Developments in Singapore Company Law in 2021

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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 Annual Review of Cases published by the Singapore Academy of Law (a multipartite institution representing private practitioners, lawyers in public service, the judiciary, and legal academia), this Paper reviews recent legally significant company law decisions of the Singapore superior courts (comprising the General Division of High Court, Appellate Division of the High Court, and the Court of Appeal) mostly decided in 2021. The cases reviewed feature a wide range of issues with domestic and international significance, including private enforcement and public regulation of directors' duties, corporate veil piercing, reflective loss, dishonest assistance, and shareholder disputes. This Annual Review will be useful for academics and lawyers interested in jurisprudential developments in a leading Asian, common law jurisdiction, and on the diffusion and reception of landmark, foreign common law cases in a prominent Anglo-Commonwealth jurisdiction.

Keywords: Corporate law, Singapore, directors' duties, shareholder remedies, direct suits, shareholder litigation, veil piercing

JEL Classifications: K12, K22, K41, K42

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Contents

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I. Corporate Veil

9.1 It is trite law that while a company is a legal person and therefore separate from its shareholders and directors, the court may in exceptional circumstances pierce the corporate veil and treat a company's shareholders and/or directors as being one and the same with the company for limited purposes. The company does not in such cases lose its legal personality but in relation to particular transactions or facts, the company and its shareholders and/or directors are treated as being equivalent.

9.2 It has been remarked on numerous occasions that this area of company law is bedevilled with the use of metaphors that have made it difficult to understand the true rationale behind veil piercing.[1] In more recent years some Commonwealth courts have provided guidance on the proper approach to be taken.[2] Further useful guidance can now also be obtained from *Mohamed Shiyam v Tuff Offshore Engineering Services Pte Ltd* ("*Tuff Offshore*").[3] The plaintiff had applied to amend his statement of claim and join persons who were, at various material times, the shareholders and directors of the defendant ("the proposed defendants"). One of the grounds for the application was that the defendant's corporate veil should be lifted as the defendant was the *alter ego* of the proposed defendants, the defendant was a sham or façade, or the defendant was used for improper purposes.

9.3 Whether a company is a sham or façade, or has been used for improper purposes such that there has been abuse of the corporate form, are now fairly well established and need little discussion. The court found that the proposed pleadings did not sufficiently disclose any basis for the corporate veil to be lifted on these grounds. There was no abuse of the corporate form simply because the controllers of a company extracted funds wrongly to the detriment of creditors. This would undoubtedly be a wrong against the company to which the company could bring a claim either through a derivative action by minority shareholders or through a liquidator should the company become insolvent, but it was not an abuse of the corporate form in the sense of the company being used as an instrument to further an improper purpose. Similarly, whether a company was the true contracting party with another person or merely a

[1] For example, see Tan Cheng Han, "Piercing the Separate Personality of the Company: A Matter of Policy?" [1999] SJLS 531.
[2] Notable cases include *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 and *Tjong Very Sumito v Chan Sing En* [2012] 3 SLR 953 at [67].
[3] [2021] 5 SLR 188.

sham or façade to conceal who the real contracting party was, e.g. a shareholder of the company, had nothing to do with diversion of a company's assets. If the company was the true contracting party in a transaction, the fact that its controllers subsequently diverted its assets wrongly did not render the company's involvement in the transaction a sham or façade.

9.4 This leaves the *alter ego* ground for discussion because, as the Court of Appeal in *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd*[4] said, while this ground is not recognised in English law, it is presently a separate ground in itself in Singapore and a definitive view of whether the English position ought to be adopted should be expressed only when it is directly in issue before the Court of Appeal.[5]

9.5 While this is understandable, *Tuff Offshore*[6] illustrates the difficulty of recognising *alter ego* as a ground in itself for veil-piercing purposes. As Roger Giles IJ pointed out, in *Alwie Handoyo v Tjong Very Sumito*[7] ("*Alwie Handoyo*") the Court of Appeal said that the key question in relation to such ground was whether the company was carrying on the business of its controller. In *Alwie Handoyo*, Alwie had treated the company's monies as his own and the Court of Appeal observed that "it is evident that Alwie made no distinction between himself and [the company.] Therefore, we agree with the Judge's decision to pierce [the company's] corporate veil".[8] In *Tuff Offshore*, Giles IJ was of the view that as the company was the real contracting party, no issue of veil piercing could arise under the *alter ego* ground.

