

Book Review

MINORITY SHAREHOLDERS' RIGHTS AND REMEDIES

by Margaret Chew (LexisNexis, 2nd Ed, 2007)

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1 A reviewer of the first edition of the book started his review by highlighting that a foreword (contained in that edition) penned by Sir Anthony Mason, the former Chief Justice of the High Court of Australia was the highest accolade that could be given to any book on minority shareholders' rights and remedies.¹ The inclusion in this second edition of that foreword as well as a new foreword by Singapore Judge of Appeal, Justice Andrew Phang, is perhaps illustrative of how the author has further built on the foundations laid by her already impressive first edition to reach even higher standards of excellence as well as the increasing autochthony of the book.

2 In his foreword, Justice Phang says that “[w]hat is particularly praiseworthy about this work is the manner in which it seamlessly weaves the theoretical foundations with practical rules and principles”. Having used the book, first as a text for academic teaching as well as a reference to provide practical advice to aggrieved shareholders, one wholly concurs with the learned judge. The discourse in the book constantly moves from the general theory to the specific rules and back again to the broader policy perspective with fluidity and clarity, thus enabling the reader to understand not just the “black letter” rules but the policy considerations behind those rules.

3 This is particularly important in an area in which, due to its very nature, it is difficult to ascertain the exact application of a rule. The regulation of relationships is a particularly difficult area in which to devise universal rules. Each party and each relationship has its own peculiarities, and the context for the application of the rule in such a collage of interconnected parties and relationships is important. The law on shareholders' rights and remedies seeks to regulate the relationship between shareholders *inter se* and between shareholders and

1 Hans Tjio, “Book Reviews” [2000] Sing JLS 643.

management. However, each company is different and each shareholder enters into that company with different expectations and negotiated bargains. Thus, it is by definition an area in which the policy considerations significantly inform the interpretation of the rules and hence understanding those considerations becomes as paramount as knowing the rules themselves.

4 While much of the theory and policy considerations remain the same – the plight of minorities or the oppressed has long been a problem that governance scholars have tried to balance with the need to allow managers to exercise their discretion to take risks² – significant new additions to the book have been made in various chapters.

5 In Chapter 1: Majority Rule and Minority Protection, the author discusses the amendments introduced by the Companies (Amendment) Act 2004 which, by making both the memorandum and the articles alterable by special resolution, rendered obsolete a prior practice of creating technically irrevocable provisions by placing them in the memorandum. Of particular note, is the discussion of the new s 26A of the Companies Act introduced by the aforementioned amendment, and the common law. The section provides that an entrenching provision may be included if there is unanimous agreement and then may only be removed by unanimous consent. The author correctly points out that under common law, a company may not by independent contract bargain away its rights to alter its articles. As such, the author then insightfully submits that this common law principle would be applicable in Singapore where the company seeks to do this in a way that bypasses s 26A and suggests that an alternative could be found by relying on a shareholders' agreement which the author then proceeds to discuss.

6 In Chapter 2: Personal Actions, the author discusses departures from the long standing proposition arising from *Percival v Wright*³ that the directors of a company do not owe duties to shareholders individually. The author discusses the development of exceptions to this rule in the case of *Coleman v Myers*⁴ to *Peskin v Anderson*⁵ and the local

2 See Cary Coglianese, "Legitimacy and Corporate Governance" (2007) 32 Delaware Journal of Corporate Law 159 for an interesting observation on the interaction of corporate governance and public governance.

3 [1902] 2 Ch 421 (Chancery Division, UK).

4 [1977] 2 NZLR 225 (Court of Appeal, New Zealand).

5 [2001] 1 BCLC 372 (Court of Appeal, UK).

case of *Tai Kim San v Lim Cher Kia*⁶ and concludes that special circumstances could create a fiduciary relationship between a director and an individual shareholder.

7 This “special circumstance” theme is continued in Chapter 4: Oppression Actions, where in both the first and second editions, the author adopts a contractarian analysis of s 216 on oppression, and advocates an objective test of fairness that extends beyond breaches of fiduciary duties. The reviewer of the first edition predicted: “Chapter 4 will be heavily cited to the Singapore courts given the importance of oppression actions in a society where many companies are still structured in the form of quasi-partnerships.”⁷ Indeed, while the first edition of the book has been cited in several other cases, the fact that the Singapore Court of Appeal cited the book with approval in its most recent case on oppression, *Lim Swee Khiong v Borden Co (Pte) Ltd*,⁸ underscores the valuable contribution to legal scholarship that the book has provided and continues to provide. The court cited the earlier edition’s pertinent observation:

Section 216 of the Companies Act was conceived and passed with the objective of protecting minority shareholders from majority abuse. In order to offer effective and comprehensive protection, section 216 confers on the courts a flexible jurisdiction to do justice and to address unfairness and inequity in corporate affairs... The courts may be said to be empowered under section 216 of the Companies Act to re-lay the boundaries of what is or is not fair as between corporate participants.⁹

8 In the new chapter, the author highlights the court’s implication, that in a company that was more like a quasi-partnership, the court would imply a set of understandings beyond traditional company law approaches to directors’ and shareholders’ duties. She then elaborates on this in the chapter by discussing various situations which may result in such a set of implied understandings.

9 In Chapter 6: Statutory Derivative Actions, like in all previous chapters, the author undertakes a very conscientious update of both the local and international cases on point. What is noteworthy about this is that the first edition of the book was published in 2000. The statutory derivative action had then been available to shareholders of a company

6 [2001] 1 SLR 607 (High Court, Singapore).

7 *Supra* n 1 at 645.

8 [2006] 4 SLR 745 (Court of Appeal, Singapore).

9 *Ibid*, at [81].

incorporated in Singapore for only about six years prior to the first edition. As such, the paucity of local cases required that significant guidance be sought from Canadian cases interpreting the Canadian legislation which inspired ss 216A and 216B of Companies Act of Singapore. Seven years have since passed and while still less than copious, a local body of cases has emerged and the reader would be well advised to avail himself of the chapter's very comprehensive but concise update. In particular, the discussion of *Hengwell Development Pte Ltd v Thing Chiang Ching*,¹⁰ as authority that even majority shareholders may avail themselves of the statutory derivative action for reflective loss if there is no risk of prejudice to other parties, merits careful reading. The discussion analyses some of the exceptions to *Johnson v Gore Wood & Co*,¹¹ the English authority against recovery for reflective loss, and shows when layers of subsidiaries may not be an impediment to a successful derivative action. This will prove very useful for international joint venture lawyers seeking to determine how best to advise their clients.

10 Throughout the book, the author remains true to her previous position in the first edition that a balance has to be struck between the rights of minority shareholders that are voluntarily part of a company, and the continued existence of the company. The author has also herself struck a wonderful balance in the book between concision and comprehensive coverage, theory and practice as well as description and prescription.

11 It may be customary for a reviewer to provide suggestions on how the next edition of the book may be improved, but in this case, it was extremely difficult to come up with suggestions as to how an already exceptional work which had been further improved in its second edition could be improved any further. It is, therefore, necessary to go outside the scope of the work and suggest that the author could consider adding a discourse specifically about the interaction of minority shareholders' rights and remedies with other corporate governance rules. It should, however, be noted that the author already does this to some extent in each of the chapters and it may well be that such a discourse due to its scope would have to be developed into a separate book. If so, then this reviewer would welcome such a book.

10 [2002] 4 SLR 902 (High Court, Singapore).

11 [2001] 2 WLR 72 (House of Lords, UK).