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Developments in Singapore Company Law in 2020

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Abstract

Singapore's common law-origin corporate law regime ranks highly on corporate law and governance indices and is administered in part by superior courts served by judges with significant commercial expertise. As part of the Singapore Academy of Law's Annual Review of Cases, this Paper reviews decisions of the Singapore superior courts (comprising the High Court and the Court of Appeal) decided in 2020. The cases reviewed feature a wide range of issues with domestic and international significance, including private enforcement of directors' duties, corporate attribution, corporate veil piercing and shareholder disputes. This Annual Review will be useful for academics and lawyers who wish to stay up to date on legal developments in a leading Asian, common law jurisdiction, and on the reception of landmark common law cases in a leading Anglo-Commonwealth jurisdiction.

Keywords: Corporate law, Singapore, directors' duties, shareholder remedies, investor protection, enforcement, litigation, corporate contract

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I. Directors' duties

9.1 In *Sim Poh Ping v Winsta Holding Pte Ltd*,[1] a director submitted that he was not in breach of the no-conflict rule as he had not favoured his own interests over those of the plaintiff group since he had no interests in the defendant corporations to whom the opportunities had been diverted. This is an extremely narrow conception of the no-conflict rule and was rightly rejected by the Court of Appeal which pointed out that a breach of this duty can take place if the interests of a third party are preferred over those of the party to whom the duty is owed.

9.2 More significantly, the court helpfully clarified the approach to the issue of causation in relation to non-custodial breaches of a core fiduciary duty, these being the duty to act in good faith, not to make an unauthorized profit from the relationship, and not to be in a position of conflict. This was because the court said that the High Court had adopted different approaches to this issue in previous decisions. The Court of Appeal held that in such cases the plaintiff-principal must first establish that the fiduciary breached the duty and establish the loss sustained. Once this was done, the legal burden then fell on the fiduciary to rebut the presumption that the fiduciary's breach caused the loss. If the fiduciary is unable to prove that the principal would have suffered the loss in spite of the breach, the fiduciary must pay equitable compensation to the principal, such compensation being assessed at the upper limit by reference to the position the principal would have been if not for the breach.

9.3 In exceptional circumstances, directors may owe fiduciary duties to persons other than their companies. One well established situation where this is so is where the company is insolvent or near insolvency though it is more accurate to say that in these circumstances the duty to the company must take into account the interests of creditors as a whole instead of the shareholders collectively as in the case of a solvent company. This was reiterated in *Ho Pak Kim Realty Co Pte Ltd (in liquidation) v Ho Soo Fong*[2] where Audrey Lim J found that the defendant directors were in breach of their fiduciary duty to the company and its creditors as the company was insolvent or in a "parlous financial position", and the directors had *inter alia* failed to take reasonable steps to collect debts owing to the company and caused the books and records of the company to be destroyed to render collection difficult or impossible.

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1 [2020] 1 SLR 1199.
2 [2020] SGHC 193.

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9.4 *Ho Pak Kim* also contains some useful comments on the statutory duty of "reasonable diligence" in s 157(1) of the Companies Act ("the Act"),[3] a statutory duty which encapsulates the separate common law duty on directors to act with due care, skill and diligence. It is sometimes argued that the law in this area is overly rigid and that a 'one size fits all' standard of diligence or care cannot take proper consideration of the different types of companies and the variety of skills that are needed on boards of directors. This criticism is an oversimplification because the standard can be calibrated according to the facts of the case. What the law sets out is a minimum standard that it expects all directors to meet while other directors, as a result of their special skill or involvement within the company, will find that what is sufficient skill and care for them is set at a higher bar. In *Ho Pak Kim* the court reiterated what was said in previous cases that the standard of care and diligence owed by a director is not fixed and is a continuum depending on various factors such as the role of the director, the type of decision, and the size and business of the company.

9.5 In the present case, although one of the directors was non-executive, this did not mean he could simply be a "dummy" director. He was not a greenhorn to business or to the company's affairs. As a director, he was subject to a minimum standard of care to take reasonable steps to monitor the management of the company. This would entail some knowledge of the company's business activities and what assets and liabilities it had, even if he did not know the minute details. If he had taken some steps to monitor the company's management, he would have known that the company's main asset was the debt owing to it by related parties, which remained uncollected. Accordingly, he had not discharged the minimum objective standard of care required of him in monitoring the management of the company.

9.6 One must be careful to not overgeneralise cases beyond their specific facts, but it is suggested that the approach is a generally sensible one. The main role of non-executive directors is to monitor management. To do this they must take steps to have a reasonable understanding of the company, including its business, assets, prospects and challenges. Such knowledge need not be at the same level expected of executive directors but must be sufficient for the non-executive directors to effectively discharge their monitoring obligations. It is

[3] Cap 50, 2006 Rev Ed.

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unacceptable today (if it ever was) for non-executive directors to be passive bystanders and rubberstamps.

9.7 In *Innovative Corp Pte Ltd v Ow Chun Ming*[4] a director who resigned his directorship in order to take advantage of a maturing business opportunity that his company had been pursuing was found to have breached his fiduciary duties. Although there was some doubt over whether the company would have obtained the opportunity in view of the client's concerns over the competency of another director of the company, the decision is correct as it was incumbent on the defendant director to do all he could to try to retain the opportunity for the company. He did not appear to have done so.

9.8 *Innovative Corp* is also useful for its acceptance of the proposition that where a company's board of directors had expressly considered and rejected an offer, a director's subsequent decision to form a company to take up the offer was not in breach of the director's fiduciary duties. This proposition was thrown in doubt in *Traxiar Drilling Partners II Pte Ltd v Dvergsten, Dag Oivind*.[5]

II. Directors' disqualification

9.9 The Court of Appeal had to consider s 155A of the Act in *Kardachi, Jason Aleksander v Attorney-General*.[6] This provision is a relatively recent addition to the Act having only come into force on 3 January 2016. It provides that a person may be disqualified from being a director or be concerned in any way in the management of a company where such person was a director of a company that had been struck off the register under s 344 of the Act, and who "within 5 years immediately before the date on which [such company] was struck off" was a director of 2 other companies whose names had been struck off the register under the said section. The disqualified director applied inter alia for leave under s 155A(3) of the Act to act as a director. His application was dismissed and he filed an appeal.

9.10 One question before the Court of Appeal was whether the first two companies had to be struck off within a five-year period immediately before the date the third company was struck off, or within a five-year period ending on the date the third company was struck off.

4 [2020] 3 SLR 943.
5 [2019] 4 SLR 433.
6 [2020] 2 SLR 1190.

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The question arose because 4 companies had been struck off within a five-year period and the second and third companies were struck off on the same date. The disqualified director argued that the disqualification should therefore have commenced from 8 January 2018, the date when the second and third companies were struck off instead of 6 August 2018 when the fourth company was struck off. While on 8 January 2018 three companies would have been struck off under s 344 of the Act, there was only one company prior to such date that had been struck off under this section. On a literal interpretation, the fact that only one company had been struck off prior to the date when the second and third companies were struck off led the court to hold that s 155A was not applicable on 8 January 2018 and the proper date from which the disqualification took place was 6 August 2018.

9.11 On the issue of whether leave should be given to the appellant to act as a director, the court outlined three non-exhaustive considerations. These are the applicant's capacity for compliance in the future; whether there were any exculpatory reasons for the applicant's non-compliance with the Act; and whether the applicant has provided an explanation of why it was necessary for him to be a director of the specific company or group of companies together with sufficient detail of these entities for which leave was being sought. Taking these considerations into account, the court denied the leave application.

9.12 *Bijynath s/o Ram Nawal v Innovationz Pte Ltd*[7] was another decision involving director disqualification. The disqualification had been on the basis that the applicant was listed as the director of three companies which had been struck off the register pursuant to s 344(1) of the Act. Subsequently, one of the companies was restored to the register and the applicant brought an application under s 344G(3) of the Act that he should be placed "in the same position (as nearly as may be) as if the company had not been dissolved or its name had not been struck off the register." Ang Cheng Hock J granted the application on the basis that the court had a very broad discretion to do what was "just". In the circumstances, the failure to file the company's annual returns had been caused by the other directors going incommunicado and there was nothing to suggest this could have been foreseen by the plaintiff at the time of his appointment as nominee director. There were also no realistic preventative measures which the plaintiff could have taken to avoid the striking off. The plaintiff's continued disqualification would also have imposed significant hardship as it would have prevented him being a director of his own

7 [2020] 4 SLR 534.

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law practice. His conduct did not ultimately amount to such a serious lapse in corporate behaviour which justified disqualification on the grounds of general deterrence.

III. Attribution

9.13 The issue of when a director's acts or knowledge should be attributed to the company in transactions that are illegal have created difficulty in recent years. This issue arose again in *Red Star Marine Consultants Pte Ltd v Personal Representatives of Satwant Singh*.[8] The deceased had obtained a large amount of money from the appellant company which was now suing to recover the same. The deceased had admitted taking the monies but alleged that this was with the consent and knowledge of the controlling shareholder and director, Mr Singh, for whom she worked as a secretary. As such, his knowledge should be attributed to the appellant thereby precluding the appellant from claiming the monies as the loss should lie where it falls in cases involving illegality.

9.14 The Court of Appeal accepted that Mr Singh together with the deceased were parties to the fraud perpetrated on the appellant. The court decided further that Mr Singh's knowledge should be attributed to the appellant based on the third of the three distinct rules of attribution developed in *Meridian Global Funds Management Asia Ltd v Securities Commission*[9] and adopted by the Court of Appeal in *Ho Kang Peng v Scintronix Corp*.[10] This third rule states that courts may fashion special rules of attribution where a rule that is intended to apply to companies may otherwise be defeated without such a special rule of attribution, as the other rules of attribution do not apply. Such rules are context-specific and their content should be determined based on the language and purpose of the substantive law upon which potential liability is to be established. In the present case the defence of illegality is applicable to companies and Mr Singh, who owned almost all the shares in the appellant, would effectively be the beneficiary of the appellant's claim succeeding. In such a situation, the court would be lending its aid to Mr Singh to recover the fruits of his illegal conspiracy with the deceased to defraud the appellant of its monies. On this basis, Mr Singh's knowledge was attributed to the company making it a participant in the illegality and therefore unable to recover from the Estate of the deceased.

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8 [2020] 1 SLR 115.
9 [1995] 2 AC 500.
10 [2014] 3 SLR 329.

