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9. COMPANY LAW

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I. Corporate veil

9.1 Although the validity of the doctrine of veil piercing is increasingly being challenged in England, it remains the position that while a company is a legal person and therefore separate from its shareholders and directors, the court may in exceptional circumstances pierce the corporate veil and treat a company's shareholders and/or directors as being one and the same with the company for limited purposes. The company does not in such cases lose its legal personality but in relation to particular transactions or facts, the company and its shareholders and/or directors are treated as being equivalent.

9.2 Unlike English law, the Singapore Court of Appeal has recognised the "alter ego" ground as one instance in which the corporate veil may be pierced.[2] There has been little explanation of this ground though and it has been suggested that it can be understood in one of four alternative ways.[3]

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1 The authors thank Samantha Tang for advice and research.
2 *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308.
3 Yeo Hwee Ying & Ruth Yeo, "Revisiting the *Alter Ego* Exception in Corporate Veil Piercing" (2015) 27 SAcLJ 177. One of the four possibilities is that the alter ego ground is similar to what was described in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 at [28] as the "concealment" principle and this is the position suggested
(cont'd on the next page)

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In *Commodities Intelligence Centre Pte Ltd v Mako International Trd Pte Ltd*,[4] Lee Seiu Kin J observed that in Singapore the scope of the alter ego ground and therefore veil piercing has not been settled. Nevertheless, the consistent view has been that the doctrine should only be applied in limited circumstances. After considering the evidence, Lee J said it was not at all clear that the company was carrying on the personal business of its purported controllers. Accordingly, it would not be appropriate to pierce the corporate veil on the alter ego ground.

II. Directors' duties

9.3 A number of cases on directors' duties arose in the course of the year. Many of them turned on findings of fact.[5] In some instances, such as *Beyonics Asia Pacific Ltd v Goh Chan Peng*[6] and *Cheong Hong Meng David v Sim Irene*,[7] the director preferred the interests of others or himself over those of the company. In another, *OOPA Pte Ltd v Bui Sy Phong*,[8] the facts involved the (unfortunately) fairly typical case of a director who diverted a business opportunity properly belonging to the company to the director or others associated with the director. In this case, Philip Jeyaretnam JC found that the director had diverted a maturing business opportunity that the company was actively pursuing to another person with whom the director was associated. While the facts found by Jeyaretnam JC lent ample support to the existence of a maturing business opportunity and that it was not merely an idea as contended by the defendant director, it is submitted that in appropriate circumstances even an idea at the exploratory stage would suffice to preclude a director from developing the idea for the director's own benefit.[9] Indeed, even if a company was unaware of a potential business opportunity, a director who has come to know of such opportunity may usually not take advantage of it without first bringing it to the company's attention and obtaining the

in Tan Cheng Han SC, "Some Current Issues in Singapore Corporate Law" (2019) 31 SAcLJ 1008.

4 [2022] 5 SLR 837.

5 See, *eg*, *Shandong Qixia Shida Fruits Refrigeration Co, Ltd v Yong Zeng Yuan Pte Ltd* [2022] SGHC 48; *Bit Baltic Investment & Trading Pte Ltd v Wee See Boon* [2022] SGHC 110; *Baker, Samuel Cranage v SPH Interactive Pte Ltd* [2022] SGHC 238; *True Yoga Pte Ltd v Wee Ewe Seng Patrick John* [2022] SGHC 155; *Darco Water Technologies Ltd v Thye Kim Meng* [2022] SGHC 49; and *Dways International Pte Ltd v Lim Seow Hui Ratna Irene* [2022] SGHC 158.

6 [2022] 1 SLR 1.

7 [2022] SGHC 72.

8 [2022] 4 SLR 537.

9 For instance, this may happen where a company is approached by a third party about a possible business venture.

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company's fully informed consent to do so.[10] This is especially the case when the director in question is an executive director.[11]

9.4 A similar breach of fiduciary duty took place in *Wei Fengpin v Raymond Low Tuck Loong*[12] ("*Wei Fengpin*"), where the director in question diverted business away from the company and attempted to undercut it. The director attempted to rely on *Tokuhon (Pte) Ltd v Seow Kang Hong*[13] ("*Tokuhon*") to argue that the circumstances were such as to justify his acts so that there was no breach of duty. The Court of Appeal firmly rejected this argument pointing out the exceptional circumstances in *Tokuhon* where the conflict between the shareholders was well known to the outsider and that all the shareholders had divulged confidential information to this third party. This demonstrated that each of the shareholders regarded such conduct as fair game and acceptable. It was the norm in that case but there was no such evidence of such a norm in *Wei Fengpin*. The present case also did not involve any expulsion of the director that might have justified him setting up a competing business to earn a livelihood.

