Published on e-First 17 September 2020

9. COMPANY LAW

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I. Directors' duties

9.1 The case of *Lim Seng Choon David v Global Maritime Holdings Ltd*[1] is a straightforward, yet salutary, reminder of the importance for a director to act *bona fide* and in the best interests of his company. In that case the laundry list of breaches was long, including making unnecessary business trips, obtaining reimbursement wrongly for overseas trips, making claims and obtaining reimbursement for personal expenses, issuing unnecessary and unauthorised cheques to various third parties, and causing the company to enter into lease agreements for properties owned by the director's wife and himself.

9.2 Other cases involving the duty of directors to act *bona fide* and in the best interests of the company require a more complex legal analysis. This often occurs when the court must grapple with the vexed issue of whether an objective or subjective standard should be applied – which often manifests itself in cases where directors engage in bribery and then claim that their actions were carried out in the best interests of the company. In *Ong Bee Chew v Ong Shu Lin*[2] ("*Ong Bee Chew*"), the plaintiff and the defendant were the only directors and shareholders of Hocen

1 [2019] 3 SLR 218.
2 [2019] 3 SLR 132.

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International Pte Ltd ("Hocen"). After entering liquidation, Hocen sued the defendant for breach of fiduciary duty, alleging that he had caused Hocen to make payments of $1.8m to Crossbridge International Pte Ltd to facilitate bribes to procure business in China for Hocen. This claim was later assigned to the plaintiff. As the court found on a balance of probabilities that the allegation of bribery was made out, the court held the defendant to be in breach of his duty to Hocen.

9.3 The decision is consistent with the earlier Court of Appeal decision in *Ho Kang Peng v Scintronix Corp Ltd*[3] ("*Ho Kang Peng*"). Nevertheless, there are two points that merit further discussion. First, the court made some observations on the objective-subjective basis on which to determine a director's liability for breach of fiduciary duty. It is suggested that, generally speaking, a director's honest subjective belief that an act is in the best interests of the company is determinative, given that courts do not usually sit in judgment of commercial decisions. However, an entirely subjective approach arguably leads to a lack of accountability on the part of directors. Accordingly, the courts may also ask themselves if the decision was one that a reasonable director could have arrived at or, as it is sometimes put, whether the decision was one that no reasonable director could have arrived at. For instance, in *Goh Chan Peng v Beyonics Technology Ltd*[4] ("*Goh Chan Peng*"), the Court of Appeal stated that "where the transaction is not objectively in the company's interests, a judge may well draw an inference that the directors were not acting honestly".[5]

9.4 In *Ong Bee Chew*, the court said that *Goh Chan Peng* could be read in two ways. First, it may be read as relying on the objective assessment of a director's intention purely as an evidential basis upon which to draw an inference as to his subjective intention. To the extent that this is true, *Goh Chan Peng* departed from the Court of Appeal's earlier approach in *Ho Kang Peng*. According to the court, *Ho Kang Peng* was regarded in a leading local text as laying down a purely objective approach to determining a civil breach of the duty to act *bona fide* in the interests of a company. The second way in which *Goh Chan Peng* may be read is that it lays down a substantive objective component, consonant with *Ho Kang Peng*. The court said it would approach *Goh Chan Peng* in this second way to be consistent with *Ho Kang Peng*.

3 [2014] 3 SLR 329.
4 [2017] 2 SLR 592.
5 *Goh Chan Peng v Beyonics Technology Ltd* [2017] 2 SLR 592 at [36], citing with approval *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Rev 3rd Ed, 2009) at para 8.36.

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9.5 With respect, it is submitted that *Ho Kang Peng* did not lay down a purely/substantive objective approach to determining a civil breach of the duty to act *bona fide* in the best interests of the company. It bears observing that in both *Ho Kang Peng* and *Goh Chan Peng* the Court of Appeal endorsed the subjective approach, namely, that it was for directors to exercise their discretion *bona fide* in what they considered – not what a court may consider – to be in the best interests of the company. Accordingly, a court would be slow to interfere with commercial decisions made honestly even if they were ludicrous business decisions.

9.6 The context of both cases must be kept in mind. In *Ho Kang Peng*[6] the issue related to the payment of bribes to procure business, and in *Goh Chan Peng*[7] the director in question had wrongfully diverted business away from his company and received bribes from a third party. In the face of such blatant wrongdoing, it is understandable why the Court of Appeal in both cases felt that the objective facts indicated that there could not have been an honest subjective belief on the part of the respective directors that they were acting in the best interests of their companies. The starting point should not be the objective analysis. The objective analysis is a useful means by which to test the subjective *bona fides* of directors, albeit through the relatively narrow lens of whether a reasonable director could have regarded what was done as being in the best interests of the company regardless of whether this was a decision that would be so regarded by all reasonable directors or even a majority of reasonable directors.

9.7 Second, the court said that the objective approach, which was unexceptional in a case like *Ho Kang Peng* that involved a listed company with many stakeholders, seemed anomalous in a case like the present where the company was a small, closely held, private company with a complete coincidence of identity between the directors, shareholders and the company. Unlike companies that are large, in small and closely held companies, there may be no abstract third-party interests or principal-agent concerns that require protection. The law relating to directors' duties should nevertheless be applicable to closely held companies so as to vindicate a public interest in holding directors to minimum standards of commercial morality in directing a company's affairs. In addition, it is preferable for company law to take a single approach to all companies, whether large or small and whether widely or closely held. Just as all directors are subject to the same fiduciary, common law and statutory duties regardless of the size and nature of their companies, so too all directors must be subject to the same objective approach.

6 See para 9.3 above.
7 See para 9.3 above.

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9.8 The authors respectfully agree with these reasons though we disagree that there is a purely objective approach if, by this suggestion, it is intended that the subjective intention of directors is subsidiary to the court's objective assessment of such intention. In addition, it is suggested that, instead of using the arguably vague (and new) language of "commercial morality", it may be better at this time to justify the public interest on the prevention of wrongdoing given that the cases in question are of this nature. In saying this, the authors are not suggesting that only such cases would give rise to the said public interest, but simply that it is preferable to avoid a wide and arguably subjective concept such as "commercial morality". The law can then develop incrementally as necessary.

9.9 Another complexity in the context of directors' duties in Singapore arises from the fact that directors are subject to both statutory duties articulated in the Companies Act[8] ("the Act") and duties at common law and equity. The extent to which these duties overlap, or create distinct obligations and liabilities from each other, is a matter that is not yet entirely clear and settled.[9] In *Traxiar Drilling Partners II Pte Ltd v Dvergsten, Dag Oivind*[10] ("*Traxiar*"), the defendant director, against whom allegations of a conflict of interest had arisen, argued that he did not breach the no-conflict rule as he had, pursuant to s 156(5) of the Act, made full disclosure to the board. The court rejected the argument on the basis that a director's statutory obligation to disclose interests to the company's board under s 156 of the Act was independent of the general duty at common law to avoid conflicts of interest stemming from the no-conflict rule and the rule against self-dealing. In fact, s 156(14) of the Act expressly provided that s 156 shall be in addition to and not in derogation of the operation of any rule of law. As such, the defendant's submission conflated the director's statutory obligation to disclose his interests in related entities with the director's obligation to avoid conflicts of interest at general law. If anything, disclosure pursuant to s 156(5) of the Act would only mean that the defendant would not incur civil and criminal liability under s 156 of the Act. To avoid a breach of the no-conflict rule at general law, there must have been full disclosure to all the shareholders of all the material facts together with subsequent shareholder approval.

8 Cap 50, 2006 Rev Ed.

9 The question of how statutory and non-statutory directors' duties interact is a fraught one. For an exploration of this theme see Rosemary Teele Langford, "General Law and Statutory Directors' Duties: 'Unmixed Oil and Water' or 'Integrated Parts of the Whole Law'?" (2015) 131 LQR 635 (comparing UK and Australian law on directors' duties).

10 [2019] 4 SLR 433.

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9.10 While it is a plausible view that the no-conflict rule can be avoided only by fully informed shareholder approval, it is submitted respectfully that the better position is that disclosure to the board coupled with the board's fully informed consent can in certain circumstances relieve a director from what would otherwise be a breach of such director's duty to the company arising from a conflict of interest.

9.11 Such a position was articulated in *Dayco Products Singapore Pte Ltd v Ong Cheng Aik*[11] ("*Dayco*"), where the High Court expressed the view that s 156(1) of the Act – and sometimes the articles of a company permit – a director who is interested in a proposed transaction to take the benefit of the transaction if the director discloses her interest to the board and takes no part in the decision of the board on the transaction. If the director makes such disclosure and abstains from taking part in the decision, the validity of the transaction will not be impaired. On the other hand, a failure to adequately disclose will render the director accountable to the company for the profits made from such transaction. The judgment in *Dayco* clearly went beyond stating that the effect of compliance with s 156(1) only had the effect of avoiding potential liability under the Act but would also preclude the company from claiming the profits made by the director from the declared transaction.

