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Case Note

A NEW ARROW IN THE SHAREHOLDER'S QUIVER?

Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd
[2024] 3 WLR 986

In *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986, the Privy Council ruled that shareholders have the requisite standing to commence a personal action against their companies for improper allotment and issuance of shares by their directors. It was held that this right of the shareholders was premised on an implied term in their companies' constitutions. This note covers three points. First, this note analyses how the Privy Council's holding would affect the shareholder litigation landscape in Singapore. Second, this note will consider whether it is possible to imply such a term in companies' constitutions under Singapore law. Third, this note examines whether it is possible to extend the Privy Council's holding to other breaches of director's duties.

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I. Introduction

1 In *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd*[2] ("*Tianrui*"), the Privy Council – after considering various English and Australian authorities – held that a shareholder has

1 This note is written in the authors' own capacity. The opinions expressed in this note are entirely the authors' own views.
2 [2024] 3 WLR 986.

a personal right of action against the company to challenge the allotment and issuance of shares by his or her directors. This action is premised on an implied term that prohibits the allotment and issuance of shares by directors pursuant to an improper purpose.

2 This note examines three points. First, a comparison between the rule in *Tianrui* and the existing framework for shareholder litigation in Singapore will be made. Second, the question of whether the rule in *Tianrui* can be adopted in Singapore will be considered. This note argues that the key question is whether it is necessary to imply the term found in *Tianrui* in the local context. Third, a brief examination of whether the rule in *Tianrui* can be extended to other circumstances of breaches of director's duties. This note argues that considering the unique type of loss that the Privy Council was considering in *Tianrui*, it is unlikely the rule in *Tianrui* can be extended to other situations.

II. Facts and decision in *Tianrui*

3 The appeal arose out of a prolonged battle for control of the respondent company, China Shanshui Cement Group Ltd ("CSCGL"), whose shares were listed on the Hong Kong Stock Exchange ("HKSE").[3] The principal shareholders in CSCGL included: the appellant company ("Tianrui"), Asia Cement Corporation ("ACC"), China National Building Materials Co Ltd ("CNBM") and China Shanshui Investment Company Ltd ("CSI").[4] Each of CSCGL, Tianrui, ACC and CNBM were competitors in the cement production industry in the People's Republic of China. From April 2015 to 31 October 2018, CSCGL's shares were suspended from trading on the HKSE. On 23 October 2017, HKSE gave notice that CSCGL would be delisted unless by 31 October 2018 CSCGL, among other things, restored its public float above the 25% minimum threshold required by the HKSE Main Board Listing Rules.[5]

4 In May 2018, a majority of shareholders of CSCGL, including ACC, CNBM and CSI, voted at an extraordinary general meeting ("EGM") to reconstitute the board of directors. The reconstituted board comprised of one director from CNBM, one director from ACC and three independent non-executive directors. Thereafter, CSCGL issued convertible bonds in two tranches, the first for a total value of US$210.9m

3 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [6].

4 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [7].

5 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [8]–[9].

and the second for a total of US$320.7m.[6] CSCGL claimed that the proceeds of the bonds were primarily used to repay loan notes that were repayable in March 2020.[7]

5 On or about 6 October 2018, CSCGL entered into deeds of amendment with each of the subscribers of the bonds to accelerate the conversion of US$456.6m in principal amount of the first and second bond issues into shares at an "Early Conversion Price". CSCGL also agreed with the holders of bonds the allotment of 888,980,352 new shares in exchange for some of the bonds.[8]

6 On 30 October 2018, CSCGL held an EGM where a majority of the shareholders passed a resolution mandating the directors to allot and issue 1,067,830,759 shares – comprised of the shares mentioned earlier and a further 93,004,771 shares, which represented shares relating to the bonds held by persons who had not already agreed to the share conversion. The new shares were issued on 30 October 2018, and restored the public float of CSCGL to 25%.[9]

7 Tianrui did not dispute this brief account of facts which appeared to be a rational response to the notice given by HKSE that the company would be delisted if it did not restore its public float to 25%. However, Tianrui alleged that the shares were issued for the purpose of enabling ACC and CNBM to control CCGL and achieving a dilution of Tianrui's shareholding to under 25%, with the result that Tianrui could no longer block special resolutions. Tianrui also alleged that ACC and CNBM agreed to form an alliance to take over CSCGL, that they would make a joint offer for CSCGL's shares and that they would oppose Tianrui's attempts to obtain a greater interest in CSCGL.[10]

8 Tianrui averred that the reconstituted board of CSCGL exercised their power to issue the convertible bonds and new shares for an improper purpose and that those transactions were invalid. Accordingly, Tianrui sought a declaration that the exercise by the directors of CSCGL of the powers (a) to issue the convertible bonds; (b) to convert the bonds into

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6 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [10]–[11].

