www.nicholastong.com/lawnotes

NICK'S LAW NOTES

company law

Nick's

Company Law

Exam Notes

2012

1. INCORPORATION ... 4
- **PRE-INCORP. CONTRACTS ... 4**
  - COMMON LAW ... 4
  - STATUTE ... 4
  - CRTPA ... 5
- **PIERCING CORPORATE VEIL ... 5**
  - STATUTORY VEIL-PIERCING ... 5
  - JUDICIAL VEIL PIERCING ... 5
    - PURPOSIVE INTERPRETATION OF STATUTE ... 5
    - AGENCY ... 5
    - FAÇADE OR SHAM ... 6
    - FRAUD OR EVADING EXISTING OBLIGATIONS ... 6
    - AVOIDING POTENTIAL LIABILITY ... 7
    - GROUP/SINGLE ECONOMIC UNIT ... 7
    - BONUS ... 8

2. CORP CONSTITUTION ... 9
- **EFFECTS OF THE M&A ... 9**
  - MEMBERS INTER SE ... 9
  - OUTSIDERS ... 9
  - COMPANY AND MEMBERS* ... 9
- **ALTERATION OF AOA ... 11**
  - BONA FIDE ... 11

3. CORPORATE LIABILITY ... 12
- **ULTRA VIRES ... 12**
- **AGENCY ... 12**
  - 1A) ACTUAL EXPRESS AUTHORITY (PRINCIPAL → AGENT) ... 12
  - 1B) ACTUAL IMPLIED AUTHORITY (PRINCIPLE → AGENT) ... 12
  - 2. APPARENT AUTHORITY (PRINCIPAL → 3P) (ESTOPPEL) ... 13
  - 3. INDOOR MANAGEMENT RULE ... 13
  - 4. RATIFICATION ... 14
    - REASONABLE TIME ... 14
    - AGENT ACTING WITHOUT AUTHORITY, SUBSEQUENT REPUDIATION ... 15
    - PRE-INCORPORATION CONTRACTS ... 15
    - EVALUATION ... 15
  - 5. EFFECTS OF AGENCY ... 15
  - 6. UNDISCLOSED AGENCY ... 15
  - 7. CRIMINAL LIABILITY OF COY ... 15

4. MEETINGS ... 17
- **TYPE OF RESOLUTION ... 17**
- **NOTICE PERIOD ... 17**
- **CONTENT OF NOTICE ... 17**
- **CONDUCT OF MEETINGS ... 17**
    - VOTING ... 17
    - PROXIES ... 17
- **FREEDOM OF VOTING ... 18**
- **PROCEDURAL IRREGULARITY ... 18**
  - PROCEDURAL IRREGULARITY ... 18
  - SUBSTANTIAL INJUSTICE ... 18

5. SH'S REMEDIES ... 20
- **PROPER PLAINTIFF RULE & MAJORITY RULE PRINCIPLE ... 20**
- **PERSONAL LOSSES ... 20**
  - 3 SITUATIONS WHERE FOSS RULE DON'T APPLY ... 20
  - "NO REFLECTIVE LOSS" RULE ... 20
    - 1. PERSONAL CLAIMS ... 20
    - 2. TRANSACTION REQUIRING SPECIAL MAJORITY ... 20
    - 3. ULTRA VIRES TRANSACTION ... 20
- **S216A STATUTORY DA ... 21**
  - PROCEDURAL REQUIREMENTS ... 21
  - 14 DAYS NOTICE ... 21
  - GOOD FAITH ... 21
  - PRIMA FACIE IN THE INTEREST OF COMPANY ... 22
- **COMMON LAW DA ... 23**
  - 0. PRIMA FACIE CLAIM ... 23
  - 1. WRONGDOER'S BENEFIT ... 23
  - 2. BENEFIT AT EXPENSE OF COY ... 23
  - 3. WRONGDOER'S CONTROL** ... 23
  - CLEAN HANDS ... 23
  - AVAILABILITY OF OTHER REMEDIES NOT A BAR ... 24
  - LEGAL COST OF CLDA BORNE BY CLAIMANT OR COY? ... 24
- **S216 OPPRESSION ... 25**
  - COMMERCIAL UNFAIRNESS ... 25
  - BREACH OF WRITTEN AGREEMENT ... 25
  - LEGITIMATE EXPECTATIONS ... 25
  - INFORMAL UNDERSTANDING ... 25
  - IMPLIED UNDERSTANDING ... 25
  - PREJUDICIAL CONDUCT AMOUNTING TO COMMERCIAL UNFAIRNESS ... 26
  - REMEDIES ... 26
    - BUYOUT ... 27
    - WINDING UP ... 27
    - DERIVATIVE ACTION ... 27
- **S254 J&E WINDING UP ... 28**
  - PROCEDURAL REQUIREMENTS ... 28
  - STRATEGIC CONSIDERATIONS ... 28
  - FAIRNESS TEST ... 28
  - COMMON EXAMPLES OF J&E WINDING UP ... 28
    - 1. IRRETRIEVABLE BREAKDOWN ... 28
    - 2. LOSS OF SUBSTRATUM ... 29
    - 3. FRAUDULENT INCEPTION/PURPOSE ... 29
  - DEFERRED WINDING UP ... 29
  - CONSEQUENCES OF S254(1)(I) ... 30

6. DIRECTORS' DUTIES ... 31
- **S1: PUBLIC OR PRIVATE COY ... 32**
- **S2: WHO ARE THE DIR? ... 32**
- **S3: WHAT TYPE OF DIR? ... 32**
  - DE FACTO DIRECTOR ... 32
  - SHADOW DIRECTOR ... 32
  - NON-EXECUTIVE DIRECTOR ... 32
  - NOMINEE DIRECTOR ... 33
  - CHAIRMAN ... 33
  - OFFICERS ... 33
- **S4: FIDUCIARY DUTIES ... 34**
  - 1. DUTY TO ACT BONA FIDE IN THE BEST INTEREST OF COY ... 34
    - ACTING BONA FIDE ... 34
    - ACTING IN THE INTEREST OF THE COMPANY ... 34
    - ++OVERLAP WITH S. 157 - DUTY TO ACT HONESTLY ... 34
    - CONSEQUENCES ... 35
  - 2. DUTY TO AVOID CONFLICT OF INTEREST ... 35
    - (1) NO CONFLICT RULE ... 35
    - (2) NO TAKING OF SECRET PROFITS / CORP OPP RULE 36
    - (3) NO MISAPPROPRIATION OF CORPORATE ASSETS OR OPPORTUNITIES RULE ... 36
    - ++OVERLAP WITH S. 157 – DUTY TO ACT "HONESTLY" 36
    - CONSEQUENCES ... 37
    - ++SUPPLEMENTED BY S. 156 - DUTY TO DISCLOSE ... 37
    - CONSEQUENCES ... 37
    - ++ S. 157 – IMPROPER USE OF INFORMATION ... 37
    - ++ S. 162 – LOAN TO DIRECTORS ... 37
    - ++ S.168,169 – COMPENSATION TO DIRECTORS ... 38
  - 3. DUTY TO ACT FOR THE PROPER PURPOSE ... 38
  - 4. DUTY TO NOT FETTER DISCRETION ... 38
- **S5. NEGLIGENCE DUTIES ... 39**

(1) STANDARD OF SKILL ... 39
(3) STANDARD OF DILIGENCE ... 39
S6. RELIEF FROM LIABILITY ... 40**
GIVEN BY COURT – S. 391 ... 40
GIVEN BY COMPANY (RATIFICATION) ... 40
EXCEPTIONS ... 40
WHAT IS FULL AND FRANK DISCLOSURE? ... 40
S7. REMEDIES ... 41
FRAUD ... 41
BREACHING COMMON LAW DUTIES ... 41
INJUNCTION (S. 409A) ... 41
COMPENSATION OR DAMAGES ... 41
ACCOUNT OF PROFITS ... 41
CONSTRUCTIVE TRUST ... 41
RESCISSION OF CONTRACT ... 41
BREACHING STATUTORY DUTIES ... 42

7. SHARES ... 43
PUBLIC OR PRVIATE COMPANY ... 43
SCRIPLESS TRADING ... 44
OWNERSHIP OF SHARES ... 44
GENERAL ... 44
LEGAL/EQUITABLE OWNERSHIP ... 44
**ADVISE ... 44
SHARE TRANSFERABILITY ... 44
SHARE TRANSFER ... 44
POWER TO REFUSE SHARE TRANSFER ... 45
COURT'S POWER TO RECTIFY COY'S REGISTER OF MEMBERS .. 45
TRANSFER INVOLVING SHARE CERTIFICATES ... 45
IMPLIED WARRANTY ... 45

8. CHARGES ... 46
S1: WHAT KIND OF SECURITY IS CREATED? ... 46
PLEDGE ... 46
CONTRACTUAL LIEN ... 46
MORTGAGE ... 46
CHARGE ... 46
DISTINGUISHING SECURITY FROM QUASI-SECURITY ... 46
CONTINGENT RIGHT TO CREATE A CHARGE IN THE FUTURE - *ASIATIC* ... 46
S2: WHAT TYPE OF CHARGE? ... 47
EQUITABLE CHARGE ... 47
FIXED OR FLOATING? ... 47
REGISTRATION ... 47
EFFECT OF NON-REGISTRATION OF CHARGES ... 47
BOOK DEBTS – FIXED OR FLOATING? ... 47
CIRCUMVENTING RULE ON BOOK DEBTS ... 48
S3: CRYSTALLISATION ... 48
S4: PRIORITY ... 48
NEGATIVE PLEDGE WITH FLOATING CHARGE ... 49
** ADVISE ... 49
EXPERIENCE OF PARTIES ... 49

9. CAP MAINTENANCE ... 50
NO CAPITAL REDUCTION ... 50
COURT-ORDERED (S. 78G – I) ... 50
SOLVENCY-BASED (S. 78B – F) ... 50
CONSEQUENCES OF VIOLATION ... 51
CF. SHARE BUYBACK AND CAPITAL REDUCTION ... 51
NO LENDING OF MONEY ON SECURITY OF OWN SHARES ... 51
EXCEPTIONS ... 51
CONSEQUENCES ... 51
NO SHARE BUYBACK ... 52
REASONS FOR SHARE BUYBACK ... 52
NO-CONSIDERATION EXCEPTION ... 52
EXCEPTIONS TO BUYBACK ... 53
SPECIFIC SITUATIONS ... 53
EXCEPTIONS (76C-E) ... 53
PRE-CONDITIONS ... 53
CONSEQUENCES ... 53
TREASURY SHARES (OPTIONAL) ... 53
NO PAYMENT OF DIVIDENDS ... 54
1) PROFIT ON THE REVENUE ... 54
2) INCREASE IN CAPITAL ASSETS ... 55
3) UNREALISED PROFITS ... 55
CONSEQUENCES ... 55
FINANCIAL ASSISTANCE ... 56
LOCUS STANDI* ... 56
S1: FINANCIAL ASSISTANCE ... 56
S2: DEPLETION OF ASSETS ... 56
S3: DIRECT OR INDIRECT ... 56
S4: FOR THE PURPOSE OF OR IN CONNECTION WITH THE ACQUISITION OF SHARES ... 56
S5: EXCEPTIONS ... 57
S6: AUTHORISATION OF FA ... 57
S7: CONSEQUENCES ... 57
SOLVENCY TESTS APPROACH ... 58
S7A SOLVENCY STATEMENT ... 58
S76F SOLVENCY REQUIREMENT FOR SHARE BUYBACK 58
PROBLEMS IN THIS AREA OF LAW ... 58

1. Incorporation

Outlook

PRE-INCORPORATED CONTRACTS (if any)

PRIMA FACIE: SEPARATE LEGAL ENTITY

STATUTORY PIERCING

JUDICIAL PIERCING Statutory interpretation/Agency/Façade/ Evade obligations/Group companies

1. One must always remember that ignoring the corporate personality is the **exception rather than the rule**
   a. Furthermore, company **still exists** and may well **be a separate entity for other transactions**
2. Courts are strict about lifting the corporate veil because the **onus is on the aggrieved party to bargain or negotiate for unlimited liability** i.e. by extracting personal guarantees from members of the company
3. The lack of distinction in treatment towards involuntary creditors e.g. tort victims and voluntary creditors suggests that **greater leeway should be given to the former in lifting the corporate veil to achieve justice**. However, no common law jurisdiction has yet done so for reasons of **business efficacy**.
4. Many alternative means of actions are usually available in such cases; think of creative means and do not get pigeonholed. Furthermore, in the eyes of the law, certain acts are so inegregious that **separate causes of actions** could be made out
   a. Jones v Lipman
      i. **Equity**: even if courts apply the Salomon principle and treat both D as separate entities, equity will allow for **remedies**
      ii. **Consideration/unwind transaction**: alternatively, can question whether there was even consideration or that consideration was illusory/a sham → seek to **unwind the purchase**
   b. Gilford Motor Co v Horne
      i. **Tort**: can argue that Horne was interfering with his contractual obligations and seek an **injunction** against him
   c. **Fraud**: other actions are usually available
5. At present, business efficacy is primary policy and commercial reason so Adams v Cape Industries and PP v Lew Syn Pau's position in upholding Salomon principle for single and group entities respectively will likely prevail.
   a. Advise client that there is a chance here that we can take but here are some limitations

PRE-INCORP. CONTRACTS

COMMON LAW

Briefly, common law position is that contracts before incorporation cannot be made by coy or its agents and that a coy is not bound by a contract made before its incorporation. Coy thus may not ratify and adopt such a contract (Newborne v Sensolid).

STATUTE

In Singapore, s 41(1) of CA allows coy to ratify any contract or transaction purporting to have been entered into on its behalf before its incorporation.

- 2 conditions before a pre-incorporation contract can be binding upon a company.
  - [1] Contract must purportedly have been entered into by the company or by any person on behalf of the company before its incorporation (e.g. specifically saying "for and on behalf of Company").
  - [2] Company must ratify the contract after its formation (expressly or impliedly).
- Company is not obliged to ratify any pre-incorporated contracts; it is entirely at its discretion.

When the contract was [1] purported to have been entered into by the company or by any person on behalf of the company before its incorporation and [2] the contract was ratified by the company after its formation, the contract will [3] ante-date and be ratified on the day it was purposed to have been made (Khoo Chiang Poh).

CRTPA

S. 2, Contracts (Rights of Third Parties) Act: 3rd parties can enforce a term of a contract if the contract conferred a benefit on him.

PIERCING CORPORATE VEIL

When someone wants to sue the director/shareholders for the company's debt

The prima facie position is that every company is a separate legal personality (*Salomon v. Salomon*). Thus, the company's debt is its own (not the members) and therefore is limited liability conferred upon the members of the company (*Yee Yut Ee*; *Vita Health*).

STATUTORY VEIL-PIERCING

Does a specific provision of CA allow corporate veil to be pierced?

- S. 340, CA: Responsibility for **fraudulent trading**.
- S. 401, CA: **False and misleading statements**.
- S. 404, CA: **Fraudulent trading** inducing persons to invest money.
- S. 406, CA: **Frauds by officers**.
- S. 403(2)(b), CA: **Dividends payable from profits only**. A director or manager who wilfully pays out or permits the payment of a dividend in the absence of profits will be made personally liable to the creditors to the extend by which the dividends exceed the available profits.
- S. 339(3), 340(2), CA: Where **debts are contracted without any reasonable or probably expectation** that the company would be able to pay the debts, the contracting person may be made personally liable for its payment.
- S. 340(1), CA: During the **course of the winding up** of the company, if a business has been carried out with the **intent to defraud the creditors of the company**, the guilty party shall be personally liable for the debts/liabilities of the company.

JUDICIAL VEIL PIERCING

PURPOSIVE INTERPRETATION OF STATUTE

Corporate veil can be pierced if a statutory provision provides for it, or in the absence of clear express words, a purposive construction of the statutory provision leads to the conclusion that such must have been Parliament's intent.

- Re FG (Films): Coy brought into existence for sole purpose of making film qualify as British film. Coy not real maker of film, did not satisfy Cinematograph Film Act, so veil pierced.
- Lee v Lee's Air Farming: whether wife's deceased husband = employee under NZ Worker's Compensation Act. Purpose of statute not to prohibit dual capacity of husband as both employer and employee in coy, did not go against legislative intent. Veil not pierced, entitled to compensation
- Re Bugle Press: Majority 90% shares, incoporated new coy to purchase 90% shares to invoke s209, CA in UK to force compulsory buyout. Strict terms complied, but purpose of statute was not to get rid of minority SH. Veil pierced, new coy = majority SH (of old coy), claim failed.

AGENCY

- Authority (expressed or implied)
- Is there express authority confered onto RT? [usually not. Otherwise too easy]
- Is there any kind of implied or apparent authority?

LAW (implied agency)

If coy is acting as the agent of a person, then the person will be fully liable for the whole loss and will not be protected by the principle of limited liability.

- Smith, Stone & Knight Ltd: Waste coy was subsidiary coy to P – D tried to compulsory purchase coy's land – P sued for compensation – D argued that P did not own the land – held, P entitled to compensation because subsidiary waste coy was his agent.
    - Coy was so grossly undercapitalised that it could not have run the biz independently
    - Emphasis on **INDEPENDENCE**
- Adams v Cape: No agency – each subsidiary carrying on biz even though group was single economic entity

APPLICATION

- Check if coy is grossly undercapitalised (no office, no staff, no assets) → cannot run biz independently
- Profits/staff

FAÇADE OR SHAM

LAW

Where company was never intended to be a proper party to that transaction or to fulfil a proper business function, court may lift veil on grounds that coy was a façade or sham that conceals the state of affairs.