9.12 As a result of *Traxiar*,[12] it now appears that there are two decisions of the High Court that are in conflict with each other.[13] It is submitted that the position in *Dayco* is to be preferred.[14] As a general rule, powers of management are vested with the board of directors pursuant to s 157A of the Act. Where one of their own is interested in a transaction or proposed transaction with the company, it should be open to the rest of the board to make an informed decision to proceed with such transaction if they are of the view that this is in the best interests of the company. There is no necessity to seek shareholders' approval as this is a management matter. This would especially be the case when the constitution includes a provision, like in *Dayco*, that permit the director to take the benefit of such a transaction with board approval – in such a case the constitution can be seen to reflect the *ex ante* approval by the shareholders. In addition, such transactions can be in the best interests of the company, for example,

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11 [2004] 4 SLR(R) 318.

12 See para 9.9 above.

13 It is somewhat puzzling why the learned judge in *Traxiar Drilling Partners II Pte Ltd v Dvergsten, Dag Oivind* [2019] 4 SLR 433 did not refer to that part of the judgment in *Dayco Products Singapore Pte Ltd v Ong Cheng Aik* [2004] 4 SLR(R) 318 ("*Dayco*") relevant to the point discussed even though *Dayco* was cited for the proposition that disclosure can be made to the shareholders in general meeting.

14 See also Tan Cheng Han, "Some Current Issues in Singapore Corporate Law" (2019) 31 SAcLJ 1008 at 1023–1029, paras 34–46.

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where a company wishes to contract with another company that one of its directors is a substantial shareholder of because such company is a major supplier of a product the first-mentioned company requires for its business.

9.13 Similarly, where a director faces a potential conflict of interest, the other members of the board may decide if it is in the best interests of the company to allow the director to continue holding office notwithstanding the potential conflict. They may do so if they feel that the potential conflict can be managed and do not want to risk losing the services of the director. Once again, this is a management issue. Where the board after due deliberation and with full knowledge, and provided that the director in question does not participate in the decision, is prepared to allow the potential conflict of interest to arise, there is no longer any breach of fiduciary duty if the director acts in the manner that the board has endorsed as long as there has been no relevant change in circumstances.

9.14 Such an outcome is consistent with general law and therefore does not contradict s 156(14) which states that s 156 "shall be in addition to and not in derogation of the operation of any rule of law" that prohibits conflicts of interest by directors. In *Queensland Mines Ltd v Hudson*[15] the plaintiff company was initially interested in developing a mine. The defendant, who was at the time the managing director of the plaintiff, obtained the necessary licences to do so. Unfortunately, the plaintiff was in financial difficulties and could not proceed with the project. The defendant resigned his position and, with the full knowledge of the directors of the plaintiff, developed the mines successfully. In a suit by the plaintiff against the defendant for an account of profits, the Privy Council advised that the claim be dismissed. The managing director had acted with the full knowledge of the plaintiff's directors, who had firmly decided they were no longer interested in the mine and had to be taken to have assented to the managing director's activities. The issue of whether to exploit the licences was a board matter. Upon the board making its decision, it could be said that either the mining venture was outside the scope of the fiduciary relationship, or the plaintiff had given the defendant the plaintiff's fully informed consent for the defendant to pursue the licences as best he could.[16] The outcome was therefore consistent with the well-known rule in equity expressed in cases such as *Aberdeen Rail Co v Blaikie Brothers*[17] that:[18]

15 (1987) 18 ALR 1.
16 See also *Peso Silver Mines Ltd v Cropper* [1966] SCR 673.
17 [1843–1860] All ER Rep 249.
18 *Aberdeen Rail Co v Blaikie Brothers* [1843–1860] All ER Rep 249 at 252. See also *North-West Transportation Co v Beatty* (1887) 12 App Cas 589 at 593.

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

9.15 Another aspect of *Traxiar*[19] that requires further discussion is that the court appeared to be of the view that disclosure pursuant to s 156(5) would mean the avoidance of civil and criminal liability under s 156 but not civil liability under common law. It is not at all clear that s 156 intends to impose civil liability – certainly there is no explicit mention of this – but if it does (which is doubtful since it does not seem rational for a statute to impose civil liability of the same nature as already exists under common law), it may not be sensible to draw a distinction between civil liability under s 156 and such liability under common law. The two ought to be the same; therefore, avoidance of civil liability under s 156 should lead to similar avoidance under common law.

II. Attribution

9.16 In *Ong Bee Chew v Ong Shu Lin*,[20] it was also argued that the plaintiff, who was the other shareholder and director of Hocen, knew of the bribes and Hocen was therefore precluded by the doctrine of *ex turpi causa non oritur actio* and by the plaintiff's unclean hands from claiming against the defendant for his breach of duty.

9.17 The court held that for the *ex turpi causa* doctrine to apply, some turpitude on the part of Hocen had to be established. This in turn depended on whether the defendant's wrongful conduct could be attributed to Hocen such that Hocen's claim was founded on its own turpitude. It found that no such attribution should be made as a company that makes a claim against a director arising from the director's breach of duty is treated in law as being a victim of that breach of duty. As such, the law will not allow the director to attribute any turpitude involved in his breach of duty to the company in order to invoke the *ex turpi causa* doctrine and defeat the company's claim. This conclusion is consistent with *Ho Kang Peng*.[21] As for unclean hands, the company was a distinct entity from the plaintiff.

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19 See para 9.9 above.
20 See para 9.2 above.
21 See para 9.3 above.

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III. Share capital

9.18 The question of financial assistance and its consequences arose for determination in *The Enterprise Fund III v OUE Lippo Healthcare Ltd*.[22] In this case, the respondent ("IHC") obtained a standby facility from the appellants who were part of the Crest umbrella of companies ("the Crest entities") to defend IHC from what IHC considered to be a short-selling attack. It was agreed that the Crest entities would use the standby facility to purchase IHC shares on behalf of IHC and hold such shares on trust for IHC. This took place between April and August 2015 ("the open market acquisitions"). Subsequently, after IHC's board of directors was removed in January 2017, the new board took the view that the transaction by which the IHC shares were acquired ("the Transaction") amounted to prohibited financial assistance that could be avoided. IHC accordingly commenced an action and sought declarations that the standby facility, the supporting security agreements, as well as the open market acquisitions were voidable and had been avoided by way of a notice that IHC had given in March 2017. In the High Court it was held that the trust arrangement and the open market acquisitions contravened the prohibition in s 76(1A)(*a*)(i) of the Act against a company acquiring its own shares directly or indirectly in any way but the open market acquisitions were saved by s 76A(1A) from being made void pursuant to s 76A(1)(*a*). The loan agreements were voidable under s 76A(2) for being related to the prohibited acquisition of IHC shares, and had been avoided by IHC by way of its written notice of March 2017. IHC thus bore no contractual obligation or liability whatsoever to the appellants in respect of the Transaction. The appellants appealed and the Court of Appeal dismissed the appeal.

9.19 The decision is, with respect, undoubtedly correct. The court found that the Transaction, comprising the loan agreements, the open market acquisitions and the trust arrangement, constituted a single, composite transaction that was caught by the prohibition in s 76(1A)(*a*)(i). It was clear that the trust arrangement and the open market acquisitions stood together as a matter of commercial substance given that the appellants had been requested by IHC to purchase IHC shares, and the appellants always intended that the shares would be held on trust for IHC. The loan agreements, too, were inseparable from the open market acquisitions and the trust arrangement because the appellants knew from the outset that the Standby Facility would be used to purchase IHC shares, and this purpose was carried into effect by one of the appellants.

22 [2019] 2 SLR 524.

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9.20 While the open market acquisitions, which were made by way of book entries in the Depository Register, were saved by s 76A(1A) of the Act, this was only intended to uphold the integrity of the scripless trading system to ensure that subsequent purchasers of the affected shares would be left in no doubt that the sellers had good title to pass on. Such a saving provision should be construed in this context and not extended to validate the trust arrangement or the loan agreements. Accordingly, the Transaction was void by virtue of s 76(1A)(*a*)(i) read with s 76A(1)(*a*) of the Act save where the open market acquisitions were concerned.

9.21 The appellants had argued further that IHC should be estopped from avoiding the loan agreements given that IHC had made certain representations in the standby facility that the appellants had relied upon to their detriment, including one that IHC would take all necessary steps to lawfully enter into the standby facility and the supporting security documents. This argument was rejected as there was no place for the doctrine of estoppel to apply where a transaction was void since, unlike a transaction that is voidable, a void transaction does not leave the representor with the option of not avoiding the transaction.

9.22 One final point of note is the court's recognition that while a transaction that caused a company's capital or assets to be depleted or put at risk would be readily found to be caught by the prohibition against financial assistance, the wide language used in s 76(1A)(*a*)(i) meant that a transaction might still fall within the prohibition even if it did not deplete or put at risk a company's capital or assets. This is a welcome clarification.[23]

IV. Valuation of shares

9.23 Share valuation issues have arisen frequently in the context of shareholder oppression actions (s 216 of the Act). In *Thio Syn Pyn v Thio Syn Kym Wendy*[24] the question before the Court of Appeal was whether there was or should be a minority discount applied to the valuation of shares in a non-quasi-partnership where a buy-out order had been made pursuant to s 216 of the Act. The High Court had decided that there was no such presumption and the Court of Appeal agreed. The court said that it ought to look at all the facts and circumstances of the case before arriving at a decision whether to apply a discount. Such a proposition had normative force inasmuch as it would be an objective universal or general starting point for each court. Even if there was a presumption of

23 *Public Prosecutor v Lew Syn Pau* [2006] 4 SLR(R) 210 appeared to suggest otherwise.
24 [2019] 1 SLR 1065.