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9.15 A brief observation may be made in relation to the first two rules of attribution. We agree that the primary rules of attribution did not apply as there were no acts in accordance with the corporate constitution or general company law to show that the fraudulent acts were approved by the company. In relation to the general rules of attribution that are based on the rules of agency and vicarious liability, the court stated they did not apply as the appellant must itself be responsible for the wrong. Presumably this was not the case as any wrong was committed by its director, Mr Singh, and the deceased. In saying this the court followed the approach in *Scintronix*.[11] This aspect of *Scintronix* should be revisited. It was based on a statement in *Stone & Rolls Ltd v Moore Stephens* that the defence of *ex turpi causa* "will only apply where the claimant was personally at fault and thus where his responsibility for wrongdoing was primary rather than vicarious".[12] It is suggested that all *Moore Stephens* intended to preclude were the general rules of attribution based on vicarious liability in tort. This is sensible as vicarious liability arises based on the tortious act of a servant without any wrongdoing by the master and it would seem unduly harsh to allow the *ex turpi causa* defence to be used against companies simply because the doctrine of vicarious liability applied. However, there is no reason why acts or knowledge cannot in cases involving illegality be attributed to a principal where the agent was acting within actual or apparent authority, particularly in cases of corporate principals that can only act through human actors. Nevertheless, in the present case we agree that the second rule of attribution did not apply as the deceased, given her close relationship to Mr Singh as his personal secretary, must have known that he did not have authority to transfer the monies to her and thus there was no primary liability for the appellant based on agency.

IV. Corporate constitution

9.16 It is well known that pursuant to s 39(1) of the Act, a company's constitution constitutes a contract between the company and its members and between the members *inter se*. In *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV*,[13] the Court of Appeal held that the appellants had a good arguable case that its former directors were bound to observe the appellants' constitutions. Clearly s 39(1) could not be the basis for this as

11 [2014] 3 SLR 329 at [66].
12 [2009] 1 AC 1391 at [27].
13 [2020] 1 SLR 226.

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directors are not mentioned as parties to such statutory contract. Rather, the court took the view that by giving their consent to act as directors of the appellants, the former directors had on the facts agreed that they would serve the appellants based on the terms of their constitutions. Given that the constitutions in question contained provisions relating to the appointment, duties and powers of the company's directors, the only reasonable inference was that the directors must have agreed with the appellants that their terms of service were to include the appellants' constitutions. The court could infer that the parties intended to contract on the basis of the constitution if there were no written or express terms of appointment.

9.17 With respect, the result is correct. The directors in question appeared to be executive directors with contracts of service and the relevant terms of the corporate constitution could be implied into such a contract of service. Such implication may be by way of law as a standard term founded on public policy.[14] However, not all directors are in a contractual relationship with their companies. Many directors are appointed on a non-executive basis to provide independent oversight of companies. In such a situation, an alternative analysis that will lead to the same result is that directors must exercise their powers for proper purposes and this includes acting in accordance with the corporate constitution. If they do not do so, they are in breach of their fiduciary duty. This analysis is also applicable to directors with terms of service.

V. Derivative actions

9.18 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?

9.19 Under normal circumstances, this question is answered easily through the regular corporate decision-making process. Ordinarily, company law vests the board of directors with

[14] On implied terms in law and the distinction with implied terms in fact, generally see Edwin Peel, *Treitel's Law of Contract* (Sweet & Maxwell, 15th ed, 2020) 6-050-6-082; Tan Cheng-Han, "Implied Terms in Undisclosed Agency" (2021) 84 MLR 532.

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the power to make management decisions for the company.[15] 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.

9.20 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.

9.21 From the time of *Foss v Harbottle*,[16] Commonwealth courts have grappled with this intractable problem. Their solution has been to allow individual shareholders, in circumstances where such an acute conflict of interest arises, to pursue an action for, and on behalf of, the company against the wrongdoing directors, by circumventing the regular corporate decision-making process. 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).[17]

9.22 In this light, it is clear that derivative actions are essential for good corporate governance. Indeed, without them directors' duties would essentially be rendered nugatory for all controlling shareholder-directors and largely ineffective for wrongdoing directors in companies with widely dispersed shareholders. It is, however, equally clear that by allowing a single shareholder to thrust an entire company into potentially harmful litigation, the derivative action presents serious corporate governance risks. These risks are heightened by the fact that individual shareholders do not normally owe any duties to the company, often lack critical

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15 See s 157A of the Companies Act (Cap 50, 2006 Rev Ed) and reg 77 of the First Schedule to the Companies (Model Constitutions) Regulations 2015 (S 833/2015) (Model Constitution for a Private Company Limited by Shares).

16 (1843) 67 ER 189.

17 See *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 1, at p 8 for more details.

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information about the company's potential lawsuit, and may be using the derivative action to serve their own interests, which can diverge, sometimes significantly, from the company's interests. It is in this context that common law courts have strived to develop an effective filter that both weeds-out abusive, wealth-reducing, derivative actions and at the same time allows legitimate, wealth-maximising ones to proceed.[18]

9.23 The filter developed in Singapore and throughout the Commonwealth has been to require potential shareholder-plaintiffs to convince the court to grant leave for the right to pursue a derivative action. Historically, to do this, potential shareholder-plaintiffs had to establish that the wrongdoing director committed "fraud on the minority" – a concept which is vexed with ambiguity and has often made derivative actions inaccessible even for aggrieved minority shareholders.[19] The law in Singapore remained unsettled on the precise criteria for establishing "fraud on the minority".[20] However, as discussed below, recently the High Court in *Hou Chao (In his personal capacity and also in his representative capacity on behalf of Yong Zhen Yuan Pte Ltd) v Gu Xiaolan*[21] helpfully provides some additional clarity into the test for establishing "fraud on the minority" – but the precise test still remains unsettled.

9.24 In 1993, the problems with the "fraud on the minority" filter inspired the Singapore Parliament to enact a new statutory procedure – s 216A – which was designed to remove the obstacles created by the common law and, in turn, provide an effective remedy for aggrieved minority shareholders.[22] Singapore was ahead of the curve, but over the last two decades, the UK and most other leading Commonwealth (and many civil law) countries have similarly, provided for a statutory derivative action in their companies acts to facilitate the protection of aggrieved minority shareholders.[23]

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18 See *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 1, at p 2 for more details.

19 See *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 1, at pp 66–72 for more details.

20 See *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 at [54]–[55].

21 [2021] 3 SLR 704.

22 See *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 8, at pp 323-324; 336-341.

23 See Samantha S Tang, "The Anatomy of Singapore's Statutory Derivative Action: Why do Shareholders Sue – or Not?" (2020) 20 JCLS 327, 332–336. See *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 1, at p 2 for more details.

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9.25 However, despite Singapore's first mover advantage on the statutory derivative action, two related idiosyncrasies persist in its derivative actions regime that have kept the common law derivative action – and, in turn, the much-criticised "fraud on the minority" test – alive. First, distinct from other Commonwealth jurisdictions, Singapore's common law derivative action was not expressly abolished with the introduction of the s 216A statutory derivative action.[24] Second, until 2015, Singapore's statutory derivative action did not apply to foreign-incorporated companies or companies listed on the Singapore stock exchange.[25] As such, the vexed common law derivative action remained very much alive in Singapore.

9.26 On 1 July 2015, s 216A was extended to all Singapore-incorporated companies – regardless of whether they are listed.[26] However, the amendment did not extend s 216A to foreign-incorporated companies. As such, the common law derivative action remains the only avenue for shareholders in foreign-incorporated companies to pursue a derivative action.[27] The inability for foreign incorporated companies to pursue a s 216A statutory derivative action explains why the common law derivative action decisions in Singapore have traditionally involved foreign incorporated companies.[28]

9.27 As the common law derivative action was not abolished, shareholders in a Singapore incorporated company can still choose to pursue a common law derivative action, even though they also can pursue a statutory derivative action under s 216A. This "choice" has traditionally been seen by leading academics and the court as more of a technicality, than a difficult strategic decision, as s 216A provides shareholders with an easier path to succeed in being granted leave to pursue a derivative action.[29] Indeed, the reason s 216A was adopted was to overcome the

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24 See *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 8, at pp 331 for more details.

25 Dan W Puchniak & Tan Cheng Han SC, "Company Law" (2015) 169 SAL Ann Rev 255 at 263–264. For the legislative history of Singapore's idiosyncratic decision to initially exclude listed companies from the ambit of s 216A, see Samantha S Tang, "The Anatomy of Singapore's Statutory Derivative Action: Why do Shareholders Sue – or Not?" (2020) 20 JCLS 327, 337–340.

26 Companies (Amendment) Act 2014, Act 36 of 2014, s 146(a). The amended provisions on the statutory derivative action came into force on 1 July 2015: Companies Amendment Act 2014 (Commencement) Notification 2015, No S 354 (2015), s 2.

27 Dan W Puchniak & Tan Cheng Han SC, "Company Law" (2015) 196 SAL Ann Rev 255 at 263–264.

28 See e.g. *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR(R) 197 (common law derivative action brought in respect of a Hong Kong incorporated company).

29 See *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 8, at pp 323–324; 336–341; Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 2nd Ed, 2007), at p 324; *Walter Woon on Company Law* (Tan Cheng Han SC gen ed) (Sweet & Maxwell, Rev 3rd Ed, 2009), at para 9.73.

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hurdles created by the common law "fraud on the minority" test.[30] As such, it is difficult to see why any shareholder-plaintiff would choose to jump over hurdles to meet a more onerous standard, when s 216A provides a clearer path to being granted leave. As concisely articulated by the Court of Appeal in *Petroships Investment Pte Ltd v Wealthplus Pte Ltd*:[31] "What does appear clear, however, is that, as a matter of ***practicality***, it does not seem efficient or effective for a party to initiate a common law derivative action when a statutory derivative action pursuant to s 216A is available."[32]

9.28 Prior to 2020, this logic comported with reality as the authors were unaware of a single case where a common law derivative action had been pursued when a shareholder had the option of pursuing a s 216A. However, in 2020, this changed when in two unrelated cases, surprisingly, shareholder-plaintiffs pursued common law derivative actions when s 216A derivative actions were available. These cases confirmed the prevailing view that shareholder plaintiffs in Singapore incorporated companies technically can "choose" between pursuing a s 216A statutory derivative action or a common law derivative action. However, in both cases, the leave applications were forcefully rejected by the court. As such, these cases reaffirm that making the "choice" to pursue a common law derivative action when a s 216A is available will likely be made at the shareholder-plaintiff's peril.

9.29 In *New Ping Ping Pauline v Eng's Noodles House Pte Ltd*[33] a minority-shareholder-plaintiff in a Singapore incorporated company claimed that two defendant-directors of the Company, who together held the remaining majority of its shares, engaged in a conspiracy with the other defendants to injure the Company and, in the process, breached their fiduciary duties to the Company. Although the claims brought by the minority-shareholder-plaintiff were pursued on behalf of the Company, the plaintiff did not seek leave to bring a derivative action. In turn, two defendants made an application to strike out the action due to the lack of leave. However, the Assistant Registrar dismissed the application and the defendants chose not to appeal the decision.

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30 See *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 8, 330; Samantha S Tang, "The Anatomy of Singapore's Statutory Derivative Action: Why do Shareholders Sue – or Not?" (2020) 20 JCLS 327, 336.

31 [2016] 2 SLR 1022.

32 *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1022 at [71].

33 [2020] SGHC 271.