- "The Saudi Al Jubail" (1998)
  - P arrested The Saudi in a sister-ship action against its owners and proved that the charterer of P's ship was the owner of The Saudi.
  - HELD: Veil lifted. Owner formed the company to charter the ship and **used it as a front for his activities**. The owner also did not keep the companies separated from one another or from his own personal affairs.
- TV Media Pte (2004)
  - P sued D who was also the principal shareholder and director of a health company.
  - HELD: Veil lifted. D was clearly the **controlling mind and spirit of the company**. P committed a series of negligent act in his capacity as director of the company and should not be able to escape from his personal liability through the company's separate legal personality.
- Sitt Tatt Bhd v. Goh Tai Hock (2009)
  - P sued D, who was the **sole shareholder and director of the company** when the company withdrew from the joint venture agreement for the refund of the $1 million payment invested.
  - HELD: Veil not lifted. "It was not appropriate for the court to pierce the corporate veil and hold D personally liable for the company's repudiation of the final joint venture agreement. The company had a separate legal personality and there was no evidence that it had been created as a sham or a façade to shield D from responsibility for nefarious transactions.
- Tjong Very Sumito v Chan Sing En [SGHC-2012]
  - Courts will, **in exceptional cases**, be willing to pierce the corporate veil to impose personal liability on the company's controllers. While there is as yet no single test to determine whether the corporate veil should be pierced in any particular case, there are, in general, **two justifications** for doing so at common law – first, where the **evidence shows that the company is not *in fact* a separate entity**; and second, where the **corporate form has been abused to further an improper purpose**
  - One instance where courts would pierce the corporate veil is where the controller of a company uses the company as an extension of himself and makes no distinction between its business and his own, *eg*, in *TV Media*, where the overwhelming personal involvement of the director and principal shareholder (Semon) in the negligence of the company (Health Biz) had been "not merely very great", but "total"

APPLICATION

- Check if coy is just a puppet:
  - Meetings
  - BoD (common Dir/SH)
  - Employees
  - Assets (undercapitalisation argument)
  - Ability to make own corporate decisions/**CORPORATE INDEPENDENCE** (c.f. *Win Line* with *New Line)*
  - Controlling mind and spirit
  - Director's personal involvement
- Motive for creating a sham – must hint at a scheme

FRAUD OR EVADING EXISTING OBLIGATIONS

For fraud, look for **mental element** (hard to establish).

For evasion of existing obligations:

Where there has been an **abuse of the corporate form**, the privilege of incorporation should be lifted and court will disregard the company's notional separateness.

Instead of using the company vehicle to bona fide run a business, the company's existence was for fraudulent purposes, that often involves some degree of dishonesty/lack of moral probity.

- Trustor AB v. Smallbone (No. 3) (2001)
  - P sued D, who had incorporated a company to hide funds.
  - HELD: Veil lifted. Company was used as a device or façade to conceal the true facts thereby avoiding or concealing liabilities of the individual.

- Gerhard Hendrik Gispen & ors v. Ling Lee Soon Alex & anor (2001)
    - P sued Ds personally when Ds' shell company failed to make payment on goods.
    - HELD: Veil not lifted. Court upheld the Salomon principle. There must be fraud or impropriety to make Ds personally liable. On the facts, P knew that the company was a shell company and Ds did not deceive P to the nature of the company.
- Nagase Singapore Pte Ltd v. Ching Kai Huat and Others (2008)
    - D1, a director and D2, a company sued by P for overcharging. Issue was whether a director can conspire with a company?
    - HELD: Allowed claim in conspiracy against D1 and D2. Court opined that P could have brought his claim against D1 personally by piercing the corporate veil too.

AVOIDING POTENTIAL LIABILITY

When a director sets up coy to avoid potential liability

LAW

Prima facie position is that every coy is a separate legal personality (Salomon v Salomon). In the absence of some impropriety, courts in general will not pierce corporate veil if restructuring/setting up of separate coy was genuine commercial decision and not one designed to defeat particular claims/evade existing liabilities. This is seen in Adams v Cape Industries, where the setting up of a subsidiary coy to undertake risky ventures was held to be legitimate.

- Adams v Cape: parent coy in UK not liable to pay damages to employees employed by subsidiary coy in South Africa who were negligently exposed to asbestos
- Yukong Line: coy entered into chartering agreement with R which it broke, leaving it liable to pay damages for breach of contract. On the day of breach and before R commenced proceedings, assets were transferred to another coy. Court refused toa llow R to claim that sum from the transferee.

POLICY

- Parliament treats this as sound business practice to ring-fence risk and has determined that the benefits of encouraging entrepreneurial activity outweighs the disadvantages of permitting undercapitalised companies to operate.
- Judicial support found in Trustor AB v Smallbone, where court took the view that the veil of incorporated will not be lifted simply because 'justice' would suggest that it should be done.
- Requires some element of impropriety as in the case of Kensington, where the court held it was appropriate to pierce corproate veil where a series of transactions within a structure of coy lacked legal substance and was designed to defeat claimant's claim.
- Company Law Review Steering Group: recommendation for an 'elective' regime to be adopted in connection with groups of companies

---

GROUP/SINGLE ECONOMIC UNIT

B Ltd is a wholly-owned subsidiary of R Ltd but, as a registered company, it is a separate legal person from its shareholder. Traditionally, a shareholder has no legal interest in the property of the company. Thus in Macaura v Northern Assurance (1925), a SH was unable to claim on a policy of insurance which he had effected on certain coy's assets and which had been destroyed by fire; one cannot insure another's property and the assets belonged to the company. Thus the amount payable for the ___ would seem to be limited to an appropriate sum determined by legislation. However, the forfeiture of the land may also have an adverse effect upon other companies within R Ltd group, resulting in greater loss than that which is payable to B Ltd.

Can R claim that the veil of incorporation cloaking B Ltd can be torn aside, so that R and B are treated as one company for the purposes of compensation? There are some circumstances in which a court will ignore the separate legal personality of a company. The disregard of corporate legal status may be required by statute or, in exceptional cases, be decreed by courts? One statutory situation is pertinent. The statutes which permit _____ allow a court to disregard the separate legal personality of individual companies within a group and consider the effect of the order on the biz of the group as a whole. This happened, with facts very similar to DHN, but it cannot be said that in all such cases compensation will be awarded on this basis. See for instnace, the decision of the HL in Woolfson and the view of the CA in Adams v Cape Industries.

- In some cases, separate personalities of companies in a group may be ignored.
    - Most of these cases are dealing with statutory provisions, where the lumping

them together as one entity is justified on the basis that it was within the legislative purpose of the respective statutes to treat the group as one entity.
    - There must be **functional unity** within the group with [1] **unity of ownership** and [2] **unity of control**.
- Hence, either it was necessary to give effect to legislative provisions or otherwise, "group entity" concept should not be taken too far and it would seem that for the corporate veil to be lifted for group companies, some abuse or impropriety must have been present.

LAW

In Singapore, position on SEC is that veil will not be lifted unless there is fraud or impropriety (Gerhard; PP v Lew Syn Pau).

POLICY

Judicial attitude swing from DHN (1976) [**fairness**] to Adam v Cape (1990) [**business efficacy, Salomon**] which is affirmed in SG Gerhard (2001):

- Gerhard (2001)
    - P sued Ds personally when Ds' shell company failed to make payment on goods.
    - HELD: Veil not lifted. Court upheld the Salomon principle. **There must be fraud or impropriety to make Ds personally liable**, not simply because the group was a single economic unit.
- The UKCA in Adams v Cape Industries took the view that the decision in DHN Food Distributors Ltd v Tower Hamlets LBC as well as in the other authorities cited in which the court had treated the parent and subsidiary as a single unit ought to be regarded as **decisions that turned on the relevant statutory provisions**.*
    - The court then went on to **uphold the Salomon doctrine** in very strong terms
- Public Prosecutor v. Lew Syn Pau (2006) [SG affirmation of Adam v Cape (certainty) over DHN (fairness)
    - HELD: Prosecution failed to make case that corporate veil should be lifted and thus cannot prove that there was financial assistance contravening s. 76, CA.
    - Noted that the proposition advanced by the plaintiff that the corporate veil may be pierced where one company exercises complete dominion and control over another is entirely too simplistic
    - Even when there is strong pressure from BIGL on CM subsidiary coy to give loan, corporate veil not lifted

---

BONUS

How far should the court go in protecting companies? Competing interests (**biz efficacy** and **externalities**). Line is not very clear and in fact **not very useful to draw clear lines** → won't be able to give courts the flexibility to deal with various cases

To what extent can we stretch the concept of lifting the corporate veil?

- Gramsci (2011): involves SH-COY – new principle: if a company enters into a contract with a 3P, and if the veil is lifted, then the **shareholder becomes a de facto party to the contract** – judge held that a victim would be entitled to enforce a contract entered into by a corporate company and also the puppeteer
- VTB (2012): stated that Gilford and Jones were convicted based on equity and convenience – none of the cases have gone so far as to impose obligations on the 3P – expressly overruled Gramsci – UM: good understanding of how the courts are still struggling with this issue; newer principles are still being sought to be applied; courts like VTB still revert back to traditional position

How to protect particular investors' interests i.e. parent-funding in a family company?

The final question to be addressed is how to protect the financial stake being provided by L's parents. Ordinary shares in a private coy are not readily marketable and offer no rptoection against insolvency; they are not an appropriate choice. Preference shares are subject to the same handicaps, although redeemable shares would guarantee a return of capital if the coy was still a going concern. The best solution would appear to be a secured loan, preferably redeemable at a fixed date, in their favour. Obviously, the coy must have an asset of sufficient value to stand as security for the loan and a specified asset subejct to a fixed charge is more likely to guarantee repayment than a floating charge.

2. Corp Constitution

EFFECTS OF THE M&A

MEMBERS INTER SE

Any member has a right to enforce observance of the terms of the M&A, by virtue of the contractual effect given to the M&A by s. 39. (Wood v. Odessa Waterworks Co) He may sue another member without joining the company as a party (Rayfield v Hands). Such provisions must "apply to the relationship of the members **in their capacity as members**" (Beattie v. E and F Beattie Ltd).

OUTSIDERS

Hickman v Kent held that the M&A do not constitute a contract between the company and a third person. Without recourse to a contractual right, a **3rd party cannot take advantage of a benefit conferred upon him in the M&A**. (Malayan Banking Ltd v. Raffles Hotel Ltd). Thus, in Malayan Banking, the plaintiff, as a lessor, was granted the power to appoint a director, but this was not enforceable since it was not a member.

If there is a contract between the company and a 3rd party, the company may not be restricted from altering its M&A but the **amendment of the M&A cannot affect the existing relationship** and might lead to the company being sued for breach of contract. (Southern Foundries v. Shirlaw).

- Advise client: can **include a term in the contract that where article is altered, the terms of the contract is also altered**
- This is to protect the company and to circumvent Southern Foundries

---

COMPANY AND MEMBERS*

What kind of rights are membership rights?

- *Right to have M&A observed*
- *Right to restrain ultra vires and illegal acts*
- *Right of access to various records of coy*
- *Right to attend and vote at meetings*

THE LAW

Starting position: Hickman/Eley

The traditional view as per Hickman is that a SH can enforce the articles insofar as the relevant article creates a 'membershi[' right, that is, a right attaching to each and every share which relates to the holding of shares. It would seem that a right vested in only some of the membership is not such a right. In Eley, where the articles provided that E was to be company solicitor for life, E was held to have no contractual right of employment as solicitor.

No right merely purported to be given by an article to a person, whether a member or not, in a capacity other that of a member (e.g. as a solicitor) can be enforced against a company (Hickman; Eley).

However this principle of "in a capacity other than a member" was not directly accepted in Singapore (Tan Cheng Han, in "Walter Woon On Company Law") as the local case of Raffles Hotel concerned an outsider trying to enforce rights conferred upon him by the article, but did not deal with a member enforcing the same rights in a capacity other than a member.

Salmon position

In Quin and Axtens v Salmon, HL allowed a member-director to compel the company to adhere to its articles, even if the result was to indirectly protect a right which was "in a capacity other than a member". If Salmon is accepted as the correct view, it would render the "in a capacity other than a member" doctrine nugatory with respect to rights between the company and its members

THE APPLICATION

Issue: Is this right of ____ a right conferred upon a member in his capacity other than a member?

- You have a right to be director, chef, solicitor [No, Eley type case]
- You have director/management power, e.g. right to veto a transaction [Salmon case]
- You have added shareholder power (exclusive to a small grp of ppl), e.g. right to veto appointment of a director
- You have the right to appoint director (Yes, appt of director is decided by SH in a GM – ordinary reso)
  - TCH explained that such a provision could still be considered membership rights. Membership rights need not be universally applicable to every member. Articles that are intended to provide a propective function (perhaps to minority) is no less memership rights even if they do not extend to every member
  - **Distinguish whether it falls under realm of SH or director*

*** If FOR enforcement of right*

It is submitted that the broadly defined "membership right" in *Salmon v. Axtens* is the better position to adopt as a company is free to include or remove terms in its AOA/MOA, and thus if there is a right is entered in it (whether deliberately or mistakenly), a company should be bound by it – this is the very principle of general contract law, albeit this is a statutory contract.

Even if it were held to be unenforceable, if the clause was meant to benefit ___, and right was expressly or impliedly stated in the article, could apply CRTPA.

*** If AGAINST enforcement of right*

It is submitted that the more narrowly defined "membership right" in *Hickman v. Kent* is the better position to adopt as the AOA/MOA is a statutory contract between all the members inter se and thus a "membership right" must be one that is conferred to all the, if not a class of, members and not just to one or two persons. A 'right' to be a solicitor is not a right that is conferred on all the members and thus it is not a right in the "capacity of the member", and should not be allowed to be enforced on the company.

Further, it is submitted that the court should interpret Salmon narrowly to mean that a company is only required by a member to act in accordance with the articles where there is a close nexus between inducing the person to join the company and the clause in question.

General conclusion

It should be noted that this has not been adopted by either UK or Singapore. In practice, the Hickman principle does not seem to engender much difficulty. While the rule is not wholly desirable, it is a clear rule and the cost of contracting around it is not high. As a result, practice has accomodated itself to the rule. (Paul Davis) Therefore, the courts would likely not be sympathetic to the plaintiff in this case, given that he was able to negotiate a separate contract (more compelling argument if experienced director etc).

Evaluation

There may be good policy reason for the law to be uncertain in this area. Courts do not favour the inclusion of unconventional clauses in the M&A since they bind all members, even those who enter the company post-incorporation, and who have no actual knowledge of the M&A. Uncertainty in enforcement means that companies will be less inclined to include clauses that impose obligations on its members, and will instead, have to enter into separate agreements with them.

ALTERATION OF AOA

BONA FIDE

If the alteration is *not* one that is "*bona fide* for the benefit of the company as a whole" it *may* be successfully challenged—but the court is normally reluctant to interfere (and the oppression remedy normally provides a better option for the aggrieved minority shareholder)

The general rule is that when voting to alter the articles members must do so in a manner that is "***bona fide*** **for the benefit of the company as a whole**" (*Allen v Gold Reef*). This is based on an **objective minimum standard**, whether a reasonable man would consider the alteration to be for benefit for the company (*Shuttleworth*). The member challenging the alteration has the **burden of proving** that the alteration was *not* made *bona fide* for the benefit of the company (*Citco Banking*).

There is a greater likelihood of successfully challenging the alteration if there is a **discrimination** against the minority (e.g. compulsory transfer of the minority's shares) – but only if it gives the majority an **unfair advantage** which the **minority is deprived of** (*Greenhalgh*).

Simply demonstrating that the alteration prejudicially effects the minority (even when it involves a compulsory transfer of shares) is normally insufficient to successfully challenge the alteration if, from the perspective of a **reasonable shareholder** (not from the perspective of the court), such an alteration could **provide a benefit for the company** (*Sidebottom*; *Citco Banking*)

It is an **unresolved question in Singapore** whether an alteration of the articles which results in an expropriation of shares ***can only*** **be justified** if *the* ***purpose*** **is to save the company from a *detriment*—and *cannot* be justified** if the **purpose is to *advance* the company's interests** as a commercial entity (*Gambotto*, Australian Case) – rejected in UK

The jurisprudence concerning the alteration of articles has become less significant with the growth of the oppression remedy (s 216) which often provides a more powerful remedy for minority shareholders.

3. Corporate Liability

ULTRA VIRES

In Singapore, the doctrine of ultra vires has been watered down considerably, as no act shall be invalid by reason only of the fact that the company was without capacity or power to do such an act (s. 25(1)).

Objects clauses are no longer mandatory (s. 23).

However, the lack of capacity may still be relevant when (i) a member or debenture holder wishes to restrain a company from committing and ultra vires act, (ii) the company or its members wish to commence an action against former or present officers of the company, and (iii) when a minister is seeking to wind-up a company (s. 25(2)).

Under these circumstances, the court may award remedies that are just and equitable, and these include (i) compensation (restitutionary interest, not expectation interest), (ii) order to set aside the transaction, or (iii) restraint of performance (s. 25(3)).

This is consistent with the abolishment of the constructive notice doctrine in s. 25A – where the third party is no longer put on notice by the company's memorandum and articles.