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a discount (which was not the legal position), the court concerned would still be required to consider all the facts and circumstances of the case in order to decide whether such a presumption ought to be rebutted.

9.24 The Singapore International Commercial Court arrived at a similar conclusion in *Kiri Industries Ltd v Senda International Capital Ltd*.[25] The court stated that whether a minority discount should be applied to a company that is not a quasi-partnership is a fact-sensitive matter guided by the overall aim of ensuring that the forced buyout is fair, just and equitable. Two facts that were relevant to the case at hand were whether the majority's oppressive conduct was directed at worsening the position of the minority as shareholders to compel them to sell out, and whether such conduct was entirely responsible for precipitating the breakdown in the parties' relationship. Where these were made out, the court would be more inclined to order that no minority discount be applied despite the lack of control on the part of the shareholders being bought out.

9.25 *Abhilash s/o Kunchian Krishnan v Yeo Hock Huat*[26] was yet another case involving the valuation of shares pursuant to a claim of oppression under s 216 of the Act. In this case the matter was settled on the first day of the trial with the parties agreeing that the defendant would purchase the plaintiff's shares in the company at "fair market value". The plaintiff, being dissatisfied with the High Court's determination of such value, filed an appeal on the principal basis that there was an offer by a third party to purchase all the shares of the company for $50m. This purchase price of $50m was stated as tentative and subject to due diligence. Ultimately it was not proceeded with and due diligence did not take place. Nevertheless, the plaintiff submitted that it was the best evidence of the market value of the shares.

9.26 Whether an offer constitutes the best evidence of the market value of shares is ultimately largely a fact specific question that depends on the circumstances of the offer including the terms that the offer may be conditional on. For instance, if a particular purchaser has a special reason for paying a premium, such an offer may not necessarily reflect the fair market value of the company's shares. Similarly, where, as in the present case, $40m of the proposed acquisition price was to be re-invested in the purchasing company, the indicated purchase price may not necessarily be indicative of fair market value. The Court of Appeal therefore said that while an offer to acquire a company's shares may provide some evidence of the value of those shares, that is not a rule that applied invariably.

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25 [2019] 4 SLR 1.
26 [2019] 1 SLR 873.

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In the present case, the offer was not an unconditional offer capable of immediate acceptance. It was subject to due diligence which was never carried out irrespective of whose fault it was which prevented the due diligence exercise. In addition, the offer was not on a cash basis. It was also significant that none of the expert valuers considered the offer to be a basis on which to determine the value of the shares. For these reasons, the appeal was dismissed as the plaintiff did not establish that the company had a fair market value of $50m.

9.27 *Liew Kit Fah v Koh Keng Chew*[27] is an interesting decision involving a split Court of Appeal.[28] The respondent minority shareholders had commenced a s 216 action against the appellant majority shareholders, but the parties settled before trial via a consent order on the terms that, "without admission of liability" by the majority shareholders, the court would order either the majority or minority to buy the other out.[29] Following the order that the majority buy the minority out[30] and a set of valuation directions[31] issued by the High Court, the parties applied to the High Court for directions on the applicability of minority and marketability discounts, and further appealed the order to the Court of Appeal. In a relatively uncommon split judgment and reversing the judgment of Chua Lee Ming J,[32] the Court of Appeal majority (comprising Steven Chong JA and Quentin Loh J) held that a buyout pursuant to a consent order called for the application of a minority discount, and that the independent valuer may at their discretion decide whether to impose a marketability discount.

9.28 In a strong dissent, Belinda Ang Saw Ean J opined that a minority discount[33] was inappropriate in the circumstances.[34] First, there would be a "meaningful *increase* in control"[35] as the majority would acquire supermajority control by buying out the minority.[36] Second, the company

27 [2020] 1 SLR 275.
28 For the avoidance of doubt, no party involved in the litigation is related to any of the authors of this Ann Rev.
29 *Liew Kit Fah v Koh Keng Chew* [2020] 1 SLR 275 at [5]–[6].
30 *Koh Keng Chew v Liew Kit Fah* [2016] SGHC 140.
31 *Koh Keng Chew v Liew Kit Fah* [2018] 3 SLR 312.
32 *Koh Keng Chew v Liew Kit Fah* [2018] SGHC 262.
33 Belinda Ang Saw Ean J used "minority discount" as an umbrella term for discounts arising from (a) lack of control (*ie*, a "minority" discount in the narrow sense); and (b) marketability (applying in a private sale of shares to external parties): see *Liew Kit Fah v Koh Keng Chew* [2020] 1 SLR 275 at [92]. Here, "minority discount" is used in the narrower sense, *ie*, for lack of control arising from minority shareholding status.
34 *Liew Kit Fah v Koh Keng Chew* [2020] 1 SLR 275 at [106].
35 *Liew Kit Fah v Koh Keng Chew* [2020] 1 SLR 275 at [95].
36 *Liew Kit Fah v Koh Keng Chew* [2020] 1 SLR 275 at [98].

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constitution's provisions on valuation of shares contemplated only the scenario of a voluntary sale to a third party (which would be subject to a right of first refusal), not an oppression action in which a shareholder sought either to be bought out by or to buy out another shareholder, nor the specific scenario created by the consent order.[37] Finally, it was noted that the bulk of the minority shareholders' shares derived from the initial investment, and there was no finding that subsequently acquired shares were purchased at a discount.[38] Ang J also dissented on the marketability discount, opining that such a discount, which makes sense in the context of a sale of shares to external parties, would also be inappropriate because the sale was not to an external party, but rather to the majority shareholders.[39]

9.29 As the majority judgment seems to run counter to the trend of non-applicability of minority discounts, the authors respectfully urge that it should be treated with caution and confined to the specific facts. Conversely, in demonstrating sensitivity to the specific context of the particular sale, and the limits of contractual sale and valuation mechanisms drafted *ex ante* without specific contemplation of the facts at hand, there is much about the dissent that is commendable.

9.30 Ultimately, however, in the authors' respectful opinion, the irony is that both the majority and dissent in *Liew Kit Fah v Koh Keng Chew*[40] may unfortunately have similar deleterious effects: (a) undermine settlement negotiations; (b) increase litigation costs; and (c) weaken minorities. Consider first the part of Ang J's dissent in which her Honour expressed doubt as to whether the court has the power to make a buyout order when the parties have compromised on the issue of liability under oppression.[41] Suppose that the dissent were to become good law, with consequence that the court would have power to order a buyout only upon a finding that oppression has occurred on the facts. In this scenario, how would parties who agree that a buyout should occur, but disagree on the precise factual basis of the oppression, behave? They would have no choice but to either litigate their factual dispute to the bitter end, or take matters out of court entirely. Such a result *ipso facto* works to the detriment of the minority or the financially weaker party regardless of

37 *Liew Kit Fah v Koh Keng Chew* [2020] 1 SLR 275 at [102]–[105].
38 *Liew Kit Fah v Koh Keng Chew* [2020] 1 SLR 275 at [101].
39 *Liew Kit Fah v Koh Keng Chew* [2020] 1 SLR 275 at [93]. In the same paragraph, it was also observed that it would be inconceivable for the majority shareholders, being the purchasers, to enforce share transfer restrictions against themselves.
40 See para 9.27 above.
41 *Liew Kit Fah v Koh Keng Chew* [2020] 1 SLR 275 at [135].

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the legal merits of their position.[42] The majority judgment may be no less problematic. Consider the situation where the parties were open to a compromise in which the minority party is to be bought out by the majority. If the majority judgment stands, a compromise risks subjecting the minority seller to minority discounts and other financial detriment. Consequently, the minority would have every incentive to litigate to the bitter end, including over thorny factual issues relating to liability to force an outcome where the majority is ordered to buy out the minority without a discount.

9.31 Respectfully, the brief, yet well-reasoned and pragmatic, first instance judgment of Chua J[43] in its entirety would have been the clearly preferable outcome not only for the parties, but also for the law of oppression. As noted above,[44] the overall trend is towards undiscounted valuation of minority interests in the context of share buyout orders – a trend into which the first instance judgment fits nicely and offers certainty. A further advantage of undiscounted valuation as a legal starting point is that it opens up opportunities for negotiation and settlement. As Chua J astutely observed, minority discounts might be common even as between willing parties to a share sale and purchase, but they are "nevertheless still a matter of negotiation".[45] Consider how a situation in which the parties agree in principle that a buyout should occur but are quibbling over price would be resolved differently applying (a) the *Liew Kit Fah v Koh Keng Chew* majority judgment (Scenario 1); and (b) Chua J's first instance judgment (Scenario 2). Scenario 1, as described above in the previous paragraph, would end in a negotiating impasse and probably drawn-out, unnecessary, and costly litigation over an issue (liability) that the parties were already prepared to compromise on. By contrast, in Scenario 2, the buyer and seller would be reasonably clear on where they stand legally as a starting point. The parties know that, if litigated, the much more likely outcome would be that the buyer would be ordered to purchase the seller's shares on an undiscounted basis. From the buyer's perspective, litigation in pursuit of a lower purchase price (with minority/marketability discount applied) would incur substantial costs for an uncertain payoff. From the seller's perspective, defending its probable legal entitlement to undiscounted valuation in court would also incur costs and some degree of risk. Given that the range of possible litigated outcomes for the parties is from substantially-discounted valuation to undiscounted valuation, it would make more sense for the parties to meet somewhere in the middle

42 Happily, this objection does not apply to the parties in this particular saga, as the minority shareholders were, by the terms of the parties' partial settlement, prepared to buy out the majority: *Liew Kit Fah v Koh Keng Chew* [2020] 1 SLR 275 at [6].