9.5 A less typical instance of breach of fiduciary duty arose in *Lim Oon Kuin v Ocean Tankers (Pte) Ltd*[14] where the Court of Appeal reiterated the position that where a company's solvency was in question, its directors have a duty to consider the interests of creditors rather than shareholders. It was not necessary for a company to be technically insolvent for this to arise. A strict and technical application of the "going concern" and "balance sheet" tests were of limited utility and it was sufficient if the company was in fact financially imperilled at the material time. The purpose of such a broad-based assessment was to prevent errant directors of a company from relying on the technical balance sheet and/or cash flow tests to escape liability for their breaches of duties in relation to the interests of the company's creditors. As long as there were reasons to be concerned that the interests of creditors were or would be at risk because of difficult financial circumstances, the directors ignore those interests at their peril. In the present case, the Court of Appeal agreed with the court below that various payments had been made at a time when the company was insolvent or near insolvent, or at the very least in a parlous financial position. The directors who approved such payments had therefore breached their fiduciary duties.

10 *Queensland Mines Ltd v Hudson* [1978] 18 ALR 1.
11 Dan W Puchniak & Tan Cheng Han, "Company Law" (2016) 17 SAL Ann Rev 235 at 239–240.
12 [2022] 2 SLR 363.
13 [2003] 4 SLR(R) 414.
14 [2022] 1 SLR 434.

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9.6 The factor of the company being in a parlous financial state was also relied on in *OP3 International Pte Ltd v Foo Kian Beng*,[15] where the court rejected the argument that the duty for directors to consider the interests of creditors only applied when the company was on the verge of insolvency, a situation that was more severe than being in a parlous financial situation. In determining whether a company was financially parlous, Hoo Sheau Peng J said that a practical and broad assessment of the financial health of the company should be undertaken. In this regard, contingent liabilities could be taken into consideration and the nub of the matter was whether any such liability was reasonably likely to materialise.

III. Shares

9.7 In *Portcom Pte Ltd v Verrency Group Ltd*,[16] Philip Jeyaretnam J opined that for the purpose of determining if the 90% threshold for s 215(1) of the Companies Act 1967[17] (the "Act") had been reached, the convertible notes that had been issued by the company could not be regarded as units of shares within s 215(8A) of the Act, which defined "shares" as including "units of shares". Section 4(1) of the Act defined the word "unit", in relation to a share, as meaning any right or interest in the share by whatever name called and included any option to acquire any such right or interest in the share. In the present case, the convertible notes did not have a conversion price. Accordingly, in the absence of a mechanism or formula to fix the conversion price, the convertible notes could not be regarded as an option to acquire a right or interest in a share since in the event of a disagreement the right to convert would not be exercisable. An agreement to agree was not enforceable.

IV. Wrongs against companies

9.8 In *Bhavin Rashmi Mehta v Chetan Mehta*,[18] Valerie Thean J reiterated the reasons behind the proper plaintiff rule, also known as the rule in *Foss v Harbottle*,[19] that disallows shareholders from bringing claims for wrongs perpetrated against companies. Thean J then went on to state that in certain circumstances the Act provides members with personal rights and in such circumstances the proper plaintiff rule was inapplicable. Two such provisions that were the subject of the present case were ss 399 and 409A of the Act. In the court's view, both provisions were

15 [2022] SGHC 225.
16 [2022] SGHC 97.
17 2020 Rev Ed.
18 [2022] SGHC 173.
19 (1843) 2 Hare 461.

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inapplicable to the facts. The provisions did not apply to any case where there was wrongdoing, improper conduct or irregularity in relation to a company. They only applied where such wrongdoing, improper conduct or irregularity contravened the Act in the manner specified within the provisions. It must be said that this is clear from the language of the provisions. If the provisions were to have the effect contended for by the applicant, clear language must be used because it would effectively sweep away the proper plaintiff rule.

9.9 The applicant also relied on s 39 of the Act which provides that the corporate constitution is a statutory contract between the company and its shareholders and between the shareholders *inter se*. Thean J held that s 39 of the Act merely states the effect of the corporate constitution and does not impose a statutory obligation to obey its terms. As such, even if the constitution had not been adhered to, there would not have been a contravention of the Act for the purposes of ss 399 and 409A of the Act. It may also be pointed out that if a member of a company wished to argue that the corporate constitution had not been complied with, the member would only be entitled to relief if she could establish that the constitutional provision in question was one that affected her in her capacity as a member. This is known as the "*qua* member" rule.[20] If the fact of breach and that such breach affected the member in such capacity has been established, she may bring a claim in her personal capacity. There need be no reliance on ss 399 or 409A of the Act to do so.