All of these changes were put in place so as to prevent the abuse of the doctrine of ultra vires.

AGENCY

In determining whether someone is an agent, there is a three-step inquiry to take: (i) whether there had been actual authority on the part of the agent, (ii) whether there had been apparent or ostensible authority, (iii) whether there was anything to put the 3rd party on notice as to the agent's lack of authority.

1A) ACTUAL EXPRESS AUTHORITY (PRINCIPAL → AGENT)

***Always find out if there are EXPRESS RESTRICTIONS to authority included somewhere (restrictions > authority)*

Express authority can be conferred upon the agent via oral agreement or in writing, and this may occur through statute, the memorandum and articles of association, general meeting, delegation of authority by agent or terms of contracts.

1B) ACTUAL IMPLIED AUTHORITY (PRINCIPLE → AGENT)

Implied authority has three forms:

(i) **INCIDENTAL AUTHORITY** – where an agent has authority to do tasks reasonably incidental to the fulfillment of the tasks he is expressly authorized to do,

- Agent must prove that he was expressly authorised.
- Then prove that what he did was reasonably incidental.

(ii) **USUAL AUTHORITY** – where an agent has authority to do things that a person in such a position would usually do, and

- Agent must prove that his act was what an office of that sort is reasonably expected to do.
  - Proved by **previous practices of the company**.
  - Also seen from **case law precedents**.
  - E.g. managing director has implied authority to manage the company's business in the ordinary way.
  - E.g. individual director does not generally have implied authority to make contracts on behalf of the company.
  - E.g. company secretary has implied authority to make representations and to enter into contracts in the course of his administrative functions.

*[**CHAIRPERSON**] In general, chairperson is merely titutor and has no authority to bind the company (Hely Hutchinson)*
*[**COMPANY SECRETARY**] In general, the company secretary has the authority to bind the company to contracts that include compliance acts but not commercial contracts.*
*[**MD**] The Board of Directors would normally delegate its power to the MD (Art 93 of Table A). Hence, 3P can assume that the MD has authroity to act on behalf of the company.*
*[**FINANCE MANAGER**] The court in Skandanaviska held that mere position as a finance manager does not give authority or connote any specific power. One would need to ead evidence*

on the actual job scope and see whether commercial logic justified him doing what he did, e.g. commit company to a huge loan]

(iii) **ACQUIESCENCE OF SUPERIORS** – where the agent needs to show that the superiors knew of the acts but allowed him to do them.

- Equitcorp Finance Ltd v. Bank of New Zealand [From the conduct of parties]
  - HELD: Court will infer the implied authority from the conduct of the parties.
- Koh Kia Hiong v. Guo Enterprises (1990) [From the way coy is set up]
  - P was the Managing Director of D, and argued that the sale of the property that he entered required approval from the Board of Directors. Board only consisted of his mother and clerks, both nominal directors.
  - HELD: In all probability, Koo's mother (other Dir) left everything to him to decide
- SPP Ltd (1993) [from past practice]
  - Board was content to let him manage and run SPP the way he did, thus there's acquiscence
- Hely Hutchinson v. Brayhead Ltd (1967) [X]
  - Board acquiesce in his acting as their CEO and without sanctions over many months
  - **Note: No longer good law because of s. 157A, CA?** Default position now is that managing power lies with the Board of directors.

---

2. APPARENT AUTHORITY (PRINCIPAL → 3P) (ESTOPPEL)

ELEMENTS: Freeman v Lockyer

1. Representation
   - Usual position: First Energy (communicate approval)
   - Usual conduct
   - Express
2. Authority to represent
   - No self-representation
3. Reliance (and detriment)
   - No knowledge of representation
   - Knowledge of lack of authority
   - Not put on inquiry

Apparent authority is the authority the agent appears to have to the outside world, because of the representation made by the principal on behalf of the agent. If there had been no actual authority, a principal may still be precluded from raising the agent's lack of authority by the doctrine of estoppel if the agent had acted within the scope of his ostensible or apparent authority, even if this were to be outside his actual authority (Freeman). This may be the case even where the agent had made a mistake.
However, a **representation made by the agent himself as to his own authority is valueless**; the **only exception to this is where the principal's representation gives the impression that the agent himself can make representations about his own authority** (First Energy – where a distinction was drawn between the authority to approve and the authority to communicate the approval and held that the bank was bound. This case stretches the notion of apparent authority, and was doubted in Singapore in the case of Skandinaviska.

Where there is no apparent or ostensible authority, or if the agent had made a representation about his own authority which does not fall within the First Energy exception, the principal is not bound by the agent's actions.

---

3. INDOOR MANAGEMENT RULE

***Was there anything to put the 3rd party on notice as to the agent's lack of authority?*

- Entitled to assume transactions free of internal irregularities: Turquand's case, Mahony v East Holyford
- Encompassed in s 392 CA (procedural irregularities)

THE LAW

In general, a principal will be bound by its agent's actions by estoppel if the 3rd party has had no notice of the agent's lack of authority. However, where the 3rd party has been notified of the agent's lack of authority, the principal will not be bound by the agent's actions.

The indoor management rule is a presumption of regularity. When it comes to internal procedures, the general rule is that if an agent has apparent authority to do an act, then the 3rd party contractor dealing with the company is entitled to assume that all matters of internal management procedures prescribed by the memorandum and the articles have been

complied with (Turquand; Mahony). However, where the 3rd party is put on notice because of the suspicious nature of the transaction, where for instance, directors had benefitted but not the company, then the 3rd party ought to have done more to inquire about the authority of the agent and the principal will not be bound (Northside Developments Pty Ltd v Registrar-General).

THE APPLICATION

3 exceptions (known or should have known - lack of authority):

1. Actual knowledge (i.e. insider, directors → ought to have known also counted)
2. M&A put on notice
    a. Applies when M&A clearly states that agent could not be authorised
    b. CL: constructive notice of documents on the whole world
    c. SG: s25A reverses the position, and onus is on party alleging knowledge to prove
3. Nature of transaction: *Northside v Reg-Gen* (benefit to MD not company)
    a. Where circumstances are such that reasonable person would be put on notice

4. RATIFICATION

Where an agent acts in an unauthorized manner, the agent breaches his duty to the principal. Thus, where a principal is liable to the third party because of apparent authority, the principal is entitled to recover his loss from the agent. However, **where the principal ratifies the agent's acts, in general, the principal waives his rights against the agent for the breach of duty, since the principal has seen it fit to adopt the agent's acts**. There may be circumstances though where the principal feels compelled to adopt the agent's acts, e.g. the principal's business reputation would materially suffer if no ratification took place, and in such circumstances, it is possible that ratification will not absolve the agent from liability to the principal.

Where the agent's act is unauthorized, but the principal wishes to take the benefits of the act, he may ratify it such that the agent will be said to have been authorized from the very outset. Ratification may be express or implied – but must be an unequivocal affirmation. Ratification can be done to pre-incorporation contracts such that the parties are bound as though it had been in existence at the date of the contract (s. 41(1)). An important pre-condition is that the agent **must have purported to act on behalf of the principal** (Keighley).

REASONABLE TIME

Ratification must take place within a reasonable time after the unauthorized act had taken place, and cannot extend the time fixed for doing an act, and cannot adversely affect any proprietary rights which had arisen (Secunda).

AGENT ACTING WITHOUT AUTHORITY, SUBSEQUENT REPUDIATION

Where an agent acts without authority and purchases a house for his principal from a third party, and the third party repudiates the contract before the principal ratifies the contract, the repudiation is rendered ineffective because the ratification clothes the agent with authority to act from the very outset (Bolton Partners). This case has been criticized because it puts the 3rd party at the mercy of the principal who may choose whether or not to ratify at any time.

PRE-INCORPORATION CONTRACTS

The position in Singapore is that the coy is allowed to raify any contract or transaction purporting to have been entered into on its behalf before its incorporation as per s41(1), subject to the conditions that a) contract must purportedly have been entered into by coy/any person on behalf of coy before incorporation and b) coy must ratify contract after its formation.

EVALUATION

This area of law is potentially unfair, given that 1) principal is not bound by unauthorised acts of agents, thus cannot be sued by 3P, but 2) if principal so wishes, he is entitled to raify unauthorised acts of agents and enforce any contract upon principal. Accordingly, whether price goes up or down, 3P seller is in a disadvantageous position.

---

5. EFFECTS OF AGENCY

Breach of implied warranty

There is an implied warranty on the part of the agent – such that the agent will be deemed to have said the truth, and will liable for the 3rd party's losses if (i) he had represented that he had the authority to act on behalf of the principal, and (ii) the 3rd party had relied on this representation; notwithstanding the good faith or mistaken belief of the agent (Fong Maun Yee).

---

6. UNDISCLOSED AGENCY

Where the third party contracts with an agent, and does not know that there is a principal, there is an undisclosed agency. This area of law constitutes a major exception to the law of privity of contract. The rationale for allowing undisclosed agency is that it **makes commercial sense for the principal to remain anonymous**.

The undisclosed principal is **entitled to enforce the contract so as to take the benefits of the contract** if (i) the agent had actual authority (Keighley), and (ii) the identity of the contracting party is not important to the 3rd party (Said v Butt).

- Said v Butt: P banned from theatre – through agency of friend, obtained ticket at theatre without disclosing his identity – refused admission – court held, identity of P was material element in formation of contract

Commercial practice may also allow for the **undisclosed principal to claim benefits** – such as the context of a charterparty (F Drughorn).

While the **terms of the contract may exclude the rights of the (undisclosed) principal from suing**, the courts are generally reluctant to do so in the absence of such a term because it defeats the commercial convenience which underlies the doctrine of undisclosed agency (Siu Yin Kwan).

The doctrine is still regarded as anomalous and some aspects still require further clarification. The Singapore case of Family Food Court considered whether substantial damages were recoverable by an agent for losses suffered only by the undisclosed principal. The *narrow ground exception* is inapplicable since it requires the parties to contemplate the transfer of proprietary interest in the contractual subject matter (which is absent since the 3rd party does not know of the existence of the undisclosed principal). The court recognized arguments for and against allowing recovery on the *broad ground* (i.e. performance interest of the contracting party), and noted that multiplicity of proceedings can be avoided by joining the undisclosed principal when he is identified, but did not decide on its applicability.

---

7. CRIMINAL LIABILITY OF COY

Companies have a separate legal personality, hence, wrongs of its constituting members may not be imputed to it. However, companies may be held liable for criminal and

tortious acts despite it lacking a mind of its own. Examples of these include:

1) Strict liability offences that do not require mens rea
2) Where the board of directors / members unanimously authorizes the commission of an offence during a meeting
3) Where the CEO or director of a company is responsible for the commission of the act?
    a. Where the manager is not the "directing mind and will" of the company, his conduct cannot be attributable to the company since he is merely a subordinate. **A company will only be liable if the "directing mind and will" of the company commits an offence** (Tesco Supermarket v Nattrass)
    b. However, this may not always be the case. There are also agency laws and laws on vicarious liability; and the construction of the statutory provision in question may have shown the desire to **impute knowledge from lower-level employees to the company** (Meridien Global)

---

4. Meetings

In Singapore, directors are allowed to exercise all the power of a company except when a general meeting is required (s. 157A, reproduced in Art 73, Table A). This means members cannot pass an ordinary resolution to overrule the director's decision (*Automatic Self-Cleansing*).

***Here, can the director do this particular act? Most likely not, need to pass resolution.*

TYPE OF RESOLUTION

According to _____, in order to ______, a ______ resolution needs to be passed at a General Meeting.

- Alter Object Clause (in MOA) – s. 33 – 21 day + **Special Resolution**
- Alter MOA – s. 26 – **Special Resolution**
- Alter AOA – s. 37 – **Special Resolution**
- Alter Entrenching Clause – s. 26A(1) – **Unamity**
- Alter Entrenched Clause – s. 26A(2) – **only by the conditions specified**
- Remove Director (private coy) – Art 69, Table A – **Ordinary Resolution**
- Remover Direct (public coy) – s. 151(1) **Ordinary Resolution** + s. 151(2) Special Notice
- s. 36, Table A adopted as company's AOA, in so far as they are not excluded or modified by company.

NOTICE PERIOD

Ordinary resolution: at least **14** days notice + not less than **50%** (s. 177).

- Informal assent 100% no need notice (Re Duomatic; Jimat)

Special resolution: **14** days notice (private coy) / 21 days (public coy) + not less than **75%** (s. 184)

- Informal assent 100% seems like no need notice (Cane v. Jones, referred locally with approval in Jimat). However, given the wording of s. 184(1), written notice is still required.

Special Notice: **28** days (s. 185)

CONTENT OF NOTICE

The notice must state with sufficient particularity the matters which are going to be decided at the meeting – and must include details on the place and time of the meeting and the general nature of the special business that is to be transacted during an EGM (A. 45 and 46 of Table A).

Whether notice is sufficient depends on the facts of the case – it must contain enough information to enable the recipient to decide whether or not to attend himself, appoint a proxy, or to let others decide (Tiessen v Henderson). If insufficient notice was given with regard to the agenda of the meeting, such that the recipient of the notice was denied of the chance to decide whether or not to attend, the meeting could be invalidated (Lau Ah Lang v Chan Huang Seng).

Requisitionists must state the resolution intended to be passed during the meeting in the notice (Hup Seng Co Ltd v Chin Yin). Where the purpose of an EGM is to remove a director, the notice has to state this purpose (Paillart Philippe Marcel v Eban Stuart Ashley). If an EGM was convened for the purpose of passing a resolution which was ultra vires, the directors need not convene the meeting and any resolution from that meeting is void (Credit Development Pte Ltd v IMO Pte Ltd).

CONDUCT OF MEETINGS

VOTING

All members are entitled to vote (s. 180(1)). There are 2 ways to vote – **through a show of hand** where each member present is entitled to one vote; or **through a poll** – where every member votes according to how many shares are held.

POLLS CAN BE DEMANDED (s. 178(1)(b)).

The default rule is that each share translates into one poll vote (s. 179(1)(c)(ii) and A. 54 of Table A).

PROXIES

All members may **vote by proxy** (s. 181), where a proxy is an agent who votes on behalf of the member principal. Unless the articles state otherwise, a maximum of 2 proxies may be appointed (s. 181(1)(b)).

A standard form must be followed (A. 60 of table A). The form must also stipulate whether to vote for or against the

resolution (s. 181(5)). The proxy form must be deposited within 48 hours of the conduct of the meeting (a. 61 of Table A), and the articles of association cannot alter this 48 hour period (s. 178(1)(c)).

A **proxy's power to vote on his principal's behalf can be revoked before the meeting** – where the principal appears at the meeting, the proxy becomes redundant and his vote will be rejected; the member's vote will be accepted instead (Cousins v International Brick).

Where the proxy acts against the instructions of the principal, the **proxy's vote will not be considered** (Tong Keng Meng v Inno Pacific Holdings). However, if the **member fails to give proper instructions in the proxy form, the member will risk getting the vote counted** regardless of whether the vote was made correctly, because there had been ostensible authority.

In absence of a contrary article, the proxy cannot vote except on poll, so a poll should be demanded. However, Art 54 Table A allows member to vote on show of hands either personally or through proxy.

FREEDOM OF VOTING

A shareholder owes no duty to the company and may vote as he wishes, even if the shareholder may have a personal interest different from or opposed to that of the company (North-West Transportation Co Ltd v Beatty).

However, this is subject to various exceptions:

- Majority members may not use their votes to appropriate to themselves property which belongs to the company or to condone their own fraud (Cook v Deeks)
- Where there is a resolution on an issue which affects the rights of members, such as an alteration of the articles, the majority must act Bona Fide in the interest of the company as a whole (Allen v Gold Reefs)
- Where it is sought to bring an action against persons who have allegedly committed wrongs against the company, (fraud on the minority) the alleged wrongdoers may not use their votes to stop the action from being brought (exception to Foss v Harbottle)
- Votes must not be used oppressively, must be used for genuine purposes (not really supported by case law; purported by Clemens v Clemens Bros)

PROCEDURAL IRREGULARITY

A member has no right to insist on full procedural compliance, but may object when there is substantial injustice caused by the procedural irregularity. The list under **s. 392** is not exhaustive (Golden Harvest Films v Golden Village). A general meeting is a "proceeding" for the purpose of s. 392 (Welch v Britannia Industries).

The proper forum for invalidating a procedural irregularity is the high court (Goh Ah Jee v Conteem Engineers Pte Ltd).

PROCEDURAL IRREGULARITY

Mere irregularities will not suffice (Golden Harvest Distribution (pte) Ltd v Golden Village Multiplex Pte Ltd) – and this includes a mere lack of quorum (Sum Hong Kum v Li Pin Furniture) and deficient notice (Goh Ah Jee v Conteem Engineers). The rationale behind this is that the majority will eventually be able to get their way after the court attempts to cure the situation (MacDougall v Gardiner).

There is no solid definition of procedural irregularity, however, it has been interpreted to be dependent on the aim of the requirement that was not complied with in the case of Thio Keng Poon v Thio Syn Pyn. However, this case is criticized because it held that the failure to serve notice to the director that was bound to be removed was a substantive irregularity, on the grounds that the director had been deprived of an opportunity to choose his options. The case could have arrived at the same result by holding that the irregularity was a procedural one which fit under s. 392.

