussed below).[12] Hence, it is important to have clarity on this issue, as litigants may incur considerable expense in attempting to establish findings of fact, and in ventilating the substantive legal merits of their position in lower courts, before discovering at a later appeal stage that their choice of legal strategy – a s 216 claim – was never available to them in the first place. This is arguably particularly important in a s 216 claim, which unlike the statutory derivative mechanism under s 216A of the Companies Act, does not have a preliminary proceeding to determine whether a plaintiff would be granted leave to bring a statutory derivative action.[13]

8 [2013] SGHC 216.

9 *Sim City Technology Ltd v Ng Kek Wee* [2013] SGHC 216 at [99]–[101]. There were two other shareholders, Accord Perfect Investment Corporation (with 6.375% shareholding) and Atomic International Ltd (with 25% shareholding), though their involvement in the s 216 dispute was peripheral. The relevant details of this decision are discussed in para 7 *ff* below.

10 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [28].

11 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [59].

12 See para 7 *ff* below. For completeness, it should be noted that the Court of Appeal in *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 also considered, *inter alia*, two other important issues of law: (a) whether a court is entitled to have reference to the conduct of the affairs of the relevant company's subsidiaries in determining whether a claim under s 216 would be made out in respect of the relevant company itself (at [38]–[45]); and (b) the distinction between a corporate and personal wrong (at [60]–[71]). On the former issue, see generally Zhong Xing Tan, "Unfair Prejudice from Beyond, Beyond Unfair Prejudice: Amplifying Minority Protection in Corporate Group Structures" (2014) 14(2) *Journal of Corporate Law Studies* 367. On the latter, see generally Pearlie Koh, "The Shareholder's Personal Claim" (2011) 23 SAcLJ 863; Pearlie Koh, "A Reconsideration of the Shareholder's Remedy for Oppression in Singapore" (2013) 42(1) *Common Law World Review* 61 at 82–89.

13 Companies Act (Cap 50, 2006 Rev Ed) ss 216A(3)(*a*)–216A(3)(*c*).

4 Moreover, from an *ex ante* litigation strategy perspective, the potential availability of the s 216 remedy to majority shareholders (in certain circumstances) is a significant addition to their arsenal of legal weaponry, given the breadth of the court's remedial powers in such circumstances (including directions on the regulation of the conduct of the company's affairs,[14] buy-out orders,[15] and winding-up[16]). One can conceive of situations where a majority shareholder, despite holding a controlling interest, may seek legal advice on whether it can bring a s 216 claim. This is particularly pertinent in the corporate joint-venture context, where, for example, a minority shareholder with certain business expertise collaborates with a majority shareholder who provides funding for the business and leaves the day-to-day running of the company to the minority shareholder (or its representatives on the joint-venture company's board of directors). *Sim City* is an example of such a situation – where the minority shareholder sought out the majority shareholder to co-invest in his software and consultancy business, as he had plans to expand the business; and a joint-venture vehicle was incorporated pursuant to a joint-venture agreement.[17] Despite his minority shareholding, he appeared to have day-to-day control of corporate affairs as group chief executive officer, chief technical officer and managing director of the joint-venture company (Singalab International Pte Ltd), as well as having vital positions in its various subsidiaries (including being managing director of Singalab Pte Ltd and chairman of Beans Factory Hong Kong Co Limited).[18] Equally common is the situation where particular areas of management or decision-making are designated to the minority and majority shareholders, respectively (a practice designed to avoid operational deadlock in corporate decision making).[19] In the above situations, as the majority shareholder has ceded a measure of operational (if not voting) control to the minority shareholder, there is at least some potential for minority shareholders (through their board representatives) to conduct part of the affairs of the corporate joint venture in a way that is *prima facie* unfair or prejudicial to the majority shareholders – and hence for majority shareholders to desire access to the s 216 remedy.[20]

5 Finally, from an academic perspective, it is important to seek clarity on the conceptual basis of extending the s 216 remedy to

14 Companies Act (Cap 50, 2006 Rev Ed) s 216(2)(*b*).
15 Companies Act (Cap 50, 2006 Rev Ed) s 216(2)(*d*).
16 Companies Act (Cap 50, 2006 Rev Ed) s 216(2)(*f*).
17 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [7].
18 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [10]–[12].
19 See Ian Hewitt, *Joint Ventures* (Sweet & Maxwell, 3rd Ed, 2005) at p 212.
20 Of course, whether this should ultimately give a majority shareholder recourse via the s 216 remedy is the subject of the following discussion. The point is that it is important to clarify this issue, given a majority shareholder's potential demand for access to the s 216 remedy.

majority shareholders. The authors of *The Anatomy of Corporate Law: A Comparative and Functional Approach*,[21] a well-known text on the conceptual structure of corporate governance, locate the s 216 remedy (which they term the "oppression standard") under the wider umbrella of legal constraints used to address the agency problem between majority controlling shareholders (as agents) and minority non-controlling shareholders (as principals)[22] – that is, as one of the *minority* protection strategies given the majority's decision-making power and potentially self-interested behaviour at the expense of the minority, whose welfare may be adversely affected.[23] To pre-empt the discussion that follows, any extension of the s 216 remedy therefore must be justified by reference to the existence of a hitherto unrecognised reverse agency problem between minority shareholders (as agents) and majority shareholders (as principals); as well as by reference to the underlying purpose of the s 216 remedy and its place in the overall architecture of shareholder protection in corporate law. In essence, a clear principle must be articulated and fleshed out for situations where majority shareholders are permitted recourse to the s 216 remedy. This is necessary also in light of the fact that to date, there has been little academic comment on this issue (apart from a number of brief, slightly-dated and jurisdiction-specific commentaries[24]), and none which brings together the various UK and Commonwealth authorities which have considered this issue.

6 The balance of this discussion proceeds as follows. Section II considers various UK, Commonwealth and local authorities on this issue, and identifies a consensus on the basis for generally refusing a majority shareholder access to the s 216 remedy – the fact that s 216 is a *residual* remedy, available only where a shareholder is unable to cure oppression through the means of self-help remedies (primarily, voting control over the appointment of the board). Section III explores the wider theoretical and policy justifications for the residual nature of the s 216 remedy. Given that the availability of the s 216 remedy rests on the availability of self-help remedies, section IV discusses four types of scenarios where self-help is unavailable: where voting power is insufficient, neutralised, entirely circumvented or irrelevant. These categories are discussed with reference to actual decisions in the UK, Australia, New Zealand and Malaysia, including recent authorities,

21 Reinier Kraakman *et al*, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2nd Ed, 2009).

22 Reinier Kraakman *et al*, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2nd Ed, 2009) at pp 35–36.

23 Reinier Kraakman *et al*, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2nd Ed, 2009) at p 99.

24 See Robert Goddard, "*Re: Legal Costs Negotiators Ltd*: An Oppressed Majority?" (1999) 20(7) *The Company Lawyer* 241; M Rice, "The Availability of the Oppression Remedy to Majority Shareholders in Ontario" (1989) 16 Can Bus LJ 58.

which have extended the availability of the s 216 remedy (or its equivalent) to majority shareholders.