43 *Koh Keng Chew v Liew Kit Fah* [2018] SGHC 262 took up a mere ten pages of text.

44 See paras 9.23–9.28 above.

45 *Koh Keng Chew v Liew Kit Fah* [2018] SGHC 262 at [12].

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(that is, slightly discounted valuation or simply an agreed price) than to foot the bill for testing their respective counsel's mettle in court. Thus, in addition to the reasons given in Chua J's first instance judgment, in the interests of facilitating negotiation and settlement, it is respectfully submitted that undiscounted, *pro rata* valuation is generally the best outcome in s 216 share valuation proceedings. It is also consistent with the premise behind s 216 proceedings, which is that the party being bought out is usually not truly a voluntary seller.

V. Derivative actions

9.32 A foundational principle of company law is that a company is a separate legal person. As such, when the company has a cause of action, the company alone, as a separate legal person, has the right to decide whether to sue. However, as companies are fictitious persons, they cannot decide whether to sue on their own and can only act through decisions made by human beings. The natural question that arises is: Who has the power to decide whether the company, as a separate legal person, should sue?

9.33 Under normal circumstances, this question is answered easily through the regular corporate decision-making process. Ordinarily, company law vests the board of directors with the power to make management decisions for the company.[46] As the decision to sue is a management decision, the board normally has the power to decide whether the company should sue. This makes sense because the board is normally positioned to have the best available information about the company's potential lawsuit, and board members are bound by their directors' duties to decide in the best interests of the company whether the lawsuit should be pursued.

9.34 An obvious problem arises, however, when the directors themselves are the target of the company's lawsuit or have another personal interest in the company not suing. In such a case, the normal corporate decision-making process produces an acute conflict of interest. This conflict of interest becomes intractable when the directors are also the company's controlling shareholders as they can then entrench themselves and effectively foreclose the company from commencing a lawsuit which is in the company's best interests to pursue.

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46 See s 157A of the Companies Act (Cap 50, 2006 Rev Ed) and Art 77 of the First Schedule to the Companies (Model Constitutions) Regulations 2015 (S 833/2015).

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9.35 From the time of *Foss v Harbottle*,[47] Commonwealth courts have tried to solve this intractable problem by creating a legal remedy that allows minority shareholders to apply to the court to obtain leave to circumvent the regular corporate decision-making process by commencing an action on behalf of the company. These shareholder-driven corporate actions have come to be known as "derivative actions" because the shareholders pursuing them do not seek to enforce their own personal rights, but rather the company's rights (that is, rights "derived" from the company). In 1993, with the aim of empowering minority shareholders, Singapore enacted s 216A and became one of the first countries to provide for a statutory derivative action.[48]

9.36 Under s 216A, there are three requirements that every complainant – which includes a shareholder or any other person the court deems proper – must satisfy before leave will be granted to pursue a statutory derivative action: (a) the complainant must give 14 days' notice to the company's directors of their intention to bring the derivative action before commencing the application for leave; (b) the complainant pursuing the derivative action must be acting in good faith; and (c) it must appear to be *prima facie* in the interests of the company that the derivative action be brought. Although these three requirements are much clearer than the common law derivative action test, for s 216A to function effectively, courts must provide detailed guidance on how each of these three requirements should be applied in practice, which the Singapore courts have done consistently since its enactment.

9.37 In *Ganesh Paulraj v A&T Offshore Pte Ltd*,[49] the first respondent ("the Company") had two corporate shareholders: Tuff which held 40% of its shares; and, Avantgarde which held 60% of its shares. The applicant, who was the beneficial owner of Tuff and a director of the Company, sought leave to commence a s 216A statutory derivative action on behalf of the Company to pursue a contractual claim by the Company against Avantgarde. In arriving at his decision to grant leave, Aedit Abdullah J addressed at least three important issues, which, in the authors' respectful opinion, provide useful guidance for future s 216A applications.

9.38 First, as the applicant was not a member of the Company, there was an issue of whether the applicant had *locus standi* to bring a s 216A application on behalf of the Company. His Honour noted that

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47 (1843) 67 ER 189.

48 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 *et al* eds) (Cambridge University Press, 2012) at p 323.

49 [2019] SGHC 180.

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s 216A(1)(*c*) "confers on the Court the discretion to allow any person it regards as a 'proper person' to apply for a statutory derivative action".[50] Since the applicant was the beneficial owner of Tuff, which in turn was a 40% shareholder of the Company, his Honour held that the applicant was a "proper person" and, therefore, had standing.[51]

9.39 It is noteworthy that this decision effectively granted the applicant the right to pursue a "multiple derivative action", which allows a shareholder of Company A to pursue a derivative action on behalf of Company B, on the basis that Company A is a shareholder of Company B. To the best of the authors' knowledge, there is no local decision that has explicitly sanctioned the use of a "multiple derivative action" in Singapore[52] and, contrary to some other commonwealth jurisdictions, the multiple derivative action is not explicitly provided for in the Companies Act.[53] However, academic commentaries have suggested that the "proper person" exception in s 216A(1)(*c*) could be interpreted to provide the court in Singapore with the discretion to grant a multiple derivative action.[54]

9.40 In this case, as the applicant controlled Tuff, and Tuff was a 40% shareholder of the Company, a justification for granting a multiple derivative action was procedural pragmatism: the applicant could have simply brought a fresh application using his control over Tuff as a direct shareholder of the Company to avoid the need for a multiple derivative action.[55] It is important to note that the High Court did not explicitly mention that it was granting a "multiple derivative action", rather it simply held that the applicant was the "proper person".[56] The fact that the applicant would have been able to pursue a derivative action by starting a fresh application with Tuff as the applicant (rather than himself as

50 *Ganesh Paulraj v A&T Offshore Pte Ltd* [2019] SGHC 180 at [11].
51 *Ganesh Paulraj v A&T Offshore Pte Ltd* [2019] SGHC 180 at [12].
52 The court appears to have granted a multiple derivative action on one other occasion: *A Co v D* [2018] SGHCR 9 at [12]. However, there was no discussion of the basis for making the order or any mention of a multiple derivative action in this reported decision, which referenced an unreported decision in which the order appears to have been made. Separately, in the case of *Re Winpac Paper Products Pte Ltd* [2000] 1 SLR(R) 415, the court was presented with facts which should have raised the issue of a multiple derivative action – but the issue was not considered in the decision. As such, it does not appear that the multiple derivative action has been explicitly accepted (or rejected) by the court in Singapore.
53 Srruthi Ilankathir, "Making Way for the Multiple Derivative Action in Singapore" (2016) 34 Sing L Rev 247 at 248 and 254–255.
54 Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at paras 10.041–10.043; Pearlie Koh, *Company Law* (LexisNexis, 2017) at p 147.
55 *Ganesh Paulraj v A&T Offshore Pte Ltd* [2019] SGHC 180 at [12].
56 *Ganesh Paulraj v A&T Offshore Pte Ltd* [2019] SGHC 180 at [10]–[12].

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the beneficial owner of Tuff) meant that even if the High Court did not grant a multiple derivative action, the applicant would have had another avenue for redress. As such, it is understandable why the High Court did not engage in a detailed discussion of the multiple derivative action in this case.

9.41 However, in many cases when a multiple derivative action is sought, the applicant is a minority shareholder in a parent company who wants to cause the subsidiary to pursue an action against a wrongdoer who controls both the parent and subsidiary.[57] In turn, the applicant does not have the ability to take control of the parent company to directly apply for a derivative action to be commenced against the subsidiary. Therefore, unlike in this case, the multiple derivative action would be the applicant's only avenue for redress. In such cases, in the authors' respectful opinion, it is essential that the court applies its discretion[58] under the "proper person" exception in s 216A(1)(*c*) to grant a multiple derivative action. Without this discretion, wrongdoing controllers can breach their duties with impunity in subsidiaries and minority shareholders in parent companies may be unfairly left without a remedy.[59]

9.42 Second, his Honour reaffirmed that the 14 days' notice requirement under s 216A(3)(*a*) is intended to "afford a company's directors a chance to consider if it would be willing to pursue the complaint on its own".[60] As such, the substance of what the directors knew is more important than the form in which the notice is given. In this case, the Company's directors appeared to have been made aware that an application under s 216A "was being planned and would be pursued", which took precedence over the precise form in which the directors acquired this knowledge.[61] In the authors' respectful opinion, this "substance over form approach" makes sense as it accords with Singapore's pragmatic approach for ensuring efficient and effective protection for minority shareholders.[62]

57 Harald Baum & Dan W Puchniak, "The Derivative Action: An Economic, Historical and Practice-oriented Approach" in *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak *et al* eds) (Cambridge University Press, 2012) at p 8.