SUBSTANTIAL INJUSTICE

In order to establish substantial injustice, there must be (i) a *nexus* between the irregularity and the injustice caused, (ii) that the *injustice has to be substantial* – which is more than just ordinary prejudice, and (iii) that there could have been a *different result if not for the occurrence of the procedural irregularity* (Thio Keng Poon v Thio Syn Pyn). The person attacking the validity of the proceedings bears the burden of proving substantial injustice. This is determined through a holistic weighing and balancing of the various interests of all the relevant parties (The Oriental Insurance Co Ltd v Reliance National Asia).

Where notice regarding the removal of a director was deliberately not given to this director, in bad faith, and this

resulted in substantial injustice, the meeting may be invalid and its resolutions will be rendered void, even if the articles provide for its validity (Polybuilding v Lim Heng Lee).

5. SH's remedies

PROPER PLAINTIFF RULE & MAJORITY RULE PRINCIPLE

The locus classicus case of Foss v. Harbottle sets out 2 rules. First, the **proper plaintiff rule** that only the company has locus standi to sue for the company's losses – not the shareholders – and this is due to the company's separate legal personality. Second, the **majority rule principle** that a majority is allowed to lawfully ratify the issue that arise out of a minority's suit against the company (such as mere irregularity or illegality in (MacDougall v Gardiner) and the majority decision is final (Edwards v. Halliwell). Both of these principles were affirmed in Prudential Assurance.

PERSONAL LOSSES

3 SITUATIONS WHERE FOSS RULE DON'T APPLY

However there are 3 situations where the rule in Foss (Prudential Assurance) does not apply: (1) Personal Claims, (2) Transactions that could only be sanctioned by special majority of members, (3) Ultra Vires Transactions.

"NO REFLECTIVE LOSS" RULE

APPLIES TO PERSONAL CLAIMS AND S.216A

A shareholder cannot make a claim for reflective loss (Prudential Assurance, accepted locally in Townsing Henry). This is to prevent double recovery as the 2 wrongs suffered by the company and the shareholders are essentially the same thing.

However, there are 2 disjunctive exceptions to the "no reflective loss" rule (Johnson v. Gore Wood, accepted locally in Hengwell Development Pte and Townsing Henry). First, is where the company has no cause of action to recover its own direct loss, such as when the wrongdoer director prevented the company from suing either by causing the company to become insolvent (Giles v. Rhinder) or by controlling the board meetings (Hengwell). Second, is when the shareholders suffered a loss separate and distinct from the company, such as a breach of contract between the wrongdoer director and shareholder (Street v. Coombes).

1. PERSONAL CLAIMS

1. Express contracts
2. Statutory contract (s39)
3. Companies Act
   - *Qua* member rights
   - s 392 CA
4. Common law
   - Right to vote: *Pender v Lushington; MacDougall*
   - Directors' right not to be wrongfully remove: *Pullbrook v Richmond*

2. TRANSACTION REQUIRING SPECIAL MAJORITY

No room for operation of Foss rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a greater majority (Prudential Assurance).

3. ULTRA VIRES TRANSACTION

Ultra vires acts are acts that clearly exceeds the objects of the company and not merely acts that were unauthorized by the company (Rolled Steel Products, adopted locally in Banque Bruxelles Lambert).

Under common law, ultra vires acts are void ab initio and cannot be ratified (Ashburn Railway Carriage). Thus, the majority rule principle in Foss does not apply if the wrongdoing is an ultra vires act (Prudential Assurance). However, the common law ultra vires doctrine is severely diminished by s. 25(1), which now validates ultra vires acts. Nonetheless, the ultra vires doctrine is allowed in limited circumstances as prescribed under s. 25(2). Under s. 25(2)(b) a member can use the ultra vires act to support a claim against the directors, such as an oppression remedy in s. 216. Under s. 25(2)(a), a member can restrain the company from committing an ultra vires act, but only if it has not been wholly executed.

***Apply facts to see if the act comes within object clause of the company, otherwise it is ultra vires. Then, has the act been wholly executed?*

S216A STATUTORY DA

PROCEDURAL REQUIREMENTS

In order to bring a statutory derivative action against wrongdoing controllers of the company on behalf of the company,

(i) the company must be incorporated in Singapore and not be listed on the Singapore stock exchange (s. 216A(1)), (Ting Sing Ning v Ting Chek Swee), (Sinwa SS(HK) Co Ltd v Morten Innhaug),

(ii) the complainant must be a member of the company, Minister of Finance, or any other "proper person" (s. 216A(1)), and

(iii) the loss must be suffered by the company as opposed to the shareholder, and reflective loss cannot be the basis of a claim. There are, however, exceptions to the use of reflective loss as the basis of a claim - (i) where the company has no cause of action to recover its loss, for instance, when the company is in a jurisdiction that offers it no proper remedy (Hengwell Development Pte v Thing Chaing Chin); and (ii) where the shareholder suffers a loss that is separate and distinct from that suffered by the company – in other words, where there is no reflective loss (Giles v Rhind), (Hengwell Development Pte v Thing Chaing Chin). Ultimately, there must be no risk of double recovery and no prejudice to the creditors or shareholders.

---

14 DAYS NOTICE

Under s. 216A(3)(a), 14 days notice must be given to the company of the intention to seek a s. 216 derivative action so that the board can deliberate whether it wants the company to commence the action itself. The notice need not specify every cause of action (Re Bellman) and there is no requirement to give more than 14 days notice to allow independent legal advice to be sought (Eden Aesthetics).

If there is an amendment of pleadings, a reissue of the 14 days notice is not required if the fundamental nature of the application did not change (Agus Irawan).

Further, per s. 216A(4), the court retains the discretion to shorten the notice requirement "as it deems fit" if the applicant can prove that it is not expedient to give the 14 days.

- One such way is to show that the giving of notice would have been "futile" because the company would not have done anything to verify or investigate anyways (Fong Wai Lyn). In such a case, courts will examine the company's conduct before and after the s. 216A leave application.
  - However, this approach is criticised by Puchniak & TCH for **equating ex poste actions necessarily with ex ante actions**.
  - Practical effect is that directors would likely be adivsed to always make a bona fide and determined effort to investigate claims even if inadequate notice is provided: **positive corporate governance development**
- Alternatively, it might also be possible to show that the notice requirement is "impracticable" by shewing evidence that the provision of notice would undermine the action being sought.

***Apply facts to see if it is futile to give notice, perhaps actions of parties after the application was brought indicate they were not going to do anything, e.g. did not investigate or audit.*

GOOD FAITH

Next, under s. 216A(3)(b), the complainant must be acting in good faith in bringing the action. Court will assume good faith if there is a reasonable and legitimate claim, and the defendant bears the burden of proving otherwise (Pang Yong Hock; Agus Irawan).

It is generally **insufficient to prove a lack of good faith based on feelings of hostility, ill-feeling or dislike** between the parties as these are very common in cases of this category (Pang Yong Hock, reaffirmed in Fong Wai Lyn). However, where the defendant is able to establish that the complainant was "**so motivated by vendetta, perceived or real, that his judgments would be clouded by purely personal considerations**", this might be sufficient to prove bad faith on his part (Pang Yong Hock, reaffirmed in Urs Meisterhans). A complainant's good faith might also be doubted if he **appears to be set on damaging or destroying the company out of sheer spite or for the benefit of a competitor** (Pang Yong Hock).

This means that **bad faith might be inferred if the complainant does not act in the company's interests**; indeed, there is an overlap and interplay of the requirements in s.

216A(3)(b) good faith and s. 216(3)(c) interests of the company (Agus Irawan, affirmed in Pang Yong Hock).

Most importantly, **there is good faith so long as the application raises legitimate issues** which cannot be considered as “frivolous, vexatious or devoid of merit” (Richardson Greenshields – buy 1 share in coy to sue), even if the applicant had a collateral purpose (Fong Wai Lyn).

***Apply facts to see if there is prima facie case if yes, there is assumed good faith*

PRIMA FACIE IN THE INTEREST OF COMPANY

Lastly, under s. 216A(3)(c), the complainant must establish that the bringing of the application is *prima facie* in the interests of the company.

Prima face entails a “reasonable semblance of merit” and not that the case is likely to succeed (Agus Irawan and affirmed in Urs Meisterhans). A case may be meritorious but not in the interest of the company if shareholders have genuine commercial considerations such as bad publicity or preserving business relationships (Pang Yong Hock). Thus, courts have to weigh all the circumstances in order to decide whether a prima facie case is indeed in the interest of the company.

***Apply facts to see if there is a case with reasonable semblance of merit and if it is in the interest of the company.*

Pang Yong Hock also made it clear that Ting Sing Ning is not authority for the proposition that a court will refuse s. 216A action if there are alternative remedies.

***Therefore even though present case might have other remedies but still allow s.216A*

COMMON LAW DA

*** Used when it is a foreign coy or listed*

"Fraud on the Minority" is a procedural device for a shareholder to enforce the rights of the company (and not his). There is no legal test that has been authoritatively stated by our courts.

In Sinwa SS (SGHC), Justice Ang suggested in obiter, a very loose test, namely any wrong committed by a director if accompanied by an improper attempt to stifle the company's attempt for redress.

However, it is submitted that the better test is the stricter approach set out in Daniels v. Daniels that was positively cited in the court of appeal case of Ting Sing Ning (SGCA). Daniels v. Daniels set out a three-part test: (1) Wrongdoer must obtain some sort of benefit, (2) Benefit was obtained at the expense of the company, and (3) Wrongdoer had controlling interest to prevent company action.

---

0. PRIMA FACIE CLAIM

However, before apply the actual test, it was suggested in obiter in Sinwa SS that there should be a preceding threshold test, namely whether the company is prima facie entitled to the claim.

***Apply the threshold test; mostly likely there is a prima facie claim.*

---

1. WRONGDOER'S BENEFIT

Moving on to the first limb, fraud is to be understood not in the narrow common law sense but can include a wrongdoer's negligence (Daniels v. Daniels). However, if the wrongdoer did not obtain a benefit there is no "fraud on the minority" despite his negligence (Pavlides v. Jensen).

***Apply the facts to see if wrongdoer benefitted.*

---

2. BENEFIT AT EXPENSE OF COY

On to the second limb, the wrongdoer's benefit must have cause detriment to the company (Cooks v. Deeks). There is no detriment to the company if the wrongdoer director benefited from a business opportunity that did not belong to the company (Burland v. Earle) or when the company was unable to pursue the business opportunity in the first place (Regal (Hastings) Ltd v. Gulliver).

***Apply the facts to see if company suffered any detriment as a result.*

---

3. WRONGDOER'S CONTROL**

On to the third and last limb, a derivative action will not be allowed if the wrongdoer did not have control to prevent the company from suing (Mozeley v. Alston). To establish wrongdoer control, one must show either that the wrongdoer held majority of the voting power, or wrongdoer exercised de facto control by his influence to control the voting power of the majority (Prudential Assurance). De facto control may be established if the wrongdoer has familial relationship with other shareholders that when pulled together form a majority shareholding (Ting Sing Ning). However, wrongdoer control is not just about requisite shareholding but rather the crucial question is whether the wrongdoer is able to prevent an action against him (Sinwa SS). In addition, it was suggested in obiter in Smith v. Croft that even if wrongdoer control is established, the derivative action may not be allowed if the majority of the minority – who are independent of the wrongdoer and the minority commencing the action – is against the derivative action. However, these independent shareholders, who are the majority of the minority, must be fully informed of the nature of the wrongdoing when opposing the action (Ting Sing Ning).

***See if wrongdoer has majority share or de facto control. And if there is independent majority of the minority who oppose action, and if they are fully informed.*

CLEAN HANDS

Also, plaintiff must come to court with clean hands (Nurcombe v. Nurcombe, positively cited in Sinwa SS) as this derivative action is based in equity. A delay in pursuing the action is a legitimate factor to consider for "clean hands" (Ting Sing Ning).

***Clean hands is usually easily satisfied*

AVAILABILITY OF OTHER REMEDIES NOT A BAR

Lastly, the mere availability of an alternative remedy will not foreclose the court in allowing a derivative action, unless it is a superior remedy (Ting Sing Ning, and supported by academics Tan Cheng Han and Dan Puchniak, though it was suggested otherwise by a lower court in Sinwa SS)

***Apply the facts to see if there is superior remedy, most likely not.*

LEGAL COST OF CLDA BORNE BY CLAIMANT OR COY?

Normally, the legal cost of bringing the derivative action is borne by claimant while proceeds are awarded back to the company. However, the court has the discretion to order the company to indemnify the legal costs if the claimant has reasonable ground for bringing the action and it is in the interest of the company (Wallersteiner v. Moir) or if the claimant genuinely did not have the resources to finance the action (Smith v. Croft).

S216 OPPRESSION

The oppression remedy is a substantive device in that the claimant has a personal action and he will receive the benefits directly.

s. 216 applies only to Singapore Company (*Lim Chee Twan*), and this is not an issue here as....

COMMERCIAL UNFAIRNESS

Although s. 216(1) seems to provide 4 alternative limbs, they are not to be read disjunctively but together as one compound element – commercial unfairness (*Over & Over*; *Ng Sing King*). To determine commercial unfairness, courts will take into account both the legal rights (as reflected in written agreements) and the legitimate expectations of the members (*Over v. Over*).

BREACH OF WRITTEN AGREEMENT

The starting point is to look at the written agreement and see whether the conduct of the stakeholders is in accordance with company's articles (*Re Saul D Harrison*, cited with approval in *Over v. Over*).

It is interesting to note that if there is a breach of the written agreement, a stakeholder could actually turn to s. 39 and enforce the statutory contract instead of resorting to s. 216. The benefit is that there is no need to prove the higher threshold that the breach amounted to commercial unfairness. However, the disadvantage is that relief under s. 39 is usually limited to forcing compliance with the articles. (and this is not wanted here?)

***Apply to facts and see if there is breach of written agreement*

LEGITIMATE EXPECTATIONS

Even if the written articles are complied with, courts may intervene if there is a breach of legitimate expectations of members, which are based on informal understanding or implied understanding (*Over & Over*).

However, if the parties were dealing at arm's length and comprehensively laid down the rights of shareholders in the articles, it is unlikely that any legitimate expectations arose outside of the written agreement (*Ng Sing King*).

***Apply to facts and see if parties dealt at arms' length*

INFORMAL UNDERSTANDING

Legitimate expectations based on informal understanding are very often confined to quasi-partnerships (*Over & Over*). A quasi-partnership has 2 essential characteristics (1) Personal relationship involving mutual confidence and trust, and (2) an understanding that shareholders will participate in the conduct of business (*Embrahimi*, approved locally in *Over & Over* but SGCA doubted the third element of restriction of share transfer, but is supported by academics *Tan Cheng Han and Dan Puchniak*).

***Apply to facts, see if there is quasi-partnership.*

The informal understanding cannot be a unilateral assumption even if it is a reasonable one (*O'Neill v. Philips*). In *Thio Keng Poon*, our courts held that the understanding must explicitly be communicated and cannot be unspoken. However, academics *Tan Cheng Han and Dan Puchniak* disagreed and argued that whilst the agreement is unspoken it does not *ipso facto* mean than the shareholders did not know of the understanding.

***Apply to facts, see if understanding is communicated, if not argue for academics*

IMPLIED UNDERSTANDING

Legitimate expectations can also be based on implied understanding that arises based on the nature and commercial purpose of the corporate structure. For example the implied understanding that the company's articles and Companies Act will be complied with, or that directors will not use their position to defraud other shareholders contrary to their duties under common law, equity or statute (*Low Peng Boo*; *Re Gee Hoe Chan*). In a quasi-partnership, shareholders are held to a higher standard of corporate governance because of the peculiar vulnerability of the minority (*Over & Over*). Any legitimate expectations in listed companies are more likely to be based on implied understanding than informal understanding as the liquidity of shares allow easy exit of displeased shareholders (*O'Neill v. Phillips*).

***Apply to facts, see if there is breach of director's duties for implied understanding.*

PREJUDICIAL CONDUCT AMOUNTING TO COMMERCIAL UNFAIRNESS

Even if there is a breach of legitimate expectation, it does not ipso facto lead to the finding of oppressive conduct. The claimant must prove that the breach was prejudicial to him and caused him harm (Ng Sing King). Courts will consider if the breach was deliberate, if the breach was a significant one in disregard of a major expectation, and if it prejudiced the claimant's interest (Ng Sing King). Commercial unfairness is determined on an objective standard and there is no need to show wrongdoer's bad faith nor conscious intention to prejudice claimant (Re a Company). One must remember that the test is of unfairness and not unlawfulness (Re a Company). Evidence of oppression may be derived from activities of oppressor in other companies (Lim Chee Twan). Unfairness may be avoided by an offer to purchase minority's shares under certain conditions (O'Neill v. Phillips).