9.6 This illustrates the significant overlap between the sham and façade ground, also referred to as the concealment principle in *Prest v Petrodel,*[9] and the *alter ego* ground. Where the company is in fact carrying on the business of the controller, the facts as a whole may indicate that the real contracting party is the controller. However, while the controller having treated the company's monies as his own may be an indication of this, it should not be decisive in itself because diversion of corporate assets *per se* does not mean that corporate personality should be disregarded. Alternatively, if the parties to the contract are the company and the counterparty, the fact of the controller treating the company's assets as the

[4] [2019] SGCA 51.
[5] *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2019] SGCA 51 at [9].
[6] See para 9.2 above.
[7] [2013] 4 SLR 308.
[8] *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 at [100].
[9] [2013] 2 AC 415 at [28].

controller's own can give rise to claims by the company against the controller for misappropriation of corporate assets such that a constructive trust may be imposed against the controller. Depending on the facts, it may also be the case that the company is a trustee of its assets in favour of the controller.[10] This may allow creditors of the company in a liquidation to sue the controller to recover assets that belong to the company, or allow creditors of the controller to proceed against assets held by the company on trust for the controller. In neither of these cases is there veil piercing. Accordingly, it is not clear that a separate *alter ego* ground is necessary, and it is suggested that when the opportunity arises, the courts should do away with such ground as a basis for veil piercing.

II. *De Facto* Directors

9.7 In *AIX Engineering & Construction Pte Ltd v Yeong Wai Teck*,[11] Lai Siu Chiu SJ found that the third defendant, who was a representative of the plaintiff company, was also a *de facto* director of the plaintiff. Her Honour did so on the basis that the third defendant exercised real influence in the corporate governance of the plaintiff, and participated in its affairs on an equal footing with the plaintiff's sole director on record, one Gan Kim Hui. Theirs was a relationship of equals. The plaintiff company had also held the third defendant out as a director of the plaintiff. Taking this and the other relevant circumstances into consideration, the court found that the third defendant had the requisite authority to enter into various set-off agreements on behalf of the plaintiff.

III. Directors' Duties

9.8 An interesting perspective on the scope of s 157 of the Companies Act 1967[12] ("the Act") was provided in *Prime Cars Leasing Pte Ltd v Zenith Automobile Pte Ltd*[13] ("*Prime Cars*"). A claim having been brought against a director of the company for breach of fiduciary duty, counsel for the company argued that if the director wanted to do something that was not in the company's interests, the director should have sought the majority shareholders' consent but did not do so. The learned judge said that this was an unfeasible

[10] See, *eg*, *Asteroid Maritime Co Ltd v The owners of the ship or vessel "Saudi Al Jubail"* [1987] SGHC 71.
[11] [2021] SGHC 118.
[12] 2020 Rev Ed.
[13] [2021] SGHC 262.

argument as an illegal act by a director was not capable of release by the majority of shareholders. Where directors commit an illegal act, shareholders cannot release the directors from their fiduciary duties pertaining to that act by prior agreement or subsequent ratification. Reliance was placed on the statutory duty found in s 157(1) of the Act that a director "must at all times act honestly and use reasonable diligence in the discharge of the duties of his or her office" together with s 157(3) of the Act that renders a breach of any provision of s 157 a criminal offence.

9.9 It is suggested that this may be reading too much into s 157 of the Act. While it is true that in general shareholders cannot, even when acting unanimously, cure an act of a director (or other officer) that is illegal (since what is criminal is a matter for the State to define), s 157(4) of the Act provides that s 157 "is in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company". Accordingly, it is submitted that the better interpretation is that where a company through its shareholders ratifies an act that is a breach of fiduciary duty *per se*, this cures the breach in accordance with general law such that no illegal act exists any longer since ratification confers authority retrospectively. The alternative interpretation is harsh. It would mean that where a director exceeds authority, thereby committing a breach of fiduciary duty, such director has committed a criminal offence even if the company is prepared to ratify the transaction because it considers the terms to be favourable (and especially if those were the best terms available commercially). It would also mean that even when a company grants authority to a director to negotiate a deal in which such director may also obtain a personal benefit, this is no less a criminal act since the court in *Prime Cars* also proscribed releases of fiduciary obligations by prior agreement (as well as by ratification).[14] Such a reading of s 157 should be avoided unless there is clear language to support it. With s 157(4), not only is there an absence of this but language to the contrary.

IV. Director Disqualification

9.10 A useful exposition of the factors that should be taken into consideration when a court is asked to exercise its discretion under s 155A(3) of the Act to allow a person subject to a

[14] *Prime Cars Leasing Pte Ltd v Zenith Automobile Pte Ltd* [2021] SGHC 262 at [48].

disqualification order under s 155A(1) to act as a director or be involved in the management of a company was set out in *Re Haeusler, Thomas*.[15]

9.11 Section 155A provides for the conditions upon which a person may be disqualified from acting as a director where, within a five-year period, not less than three companies that such person was a director of had been struck off the register under s 344 of the Act. As s 344 of the Act is to allow the Registrar to strike a defunct company off the register on the Registrar's initiative, Vinodh Coomaraswamy J said that the statutory objective of s 155A of the Act was to deter a director of a defunct company from leaving it to the Registrar to do so instead of the director doing it herself. The objective was not to protect the public from a director who has engaged personally in any criminal wrongdoing.