7 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [12].

8 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [13].

9 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [15].

10 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [16]–[17].

shares; and (c) to issue new shares were each not a valid exercise of the relevant power.[11]

9 CSCGL sought to have the writ seeking declaratory relief struck out on the basis that, among other things, Tianrui did not have standing to sue CSCGL for what were essentially claims arising out of breaches by the reconstituted board of the fiduciary duties which they owed to CSCGL.[12]

10 In the Grand Court, Segal J rejected CSCGL's challenge, concluding that a minority shareholder had a personal claim against the company and that the appropriate remedy was a declaration that the allotment and issue of shares was unlawful.[13] On appeal, the Court of Appeal overturned the Grand Court's decision and held that an aggrieved shareholder had no personal right of action against the company for the diminution of his voting power caused by the issue of shares in breach of a fiduciary duty owed to the company.[14] The Court of Appeal concluded that the postulated aggrieved shareholder has no personal right of action but must found his claim on a basis that is consistent with the rule in *Foss v Harbottle* or with the fraud on the minority exception to that rule.[15]

11 On appeal, the Privy Council overturned the decision of the Court of Appeal. The Privy Council examined English and Australian cases,[16] and concluded that they have repeatedly recognised the right of one or more shareholders to bring a personal action against the company (rather than a derivative action on behalf of the company) by way of challenge to the validity of an allotment of shares made on behalf of the company by its directors. These cases were based upon the allegation that the directors acted for an improper purpose.[17]

12 The Privy Council explained that subject to any class restrictions, shares will carry the right to attend and vote at a general meeting, and

11 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [19]–[20].
12 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [23].
13 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [24].
14 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [25].
15 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [27].
16 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [34]–[64].
17 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [65].

thereby play a part in the exercise of the shareholders' collective power to influence or control the general direction of its affairs. The active power of a shareholder is critically dependent upon the proportion which the individual shareholder bears, relative to the shares of the company as a whole. For example, possession of more than 25% of the shares might confer negative control through the ability to block or stop certain steps requiring a special resolution, including the power to alter the articles of association. The value per share of such a block is thus *critically sensitive* to dilution, where in particular the percentages fall below 50% or 25% of the whole. Dilution of these shareholding proportions may critically affect the balance of power between shareholders.[18]

13 The power to cause the company to allot and issue shares is conferred upon the directors, acting as fiduciaries, by the articles of association. The power is thus a fiduciary power and must be exercised for proper purposes. As explained by the Privy Council, no part of these proper purposes includes deliberately altering the balance of power between shareholders.[19]

14 On this basis, the Privy Council held that there is an implied term in the contract constituted by the articles of association that the company's power to allot and issue new shares, delegated by the articles to the directors, will be exercised by the directors in accordance with their fiduciary duties. This formed the basis of the shareholder's right to bring an action against the company to challenge an improper exercise of the directors' power to allot and issue shares.[20]

15 The Privy Council explained that the harm to the shareholder is the alteration in the balance of power between the company's shareholders and the particular harm which that does to the value of the rights embedded in his shares. Further, this harm was actionable because the impropriety in the directors' actions contravened the corporate contract binding the shareholder and the company, *even though the relevant fiduciary duty breached by the directors was not owed to the shareholder*.[21] Therefore, even though the action is founded upon the commission of a breach of a fiduciary duty by the directors, the *cause of action* is the breach of the implied term in the corporate contract between

18 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [68].

19 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [69].

20 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [72].