58 *Ganesh Paulraj v A&T Offshore Pte Ltd* [2019] SGHC 180 at [11].

59 Srruthi Ilankathir, "Making Way for the Multiple Derivative Action in Singapore" (2016) 34 Sing L Rev 247 at 248.

60 *Ganesh Paulraj v A&T Offshore Pte Ltd* [2019] SGHC 180 at [20].

61 *Ganesh Paulraj v A&T Offshore Pte Ltd* [2019] SGHC 180 at [21].

62 For an overview of Singapore's approach see, 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 *et al* eds) (Cambridge University Press, 2012) 323.

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9.43 In addition, his Honour held that even if proper notice under s 216A(3)(*a*) had not been given, the notice requirement could be dispensed with under s 216A(4), which permits dispensing with proper notice when providing proper notice is "impracticable". In determining impracticability, the High Court stressed that it could "consider the conduct of parties after the application has been brought to the company's attention".[63] It was held that after the directors of the Company were made aware of the 216A application, they did not make "any serious attempt to investigate" the potential contractual claim that the Company had against Avantgarde, which was the basis for the proposed derivative action.[64] In addition, "the dysfunctional state" of the Company's board rendered it unable to properly investigate the contractual claims.[65] On this basis, his Honour held that the requirement of impracticability was met, which justified dispensing with proper notice. This finding reinforces the idea that a company's board should meet and seriously consider any s 216A application it becomes aware of.[66] Failing to do so will prevent it from relying on evidence of improper notice to quash a s 216A application. In the authors' respectful opinion, this requirement is reasonable as it is not overly onerous on directors and promotes good corporate governance, although the courts should be alive to the risk that boards may respond by holding a perfunctory meeting and satisfying the barest of formalities without seriously considering the s 216A notice.[67]

9.44 It should also be noted that this case involved a potential deficiency in the form of notice provided and was not a case in which no notice was given at all.[68] This distinction is important as the wording of s 216A and case law[69] make it clear that although the court has the discretion under s 216A(4) to dispense with the formal requirements for notice, it does not permit the court to allow no notice to be provided at all.[70] In this case, the High Court held that the applicant had attempted to

63 *Ganesh Paulraj v A&T Offshore Pte Ltd* [2019] SGHC 180 at [23].
64 *Ganesh Paulraj v A&T Offshore Pte Ltd* [2019] SGHC 180 at [24].
65 *Ganesh Paulraj v A&T Offshore Pte Ltd* [2019] SGHC 180 at [28].
66 See *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 at [18].
67 On this point, see Alan K Koh, "Excusing Notice under Singapore's Statutory Derivative Action" (2013) 14(2) *Australian Journal of Asian Law* Article No 3 at 5–6.
68 *Ganesh Paulraj v A&T Offshore Pte Ltd* [2019] SGHC 180 at [6]–[8].
69 Dan W Puchniak & Tan Cheng Han SC, "Company Law" (2013) 14 SAL Ann Rev 179 at 187–188.
70 Although this view appears to have been formed without judicial consideration of the arguments presented in Alan K Koh, "Excusing Notice under Singapore's Statutory Derivative Action" (2013) 14(2) *Australian Journal of Asian Law* Article No 3; Dan W Puchniak & Tan Cheng Han SC, "Company Law" (2011) 12 SAL Ann Rev 143 at 158–159. *Quaere* if the distinction between some (even if late or defective) notice *versus* no notice at all (even in circumstances where giving notice

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provide notice.[71] Therefore, the only issue was whether the form in which the notice was given met the requirements under s 216A(3). As such, this decision makes it clear that the court has the power under s 216A(4) to allow an action to proceed based on "impracticability" if there is a deficiency in the *form* of the notice provided by the applicant, which is important as earlier case law has tended to focus on a deficiency in the *timing* of the notice.[72]

9.45 Third, this case is an important reminder that s 216A applications are not limited to cases involving the enforcement of directors' duties. The wording of s 216A(1) makes it clear that a statutory derivative action can be commenced by a member, the Minister in the case of a declared company, or a proper person for any claim which is *prima facie* in the company's interests. In this case, the claim for which the derivative action was sought was a contractual claim that the Company had against another company. This is important to recognise as the derivative action in some jurisdictions is limited to certain types of actions, such as breaches of directors' duties,[73] which is clearly not the case in Singapore.[74]

VI. Just and equitable winding up

9.46 In *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd*,[75] three brothers were the primary shareholders in two Singapore incorporated companies ("the Companies"), which they managed based on a relationship of mutual trust and confidence. The appellant, who was the widow and executrix of the estate of one of the brothers, took over her husband's shares in the Companies when he passed away. In the midst of a tsunami of litigation among the family members, the appellant sought to wind up the Companies under s 254(1)(*i*) on the grounds that: (a) the relationship of mutual trust and confidence among the brothers in managing the Companies extended to their respective family

would be "impracticable") for the purposes of s 216A standing has ever been tenable and should be reconsidered.

71 *Ganesh Paulraj v A&T Offshore Pte Ltd* [2019] SGHC 180 at [19].

72 Dan W Puchniak & Tan Cheng Han SC, "Company Law" (2011) 12 SAL Ann Rev 143 at 158–159.

73 Harald Baum & Dan W Puchniak, "The Derivative Action: An Economic, Historical and Practice-oriented Approach", in *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak *et al* eds) (Cambridge University Press, 2012) 1 at p 57.

74 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 *et al* eds) (Cambridge University Press, 2012) at p 341.

75 [2019] 1 SLR 1046.

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members and had irretrievably broken down; (b) the Companies had been mismanaged; and (c) there had been a loss of substratum in each of the Companies. The Court of Appeal partially reversed the High Court's decision and granted the winding up of one of the Companies on the basis that it had lost its substratum. This decision illuminates at least four points concerning s 254(1)(*i*) applications.

9.47 First, the Court of Appeal reaffirmed that a company, which is deemed to be a quasi-partnership, can be wound up under s 254(1)(*i*) when there is a breakdown in the relationship of mutual trust and confidence among the company's members.[76] However, upon the death of a quasi-partner, such rights and privileges based on a relationship of mutual trust and confidence between the founders are not generally transmissible to subsequent shareholders.[77] In addition, family businesses are not automatically considered to be quasi-partnerships.[78] In this context, any person asserting the existence of a relationship of mutual trust and confidence as the basis for a remedy under s 254(1)(*i*) has the onus of proving that such a relationship existed *vis-à-vis* themselves and the founding members – even in a family company.[79]

9.48 In this case, the Court of Appeal held that there was no evidence that the three brothers intended the appellant (or any of their heirs) to run the Companies on the same basis of mutual trust and confidence which governed their relationship.[80] The authors respectfully applaud the Court of Appeal's evidence-based approach towards determining whether a relationship of mutual trust and confidence exists between members in a family company. It has been pointed out that the underlying basis for the court's statutory remedies to ameliorate unfairness among shareholders is because the offending acts are contrary to the shareholders' express or implied agreement or understanding.[81] It would therefore be factually incorrect – and inconsistent with related s 216 jurisprudence[82] – to assume that all family companies are quasi-partnerships. It would also seem unfair to extend the same rights and privileges to members of the family who did not become involved in the company based on a relationship of

76 *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [28]–[29].
77 *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [30].
78 *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [34].
79 *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [30] and [34].
80 *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [32] and [37].
81 Tan Cheng-Han & Wee Meng-Seng, "Equity, Shareholders and Company Law" in *Equity, Trusts and Commerce* (Paul S Davies & James Penner eds) (Hart Publishing, 2017) at p 16.
82 Dan W Puchniak, Tan Cheng Han SC & Samantha S Tang, "Company Law" (2017) 18 SAL Ann Rev 247 at 259–261, paras 9.28–9.32.

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mutual trust and confidence, as those that joined the company based on such a relationship.[83]

9.49 Second, the Court of Appeal reaffirmed that a ground for winding up a company under s 254(1)(*i*) exists when the company's business has been carried on in a fraudulent manner. To succeed on this ground, the complainant shareholder must prove a "lack of probity" in the directors' conduct as a "mere suspicion or assertion of impropriety will not pass muster".[84] In this case, the Court of Appeal held that none of the appellant's allegations established a "lack of probity" on the part of the Companies' directors.[85] The authors respectfully agree with this finding as most of the evidence presented by the appellant appeared to be based on the mere suspicion that the directors may have been acting incorrectly.[86] To allow minority shareholders to wind up a company based on a mere suspicion that the directors were acting improperly would undercut the foundational principle of company law that shareholders *prima facie* do not have a right to return of their capital.[87]

9.50 It will, however, be important in future cases for the courts to continue to define the types of behaviour which meet the threshold for establishing a "lack of probity". It would seem that the threshold would have to be higher than merely establishing any breach of directors' duties – which might be dealt with as such and would not always seem to justify the more extreme remedy of winding up a company.[88] In this regard, the High Court's recent decision in *EQ Capital Investments Ltd v The Wellness Group Pte Ltd*[89] provides some useful guidance. Citing the Court of Appeal's decision in this case, the High Court ordered a winding up based

83 This, however, does not mean that entitlements of family members in a family company should be arbitrarily disregarded by the successor generation of management. On this, see Dan W Puchniak, Tan Cheng Han SC & Samantha S Tang, "Company Law" (2018) 19 SAL Ann Rev 227 at 234–236 and Samantha S Tang, "Corporate Divorce in Family Companies" [2018] LMCLQ 19.