V. Meetings

9.10 The High Court case of *Tanoto Sau Ian v USP Group Ltd*[21] ("*Tanoto Sau Ian*") addressed a critical issue for corporate governance in public companies listed on the Singapore Stock Exchange ("SGX"): whether beneficial owners of shares could be deemed as "members" entitled to requisition the company to convene an extraordinary general meeting ("EGM") pursuant to s 176(1) of the Act. The significance of the case lies in the practical reality that retail investors in SGX-listed companies generally do not directly hold shares in their own name. Pursuant to s 81SF of the Securities and Futures Act 2001, investors may either hold shares: (a) in a personal account with the Central Depository ("CDP") as "depositors"; or (b) via a private nominee arrangement with an intermediary (*eg*, a brokerage house) as a "sub-account holder". *Tanoto Sau Ian* was concerned with whether "sub-account holders" would be recognised as members for the purpose of s 176(1) of the Act.

20 *Hickman v Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch 881.
21 [2023] 5 SLR 909.

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This case therefore has significant consequences for the enfranchisement of retail investors – and the protection of their rights as shareholders – in Singapore.

9.11 In *Tanoto Sau Ian*, four persons (the "Requisitionists") signed a letter purporting to requisition an SGX-listed company, USP Group, to convene an EGM for the purpose of removing the company's existing directors and appointing new ones.[22] The applicant was an existing director and the Chief Executive Officer ("CEO") of the company.[23] Collectively, the Requisitionists were beneficial owners of roughly 11% of ordinary shares in the company.[24] While their combined shareholding satisfied the minimum 10% statutory requirement to requisition an EGM,[25] none of the Requisitionists were themselves registered members at the time the requisition notice was submitted to the company. Instead, all Requisitionists held their shares via various brokerage houses, which served as the registered members.[26] The Requisitionists were therefore "sub-account holders" pursuant to s 81SF of the Securities and Futures Act 2001.[27] The company then applied to court for a declaration that the Requisitionists were not "members" of the company for the purpose of s 176(1) of the Act.[28]

9.12 Goh Yihan JC held that the Requisitioners were not "members" of the company when the requisition notice was submitted to the company. Accordingly, the Requisitionists did not have standing to have an EGM convened pursuant to s 176(1) of the Act.[29] Only CDP depositors are recognised as registered members for SGX-listed public companies.[30] As the company argued, only a simple formality was necessary for the Requisitionists to become registered members: they only needed to have the brokerage houses transfer the shares to the Requisitionists' own CDP accounts.[31] The Requisitionists, however, countered that this would be no simple matter; two of the Requisitionists did not have any existing CDP accounts which could take over two months to open and set up. The Requisitionists further argued that the EGM in question had been

22 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [7].
23 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [2].
24 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [8].
25 Companies Act 1976 (2020 Rev Ed) s 176(1).
26 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [8].
27 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [28].
28 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [18].
29 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [27]–[29].
30 Securities and Futures Act 2001 (2020 Rev Ed) s 81SJ read with s 81SF.
31 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [23].

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already delayed for months by the company and its directors, who were "trying all ways and means to stymie the holding of the EGM".[32]

9.13 This brings us to the main thrust of the Requisitionists' argument: the company was estopped from challenging their status as "members" either by virtue of the company's general conduct since its receipt of the requisition notice, or pursuant to a High Court judgment previously obtained by the Requisitionists to extend the validity of the requisition notice and to direct the company to assist the Requisitionists in convening the EGM.[33] Goh JC rejected the Requisitionists' arguments, holding that an estoppel "would effectively allow the parties to apply a meaning of s 176(1) contrary to its correct interpretation".[34] In so doing, Goh JC distinguished the present case from *Kitnasamy s/o Marudapan v Nagatheran s/o Manogar*[35] ("*Kitnasamy*"), where the Court of Appeal held that the company was estopped from denying that the appellant was a registered member for an oppression claim under s 216 of the Act.[36] In *Kitnasamy*, the appellant satisfied all statutory requirements to be deemed a member; the only obstacle was the company's refusal to enter his name into its register of members. Conversely, the Requisitionists did not in the present case satisfy the statutory requirements necessary to be "members" under s 176(1) of the Act.

9.14 There is much to commend in this High Court judgment, both in the exhaustive examination of the legal materials canvassed, and the speed with which it was issued following hearings – a mere two days.[37] Time is of the essence where EGMs are concerned, and this was no exception. Goh JC observed that "[i]t is unacceptable that USP Group is trying to disrupt the democratic processes of the company"[38] and allowed the Requisitionists to apply for any orders necessary to compel the company to issue the necessary documents for the Requisitionists to open CDP accounts, and to become "members" as soon as practicable.[39] Nonetheless, the case is a cautionary tale for retail investors on the importance of knowing how and where one's shares are held – and for making necessary arrangements well in advance of any attempt at exercising shareholder rights. While the

32 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [23]. The requisition notice had been submitted to the company on 26 October 2022: *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [1].
33 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [37].
34 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [37].
35 [2000] 1 SLR(R) 542.
36 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [44].
37 Hearings were held on 14 and 17 April 2023; the judgment was dated 19 April 2023. The EGM was scheduled for 21 April 2023: *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [2].
38 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [87].
39 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [88].