21 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [72].

the shareholder and the company, *ie*, that the directors will exercise the power to allot and issue shares in accordance with their fiduciary duties.[22]

16 The Privy Council also explained that it is irrelevant whether the company itself has a cause of action against the directors for the breach of fiduciary duty owed to it. The shareholder's action against the company may coexist with an action by the company in respect of the same breach of duty by the directors.[23]

17 Applying the law to the assumed facts, the Privy Council held that if the allegations by Tianrui were proven to be true, the directors had acted for an improper purpose in the issue and allotment of the disputed shares. The purported ratification of their actions was also vitiated by the intent of the majority to oppress Tianrui as a minority shareholder. Accordingly, the Privy Council allowed the appeal.[24]

III. *Tianrui*'s interaction with existing legal framework for shareholder litigation in Singapore

18 The rule in *Tianrui* grants shareholders a *personal action* to "bring an action against the *company* to challenge an improper exercise of the directors' power to allot and issue shares"[25] [emphasis added]. Given that the rule is premised on an implied term in a company's constitution,[26] shareholders are effectively enforcing their constitution – which is a well-recognised right[27] – when they sue under the rule.

19 However, what is unique about this cause of action is that it is contingent *solely* on the directors' breach of the fiduciary duty to act for proper purposes in allotting and issuing shares. This was previously unheard of as it is well known that directors owe such a duty to their

22 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [75].
23 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [79].
24 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [86]–[87].
25 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [72].
26 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [70].
27 Lee Pey Woan, "Corporate Constitution and Membership" in Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2nd Ed, 2024) ch 5, at para 05.012.

companies,[28] and therefore companies are generally the proper claimants in policing any breach of such a duty.[29] The rule in *Tianrui* effectively allows shareholders to sue on a breach of fiduciary duty to make the allotment and issuance of shares voidable.[30]

20 If the rule in *Tianrui* is adopted under Singapore law, there is likely to be a revamp of the landscape for shareholder litigation. Under the current regime in Singapore, the two common weapons in shareholders' arsenal are derivative actions – under common law and s 216A of the Companies Act 1967[31] ("Companies Act") – and what are generally known as claims under s 216 of the Companies Act.[32] The rule in *Tianrui* could render these avenues obsolete if the wrong complained of is a director's breach of the fiduciary duty to act for proper purposes in allotting and issuing shares.

21 Beginning first with derivative actions, under common law and statute,[33] shareholders can commence derivative actions and sue – in the name and on behalf of their companies –persons who had committed wrongs against their companies.[34] The availability of derivative actions is important because in Singapore, companies' decisions to commence litigation are managed by their directors. Therefore, it is entirely possible for the directors to restrain their companies from commencing actions against themselves. In such a situation, a derivative action provides shareholders with an avenue to hold their directors accountable.[35] For instance, it is possible for shareholders to commence derivative actions against their directors for breach of the duty to act for proper purposes in issuing shares, as that is wrong suffered by the company.[36] After succeeding in their claims, courts may set aside the issuance of shares – the same

28 See *BIT Baltic Investment & Trading Pte Ltd v Wee See Boon* [2023] 1 SLR 1648 at [31].

29 See *Ascend Field Pte Ltd v Tee Wee Sien* [2020] 1 SLR 771 at [35].

30 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [74].

31 2020 Rev Ed.

32 See generally, Pearlie Koh, "Shareholder Litigation – Corporate Wrongs" in Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2nd Ed, 2024) at ch 10.

33 In Singapore, derivative actions are available under both common law and the Companies Act 1967 (2020 Rev Ed): see *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1022 at [67]–[71].

34 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [88].

35 Pearlie Koh, "Shareholder Litigation – Corporate Wrongs" in Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2nd Ed, 2024) ch 10, at para 10.001.

36 See *BIT Baltic Investment & Trading Pte Ltd v Wee See Boon* [2023] 1 SLR 1648 at [31], where the court stated that a director owes a fiduciary duty to his or her company to act for proper purposes.

remedy that may be obtained by companies if they had commenced the actions themselves without the shareholders being involved.[37]

22 So far, the rule in *Tianrui* is highly similar to derivative actions save for the capacity in which the shareholders are suing and the defendants in the respective actions. However, what makes the rule in *Tianrui* more attractive to shareholders is that there are no requirements to be met before shareholders can commence their actions. In contrast, there are prerequisites that must be fulfilled before shareholders commence derivative actions. Under common law, a shareholder must show that his or her company has a reasonable cause of action against the defendant; and the shareholder must have the *locus standi* to bring the action.[38] Similarly, under the statutory regime, s 216A(3) of the Companies Act mandates shareholders to comply with the notice requirement, act in good faith and show that their actions are *prima facie* in their companies' interests.