84 *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [38].

85 *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [50] and [60].

86 *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [44]–[60].

87 Reinier Kraakman *et al*, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2017) at p 6.

88 That said, breaches of directors' duties may be possibly grounds for winding up in so far as (under s 254(1)(*f*) of the Act):

> [T]he directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatever which appears to be unfair or unjust to other members.

Quaere whether s 254(1)(*f*) is now practically defunct given that its functions seem subsumable – if not already subsumed – under the "lack of probity" head in s 254(1)(*i*) jurisprudence.

89 [2019] SGHC 154 at [22].

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on a "lack of probity". Its finding relied on the wrongdoing controlling-shareholder-directors' "grossly unfair" behaviour and complete disregard for the minority shareholders' interests–behaviour far more egregious than a typical breach of directors' duties.[90] This appears to be consistent with the Court of Appeal's earlier decision in *Foo Peow Yong Douglas v ERC Prime II Pte Ltd*,[91] where a winding up was ordered based on a "lack of probity". The court in this case found that the wrongdoer's audacious conduct, stemming from several conflicts of interest and breaches of directors' duties, constituted unfair if not oppressive treatment of shareholders, which in turn betrayed a lack of probity on the part of the wrongdoer.[92]

9.51 Third, the Court of Appeal held that the High Court had erred in its finding that under s 254(1)(*i*) the:[93]

> … loss of substratum can only be relied upon by a non-founding shareholder if that shareholder has taken up shares on an assumption that the company [would] continue to run a particular business.

In this context, the Court of Appeal stressed that any member may be granted a remedy under s 254(1)(*i*), regardless of the reason for their becoming a member.[94] It was further held that a loss of substratum could also be found when at the time of the application the company is effectively dormant, such that the company would not have a reasonable prospect of achieving its substratum.[95] In this case, the Court of Appeal held that one of the Companies, which was dormant, had lost its substratum and, therefore, ordered it to be wound up under s 254(1)(*i*).[96]

9.52 In arriving at its decision, the Court of Appeal articulated that the "guiding principle" for determining if a s 254(1)(*i*) remedy should be granted based on a loss of substratum was:[97]

> … whether there is unfairness in keeping the aggrieved shareholder (whatever her reason for becoming a member of the company) locked into a company which is no longer carrying out and/or can no longer carry out the business it set out to do.

90 *EQ Capital Investments Ltd v The Wellness Group Pte Ltd* [2019] SGHC 154 at [45].
91 [2018] 2 SLR 1337.
92 *Foo Peow Yong Douglas v ERC Prime II Pte Ltd* [2018] 2 SLR 1337 at [51].
93 *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [63].
94 *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [63] and [65].
95 *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [64].
96 *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [73].
97 *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [65].

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In the authors' respectful opinion, in this particular case, the guiding principle produced a fair result as it would have been unfair for the appellant to remain locked into a dormant company which was never going to achieve its purpose. However, the authors respectfully suggest that in some – but not all – cases, the reason that a person becomes a member of a company may be a valuable indication of whether it would be fair to provide a remedy based on a loss of substratum.

9.53 This may occur when the company engages in precisely the type of business that was the reason for the person becoming a member, but that the company's current business is substantially different from the original purpose for which it was incorporated (that is, the company lost its substratum before the person became a member). Consider a case in which a person buys shares in a telecom company, which continues to operate as a telecom company, but one day the person discovers that the company was originally incorporated to be a paper mill. In this case, which is based on the real-world example of Nokia, there is a clear loss of substratum. However, it would seem unfair to grant a shareholder whose reason for buying shares was to invest in a telecom company a s 254(1)(*i*) remedy, as the shareholder received precisely what they bargained for. This suggests that, in some cases, the reason for a person becoming a member should be considered by the courts as it can be determinative of whether it would be fair to grant a remedy for a loss of substratum under s 254(1)(*i*).

9.54 However, it should be noted that in this case, the reason that the appellant became a shareholder was irrelevant because the appellant inherited her shares and, therefore, did not become a member for any particular reason.[98] Moreover, the company did not fulfil any purpose as it was dormant and, therefore, the reason for the appellant becoming a member was irrelevant.[99] As such, in this particular case, the authors respectfully agree with the Court of Appeal's view that the reason for the appellant becoming a member was irrelevant.

9.55 Finally, it is important to note that in this case the Court of Appeal decided to order the company to be wound up, despite the fact that there was an exit mechanism in the company's articles of association. The Court of Appeal acknowledged the existing jurisprudence, which makes it clear that where there is an exit mechanism, it should be used – and, in turn, an order under s 254(1)(*i*) should not be granted – unless there are

98 *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [8].
99 *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [64] and [72]–[73].

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extenuating circumstances.[100] The extenuating circumstances previously enumerated by the Court of Appeal have included where the:[101]

> … disaffected shareholder legitimately did not expect to have his shares valued in the manner prescribed by the agreed mechanism, where the shareholders had conducted the company's affairs in bad faith or improperly, and where there was a defect in the valuation mechanism.

In this case, the Court of Appeal held that as the Company's financial affairs were unclear it was unlikely that a fair and proper valuation of the Company would proceed under the exit mechanism and, therefore, it ordered a s 254(1)(*i*) winding up so that a liquidator could conduct a fair and proper valuation.[102] As such, there now appears to be an additional enumerated extenuating circumstance – a lack of clarity in the company's financial affairs, which requires a liquidator for a fair evaluation – that may justify providing relief under s 254(1)(*i*), despite the company's articles having an exit mechanism.

9.56 In the authors' respectful opinion, it is helpful that the Court of Appeal enumerated this additional extenuating circumstance for when a winding up will be ordered, despite the existence of an exit mechanism. It is clearly inappropriate for a shareholder to be granted relief under s 254(1)(*i*) when the motive for seeking relief is merely to avoid the exit mechanism agreed to by the parties.[103] However, when the company's financial affairs lack the clarity to allow an exit mechanism to work properly, then relief under s 254(1)(*i*) can be justified as the exit mechanism will no longer provide an effective means for enforcing the parties' agreement. As winding-up cases often involve companies in a desperate situation, there is likely to be many cases in which a company's financial affairs lack clarity, making this ground useful. Examples of this can be found in the High Court's recent decisions in *Wong Kit Kee v KSE Technology (Int'l) Pte Ltd*[104] and *EQ Capital Investments Ltd v The Wellness Group Pte Ltd*,[105] in which the Court of Appeal's new enumerated circumstance was the basis for s 254(1)(*i*) winding-up orders, despite the existence of an exit mechanism in both cases.

9.57 It is also appropriate to consider briefly how the global coronavirus pandemic, which began in early 2020 and at the time of writing continues

100 *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [76].
101 *Perennial (Capitol) Pte Ltd v Capitol Investment Holdings Pte Ltd* [2018] 1 SLR 763 at [56].
102 *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [79]–[81].
103 *Perennial (Capitol) Pte Ltd v Capitol Investment Holdings Pte Ltd* [2018] 1 SLR 763 at [56].
104 [2019] SGHC 97 at [11].
105 [2019] SGHC 154 at [49] and [54].

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to impact businesses in Singapore, would impact the law of just and equitable winding up. Multiple industries have come under existential threat due to the pandemic, but individual businesses have responded to shifting circumstances and demands with drastic changes. For example, Bloomberg reported that a local dentistry practice had started using its 3D printers to produce not dental equipment, but rather nasal swabs designed for coronavirus testing.[106] Consider another example close to Singaporean hearts: food and beverage businesses. As part of the State's response to the pandemic, food and beverage businesses have been subject to varying and rapidly changing restrictions on their operations.[107] Some have closed down either permanently or temporarily, whereas others have changed their business model overnight, such as pivoting from dine-in towards delivery, or forming tie-ups with other businesses to continue offering their wares.[108] Even if such moves may arguably be in the interest of the business' survival, it does involve risks that may not be agreed expressly or even contemplated by the shareholders. It is not difficult to anticipate that at least some shareholders would be unsatisfied with sudden changes in business direction and accordingly wish to call it quits.

9.58 For shareholders desirous of exit – particularly in solvent companies without any contractual or constitutional exit mechanisms, or where any existing mechanisms would fail for reasons such as lack of clarity on the company's financial affairs – just and equitable winding up is the obvious port of call. Such winding-up applications are not necessarily fanciful from a legal standpoint. It is at least arguable that the exceptional nature of the pandemic itself, government regulatory measures, and corresponding changes in the business environment and day-to-day operations may individually or together could constitute loss of substratum. It should be pointed out that regardless of whether winding-up applications featuring these facts would be granted by the courts, under current law, commencement of winding up on the just and equitable ground is deemed to be at the time of the making of the winding-up application.[109] In other words, winding up commences even before the winding-up application is heard and decided in court. Even before

106 David Ramli & Faris Mokhtar, "Singapore's Pivot to Mass Tests Challenged by Kit Shortage" *Bloomberg* (8 May 2020).

107 See, *eg*, Rei Kurohi, "No More Bubble Tea Shops and Other New Covid-19 Measures" *The Straits Times* (21 April 2020).