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9.30 At trial, the plaintiff's primary position was that leave from the court was not required to pursue a common law derivative action.[34] Based on "well established"[35] jurisprudence and clear academic commentary, Valerie Thean J reaffirmed that leave is indeed required to pursue a common law derivative action. The authors hope that this clear reaffirmation that leave is required – which has been a foundational requirement throughout the history of the derivative action in the Commonwealth for the policy reasons explained above – will dissuade any future attempts by shareholder-plaintiffs to pursue a claim on behalf of the company (i.e., a derivative action) without leave.

9.31 Having reaffirmed that leave is required, Thean J considered arguments by the parties regarding the stage in the proceeding that the plaintiff ought to seek leave. Plaintiff's counsel suggested orally that the judge should simply grant leave on the first day of trial. Her Honour rejected this argument, observing that plaintiff's counsel had raised the issue of leave "too casually" [36] as he made no formal application for leave and his written opening statement did not mention the issue at all. The defendants argued that leave could be addressed at the end of trial. Her Honour also rejected this argument on the basis that the purpose of leave is to avoid the wasted time and costs of a trial being brought by a party without standing.[37] As such, Thean J held that a shareholder should seek leave prior to trial and that a failure to do so would result in the plaintiff being responsible for the costs of an unsuccessful action. With respect, this makes sense as allowing a trial to be commenced, without the plaintiff first having obtained the requisite leave, unnecessarily risks wasting time and costs if leave is denied at trial.

9.32 Thean J further held that if a plaintiff commences a common law derivative action without the requisite leave, the defendant may bring an application to strike out the action or have it dismissed at an interlocutory stage under the Rules of Court.[38] However, if a defendant does not successfully avail itself of these remedies, then the issue of whether the plaintiff can sustain a common law derivative action will be considered as an issue in the trial. As noted above, the two defendants did not appeal the Assistant Registrar's decision to dismiss their application to strike out the plaintiff's action for lack of leave. In addition, the other defendants did not challenge the plaintiff's lack of leave at all. As such, Thean J held that the defendants

[34] *New Ping Ping Pauline v Eng's Noodles House Pte Ltd* [2020] SGHC 271 at [46], [52].
[35] *New Ping Ping Pauline v Eng's Noodles House Pte Ltd* [2020] SGHC 271 at [48].
[36] *New Ping Ping Pauline v Eng's Noodles House Pte Ltd* [2020] SGHC 271 at [52].
[37] *New Ping Ping Pauline v Eng's Noodles House Pte Ltd* [2020] SGHC 271 at [54].
[38] Cap 322, R 5, 2014 Rev Ed.

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had conceded their case on the issue of leave – a stark reminder that defendants should vigorously pursue their available remedies under the Rules of Court to dispose of a common law derivative action that has been commenced without leave. Otherwise, they will have to endure the time and costs of defending the entire action to its end – with the issue of whether the plaintiff has the right to sustain a common law derivative action being considered as an issue at trial.[39] However, in the event that future poorly advised defendants fail to do so, we respectfully suggest that it would also be open to the court to rule *sua sponte* – and prior to trial – on the issue of leave.[40]

9.33 In considering whether the plaintiff had the right to sustain a common law derivative action, Thean J reiterated the two-part test set out in *Sinwa SS (HK) Co Ltd v Morten Innhaug*[41] that a plaintiff-shareholder must establish to pursue a common law derivative action:[42] (1) the company must have a reasonable case against the defendant(s); and, (2) the shareholder-plaintiff has *locus standi* to bring the derivative action in the name of the company as she falls within the "fraud on the minority" exception to the proper plaintiff rule. Based on the finding that the defendants had not engaged in a conspiracy nor breached their fiduciary duties, Thean J held that the company did not have a reasonable case against the defendants. Moreover, there was no evidence that the defendants committed a "fraud on the minority". As the common law derivative action was the basis for all the plaintiff's claims, this finding disposed of the plaintiff's claims in their entirety. With respect, the reaffirmation of the two-part test in *Sinwa* is helpful as it confirms that this is the test that shareholders must meet to pursue a common law derivative action which – as highlighted in this decision – should normally be dealt with in a leave application brought by the shareholder-plaintiff prior to trial. However, as there was clearly no evidence of "fraud on the minority" in this case, the court unfortunately did not have the opportunity to clarify the vexed question of what exactly amounts to "fraud on the minority" – an important point of law that remains unsettled.

9.34 A final curiosity in this case is why the plaintiff decided to pursue her claim as a common law derivative action when the Company was incorporated in Singapore and,

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39 *New Ping Ping Pauline v Eng's Noodles House Pte Ltd* [2020] SGHC 271 at [54].

40 *See*, Rules of Court, O 14 r 12, which allows the Court to act sua sponte or upon application by any party to determine an issue of law (r 12(1)). The Court is free to dismiss the entire matter if there is no *locus standi* (r 12(2)).

41 [2010] 4 SLR 1.

42 *New Ping Ping Pauline v Eng's Noodles House Pte Ltd* [2020] SGHC 271 at [116].

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therefore, a s 216A statutory derivative action would have been available to the plaintiff to pursue her claims on behalf of the Company. As highlighted above, leading academics and the court have made it clear that it almost always makes sense for a shareholder to pursue a s 216A derivative action when it is available, rather than a common law derivative action, as s 216A provides a clearer path for the plaintiff to obtain leave. As the plaintiff (incorrectly) argued that leave was not required to pursue a common law derivative action, it may have been that the plaintiff had assumed (incorrectly) that the common law derivative action was the strategically better option compared to s 216A, which does explicitly require leave to be obtained. However, based on Thean J's reaffirmation that leave is required to pursue a common law derivative action, this case comports with the consensus among leading academics and the case law that s 216A will almost always be the logical course of action, provided it is available.

9.35 *Hou Chao*[43] provides another example of a minority shareholder-plaintiff who curiously chose to pursue a common law derivative action when a s 216A derivative action was available. In this case, a husband and wife, who were embroiled in divorce proceedings in China, were minority shareholders and directors in a Singapore incorporated Company, in which their daughter was a director and the majority shareholder. Among other claims, the husband brought a common law derivative action on behalf of the Company claiming that: (1) his wife acted fraudulently and/or breached her fiduciary duties by wrongfully transferring funds from the Company to its subsidiary; and, (2) his wife and daughter acted fraudulently and breached their fiduciary duties by causing the Company to not pay a supplier and to then cause the Company to defend a lawsuit brought by the supplier for failing to pay the debt. The wife and daughter made an application to strike out the derivative action, which was granted by the Assistant Registrar and subsequently appealed by the husband. S Mohan JC upheld the decision of the Assistant Registrar finding that the transfer of funds to the Company's subsidiary did not result in loss to the Company and that the mother and daughter could not have breached their fiduciary duties by causing the Company to defend a claim against it.

9.36 In arriving at his decision, Mohan JC made four findings which helpfully clarify the law governing derivative actions in Singapore. First, His Honour confirmed the widely held consensus, explained above, that although a shareholder in a Singapore incorporated company may technically be able to choose to pursue a common law derivative action, almost always

[43] [2021] 3 SLR 704.

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the logical course of action is for a shareholder to pursue a s 216A derivative action. Citing the Court of Appeal's decision in *Petroships,* Mohan JC found that s 216A provides "a 'clear, simplified and efficient procedure' as compared to the 'convoluted course of a common law derivative action'".[44] As such, His Honour found it "difficult to appreciate why the plaintiff had eschewed the statutory derivative action in favour of commencing a common law derivative action".[45] This reaffirmation that s 216A is the logical course of action for shareholders in a Singapore incorporated company is helpful to prevent shareholders erroneously pursuing common law derivative actions when s 216A is available.

9.37 Second, Mohan JC rejected the plaintiff's argument that a good reason for pursuing a common law derivative action, instead of a s 216A derivative action, is that it would obviate the need for the plaintiff to give notice of the derivative action to the company's directors prior to making a leave application, which is required by s 216A(3)(a). Although giving such notice is not a requirement to bring a common law derivative action, His Honour astutely noted that s 216A(4) allows a complainant to apply for leave to dispense with the notice requirements under s 216A(3)(a) – rendering this ostensible advantage of a common law derivative action nugatory.[46] In addition, it should be noted that it may be a wise strategic decision to provide notice before commencing a common law derivative action as this would provide evidence that the plaintiff has 'clean hands' – which is a requirement for being granted leave to pursue a common law derivative action. This further reinforces the point that there is no conceivable reason why a shareholder in a Singapore incorporated company, who has access to a s 216A derivative action, would choose to pursue a common law derivative action.

9.38 Third, citing the Court of Appeal's decision in *Petroships,* Mohan JC inferred that the lack of an obvious reason for a plaintiff to choose to bring a common law derivative action, when a 216A derivative action is available, suggests that the common law derivative action may have been brought for an ulterior motive. His Honour found that the husband had an ulterior motive – noting, among other things, that the husband had commenced the common law derivative action about a month after his wife had commenced divorce proceedings against him in China. In this case, the behaviour of the husband and timing of the action might plausibly

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44 *Hou Chao v Gu Xiaolan* [2021] 3 SLR 704 at [30].
45 *Hou Chao v Gu Xiaolan* [2021] 3 SLR 704 at [31].
46 On the issues arising from excusing notice, see eg Alan K Koh, "Excusing Notice under Singapore's Statutory Derivative Action" (2013) 14 Austl J Asia L 3, pp 1–15, at https://ssrn.com/abstract=2368634.

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support a conclusion that the husband had an ulterior motive. However, with respect, it is questionable whether any inference about an ulterior motive can normally be drawn from a shareholder-plaintiff's seemingly illogical decision to pursue a common law derivative action, when s 216A is available. If the husband's ulterior motive was retribution against his wife, bringing a s 216A action, rather than a common law derivative action, would have given him a more powerful "axe to grind"[47] as it would have had a greater chance of success. Considering Hanlon's Razor: it seems at least arguable that the more plausible explanation for the decision to bring a common law derivative action when a s 216A is available, may simply be that it was the result of poor advice on litigation strategy by plaintiff's counsel. This is because pursuing a common law derivative action, when a s 216A is available, is normally against the plaintiff's interests – making it unlikely that it would be driven by any motive of the plaintiff, ulterior or otherwise.

9.39 Fourth, Mohan JC reaffirmed that a shareholder-plaintiff must satisfy the two-part test laid down in *Sinwa* for the court to grant leave for a common law derivative action: (1) the company must have a reasonable case against the defendant(s); and, (2) the shareholder-plaintiff has *locus standi* to bring the derivative action in the name of the company as she falls within the "fraud on the minority" exception to the proper plaintiff rule. With respect to part-one of the test, Mohan JC held that the shareholder-plaintiff must demonstrate "that the company has, on a *prima facie* basis, a reasonable or legitimate case against the defendant for which the company may recover damages or otherwise obtain relief".[48] Stated differently, "the leave application will be denied if it appears that the intended action is frivolous or vexatious or is bound to be unsuccessful".[49] Part-one of the test makes sense as a derivative action serves no purpose unless the company itself has a cause of action. However, the shareholder-plaintiff can only be expected to establish this on a *prima facie* basis; requiring this to be proven on a balance of probabilities at the leave stage would be illogical as it would be tantamount to requiring a trial of the company's claims to get leave to repeat the same trial.