II. Section 216: A residual remedy

7 The key to understanding whether the s 216 remedy is available to majority shareholders is to appreciate that it is *residual in nature* – that is, it serves an "essentially 'gapfilling' role", limited to "instances in which the petitioner himself is unable to remedy the conduct of which complaint is made".[25] In practice, this would usually mean that where the majority shareholder can effectively exercise voting control to select or remove directors – that is, to effect what has been called (in corporate governance terminology) "appointment rights" for controlling enterprise[26] – he should be required to exercise such rights to take control of the board and put an end to oppressive or prejudicial acts. If the majority shareholder has not done so, it follows that any attempt to access the s 216 remedy would thus be considered premature by a court. If the majority shareholder has done so, any attempt to invoke the s 216 remedy would be pointless since the oppression would have already been cured.

8 The pedigree of this principle was affirmed in the English Court of Appeal decision of *Re Legal Costs Negotiators Ltd*,[27] where the majority (75%) shareholders presented an unfair prejudice petition against the minority (25%) shareholder (H) after having dismissed H from employment, on the basis that H failed to carry out specific responsibilities relating to the company's accounting function, and that he had been aggressive and domineering in conduct, for example at board meetings.[28] The Court of Appeal agreed with counsel for the minority shareholder's submission that:[29]

> [T]here is academic and judicial consensus as to the meaning of the [unfair prejudice] section and as to the mischief which it was intended to cure, *viz.* the abuse of power to the prejudice of shareholders who lack the power to stop that abuse … in the ordinary case where the shares carry equal voting rights, a majority shareholder will generally have the power to stop unfairly prejudicial conduct of the company's affairs or any unfairly prejudicial act or omission of the company.

25 Robert Goddard, "*Re: Legal Costs Negotiators Ltd*: An Oppressed Majority?" (1999) 20(7) *The Company Lawyer* 241 at 241.

26 Reinier Kraakman *et al*, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2nd Ed, 2009) at p 42.

27 [1999] BCC 547. This case is noted in Victor Joffe *et al*, *Minority Shareholders: Law, Practice, and Procedure* (Oxford University Press, 2011) at pp 242–243.

28 *Re Legal Costs Negotiators Ltd* [1999] BCC 547 at 549.

29 *Re Legal Costs Negotiators Ltd* [1999] BCC 547 at 553.

9 On the facts of the case, H had already been dismissed and had thereafter resigned his directorship under threat of removal.[30] Though the majority shareholders sought to argue that their legitimate expectation that the minority shareholder would contribute to management was defeated by his misconduct necessitating his dismissal (thus giving grounds for an unfair prejudice petition), the Court of Appeal held that the majority shareholders had chosen to dismiss the minority shareholder, rather than allowing their legitimate expectation to be fulfilled by letting him continue to contribute to the management of the company.[31] By choosing the former, the majority shareholders had put an end both to their legitimate expectation and to the prejudicial conduct of the affairs of the company by H.[32] In such circumstances, there would be no access to the statutory unfair prejudice remedy.

10 The Court of Appeal further referred to the decision of *Re Baltic Real Estate Ltd (No 2)*,[33] a case in which an unfair prejudice petition was brought by a 51% shareholder as against the minority shareholders who collectively held 49% of the issued share capital of the company. In deciding an interlocutory application (whether leave should have been granted to serve the unfair prejudice petition out of jurisdiction on the minority shareholders), it was similarly held that as the petitioner had already taken control of the board and removed the minority shareholders from the board at the material time,[34] the unfair prejudice remedy would not be available. The court clearly emphasised the residual nature of the remedy:[35]

> Even the wider phrase 'unfair prejudice', however, in my judgment is not apt to encompass prejudice from which the person whose interests are said to be prejudiced can readily rid himself. The prejudice relied upon by the petitioner is based solely upon the activities of the second and third respondents as directors of the company [*ie*, the minority shareholders], a status which they only enjoyed until the majority shareholders removed them. That the second and third respondents were in breach of their obligations under the shareholders' agreement, which I assume in the petitioner's favour, does not in my view establish the proposition that the petitioner's prejudice was unfair within the meaning of s 459 [*ie*, the unfair prejudice provision of the UK Companies Act 1985[36]], because on that hypothesis the petitioner had an available method of brining that prejudicial state of affairs to an end and indeed did so … the section was I believe enacted to enable help to be given to those who needed it and it seems to me to

30 *Re Legal Costs Negotiators Ltd* [1999] BCC 547 at 550.
31 *Re Legal Costs Negotiators Ltd* [1999] BCC 547 at 553–554.
32 *Re Legal Costs Negotiators Ltd* [1999] BCC 547 at 554.
33 [1992] BCC 629.
34 *Re Baltic Real Estate Ltd (No. 2)* [1992] BCC 629 at 632.
35 *Re Baltic Real Estate Ltd (No. 2)* [1992] BCC 629 at 636.
36 Companies Act 1985 (c 6) (UK) s 459.

be improbable that the petitioner could show it fell into such a category.

11 The above insights have been applied beyond the shores of the UK. In the Supreme Court of Queensland decision of *Re Polyresins Pty Ltd*,[37] the majority shareholder holding 11 of 18 issued shares in the company sought an oppression remedy against the minority shareholder pursuant to s 260 of the Australian Corporations Act 1989,[38] on the basis, *inter alia*, that he had been excluded from management and denied access to the books and records of the company.[39] In a nuanced analysis of the relevant legislative provision, it was held that in respect of s 260(2)(*a*),[40] which concerns continuous oppressive or unfair conduct, it would be "unrealistic to suppose that a company's affairs may be conducted in [such] a manner" as against "a member who controls a majority of votes that may be cast at a general meeting and who can thereby remove directors and appoint others in their stead", and who would in all likelihood not allow such conduct to continue.[41] Similarly, in respect of s 260(2)(*b*),[42] which concerns non-continuous singular acts (or resolutions) or proposed acts (or resolutions), it held that such conduct "will lack the requisite character [of commercial unfairness] because the person or persons affected by it can act to prevent it having the character of unfairness".[43] In essence, having voting control allows a majority shareholder to prevent or cure conduct that may otherwise fall within the ambit of s 216.

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37 (1998) 145 FLR 141; (1998) 16 ACLC 1674.