**Apply to facts to see if the breach was prejudicial to the shareholder that amounts to unfairness. At the same time analogize with ONE of the established categories:

- **Dominant members advancing own interests**
  - Lim Swee Khiang (diverted assets and opportunities to son's company; conflict of interest)
  - Low Janie (personal travelling expenses)
  - [X] Re Kong Thai Sawmill (motor yacht for personal use, extravagant but not oppressive)

- **Abuse of voting power**
  - Re SQ Wong Holdings (refuse dividend to retain control of Board)

- **Exclusion from management**
  - Tan Choon Yong (invited Dr Tan to be CEO, aided in listing)
  - Lim Swee Khiang (removed from executive role, "kept out entirely" from co. affairs)
  - Kitnasamy (instrumental in securing main contract, to safeguard money and effort in co.)
  - Re A company (exclusion not *ipso facto* unfairness, w/r reasonable and w/r compensation)
  - [X] Ng Sing King (comprehensive shareholder's ag, precluded informal understanding)

- **Serious mismanagement**
  - Re Kong Thai Sawmill (majority rule insufficient, must be oppressive on minority)
  - [X] Re Tri-Circle Investment (majority rule unless *bad faith* for ulterior purposes, even if losses)
  - Lim Swee Khiang (failure to explain decision + *prima facie* not interest of company = inference of oppression)
  - Re Macro (Ipswich) (numerous breach of duty and self serving conduct – but not pre-requisite)

- **No or inadequate dividends (and/or excessive directors remunerations)**
  - Re Sam Weller & Sons (same dividend for years, prejudice - even if directors equally prejudiced)
  - Re Gee Hoe Chan Trading (pay directors fees and salaries but not dividends)
  - Low Janie (low dividends to increase profits – director's bonus depends on profits)

- **Loss of substratum**
  - O'Neill (analogy of contractual frustration)
  - Over & Over (new business venture not contemplated – may be oppressive)
  - Ng Sing King (no oppression – no fault loss of substratum – s254)

- **Offer to purchase minority shares at discount**
  - O'Neill

REMEDIES

Courts has a very wide discretion under s. 216(1) to do "as it thinks fit", with a small limitation that remedy must be to a view of ending the matter complained of (K*umagi Gumi*). Because of this wide discretion, s. 216 is a risky action as the claimant may not get the specific action that he requested for (*Borden Co*).

BUYOUT

However, courts tend to favour awarding buyout of shares under s. 216(2)(d). This is because it allows minority to realize the value of their shares, puts an end to the unfairness and yet does not destroy the company which is a going concern. Courts will normally order a share buyout if there is no residual goodwill or trust left in the company and there is no point to tie claimant in a broken and bitter relationship (*Over & Over*).

***Apply facts to see if share buyout is available. If facts show that the shares price has changed, might have to go into "valuation of shares".*

Valuation:

- Market value without minority discount: Over v Over
- Valuation at price bought: Tullio v Maoro
- No pre-judgement interest: Yeo Hung Khiang
- Overriding principle – fair on the facts: Profinance Trust

WINDING UP

Courts will may also allow winding up under s. 216(2)(f), but this is a last resort as it is harsh and drastic. Therefore, courts will always favour a share buyout first before resorting to winding-up (*Over & Over*; *Tan Choon Yong*).

***Apply facts to see if share buyout is available.*

- Wind up sought but awarded buyout: Lim Swee Khiang
- Wind up when insufficient resources to buyout: Re Gee Hoe Chan
- Wind up in lieu of buyout in 30 days: Tan Choon Yong

It is also possible for the court to order that wrongdoer make good of the corporate loss back to the company (*Low Peng Boon*), but only if it is one component of the general claim in commercial unfairness (*Kumagi Gumi*; *Kung v. Kon*).

DERIVATIVE ACTION

Lastly, a derivative action under s. 216(2)(c) is also possible. However, this option has been played down in *Kumagi Gumi* as it might be more appropriate to order compensation without the necessity of a separate derivative action.

S254 J&E WINDING UP

PROCEDURAL REQUIREMENTS

Due to use of the word "company" in the statute, which is defined as one that is incorporated in Singapore, just and equitable winding-up under s. 254(1)(i) only applies to Singaporean companies (*Lim Chee Twang*; *Ting Sing Ning*).

This is not an issue in the present case as....

---

1. **Winding up under s 254**
   - Voluntary CWU: insolvent or company no longer serves its purpose
     - Minority has no voting power to secure special resolution for CWU (75% vote)
   - Court CWU – s254
     - Minority can prove J&E winding up under s254(1)(i)
     - Wide discretion but narrow remedy

2. **Parties permitted to bring a winding up under s 254: s253(1) CA**
   - Contributory – definition: all members: s4(1)
     - Shares originally allotted to member
     - Shares held for at least 6 months in 18 month period before application*
     - Shares held as transferred through death or bankruptcy of previous holder (operation of law)
   - Parties with interest in shares but not registered member: Miharja Devt Sdn Bhd v Tan Sri Datuk Loy Hean Heong (Msia HC)
   - Company and creditors

STRATEGIC CONSIDERATIONS

- Wide flexibility of remedy for s216 as compared to CWU for s254
- S254 more appropriate where (1) minority is intent of CWU or (2) fault-neutral irretrievable breakdown (w/o oppression)
- Can **concurrently pursue both applications**
- CWU under s254 has potentially crippling effects on company – court do not look kindly on minority who use this power to improve bargaining power

Winding-up in s. 254(1)(i) is broader than in s. 216(2)(f) as it can apply in cases of deadlock where there is no oppression (Evenstar Investments). However, shareholders cannot use s. 254(1)(i) to bypass the more appropriate remedies under s. 216 (Summit Co).

Also, s. 254(1)(i) cannot be used to harass the company as it will be struck down for being vexatious (Sim Yong Kim).

**Apply facts to see if it's harassing or bypassing oppression remedy in s.216

FAIRNESS TEST

BALANCE OF FAIRNESS TO MINORITY AND UNFAIRNESS TO OTHER STAKEHOLDERS

In deciding whether to allow winding up under s. 254(1)(i), courts will weigh the unfairness suffered by aggrieved minority against the unfairness caused to other corporate stakeholder if the company were to be wound up, i.e. whether the cure is worse than the illness (Evenstar Investments).

The test of unfairness is objective – whether a reasonable bystander observing the consequence of wrongdoer's conduct would regard it unfairly prejudicial to petitioner (Summit Co).

Also, the facts and circumstance supporting the claim must subsist at the time of order (Summit Co). Winding up under s. 254(1)(i) will not be allowed just merely because members feel aggrieved or when there is self-induced loss of trust and confidence (Evenstar Investments).

COMMON EXAMPLES OF J&E WINDING UP

Whilst the court has wide discretion to allow winding up and it cannot be circumscribed to case law (Chow Kwo Chuen), courts will usually allow winding up if there is irretrievable breakdown (Ng Sing King), loss of substratum (Summit Co) or that the company was set up for a fraudulent purpose (Re Thomas Edward).

---

1. IRRETRIEVABLE BREAKDOWN

Factors that lead to court ruling that there is an irretrievable breakdown include

- **acrimony and irreconcilable differences between shareholders** (Ng Sing King – biz crippled by endless disputes, unable to work in the future),

- a **lack of mutual confidence** between shareholders (Chow Kwok Chuen), or
- **tension and resentment** between shareholders (Lawrence v. Lawrence Motors – adultery, tension or resentment between quasi-partner, no need for fault)
- **[X]** Summit Co – not irretrievable breakdown, still director of coy with management power, "heart to heart talk" – lines of communication remain open

All of which must eventually **render co-operation between shareholders impossible** (Ng Sing King, Chow Kwok Chuen) such that the company has no "meaningful operation" and it is unfair to lock the interest of the petitioning shareholder in the company (Chow Kwok Chuen).

***Apply to facts and see if co-operation is impossible or no meaningful operation*

- The test is **practical rather than theoretical** – the fact that the deadlock could hypothetically be broken will not necessarily prevent a winding up order. It must be shown that the day-to-day management of the company is impossible, in order for there to be a deadlock. **If the deadlock can be broken by the appointment of a new director or casting vote**, the winding up order will not be granted.
- Complainant **cannot be cause of the breakdown/deadlock** (Lawrence v Lawrich)
    - Although s254 no-fault remedy, but s254 is an **equitable remedy thus requires clean hands**
    - Conduct of defendant not important but conduct of claimant

2. LOSS OF SUBSTRATUM

For **loss of substratum**, the claimant must prove that it is impossible to carry on the business at the date of the petition (Summit Co). And because the company is no longer viable, it is pointless for shareholders to "continue flogging a dead horse" and courts will usually allow winding up (Ng Sing King).

***Apply to facts and see if there is impossibility of business at time of petition.*

- No longer viable and lack profitability (Ng Sing King)
- But if only one type of product line loss, niche business, can continue business then **[X]** (Summit Co)
- Where the company has a **main or primary objective** (for which the company was set up) and it can no longer be achieved, it may be J&E to order for CWU, even if there is no issue of oppression.
- The company may also be wound up if it **engages in acts which are entirely outside** what can fairly be regarded as having been within the general intention and common understanding of the members when they become members.
    - One must look to the agreement amongst corporators to determine what business the company was meant to conduct
    - Rationale: the businessman who puts his money into a particular business does his financial calculations on the basis of that business. It would be unfair for his money to be hijacked by others in the company for some business that he has not agreed to and which may involve totally different risks and returns.
- It also occurs when the **company has abandoned the business that the corporators have agreed among themselves** that it should do whatever the object clauses may provide.

3. FRAUDULENT INCEPTION/PURPOSE

Where a company is fraudulent at its inception, it may be J&E to order for CWU even if there is no oppression (Re Thomas Edward – formed to carry out biz of manufacturing pianos to pass off products of another firm).

A person who puts his money into a company has a right to expect that the business of the company will be carried on properly and not in fraud of somebody else. Where the business of a company is carried on fraudulently and the shareholders have been misled into investing in the company, the shareholders may have the company wound up in order to get their money back.

DEFERRED WINDING UP

Even if winding-up is granted, courts will normally prefer to exercise their power under s. 257(1) and **defer the winding up** to give opportunity for parties to reach a compromise (Evenstar Investments, affirmed in Chow Kwok Chuen). In addition, winding up under s. 254(1)(i) needs to be advertised (unlike under s. 216(2)(f)).

***say most likely defer, but anyway the facts of the case will lead to winding up and then need to advertise.*

CONSEQUENCES OF S254(1)(I)

- Application for CWU must be **advertised**
- Winding up petition will usually result in company's **credit "drying up"** – bank will freeze accounts and creditors will deal on cash only (usually in event of default of loan agreement and guarantees)
- Unlike a CWU petition, s216 does not have such negative effects

---

6. Directors' Duties

- Is he a director?
  - If no, could he be a shadow/de facto director anyway?
  - If no, could he be an officer?
    - Think of s157(2),
- What kind of director? NED or ED
  - Makes a difference in neg. duties
- What is the breach?
  - Bona fide in the best interest of coy
    - Bona fide
      - 157(1)
      - Loaning?
    - Interest of coy
      - SH
      - Creditors (when insolvent)
        - Cue to think of the loaning situation
      - Group coy (parent-subsidiary)
      - Factions (fairness)
  - No conflict
    - Is he a nominee / 2 coy situation?
      - Giving of info to parent coy restricted to certain conditions
      - Cue: Nominee // duty not to fetter discretion
    - The tests
      - Mere possibility
      - Reasonable possibility
    - No taking of corporate opportunities rule
      - If got conflict → + profit → account for profits
      - If <u>coy rejects</u>, and you take it up?
        - Regal (Hastings)
        - Peso-Silver Mines
    - Misappropriation
      - Taking away the corporate assets
      - Contract where coy is currently negotiating
    - Relevant sections
      - 157(1)
      - 157(2)
      - 156
  - Improper purpose
  - Duty not to fetter
- Negligence duties
  - Care
    - Rely on consultant etc
    - Can delegate but have duty to oversee
  - Skill
    - Objective standard cannot be lowered but can be increased
    - NED: duty to know enough about coy's affairs
    - ED: measured against skill of ppl in the field
  - Diligence
    - NED only have to give intermittent attention
    - Cue: usually when NED appears = negligence = too slack already
- Ratification
  - Cannot be ratified
    - Misappropriation
    - Coy near insolvency
  - Court can provide relief under sXXX
- Remedies
  - Damages
  - Injunction
  - Account of profit
  - Rescind
  - Constructive trust
- Consequences of breach
  - Against director
    - Damages, injunction, account of profit
    - Rescind contracts made between coy and Dir
    - Take away property → constructive trust
  - Against 3P
    - Rescission
      - Burden on proof is on you to prove 3P has no knowledge
    - Constructive trust
      - 3P has to prove Equity's Darling

S1: PUBLIC OR PRIVATE COY

S2: WHO ARE THE DIR?

S3: WHAT TYPE OF DIR?

DE FACTO DIRECTOR

- Person who acts as a director even though not formally appointed as such.
- S. 4(1), CA includes such a person "by whatever name called".
  - Label is not important – it is not what the person is called, but what he does.
  - He must perform functions that only a director can perform – if task can be performed by someone of a lower corporate level, then not considered a director.

To establish de facto director, must prove (Re Hydrodam):

- **[1] he undertook functions only a director can properly discharge** and it is insufficient if he managed a company's affairs if it can be performed by a lower level manager and
- **[2] have to look at what the "director" did and the governance structure of the MOA and AOA**.
  - E.g. directing others compendiously.
  - E.g. committing company to major obligations.
  - E.g. taking part in Board level of actual Board decisions.
- Lee Sai Poh v. Vejayakumar (1997)
  - HELD: Was a de facto director. D and 3 others set up a company for a joint venture. Although not appointed as director formally, he made decisions, ran and managed the company.

SHADOW DIRECTOR

A person not named as a director can fall under s. 4(1), CA because they direct the actions of the named directors behind the scene.

- In UK, fiduciary duties may not be attached to shadow directors because they do not undertake a relationship of trust and loyalty. They also exert only an indirect influence and may be inimical to the company's interests.
- The mere fact that he is a shadow director does not impute duties unless it can be shown that there was a fiduciary relationship.
  - Heap Huat (2003) – approving factors listed out in Re Hydrodam.

To establish a shadow director, must prove (Heap Huat):

- [1] Who are the directors of the company (de facto and de jure),
- [2] That D directed those directors of the company on how to act in relation to the company or that he was one of the persons who did so,
- [3] That the directors acted in accordance with the directions,
- [4] And that they were accustomed to so act.
- To prove "**accustomed to so act**":
  - Ultraframe v. Fielding (2005)
    - HELD: **Must show that a consistent/governing majority of the Board has been accustomed to act on the directions of the shadow director**. If the board usually took his advice, it is immaterial if that 1 time, they exercised their own discretion. If "accustomed to so act is proved", no need to prove that it was the directors' decisions were mechanical and not considered (in their own discretion).

Who are NOT shadow directors?

- Professional advisors
- Creditor/customer/funder – a position of strong influence is not necessarily a fiduciary position.

NON-EXECUTIVE DIRECTOR

*** Cue: lowered duty of care + not bound to give continuous attention to affairs of corporation*

- Director who does not work in the company in full capacity.
- Normally sits on the Board to offer objectivity, prestige, external perspectives and independent judgement of the company's management.
- Only has 1 formal requirement under s. 201B, CA:
  - Every listed company must have an audit committee, the majority of which must be

composed of non-executive independent directors (and 1/3 must be independent).

- **Generally, may not be held to the same standards of care as a normal director**.
  - Personal Automation Mart v. Tan Swee Sang (2000)
    - HELD: Non-executive directors **held to a lower duty of care** when compared to executive directors.
  - AWA Ltd v. Daniels (1992)
    - HELD: In contrast to managing directors, **non-executive directors are not bound to give continuous attention to the affairs of the corporation**. Their duties are intermittent in nature and performed periodically when they need to do it (e.g. when they are appointed to meetings or committees).

NOMINEE DIRECTOR

*** Cue to notice issues such as duty not to fetter discretion / conflict of interest between principal and coy*

A nominee director in Singapore has the same duties as an ordinary director (Chew Yin What). He has a foremost duty to serve the interests of the company before serving the interests of those who appointed him (Bennetts).

However, there are situations where the nominee director can take into account interests of principal if it does not conflict with the interests of coy (Levin v Clark; Intraco).

- Levin v Clark: Nominee director must have honestly believed that interests of principal = interests of coy.
- Intraco: **Prioritising interests of the principal allowed if the nominee director believed that the transaction was for the benefit of the company as well and that the 2 interests are the same**.

These cases tend to be for family/group enterprises where a **broader approach is taken to view that a benefit to the principal organisation can also, in a bigger scheme of things, benefit the company**. However,

- OCBC v. Justlogin Pte Ltd (2004)
  - HELD: Nominee directors can take into account the principal's interest if it does not conflict with the company's interest but it **cannot be at the expense of the company's interests**.
  - Duty not to fetter discretion

- S. 158, CA: Disclosure of information by nominee directors.
- S. 158(2), CA: Sanctions transmitting information upwards to the principal if nominee director declares this to the Board, received authorisation and transmission is not likely to prejudice the company.
- S. 158(3), CA: Procedural requirement for disclosure to the Board at meeting.

CHAIRMAN

Chairman of the Board chairs the director's meetings and signs the minutes of the meeting.

- He has a casting vote if there is a deadlock.
- He has the same general duties and liabilities as all other directors.

OFFICERS

Officers as per s 4(1)- director, secretary of corporation, person employed in executive capacity

Can be liable for – s 157(2) "use of information"

S 339(3) – officer knowingly incur debts with no reasonable expectation of repayment

---

S4: FIDUCIARY DUTIES

1. DUTY TO ACT BONA FIDE IN THE BEST INTEREST OF COY

A director has, under common law, a fiduciary duty to act bona fide in the interest of the company. It comprise of two limbs: (1) acting bona fide (i.e. good faith), and (2) acting in the interest of the company.