23 However, where the breach is ratified by shareholders, the statutory derivative action offers a more attractive avenue. Under s 216B(1) of the Companies Act, evidence of ratification by shareholders is not an absolute bar; rather, it only serves as a consideration for a court to take into account in considering whether to grant permission to commence a statutory derivative action. In contrast, the common law derivative action and the rule in *Tianrui* suffer from an identical restriction – ratification by shareholders may bar proceedings unless fraud on the minority has been committed.[39]

24 As regards s 216 of the Companies Act, its purpose is to provide remedies to minority shareholders who are being oppressed by majority shareholders in a company.[40] In s 216 claims, shareholders would be vindicating wrongs caused to them in their personal capacity as shareholders.[41] Although there are four limbs under s 216 – namely, oppression, disregard of a shareholder's interests, unfair discrimination

37 For the remedy in a situation where shares were issued pursuant to an improper purpose, see *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 at [122].

38 *Sinwa SS(HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 at [20].

39 For common law derivative action, see *Ting Sing Nin v Ting Chek Swee* [2008] 1 SLR(R) 197 at [12]. In *Sinwa SS(HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 at [48], the High Court stated that the "fraud on the minority exception" is the only true exception to ratification by shareholders.

40 Pearlie Koh, "Shareholder Litigation – Personal Actions" in Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2nd Ed, 2024) ch 11, at para 11.023. Although it should be noted that s 216 claims are not exclusive to minority shareholders: see *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [48].

41 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [88].

and prejudice – the common element is commercial unfairness,[42] which is understood to mean "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".[43]

25 While an allotment and issuance of shares in pursuit of an improper purpose by a director is likely a breach of his or her duty,[44] it might not suffice to form a claim under s 216. The Singapore Court of Appeal previously noted:[45]

> … breach of fiduciary duties by a director *does not by itself constitute oppression of a shareholder*. It is only when an injury is caused to the shareholder which is *distinct* from the injury caused to the company and such injury amounts to commercial unfairness that oppression is made out. [emphasis added]

Because a director only owes fiduciary duties to his or her company, any breach of such duties is a wrong to the company, not the shareholders. Therefore, shareholders need to suffer a distinct injury from the one suffered by the company in order to succeed in their claim under s 216, which is premised on a wrong to them in their capacity as shareholders.[46]

26 In the context of a rights issue, the Singapore High Court previously provided some guidance in relation to when a rights issue might provide a basis for a claim under s 216:[47]

> In my judgment, a rights issue would be unfair within the meaning of s 216 if (a) there is no commercial reason to raise capital through a rights issue, or (b) the dominant purpose of the rights issue is to dilute non-subscribing shareholders.

The Singapore Court of Appeal's decision in *Over & Over Ltd v Bonvests Holdings Ltd*[48] ("*Over & Over*") is illustrative of when a shareholder may succeed in his or her s 216 claim in a situation involving a rights issue. There, the minority shareholder argued, *inter alia*, that a rights issue was done in an oppressive manner by the majority shareholder.[49] The court

42 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [81].
43 *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 at [77].
44 See *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 at [122].
45 *Ascend Field Pte Ltd v Tee Wee Sien* [2020] 1 SLR 771 at [56].
46 See the Court of Appeal's analytical framework on ss 216 and 216A: *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [116].
47 *The Wellness Group Pte Ltd v OSIM International Ltd* [2016] 3 SLR 729. This decision was upheld on appeal by the Singapore Court of Appeal: see *The Wellness Group Pte Ltd v Paris Investment Pte Ltd* [2018] 2 SLR 973 at [7].
48 [2010] 2 SLR 776.
49 See *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 at [43]–[52].

held that this was so.[50] First, the court found that the price per share was designed to dilute the shareholding of the minority to the maximum extent possible.[51] Second, there was no commercial justification for the rights issue.[52] Third, little time was given to the minority shareholder to subscribe to the new shares, and any request for extension was ignored.[53] In totality, the rights issue was therefore done not for the purpose of raising funds, but to dilute the shareholding of the minority shareholder.[54]

27 One could see that whether a shareholder could succeed in arguing that a rights issue is done in an oppressive manner is highly dependent on the facts. It is an uphill battle for shareholders to mount such an argument given that "there is no general expectation that the shareholding of a company will remain constant".[55] Indeed, a later decision noted that *Over & Over* was "premised in significant part on the finding that there *was a* quasi-partnership between the majority and minority shareholders"[56] [emphasis in original].