108 The most famous example (as of May 2020) being the sudden proliferation of tie-ups between bubble tea shops and other businesses selling cooked food. See, *eg*, Yip Jieying, "Here's Where You Can Still Get Bubble Tea during the Circuit Breaker Extension" *8days* (22 April 2020).

109 Companies Act (Cap 50, 2006 Rev Ed) s 255(2); see also s 126(2) of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018).

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the pandemic, this was not an ideal situation as the commencement of winding up has deleterious effects on the company's ability to continue operations.[110] The possibility that countless businesses under severe financial pressure during the pandemic might be wound up by creditor application has been partially addressed by emergency legislation,[111] but nothing has been done about just and equitable winding up so far.[112]

9.59 In the absence of full hearings and reasoned judgment by the courts in actual cases, it would be hasty to draw a conclusion either way as to whether changes in business direction prompted by the pandemic should be accepted as a basis for winding up on the just and equitable ground. Legislation, even emergency legislation, that would change the substantive law of just and equitable winding up would be premature at this time. However, it is respectfully submitted that an interim measure preventing the consequences of winding up from triggering at the point of the making of a winding-up application on the just and equitable ground[113] would be a measured and appropriate response.

VII. Oppression remedy

9.60 The year 2019 was a bumper year for shareholder oppression, with five cases resulting in written judgments.[114] Of these, *Anita Hatta v Lee Siow Kiang Georgia*[115] ("*Anita Hatta*") reinforces a growing recognition that oppression is also a remedy for disputes in companies other than "quasi-partnerships". In this case, the plaintiff minority shareholder applied for relief under s 216 against the defendant majority shareholder (and sole director) of the companies involved. The plaintiff alleged that, *inter alia*, the defendant had failed to supply her with fair and accurate information about her S$2m investment, and further engaged in various related party transactions that ultimately benefited the defendant personally at the plaintiff's expense.

110 See Alan K Koh & Samantha S Tang, "Towards a 'Just and Equitable Remedy' for Companies" (2017) 133 LQR 372 at 376–377.

111 See ss 22 and 23 of the Covid-19 (Temporary Measures) Act 2020 (Act 14 of 2020).

112 As of 28 May 2020.

113 As was proposed pre-pandemic in Alan K Koh & Samantha S Tang, "Towards a 'Just and Equitable Remedy' for Companies" (2017) 133 LQR 372 at 377.

114 *Ng Kian Huan Edmund v Suying Metropolitan Studio Pte Ltd* [2019] SGHC 56; *Ram Niranjan v Navin Jatia* [2020] 3 SLR 1037; *Senda International Capital Ltd v Kiri Industries Ltd* [2019] 2 SLR 1; *Swee Wan Enterprises Pte Ltd v Yak Thye Peng* [2019] SGHC 149; *Anita Hatta v Lee Siow Kiang Georgia* [2019] SGHC 222. These do not include judgments that purely concern share valuation.

115 [2019] SGHC 222.

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9.61 The High Court held that the companies were not quasi-partnerships, notwithstanding the informal nature and absence of formal written documentation governing the parties' relationship.[116] The defendant generally managed the companies without consulting with or seeking directions from the plaintiff;[117] the plaintiff did not play a substantial role in the company's management, and this was commensurate with the relatively small size of her shareholding.[118] Nevertheless, the plaintiff could, notwithstanding the absence of a quasi-partnership, have legitimate expectations based on "informal" and "implied" understandings.[119] The key seems to be the existence of a "personal relationship" pointing to a "common understanding" that their relationship would not be exhaustively governed only by formal constitutional documents.[120] These legitimate expectations were for the defendant to (a) comply with her directors' duties; (b) reasonably answer the plaintiff's legitimate queries; and (c) to treat the plaintiff fairly in a joint venture agreement involving the companies.[121] The High Court held that these legitimate expectations had been breached,[122] and ordered that the defendant purchase the plaintiff's shares.

9.62 The authors welcome Valerie Thean J's decision as a positive contribution to Singapore corporate law for both doctrinal and policy reasons. First, the High Court held that a shareholder may have legitimate expectations even if they are not a member of a quasi-partnership. This holding is consistent with *Thio Syn Kym Wendy v Thio Syn Pyn*,[123] where Judith Prakash JA in her trial judgment held that legitimate expectations may be derived from "informal understandings among shareholders *independent* of whether the company is a quasi-partnership" [emphasis added].[124] Similarly, the High Court in *Leong Chee Kin v Ideal Design Studio Pte Ltd*[125] held that:[126]

116 *Anita Hatta v Lee Siow Kiang Georgia* [2019] SGHC 222 at [71].
117 *Anita Hatta v Lee Siow Kiang Georgia* [2019] SGHC 222 at [63].
118 *Anita Hatta v Lee Siow Kiang Georgia* [2019] SGHC 222 at [77].
119 *Anita Hatta v Lee Siow Kiang Georgia* [2019] SGHC 222 at [69], citing *Fisher v Cadman* [2005] EWHC 377 (Ch); [2006] 1 BCLC 499, *per* Philip Sales.
120 *Anita Hatta v Lee Siow Kiang Georgia* [2019] SGHC 222 at [70]–[71].
121 *Anita Hatta v Lee Siow Kiang Georgia* [2019] SGHC 222 at [88].
122 *Anita Hatta v Lee Siow Kiang Georgia* [2019] SGHC 222 at [121], [146], [150] and [151].
123 [2017] SGHC 169.
124 *Thio Syn Kym Wendy v Thio Syn Pyn* [2017] SGHC 169 at [44]. This decision was affirmed on appeal in *Thio Syn Kym Wendy v Thio Syn Pyn* [2018] 2 SLR 788.
125 [2018] 4 SLR 331.
126 Dan W Puchniak, Tan Cheng Han SC & Samantha S Tang, "Company Law" (2017) 18 SAL Ann Rev 247 at 256, citing *Leong Chee Kin v Ideal Design Studio Pte Ltd* [2018] 4 SLR 331 at [65].

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> [O]ppression can be founded on a breach of an implied understanding, which gives rise to a legitimate expectation that 'those in control of the company will act *bona fide* in the best interests of the company' …

and that such an implied understanding can exist outside of a quasi-partnership. Second, the High Court, applying the Court of Appeal's test in *Ho Yew Kong v Sakae Holdings Ltd*[127] ("*Sakae*") analysed in the 2018 edition of this *Review*,[128] confirmed that a breach of directors' duties that confers a personal benefit on the wrongdoer[129] at the shareholder's expense is an independently actionable personal wrong that may justify oppression relief.

9.63 When evaluating *Anita Hatta*'s[130] contribution, Singapore's corporate governance landscape should also be taken into consideration. Shareholder disputes in Singapore decided in recent years featured increasingly diverse entities ranging from autocratic patriarch-dominated family businesses to the type of business in *Anita Hatta* itself – not quite a quasi-partnership but nonetheless a closely-held business founded on a personal relationship. Despite their diversity, these companies share the same fundamental characteristics: the absence of (or a very weak) market for shares, and the corresponding absence of a lawful means by which an aggrieved shareholder (often in the minority) may extricate themselves from the dispute with their investment materially intact. Minority shareholders in such companies – commonly referred to in comparative corporate law as "close corporations" – benefit immeasurably from legal mechanisms facilitating a resolution of the dispute via the minority's voluntary and compensated exit from the close corporation ("withdrawal" or "withdrawal remedies").[131] Singapore's withdrawal remedies in the form of the share buyout order that the court may make under s 216 (and more recently, s 254(2A))[132] of the Act are thus crucial

127 [2018] 2 SLR 333.

128 See Dan W Puchniak, Tan Cheng Han SC & Samantha S Tang, "Company Law" (2018) 19 SAL Ann Rev 227 at 240–242.

129 The wrongdoer is often simultaneously a director and shareholder in the company, and often a controlling or majority shareholder.

130 See para 9.60 above.

131 This theme will be elaborated in a comparative context in Alan K Koh, *Shareholder Protection in Close Corporations: Theory, Operation, and Application of Withdrawal in Leading Economies* (Cambridge University Press, forthcoming). See also Alan K Koh, "Shareholder Protection in Close Corporations and the Curious Case of Japan: The Enigmatic Past and Present of Withdrawal in a Leading Economy" (2020) Vand J Transnat'l L (forthcoming).

132 The key difference between the ss 216 and 254(2A) buyouts (*ie*, withdrawal) is whether the grounds are based on "fault" or "non-fault". On s 254(2A), see the analysis in Alan K Koh & Samantha S Tang, "Towards a 'Just and Equitable Remedy' for Companies" (2017) 133 LQR 372. On the difference between "fault" and "non-fault" withdrawal more generally and from a comparative perspective see Alan K Koh,

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elements of a corporate law system that has earned a reputation as one taking minority shareholder protection seriously.[133] The willingness of the Singapore courts to grant oppression relief based on breaches of informal or implied understandings arising outside of narrowly-defined quasi-partnerships demonstrated in *Anita Hatta* is thus sensitive to and reflective of the reality of close corporation disputes, and adds substance to Singapore's positive reputation in shareholder protection.