ACTING BONA FIDE

Under the first limb, directors must exercise his discretion bona fide on what they consider – and not what a court may consider – is in the best interest of the company (*Cheong Kim Hock*). Directors can take risk with the company property if he honestly believes that it was in the interest of the company (*Cheam Tat Pang v. PP*). Furthermore, courts will be slow to substitute its decisions in place for the commercial decisions taken by directors as this will coerce directors into making defensive commercial judgements, contrary to the whole purpose of the company structure which is to provide limited liability to encourage commercial risk-taking and entrepreneurship (*Vita Health*). Therefore, this subjective honest belief test seems to give directors quite a huge safety net to exercise their discretion.

On the other hand, **FOR GROUP COMPANIES**, case law seems to suggest that an objective standard can be considered – whether an honest intelligent man, in the position of a director in the company concerned, could have reasonably believe that the transaction was for the benefit of the company as a whole (*Intraco v. Multi-pak*).

However, in practice there is no significant difference between the subjective and objective tests. As even when determining the subjective belief of the director in question, the **courts will still draw a comparison with other directors**. For example, if a director takes risks which no director could honestly believe to be taken in the interest of the company, such actions will support the allegation that the director has indeed breached his fiduciary duties (*Cheam Tat Pang v. PP*).

***Apply the facts to see if director has the subjective honest belief if he was acting for coy.*

ACTING IN THE INTEREST OF THE COMPANY

Next, the director's action must be in the interest of the company. The interest of the company is determined by the interests of the various stakeholders and contingent on the situation of the company.

If a company is **solvent and not on the brink of insolvency**, the proprietary interests of the shareholders entitle them as a general body to be regarded as the company (*Chip Thye Enterprise*). Directors also need to consider the interest of the employees (per s. 159, C.A.). All in all, the directors must act to promote the prosperity of the company as a commercial entity (*Re W & M Roith Ltd*).

If the company is **deeply divided among shareholder factions**, the test is not a question of the company as a whole but a question of what is fair as between different factions of shareholders (*Tokuhon (Pte) Ltd*).

If the company is **insolvent or on the brink of insolvency**, the interests of the creditors intrude and a duty is owed to creditors present or future (*Chip Thye Enterprise*). This is because when a company is insolvent the company is effectively trading and running the business with the creditor's money (*Progen Holdings Ltd*) and the creditors will be prejudiced as the company is likely to be unable to satisfy its debts with the creditors (*Federal Express Pacific*). However, the court of appeal in *Chee Yon Chuan* clarified that this fiduciary duty is owed to the company (to consider the interest of the creditors) and not to the creditors directly.

If the company is **part of a legally defined larger group**, the directors can look at the benefit of the group as a whole and not just the individual company, as long as it does not sacrifice the interest of any of the company within the group (*Intraco v. Multi-pak*).

***Apply the facts to see which category does company falls under and consequently who determine the interest of the company is and whether he acted for their interest.*

++OVERLAP WITH S. 157 - DUTY TO ACT HONESTLY

It is important to note that the common law duty to act bona fide in the interest of the company has a statutory equivalent, which is the duty to "act honestly" under s. 157(1). These two duties are composite obligation and they impose a unitary obligation on the director to act bona fide in the interest of

the company in the performance of his directorship functions (*Townsing Henry*).

Besides this, the duty to "act honestly" under s. 157(1) also mirrors other common law fiduciary duties, such as avoiding conflict of interest and acting for a proper purpose and not for any collateral purpose (*Cheam Tat Pang v. PP* affirmed in *Lim Weng Kee v. PP*). Thus, s.157 is seen as a general codification of the common law duties and breaching any of the fiduciary duties will often fall afoul with s.157(1) as well.

Indeed, a breach of s. 157 can incur both civil and criminal liability because Parliament did not intend for different tests to be used for the imposition of liabilities (*Lim Weng Kee v. PP*) – as expressed in s. 157(3) which allows the application of common law.

***Apply the facts and just say that director is likely to be found to be not acting honestly too.*

CONSEQUENCES

A breach of s. 157 is a criminal offence that can incur up to 12 months imprisonment or $5,000, per s. 157(3)(b). The director may also be asked to account for profits or pay damages to the company under s. 157(3)(a).

Also check:

- S 339(3) – An **officer** knowingly incurs debts where there is no reasonable expectation of repayment
- S 339(3) – Offence ($2,000; 3 months)

---

2. DUTY TO AVOID CONFLICT OF INTEREST

The broad fiduciary duty to avoid conflict of interest (duty to disclose) can be divided into 3 main rules: (1) No Conflict Rule, (2) No Secret Profit and Corporate Opportunities Rule, and (3) No Misappropriation of Corporate Assets Rule.

---

(1) NO CONFLICT RULE

*** Overarching inquiry that colours the application of the other tests i.e. if there is no conflict and you make profit, it is ok.*

It is an inflexible equity rule that a director, as a fiduciary of the company, cannot put themselves in a position in which their duties and personal interests may conflict (*Chua Boon Chin v. JM McCormack*), regardless of whether profits are made (*Furs Ltd v. Tomkies*). This is to prevent the danger that a fiduciary, in all human nature, may be swayed by interest and prejudice those whom he was bound to protect.

For **nominee directors** in particular, they cannot put the appointor's interest before those of the company; but may take into account the interest of the appointor if such interest does not conflict with the interest of the company (*OCBC v. Justlogin Pte Ltd*).

There are **two tests that can be applied**. In Boardman v Phipps, there was a divergance of view in the House of Lords as to the degree of likelihood of a conflict of interest required to render a fiduciary liable. The majority preferred the "**mere possibility**" of conflict test while the minority (Lord Upjohn) preferred the "**real and sensible possibility** of conflict test".

The position is still unclear in Singapore. While the high court case of Dayco has applied the real and sensible possibility test, the Court of Appeal in Ng Eng Ghee preferred the "mere possibility of conflict test", albeit it being strictly dicta.

It is submitted that the real and sensible possibility test should be adopted instead as

(1) overly strict requirements would **deter people from being directors**. In addition, this is also
(2) **aligned with the policy reasons** behind 156(2) which requires disclosure only when there is a "material interest".

It should be noted that in reality the two tests are unlikely lead to different result in cases where conflict is distinct.

- E.g. director in pepsi and deals personally with coke.
- E.g. if enter into a transaction different but related to co's biz; but 5% share another company

However, the director may put himself in such a position if he **discloses it to the shareholders at a General Meeting, and these shareholder must approve** of or at least acquiesce to it (Dayco Products).

***Apply the facts (based on which side you're on) to see which test should apply (mere or real and sensible) and whether director gotten approval from shareholders in General Meeting (not Board).*

---

(2) NO TAKING OF SECRET PROFITS / CORP OPP RULE

Directors may not make an unauthorized profit out of their fiduciary position, (Regal Hastings; Boardman v Phipps), nor may they divert contracts or business opportunities to other persons or corporate entities (IDC v Cooley) – unless all the material facts are disclosed to the shareholders and by resolution a general meeting approves, or acquiesce to it (Furs Ltd v Tomkies).

The breach of such a duty may result in an account for profits by the director (IDC v. Cooley).

It is immaterial whether it was done for the benefit of the company, or in good faith (Regal Hastings, Boardman).

It is also immaterial whether the company could not have secured the contract (Hytech Builders), or whether company is not pursuing the opportunities in question (Bhullar v Bhullar).

(**optional:**
However, case law suggests that if the director is an employee, he may be allowed to take **preparatory steps to set up a competing business** as long as it does not actually compete with the company before resignation (Universal Westech). Nonetheless, if a **director's resignation was prompted by the desire** to acquire the corporate opportunity himself, he is also liable despite being an ex-director (Canadian Aero Service).

Taking of profit after coy has rejected**

What is more controversial, however, is the divergence of views by courts as to whether a director can profit from a corporate opportunity that was rejected by the company. In Australia (Furs Ltd v Tomkies) and UK (Regal Hastings), courts have held that a **director may not escape liability even if the company itself is not able to make the profit or even if no loss is caused to the company by the gain of the director**. This strict rule is one of expediency to strongly deter directors from breaching their fiduciary duty.

On the other hand, Canada adopted a slightly less strict approach in Peso-Silver Mines, where the court held that **if the Board has rejected the corporate opportunity in good faith and for sound business reasons in the interest of the company, then the rejected opportunity ceases to be a corporate opportunity** and it cannot be said that opportunity came to the director by reason of his position as a director. Therefore, a director is allowed to profit from the rejected opportunity as a member of the public, even without disclosure.

Singapore courts has yet to take a stance on this differing positions, however it is submitted that the position in Peso-Silver Mines is the better approach to take as it more commercially realistic and fair. When the company has already made a business decision to reject the opportunity, it is innately unfair for the company to claim against the director as this is **arguably tantamount to an unjust windfall** – the company is outwardly stealing all the fruits of labour of the director. Furthermore, there are **sufficient safeguards** in Peso-Silver Mines against potential abuse by directors who may influence the Board to reject the opportunity so that he may pick it up himself – as the test clearly requires it to be done in **good faith, for sound business reasons, and in the interest of the company**. Therefore, our courts are likely to adopt the position in Peso-Silver Mines, and the following analysis will take such a stance.

***Apply the facts to see whether the corporate opportunity is obtained from director's position and whether disclosure is necessary.*

---

(3) NO MISAPPROPRIATION OF CORPORATE ASSETS OR OPPORTUNITIES RULE

A director **cannot use company property or take a corporate opportunity for his own personal advantage** or for the benefit of any third party.

It is **not open to the company in general meeting to ratify the misdeed and excuse the director from liability** where the director has misappropriated corporate assets or opportunities from the company (Cook v. Deeks).

***Apply the facts to see if director misappropriated assets and if company tried to ratify.*

++OVERLAP WITH S. 157 – DUTY TO ACT "HONESTLY"

The fiduciary duty to avoid conflict of interest is also reflected in s. 157(1) under the duty to "act honestly". Thus, breaching any of the fiduciary duties will often fall afoul with s.157(1) as well. Indeed, a breach of s. 157 can incur both civil and criminal liability because Parliament did not intend for different tests to be used for the imposition of liabilities (*Lim Weng Kee v. PP*) – as expressed in s. 157(3) which allows the application of common law.

***Apply the facts and just say that director is likely to be found to be not acting honestly too.*

CONSEQUENCES

A breach of s. 157 is a criminal offence that can incur up to 12 months imprisonment or $5,000, per s. 157(3)(b). The director may also be asked to account for profits or pay damages to the company under s. 157(3)(a).

++SUPPLEMENTED BY S. 156 - DUTY TO DISCLOSE

The common law fiduciary duty to avoid conflict of interest (duty to disclose) is supplemented by s. 156.

Under s. 156(5), disclosure is required if a director holds any office or possess property, whereby duties or interest, directly or indirectly, might be created in conflict with his duties as a director.

Also, disclosure is required under 156(1), if the director is in any way, directly or indirectly, has "material interest" in a transaction with the company. Similar to the common law no-conflict rule, a "material interest" under s. 156(2) means a "real sensible possibility" of a conflict of interest (Queensland Mines v. Hudson). In most cases, a controlling interest in the company is a material interest requiring disclosure (Yeo Geok Seng v. PP).

What is less certain, however, is whether a less than controlling interest in the company can constitute material interest. In Yeo Geok Seng v. PP, the court held that a wide interpretation of s.156 is necessary to give effect to its purpose of allowing Boards to make informed decisions. In line with such a wide interpretation, it is submitted that the real threshold test should be **whether the director in question is able to wield such power so as to surreptitiously influence the Board to rule in his favour**. If he does, then there is a "real sensible possibility of a conflict of interest" and this must be disclosed to allow the Board to make an informed decision. Therefore, a director may very likely have a material interest even if he does not possess a controlling interest in the company.

[Transacting with family kind of situation]
By virtue of s 156(8), an interest of a member of a director's family shall also be treated as an interest of the director. [members including spouse, son, adopted son, daughter, adopted daughter, step daughter etc)
Therefore, if family member has a material interest, director would also be deemed to have material interest in the company.

- e.g. director enters into transaction, with another co where wife has more than 50% interest

CONSEQUENCES

As s. 156(9) allows the application of common law, a director's breach of s. 156 may also attract civil liability (under fiduciary duties). However, s. 156 requires disclosure only to the Board, whereas the common law duty to avoid conflict of interest requires disclosure to the shareholders at a General Meeting. Therefore, compliance with s. 156 (which creates criminal liability) does not discharge the director from his civil liability.

Nonetheless, the **articles of a company may provide that directors may discharge, specifically, their no-conflict rule duty under common law by disclosing it to the board alone** (Dayco Products) – also known as the "*Dayco* exceptions".

A breach of s. 156(1) is a criminal offence that can incur up to 12 months imprisonment or $5,000 (per s. 156(10)). Additionally, the failure to disclose will also cause automatic vacation of the director's office by virtue of Art 72(i), Table A.

***Apply the facts to determine if he has material interest (s. 1561(1)) or holds conflicting office/property (s. 156(5). Then, see if he disclosed to the board, if did not, see whether there's Dayco exceptions – if not specified, assume Table A, i.e. no such exceptions – liable.*

++ S. 157 – IMPROPER USE OF INFORMATION

S 157(2) – An officer or agent's improper use of company information acquired by virtue of their position to gain either directly or indirectly a benefit for themselves or any other person.

S 157(3) – Damages/Account for profits/ offence ($5,000;12 months)

++ S. 162 – LOAN TO DIRECTORS

S 162 – A company (other than an exempt private company) makes a loan to their director (or the directors of their related company) which is not permitted

S 162(4) & (5) – The director that authorized ($20,000; 24 months); the director may be made to indemnify for any loss suffered as a result of an unauthorized grant of FA

++ S.168,169 – COMPENSATION TO DIRECTORS

S 168 – A director is compensated for loss of office or retirement without disclosure and GM approval

> S 168 (1) – The director is deemed to hold the money in trust for the company

S 169 – Company cannot provide emoluments for a director in respect of his office unless the provision is approved by a resolution solely for the purpose in the general meeting

---

3. DUTY TO ACT FOR THE PROPER PURPOSE

Directors are obliged to exercise their powers given and use the company's assets for the purpose they were intended. Even if a director had the honest belief that he was acting in the interest of the company, he will still be liable if his action was for an improper purpose (*Howard Smith Ltd v. Ampol Petroleum Ltd*) – such as for a hostile takeover of the company by issuing shares. To establish breach of such a duty there is 2-part test: (1) determine the limits within which the powers can be exercised; (2) decide whether the substantial purpose for which the power was exercised fell within those limits.

---

4. DUTY TO NOT FETTER DISCRETION

As fiduciaries, directors cannot bind or fetter themselves to decide in any particular manner, for example agreeing to vote at board meetings in accordance with the direction of some other person. This duty is usually **most relevant in the case of nominee directors**, and **s. 158** prescribes certain conditions before a **nominee director** (or multiple directors) **can disclose** to his principle on company information obtained by reason of his position as a director.

The conditions in s. 158 are:

(3) Nominee director must declare at Board meeting the information to be disclosed and its particulars;
(4) Nominee Director must receive prior authorization by Board before disclosing the information;
(5) Disclosure of such information cannot be likely to prejudice the company.

S5. NEGLIGENCE DUTIES

Traditionally, the duty of skill, care and diligence were treated a one single component under the general rubric of negligence. The test is based on a purely subjective standard as a director need not exhibit a greater degree of skill than reasonably expected from a person of his knowledge and experience (*Re City Equitable Fire Insurance Co Ltd*). This is a reflection of the fact that directors were commonly seen as mere figureheads of the company (*Re Cardiff Savings Bank*).

However, in the present day, a director is no longer treated as an ornament but an essential component of corporate governance (*Daniels v. Anderson*). Thus, the current approach is to treat the duties as 3 distinct components, though admittedly they might have some overlaps. In *Lim Weng Kee v. PP*, our courts held that the standard is not fixed but a continuum depending of various factors, such as the individual's role in the company, the type of decision being made, the size and the business of the company. Also, the standard will not be lowered to accommodate the director's inadequacies but may be raised if he possesses (or claims to posses) some special knowledge or experience. This minimum objective standard applies across all 3 duties.

---

(1) STANDARD OF SKILL

Skill refers to the what reasonably could be expected of someone who undertakes a task that requires expertise. Non-executive director are minimally expected to keep abreast of and understand company affairs to the extent of actually reaching a reasonably informed opinion of its financial capacity (*Commonwealth Bank of Australia v. Frierich*). Executive directors are required to meet an objective level of skilfulness possessed by those in the same calling (*Permanent Bulding Society (in liq) v. Wheeler*).

---

(2) STANDARD OF CARE

Care refers to how an ordinary, reasonable man would act. A director must inform himself about the company's affairs and join co-directors in supervising and controlling them (*Re Barings*, applied locally in *Vita Health*).

If directors exercise the **power of delegation**, he must ensure that the delegate is properly supervised, reasonably qualified and can reasonably be expected to honestly and effectively perform the task (*Daniels v. Anderson*). Incidentally, this is similar to **s. 157C,** which allows director to rely on information prepared by employees, fellow directors or professional expert; however he must have acted in good faith, made proper inquiry if circumstances required and had no knowledge that that such reliance was unwarranted.

However, **non-executive directors** are held to a **lower standard of care** than executive directors with respect to delegation as the latter is reasonably expected to have a more in-depth knowledge of the delegate and greater ability to supervise (*Daniels v. Anderson*).

Also, a director must make an effort to have a **basic understanding of his rights and obligations** under the company's article and the law. This may require him to seek legal advice but does not require him to be a legal expert (*Re Duomatic Ltd*).