9.12 Given that the objective was deterrence from causing the register to be cluttered with defunct companies rather than protection of the public or punishment for wrongdoing, the discretion given to the court under s 155A(3) to allow a disqualified person leave to act as a director or to be concerned in the management of a company required a bespoke set of factors that recognised the unique nature of this disqualification. The factors may include those that are used in relation to the exercise of discretion under s 154 of the Act but need not be so as s 154 of the Act deals with disqualification upon conviction of certain criminal offences. The learned judge acknowledged that his analysis in this regard differed from the approach taken by the Court of Appeal in *Kardachi, Jason Aleksander v Attorney-General*.[16]

9.13 Taking into account the scope and objective of s 155A, the court was of the view that it was not necessary for an applicant to demonstrate exceptional circumstances to be granted the leave sought under s 155A(3). In relation to situations where companies were struck off under s 344 because of a breach of the Act, an applicant must demonstrate a capacity for compliance since the strikings off themselves demonstrated such lack of capacity. This was to be assessed based on the circumstances which led to the three companies being struck off; the compliance record in relation to other companies that the applicant might have been a director of; and the applicant's conduct during the period of disqualification.

[15] [2021] 4 SLR 1407.
[16] [2020] 2 SLR 1190.

9.14 The applicant should also specify which companies she wished to become a director of and there should at least have been some period of disqualification time served. If an applicant could establish that there were circumstances beyond her control despite her best efforts, this would be relevant. Where appointment was accepted after s 155A of the Act came into force, the terms on which the applicant accepted appointment and how these catered for the risks she faced would also be relevant.

V. Reflective Loss

9.15 The leading case on reflective loss prior to the decision of the Court of Appeal in *Miao Weiguo v Tendcare Medical Group Holding Pte Ltd*[17] ("*Tendcare*") was the earlier decision of the Court of Appeal in *Townsing Henry George v Jenton Overseas Investment Pte Ltd*[18] ("*Townsing*"), even if the court's views on the issue in *Townsing* were *obiter*. *Townsing* has been a difficult case to apply in that its contours were uncertain (though this was also the case in England) but much useful clarification has now been given in *Tendcare* which broadly follows the approach of the majority of the UK Supreme Court in *Marex Financial Ltd v Sevilleja*.[19]

9.16 In *Tendcare*, the court acknowledged that there was a tension between two possible rationales for the reflective loss principle. One possibility was that the principle was rooted in the sphere of company law, namely, that a company is a separate legal entity and the rightful claimant in relation to wrongs done to it. The corollary of this is that where there has been a diminution in the value of a shareholding or in distributions to shareholders that is merely the result of a loss suffered by the company arising from a wrong committed by the defendant, the company and not the shareholder is the proper plaintiff because the loss suffered by the shareholder is simply reflective of the company's loss even if a wrong was also done to the shareholder. The other possibility was that the rule was premised around the prevention of double recovery and was not a rule of law but founded on public policy.

9.17 The court stated that *Townsing* attempted to bridge these two rationales but this was unsustainable. The court was of the view that the reflective loss principle was one relating to

[17] [2021] SGCA 116, [2022] 1 SLR 884.
[18] [2007] 2 SLR(R) 597.
[19] [2021] AC 39.

the sphere of company law and as such, the *Townsing* approach should no longer be regarded as the law in Singapore. This did not mean that the issue of double recovery was unimportant. The law had many avenues to prevent double recovery without placing it within a specific company law principle that diluted or undermined its rationale within the context of company law.

9.18 Participation in a company as a shareholder is a matter for regulation by company law. A person who becomes a shareholder takes advantage of the corporate form but must also be bound by its characteristics including the manner in which company law regulates the rights and duties of shareholders. In cases where the reflective loss principle applies, a loss has been caused to a company and a shareholder wishes to claim against the wrongdoer as a consequence of that loss. In such context, the company law perspective must prevail over the shareholder's private law right to bring a claim because the scope of the shareholder's remedies is necessarily tied to company law principles. In particular, the reflective loss rule is justified by the proper plaintiff rule in *Foss v Harbottle*[20] and the principle that the management of a company is entrusted to the decision-making organs of the company ("the corporate management principle"). The reflective loss rule prevents both the proper plaintiff rule and the corporate management principle from being undermined. Where shareholders have meritorious claims, these will have to be pursued within the mechanisms that company law has prescribed such as the oppression claim and the statutory derivative action.

9.19 Having come to the view that the reflective loss principle is a rule of company law arising from the status of shareholders, the scope of the rule extends only to shareholders *qua* shareholders and not to shareholders suing in some other capacity such as a creditor. Tendcare Medical Group's action for part of its claim was therefore correctly brought as it was not suing as a shareholder of another company for the diminution in the value of its shareholding or in distributions from such company. Its claim against the appellant was for dishonestly assisting in a wrong done directly to it, and the basis for the claim was that such dishonest assistance prevented Tendcare Medical Group from recovering the sum in question from such company.[21]

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[20] (1843) 2 Hare 461.
[21] See also Samantha S Tang & Alan K Koh, "Reflective Loss and Dishonest Assistance" [2022] LMCLQ 363.