28 In contrast to a claim under s 216, the rule in *Tianrui* is far more attractive to shareholders in the *specific* context of an allotment and issuance of shares pursuant to an improper purpose. Shareholders only need to show that their directors have breached the duty to act for proper purposes in allotting and issuing shares. There is no further requirement to show how oppressive the act was to shareholders. On the other hand, for a claim under s 216, the fact that there is a breach of the duty to act for proper purpose *merely* forms the backdrop for shareholders to show that there is commercial unfairness. Therefore, the rule in *Tianrui* functions as a simpler route to obtain a remedy in the *limited* situation of shares being allotted and issued for an improper purpose.

29 Additionally, if a shareholder only seeks to make the allotment and issuance of shares voidable, the rule in *Tianrui* is more certain in achieving that outcome. Under s 216, courts retain discretion in crafting the appropriate remedy under s 216(2),[57] which provides for a range of remedies – such as cancelling or varying resolutions to winding up the company. While an allotment and issuance of shares may be cancelled

50 *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 at [127].
51 *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 at [121].
52 *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 at [124].
53 *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 at [120]–[121].
54 *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 at [127].
55 *The Wellness Group Pte Ltd v OSIM International Ltd* [2016] 3 SLR 729 at [188].
56 *Farzin Ratan Karma v Helen Campos* [2024] SGHC 41 at [100].
57 *Low Peng Boon v Low Janie* [1999] 1 SLR(R) 337 at [55]; see generally, Pearlie Koh, "Shareholder Litigation – Personal Actions" in Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2nd Ed, 2024) ch 11, at para 11.083.

pursuant to an order under s 216(2)(*a*), it is entirely possible that a court may consider another order to be more appropriate.

IV. Adopting the rule in *Tianrui* in Singapore?

30 In Singapore, it has been said that s 39 of the Companies Act – which states the effect of a company's constitution – has the effect of:[58]

> creating a contract between the *company and all its members*, and between the members inter se. In effect, this confers upon a member the personal right to bring an action to enforce a regulation of the constitution, or to restrain its breach. [emphasis added]

This contractarian view has resulted in contractual principles being applied to constitutions.[59] This view is crucial to understanding how the rule in *Tianrui* could be transplanted into Singapore law, as the Privy Council stated that the basis for it was an *implied term in law* in companies' constitutions.[60] Specifically, the Privy Council stated:

> *It is a term of the corporate contract that, if the exercise of the power to allot and issue new shares by the directors as agents for the company is to be valid and binding as between the individual shareholder and the company, it should comply with all conditions necessary to make it a proper exercise*. These include compliance with the directors' fiduciary duty owed to the company. This is a constraint *implied by law* as inherent in the relationship between the shareholder and the company. [emphasis added]

31 The significance of implied terms in law under the rule in *Tianrui* must first be understood. The following was stated in relation to implied terms in law under general contract law:[61]

> There is a *second* category of implied terms which is wholly different in its nature as well as practical consequences. Under this category of implied terms, once a term has been implied, such a term will be implied in *all future* contracts of *that particular type*. [emphasis in original]

Due to this, it has been cautioned that courts should be careful in implying terms in law in a case given that it could "set a precedent for all

58 Lee Pey Woan, "Corporate Constitution and Membership" in Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) ch 5, at para 05.012.

59 See Lee Pey Woan "Corporate Constitution and Membership" in Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) ch 5, at paras 05.025–05.039.

60 [2024] 3 WLR 986 at [70].