38 Corporations Act 1989 (Cth). This was the predecessor to the Corporations Act 2001 (Cth). The relevant provision is *in pari materia* with the local s 216, and reads as follows:

> 260(2) If the court is of the opinion:
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> (a) that affairs of a company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members (in this section called the 'oppressed member or members') or in a manner that is contrary to the interests of the members as a whole; or
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> (b) that an act or omission, or a proposed act or omission, by or on behalf of a company, or resolution, or a proposed resolution, of a class of members of a company, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members (in this section also called the 'oppressed member or members') or was or would be contrary to the interests of the members as a whole;
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> the court may, subject to subsection (4), make such order or orders as it thinks fit …

39 *Re Polyresins Pty Ltd* (1998) 145 FLR 141 at 152–155.

40 This provision corresponds with the local s 216(1)(*a*) of the Companies Act (Cap 50, 2006 Rev Ed).

41 *Re Polyresins Pty Ltd* (1998) 145 FLR 141 at 145.

42 This provision corresponds with the local s 216(1)(*b*) of the Companies Act (Cap 50, 2006 Rev Ed).

43 *Re Polyresins Pty Ltd* (1998) 145 FLR 141 at 145.

12 In finding that the majority shareholder had already taken effective measures to gain control of the board by appointing his representative (to thereby command the votes of three out of five directors),[44] the court also highlighted the residual nature of the remedy:[45]

> The intervention by the court pursuant to s 260 is to be seen as an exception to the premise that companies conduct their affairs in accordance with their articles of association and the rule of majority decision-making. It is a compelling reason for the court not to intervene that the person particularly affected by the alleged unfairness is the majority shareholder who can act properly and decisively to abate the wrongs of which he complains. If such an applicant declines to act to protect his own interests the court should be reluctant to do so.

13 Returning to the Singapore Court of Appeal decision in *Sim City*, in deciding that the majority shareholder was precluded from making a s 216 claim, the Court of Appeal held that:[46]

> In our judgment, the touchstone is not whether the claimant is a minority shareholder of the company in question, but whether he lacks the power to stop the allegedly oppressive acts. … Having regard to the purpose underlying s 216, we think the correct position is that where a member is able to remedy any prejudice or discrimination he has suffered through the ordinary powers he possesses by virtue of his position, the conduct of the defendant cannot be said to be unfair to him …
>
> It would be contrary to the purpose and intent of s 216 of the Companies Act to permit a shareholder to seek relief where he possesses the power to exercise self-help by taking control of the company and bringing to an end the prejudicial state of affairs …

14 This clear articulation of the "self-help" principle is entirely consonant with the residual nature of the s 216 remedy. In a nuanced judgement, the Court of Appeal demonstrated sensitivity to the recognition that it is "always a question of fact whether in a particular case a shareholder claiming relief ought to be considered to lack control over the affairs of the company".[47] It noted that if the claimant was entitled to change the board of directors or otherwise take control of the company, the defendant could then legitimately claim that the claimant should have exercise his right to take control of the company rather than seek relief from the court via a s 216 remedy.[48] On the facts of the case,

44 *Re Polyresins Pty Ltd* (1998) 145 FLR 141 at 154.
45 *Re Polyresins Pty Ltd* (1998) 145 FLR 141 at 152.
46 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [48]–[49].
47 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [50].
48 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [54].

the Court of Appeal noted that the majority shareholder, while lacking day-to-day control of the company, could have voted its representatives onto the board of directors and in fact did so after commencing legal proceedings.[49] Having effective control of the board, the majority shareholder could have removed the minority shareholder from the board or caused the company to claim against the minority shareholder for assets which had been improperly siphoned away (one of the alleged grounds of oppression).[50] Furthermore, there was nothing in the memorandum or articles of association of the company which conferred special powers of control on the minority shareholder as managing director or which precluded the participation of the majority shareholder in the board.[51] In the circumstances, the majority shareholder had failed to exercise its readily available self-help remedies and was thus not allowed access to the s 216 remedy. While *Sim City* contemplated a slightly different scenario from the cases of *Re Legal Costs Negotiators Ltd* and *Re Baltic Real Estate Ltd (No 2)*, in that in the latter cases any oppression was in fact cured by the removal of the wrongdoing directors/minority shareholders, whereas in *Sim City* the minority shareholder had not been removed from the board at the material time, the residual nature of the s 216 remedy nonetheless precluded an oppression claim as being premature.

15 In a clear affirmation of the residual nature of the s 216 remedy, the Court of Appeal disagreed with counsel for the majority shareholder that the issue of control was a mere "technicality", stating that "[t]he requirement that the shareholder … claiming relief under s 216 must be otherwise powerless to change its fate by taking control of the company is a substantive one that goes to the very heart of the s 216 process".[52]

III. Rationalising residual nature of the s 216 remedy

16 Apart from the fact that there appears to be some consensus across the UK, Australian and local authorities that the oppression remedy is residual in nature, is there some deeper underlying justification for providing that s 216 is only available as a "last resort" for majority shareholders?

17 Firstly, it is submitted that the justification for the residual nature of the s 216 remedy finds its roots in what has been called the "internal-management" and "majority-rule"[53] principles forming part of

49 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [55].
50 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [55].
51 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [56].
52 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [58].
53 A J Boyle, *Minority Shareholders' Remedies* (Cambridge University Press, 2002) at p 2.

the well-known rule in *Foss v Harbottle*.[54] As noted by Boyle, in the early 19th century era of the unincorporated joint stock company, the Chancellors maintained a measure of reluctance in interfering with matters of internal regulation, except with a view to dissolution, an attitude which they had long since adopted to partnerships on the basis that "harmony between partners is not to be had by decree".[55] For example, in *Carlen v Drury*,[56] the Chancery court refused to intervene because the articles of partnership provided an effective internal remedy for mismanagement which had not been pursued by the plaintiffs, and which they should have tried before coming to court – the appointment of a committee of 12 by the general meeting which had the power to report to a subsequent general meeting any managerial misbehaviour.[57] In *Foss v Harbottle* itself, Wigram VC emphasised that the minority must demonstrate that they had exhausted any possibility of redress in the internal forum, and tied this together with the "majority-rule" principle by stating that the court will not intervene where a majority of the shareholders may lawfully ratify irregular conduct.[58] As Boyle notes, these principles were further entrenched in *MacDougall v Gardiner*,[59] where it was established that the *Foss v Harbottle* rule prevented a minority action whenever the alleged misconduct was in law capable of ratification, whether or not an independent majority would ever be given a real opportunity to consider the matter.[60] In effect, it became clearly established that majority rule was the medium through which internal disputes should be resolved in all but the rarest of cases.[61]

18 It is important to understand the rationale for the procedural hurdles set up by the above principles, and appreciate the effect they continue to exert even in an era where the rule in *Foss v Harbottle* has been further circumscribed, not least by the enactment of statutory

54 (1843) 2 Hare 461; 67 ER 189.
55 A J Boyle, *Minority Shareholders' Remedies* (Cambridge University Press, 2002) at p 2.
56 (1812) 1 Ves & B 154; 35 ER 61.
57 A J Boyle, *Minority Shareholders' Remedies* (Cambridge University Press, 2002) at pp 2–3.
58 *Foss v Harbottle* (1843) 2 Hare 461 at 494–495.
59 (1875) 1 Ch D 13.
60 (1875) 1 Ch D 13 at 25.
61 A J Boyle, *Minority Shareholders' Remedies* (Cambridge University Press, 2002) at pp 24–60.

shareholder remedies (including s 216 and s 216A).[62] As explained by Drury in his well-known article:[63]

> The concept of a long-term contractual relationship exactly fits the contract that underlies the workings of companies. The parties are bound up in the same enterprise, and thus have to 'do business' with each other over a long period of time. They thus have an interest in the continuance of this relationship. In addition, the respective rights and interests of the parties to the contract may change considerably during its existence … Accordingly, therefore, any analysis of the company contract which says that its object is to give the parties inviolable rights which can be protected by litigation, as if they were involved in a discrete transaction, completely fails to take account of the long duration and changing nature of the relationships involved.