VI. Derivative Actions

9.20 There were three superior court written judgments (one Court of Appeal,[22] one Appellate Division of the High Court[23] and one General Division of the High Court[24] ("High Court (General Division)")), and one District Court[25] judgment on derivative actions within the review period. Of these, only one set of cases raised noteworthy issues of first impression.

9.21 In *Shanghai Shipyard Co Ltd v Opus Tiger 1 Pte Ltd*[26] ("*Shanghai Shipyard*") (which is the appeal from *Reignwood International Investment (Group) Co Ltd v Opus Tiger 1 Pte Ltd*),[27] the complainant ("Reignwood") applied for leave to bring statutory derivative arbitration claims on behalf of four subsidiaries (Opus Tiger 1 Pte Ltd, Opus Tiger 2 Pte Ltd, Opus Tiger 3 Pte Ltd and Opus Tiger 4 Pte Ltd) of the company ("OOL"). Reignwood was the majority shareholder and a creditor of OOL. The intended defendant of the proposed derivative claims was a third party, Shanghai Shipyard Co Ltd ("SSY"). The High Court granted leave for the derivative claims to proceed. Subsequently, SSY applied to be joined as a party to the leave application, citing the power of the court to order joinder under the now-revoked Rules of Court (2014 Rev Ed). The High Court dismissed the joinder application at the first instance on the facts, but took the position that the court had power to order joinder even after a leave application was determined and the time for appeal had expired, provided the parties seeking to be joined were "insiders" with an interest in the company's management. SSY appealed to the Court of Appeal. On appeal, the appellant SSY argued that joinder should be allowed on the basis that SSY was a "proper person" within the meaning of s 216A(1)(*c*) of the Companies Act. SSY's argument was that as it was the largest creditor of OOL and its subsidiaries, given the group's state of insolvency or near-insolvency, SSY's economic interests as creditor prevailed, and that SSY was analogous to a minority shareholder in that it could not influence OOL's management.

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[22] *Shanghai Shipyard Co Ltd v Opus Tiger 1 Pte Ltd* [2021] SGCA 109, [2022] 1 SLR 643. For completeness, *Lin Jianwei v Tung Yu-Lien Margaret* [2021] SGCA 67; [2021] 2 SLR 683 arose in connection with a derivative action dispute, but as this particular judgment was concerned with costs rather than substantive issues in the law of derivative actions, it will not be examined in this Review.
[23] *New Ping Ping Pauline v Eng's Noodles House Pte Ltd* [2021] SGHC(A) 4.
[24] *Reignwood International Investment (Group) Co Ltd v Opus Tiger 1 Pte Ltd* [2021] SGHC 133.
[25] *Raveendran Rakesh v Jason Mike Nathan* [2021] SGDC 73.
[26] [2021] SGCA 109, [2022] 1 SLR 643.
[27] [2021] SGHC 133.

9.22 The Court of Appeal dismissed SSY's appeal and further overruled the High Court in part. The Court of Appeal characterised the sole issue in a derivative action leave application as "whether the complainant is entitled (pursuant to s 216A(2) of the Act) to commence derivative proceedings and exercise the company's rights against a putative defendant on its behalf".[28] It follows that once the court resolves the leave application and makes an order as to whether leave is to be granted or refused, and time to appeal expires, the court no longer has power to order joinder.[29] An order granting leave with liberty to apply does not change the fact that the leave application proceedings are themselves concluded and joinder impossible.[30]

9.23 The Court of Appeal made additional remarks on the operation of mandatory requirements for joinder under O 15 r 6(2)(*b*) of the old Rules of Court in the context of derivative proceedings. Briefly, the Court of Appeal took the view – as did the High Court below – that "an intended defendant who is not also an insider of the company" does not have a legal interest in the outcome of a leave application[31] that is a necessary prerequisite to be joined as a party to the leave application under O 15 r 6(2)(*b*) of the old Rules of Court.[32] There is also no basis to join such outsider intended defendants to the leave application in the inherent jurisdiction of the court.[33]

9.24 For completeness, the Court of Appeal declined to consider substantively the appellant's new argument – that it was a "proper person" within the meaning of s 216A(1)(*c*) of the Act and therefore satisfied the requirements for joinder under the old Rules of Court – for procedural reasons.[34] In its brief *obiter* remarks, however, the court signalled scepticism of the appellant's argument, observing that a creditor could not supplant management of even an insolvent company without opening insolvency proceedings, and that the creditor would be protected separately by the statutory regime governing fraudulent or wrongful trading.[35]