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2014 Companies Act reforms now permit sub-account holders to vote at general meetings as an approved proxy of the intermediary that stands as a registered member,[40] sub-account holders do not, as beneficial owners of shares, otherwise enjoy any of the rights that a registered member has under the Companies Act. In this respect, the enfranchisement of retail investors in Singapore remains a work in progress.

VI. Derivative actions

9.15 Continuing on from the case of *Tanoto Sau Ian,* the applicant also brought a leave application under s 216A of the Act to apply for an injunction on the company's behalf against the Requisitionists to prevent them from holding an EGM. The applicant was the CEO, executive director and shareholder of the company.[41] In so far as reported judgments are concerned, *Tanoto Sau Ian* is only the second leave application in respect of an SGX-listed company[42] brought since the 2014 Companies Act reforms extended s 216A applications to all Singapore-incorporated companies.[43]

9.16 Given that the High Court had already held that the Requisitionists did not have standing to have an EGM convened under s 176(1) of the Act, the leave application was admittedly moot. However, Goh JC applied s 216A of the Act and refused to grant the applicant leave. In his analysis, Goh JC made two important clarifications on Singapore's derivative action jurisprudence.

9.17 The first is the scope of legal proceedings that may be the subject of a leave application. In an *obiter* paragraph from *Chan Siew Lee v TYC Investment Pte Ltd* ("*TYC Investment*"), the Court of Appeal opined:[44]

> The shareholders may well take a different view from the board of directors as to the course that should be adopted in relation to a possible action that may be available to the company or in which it may be involved and which is unconnected to any breach of duty by a director, for instance, a debt which the company owes to a third party. But the decision as to how best this should be

40 Companies Act 1967 (2020 Rev Ed) ss 181(1C) and 181(6).

41 Tan Nai Lun, "Court Rules USP's Apr 21 EGM Need Not Proceed, But Raps Firm for Disrupting Democratic Process" *Business Times* (19 April 2023) <https://www.businesstimes.com.sg/companies-markets/court-rules-usps-apr-21-egm-need-not-proceed-raps-firm-disrupting-democratic> (accessed 19 July 2024).

42 The other is *Tiong Sze Yin Serene v HC Surgical Specialists Ltd* [2020] 3 SLR 1269. See discussion in Alan K Koh, Dan W Puchniak & Tan Cheng Han, "Company Law" (2020) 21 SAL Ann Rev 224 at 243–244.

43 Alan K Koh, Dan W Puchniak & Tan Cheng Han, "Company Law" (2020) 21 SAL Ann Rev 224 at 233.

44 *Chan Siew Lee v TYC Investment Pte Ltd* [2015] 5 SLR 409 at [59].

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> dealt with is one that resides in the board of directors; and the shareholders may not interfere with the board's decision in this respect because the management of the company is generally within the sole jurisdiction of the directors.

If *TYC Investment* is applied strictly, then there remains a distinct possibility that actions that do not involve a breach of duty by a director cannot be the subject of a leave application. In *Shanghai Shipyard Co Ltd v Opus Tiger Pte Ltd*[45] ("*Shanghai Shipyard*"), the subject matter of the leave application was the commencement of arbitration proceedings against a third party that was a creditor and party to contracts with the company's subsidiaries. Notwithstanding the Court of Appeal's decision to deny leave in *Shanghai Shipyard*, the vexed paragraph in *TYC Investment* did not appear to limit the scope of s 216A leave applications to actions involving a breach of directors' duties.[46]

9.18 In *Tanoto Sau Ian*, Goh JC opined[47]

> While the Requisitionists do not spell this out definitively, it appears that they rely on the words 'bring an action' in s 216A(2) to argue that there must be an underlying cause of action for the company to prosecute. … However, I do not think that s 216A(2) is so narrow as to limit the applicant to only bringing a 'cause of action' in the name and on behalf of the company against another party. This would be adding an impermissible gloss to the clear statutory text. *Rather, the word 'action' should be given a broad interpretation to refer to proceedings that the company has standing to commence and can encompass, as in the present case, an injunction that is not tied to an underlying cause of action.* [emphasis added]

This holding helpfully clarifies an important aspect of s 216A which has the potential to increase the robustness and fairness of the protection of minority shareholders in Singapore. The derivative action is designed to solve the corporate governance problem of the controller of the company's regular decision-making process – which due to s 157A is normally the board – using its control to prevent the company from acting in its interests.[48] To narrowly confine the scope of s 216A solely to circumstances when the company has an underlying cause of action, would be to allow a wrongdoing board to prevent the company from pursuing legal proceedings even when it is in the company's interests to

45 [2022] 1 SLR 643.