19 Given that the corporate contract (as embodied by the articles of association, shareholder agreements and other informal or implied understandings between shareholders which formed the basis of their association) is a "long-term" or "relational" contract, Drury concludes that:[64]

> [I]t can be argued that providing a forum for the dispute, such as the general meeting, and leaving the decision … to be settled according to the will of the majority, is in many cases ultimately going to be more effective in promoting the continuance of that relationship than allowing an individual shareholder unlimited access to what might be described in trans-Atlantic terms as the 'discrete transaction oriented dispute-solving machinery' of the courts.

20 In essence, given that the judicial preference for internal dispute resolution via majority rule rests of a deeper underlying policy of preserving the long-term business relationship between the members to the corporate contract, it follows that in the usual course of things where a majority shareholder can address any potential unfairness of prejudice through its own powers (namely, its appointment rights over the board), it should be required to avail itself of the internal dispute-resolution architecture of the company, rather than circumvent this to directly seek "external" (*ie*, non "self-help") recourse from the courts via the s 216 remedy.

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62 Companies Act (Cap 50, 2006 Rev Ed). See generally, Meng Seng Wee & Dan W Puchniak, "Derivative Actions in Singapore: Mundanely Non-Asian, Intriguingly Non-American and at the Forefront of the Commonwealth" in *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 8, at pp 323–368.

63 R R Drury, "The Relative Nature of a Shareholder's Right to Enforce the Company Contract" (1986) 45 CLJ 219 at 222.

64 R R Drury, "The Relative Nature of a Shareholder's Right to Enforce the Company Contract" (1986) 45 CLJ 219 at 223.

21 A secondary related rationale for the residual nature of the s 216 remedy lies in the court's wider policy of avoiding pointless corporate litigation, and discouraging parties from invoking the court's assistance where this would not provide any added value (and in fact simply impose unnecessary litigation costs).[65] In this regard, reference can be made to the rule that recourse to the s 216 remedy may be precluded by a reasonable buy-out offer from the party against whom redress is sought. As noted by the Singapore High Court in the recent decision of *Lim Ah Sia v Tiong Tuang Yeong*,[66] citing the leading UK decision of *O'Neill v Phillips*,[67] it is "trite law that 'unfairness does not lie in the exclusion [from management of a shareholder, contrary to an implied understanding] alone but in exclusion without a reasonable offer'".[68]

22 Basically, a shareholder's corporate governance options can be crystallised into two options: using voting rights to influence management (voice) or selling out (exit).[69] In the quasi-partnership, closely-held corporate setting, where restrictions on share transfers are a key feature, exit via capital markets is less readily available, necessitating potential recourse to s 216 for a buy-out remedy to be ordered by the court (at its discretion).[70] However, where a reasonable buy-out offer has been made to the aggrieved shareholder, there is no longer any "unfairness" as the exit remedy sought by the aggrieved shareholder becomes available to him without seeking the court's assistance. A s 216 claim would thus serve no meaningful purpose except to inflate litigation costs. In the same vein (and quite apart from the concern to preserve the long-term relationship between shareholders), one can understand that the courts would be reluctant for reasons of judicial expedience and efficiency to allow a majority shareholder access to the s 216 remedy where he can or has, in fact, cured the relevant unfair or oppressive conduct. In this parallel sense, since the majority shareholder can effectively exercise his "voice" option, he does not require the court's assistance. It is only where the shareholder's "exit" and "voice" options are effectively constrained that access to the s 216 remedy becomes necessitated.

65 See generally, Colin Baxter, "The Role of the Judge in Enforcing Shareholder Rights" (1983) 42 CLJ 96.

66 [2014] 4 SLR 140 at [75].

67 [1999] 1 WLR 1092.

68 *O'Neill v Phillips* [1999] 1 WLR 1092 at 1107.

69 See, generally, Albert O Hirschman, *Exit, Voice and Loyalty* (Harvard University Press, 1970); David C Donald, "Shareholder Voice and Its Opponents" (2005) 5(2) *Journal of Corporate Law Studies* 305.

70 See *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 at [83].

23 A final policy reason for making s 216 a residual remedy lies in its potential for abuse by majority shareholders. As one commentator has observed:[71]

> [T]here is a potential risk to the minority shareholder by the mere fact that this remedy is technically available to majority shareholders. This is due to the fact that majority shareholders, because of their majority status, generally have other options available to them. The most obvious option, of course, is the exercise of their majority vote against the allegedly oppressive or unfair actions of the minority. Assuming, for the moment, that these other courses of action are available, it is conceivable that a majority shareholder might try to use the oppression remedy (or perhaps just the threat of the remedy) in an effort to secure concessions from the minority … Given the potential for misuse, the court should be cautious when confronted with an oppression remedy application by a majority shareholder and should consider limiting its applicability where another remedy is available to this majority shareholder.

24 Given the persuasive rationales for keeping s 216 as a residual remedy, it would seem that this option would generally be foreclosed to a majority shareholder. Nonetheless, the Court of Appeal in *Sim City* has astutely noted that there is no blanket prohibition against a majority shareholder making a s 216 claim; rather, the question of standing is to be determined by a fact-sensitive inquiry of whether the claimant lacks the power to stop the allegedly oppressive acts.[72] It follows that there remains scope for the majority shareholder to access the s 216 remedy where self-help remedies are unavailable. The following section discusses the relevant authorities from the UK, New Zealand, Australia, and Malaysia which have identified situations where a claim for reverse oppression by a majority against a minority shareholder has in fact been permitted.

IV. Recognising reverse oppression in rare circumstances: Where self-help remedies unavailable

A. Where voting power is insufficient

25 The first situation where reverse oppression may be recognised is where a majority shareholding does not correspond with voting control given the share structure of the company in the particular circumstances. In the English Court of Appeal decision of *Re H R*

71 M Rice, "The Availability of the Oppression Remedy to Majority Shareholders in Ontario" (1989) 16 Can Bus LJ 58 at 64–65.