9.40 With respect to part-two of the test, Mohan JC held that to fall within the "fraud on the minority exception" the shareholder-plaintiff must establish two elements: (1) "control"; and,

47 *Hou Chao v Gu Xiaolan* [2021] 3 SLR 704 at [74].
48 *Hou Chao v Gu Xiaolan* [2021] 3 SLR 704 at [37].
49 *Hou Chao v Gu Xiaolan* [2021] 3 SLR 704 at [37].

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(2) "fraud".[50] There was no dispute that the plaintiff had established the element of control – which was clear as the wife and daughter controlled a majority of the shares in the Company. In terms of "fraud", the plaintiff recognized that the definition of "fraud" is presently unsettled under Singapore law. However, given that the plaintiff had failed to pass part-one of the common law derivative action test, His Honour held that this case did not turn on the precise definition of "fraud". In addition, regardless of how fraud was defined, given the facts in this case, the plaintiff would have failed to establish "fraud". As such, Mohan JC declined to opine on the definition of "fraud" as it was not dispositive in this case. With respect, although his Honour's approach made sense in this case, the fact remains that the core element for establishing "fraud on the minority" remains unsettled under Singapore law – further reinforcing the point that when a s 216A derivative action is available a shareholder-plaintiff should choose it to avoid the intellectual quagmire of the "fraud on the minority" test.

9.41 Finally, Mohan JC reaffirmed that as the common law derivative action is an equitable remedy the court has the discretion to not grant leave, even when the plaintiff has satisfied the two-part test, if the plaintiff lacks "clean hands". In turn, the plaintiff seeking to "maintain a derivative action must do so in the best interests of the company and not for any ulterior purpose".[51] As explained above, Mohan JC found that the plaintiff had indeed pursued the common law derivative action for an ulterior purpose. Therefore, his Honour held that even if the two-part test was satisfied, he would not have exercised his discretion to grant leave in this case. There is no doubt that the "clean hands" requirement must be met as the common law derivative action is an equitable remedy. However, with respect, we suggest that the standard for denying leave due to a lack of "clean hands", when the two-part *Sinwa* test has been satisfied, should be used only in exceptional circumstances. This is because the result of such a decision will likely be that the corporate wrongdoers would benefit from their wrongdoing with impunity and that the innocent company and its stakeholders would suffer without redress. However, in this case, Mohan JC's finding of a lack of "clean hands" was unobjectionable in the outcome as leave should have been denied in any event given that neither of the two-parts of the *Sinwa* test were established.

[50] *Hou Chao v Gu Xiaolan* [2021] 3 SLR 704 at [58].
[51] *Hou Chao v Gu Xiaolan* [2021] 3 SLR 704 at [70].

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9.42 From the discussion above, it should be settled that when a shareholder in a Singapore incorporated company wants to pursue a derivative action they should do so by applying for leave under s 216A (rather than pursuing a common law derivative action). According to 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 his 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 "fraud on the minority" test, for the s 216A filter to function effectively, courts must provide detailed guidance on how each of these three requirements should be applied in practice.

9.43 In *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd*,[52] the plaintiff was the executrix of the estate of her late husband who had been a shareholder and director of a Singapore incorporated Company. The plaintiff filed a s 216A leave application alleging that the directors of the Company had breached their fiduciary duties by failing to cause the Company to collect unpaid rent from a related company since 2013. Valerie Thean J granted the plaintiff leave in a decision upheld by the Court of Appeal with no written grounds of decision rendered.

9.44 In arriving at the decision, Thean J made two important findings which provide further guidance on how s 216A should be applied in practice. First, Her Honour reaffirmed that the "good faith" and "prima facie in the interests of the company" requirements, which must be established by the plaintiff to succeed in a s 216A leave application, are related. Although the relationship between the two requirements is well established, Thean J's explanation for why it makes sense for the court to consider the interests of the company requirement first, before considering the good faith requirement, is helpful. This approach comports with the emphasis that the case law has put on the interests of the company requirement as the focal point of an s

[52] [2020] 5 SLR 1374.

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216A application. However, as the good faith requirement is listed before the interests of the company requirement in s 216A, this approach required an explanation. Thean J reasoned, based on the existing case law, that it would be difficult for a plaintiff to establish good faith without first establishing that the claim is in the interests of the company.[53] Relatedly, the plaintiff would likely (but not necessarily) be able to establish the good faith requirement by showing the claim was in the interests of the company. Stated simply, the interest of the company requirement is ordinarily dispositive of a s 216A leave application. This is evidenced by the fact that the authors are unaware of a single case where the court has denied a s 216A leave application based solely on "good faith" (i.e., in which the court also found that the claim was in the interests of the company).

9.45 Second, in finding that the plaintiff had satisfied the interests of the company requirement, Thean J rejected the defendant's argument that the costs of the proposed litigation would outweigh the quantum of the proposed claim. Her Honour reasoned that the argument could not be sustained in light of the plaintiff's undertaking to ensure that the Company would be entirely insulated from any legal costs of the action.[54] Moreover, in considering the good faith requirement, Her Honour reasoned that "while the defendants contended that this is a small claim, there would nevertheless be financial benefit to [the Company] because the plaintiff has undertaken to insulate it from all costs."[55]

9.46 With respect, the authors observe that by considering the plaintiff's agreement to insulate the Company from legal costs, the court has altered a core theoretical principle underpinning the derivative action. In cases where the company has a small claim, directors may honestly and reasonably decide that it is in the best interests of the company not to pursue the claim because the legal costs will be greater than the amount recoverable. If the plaintiff during the proceedings agrees to insulate the company from legal costs, the court could logically decide that what would have been a reasonable decision of the directors not to pursue a claim on behalf of the company, has been transformed into a claim that subsequently is in the interests of the company. This changes the theoretical underpinning of the derivative action as it provides an avenue to circumvent the normal corporate decision-making process when the

[53] For an alternative and more straightforward approach to good faith centred on the legal merits of the proposed claim, see Alan K Koh, "Searching for Good Faith in Singapore's Statutory Derivative Action" (2015) 36 Co Law 207.

[54] *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2020] 5 SLR 1374 at [26].

[55] *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2020] 5 SLR 1374 at [32].

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directors made an honest and reasonable decision not to pursue an action in the best interest of the company.

9.47 The benefit of such an approach is that it allows for claims of a *de minimis* economic value to be pursued on behalf of the company if a shareholder-plaintiff is willing to insulate the company from the risk of legal fees – which could serve to hold wrongdoing directors accountable for breaches of directors' duties regardless of the amount of damages caused by their breach. The cost is that wealthy shareholder-plaintiffs may theoretically use the company to settle a personal vendetta when the company may stand to gain little monetarily, though the requirement for good faith can prevent this. The greater risk is that such litigation may distract from actual business operations – which in this case was not a risk as the court found that the Company was solely an investment holding company. Nevertheless, if the financial ramifications of a *de minimis* claim is not in issue only because the shareholder-plaintiff is prepared to underwrite the cost of litigation, it is an open question whether leave should have been granted to pursue a derivative action against the third party debtor instead of the directors. The language of s 216A is broad enough to accommodate such claims.

9.48 *Tiong Sze Yin Serene v HC Surgical Specialists Ltd*[56] holds the distinction of being the first reported decision in which a shareholder has attempted to pursue a derivative action in a Singapore-listed company.[57] The significance of this case is underscored by the rarity of derivative actions in listed companies throughout the Commonwealth[58] and in most other jurisdictions around the world.[59] The reason for the dearth in derivative actions in listed companies is that it normally does not make financial sense for a shareholder in a listed company to pursue a derivative action.[60] This is because in all jurisdictions, shareholders are *prima facie* responsible for the cost of pursuing the derivative action, but if the derivative action

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56 [2020] SGHC 201.

57 As first observed by Puchniak and Varottil, "[h]owever, extraordinarily, we are unaware of even a single successful suit – or even a single suit ever filed – by a minority shareholder against a director of a listed company in the history of Singapore in relation to self-dealing or for any other wrongdoing whatsoever." Dan W. Puchniak & Umakanth Varottil, "Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm" (2020) 17 Berkeley Business Law Journal 1 at 13.

58 Samantha S Tang, "The Anatomy of Singapore's Statutory Derivative Action: Why do Shareholders Sue – or Not?" (2020) 20 JCLS 327, 342–347.

59 See *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 1, at pp 19–23.

60 See *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 1, at pp 19–23.

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succeeds, the damages are paid to the company (not the shareholders).[61] As a result, derivative actions in listed companies around the world generally only occur when they are driven by contingency fee lawyers or shareholders who decide to pursue the derivative action for reasons other than financial gain.[62] As contingency fees are not permitted in Singapore,[63] it is unsurprising that this case was driven by a shareholder for reasons other than financial gain.

9.49 In *HC Surgical*, the Company, which is listed on the Catalist Board of the Singapore Stock Exchange and involved in the medical services industry, entered into an agreement to acquire a portion of another company ("Target Company") in the same industry. The plaintiff alleged, among other things, that the surgeon who owned and managed the Target Company ("Managing Surgeon") exchanged WhatsApp messages with another doctor ("Other Doctor"), with whom she had an intimate affair, about actual or potential sexual exploits involving the plaintiff, other women, and one of the Managing Surgeon's patients. The Other Doctor filed a police report alleging that the plaintiff threatened to disclose the WhatsApp messages to his family unless he paid her $10,000. The plaintiff lodged a Complaint against the Managing Surgeon and the Other Doctor with the Singapore Medical Council ("SMC") alleging that the Other Doctor took advantage of the doctor-patient relationship to advance an intimate relationship with her and that the Other Doctor and Managing Surgeon had colluded to take advantage of other vulnerable female patients. The plaintiff forwarded a text of the Complaint to persons whom she believed were the superiors or colleagues of the Managing Surgeon and the Other Doctor.

9.50 The Managing Surgeon informed the Company's Executive Director and the Chief Executive Officer ("CEO") that the plaintiff was making allegations of sexual misconduct against him and that he had filed a Defamation Action against the plaintiff. The CEO asked the Managing Surgeon to keep him updated and informed the Company's board about the situation. The Company's board was of the view that the SMC investigations should be allowed to take their course and asked the CEO to keep them updated. Among other things, the CEO followed-up with the Managing Surgeon and updated the Company's board as the situation progressed.

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61 See *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 1, at pp 7, 19–23.

62 See *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 1, at pp 19–23.

63 Samantha S Tang, "The Anatomy of Singapore's Statutory Derivative Action: Why do Shareholders Sue – or Not?" (2020) 20 JCLS 327, 332–336.