46 Alan K Koh, Dan W Puchniak & Tan Cheng Han, "Company Law" (2021) 22 SAL Ann Rev 203 at 213.

47 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [72].

48 For the rationale and characteristics of the derivative action see generally, Harald Baum & Dan W Puchniak, "The Derivative Action from an Economic and Functional Perspective" in *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) at pp 1–84.

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do so (and, often against the wrongdoing board's interests). As such, given that the derivative action mechanism clearly allows the complainant to litigate on the company's behalf,[49] it stands to reason that it should allow a complainant to bring any and all legal proceedings that the company itself can bring. Imposing constraints on the subject matter of leave applications risks hamstringing what is otherwise a highly flexible mechanism for minority shareholder protection. It would also provide cover for wrongdoing boards that prevent the company from pursuing legal proceedings that are in its interests – militating against Singapore's long history of being at the forefront of providing strong rights to protect minority shareholders.[50]

9.19 The second point is that a court should be slow to, if ever, allow the derivative action mechanism to be used to impose a permanent injunction restraining shareholders from ever requisitioning an EGM – which was what the applicant was effectively seeking. Goh JC held that this was a "draconian outcome" that necessitated "credible evidence" from the applicant[51] – and which the applicant was not able to furnish. Specifically, the applicant alleged that investigations as to how the Requisitionists had acquired their shares were ongoing and, in turn, there was "no evidence that the Requisitionists [had] done anything wrong".[52]

9.20 Goh JC further observed that a permanent injunction preventing the Requisitionists from requisitioning an EGM would severely impact the company's corporate governance:[53]

> [T]he Requisitionists are simply seeking an EGM to allow the democratic process of the company to take place. Whether that process will result in the Requisitionists taking control is unknown before the EGM has taken place. In this case, granting the injunction Tanoto seeks would severely undermine the democratic process within USP Group. It would also entrench the current Board of Directors against any new board that the Requisitionists may bring forward. This is not acceptable.

49 See Alan K Koh & Samantha S Tang, "Direct and Derivative Shareholder Suits: Towards a Functional and Practical Taxonomy" in *Comparative Corporate Governance* (Afra Afsharipour & Martin Gelter eds) (Elgar, 2021) at pp 431–453.

50 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, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) at pp 323–324.

51 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [80].

52 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [76]–[78].

53 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [82].

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9.21 As such, the applicant's proposed action was not *prima facie* in the company's interests.[54] Goh JC also held that the applicant was not acting in good faith as he did not have a reasonable belief that a good action exists.[55] The High Court's stridency in dismissing the applicant's leave application should not be taken as a blanket rejection of any attempt to use the derivative action to bring an injunction on the company's behalf. Rather, taken in context, the court's objection was clearly with the specific injunction sought in this case, which would have effectively barred the Requisitionists from *ever* convening an EGM – a disproportionate response to any sound mind.[56]

9.22 A final comment would be that an injunction of the sort sought in the case – albeit perhaps on a more reasonable, temporary basis – could seem appropriate depending on the circumstances. It would be an error to interpret the *Tanoto Sau Ian* decision as requiring a derivative action as a preliminary step for obtaining such an injunction given the existence of direct suit mechanisms,[57] such as those under ss 25(2)(*a*)–25(2)(*b*) and 409A of the Act, that could have sufficed.

VII. Oppression

9.23 In *Deniyal bin Kamis v Mapo Engineering Pte Ltd*[58] the claimant ("Deniyal") sought relief under s 216 of the Act against the defendant ("Niew"); both were directors and shareholders of two companies. The High Court held that Niew had unfairly diverted dividends and directors' fees that should have been paid to Deniyal. Niew had also caused the companies to unfairly bear the burden of paying his salary when his salary had previously been borne by companies in which Deniyal had no interests; this was deliberately engineered by Niew to prejudice Deniyal.[59] Jeyaretnam J ordered Niew to purchase Deniyal's shares in the companies. The shares were to be valued as of the date before Niew placed himself on the companies' payroll, with an additional upward adjustment to the value of Deniyal's shares to account for the dividends and directors' fees

54 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [78].
55 *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [79]–[85].
56 Such a permanent injunction was characterised by the court as "draconian": *Tanoto Sau Ian v USP Group Ltd* [2023] 5 SLR 909 at [80].
57 On direct suits see generally Alan K Koh & Samantha S Tang, "Direct and Derivative Shareholder Suits: Towards a Functional and Practical Taxonomy" in *Comparative Corporate Governance* (Afra Afsharipour & Martin Gelter eds) (Elgar, 2021) at pp 431–453 and Alan K Koh, "Direct Suits and Derivative Actions: Rethinking Shareholder Protection in Comparative Corporate Law" (2022) 21 *Washington University Global Studies Law Review* 391.
58 [2023] SGHC 183.
59 *Deniyal bin Kamis v Mapo Engineering Pte Ltd* [2023] SGHC 183 at [2].