[28] *Shanghai Shipyard Co Ltd v Opus Tiger 1 Pte Ltd* [2021] SGCA 109, [2022] 1 SLR 643 at [19].
[29] *Shanghai Shipyard Co Ltd v Opus Tiger 1 Pte Ltd* [2021] SGCA 109, [2022] 1 SLR 643 at [19].
[30] *Shanghai Shipyard Co Ltd v Opus Tiger 1 Pte Ltd* [2021] SGCA 109, [2022] 1 SLR 643 at [20].
[31] *Shanghai Shipyard Co Ltd v Opus Tiger 1 Pte Ltd* [2021] SGCA 109, [2022] 1 SLR 643 at [28].
[32] *Shanghai Shipyard Co Ltd v Opus Tiger 1 Pte Ltd* [2021] SGCA 109, [2022] 1 SLR 643 at [29].
[33] *Shanghai Shipyard Co Ltd v Opus Tiger 1 Pte Ltd* [2021] SGCA 109, [2022] 1 SLR 643 at [30].
[34] *Shanghai Shipyard Co Ltd v Opus Tiger 1 Pte Ltd* [2021] SGCA 109, [2022] 1 SLR 643 at [33]–[35].
[35] *Shanghai Shipyard Co Ltd v Opus Tiger 1 Pte Ltd* [2021] SGCA 109, [2022] 1 SLR 643 at [37].

9.25 *Shanghai Shipyard* is an interesting and bold attempt by an intended defendant of derivative claims who is not a shareholder, director or manager of the company to intervene in the derivative proceeding by inserting itself into the leave application. It demonstrates how a joinder application may possibly be used as a tool to outflank or otherwise interfere with the internal management matter that is the decision over whether and how to bring a suit for and on behalf of the company. Neither the High Court nor Court of Appeal fell for this attempt; both courts reaffirmed the principle that derivative leave proceedings are a matter of internal management of the company in which only insiders are eligible to participate, and that mere intended defendants may not become party to a leave proceeding. As the Court of Appeal forcefully stated,[36]

> "To allow an intended defendant of proposed derivative proceedings to have a say on how the company's claim against *itself* should be managed smacks of the most extreme conflict of interest. Permitting the joinder of such a party to a s 216A application will therefore run contrary to the notion that the affairs of a company should be run in its best interests.". [emphasis in original]

We respectfully agree.

9.26 But *Shanghai Shipyard* raises further questions that deserve consideration, albeit in future, suitable cases. It suffices for this Review to raise three. First, if the appellant creditor SSY had owned at least a token share in either the holding company or in the subsidiaries, would it have been *ipso facto* an "insider" (or "proper person" within the meaning of s 216A(1)(*c*)) and therefore eligible for joinder? Where a potential party is simultaneously a technical "insider" but with "outsider"-type interests in the litigation (that is, as an "external" defendant sued for grounds unrelated to directors' duties breaches and the like), the seemingly neat distinction drawn by the court in *Shanghai Shipyard* may come under strain.

9.27 Second, how will the position change under the new – and current – Rules of Court 2021? O 15 r 6(2)(*b*) is now history; the closest equivalent provision in the current Rules of Court is O 9 r 10(1),[37] the relevant part of which simply states that "[t]he Court may add or remove one or more claimants or defendants". Whether a mere intended defendant of a

[36] *Shanghai Shipyard Co Ltd v Opus Tiger 1 Pte Ltd* [2021] SGCA 109, [2022] 1 SLR 643 at [24].
[37] *Cf* Rules of Court 2021, Table of Derivations, Rules of Court 2021.

derivative proceeding would going forward be similarly barred from being added as a party would turn completely on the extent to which "old" case law like *Shanghai Shipyard* remains applicable under the current civil procedure regime.

9.28 Third, and perhaps most importantly for company law, is the question of the potential tension between the sort of case from which *Shanghai Shipyard* arose, and a stray *obiter* paragraph in *Chan Siew Lee v TYC Investment Pte Ltd* ("*TYC Investment*").[38] In the relevant paragraph, the Court of Appeal opined as follows:[39]

> "The shareholders may well take a different view from the board of directors as to the course that should be adopted in relation to a possible action that may be available to the company or in which it may be involved and which is unconnected to any breach of duty by a director, for instance, a debt which the company owes to a third party. But the decision as to how best this should be dealt with is one that resides in the board of directors; and the shareholders may not interfere with the board's decision in this respect because the management of the company is generally within the sole jurisdiction of the directors."

In *Shanghai Shipyard*, the subject matter of the derivative leave proceeding was the commencement of arbitration proceedings against an outside third party that was a creditor and party to contracts with subsidiaries in the group. If *TYC Investment* were to be followed strictly, then the leave proceeding itself would seem to be a non-starter given that it would not be open to the complainant to challenge the management of the parent or subsidiary companies at issue regarding the decision to open arbitration proceedings against an outsider to the company/group.[40] However, as *Shanghai Shipyard* demonstrates, there is ample utility in the s 216A statutory derivative action mechanism as a means of permitting shareholders (or in the present case, a shareholder of the parent company, to be precise) to defend subsidiaries against third parties (like the appellant SSY).[41] It may be appropriate for a future

[38] [2015] SGCA 40, [2015] 5 SLR 409.