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9.51 As the Target Company's financial performance was exceptional, the CEO proposed the Company's board to acquire more of the Target Company's shares and the board agreed as this would maximize the Company's profits. The Company entered into an agreement with the Managing Surgeon to purchase the remaining shares in the Target Company, subject to conditions based on the Target Company's performance. The Company announced the acquisition of additional shares in the Target Company to the SGX and issued a press release containing the same. Subsequently, the plaintiff contacted the Company's Chief Financial Officer ("CFO") and informed her of the lawsuit and the situation involving her and the Managing Surgeon. The CFO made the CEO and Managing Surgeon aware of the plaintiff's contact with the Company. The CEO did not see a need to meet up with the plaintiff as the Managing Surgeon had already informed him of the situation involving the plaintiff.

9.52 The day before the Company's AGM, the plaintiff bought 100 shares in the Company as she wanted to attend the AGM and express her concerns about the acquisition of the Target Company. The plaintiff turned up at the AGM but could not attend the AGM because she was not registered as a shareholder in time. The plaintiff met with the CEO and CFO after the AGM and was informed by the CFO that the decision to complete the acquisition of the Target Company was a commercial decision, which would be made by the Company's management. The Managing Surgeon obtained a Protection Order which, among other things, prohibited the plaintiff from communicating with the Managing Surgeon, the Company, and the Target Company's officers and employees. The police administered a warning to the plaintiff in lieu of prosecution for the offence of attempted extortion. The District Court dismissed the Managing Surgeon's Defamation Action and the Company took steps to protect the Managing Surgeon's patients pending the findings of the SMC.

9.53 The plaintiff filed an application for leave under s 216A to bring an action on behalf of the Company against the CEO for breaching his directors' duties in connection with the Company's acquisition of the Target Company. Chua Lee Ming J dismissed the application for leave, finding that the plaintiff had not satisfied the requirements for leave under s 216A. His Honour made several findings that helpfully clarify how s 216A should be applied in practice.

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9.54 First, his Honour reaffirmed that to satisfy the interest of the company requirement under s 216A the plaintiff must establish that the claim would be "legitimate and arguable" [64] and that the court may examine whether it would be in the practical and commercial interests of the company for the action to be brought. In addition, as a s 216A leave application is an interlocutory procedure, the "standard of proof required is low and only the most obviously unmeritorious claim will be culled".[65] His Honour found that the core of the plaintiff's claim was that the CEO breached his directors' duties because he failed to take into consideration the risks of acquiring the Target Company associated with the plaintiff's Complaint about the Managing Surgeon. However, his Honour found that the evidence was clear that the CEO and the Company's Board had carefully considered the complaint and ensured there were sufficient safeguards in the sale and purchase agreement for the Target Company to mitigate any risks. Based on the Board's consideration of the benefits and risks it concluded that the acquisition of the Target Company was in the Company's interests. His Honour held that it was not for the plaintiff, or indeed the Court, to second-guess the corporate decisions made by the Board. In turn, Justice Chua concluded that the plaintiff did not establish that there was a "legitimate and arguable" claim on behalf of the company that the CEO breached his directors' duties.

9.55 Second, his Honour reaffirmed that the onus is on the plaintiff to establish that they are pursuing a s 216A derivative action in good faith and that the test for good faith is subjective: whether the plaintiff honestly or reasonably believed that a good cause of action exists. In addition, it was reaffirmed that hostility alone does not amount to bad faith, but a plaintiff would lack good faith where her collateral purpose amounts to an abuse of process. Moreover, there may be a connection between the interest of the company and good faith requirements. Applying these principles to the facts in the case, his Honour held that the plaintiff's claim of an honest belief in the merits of the intended action should be disbelieved as she persisted in ignoring the fact that the Board had considered the risk of the Complaint. In addition, the plaintiff was not concerned about the interest of the Company as she was trying to stop the acquisition to punish the Managing Surgeon and CEO. As such, his Honour held that the plaintiff was "so motivated by vendetta, perceived or real, that [her] judgment will be clouded by purely personal considerations".[66]

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64 *Tiong Sze Yin Serene v HC Surgical Specialists Ltd* [2020] SGHC 201 at [49].
65 *Tiong Sze Yin Serene v HC Surgical Specialists Ltd* [2020] SGHC 201 at [49].
66 *Tiong Sze Yin Serene v HC Surgical Specialists Ltd* [2020] SGHC 201 at [76].

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9.56 Third, Chua J held that "the plaintiff was hardly the 'genuinely aggrieved shareholder' that s 216A is meant to protect"[67] as she merely became a shareholder by buying the minimal amount of shares so she could attend the AGM and tell the shareholders about the Complaint and Defamation Action. With respect, the authors caution that the mere act of purchasing shares for the strategic purpose of attending an AGM or bringing a s 216A derivative action should not be equated to bad faith; nor should it exclude a shareholder from being granted leave under s 216A on the basis that they are not a "genuinely aggrieved shareholder".

9.57 On numerous occasions, Singapore courts have cited *Richardson Greenshields of Canada Ltd v Kalmacoff*[68] with approval[69] – a case in which the Ontario Court of Appeal granted leave to pursue a derivative action to a shareholder who explicitly purchased a minimal amount of shares for the sole purpose of pursuing a derivative action that was in the company's interests. The present case is arguably distinguishable from *Richardson Greenshields* as the proposed action in *HC Surgical* was, according to Chua J, neither in the interests of the Company nor brought in good faith. However, the authors respectfully suggest that the court should welcome non-shareholders to become minimal shareholders if it is done to pursue claims that in good faith will benefit the interests of the company.[70] Such actions are likely to strengthen Singapore corporate governance by promoting private enforcement in listed companies.[71]

9.58 In addition, if Parliament wanted to foreclose such plaintiffs from pursuing s 216A derivative actions they could have adopted a contemporaneous ownership requirement or minimum shareholding requirement – which exist in other jurisdictions' statutory derivative actions, but which is not included in s 216A. However, no major Commonwealth jurisdiction has ever adopted a minimum shareholding requirement,[72] and derivative litigation involving

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67 *Tiong Sze Yin Serene v HC Surgical Specialists Ltd* [2020] SGHC 201 at [77].

68 (1995) 123 DLR (4th) 628.

69 Indeed, it established the "legitimate and arguable" standard: *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 at [28], [53]. See *Ma Wai Fong Kathryn v Trillion Investment Pte Ltd* [2020] 5 SLR 1374 at [35]; *Wong Lee Vui Willie v Li Qingyun* [2016] 1 SLR 696 at [34]; *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 at [23]; *Poondy Radhakrishnan v Sivapiragasam s/o Veerasingam* [2009] SGHC 228 at [20]; *Pang Yong Hock v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 at [16]; *Agus Irawan v Toh Teck Chye* [2002] 1 SLR(R) 471 at [8]; *Teo Gek Luang v Ng Ai Tiong* [1998] 2 SLR(R) 426 at [14].

70 This may well include other legitimate environmental, social, and governance ("ESG") concerns that add nuance to – or even take precedence – over narrower concerns with profit-maximisation.

71 There has been a dearth of private enforcement by shareholders even in private companies. See, Dan W. Puchniak & Umakanth Varottil, "Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm" (2020) 17 Berkeley Business Law Journal 1 at 13.

72 Samantha S Tang, "The Anatomy of Singapore's Statutory Derivative Action: Why do Shareholders Sue – or Not?" (2020) 20 JCLS 327, 332–336.

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listed companies remains extremely rare across the Commonwealth.[73] In Asia, the trend has also been towards lower barriers to entry for derivative suits in public or listed companies.[74] Accordingly, given a reality in which derivative actions have yet to function as intended as compensation or deterrence mechanisms in practically (at least) every major jurisdiction,[75] we would urge the utmost caution and the most rigorous preparatory research before any legislative amendments to s 216A ought to be considered.

VI. Oppression remedy

9.59 2020 yielded 6 cases resulting in written judgments: four from the High Court,[76] and two from the Court of Appeal.[77] In *Suying Design Pte Ltd v Ng Kian Huan Edmund*, the Court of Appeal turned its attention to, yet again, the distinction between corporate and personal wrongs. The facts of *Suying Design* may be stated simply. Ng, a shareholder-director, alleged that Tan, another shareholder-director, had siphoned monies from the company.[78] Ng alleged that Tan did so to reduce the value of Ng's shares after he had expressed an intention to exit from the company.[79] As is sometimes the case in closely-held companies operated on an informal basis, the company's accounts had been poorly handled, and documentary evidence of various financial transactions was unsatisfactory.[80]

9.60 The High Court found that Ng's oppression claim had been made out on the basis that Tan had misappropriated monies from the company.[81] The company was ordered to be wound up, a result with which the parties agreed.[82] In addition, both parties, their respective corporate

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73 See e.g. Andrew Keay, "Assessing and Rethinking the Statutory Scheme for Derivative Actions under the Companies Act 2006" (2016) 16 JCLS 39, 41; Félix E Mezzanotte, "The Unconvincing Rise of the Statutory Derivative Action in Hong Kong: Evidence from its First 10 Years of Enforcement" (2017) 17 JCLS 469; Jenifer Varzaly, "The Enforcement of Directors' Duties in Australia: An Empirical Analysis" (2015) 16 EBOR 281.

74 Kyung-hoon Chun, "Multiple Derivative Actions: Debates in Korea and the Implications for a Comparative Study" (2018) 15 Berkeley Business Law Journal 306 at 312 (on Korea); Wang Wen-yeu (王文宇), *Gongsifalun* (公司法論) [*Corporation Law*] (Taipei: Angle Publishing, 2018) 447 (reporting that the 2018 reforms in Taiwan lowered the shareholding percentage requirement from 3% to 1%).

75 *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 1.

76 *Lim Anthony v Gao Wenxi* [2020] SGHC 67; *See Eng Siong Ronnie v Sassax Pte Ltd* [2020] SGHC 96; *Ong Heng Chuan v Ong Teck Chuan* [2020] SGHC 161; *Ng Tang Hock v Teelek Realty Pte Ltd* [2020] SGHC 214.

77 *Suying Design Pte Ltd v Ng Kian Huan Edmund* [2020] 2 SLR 221; *Ascend Field Pte Ltd v Tee Wee Sien* [2020] 1 SLR 771.

78 *Suying Design Pte Ltd v Ng Kian Huan Edmund* [2020] 2 SLR 221 at [3].

79 *Suying Design Pte Ltd v Ng Kian Huan Edmund* [2020] 2 SLR 221 at [16], [42].

80 *Suying Design Pte Ltd v Ng Kian Huan Edmund* [2020] 2 SLR 221 at [67], [94]–[95], [103].

81 *Ng Kian Huan Edmund v Suying Metropolitan Studio Pte Ltd* [2019] SGHC 56 at [218], [363].

82 *Ng Kian Huan Edmund v Suying Metropolitan Studio Pte Ltd* [2019] SGHC 56 at [218], [363].