61 *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [42].

future cases relating to that same category of contracts".[62] The significance of the Privy Council's ruling is that all companies' constitutions will have the same implied term in *Tianrui*, thereby allowing shareholders to sue their companies in the same manner as in *Tianrui*.

32 Whether the rule in *Tianrui* could be transplanted into Singapore turns on whether it is possible to imply an identical term in *Tianrui* under Singapore law. Unfortunately, there appears to be no Singapore decisions on implied terms in *law* in the context of *constitutions*. The closest Singapore has seen is a *general* test for implication of terms in constitutions was *Chan Siew Lee v TYC Investment Pte Ltd*.[63] There, an agreement was invoked by Ms Chan, one of the two directors of the company, to restrain payments by the other director out of the company's accounts.[64] This resulted in a deadlock between the board members, and an extraordinary general meeting was convened to authorise the payments. Shareholders also resolved to commence proceedings against Ms Chan for breach of director's duty in invoking the agreement.[65] The Court of Appeal had to consider whether there was an implied term in the constitution providing for reserve power that was vested in general meetings in the event of a deadlock at the board of directors.[66]

33 The court stated that "[a]s with implied terms *in general*, the basis for doing so is *necessity*"[67] [emphasis added]. While it was necessary to find an implied term providing for a reserve power to authorise the payments, the same could not be said about a reserve power for shareholders to authorise the company to commence proceedings against Ms Chan. For the latter, the court stated that the availability of the derivative action mechanism under s 216A – which could be invoked by aggrieved shareholders to commence actions against directors for breach of director's duties – meant that it was unnecessary for a reserve power to be implied to achieve the same.[68]

34 If the general test for implication of terms in constitutions is necessity, there are difficulties in implying an identical term found in *Tianrui*. Chiefly, such an implication is unnecessary given the mechanism

62 Andrew Phang Boon Leong & Pearlie Koh, "Express and Implied Terms" in *The Law of Contract in Singapore* vol 1 (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) ch 6, at para 06.147.
63 [2015] 5 SLR 409.
64 *Chan Siew Lee v TYC Investment Pte Ltd* [2015] 5 SLR 409 at [11]–[15].
65 *Chan Siew Lee v TYC Investment Pte Ltd* [2015] 5 SLR 409 at [12]–[13].
66 See *Chan Siew Lee v TYC Investment Pte Ltd* [2015] 5 SLR 409 at [1].
67 *Chan Siew Lee v TYC Investment Pte Ltd* [2015] 5 SLR 409 at [37].
68 *Chan Siew Lee v TYC Investment Pte Ltd* [2015] 5 SLR 409 at [83].

under s 216A. As discussed above,[69] the rule in *Tianrui* effectively allows shareholders to sue on their directors' breach of the duty to act for proper purpose in allotting and issuing shares. On successful litigation, the allotment and issuance would be made voidable. The same set of facts could form the basis for derivative actions under s 216A, and the same outcome – that is rendering the allotment and issuance of shares voidable – could be achieved under s 216A.

35 Additionally, there is also a concern of going beyond the statutorily prescribed limits. Section 216A(3) clearly provides the prerequisites before permission for derivative actions could be granted by courts. Transplanting the rule in *Tianrui* into Singapore arguably goes beyond existing circumscription, as no permission of a court is needed before a shareholder commences an action under it.

V. Ambit of *Tianrui*

36 Once an implied term in law is found in a contract, such a term will be implied in all future contracts of *that particular type*.[70] To understand what contracts of "that particular type" refers to in this context, it is therefore important to ascertain the exact term that was implied by the Privy Council.

37 The implied term in *Tianrui* is narrowly framed, extending only to a breach of fiduciary duties by the directors of a company in issuing shares for an improper purpose.[71] It remains to be seen whether a similar implied term may also extend to other breaches of the duty to act for proper purposes by the company's directors, or even breaches of other fiduciary duties.