---

(3) STANDARD OF DILIGENCE

Diligence refers to the attention which is reasonably expected to be paid to the affairs of the company. On the standard of diligence, executive directors are expected to attend all meetings and give continuous attention to the affairs of the company whereas **non-executive directors** are only expected to give intermittent attention (*AWA Ltd v. Daniels*).

Also, this common law duty of negligence is actually **embodied in s. 157(1)** under the duty to "**use reasonable diligence**" (*Lim Weng Kee v. PP*). The Australian court in *Byrne v. Baker* held that their predecessor provision of s. 157 only includes diligence but not care and skill. However, this approach has not been adopted (or expressly rejected) in Singapore. Nonetheless, a breach in common law negligence duty of diligence will very likely also lead to a breach of s. 157(1) for not using "reasonable diligence" in the discharge of director duties. Indeed, a breach of s. 157 can incur both civil and criminal liability because Parliament did not intend for different tests to be used for the imposition of liabilities (*Lim Weng Kee v. PP*) – as expressed in s. 157(3) which allows the application of common law.

A breach of s. 157 is a criminal offence that can incur up to 12 months imprisonment or $5,000, per s. 157(3)(b). The director may also be asked to account for profits or pay damages to the company under s. 157(3)(a).

S6. RELIEF FROM LIABILITY**

GIVEN BY COURT – S. 391

The director may seek the court power to relieve him for the consequence of his breach of duty under s. 391 – which does not apply to criminal liability. In order for relief to be granted, the director must prove that he (1) acted honestly, (2) acted reasonably, and (3) it is fair to excuse him having regarded all the circumstance of the case. Test is semi-subjective. Courts will consider the experience and qualifications of the person. The burden of proof is on the director.

GIVEN BY COMPANY (RATIFICATION)

Any provision in the company's article or in any contract with the company by which a director is **exempted from or indemnified against liability** to the company for breach of duty is rendered **void** by s. 172(1).

However, the company may **purchase directors' and officers' liability insurance** on behalf of them, per s. 171(2)

Also, in certain instances it is possible for a majority of members of a company to ratify a director's breach if all the necessary information is put before them (North-West Transportation Co Ltd v. Beatty).

Members may choose to **ratify the director's actions** which would otherwise have been a breach. This has limitations. Generally possible when the directors have made disclosure and sought sanction from the board.

EXCEPTIONS

Members cannot ratify a breach where

1. It **results in a misappropriation** of company property (Cooks v Deeks)
    a. But IDC v Cooley: Corporate opportunities of a type that director is obliged to pass on the company is coy's property.
    b. **Evaluation**: It is difficult to see why ratification was assumed to be possible in Regal (Hastings) but not in Cook v Deeks. Treating corporate opportunities as assets which "belong in equity to the company" too readily assumes that our jurisprudence has accepted the concept of an opportunity as property. (Sealy & Worthington).
    c. As a matter of agency law, **ratification should be premissible** and the better view today would be to follow UK – which is to allow ratification but disregard wrongdoing director's vote (this avoids the misuse of power in Cook, where wrongdoing director has ¾)
2. It **prejudices creditors** because the company is insolvent or on the **brink of insolvency**
    a. Cannot ratify breach of duty to act bona fide in interest of creditors
    b. E.g. by leasing premises in Kinsela v Russell Kinsela despite being close to insolvency- even when there is unanimous SH agreement; and paying out monies in Re DKG Contractors despite being close to insolvency)
3. The members acted for the **same improper purpose as the directors** (eg: improper exercise of power to issue shares so as to forestall a takeover bid in Bamford v Bamford)
4. It is **oppressive** and may be challenged under s 216, CA
5. It qualifies as an **exception to the rule** in Foss v Harbottle

---

WHAT IS FULL AND FRANK DISCLOSURE?

Per Radcliffe LJ in Gray v New Augarita Porcupine Mines Ltd:

- **Amount of detail** required depends on the **nature of the contract** or arrangement proposed and the **context** in which it arises.
- It can rarely be enough for a director to say 'I must remind you that I am interested' and leave it at that, unless there is some special provision in the company's articles that makes such a general warning sufficient.
- His declaration must make the proper recipients of it '**fully informed of the real state of things**'. If it is material to their judgment that they should know not merely that he has an **interest**, but **what it is and how far it goes**, then he must see to it that they are informed. i.e. (**nature and extent**)
- NOTE: Errant dir can vote on resolution: Common law position, as seen in North West Transportation v Beatty.
    - Now outlawed in UK. The CLRFC also recoomended that person with an interest in the wrong should have vote discounted - but not accepted in Singapore

S7. REMEDIES

FRAUD

Disqualification

S should be advised that, in forging a signature of nthe cheque, he has committed a serious cirminal act, fro which he could be prosecuted. Even if prosecution, conviction and imprisonment ensued, this would not automatically terminate his non-executive directorship, walthough it might well terminate his executive directorship, since he would be unable to act as a neffective marketing director from prison. Indeed, his conduct might be found to be evidence of fraud, which could lead to his disqualification.

BREACHING COMMON LAW DUTIES

INJUNCTION (S. 409A)

If the **breach is continuing**, the company can seek an injunction under s. 409A to stop the director from continuing such an act, or requiring the director to undertake a particular action to remedy the breach.

COMPENSATION OR DAMAGES

If the company has suffered loss because of the director's breach, the company can seek damages from the director to compensate for its loss.

However, seeking damages will deny the remedy of account of profits as these 2 are **mutually exclusive**

ACCOUNT OF PROFITS

If the director profits because of his breach, company can seek for an account of profits even if the company has suffered no loss as a result of the breach (*Industrial Development v. Cooley*).

However this is mutually exclusive with Damages.

However, court may allow the wrongdoer director a proportion of the profits, if a significant proportion of profits was generated by his own effort and skill (*Warman International Ltd v Dwyer*). The onus is on wrongdoer director to prove that it is inequitable to order an account of the entire profit.

CONSTRUCTIVE TRUST

If a director has company's property as a result of a breach of his duty, the company can seek a court order that the director holds the property on trust for the company. If the property is sold to third party, the third party has to prove that it purchased the property without the knowledge of the director's breach. Failing which, the company can also apply to the court to order that the third party is holding the property on trust for the company.

The result of this constructive trust is that the property cannot be sold and it must be returned to the company upon request. The advantage of a constructive trust is that the property is not subjected to director's or third party's creditor and the company can benefit from any increase in the value of the property.

RESCISSION OF CONTRACT

When a director, in breach of its duty, enters the company into a contract with a third party, the company can apply to the court for the contract to be rescinded. If the contract is rescinded parties will be returned to the position they were in prior to entering into the contract.

This is normally possible if the contract is with the director himself or with a third party who has knowledge of the director's breach.

BREACHING STATUTORY DUTIES

Statutory Duty	Consequence of the breach
S 157 (1) – A director's failure to act honestly and use reasonable diligence	S 157(3) – Damages/Account for profits/offence ($5,000;12 months)
S 157(2) – An **officer or agent's** improper use of company information	S 157(3) – Damages/Account for profits/ offence ($5,000;12 months)
S 156(1) – A director's failure to disclose a material interest in transaction with company to the board	S 156(10) – Offence ($5,000;12 months) Failure to disclose will also cause automatic vacation of the director's office by virtue of Art 72(i), Table A.
S 156(5) – A director's failure to disclose potential conflicts arising from holding other offices or possessing property	S 156(10) – Offence ($5,000;12 months) (EXAM TIP: A director may comply with s 156 (1) & (5) but still breach her common law duty to disclose to the GM)
S 162 – A company (other than an exempt private company) makes a loan to their director (or the directors of their related company) which is not permitted	S 162(4) & (5) – The director that authorized the loan or guarantee shall be guilty of an offence ($20,000; 24 months) The director may be made to indemnify for any loss suffered as a result of an unauthorized grant of FA
S 168 – A director is compensated for loss of office or retirement without disclosure and GM approval	S 168 (1) – The director is deemed to hold the money in trust for the company
S 339(3) – An **officer** knowingly incurs debts where there is no reasonable expectation of repayment	S 339(3) – Offence ($2,000; 3 months)
Breach of statutory duties do not render contracts void or unenforceable but **may be made voidable**, on general equitable principles (*Hely-Hutchinson v. Brayhead Ltd*; *Guinness plc v. Saunders*)	

7. Shares

PUBLIC OR PRVIATE COMPANY

	Private (Smaller market)	Public (Larger market)
Weightage of votes	No limitation; subject to the limitations created by the M+A Law will not intervene in the affairs of a private company; interpersonal relationships	Each (equity) share will have one vote at a GM – s. 64(1); normally, only equity shares will be issued (with exception of golden shares in SPH) Need to maintain liquidity by offering greater protection to small investors; would encourage more investments
Issuing of shares	No preconditions for issuing or allotting shares Maximum number of shareholders: 50 (s. 18(1))	Restrictions – s. 59(1) Unlimited no. of shareholders
Share Transfer Restrictions	Transfer form to be executed by registered owner; company must effect it in 30 days (s. 130) Mandatory to have such restrictions (s. 18(1)(a)), otherwise, it would cease to become a private company No prescribed form, but would usually involve granting pre-emptive rights to existing shareholders, or directors' powers of discretion to refuse to register a transfer (which must be exercised in the best interests of the company; assumption of good faith) – see also s. 128(2) : notice must have reasons (HSBC)	Listed: no need transfer forms; done electronically within the Central Depository via scripless trading; only need confirmation note (s. 130) Public unlisted companies: may have share restrictions, but this is not mandatory Public listed companies: not allowed to have restrictions because the purpose of listing is to create a vibrant market for the trading of shares in the stock market But it may be possible for shareholders to agree with the company not to sell shares within a certain period (Pacrim Investments) ▪ May be able to do it between SH inter se but unlikely to be a general agreement between ALL shareholders
Valuation of shares	Unlisted: valued based on the assets of the company; valuers and chartered accounts look at it and can exclude extraneous factors (eg: global recession) Determined by contract	Listed: share price not tied to tangible assets – depends on market value and demand + supply Can be affected by recessions etc They also try to match their share prices with that of private companies

SCRIPLESS TRADING

Transfer forms are no longer necessary for stocks traded on the stock exchange.

- S. 130I, CA: Scripless trading and the creation of the Central Depository Pte Ltd has resulted in transfers being done electronically with the CDP only obliged to send a confirmation note to the buyer and seller.
- S. 130J, CA: Any transfers so effected and thus registered with the CDP are deemed to be conclusive and cannot be rectified.

This means that SH are better off here because **contractual arrangements are recognised and company cannot keep interfering with their rights** (right of refusal not existent here).

OWNERSHIP OF SHARES

GENERAL

- Advantages: convenience, for short-term holders/players in the market
- Disadvantages: equitable ownership arrives with limited rights (no voting rights etc) and is subject to rules of equity etc
- **Perfect this by asking to register the shares** (include name in the transfer form = no longer blank)
- Procedures = certificate + transform form (signed by legal owner) → blank

Similar to negotiable instruments or bear instruments

LEGAL/EQUITABLE OWNERSHIP

Legal ownership is manifested by registration in the company's register of members (s. 190). Equitable rights, however, cannot be registered (s. 195(4)).

- Company need not take notice of trusts and does not have to give effect to trusts of its shares (Look Chun Heng)
- Rationale: simplify things for coy – deals only with reigstered owner in his own right and not in representative capacity

Equitable interests arise when there has been a sale/mortgage/trust, but no registration in the company's register – and such interests prevail over other equitable rights which arise at a later date (Hawks v McArthur – where equities are equal, first in time prevails).

- Although equitable rights are generally non-registerable, there are some **exceptions**:
  - S. 195(1), (2), CA: Personal representative of the deceased/bankrupt person may be registered as such.
  - S. 195(3), CA: Shares marked on the Central Depository System as being in a trust.

An equitable title over shares is susceptible to the unregistered bona fide purchaser for value without notice (EG Tan & Co v Lim & Tan).

The beneficial owner of shares will not be able to recover shares if the motive for non-registration or transfer is against public policy – for example, where there had been the deception on the public administration (Suntoso Jacob v Kong Miao Ming).

****ADVISE**

Essentially, as far as company is concerned, nominee is the absolute owner. Beneficial owners should also **protect themselves** by 1) obtaining a possession of the share certificate or 2) serving a stop notice to the company

SHARE TRANSFERABILITY

SHARE TRANSFER

The starting point is that shares are freely transferrable unless restrictions are imposed by the M&A, or by agreement between the company and the shareholders, and this was clearly seen in the SGCA case of Pacrim Investments Pte Ltd v Tan Mui Keow Claire. The case also stands for the position that **provisions restricting the right to transfer, or moratoriums, are construed strictly**, and the **contra proferantum rule applies** such that any ambiguity will be resolved in favour of the party seeking to transfer the shares.

- As for **private companies**, one of the conditions for its incorporation is that the M&A must restrict the right to transfer shares as per s18(1)(a) of CA, and that such restriction may involve pre-emption rights or transfer only upon approval by board of directors.
- A **public company** may restrict its shares but it is not mandatory. A **public listed company**, on the other hand, usually cannot restrict its shares since the purpose of listing is to create a vibrant secondary market for trading shares

---

POWER TO REFUSE SHARE TRANSFER

The common law position is illustrated in the case of Re Smith & Fawcett Ltd. Directors have no discretion to refuse to register a share transfer unless the articles so provide. If such a power is granted, it constitutes a fiduciary duty that is to be exercised bona fide in the interests of the company and not for a collateral purpose. There is a presumption that directors act bona fide in the interests of the company, and the onus is on the person alleging that there had been bad faith. This is arguably a rather difficult barrier for the transferee to overcome.

The harshness of the common law position has been mitigated by statutory intervention. In Singapore, s. 128 of the CA states that where there is a refusal, directors will have to serve notice to the transferee within one month of the date of lodging the transfer, stating the reasons justifying the refusal. These reasons are subject to judicial review (s. 128(2)).

Where the directors have acted in self-interest, the refusal will be considered void, and the directors must register the shares (Xiamen International Bank v Sing Eng Pte Ltd). However, where the registration was refused to as to not breach the M+A, the refusal will be considered valid (HSBC (Malaysia) Trustee v Soon Cheong Pte Ltd). In other words, refusal to register a transfer must be legitimately based on proper principles, and must be carried out bona fide in the best interests of the company.

COURT'S POWER TO RECTIFY COY'S REGISTER OF MEMBERS

The court also has the **power under s. 194(1) to rectify the Company's register of members**, and this can be done upon evaluation of the reasons under s. 128(2).

TRANSFER INVOLVING SHARE CERTIFICATES

A share certificate is prima facie evidence of title (s. 123(1)). Where shares are not transferred via the stock exchange, shares are transferred through the lodgment of an executed transfer form and the share certificate with the company (s. 126). Only the registered owner may execute the transfer form; an equitable owner has no power to do so. However, a bank may execute the transfer form in the capacity of an attorney of the legal owner (Xiamen International Bank v Sing Eng). A company must effect the transfer form and the share certificate within a month (s. 130).

IMPLIED WARRANTY

A person who presents a transfer form for registration impliedly warrants that it is genuine and impliedly undertakes to indemnify the company against any loss that it may suffer by reason of the registration (Yeung Kai Yung).

8. Charges

S1: WHAT KIND OF SECURITY IS CREATED?

PLEDGE

In a pledge, the borrower (pledgor) **transfers possession** of the assets pledged to the lender (pledgee) while retaining legal title or ownership over the assets. Lender has right to detain the property until debt is paid. These assets are normally tangible property. On default, the lender can sell the pledged assets.

*** Say it's not a pledge because there is no transfer of possession*

CONTRACTUAL LIEN

A contractual lien is similar in that the security is **by way of possession** by the lender, except that such possession is not given initially for the purpose of security (eg: delivery to buyer, storage repair). Similarly, lender has right to detain the property until debt is paid, but there is no implied power of sale.

*** Say it's not a contractual lien because there is no transfer of possession*

MORTGAGE

In a mortgage, the borrower (mortgagor) **transfers legal title or ownership** of an asset to the lender (mortgagee) on the understanding that such title or ownership will be transferred back to the borrower upon the debt (principal loan + interest) being discharged – *equity of redemption*. Upon default, right of sale of property arises.

*** Say it's not a mortgage because there is no transfer of legal title*

CHARGE

A charge is a security interest in property created by contract, with **no transfer of title or possession**; it is a **mere encumbrance** over the assets (*Swiss Bank Corp v Lloyd's Bank Ltd 1980*). It gives the lender a **right** in or over the charged assets which are appropriated to the satisfaction of the debt.

*** Say since no possession and no transfer of legal title, therefore it must be a charge.*

DISTINGUISHING SECURITY FROM QUASI-SECURITY

However, sometimes it may be difficult to distinguish between a charge and a quasi-security, such as a sale and buyback agreement. To differentiate, the court will analyze the security via both the external and internal routes (*Thai Chee Ken v Banque Paribas*; supported by Prof Hans Tjio, *"When is an elephant a bird"*). For the external route, courts will see if that the documents should be struck down because it was a sham designed to conceal the true agreement between the parties. The internal route is where the courts will do a proper characterization of the nature of the transaction by construing the documents to ascertain parties' intention. In *Thai Chee Ken*, the court eventually held that the transaction was actually a genuine sale and buyback agreement although it was structured slightly differently and seemed like a mortgage.