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vehicles, and the company, were ordered to execute various payments to return the misappropriated funds to the company and resolve discrepancies in the company's accounts.[83] The defendants appealed to the Court of Appeal to challenge the High Court's 'findings' relevant to the oppression claim.[84] The Court of Appeal reversed the trial court's decision in part,[85] holding that Ng had failed to establish that Tan had engaged in misappropriation amounting to shareholder oppression.[86]

9.61 Insofar as the Court of Appeal found that misappropriation had not taken place and therefore oppression was not established on the facts, the decision on the facts invites little comment. Nonetheless, the authors welcome the decision in *Suying Design* as it offers a timely opportunity to clarify three difficult aspects of shareholder oppression, namely: (1) the relationship between reflective loss and the oppression remedy; (2) when a director's misappropriation of monies amounts to an actionable claim for oppression; and (3) the distinction between shareholder withdrawal on "at will", "fault" and "non-fault" grounds. It is also a cautionary example of how even easy cases make, if not "bad", then "unnecessary" or "confusing" law that is difficult to remedy.

9.62 The Court of Appeal made much of the reflective loss issue, with reasoning along the following lines. Wrongs committed against a company, such as by directors, causing loss to the company, is suffered by shareholders only as reflective loss. The company, and not the shareholder, is the proper party to recover reflective loss. The fall in value of a shareholder's shares arising from misappropriation of corporate assets is an example of reflective loss. Even if the policy rationales barring the recovery of reflective loss are not engaged (e.g., double recovery), the court may still hold that this reflective loss cannot be personally recovered by the shareholder using the s 216 oppression remedy.[87]

9.63 This line of argument comports with the traditional distinction between corporate wrongs versus personal wrongs and, in turn, the distinction between damages suffered by the company versus reflective loss. In this case, what was ordered by the trial judge was a winding up order and payments to the company. Regardless of whether the orders for payment should be reversed on the facts, by the time of the trial judgment, there was no issue of personal

83 *Ng Kian Huan Edmund v Suying Metropolitan Studio Pte Ltd* [2019] SGHC 56 at [362]–[370].
84 *Suying Design Pte Ltd v Ng Kian Huan Edmund* [2020] 2 SLR 221 at [24]–[25].
85 *Suying Design Pte Ltd v Ng Kian Huan Edmund* [2020] 2 SLR 221 at [141]–[143].
86 *Suying Design Pte Ltd v Ng Kian Huan Edmund* [2020] 2 SLR 221 at [140].
87 *Suying Design Pte Ltd v Ng Kian Huan Edmund* [2020] 2 SLR 221 at [30]–[31].

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recovery by the oppression plaintiff. Put plainly: the plaintiff was not seeking direct personal recovery of reflective loss such as via a claim for damages to be paid directly from the defendants to the plaintiff. In this light, with respect, it may be suggested that the proper precedent regarding the *outcome* – that is, the orders made – in an oppression claim is *Ho Yew Kong v Sakae Holdings Ltd*, where orders for restitution to the company bundled together with a winding up order were mostly affirmed by an excellent decision of the Court of Appeal.[88] For the purpose of disposing of the case on the facts, it would have sufficed for the Court of Appeal to find that misappropriation was not proved on the facts, as it did anyway.[89] From this perspective, with respect, the diversion into the reflective loss principle and whether it operated to bar the trial court's restitutionary orders may have been superfluous.

9.64 Second, with respect, the reflective loss principle is not a statutory rule but rather a common law doctrine based on policy.[90] The local jurisprudence does not lack good examples of sensible policy-driven analysis not based on a narrow understanding of traditional common law doctrine; an example is the decision of the Court of Appeal in *Townsing Henry*,[91] and, more recently, the insightful analysis by Coomaraswamy J in *Ideal Design*,[92] which was favourably received in a previous edition of this Review.[93] In *Ideal Design*, it was held that the application of the reflective loss principle would turn on whether the principle's underlying policy rationales were engaged on the facts.[94]

9.65 By contrast, with respect, in the *Suying Design* decision the court appears not to have considered whether the policy rationales for reflective loss were engaged on the facts of the

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88 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [128]–[129], [202]; see also the evaluation in Dan W Puchniak, Tan Cheng Han SC & Samantha S Tang, "Company Law" (2018) 19 SAL Ann Rev 227 at paras 9.32–9.33 and Tan Cheng Han, "Some Current Issues in Singapore Corporate Law" (2019) 31 SAcLJ 1008 at [60] where it was pointed out that the alternative line of reasoning from *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723, which was relied upon by the Court of Appeal in *Suying Design Pte Ltd v Ng Kian Huan Edmund* [2020] 2 SLR 221, proceeded from a misunderstanding of the English case of *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760.

89 *Suying Design Pte Ltd v Ng Kian Huan Edmund* [2020] 2 SLR 221 at [92]–[98].

90 See the analysis of various possible policy considerations in Alan K Koh, "Reconstructing the Reflective Loss Principle" (2016) 16 JCLS 373 at 380–387; *Johnson v Gore Wood (a firm)* [2002] 2 AC 1 (HL) at 66 per Lord Millett ("The disallowance of the shareholder's claim in respect of reflective loss is driven by policy considerations.").

91 *Townsing Henry George v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597.

92 *Leong Chee Kin (on behalf of himself and as a minority shareholder of Ideal Design Studio Pte Ltd) v Ideal Design Studio Pte Ltd* [2018] 4 SLR 331.

93 Dan W Puchniak, Tan Cheng Han SC & Samantha S Tang, "Company Law" (2017) 18 SAL Ann Rev 247 at para 9.23.

94 *Leong Chee Kin (on behalf of himself and as a minority shareholder of Ideal Design Studio Pte Ltd) v Ideal Design Studio Pte Ltd* [2018] 4 SLR 331 at [89] ("where there is no danger of double recovery or prejudice to other shareholders, a complainant should not be prevented from pursuing a personal claim under s 216 of the Act.").

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case, but rather seems to have read into ss 216 and 216A a legislative basis for the reflective loss principle. With respect, there does not appear to be any evidence that Parliament took into consideration (or even demonstrated any awareness of) the reflective loss principle – which is a common law doctrine with no statutory basis in almost every jurisdiction – at the time s 216A was introduced by the efforts of Professor Walter Woon.[95] The better approach would be to continue to regard the reflective loss principle as a common law-origin idea that must survive – or fall – on its own merits as ascertained through rigorous inquiry.

9.66 If the Court of Appeal meant that reflective loss cannot be recovered by the shareholder through the oppression remedy because the company should be the one pursuing the claim, with respect, the authors suggest that *Suying Design* would likely be undoing previous sound Singapore jurisprudence and also going against the grain of UK jurisprudence.[96] To reiterate, with respect, it is the authors' view that where the reflective loss principle is engaged, the only substantive question is whether the underlying policy considerations are engaged on the facts. If no policy considerations against permitting recovery of reflective loss are engaged, then the plaintiff should not be barred from recovering reflective loss. A pragmatic approach along these lines, which was taken in *Townsing Henry*[97] and draws scholarly support,[98] would nonetheless be preferable to the attempt in *Suying Design* in tackling a complex and misunderstood common law artifact without a full canvass of the rich and diverse scholarly literature on the subject.[99]

9.67 This pragmatic approach draws support from a leading treatise on minority shareholders' remedies that the Court of Appeal cited in *Suying Design*. Among the key parts of the paragraph quoted by the court[100] are as follows:

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95 The legislative history of Singapore's statutory derivative action is discussed in Meng Seng Wee & Dan W Puchniak, "Derivative Actions in Singapore: Mundanely Non-Asian, Intriguingly Non-American and at the Forefront of the Commonwealth" in Dan W Puchniak, Harald Baum & Michael Ewing-Chow (eds), *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge University Press 2012) 336–341; Samantha S Tang, "The Anatomy of Singapore's Statutory Derivative Action: Why Do Shareholders Sue – Or Not?" (2020) 20 JCLS 327, 336–340.

96 See *Marex Financial Ltd v Sevilleja* [2020] UKSC 31, [2021] AC 39, where the justices either read down the strictness of the reflective loss principle, or indicated serious doubt about the foundations and soundness of the principle itself.

97 *Townsing Henry George v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 at [85]–[86].

98 See Alan K Koh, "Reconstructing the Reflective Loss Principle" (2016) 16 JCLS 373 at 380–387 and the works cited therein.

99 On the challenges and pitfalls of engaging with common law corporate law doctrine without adequate comparative analysis, see Alan K Koh, "(Non-)Enforcement of Directors' Duties in Corporate Groups" (2018) 81(4) MLR 673.

100 *Suying Design Pte Ltd v Ng Kian Huan Edmund* [2020] 2 SLR 221 at [30].

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> "Ironically, where there could be the clearest manifestation of oppressive or commercially unfair conduct – for who amongst reasonable men of business would agree and expect to be outrightly defrauded – in the form of indisputable breaches of director's duty in stripping the company of its assets and opportunities, section 216 of the Companies Act may have its limitations. … The paradox, therefore, is that where the breach is palpably impugnable under traditional law as a corporate wrong, section 216 might not be available. Recourse would then have to be brought pursuant to section 216A."

9.68 In the last two sentences of the same quoted paragraph – which were not included in the judgment – the treatise cautions presciently against restricting the scope of s 216:[101]

> "It is notable that the relief available under section 216A would not include a share buyout or a winding up, the most desirable divorce-type remedies when one finds oneself in a dysfunctional corporate relationship. Further, *section 216A entered the statute books in 1993, when section 216 was already available, and should not be read (in the absence of clear legislative intention) to whittle down or constrict section 216*." (emphasis added in italics)

In this context, it is unlikely that the Court of Appeal intended *Suying Design* to unnecessarily restrict the ambit of s 216. Indeed, such a restriction would be inconsistent with the pragmatic approach that the Singapore courts have generally taken for shareholder remedies.

9.69 The second problem raised by *Suying Design* may be reduced to a single question: when is director misappropriation oppression? On the facts as re-decided by the Court of Appeal, there was no misappropriation. Nevertheless, it is worth reiterating that misappropriation remains a ground for oppression relief in specific cases.[102] As stated in the 2018 edition of this Review:

> … in cases where a controlling-majority-shareholder-director benefits through breaching their directors' duties in a closely held company, a s 216 oppression remedy will likely be appropriate. In such cases, although on a theoretical level the breaches of directors' duties injure only the company, in reality they are normally committed for the purpose of enriching the controlling-shareholder-director at the expense of the minority shareholders. As such, the "real injury" that the plaintiff-minority-shareholders seek to vindicate are their personal injuries, which amount to commercial unfairness. In addition, in such cases, a derivative action is normally an insufficient remedy because even if the action is successful, the damages would be

[101] Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) para 4.120.

[102] See e,g, Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) paras 4.119, 4.120; Markus Koehnen, *Oppression and Related Remedies* (Thomson Carswell, 2004) at pp 448–449; Alan K Koh, *Shareholder Protection in Close Corporations: Theory, Operation and Application of Shareholder Withdrawal* (Cambridge University Press, forthcoming) ch V.C.4.ii.b.