[39] *Chan Siew Lee v TYC Investment Pte Ltd* [2015] SGCA 40, [2015] 5 SLR 409 at [59].

[40] Unless, of course, the complainant were to allege that "the very decision of the director(s) as to how the company's liability *vis-à-vis* its creditor should be resolved is itself a breach of duty", which according to the court in *TYC Investment* "can then, at least in theory, be made the subject of a derivative suit for the same reason that the directors may not naturally give serious consideration to initiating an action on the company's behalf against themselves": *Chan Siew Lee v TYC Investment Pte Ltd* [2015] SGCA 40, [2015] 5 SLR 409 [60].

[41] The proposed arbitration proceedings against SSY were in response to SSY's attempt to call on the guarantees furnished by the complainant (Reignwood) to SSY in respect of the obligations of Opus Tiger 1 Pte Ltd and Opus Tiger 2 Pte Ltd: *Shanghai Shipyard Co Ltd v Opus Tiger 1 Pte Ltd* [2021] SGCA 109, [2022] 1 SLR 643 at [1]–[3].

court to rule determinatively on whether the problematic *TYC Investment* paragraph should stand as a statement of Singapore derivative action law.

VII. Oppression Remedy

9.29 Within the review period, there were two Court of Appeal,[42] three High Court (General Division)[43] and two Singapore International Commercial Court judgments on oppression.[44] The Court of Appeal allowed an appeal in April 2022 (*Wei Fengpin v Raymond Low Tuck Loong*)[45] against one decision of the High Court (General Division)[46] within the review period. Of these cases, the Court of Appeal's decision in *Ong Heng Chuan v Ong Teck Chuan*[47] ("*Ong Heng Chuan*") raised the most salient points of law concerning the oppression remedy in Singapore.

9.30 In *Ong Heng Chuan*, the plaintiff and the defendants were siblings and shareholders of a pure holding company ("the Company") that derived its revenue from business in its subsidiaries and associated companies. The plaintiff, as a minority shareholder in the Company, commenced an action against the majority shareholder defendants for minority oppression under s 216 of the Act. The plaintiff's oppression claim was based on alleged breaches of directors' duties by the defendants resulting from a series of acts taken in the Company, its subsidiaries and associated companies. To remedy the alleged oppressive conduct, the plaintiff sought an order for the buyout of his minority stake in the Company or, in the alternative, for one of the defendants to transfer to the plaintiff, for nominal consideration, a portion of the shares in the associated companies that were owned or controlled by the defendant.[48]

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[42] *Ong Heng Chuan v Ong Teck Chuan* [2021] SGCA 46, [2021] 2 SLR 262; *Teelek Realty Pte Ltd v Ng Tang Hock* [2021] SGCA 70, [2021] 2 SLR 719.
[43] *Wei Fengpin v Low Tuck Loong Raymond* [2021] SGHC 90; *Gui Chien Cheong Martin v Facilit8te Pte Ltd* [2021] SGHC 105, [2021] 4 SLR 1449; *Xanthopoulos, Elias v Rotating Offshore Solutions Pte Ltd* [2021] SGHC 197. For completeness, an appeal against *Xanthopoulos, Elias v Rotating Offshore Solutions Pte Ltd* [2021] SGHC 197 was partly allowed in *Elias Xanthopoulos v Rotating Offshore Solutions Pte Ltd* [2022] SGHC(A) 17, but the appeal did not concern the trial court's decision on the oppression claim.
[44] *Kiri Industries Ltd v Senda International Capital Ltd* [2021] SGHC(I) 2, [2021] 5 SLR 1; *Kiri Industries Ltd v Senda International Capital Ltd* [2021] SGHC(I) 6, [2021] 5 SLR 111. Both concerned valuation issues.
[45] [2022] SGCA 32 (allowing an appeal against *Wei Fengpin v Low Tuck Loong Raymond* [2021] SGHC 90).
[46] *Wei Fengpin v Low Tuck Loong Raymond* [2021] SGHC 90.
[47] [2021] SGCA 46; [2021] 2 SLR 262.
[48] *Ong Heng Chuan v Ong Teck Chuan* [2021] SGCA 46, [2021] 2 SLR 262 at [10].