72 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [48].

Harmer Ltd,[73] the defendant (H) formed a private limited company to acquire the business of philatelic auctioneers and valuers. The shareholding of the company and the rights attached to the various classes of shares was such that, although H's sons (C and B) and their wives had the majority of class "A" ordinary shares which carried the rights to divisible profits, they had a small minority of class "B" ordinary shares which carried voting power. Conversely, H and his wife controlled the vast majority of class "B" shares but a fewer number of class "A" shares. Only the holders of "B" shares were entitled to vote at general meetings of the company, while the "A" shares (and other preference shares) conferred no voting rights. In effect, while C and B were by far the majority shareholders (with H only holding slightly over 10% of the total equity of the company), voting control of the company resided in H and H's wife (with respectively an estimated 49% and 29% of the "B" shares). H was, therefore, able to control the company by the use of his own and his wife's voting power, in particular being in a position to procure the passing of extraordinary and special resolutions as well as ordinary resolutions.[74]

26 Subsequently, C and B petitioned for relief under s 210 of the Companies Act 1948[75] (the English equivalent of s 216 at the relevant time), on the basis that H had breached various directors' duties, including incurring unauthorised expenses, unjustifiably removing valuable employees of the company's related entities, and negotiating unauthorised sales of corporate assets.[76] Affirming the decision of the trial judge to grant C and B relief, and dismissing the appeal brought by H, the English Court of Appeal cited the judgment of the court below and the held that:[77]

> I think the point about the word 'minorities' is that it is only where the voting control is elsewhere that a case for the application of the section arises. To take this case, if the voting control had resided where the beneficial interest in the ordinary shares resides, there would have been no need to invoke the section. The father would have been eradicated root and branch by this time. …
>
> … this case is curious in that it is not a minority beneficial interest that is being oppressed, and that would be the normal case; it is a majority beneficial interest which is being oppressed because the voting control is placed in the hands of a minority beneficial interest. In my judgment, I reach the opinion … that … the affairs of the

73 [1959] 1 WLR 62, cited in *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [51]–[52].

74 *Re H R Harmer Ltd* [1959] 1 WLR 62 at 65–66 and 68–71.

75 Companies Act 1948 (c 38) (UK).

76 *Re H R Harmer Ltd* [1959] 1 WLR 62 at 66.

77 *Re H R Harmer Ltd* [1959] 1 WLR 62 at 85.

> company were being conducted in a manner oppressive to the petitioners.

27 Another variation of the above situation arises where the plaintiff is a 50% shareholder. In the English High Court decision of *Re Abbington Hotel Ltd*,[78] X and Y (both 50% shareholders) cross-petitioned for unfair prejudice under s 994 of the UK Companies Act 2006.[79] X claimed that Y had entered into negotiations for the sale of the hotel owned by the company, in breach of their original understanding that the hotel would be retained as a going concern. Y, on the other hand, contended, *inter alia*, that X had excluded Y from involvement in the company's management and affairs.[80] The Court held, *inter alia*, that X and Y had established mutual unfair prejudice. Furthermore, the Court distinguished the earlier English Court of Appeal decision of *Re Legal Costs Negotiators Ltd*, by recognising that:[81]

> The destruction of the relationship on which the company was based by [Y's] conduct in relation to his attempt to sell the hotel has not been remedied or cured. Because there are equal shareholdings between the two sides, it is not open to either side to remove the other. The prejudice was remedied in *Re Legal Costs Negotiators Ltd* by the lawful exercise by the majority of their power to dismiss the respondent.

28 Even though Y had been excluded from management by X (and so an argument could have been made that the alleged oppression has ceased), this was certainly distinguishable from a situation where a majority shareholder exercises his lawful appointment rights to take control of the board (as with *Sim City*, *Re Legal Costs Negotiators Ltd*, *Re Baltic Real Estate Ltd (No 2)* and *Re Polyresins Pty Ltd*), since Y's exclusion did not amount to a lawful removal from his office of directorship.[82] The court emphasised that "curing or remedying" the oppression must, of course, be through "proper and lawful means";[83] and in the circumstances, X was thus permitted access to the unfair prejudice remedy.[84] It is useful to note that while a 50% shareholder can at times take sporadic *preventive* action through its voting power should the other 50% shareholder be minded to push its own interests through the general meeting (as an ordinary resolution would require a simple majority), it can seldom *cure* any oppressive conduct by removing the

78 [2011] EWHC 635 (Ch).
79 c 46. *Re Abbington Hotel Ltd* [2011] EWHC 635 (Ch) at [6]–[19].
80 *Re Abbington Hotel Ltd* [2011] EWHC 635 (Ch) at [99]–[122].
81 *Re Abbington Hotel Ltd* [2011] EWHC 635 (Ch) at [111].
82 *Re Abbington Hotel Ltd* [2011] EWHC 635 (Ch) at [112].
83 *Re Abbington Hotel Ltd* [2011] EWHC 635 (Ch) at [112].
84 Likewise, Y was allowed to petition for unfair prejudice on the basis of his exclusion from management (see *Re Abbington Hotel Ltd* [2011] EWHC 635 (Ch) at [112]).

representatives of the opposing 50% shareholder. In private companies, where the issue of oppression arises paradigmatically, the default position provided under Art 69 of Table A (which can be modified by contrary provision in the corporate constitution) is that any such removal of a director requires an ordinary resolution.[85] In such circumstances, it follows that recourse to the s 216 remedy may be justified.

B. Where voting power is neutralised

29 A second situation where a claim for reverse oppression by a majority shareholder may be allowed is where the minority shareholder has negotiated himself into a position where he possesses certain positive or negative (*ie*, veto rights) of control, often coupled with an entrenchment of his (or his representatives') presence on the board, and in some cases, a preclusion of the majority shareholder's participation in management. In such cases, in contrast to the first situation discussed above, even though the majority shareholder does possess more than 50% of voting control in a company, the exercise of his appointment rights is effectively neutralised. Hence, the power to cure oppression in this situation would be illusory.

30 This situation arose in the recent New Zealand Court of Appeal decision of *Sturgess v Dunphy* ("*Sturgess*"),[86] a case concerning a joint-venture company in the business of exploring and producing petroleum. The relevant claim was made by the majority shareholders (the Group 1 and 3 interests holding 52.144% and 34% of the shareholding, respectively) against the minority shareholders (the Group 2 interests holding 13.856% of the shares), pursuant to s 174(1) of the Companies Act 1993,[87] which provides that:

85 See Art 69 of the Fourth Sched to the Companies Act (Cap 50, 2006 Rev Ed) which provides that:

> The company may by ordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead; the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

See also *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, 3rd Ed, 2009) at paras 7.88 and 7.93. See further, cl 73(*f*) of the Companies (Amendment) Bill 2014 (Bill 25 of 2014), which amends s 152 of the Companies Act (Cap 50, 2006 Rev Ed) to effectively reflect the above-mentioned default rule for private companies. For completeness, reference may also be made to the New South Wales Court of Appeal decision in *Campbell v Backoffice Investments Pty Ltd* (2008) 66 ACSR 359; 26 ACLC 537, where the court briefly considered whether there can be oppression in a 50/50 held company but did not express any concluded view on the issue (at [387]–[395]).