38 Nevertheless, it is submitted that such an extension is unlikely. The nature of shares is what gives rise to a separate cause of action in *Tianrui*. The decision was premised on the harmful consequence suffered by a shareholder and the damage to the value of the rights embedded in his shares. The detriment to the shareholder is the inability to exercise the *proportionate voting power* attached to its shares that might result from the allegedly improper allotment and issue of new shares. This is an extremely unique type of detriment, as the "loss" here does not result from an alteration in the nature of the shares or diminution of value (though this might be a natural consequence). Instead, the "loss" is found

69 See paras 18–29 above.
70 See para 31 above.
71 *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 at [75].

in the loss of power that attaches to those shares relative to the other shares in the company. Under these circumstances, the "loss" suffered by the shareholder is personal in nature and separate from the consequences on the company. It is the adverse effect on the shareholder's personal right that gives rise to this cause of action, separate and distinct from the company's own cause of action against the errant directors.

39 In comparison, the type of loss caused by other breaches of the duty to act for proper purposes, or breaches of other fiduciary duties, might be of a different nature. The loss which is suffered by the shareholders in most of these situations is usually also reflected as a loss to the company (and potentially reflected in a diminution of share value). For example, a breach of the no-profit rule by an errant director to divert business to himself will simultaneously cause loss to the company.[72] The rules on double recovery and the no reflective loss principle might therefore be relevant and bar recovery by the shareholder.[73] These concerns do not arise in the unique factual matrix of *Tianrui* because the loss was suffered by the shareholder solely, while the company benefited.[74] Therefore, due to the unique nature of shares and the resultant type of loss suffered by the appellant in *Tianrui*, it is submitted that the implied term in the constitution should be confined to a breach of fiduciary duties by the directors of a company in issuing shares for an improper purpose. It is unlikely that the reasons given by the Privy Council for finding the implied term in the constitution can be extended by analogy to other breaches of the duty to act for proper purposes or breaches of other fiduciary duties in general.

40 For completeness, on a strict reading of *Tianrui*, one might argue that it is restricted to Cayman Islands law. It is noted that the Cayman Islands Companies Act[75] does not have a counterpart to s 216 of the Singapore Companies Act for personal remedies in cases of oppression. It was perhaps this limitation that prompted Tianrui to pursue a winding-up application under s 92(e) of the Cayman Islands Companies Act, which concerns winding-up on "just and equitable" grounds. The remedial power under s 95(3) grants the Cayman Islands courts broad power to issue alternative orders. For this reason, Tianrui pursued its claim under the "just and equitable" grounds and filed a writ seeking declaratory

72 See *eg*, *Cooks v Deeks* [1916] 1 AC 554.

73 See *eg*, *Miao Weiguo v Tendcare Medical Group Holdings Pte Ltd* [2022] 1 SLR 884 at [206].

74 For example, the breach of the implied term in *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] 3 WLR 986 caused the issuances of new shares that restored the public float of the respondent company to 25%, resulting in resumption of trading in respondent's shares the following day.

75 2021 Revision.

relief for what were essentially claims arising out of breaches of fiduciary duties. The Privy Council held that the shareholders had the standing to seek a declaration, within a winding-up application, that the directors' allotment and issuance of shares were improper. Against this backdrop, it may be argued that *Tianrui* should be interpreted narrowly and is specific to Cayman Islands law.

41 However, it is submitted that the Privy Council's holding is more far-reaching. Indeed, in reaching its decision, the Privy Council examined various English and Australian authorities dealing with the issue of shareholders' personal causes of action against their companies for directors' breach of duty to act for proper purpose in allotting and issuing shares. Notwithstanding the Cayman Islands context, there seems to be a wider recognition of an implied term in companies' constitutions to act for proper purpose in allotting and issuing shares. Instead, what is unclear is whether a breach of this implied term will suffice in *other cases* giving rise to a personal cause of action for shareholders. This will necessarily be dependent on the specific relief sought.

VI. Conclusion

42 The holding in *Tianrui* is significant because it explicitly recognised the right of a shareholder to bring a personal claim against a company for an improper allotment or issuance of shares by directors in breach of their duty to act for proper purposes. This decision was premised on an implied term in the company's constitution and will be implied in all future company constitutions.

43 This decision may have implications for shareholder litigation in Singapore, though it remains to be seen how it might fit within the existing shareholder litigation framework. If accepted by our courts, it might provide an alternative cause of action for shareholders, aside from commencing an action under s 216 or 216A. As explained above, a claim under the rule in *Tianrui* might potentially be more attractive to shareholders as they would be claiming in their personal capacity, and do not need to establish oppression to make out the claim.