9.64 Considering Singapore's overall strong shareholder protection regime, the authors query if the approach taken in *Anita Hatta*, in seemingly conditioning legitimate expectations on the existence of at least a personal relationship, might be unnecessarily narrow. It should be uncontroversial that directors are bound by legal duties to do or refrain from certain things, and that failure to comply with these duties without lawful excuse is unlawful.[134] Which is more intuitive: expecting another person to obey the law, or to break the law? Rather than placing the burden on the *shareholder* to show why they had a *legitimate* expectation that a controller would comply with the law, would it not be more natural to place on the *controller* the burden of justifying why it is *illegitimate* for the shareholder to expect that the controller would obey the law?

9.65 It is respectfully suggested that the better and more generalisable view would be as follows. First, regard all shareholders in all companies – whether close corporations, autocratic family companies, listed companies, joint ventures, or anything else – as having legitimate expectations that directors would comply with their duties to the company. Second, allow shareholders to enforce those expectations through a personal remedy when the director's control as a shareholder prevents the company from doing so.[135] Not only would this approach be more consistent with the

Shareholder Protection in Close Corporations: Theory, Operation, and Application of Withdrawal in Leading Economies (Cambridge University Press, forthcoming).

133 See 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 *et al* eds) (Cambridge University Press, 2012) at *passim* (situating oppression within Singapore's pragmatic and progressive regime of minority shareholder protection).

134 The question of who *enforces* the duties is of immense practical importance given doctrinal and practical obstacles to enforcement of even the most straightforward wrongs, but just because no one could or did commence legal proceedings for a breach of duty does not change the fact that it was an unlawful act.

135 *Re Tobian Properties Ltd, Maidment v Attwood* [2012] EWCA Civ 998; [2013] 2 BCLC 567 at [22], *per* Arden LJ (holding that "the terms on which the parties agreed to do business together include by implication an agreement that any party who is a director will perform his duties as a director"). The authors caution that establishing wrongdoer control should not be difficult for plaintiffs to establish on

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spirit of a law-abiding society and of our minority shareholder protection regime, it is also clearer, pragmatic, and easier to apply by counsel and courts.

9.66 *Anita Hatta*[136] further offers a timely opportunity to take stock of the "analytical framework" laid down in *Sakae*[137] for assessing whether it is an abuse of process to litigate breaches of directors' duties under the oppression jurisdiction. It is noteworthy that the *Sakae* test has come to prominence in tandem with oppression claims based on implied understandings as to directors' duties. In both *Anita Hatta*[138] and *Ng Kian Huan Edmund v Suying Metropolitan Studio Pte Ltd*,[139] the "framework" was applied with the same result: the s 216 action was not an abuse of process. Unsurprisingly, both cases featured close corporations (although not quasi-partnerships)[140] in which the relief sought was some form of shareholder *exit* that takes into consideration the harm caused to corporate value by the oppressive acts perpetrated by a major shareholder-controller[141] rather than accountability of the controller *qua* director *per se*. *Anita Hatta* and *Ng Kian Huan Edmund* confirm the prediction in last year's *Review*[142] that:[143]

> [I]n cases where a controller-majority-shareholder-director benefits through breaching their directors' duties in a closely held company, a s 216 oppression remedy will likely be appropriate.

9.67 There are two alternative conclusions. First, the *Sakae* test has demonstrated its value and has come to be consistently applied with satisfactory results as in *Anita Hatta* and *Ng Kian Huan Edmund*. Yet it should not be forgotten that the controversy that *Sakae* had sought

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the facts, and should not be contingent on any rigid requirements as to shareholding percentage or formal legal powers.

136 See para 9.60 above.

137 See para 9.62 above.

138 *Anita Hatta v Lee Siow Kiang Georgia* [2019] SGHC 222 at [79]–[80].

139 *Ng Kian Huan Edmund v Suying Metropolitan Studio Pte Ltd* [2019] SGHC 56 at [214]–[215].

140 In *Ng Kian Huan Edmund v Suying Metropolitan Studio Pte Ltd* [2019] SGHC 56, Chua Lee Ming J made no finding as to whether the company in question was a quasi-partnership.

141 Share buyout order (*ie*, withdrawal) in the case of *Anita Hatta v Lee Siow Kiang Georgia* [2019] SGHC 222 and winding up in *Ng Kian Huan Edmund v Suying Metropolitan Studio Pte Ltd* [2019] SGHC 56.

142 Dan W Puchniak, Tan Cheng Han SC & Samantha S Tang, "Company Law" (2018) 19 SAL Ann Rev 227 at 240–242.

143 Dan W Puchniak, Tan Cheng Han SC & Samantha S Tang, "Company Law" (2018) 19 SAL Ann Rev 227 at 241. Note that although technically the liable defendant ("Patty") in *Ng Kian Huan Edmund v Suying Metropolitan Studio Pte Ltd* [2019] SGHC 56 was not found to be a "majority" shareholder, she was characterised as a "major shareholder" by Chua Lee Ming J at [1].

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to quell with the "framework" arose in the first place out of attempts by defendants to avoid oppression liability for breaches of directors' duties in the close corporation context. In our respectful opinion, the mischief that the *Sakae* court sought to address – the spectre of abuse of process by plaintiff shareholders using oppression instead of the derivative action – should never have been considered an issue to begin with. Before the fixation with the spectre of abuse arising out of the interaction between ss 216A and 216,[144] Singapore's oppression remedy was prized because it was "economically pragmatic" and valued the pragmatic facilitation of shareholder protection over "doctrinal purity".[145] Even in the UK, the key tension in oppression (and later, unfair prejudice) has mostly been over whether the remedy would provide redress in situations *beyond* actual illegality;[146] there is little to suggest that (until relatively recently) there was serious doubt that an independently unlawful act would be at least adequate as a basis for a finding of oppression.[147] However sincerely

144 Which culminated in *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333.

145 See 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 *et al* eds) (Cambridge University Press, 2012) at pp 349–351.

146 See, *eg*, *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 17–20 and *Re Tobian Properties Ltd, Maidment v Attwood* [2012] EWCA Civ 998; [2013] 2 BCLC 567 at [21]–[28].

147 See, *eg*, *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324 at 342 (defining "oppressive" as "burdensome, harsh and wrongful"); *Report of the Company Law Committee* (Cmnd 1749, 1962) at paras 203–206. Even though the statutory derivative action as introduced in 1993 in Singapore (and in 2006 in the UK) did not exist during the formative years of oppression, the assertion made by the Court of Appeal in *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [114] that the:

> … statutory derivative action, which is designed to cater to indirect wrongs that harm the shareholders of a company equally, would therefore be the more appropriate means of seeking redress for indirect wrongs to a shareholder …

is difficult to sustain given the derivative action's myriad, serious, and persistently unremedied defects which have been subject to thorough analysis elsewhere. See, *eg*, Andrew Keay, "Assessing and Rethinking the Statutory Scheme for Derivative Actions under the Companies Act 2006" (2016) 16 *Journal of Corporate Law Studies* 39 (critically analysing the under-use of the statutory derivative action in the UK); Samantha S Tang, "The Anatomy of Singapore's Statutory Derivative Actions: Why Do Shareholder's Sue – Or Not?" (2020) 20 *Journal of Corporate Law Studies* (forthcoming) (characterising the s 216A leave application as serving more the function of a *de facto* dispute resolution mechanism for close corporations in Singapore rather than its original intended purpose); Samantha S Tang & Alan K Koh, "How to Avoid a Derivative Action: A Cautionary Tale from Singapore" [2016] LMCLQ 346 (pointing out that the Singapore Court of Appeal expressly allowed wrongdoers to evade a derivative action by voluntarily winding up the company); Alan K Koh, "Searching for Good Faith in Singapore's Statutory Derivative Action: Much Ado about Something?" (2015) 36 *Company Lawyer* 207 (offering a critical view of Singapore's jurisprudence on good faith).

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attempted, the debate in our jurisprudence over whether breaches of directors' duties –independently unlawful acts *par excellence* – should be recognised as a basis for oppression relief is a uniquely dogmatic diversion.

9.68 For practical purposes, it might simply be concluded that, at least where closely held private companies (that is, close corporations) are concerned, breaches of director duties by a director-shareholder that enable the wrongdoer to benefit at the expense of a minority shareholder will ordinarily be actionable in shareholder oppression. This is a pragmatic stance that is supported on multiple bases – be it the very policy impetus for the oppression regime, a breach of "implied understandings", or pursuant to the *Sakae* framework. Regardless of which approach will find broader acceptance post-*Anita Hatta*, it should be settled law that a breach of directors' duties in close corporations by a director in control of the company may found an oppression claim brought by a minority shareholder who did not participate in the breach. Notwithstanding missteps elsewhere in the Commonwealth, controlling shareholders who take advantage of their directorships (or directors under their influence) to treat minority shareholders unfairly should not find it easy to rely on the "corporate wrong-personal wrong" doctrinal argument to avoid liability under the oppression remedy in business-friendly and pragmatic Singapore.[148]

148 The authors are grateful to Samantha S Tang for her insightful feedback on the analysis of shareholder remedies' cases, and to Benson Leong, Lim Jia Wen, Jordan Ng Qi Le, and Ivan Tan Ren Yi for research assistance.

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