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diverted from Deniyal to Niew. The valuation was to be undertaken on a going concern basis and without any minority discount.[60]

9.24 Of significance is Jeyaretnam J's approach to the quasi-partnership. In the present case, no quasi-partnership was found on the facts, but the High Court nonetheless found that Deniyal had a legitimate expectation to be treated fairly by Niew, and to share in the companies' profits. This expectation arose from the foundation of the parties' relationship: Niew had gifted Deniyal shares as a reward, and to incentivise Deniyal to remain with the companies in a long-term relationship.[61] In so doing, Jeyaretnam J downplayed the significance of a company's status as a quasi-partnership:[62]

> I do not consider that determining whether a company is in fact a quasi-partnership is always a necessary or necessarily useful step in the analysis. In particular, I do not accept Mr Niew's contention that Mr Deniyal is limited to only those legitimate expectations contained in the corporate constitutions of MEPL and MMPL absent a finding of quasi-partnership. In my view, the focus should be on discerning the *substance*, *parameters*, and *objectives* of the parties' commercial agreement (*Over & Over* at [87]). …
>
> First, it is clear that the equitable considerations that can restrain the exercise of strict legal rights are generated by the personal relationship between individuals. In other words, the legitimate expectations to which the court gives effect are those of a personal character and are not derived from the status of the corporate entity. What is required is 'a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former' (*O'Neill* at 1101 …). As Valerie Thean J held in *Anita Hatta v Lee Siow Kiang Georgia* [2020] 5 SLR 304 ('*Anita Hatta*'), the absence or presence of a 'quasi-partnership' does not determine whether legitimate expectations arising from implied or informal understandings may be taken into consideration. Instead, the focus remains on whether the circumstances of the parties' personal relationship are such as to call for intervention (*Anita Hatta* at [69] …). I therefore disagree that there are necessarily any pre-defined set of legitimate expectations that can be 'derived' from the status of a company.
>
> I therefore focus on determining the substance of the commercial agreement between Mr Niew and Mr Deniyal as demonstrated by the evidence, keeping in mind the essential context of their personal relationship (see *Anita Hatta* at [72]).
>
> Second, flowing from this first observation, the label 'quasi-partnership' is no more than that: a convenient label … It is apt in the case of a pre-existing partnership that is subsequently incorporated. However, this label cannot be

60 *Deniyal bin Kamis v Mapo Engineering Pte Ltd* [2023] SGHC 183 at [212]–[214].
61 *Deniyal bin Kamis v Mapo Engineering Pte Ltd* [2023] SGHC 183 at [93]–[94].
62 *Deniyal bin Kamis v Mapo Engineering Pte Ltd* [2023] SGHC 183 at [85], [87]–[89] and [91].

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> allowed to confuse or obscure the fact that the basis of intervention is s 216 of the Companies Act and not the law of partnership. It is incorrect to insist on the category or heading of 'quasi-partnership' as a necessary pre-requisite before legitimate expectations may be taken into account: *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2010] SGHC 268 ('*Phebe*') at [61] and *The Wellness Group Pte Ltd v OSIM International Ltd* [2016] 3 SLR 729 at [181]. In my view, this label is particularly unhelpful given the great variety of commercial arrangements under which companies may be run.
>
> To make finding a 'quasi-partnership' a pre-requisite before the court may look into legitimate expectations arising from the parties' personal relationship is to turn the proper analysis on its head. In *Over & Over*, the Court of Appeal first found as a matter of fact that the parties had associated on an informal basis and had agreed to consult one another on important financial and operational matters (*Over & Over* at [87]–[92]). The finding of 'quasi-partnership' was a conclusion reached precisely because the Court of Appeal found that the informal agreement to consult had been proven on the facts (*Over & Over* at [97]). …
>
> I therefore focus on determining the substance of the commercial agreement between Mr Niew and Mr Deniyal as demonstrated by the evidence, keeping in mind the essential context of their personal relationship (see *Anita Hatta* at [72]).
>
> [emphasis in original]

9.25 Jeyaretnam J's approach is helpful in reinforcing the position that has emerged in Singapore that it is unnecessary to establish that a company is a quasi-partnership to succeed in a claim for oppression based on legitimate expectations under s 216, such legitimate expectations itself flowing from implied or informal understandings between the parties. This finding is in line with the tenor of recent cases, such as *Anita Hatta v Lee Siow Kiang Georgia*,[63] where legitimate expectations were found notwithstanding the absence of a quasi-partnership.[64] In emphasising the centrality of the parties' commercial agreement to the s 216 analysis, Jeyaretnam J's approach is broadly consistent with the cornerstone of Singapore oppression jurisprudence: commercial fairness as a result of the understandings or agreements between the parties.[65] One might even venture that the gradual de-emphasis on the quasi-partnership in recent Singapore cases reflects the practical realities – and diversity – of commercial arrangements.[66] Whether this represents a milestone in

63 [2020] 5 SLR 304.