86 [2014] NZCA 266.

87 Companies Act 1993 (NZ).

> **Prejudiced shareholders**
>
> (1) A shareholder or former shareholder of a company, or any other entitled person, who considers that the affairs of a company have been, or are being, or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial to him or her in that capacity or in any other capacity, may apply to the court for an order under this section.

31 The New Zealand Court of Appeal took special note of the fact that the shareholder agreement between the parties vested governance generally in the board, whose decisions had to be unanimous.[88] While certain specific matters were reserved for shareholders, any shareholder resolution required the votes of an ordinary or special majority of shares in *each* of the three shareholder groups referred to above.[89] In essence, any one director or shareholding group had the power to veto any decision of the board or the general meeting, accordingly.[90] In allowing the majority shareholders to make a claim against the minority shareholders for "oppressive, unfairly discriminatory or unfairly prejudicial conduct",[91] the Court of Appeal held that:[92]

> [Section 174 of New Zealand Companies Act] provides that any shareholder may seek relief, so precluding what would amount to a presumption that a majority cannot invoke it. In the ordinary way a majority shareholder controls the company's affairs itself through its command of the general meeting, but the legislation recognises that the *locus* of corporate power is a practical question of fact and law.

32 Taking a nuanced and fact-sensitive inquiry into the ability of the majority shareholders to remedy any oppressive conduct against them, the Court of Appeal concluded that:[93]

> In this case, the Group 1 and 3 shareholders hold more than 75 per cent of the shares, but under Greymouth's constitution that does not empower them to pass ordinary or special resolutions, so their shareholding does not confer control of the company. Further, the company's governance is vested in the Board to an unusual extent and Mr Sturgess was a director, able under Greymouth's constitutional arrangements to veto Board decisions. … But Mr Sturgess was also JSAL's nominated COO under a management services contract that the Board could not terminate, and because he was a director the Board was substantially powerless to discipline any unauthorised conduct in his managerial capacity. … It is we think manifest that

88 *Sturgess v Dunphy* [2014] NZCA 266 at [7].
89 *Sturgess v Dunphy* [2014] NZCA 266 at [7].
90 *Sturgess v Dunphy* [2014] NZCA 266 at [7].
91 *Sturgess v Dunphy* [2014] NZCA 266 at [130], [136] and [143].
92 *Sturgess v Dunphy* [2014] NZCA 266 at [135].
93 *Sturgess v Dunphy* [2014] NZCA 266 at [136].

> Mr Sturgess enjoyed the capacity, as a matter of fact and law, to behave in a manner that oppressed the majority shareholders.

33 As a further gloss on the *Sturgess* exception, one may also envisage a situation where the very act by a minority shareholder of (unlawfully) neutralising the majority's voting power can itself be seen to be oppressive, and in the circumstances, incurable by any self-help remedy otherwise available to the majority. In the 2013 Supreme Court of New South Wales decision of *In the matter of Richardson & Wrench Holdings Pty Ltd*,[94] the defendant minority shareholder (holding 29% shareholding) took steps, as a director of the company in question (as well as in the purported capacity of corporate representative of the plaintiff majority shareholder holding 71% shareholding), to resolve by way of circular resolution to amend the constitution to include an "Article 44A", which provided that all resolutions should only be passed, carried and effected with the affirmative votes of at least 75% majority of votes of members present and voting.[95] In effect, the minority shareholder sought to confer a veto power on himself (the unfair or prejudicial act) *and* simultaneously preclude any action by the majority to remedy that oppressive act. In ruling that the majority shareholder had standing to make a claim under s 232(*c*) and s 232(*e*) of the Australian Corporations Act 2001[96] (*ie*, to the effect that a "resolution … of members … of a company"[97] was "oppressive to, unfairly prejudicial to, or unfairly discriminatory against"[98] the majority shareholder), the Supreme Court noted that:[99]

> The insertion of article 44A, if valid and effective, would have the effect that the majority shareholder was unable to exercise voting control … It seems to me, on its face, that an act by directors representing a minority beneficial interest to effect a change in the articles of association such as to deny the majority the ability to carry an ordinary resolution in a general meeting is an act that is, within the language of the statute, oppressive to, unfairly prejudicial to or unfairly discriminatory against the majority. The concept that, to effect any business at a general meeting, the majority should require the assent of the minority when it had not acquired its shareholding on that basis at the outset and when that position was, in effect, foist on the company by the minority while temporarily in control, is plainly, in my judgment, within the test of oppression.

94 [2013] NSWSC 1990.
95 *In the matter of Richardson & Wrench Holdings Pty Ltd* [2013] NSWSC 1990 at [8]–[12].
96 Corporations Act 2001 (Cth).
97 Corporations Act 2001 (Cth) s 232(*c*).
98 Corporations Act 2001 (Cth) s 232(*e*).
99 *In the matter of Richardson & Wrench Holdings Pty Ltd* [2013] NSWSC 1990 at [41].

34 Before proceeding to discuss other exceptions to the residual nature of the s 216 remedy, it would be useful to highlight that there may be various permutations of directorial entrenchment which impede a majority shareholder's ability to cure oppressive conduct perpetuated by a minority shareholder (in his capacity as director or through his representative on the board). As these are hypothetical, in so far as there does not appear to have been any actual decision where a majority shareholder has argued that access to s 216 should be permitted because of these particular forms of directorial entrenchment, an extended discussion of these scenarios will not be engaged in. However, it should suffice to flesh out some of these scenarios at this juncture. For example, while in the case of public companies s 152(1) of the Companies Act[100] would ensure that the company "may by ordinary resolution remove a director before the expiration of his period of office notwithstanding anything in its memorandum or articles or in any agreement between it and him", private companies falling outside the scope of the above provision can actually provide for irremovable directors in their articles of association, by choosing to omit Art 69 of Table A.[101]

35 Another more controversial form of directorial entrenchment may arise through the use of weighted voting rights, the situation considered in the well-known case of *Bushell v Faith*,[102] where the majority of the UK House of Lords gave effect to a provision in the articles of a company which stipulated that in the event of a resolution being proposed at any general meeting for the removal of any director, any shares held by that director would on poll in respect of such resolution carry the right of three votes per share.[103] While this was clearly meant to make a director irremovable, the House of Lords held that this did not fall foul of s 184(1) of the Companies Act 1948[104] (the equivalent of s 152(1) of the Singapore Companies Act),[105] since the company had the right to issue shares with different voting rights, and there was technically no inconsistency with the statutory requirement that an ordinary resolution was nonetheless required for the removal of a director (only that the director now had greater voting power to veto this outcome).[106] In the Singapore context, private companies have already been able to issue shares with different voting rights since s 64 of the Companies Act was amended via the Companies (Amendment) Act 2003.[107] (For completeness, one should also note the position with