9.31 At trial, the High Court judge dismissed the plaintiff's claim of minority oppression.[49] Among other things, the judge found that the defendants had valid commercial reasons for all the acts the plaintiff alleged amounted to oppression. Therefore, the judge held that the defendants did not breach their directors' duties. Moreover, the judge reasoned that even if the defendants' alleged breaches of directors' duties had been proven, the plaintiff's claim would, nevertheless, fail because the plaintiff was unable to demonstrate that the alleged breaches amounted to wrongs against the plaintiff in his personal capacity as a minority shareholder. Rather, the plaintiff's case was in fact based on allegations that the defendants breached their directors' duties owed to the Company and, in turn, the loss claimed by the plaintiff was really for the diminution in the value of the plaintiff's shareholding in the Company. As such, the plaintiff's claim was based on corporate wrongs and the loss he sought to recover was reflective loss.[50] On this basis, after applying the analytical framework set out in *Ho Yew Kong v Sakae Holdings Ltd*,[51] the judge held that the plaintiff's action of minority oppression under s 216 was an abuse of process.[52]

9.32 The Court of Appeal upheld the decision of the High Court and in doing so reaffirmed and clarified at least five important points concerning the complex body of law that has developed for establishing a claim of oppression under s 216 of the Act. First, the Court of Appeal reaffirmed that a majority shareholder-director's breach of directors' duties, which are *prima facie* a corporate wrong, "may, in some circumstances, *also* amount to a personal wrong capable of vindication under s 216 of the Act" [emphasis in original].[53] As the authors explained in an earlier Review, we strongly support the court's consistent affirmation of this principle.[54] A prohibition on s 216 claims where breaches of directors' duties form the evidentiary basis for oppression would allow abusive majority shareholder-directors to avoid liability under the guise of maintaining doctrinal purity by upholding the theoretical

[49] *Ong Heng Chuan v Ong Teck Chuan* [2021] SGCA 46, [2021] 2 SLR 262 at [28].
[50] *Ong Heng Chuan v Ong Teck Chuan* [2020] SGHC 161 at [270]–[271].
[51] *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333.
[52] *Ong Heng Chuan v Ong Teck Chuan* [2020] SGHC 161 at [293]–[298].
[53] *Ong Heng Chuan v Ong Teck Chuan* [2021] SGCA 46, [2021] 2 SLR 262 at [33].
[54] Dan W Puchniak, Tan Cheng Han and Samantha S Tang "Company Law" (2018) 19 SAL Ann Rev 227 at 241–242, para 9.35]; Alan K Koh, Dan W Puchniak and Tan Cheng Han "Company Law" (2019) 20 SAL Ann Rev 198 at 227–229, para 9.67.

distinction between corporate wrongs and personal wrongs.[55] Conversely, allowing majority shareholder-directors' breaches of directors' duties to be used as evidence of oppression often provides aggrieved minority shareholders with the fairest and most effective remedy in the form of a buyout at fair value – especially in closely held companies which normally lack a market for their shares.[56]

9.33 Second, the Court of Appeal stressed that to succeed in a s 216 oppression claim based on a breach of directors' duties, it was "incumbent on the claimant to go a step further, and to show how such a breach is also a wrong suffered by him *qua* shareholder".[57] Put another way, a minority shareholder cannot establish a personal wrong, and in turn cannot succeed in a s 216 claim, "merely by characterising the majority's breaches of their directors' duties as breaches of his own 'legitimate expectations' that directors should fulfil their legal duties to the company".[58] The authors respectfully agree that not *every* breach of directors' duties would amount to oppression. As the authors have explained in an earlier Review, there are cases – especially involving listed companies – where breaches of directors' duties are clearly corporate wrongs which, for reasons of efficiency and fairness, should be remedied through corporate actions (either direct or derivative), and not oppression.[59] Even in the present case, which involved a closely held company, if the alleged breaches of directors' duties are not evidence of oppression – which is what the Court of Appeal held – they should not be allowed to substantiate a s 216 claim. However, it should be noted that in the case of closely held companies, breaches of directors' duties by a majority shareholder-director will often provide evidence of oppression, especially when the breaches involve fiduciary duties (as opposed to negligence duties).[60]

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[55] Alan K Koh, Dan W Puchniak and Tan Cheng Han "Company Law" (2019) 20 SAL Ann Rev 198 at 227–229, para 9.67.

[56] Dan W Puchniak, Tan Cheng Han and Samantha S Tang "Company Law" (2018) 19 SAL Ann Rev 227 at 241–242, para 9.35. On why the buyout – but not other legal solutions – works as the sole lasting solution for such companies, see, *eg*, Alan K Koh, *Shareholder Protection in Close Corporations: Theory, Operation, and Application of Shareholder Withdrawal* (Cambridge University Press, 2022) at pp 36–38.

[57] *Ong Heng Chuan v Ong Teck Chuan* [2021] SGCA 46; [2021] 2 SLR 262 at [33].

[58] *Ong Heng Chuan v Ong Teck Chuan* [2021] SGCA 46, [2021] 2 SLR 262 at [55]

[59] Dan W Puchniak, Tan Cheng Han and Samantha S Tang "Company Law" (2018) 19 SAL Ann Rev 227 at 240–241, para 9.34. For a comparative overview of direct suits, see Alan K Koh, "Direct Suits and Derivative Actions: Rethinking Shareholder Protection in Comparative Corporate Law" *Washington University Global Studies Law Review* (forthcoming) and 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 438–448.