64 Alan K Koh, Dan W Puchniak & Tan Cheng Han, "Company Law" (2019) 22 SAL Ann Rev 203 at 213.

65 *Over & Over v Bonvest Holdings Ltd* [2010] 2 SLR 776 at [81].

66 See, *eg*, Samantha S Tang, "Corporate Divorce in Family Companies" [2018] LMCLQ 19.

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Singapore's maturing oppression jurisprudence or a mere blip will turn on whether the courts can stay free of conceptual straightjackets.[67]

VIII. Just and equitable winding up

9.26 In *Re AAX Asia Pte Ltd*[68] ("*AAX*"), winding-up applications were filed in respect of AAX Singapore Pte Ltd and AAX Asia Pte Ltd (collectively, the "Companies") pursuant to the Insolvency, Restructuring and Dissolution Act 2018[69] ("IRDA"). The Companies operated a cryptocurrency business across several jurisdictions;[70] unfortunately, their finances were in dire straits following the collapse of FTX, a cryptocurrency platform, in November 2022.[71] The former management of Atom Holdings, the ultimate parent entity of the Companies,[72] had allegedly absconded with the keys to the Companies' digital assets,[73] and were apparently still on the run from the Hong Kong authorities.[74]

9.27 Atom Holdings, a Cayman Islands-registered entity, was placed under compulsory liquidation in July 2023. The Companies' directors were removed by Atom Holding's liquidators and replaced by the liquidators' appointees, who then placed the Companies under judicial management pursuant to s 94(3) of the IRDA in March 2023. Mr Luke Anthony Furler ("Furler") was appointed as the interim judicial manager. The period of interim judicial management was extended three times by the Official Receiver, with the last day of Furler's appointment being 16 October 2023.[75]

9.28 Following investigations to identify the Companies' creditors and trace their assets, Furler concluded that none of the purposes of judicial management under s 89 of the IRDA could be achieved, given that he was unable to locate: (a) any cash or assets belonging to the Companies, such that the Companies could not be rehabilitated and survive as going concerns; (b) the financial accounts and customer records of the

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67 In particular, the contractual paradigm that gripped UK unfair prejudice jurisprudence in the wake of *O'Neill v Phillips* [1999] 1 WLR 1092. See further Alan K Koh, *Shareholder Protection in Close Corporations: Theory, Operation and Application of Shareholder Withdrawal* (Cambridge University Press, 2022) at pp 148–149.
68 [2023] SGHC 324 at [1].
69 Act 40 of 2018.
70 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [3].
71 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [5].
72 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [4].
73 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [5].
74 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [25].
75 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [7].

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Companies, such that the creditors of the Companies could not even be identified in the first place.[76]

9.29 Furler therefore applied to wind up the Companies on the grounds that: (a) the Companies were unable to pay their debts under s 125(1)(*e*) of the IRDA; or (b) that it was just and equitable for the Companies to be wound up under s 125(1)(*i*) of the IRDA. Goh Yihan J held that the Companies did not have any available assets to meet their current liabilities, and were unable to pay their debts.[77] It is to the just and equitable winding-up application that this chapter now turns.

9.30 Goh J considered two sets of arguments advanced by the applicant for the just and equitable winding up: (a) one based on the "loss of substratum" which is an established category for granting a just and equitable winding up in Singapore; [78] (b) and the other based on "enhanced investigation rationale" which was "a novel argument" as it fell outside of Singapore's established categories.[79] To start with the established category, a winding up is justified when the company's substratum (*ie*, "the main object it was formed to achieve") can no longer be achieved because "it would be unfair to hold the parties to the association".[80] An example would be a dormant company in a perilous financial state without reasonable prospect of recovery for the purposes of pursuing its main object.[81]

9.31 In this case, the Companies certainly seemed to have suffered a loss of substratum as the court had earlier found that they were cash flow insolvent.[82] The Companies were part of a corporate group whose main object was to engage in the cryptocurrency trading platform business. With the group having gone defunct and the Companies' assets missing, "there was no reasonable prospect that the Companies would be able to return to operating" the business as usual.[83] On this basis, "as the main objects of the Companies therefore were incapable of achievement" there

76 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [8].
77 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [25]–[26].
78 For a list of established circumstances under which a Singapore court would grant a just and equitable winding up, see *Grimmett, Andrew v HTL International Holdings Pte Ltd* [2022] 5 SLR 991 at [58], quoted in *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [30].
79 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [34].
80 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [31], citing *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [63].
81 *Re AAX Asia Pte Ltd* [2023] SGHC 324 [31], citing *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2019] 1 SLR 1046 at [64].
82 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [25]–[26].
83 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [33].