100 Cap 50, 2006 Rev Ed.
101 See para 28 above.
102 [1970] AC 1099. See, generally, Pontian Okoli, "Controlling Directors in a Troubled Economy – A UK Perspective" (2012) 23 ICCLR 234.
103 *Bushell v Faith* [1970] AC 1099 at 1107.
104 Companies Act 1948 (c 38) (UK).
105 Cap 50, 2006 Rev Ed.
106 *Bushell v Faith* [1970] AC 1099 at 1108–1109.
107 Companies (Amendment) Act 2003 (Act 8 of 2003).

respect to public companies under the Companies (Amendment) Bill 2014, cl 33 of which repeals and re-enacts a new s 64 as well as an additional s 64A of the Companies Act, in essence removing the one-share-one-vote restriction for public companies subject to certain safeguards, for example, requiring that the issuance of such shares is undertaken only by the approval of the shareholders via special resolution.)[108] Accordingly, while a claim for reverse oppression should be allowed in fairly limited circumstances, courts should be alive to the possibility that different forms of directorial entrenchment are possible; hence potentially necessitating access to the s 216 remedy where oppressive conduct perpetuated by minority shareholders/directors cannot be easily remedied through the exercise of majority appointment rights.

C. Where voting power is entirely circumvented

36 The previous section dealt with the scenario where a minority shareholder has made certain arrangements to appropriate a measure of voting control such as to impede the majority's exercise of its appointment rights, to cure any oppressive conduct by the minority shareholder or its board representatives. However, a slightly more egregious situation may arise where the minority shareholder's conduct is in direct defiance of the majority shareholder's uncontroverted voting power. Here, the minority shareholder is not even using any "lawful" means to impede the majority's attempt to cure oppression (for example, through an entrenchment provision in the articles or shareholders' agreement); but simply refusing to give due effect to, or in fact unlawfully impeding, the majority's rights.

37 Such a situation was demonstrated in *Parkinson v Eurofinance Group Ltd* ("*Parkinson*"),[109] where the majority shareholder/petitioner (P) had voting control of a company (EFG) through the conferment of "founder's shares" which carried two votes (in contrast to ordinary shares which carried a single vote), and was a member of EFG's board as well.[110] P was also the managing director and chairman of EFG's subsidiary, BRC.[111] After negotiations between P and the minority shareholders for P to relinquish the voting rights attached to his founder's shares fell through, the minority shareholders devised a plan to exclude P from the management of BRC and EFG and dismiss him from the employment of both companies on the basis of a series of complaints alleged to justify his dismissal (though it was found that nothing that P could have said in response to these complaints would

108 Companies (Amendment) Bill 2014 (Bill 25 of 2014) cl 33.
109 [2001] BCLC 720.
110 *Parkinson v Eurofinance Group Ltd* [2001] BCLC 720 at [2].
111 *Parkinson v Eurofinance Group Ltd* [2001] BCLC 720 at [7].

prevent his removal in any event).[112] It was further found that P had left the meetings before they had concluded and was escorted off the company premises by security guards without being permitted to remove anything from his desk or take any papers relating to the meeting, in a deliberate operation to humiliate P in front of the employees.[113] Moreover, the minority shareholders of EFG further resolved to sell its shares in BRC to another company (H) in which the minority shareholders of EFG had the majority voting power.[114]

38 In the circumstances, the court held that the sale of BRC to H was for the purpose of diluting P's majority shareholding and destroying the effectiveness of his founder's shares, and that this act, coupled with his unjustified exclusion from the management of EFG, was unfairly prejudicial to him.[115] One commentary on this case observes that "[t]he sale had the effect of overriding the petitioner's enhanced voting rights, and he was not able merely by exercising those rights to remedy the prejudice he had suffered".[116]

39 One can see how *Parkinson* can be distinguished from *Sim City*, where in the latter case, the majority shareholders demonstrated the ability to take control of the board and the capacity to put an end to any oppression,[117] while in *Parkinson*, the oppressive actions taken by the minority in sanctioning the sale of BRC could not be easily remedied given P's exclusion from the boards of EFG and BRC. While P technically still had his appointment rights (in that they were not, on paper, qualified by any countervailing minority veto rights), it would be highly unrealistic to suppose that P could exercise these appointments rights to re-appoint himself back onto the board of EFG, take control of EFG's board to then pass a resolution as shareholder of EFG to appoint himself onto the board of BRC, and then finally end the oppression by again having to take control of BRC's board and/or removing the minority directors. Any such attempts would in all likelihood have been ignored by the minority shareholders of EFG, given that they (wrongly) considered themselves justified in excluding P from the management of EFG and BRC. Accordingly, in such a situation where a majority's voting power is entirely circumvented by the minority, it is arguably the case that a majority shareholder such as P should have access to the s 216 remedy.

112 *Parkinson v Eurofinance Group Ltd* [2001] BCLC 720 at [49].
113 *Parkinson v Eurofinance Group Ltd* [2001] BCLC 720 at [51].
114 *Parkinson v Eurofinance Group Ltd* [2001] BCLC 720 at [51].
115 *Parkinson v Eurofinance Group Ltd* [2001] BCLC 720 at [88]–[91].
116 Victor Joffe *et al*, *Minority Shareholders: Law, Practice, and Procedure* (Oxford University Press, 2011) at p 243.
117 See para 14 above.

D. Where voting power is irrelevant

40 Thus far, the premise of the residual nature of the s 216 remedy has appeared to be the majority's power to end any alleged oppression by minority shareholders, *in particular*, by exercising their appointment rights to take control of the board. However, this presumes that oppressive acts are always (if not in large part) conducted through the shareholder's board representatives (or in his capacity as a director). While the phrasing of s 216(1)(*a*)[118] certainly seems to assume that this may be in the case – by referring to the "conduct" of the "affairs of the company" and the "powers of the directors" – it is clear that oppressive acts can be carried out in respect of the affairs of the company directly by an action of a shareholder against other shareholders, whether in breach of some express understanding or tacit undocumented understanding formed on the basis of mutual trust and confidence in the quasi-partnership context.[119] In such circumstances, because the source of any oppressive or unfairly prejudicial conduct is *not* via the minority shareholder's directors, any reference to the majority's appointment rights is irrelevant. The oppression cannot be simply cured by removing the minority's representatives from the board.