[60] Dan W Puchniak, Tan Cheng Han and Samantha S Tang "Company Law" (2018) 19 SAL Ann Rev 227 at 241–242, paras 9.35– 9.36.

9.34 Third, the Court of Appeal drew a negative inference against the plaintiff based on his alternative claim for relief that an amount of shares in companies controlled by the defendant be transferred to the plaintiff for a nominal value.[61] It reasoned that the plaintiff, by seeking a remedy that would result in him being a minority shareholder in companies controlled by the defendant, "was seeking a corporate marriage and not a corporate divorce".[62] The Court of Appeal further suggested his claim for such a remedy was in essence "a thinly-veiled attempt to take advantage of the efforts put in by [the defendant]".[63] We respectfully agree that seeking such a remedy is inconsistent with any concern that the plaintiff had about being oppressed by the defendant and further justifies the conclusion that there was no oppression in this case. On this basis, we suggest that plaintiffs in s 216 claims should be careful about claiming alternative forms of relief that do not involve exiting the company as such a negative inference may justifiably be drawn.

9.35 Fourth, the Court of Appeal noted that the defendants had made several serious offers to buy out the plaintiff's shares in the Company, but none of the offers were meaningfully pursued by the plaintiff. The Court of Appeal held that the plaintiff's failure to meaningfully pursue the offers or to make any counterproposal suggested that the plaintiff lacked a genuine desire for a buyout remedy.[64] As such, plaintiffs pursuing s 216 claims would be well advised to seriously consider any buyout offer and to make a counterproposal to avoid such a negative inference.

9.36 Fifth, the Court of Appeal stressed that by the time the Plaintiff commenced the s 216 action "there was no continuing state of oppression".[65] Indeed, by the time the action was commenced, almost a decade had passed since the alleged acts of oppression had occurred.[66] As the purpose of s 216 is to put an end to oppressive behaviour, this fact militated against a finding of oppression. Furthermore, this long state of inaction on the part of the plaintiff where there had been no continuing oppression would raise evidential questions on the authenticity of the allegations. Considering the legal costs and courts' time consumed by oppression cases, the authors respectfully agree that the court should not grant a remedy

[61] *Ong Heng Chuan v Ong Teck Chuan* [2021] SGCA 46, [2021] 2 SLR 262 at [93].
[62] *Ong Heng Chuan v Ong Teck Chuan* [2021] SGCA 46, [2021] 2 SLR 262 at [93].
[63] *Ong Heng Chuan v Ong Teck Chuan* [2021] SGCA 46, [2021] 2 SLR 262 at [93].
[64] *Ong Heng Chuan v Ong Teck Chuan* [2021] SGCA 46, [2021] 2 SLR 262 at [91]–[92].
[65] *Ong Heng Chuan v Ong Teck Chuan* [2021] SGCA 46, [2021] 2 SLR 262 at [89].
[66] *Ong Heng Chuan v Ong Teck Chuan* [2021] SGCA 46, [2021] 2 SLR 262 at [90].

under s 216 when there has been no continuing state of oppression for a significant period of time.

9.37 Finally, perhaps the most significant aspect of the Court of Appeal's decision is a finding that was forcefully asserted by the High Court but was not explicitly accepted by the Court of Appeal. The High Court held that because the plaintiff asserted that the Company was not a quasi-partnership "there was no basis for him to claim reliance on the doctrine of legitimate expectations".[67] As we explain in an earlier Review, there are significant policy reasons why the court has – and should – allow oppression based on legitimate expectations in *non*-quasi-partnerships.[68] With respect, we hope that the Court of Appeal's silence with respect to this aspect of the High Court's decision in this case is interpreted as not disrupting earlier jurisprudence, which rightfully allows oppression to be established based on legitimate expectations in non-quasi partnership companies.[69]

[67] *Ong Heng Chuan v Ong Teck Chuan* [2020] SGHC 161 at [276].
[68] Dan W Puchniak, Tan Cheng Han and Samantha S Tang "Company Law" (2018) 19 SAL Ann Rev 227 at 233–234, paras 9.16–9.18]; Alan K Koh, Dan W Puchniak and Tan Cheng Han "Company Law" (2019) 20 SAL Ann Rev 198 at 223–226, paras 9.60–9.63. See also Samantha S Tang, "Corporate Divorce in Family Companies" [2018] LMCLQ 19.
[69] Dan W Puchniak, Tan Cheng Han and Samantha S Tang "Company Law" (2018) 19 SAL Ann Rev 227 at 233–234, paras 9.16–9.18]; Alan K Koh, Dan W Puchniak and Tan Cheng Han "Company Law" (2019) 20 SAL Ann Rev 198 at 223–226, paras 9.60–9.63.

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