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was a solid rationale for Goh J's finding for a just and equitable winding up based on a loss of substratum.[84]

9.32 However, from another perspective, *AAX* can be seen as an unconventional loss of substratum case; there was no "aggrieved, often minority, shareholder"[85] locked into a company doomed to never achieve its purpose. Instead, the Companies were wholly-owned subsidiaries of the ultimate parent (Atom Holdings), which was itself under liquidation.[86] In this sense, perhaps this decision opens the door to similar cases in which a just and equitable winding up based on the loss of substratum does not need to be driven by an aggrieved minority shareholder. With respect, this would seem to make sense if, as in this case, the company has clearly lost its substratum and no party such as minority shareholders would be prejudiced by the winding up.[87]

9.33 The novel argument advanced by the applicant in this case was that the Companies should, in the interest of their unsecured creditors, be wound up so that Furler "could conduct investigations into the Companies' affairs, recover assets to be distributed, and identify the creditors" – or what the court called the "enhanced investigations rationale". Drawing from several cases from England and Singapore,[88] Goh J concluded that the "enhanced investigations rationale" was of relevance to the decision whether to order a winding up, and the conduct of the liquidation process. Based on the relevant case law, Goh J went on to hold that "the need to empower a liquidator to conduct enhanced investigations for the benefit of unsecured creditors constitutes a sufficient ground to wind up a company on just and equitable grounds".[89] This seems consistent with the lodestar of the just and equitable winding-up

84 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [33].
85 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [32].
86 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [3] and [6].
87 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [42]. In this regard, Goh J's reference to "free[ing] shareholders from the Companies" (at [33]) should not be taken as a requirement that must be met for the loss of substratum ground to be invoked.
88 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [36]–[39], discussing *Bell Group Finance (Pty) Ltd v Bell Group (UK) Holdings Ltd* [1996] BCC 505 (involving a creditor application to wind up a company under receivership to appoint a liquidator to investigate the circumstances in which security was granted to the secured creditors who appointed the receivers); *RCMA Asia Pte Ltd v Sun Electric Power Pte Ltd* [2020] SGHC 205 (where the court considered as relevant to its discretion to order winding up the prospect of a liquidator investigating questionable dealings and taking the appropriate action); and *DB International Trust (Singapore) Ltd v Medora Xerxes Jamshid* [2023] 5 SLR 773 (where the court stated that investigation by an independent party into the circumstances leading up to insolvent liquidation is part of the function of the insolvent liquidation process).
89 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [40].

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remedy: addressing "unfairness".[90] The enhanced investigation rationale finds doctrinal support in related cases from England and Singapore, but the authors also observe that the "enhanced investigations rationale" cited by Goh J may be particularly important given Singapore's reputation as a financial centre. This rationale was cited in the winding-up application brought by the liquidators of Atom Holdings in July 2023 before a Cayman Islands court. Kawaley J granted the application with no written grounds, but observed that there was a public interest in investigating the company's affairs and maintaining the Cayman Island's reputation as a financial centre, given that representatives of the Cayman Islands Monetary Authority had attended the hearing.[91] As such, the "enhanced investigations rationale" may be of interest to practitioners and regulators going forward in light of Singapore's continued engagement with cutting-edge financial technology that may generate novel legal issues.

9.34 Questions do remain, however. For one, what would be the circumstances in which the courts would be prepared, in the context of an otherwise solvent (*ie*, able to pay its debts[92]) and operational (*ie*, with its substratum intact and with no deadlock or the like[93]) company, to order a winding up solely to facilitate an investigation by a privately appointed liquidator (*ie*, no public inspector[94])? Whether the "enhanced investigations rationale" as a "sufficient" ground on its own will take root in Singapore jurisprudence will turn on future developments. Apart from its potential in cutting edge issues, as mentioned in the previous paragraph, there is also reason to be optimistic that this new category, if properly applied, will help address potential unfairness that may befall unsecured creditors. However, in so far as the new doctrine would interact with the increasingly complex area of insolvency law, the authors respectfully submit that more in-depth analysis as to how this novel

90 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [29].

91 For a summary by the law firm that acted for the petitioners in the Cayman Islands proceedings, see Adam Crane, "A Petitioner's Dream and a Company's Nightmare: The Compelling Case for the Winding Up of AAX Crypto Exchange Parent Company" *Atom Holdings* (11 July 2023) <https://www.bakerandpartners.com/insights/a-petitioners-dream-and-a-companys-nightmare/> (accessed 19 July 2024).

92 *Cf*, Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) s 125(1)(*e*).

93 Traditional circumstances recognised as justifying just and equitable winding up under s 125(1)(*i*) of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018).

94 *Cf*, Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) s 125(1)(*g*).

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category may impact other creditors and the entire insolvency regime is a question best left to colleagues with expertise in insolvency law.

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