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> paid back into a company that remains under the control of the wrongdoing director who could prevent any benefits from flowing to the aggrieved minority shareholders. Further, in a small closely held company, all of the minority-shareholders would likely be parties to the action, obviating the risk of possible unfairness arising from oppression relief in a given case that excludes one or more aggrieved shareholders. As such, providing an exit remedy for the minority shareholders in a s 216 oppression action would be the only way to effectively vindicate the "real injury".[103]

9.70 Notwithstanding the plaintiff's failure to prove the existence of actionable misappropriation by the defendant in *Suying Design*, we would respectfully emphasize the practical difficulties that minority shareholders may face in addressing both the corporate wrong-personal wrong distinction, and in obtaining sufficient evidence to support a claim for misappropriation. Minority shareholders have limited information rights, and often face difficulties in obtaining financial documents and information on the company.[104] The information asymmetry between minority and majority shareholders is exacerbated if the minority shareholder is not involved in the management of the company, while the majority shareholder holds directorships or managerial positions. We had in a previous edition of this Review questioned the wisdom of placing on the shareholder the burden of justifying why a breach of an independent legal duty is a breach of legitimate expectation that in turn establishes oppression.[105] In similar vein, we respectfully suggest that imposing on a minority shareholder who has already managed to prove misappropriation of the company's assets by the defendant director-shareholder – to which they are not personally complicit or have acquiesced to – the further burden of also proving why such misappropriation should be sufficient to establish a personal injury suffered by the shareholder, would run counter to the spirit of the oppression remedy and diminish its value within Singapore company law.

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[103] Dan W Puchniak, Tan Cheng Han SC & Samantha S Tang, "Company Law" (2018) 19 SAL Ann Rev 227 at para 9.35.

[104] See s 189(2A) of the Companies Act (expressly denying members the right to inspect books containing minutes of directors' meetings, among other things); reg 102(2) of the Model Constitution for a Private Company Limited by Shares ("No member (who is not a director) has any right of inspecting any account or book or paper of the company except as conferred by statute or authorised by the directors or by the company in general meeting."); *Ezion Holdings Ltd v Teras Cargo Transport Pte Ltd* [2016] 5 SLR 226 at [12] ("The statutory regime created by the Act lays down specific rights and obligations for the company and its members or shareholders, but does not expressly provide for a member or shareholder … to be given the financial statements before these have been prepared. In other words, the Act does not confer a broad right to financial information.").

[105] Alan K Koh, Dan W Puchniak & Tan Cheng Han SC, "Company Law" (2019) 20 SAL Ann Rev 198 at para 9.64.

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9.71 An alternative argument, which was unexplored in the judgment, is the connection between misappropriation and loss of confidence. In *Foo Peow Yong Douglas v ERC Prime II Pte Ltd*[106] (a just and equitable winding up decision discussed in a previous edition of this Review[107]), directorial misconduct with respect to a transaction gave rise to a justifiable loss of trust and confidence by the plaintiff in the defendant.[108] Were misappropriation established on the facts of *Suying Design*, it should be open to the plaintiff to argue that this led to a loss of confidence that would suffice for relief under a just and equitable winding up.[109]

9.72 The Court also made much of how previous decisions on s 216 (1) "do not support the proposition that shareholders have a general right of unilateral withdrawal from the company"; and (2) that the oppression remedy "cannot be invoked in a "no-fault" corporate divorce situation."[110] We respectfully suggest that these propositions may lead to future unintended conceptual confusion for two reasons. First, "a general right of unilateral withdrawal" in this context refers to what the literature calls withdrawal "at will".[111] The Court's statement (1) – that withdrawal at will is not permitted by s 216 – is relatively uncontroversial.

9.73 However, statement (2) is not congruent with statement (1). A "no-fault" corporate divorce is not synonymous with "at will"; rather, it is a completely distinct idea that has been termed "non-fault grounds" in the literature on shareholder withdrawal. Non-fault grounds are still grounds; the plaintiff is required to furnish something more than just their mere whim and fancy in order to establish a case for withdrawal.[112] Examples of non-fault grounds include a breakdown in mutual trust and confidence, which is one of the grounds for a just and equitable

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106 [2018] 2 SLR 1337.

107 Dan W Puchniak, Tan Cheng Han SC & Samantha S Tang, "Company Law" (2018) 19 SAL Ann Rev 227 at paras 9.38–9.42.

108 *Foo Peow Yong Douglas v ERC Prime II Pte Ltd* [2018] 2 SLR 1337 at [50]–[51].

109 *Quaere* if the plaintiff on the alternate facts would still have failed on the statements of law seemingly laid down in *Suying Design*, but would have succeeded had he brought the action under just and equitable winding up instead of under the oppression remedy.

110 *Suying Design Pte Ltd v Ng Kian Huan Edmund* [2020] 2 SLR 221 at [35].

111 See Alan K Koh & Samantha S Tang, "Towards A "Just and Equitable Remedy" for Companies" (2017) 133 LQR 372.

112 See Alan K Koh & Samantha S Tang, "Direct and Derivative Shareholder Suits: Towards a Functional and Practical Taxonomy" in Afra Afsharipour & Martin Gelter (eds), *Comparative Corporate Governance* (Edward Elgar 2021) at pp 438–439 (on withdrawal at will), 441 (non-fault); cf Dan W Puchniak, Tan Cheng Han SC & Samantha S Tang, "Company Law" (2017) 18 SAL Ann Rev 247 at paras 9.38–9.40 (observing that the threshold for the plaintiff to establish no-fault deadlock under the just and equitable winding up remedy must be significant to discourage plaintiffs from using the remedy to exit the company at will).

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winding up.[113] Whether statement (2) is correct or desirable as a matter of Singapore law may be debatable; what is not debatable is that statement (1) and (2) are different in content.

9.74 Writing in a way that invites the impression that statement (1) means the same thing as statement (2) risks sowing confusion among jurists unfamiliar with the broader literature. The challenges and subtleties of shareholder conflict resolution are formidable for practitioners and even academics to master; this makes the difficult task of the courts using terminology clearly and consistently of the utmost importance.

9.75 For better or for worse, there is the possibility that *Suying Design* may be one of the last major Court of Appeal judgments on oppression for some time in the wake of the recent restructuring of the Supreme Court.[114] It is hoped that the new Appellate Division of the High Court, and on some occasions, future panels of the Court of Appeal, will continue to uphold a national oppression jurisprudence characterised more by justice and pragmatism than doctrinarian hair-splitting.

VII. Just and equitable winding up

9.76 There are four written judgments rendered on just and equitable winding up within the review period.[115] Given that the bulk of the Insolvency, Restructuring and Dissolution Act 2018[116] (the "IRDA") only came into force on 30 July 2020, the cases from 2020 were decided under s 254 of the Companies Act, which has been superseded by s 125 of the IRDA. Nonetheless, as the new statutory provisions are *in pari materia* with the old, the comments in this section are equally applicable to the new regime.

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[113] Alan K Koh & Samantha S Tang, "Towards A "Just and Equitable Remedy" for Companies" (2017) 133 LQR 372, 375–376.

[114] Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) (as amended by Supreme Court of Judicature (Amendment) Act 2019 (Act 40 of 2019)), s 29C (appeals against decisions of the General Division in the exercise of its original jurisdiction lie to the Appellate Division, not the Court of Appeal, unless specified under the Sixth Schedule or other written law), Sixth Schedule para 1(d) (appeals to be made to the Court of Appeal if "the appeal arises from a case relating to the insolvency, restructuring or dissolution" of corporations and other specified business entities).

[115] *Chong Kok Ming v Richinn Technology Pte Ltd* [2020] SGHC 224; *RCMA Asia Pte Ltd v Sun Electric Power Pte Ltd (Energy Market Authority of Singapore, non-party)* [2020] SGHC 205; *See Eng Siong Ronnie v Sassax Pte Ltd* [2020] SGHC 96; *Tan Bee Hong Blossom v Tan Seng Keow Doreen* [2020] SGHC 89.

[116] Act 40 of 2018.

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9.77 The first noteworthy judgment is *Chong Kok Ming v Richinn Technology Pte Ltd*.[117] The first and second plaintiffs were minority shareholders and executive directors, and the defendants the majority shareholders and directors, in a quasi-partnership company. The defendants communicated to the plaintiffs their desire to exit the business and offered to sell their shares to the plaintiffs. The plaintiffs made an offer which was not accepted by the defendants, who also made no counter-offer. Agreement was subsequently reached at a general meeting that the company would proceed to a members' voluntary winding up if agreement could not be reached on the purchase price by a subsequent meeting on 29 January 2018. Soon after the meeting, the second plaintiff informed staff and customers of the company of the defendants' impending departure and began using his own corporate vehicle to outsource work from the company's customers to the company at a markup. When the defendants discovered the second plaintiff's activities, the defendants sent letters making allegations against both plaintiffs through solicitors and removed both plaintiffs from their executive roles in January 2018. The defendants subsequently also caused the company to sue both plaintiffs for breaches of their duties as directors in a suit that was later settled in 2020. The plaintiffs commenced winding up applications in April 2018 not only on the just and equitable ground (s 254(1)(i) Companies Act; s 125(1)(i) IRDA), but also on the ground of misconduct or unfair conduct by the directors (s 254(1)(f) Companies Act; s 125(1)(f) IRDA).

9.78 The High Court granted the plaintiff's applications on the basis that the defendants' actions in early 2018 had caused an irretrievable loss of mutual trust and confidence between the parties. Ang Cheng Hock J held that the defendants had "gone overboard in their allegations against [the second plaintiff] by making a host of other unfounded allegations", and the allegations of breaches of director's duties by the first plaintiff were without basis.[118] His Honour took the view that the defendants had most likely intended to use the company's lawsuits to extract a more favourable deal from the plaintiffs.[119]

9.79 In addition, the Court was sympathetic to the plaintiffs' argument that the non-compete clause in the parties' shareholders agreement would prevent them from earning a living outside of the company. The plaintiffs had been in the laser cutting business for their entire working lives. Unlike the defendants, they did not appear to be individuals with substantial financial

[117] [2020] SGHC 224.
[118] *Chong Kok Ming v Richinn Technology Pte Ltd* [2020] SGHC 224 at [120].
[119] *Chong Kok Ming v Richinn Technology Pte Ltd* [2020] SGHC 224 at [121].