41 An example of this situation can be found in the Australian case of *Re Associated Tool Industries Ltd*,[120] which has been said to be "significant for the fact that an order … was made where minority shareholders were shown to have oppressed majority shareholders".[121] In this case, the minority shareholders owned a company (AH) which business was closely connected to that of the company in which relief for oppression was sought. It was found that the proper course, as a matter of business, was for the latter to have taken over AH as one of its wholly-owned and controlled companies.[122] However, the minority shareholders were "determined to oppose [the sale] … unless, in breach of their fiduciary duty, they can get a substantial benefit for themselves at the expense of the Company".[123] The minority shareholders therefore took actions contrary to the basis of their association with the majority shareholder. For example, the minority shareholders (as directors of AH) resolved to prevent the company from acquiring shares in AH without the written authority of T (one of the minority shareholders), and deliberately did not disclose this to the majority shareholder at a subsequent board meeting.[124] Furthermore, T engineered for himself to

118 Companies Act (Cap 50, 2006 Rev Ed).
119 See *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 at [83].
120 (1963) 5 FLR 55.
121 R Baxt, "Oppression of Shareholders – The Australian Remedy" (1971) 8 MULR 91 at 91.
122 *Re Associated Tool Industries Ltd* (1963) 5 FLR 55 at 58.
123 *Re Associated Tool Industries Ltd* (1963) 5 FLR 55 at 58.
124 *Re Associated Tool Industries Ltd* (1963) 5 FLR 55 at 59–60.

be in a strong bargaining position with the company to sell his shares in AH at an inflated sum by entering into a service agreement with AH which gave him, *inter alia*, a golden parachute in the event of termination and entitled him to be interested in any undertaking competing with AH, as well as providing for a separate annual salary.[125] Subsequently, the minority shareholders negotiated an agreement for the exchange of £3,000 worth of shares in the company in return for their (much less valuable) shares in AH.[126] Coupled with further deliberate acts demonstrating a lack of probity (such as passing a resolution to the above effect in the absence of the majority shareholder, and further omitting to disclose the number of shares to be acquired in AH in the notice of meeting for the ratification of the above-mentioned agreement),[127] the court found that their conduct was "clearly oppressive".[128]

42 In construing s 186 of the Companies Ordinance 1962 of the Australian Capital Territory,[129] the court noted that the section itself avoids reference to minorities, whether in its heading or the text of the provision, and concluded that:[130]

> Examination of the section shows no intention to include any such limitation or restriction… It is not to be found either expressly or by necessary implication. Indeed being a remedial measure and not be construed narrowly … it should be regarded as intended to terminate defects in the pre-existing law.

43 While the reasoning of the court was ostensibly based on statutory interpretation, it is submitted that this case can also be reconciled with the principle articulated in *Sim City* that s 216 is a residual remedy. In essence, the facts of *Re Associated Tool Industries Ltd* demonstrate that, even with majority voting control, the majority shareholder was simply not in a position to prevent or cure any oppressive actions taken by the minority shareholders against him. The reason for this was because the minority shareholders were acting in their capacity as controllers of AH to make the sale of AH to the company more profitable to them. The oppression was not carried out by the minority shareholders as directors of the company, but as directors of AH, in the context of this related-party transaction.

125 *Re Associated Tool Industries Ltd* (1963) 5 FLR 55 at 60.
126 *Re Associated Tool Industries Ltd* (1963) 5 FLR 55 at 61.
127 *Re Associated Tool Industries Ltd* (1963) 5 FLR 55 at 61–63.
128 *Re Associated Tool Industries Ltd* (1963) 5 FLR 55 at 62.
129 This provision is similar in wording to s 216 of the Companies Act (Cap 50, 2006 Rev Ed).
130 *Re Associated Tool Industries Ltd* (1963) 5 FLR 55 at 67.

44 Another variant on this theme can be seen in the Malaysian High Court judgment of *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd*,[131] which concerned the slightly unusual scenario where the court held that the petitioner in a claim for corporate oppression under s 181(1) of the Companies Act 1965,[132] who was in fact the minority shareholder (holding 49% of the shareholding), was himself the true oppressor. The court reached this conclusion after finding that the minority shareholder had failed to inject funds into the company after undertaking to do so in consideration of a change in control of the management of the company from the majority to the minority shareholder and had, furthermore, taken actions to unilaterally terminate a corporate guarantee given for certain banking facilities extended to W, a subsidiary of the company, secretly and without consulting the majority shareholder.[133]

45 The court held that a claim for relief from oppression was "available to majority shareholders who are not in control of the management of the company and who, for any given reason, are unable to control the board, *eg* because they have agreed to a management power sharing formula in a separate agreement among the shareholders".[134] While the court did not expressly identify that the oppression remedy was residual in nature, it is submitted that the court's holding was entirely consistent with this principle. Firstly, as indicated above, they referred to the inability of the majority shareholders to control the board (a type of situation which has been discussed above).[135] Moreover, taking a closer look at the facts of the case, it can be seen that the minority shareholder's failure to inject funds and termination of the corporate guarantee, in breach of an express or implied understanding between the shareholders, were actions taken *not* in the capacity of the minority shareholder as a director of the company, but in its own capacity. In so far as such conduct constituted oppression, one can appreciate that the usual solution for curing such oppression – the majority shareholder's appointment rights – was simply irrelevant, since (unlike the *Sim City* type of scenario) the oppressive conduct did not appear to involve a breach of the minority shareholder's directorial duties.[136] In the premises, the court was thus correct to grant the

131 [1994] 2 MLJ 789, cited in *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [50].

132 Companies Act 1965 (Act 125 of 1973) (M'sia). This section is identical in wording to s 216(1) of the Companies Act (Cap 50, 2006 Rev Ed).

133 *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd* [1994] 2 MLJ 789 at 812–815 and 822–826.

134 *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd* [1994] 2 MLJ 789 at 808.

135 See paras 29–35 above.

136 It should be noted that the distinction between corporate and personal wrongs is, of course, much debated and not always easily parsed in practice. See *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [60]–[71].

majority shareholder access to the Malaysian equivalent of the s 216 remedy.

V. Conclusion

46 It is worth emphasising that the question of whether a majority shareholder can access the s 216 remedy is not a mere technical issue of standing, to be subordinated to other more "substantive" questions of the merits of an oppression claim. A deeper examination of this issue reveals the principle upon which access to the s 216 remedy is permitted: whether a shareholder is able to cure oppression through the means of self-help remedies (primarily, voting control over the appointment of the board). To this end, this article has suggested that s 216 is a residual remedy, and offered various theoretical and policy justifications (for example, preserving the internal dispute-resolution architecture of the company, and precluding pointless or vexatious litigation) to support this. More importantly, this discussion has harnessed various UK and Commonwealth authorities to identify important exceptions to the residual nature of the s 216 remedy: where voting power is insufficient, neutralised, entirely circumvented or irrelevant. Ultimately, while it remains generally correct that a majority shareholder should only have access to the s 216 remedy in rare circumstances, it bears repeating that a more nuanced and fact-sensitive inquiry into the *locus* of corporate power is necessitated on the facts of each individual case.