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means.[120] The plaintiffs could not earn a livelihood elsewhere so long as the company survived, and since the defendants had excluded them from working at the company, it would be unfair to force the plaintiffs to remain "locked in" as minority shareholders.[121] Winding up the company would release the plaintiffs from the shareholders agreement, freeing them to seek employment elsewhere.[122]

9.80 *Richinn Technology* demonstrates that a just and equitable winding up may be a solution (albeit a drastic one) for minority shareholders to free themselves, in circumstances when the working relationship has broken down completely, from a non-compete clause in a shareholder agreement. We respectfully agree with this approach. Minority shareholders may be "locked in" to a company not only in terms of their financial investment, but perhaps more importantly also their livelihoods. The potential for minority shareholder oppression is evidently even greater where such non-compete clauses are involved. A judicial forum is the appropriate place to address the fallout of open-ended contractual arrangements that were bargained for and made sense within a specific factual context involving the company, which has since ceased to be when the facts have changed substantially.[123]

9.81 Having found that the legal basis for a winding up has been established for both the just and equitable and director misconduct grounds, the Court did not make a final order as to relief. Citing the defendants' stated wish to keep the company intact, his Honour "was prepared to make" a buy-out order in lieu of winding up (s 254(2A) Companies Act; s 125(3) IRDA) for the plaintiff's shares to be purchased by the defendants at fair value without any minority discount. The terms of the court's intended order would be for the shares to be valued by an independent valuer as of "19 January 2018", being "the intended last date on which agreement could have been reached" for a sale of the shares, failing which the parties would have voluntarily wound up the company.[124] The court made no final order, giving the defendants a choice as to whether to purchase the plaintiffs' shares to the court and ten days to decide.[125]

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[120] *Chong Kok Ming v Richinn Technology Pte Ltd* [2020] SGHC 224 at [130].
[121] *Chong Kok Ming v Richinn Technology Pte Ltd* [2020] SGHC 224 at [133].
[122] *Chong Kok Ming v Richinn Technology Pte Ltd* [2020] SGHC 224 at [130], [133]-[135].
[123] See *Chong Kok Ming v Richinn Technology Pte Ltd* [2020] SGHC 224 at [134] (noting that "Richinn [the company] is now quite a different creature from when the quasi-partnership was first established in 2004").
[124] *Chong Kok Ming v Richinn Technology Pte Ltd* [2020] SGHC 224 at [137]. *Quaere* whether "19 January 2018" this was a typographical error as the same paragraph went on to say: "It would not be fair to order the valuation date to be the date of the commencement of the trial, as contended by the Lims, or the date of this judgment or any buy-out order to be made, because the plaintiffs have been excluded from the management of the Richinn since **29 January 2018**." (emphasis added).
[125] *Chong Kok Ming v Richinn Technology Pte Ltd* [2020] SGHC 224 at [138].

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9.82 History does not repeat itself, but it rhymes.[126] In an earlier era, winding up orders were on occasion granted, not immediately, but rather "stayed"[127] or "suspend[ed]"[128] to allow time for the parties to avert a winding up through an amicable settlement such as a buyout. The current statutory power to order a buy-out in lieu of winding up (on the just and equitable and director misconduct grounds) introduced in 2015 as s 254(2A) of the Companies Act (and which is now s 125(3) of the IRDA) can be traced back to the above judicial practice.[129] In *Richinn Technology*, despite finding that the defendants' conduct had satisfied both pleaded legal bases for winding up, Ang Cheng Hock J nonetheless eschewed an outright exercise of the court's statutory power to order a buyout and gave the defendants the final choice. In one sense, this is a throwback to the pre-section 254(2A) old days where the lack of a buy-out option made judicial deferment of a winding up order's effect desirable. *Richinn Technology* is a demonstration of how established practice can be enhanced through combination with new powers to craft better, customized solutions in new cases.

9.83 The other case worth commenting on briefly is *Tan Bee Hong Blossom v Tan Seng Keow Doreen*.[130] Here, the plaintiffs and defendants are sisters and shareholders of four companies founded and controlled by the since-deceased family patriarch. The plaintiffs commenced proceedings to wind up the companies on the just and equitable ground. They were unsuccessful. Mavis Chionh JC (as Her Honour then was) held that the companies were not quasi-partnerships as the sisters did not have a relationship of mutual trust and confidence. A key finding was that "whilst the Sisters had accepted Father's [the deceased patriarch] authority unquestioningly and whilst there might have existed a bilateral relationship of mutual trust and confidence between Father and each of the Sisters … there was no such relationship as between the Sisters themselves".[131] There was accordingly "no scope for the superimposition of equitable considerations".[132] The learned Judicial Commissioner also found separately that there was no evidence to support any "implied agreement" or "shared understanding" between

[126] Although often attributed to Mark Twain, the exact origin of the quotation in this form is unclear.
[127] *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 at [50].
[128] *Chow Kwok Chuen v Chow Kwok Chi* [2008] 4 SLR(R) 362 at [49].
[129] *Ting Shwu Ping v Scanone Pte Ltd* [2017] 1 SLR 95 at [43].
[130] [2020] SGHC 89. The LawNet editorial notes seems to indicate that the appeal from this decision has been withdrawn.
[131] *Tan Bee Hong Blossom v Tan Seng Keow Doreen* [2020] SGHC 89 at [165].
[132] *Tan Bee Hong Blossom v Tan Seng Keow Doreen* [2020] SGHC 89 at [165].

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the four parties that each would be "entitled to participate equally in the running of the [four companies]".[133]

9.84 The Court went on to consider whether the defendants' treatment of the plaintiffs amounted to commercial unfairness. As to the plaintiffs' contention that the salary increase for one of the defendants, who was (together with the other defendant) an executive director of one of the companies, was unfair, the learned Judicial Commissioner held that there was nothing in that company's constitution to require that an employee's salary may only be increased with consent of all directors or shareholders.[134] It is trite that employee salaries do not as a matter of strict company law require shareholder approval, and we agree with the holding based on the facts as found by the learned Judicial Commissioner.

9.85 Nonetheless, we respectfully highlight that where employee compensation concerns executive director-cum-major shareholders (as it was in *Tan Bee Heng Blossom*), judicial scrutiny is warranted. In fact, the learned Judicial Commissioner did properly engage in a substantive review of the defendant's increased compensation, finding that there was "reasonable justification" in light of circumstances, including one of the plaintiff's resignations from executive duties and the correspondingly increased responsibilities shouldered by the defendant director in question.[135] The fact that the plaintiff had failed to avail herself of the opportunity to object to the defendant's increased compensation also weighed on the Court,[136] and we respectfully agree. *Tan Bee Heng Blossom* thus underscores the importance of shareholders proactively airing their concerns and taking timely steps to address what they perceive to be unfair acts to avoid giving the impression that such complaints are mere afterthoughts when matters end up in litigation.

9.86 *Tan Bee Hong Blossom* is no mere isolated example. Disputes over the terms – especially the price – of an otherwise mutually agreeable sale of shares between once harmonious (or at least civil) parties that now wish to go their separate ways are not an infrequent presence in the local oppression and just and equitable winding up caseload. A more restrictive view of the court's jurisdiction over withdrawal and share valuation disputes seems

[133] *Tan Bee Hong Blossom v Tan Seng Keow Doreen* [2020] SGHC 89 at [187].
[134] *Tan Bee Hong Blossom v Tan Seng Keow Doreen* [2020] SGHC 89 at [194].
[135] *Tan Bee Hong Blossom v Tan Seng Keow Doreen* [2020] SGHC 89 at [193].
[136] *Tan Bee Hong Blossom v Tan Seng Keow Doreen* [2020] SGHC 89 at [195]–[196].

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to emerge from cases other than *Tan Bee Hong Blossom*, such as *Ting Shwu Ping*[137] (winding up) and (arguably) Belinda Ang Saw Ean J's dissent in *Liew Kit Fah* (oppression).[138] There thus appears to be a level of judicial ambivalence, even reluctance, to the idea that the courts serve as a forum for resolving what are really disputes over price.

9.87 We respectfully suggest that the question is not whether the legislation permits (or the legislator intends for) buyouts and valuations to be ordered without legally establishing oppression or just and equitable winding up (as the case may be). Regardless of how the courts interpret the statute or exercise (or refrain from exercising) their powers in practice, one fact remains unchanged: there is "market" demand for a judicially-facilitated unwinding of erstwhile close relationships. The intricacies of jurisprudence – which may partly be a matter of taste and which may be of interest mostly to specialists such as the authors – aside, few judicial institutions globally enjoy the level of confidence commanded by our senior courts among well-heeled litigants. It is therefore only reasonable for disputants in want of a neutral and impartial resolution of valuation disputes over the shares of Singapore-connected companies to turn to the local courts to meet their demand.

9.88 The real question is this: what should the Singapore courts do about this demand for valuation decisions? With the establishment of the Singapore International Commercial Court and an ongoing push by Singapore to position itself as a regional if not global dispute resolution and restructuring hub, it is beyond reasonable argument that Singapore is in the market of dispensing high-quality justice services to anyone who seeks it. So long as litigants are prepared to pay the fees and engage counsel licensed to practice in Singapore's courts, why should they be deterred, through narrower interpretations of the court's oppression and winding up jurisdiction, from bringing valuation disputes for resolution?

9.89 It is certainly possible that just and equitable winding up (and oppression) in today's context exist to serve *only* clearly articulated and legitimate policy objectives *other than* the resolution of price-related squabbles. If this is true, then provided that *de facto* valuation-only

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[137] *Ting Shwu Ping v Scanone Pte Ltd* [2017] 1 SLR 95 at [45]–[46] (in the just and equitable winding up context, holding that the court has no power to order a buyout in lieu of winding up unless it is satisfied as to the ground for winding up).

[138] *Liew Kit Fah v Koh Keng Chew* [2020] 1 SLR 275 at [135] (Belinda Ang Saw Ean J, dissenting) (doubting whether the court has the power to order a buyout in an oppression case where the parties have reached a settlement on liability). An analysis of both majority and dissenting opinions is in Alan K Koh, Dan W Puchniak & Tan Cheng Han SC, "Company Law" (2019) 20 SAL Ann Rev 198 at paras 9.27–9.31.

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disputes (e.g. *Tan Bee Hong Blossom*) are demonstrably interfering with the implementation of those true policy objectives, there would be good reason for the courts to refrain from deciding *de facto* valuation-only disputes. Whether this high bar is met is harder to say with certainty. In the interim, there appears to be no alternative to just and equitable winding up or oppression in Singapore law for parties to submit a valuation dispute for decision by an impartial, incorruptible, and transparent third-party arbiter with the power to make binding findings on matters ranging from legal issues such as apportionment of fault to technical matters such as discounts and valuation dates. Unless and until the courts first develop a rich body of valuation precedent that may be reducible into workable rules and principles, arbitrators or non-legally-trained valuation professionals would be hard pressed to render consistent, high-quality decisions across a wide range of factually differentiated scenarios.

9.90 There remains a broader, systemic question: should Singapore corporate law as administered through the country's vaunted courts be about generating the *right* answer, or the *best* answer, out of a flawed set of options? Examination papers may be designed with right answers, but real life – complicated by poor record keeping and former relationships of good faith or even trust – is rarely neat enough for anything to be declared *the* right answer. Be that as it may, it is ultimately a question of policy that only the courts can answer.

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