*** External Route – say it's not a sham. Internal Route – say on true construction parties really intended for it to be a charge and not ________.*

CONTINGENT RIGHT TO CREATE A CHARGE IN THE FUTURE - *ASIATIC*

In the present case, it seems that the agreement between the parties did not create a present security but only a contingent right for ____ to create a charge in the future.

This is similar to *Asiatic Enterprises Pte Ltd v UOB*, where the SGCA held that Clause 10 of the facility letter **did not create any present nor inchoate security interest but a contingent one**. In that case, the bank was entitled to an option to create a charge upon default, and UOB activated this option by lodging caveats over Asiatic properties. This was held to be an invalid mechanism and the court failed to elaborate further as to what might be an 'appropriate mechanism'.

In this case, it is arguable that the present clause is more robustly worded and provides that a springing charge is created upon default, as opposed to providing an option to create one like in Asiatic.

Furthermore, academics Victor Yeo and Tan Cheng Han argue that there is no requirement for such a mechanism at law and that a charge could arise contemporaneously upon default. Similarly, Lee Eng Beng reasoned that a more robust and relicitously-worded clause 10 could create an invisible and springing security

*** Argue that in this case, clause was more robustly worded etc, therefore it is an invisible, springing charge.*

S2: WHAT TYPE OF CHARGE?

EQUITABLE CHARGE

Next, determine whether an equitable charge has been created

- Equitable mortgage: insufficient formalities (enter into agreement/does some act) + intention to create legal relations
- Equitable charge: property expressly/constructively made liable + for the discharge of debt + confer on charge right of realisation by judicial process

FIXED OR FLOATING?

Next, we have to identify the type of charge that it is created – whether it is a fixed or floating charge. This is important as it has a bearing on the obligation to register the charge (s. 131) and the priority of the security so secured.

The 3-step test to determine whether a charge is a floating charge in Re Yorkshire has been re-interpreted in Re Spectrum, where it was held that the determinative factor is the third element of control – that is, whether the company has control over the asset such that it could carry on its business in the ordinary way. If it does, then the charge is a floating one.

This has been affirmed by the Singapore Court of Appeal in Dresdner Bank AG v Ho Mun-Take Don, which applied the test in an arguably stricter fashion by requiring control to be enforced instead of merely being granted to the bank via an agreement for the charge to be construed as a fixed charge.

*** Can the company deal with the charged assets? If yes – floating charge!*

REGISTRATION

All floating charges have to be registered (s. 131(2)(g)) in 30 days or else the charge is void against liquidator or any creditor (s. 131(1)), i.e. it becomes an unsecured debt, whereas, only certain fixed charges specified in s. 131(2) need to be registered. The priority of claims, in order of priority is fixed charges, preferential creditors, floating charges and lastly unsecured creditors.

*** If fixed charge, check against s. 131(3) to see if it needs to be registered!*

In addition to the company's obligation to **maintain its own register of charges** under s. 138(2), CA, certain types of charges created have to be registered under ss. 131 – 133, CA.

- S. 131(3)(g), CA: **All floating charges** are registerable (**must be registered**).
- S. 131(3), CA: Fixed charges need to be registerable only if they fall within 1 of the categories listed:
    - A charge to **secure an issue of debenture**.
    - A charge on **land or any interest in land**.
    - A charge on **book debts**, etc etc etc.
- S. 131(3), CA: **Registration must be within 30 days** of its creation.
- S. 137, CA: **Court has the power under certain conditions to extend the time** within which a charge may be registered.

EFFECT OF NON-REGISTRATION OF CHARGES

- S. 131(1), CA: Failure to register a charge within the stipulated period will render the charge void as against the liquidator and any creditor of the company.
    - S. 131(2), CA: But charge remains valid between the company and the chargee (company still has obligation to pay back the money).
    - Only causes the secured creditor to become unsecured.

BOOK DEBTS – FIXED OR FLOATING?

All book debts, whether floating or fixed charge must be registered (s. 131(2)(g), s. 131(2)(f)).

Book debts are *prima facie* a floating charge as they usually fluctuate over time and are in the control of the company (*Re Spectrum*).

Previously, the court in *Siebe Gorman* held that a book debt is a fixed charge because the chargee-bank could restrict the chargor-company's use of the proceeds. This was overruled in *Re Spectrum*, where the HL held that to create a fixed charge over book debts, the bank needs to 1) have actual control over the book debts, and 2) the collection of proceeds through payment into a blocked account which bank has exclusive control over. It is not enough to contractually create control, the bank must in fact exercise it.

Likewise, the case of *Re New Bullas*, which held that there could be a fixed charge over the book debt and a floating charge over the proceeds, was overruled by *Agnew v CIR*, where the PC held that this distinction makes no commercial sense as the value of a book debt is worthless and would not be considered a security at all without its proceeds.

Therefore, the law now is that in order for a book debt to be a fixed charge, the chargee needs to have actual control over both the book debts and proceeds and the proceeds account must be blocked.

***Was there actual control by chargee? And is the account blocked?*

CIRCUMVENTING RULE ON BOOK DEBTS

However, academics have suggested several ways to circumvent the rule on book debts in *Re Spectrum* to allow a fixed charge on the book debts yet allow company to have working capital flow. *Fidelis Oditah* suggests to have the proceeds paid into an account of which only the chargee-bank can withdraw, but each time the chargor-company wishes to withdraw it has to ask the charge-bank's permission. *Dora Neo* suggest that the proceeds to be paid into a blocked account, but the charge-bank gives express adhoc approval to the periodical realise of money into charger coy's account (*Lee Eng Beng* suggested a similar method).

***Was there such ad-hoc approval given by bank?*

S3: CRYSTALLISATION

Until a floating charge crystallises, the chargor is at liberty to use the assets charged in the ordinary course of business. Upon crystallisation of a floating charge, the charge attaches itself to whatever assets are within the class at the time of crystallisation. Crystallization is merely part of the process of enforcing a floating charge and does not create a new charge or retrospectively change the nature of the security (*Dresdner Bank*).

Usually, charge documents stipulate "events of default" upon the happening of which the chargee may crystallise the charge. In the absence of such stipulations the charge may also crystallise when the creditor takes steps to take possession of the security or generally upon the winding up of a company or its business (*Dresdner Bank*).

***Is there stipulation of defaulting event, or charge taking possession?*

S4: PRIORITY

Competition	The Charge With Priority
Between two fixed charges	The charge created first
Between a fixed charge and subsequent floating charge	Fixed charge
Between a floating charge and a subsequent fixed charge	Fixed charge—unless the subsequent fixed charge has knowledge of the existence of a negative pledge clause in the floating charge
Between two floating charges over the same assets	The charge created first—unless the prior charge allowed the company to create subsequent charges with equal or higher priority
Between a floating charge over the whole of the company's undertaking and a 2nd floating charge over a specific class of assets	Priority depends on whether the first charge allows subsequent charges to be created with equal or higher priority

- A legal charge always takes precedence over an equitable charge.
- A floating charge also loses priority to preferential debts in a winding up or receivership: s.226, s.328(5).
- As between two fixed charges, the normal rule of priorities found in the general law of property applies – "where equities are equal, the first in time prevails".

NEGATIVE PLEDGE WITH FLOATING CHARGE

A fixed charge has priority over a floating charge even if the latter was created (and registered) earlier. However, a chargee may prevent this by including a "negative pledge" in the floating charge documents. A negative pledge is a provision where the chargor company undertakes not to create any new security interests ranking in priority to or *pari passu* (equally) with the floating charge that had already been created. It is only effective against a subsequent charge who takes notice of the restriction.

Traditionally, the view is that registration of a charge gives **constructive notice to the world of the existence of the charge but not of its precise terms of the charge**, such as an accompanying negative pledge (*Wilson v Kelland*). However, things changed slightly in *Kay Hian*. There, while the SGHC was still silent on the issue of constructive notice of the negative pledge (registered with the floating charge), the court held that the default position is that the floating charge with the negative pledge would take priority and the **burden of proof** was on the subsequent fixed charge holder asserting it has priority to prove that he had no notice of the negative pledge: position is akin to that of asserting that he is a bona fide purchaser for value without notice of the prior negative pledge.

Therefore, *Kay Hian* has effectively provided a bridge to side-step the issue of constructive notice. An earlier floating charge with a negative pledge will always have priority over a subsequent fixed charge, unless the subsequent chargee can prove that he has no notice of the restriction.

***Can chargee prove that it has no notice of the negative pledge?*

** ADVISE

Modern practice is usually to register the particulars of important clauses in the charge specifically, thus giving proper and actual notice.

- Kay Hian & Co v. Jon Phua Ooi Yong (1988)
  - HELD: **Registration of the particulars of the debentures was held to be paramount**. Hence, chargees of specific charges seeking priority over the registered floating charge needs to prove that they had no knowledge of the negative pledge clause (reverse burden of proof)
- Umakanth: Chargees with the floating charge + negative pledge can **seek to increase the burden of the party seeking to prove lack of knowledge of negative pledge by advertising the terms of the charge** (with information on the negative pledge) on publications such as newspaper or biz magazines

---

EXPERIENCE OF PARTIES

Take into account experience of parties in forming such contracts – if experienced, it would suggest that they're taking up the security and accepting the attendant risks of not having priority before other chargees.

*** Does hypo provide how many years BANK/LENDER has been in existence? Look out for numerical figures wrt YEARS*

9. Cap Maintenance

This doctrine **applies to companies limited by shares**. The starting position is that capital subscribed by the shareholders is seen as an inviolable fund, which should be maintained as a fund for the protection of creditors, and should not be returned to members and shareholders. However, over the years, the doctrine has become diluted and more heavily qualified. For instance, it is now possible to return capital to shareholders through the reduction of capital. Such exceptions to the doctrine serve to strike a balance between the interests of the creditors and the company, as well as between different classes of shareholders.

NO CAPITAL REDUCTION

The test of whether a capital reduction has taken place is **whether the capital yardstick that appears in a company's accounts has been reduced** – where capital refers to either the issued, paid-up or uncalled capital.

The two common examples of capital reduction are (i) cancelling lost paid-up capital and (ii) returning excess capital to shareholders. The second method goes against the doctrine of capital maintenance, which states that shareholders are not allowed to withdraw capital from the company.

There are 2 ways to reduce capital: (i) court-ordered reduction, and (ii) solvency-based capital reduction.

The test of whether a capital reduction has taken place is whether the capital yardstick that appears in a company's accounts has been reduced – where capital refers to either the issued, paid-up or uncalled capital. The two common examples of capital reduction are (i) cancelling lost paid-up capital and (ii) returning excess capital to shareholders. The second method goes against the doctrine of capital maintenance, which states that shareholders are not allowed to withdraw capital from the company.

There are 2 ways to reduce capital: (i) court-ordered reduction, and (ii) solvency-based capital reduction.

COURT-ORDERED (S. 78G – I)

- Special resolution + court order
- Subject to **creditor protection mechanism** (s. 78H and I)
  - Court will compile a list of 'qualifying creditors' – 78H(2)
  - Definition of 'qualifying creditor' found in 78H(6)
  - Court will only approve if (s78I)
    - Creditor has consented OR
    - Creditor's debt has adequate safeguards OR
    - Court believes that safeguards are unnecessary
- The court will not exercise its discretion to confirm a reduction **unless it is satisfied** of, inter alia, the following:
  - interests of the coy's creditors are **not adversely affected**,
  - shareholders are **treated equitably**, and
  - **cause of reduction was properly put to shareholders** so that they could exercise an **informed choice**.
- Applicant owes duty of full and frank disclosure to court.
- Court is **not concerned** whether reduction makes good commercial sense.

SOLVENCY-BASED (S. 78B – F)

Introduced new and simplified procedure for reduction of capital which does away with the requirement for court sanction.

- For private companies: s. 78B
- For public companies: s. 78C
- But differences are not substantial
- **3 requirements**:
  - All directors have to make **solvency statement** (s. 7A)
    - Where it is a **private company without an auditor**:
      - Make s. 7A solvency statement via statutory declaration
    - Where it is a **private company with an auditor**, s. 7A can be made in 2 ways:
      - Statutory declaration
      - Ordinary statement + report from auditors that they are not aware of anything to the contrary of what the directors have

stated in the solvency statement
- There must be a **publicity of reduction**
- There must be a **special resolution** to approve of the reduction

- Creditors may apply to court for the reduction to be cancelled under s 78D
  - Apply within 6 weeks of the resolution sanctioning the winding up: s78D(2)

CONSEQUENCES OF VIOLATION

- S. 78D, CA: Creditors may apply to court for the reduction to be cancelled.
- Directors commit a **breach of duty**.
- Directors can be made liable to replace the misapplied capital (Re National Funds Assurance Co (1878)).
- 3rd party may be made to refund the money on basis of constructive trust if they had knowledge.
- Directors who made a solvency statement without reasonable ground will be guilty of an offence under s. 7A(6), CA and be liable for a **fine not exceeding $100,000 and imprisonment of not more than 3 years** or both.

CF. SHARE BUYBACK AND CAPITAL REDUCTION

- Reduction of capital is broader than share buyback.
  - Capital reduction may not involve a share buyback or distribution of money or assets to shareholders, eg, a cancellation of lost capital.
- Advantages (buyback): Less formalities, creditors have no standing to complain to court unlike capital reduction.
- Disadvantages (buyback): Buyback is capped at 10% in between AGMs. No similar cap for capital reduction.
- Co may use share buyback as informal method of capital reduction. → Bec there is no publicity requirement for share buyback.

NO LENDING OF MONEY ON SECURITY OF OWN SHARES

S76(1)(c) prohibits a coy from lending money on the security of its shares or the shares of its holding coy. Prohibition prevents **delayed acquisition** of these shares (which acquisition is itself prohibited by the prohibition against buy-backs in s76(1)(b)) through the coy enforcing its rights as lender

---

EXCEPTIONS

- S76(8): Exempted transactions
- S76(9): Lending institutions

CONSEQUENCES

- S76A(1)(b): any contract or transaction will be void
- S76(5): **Officer** guilty of offence will be subject to fine and/or imprisonment
- S76(6): There may also be an order for compensation to be made **to the coy or affected persons**
- S76A(4), (5): Court may call for just and equitable orders **against anyone** who was directly involved or knowingly concerned with the contravention – and these orders may include refunds, indemnities against losses, amongst others

NO SHARE BUYBACK

- S76(1)(b), CA: Companies prevented from acquiring its own shares or that of its holding coy
  - Prohibition exists at **common law** too (Trevor v Whitworth (UKHL1887))
  - Rationale
    - Protect creditors against **reduction of capital**
    - Protect SH against a **change in balance of voting power** where 1) buy-back is not from all shareholders and 2) not in proportion of their shareholdings
    - Protect investing public against **manipulation of share price** by use of coy's money

REASONS FOR SHARE BUYBACK

Unlisted Co.	Listed Co.
1) To make shares more liquid so as to attract external investors. ➔ **Attract investors with the assurance that they are only investing for a short period of time and when the time is up, the Co will be able to buy back the shares**.	1) A way to return value to shareholders. ➔ **Of course, Co. can issue dividends. But Co's usually have a consistent and stable dividend policy, so instead of suddenly altering the dividend return, the Co may want to buy back some shares.**
2) To provide an exit for existing shareholders.	2) To achieve a target capital structure. For eg, to replace expensive share capital with cheaper debt.
3) To obtain an injection of short-term capital.	3) To bolster or stabilize market price of shares.
4) To facilitate operation of employee share scheme.	4) To facilitate operation of employee share scheme.

NO-CONSIDERATION EXCEPTION

S76(1)(b) read with s76(16): prohibition applies whether acquisition is by way of 'purchase, subscription or otherwise'

- Issue: does breadth of definition given to 'acquisition' suggest that even acquisition of shares for no consideration at all could be brought within the prohibition?
- Foreign jurisdictions – **no consideration paid for shares = ok**
  - **Australia**: Corporations Act 2001, s259A(b), allows for such an exception
  - **UK**: Companies Act 2006 allows coy limited by shares to acquire its own shares as well
  - Where coy pays no consideration for the shares, the objection to buy-backs, insofar as that is founded upon an unauthorized return of capital, appears to fall away
- Kirby v Wilkins (1929) – **no consideration paid for shares = trust is valid**
  - Vendors of biz to coy voluntarily transferred a certain number of consideration shares to chairman of coy to hold in trust – later discovered that biz was sold – argument that trust was invalid because it contravened common law prohibition against buy-backs – **held**, because 1) no consideration moved from coy and 2) shares were held in trust for the coy by its chairman, case was outside prohibition
- Singapore's position – **doubtful that the no-consideration exception would be read into s 76(1)(b)**
  - Should a no-consideration exception be read into s76(1)(b)? **Doubtful** that current buy-back regime admits of such an interpretation
  - If Act **intended to exclude acquisitions for consideration**, it would permit buy-backs so long as they are paid for out of **distributable profits** (which is after all not capital). BUT THIS IS NOT THE CASE save for a redemption of redeemable preference shares
  - Also, there are other requirements to a permitted buy-back, suggesting that no-consideration alone is insufficient

EXCEPTIONS TO BUYBACK

Exceptions fairly extensive and applies only to acquisition of coy's own shares, and not those of its holding coy.

SPECIFIC SITUATIONS

- S70 – **redemption of fully-paid redeemable preference shares**
  - But cannot use capital of coy to redeem unless 1) all directors have made a **solvency statement** in coy and 2) has lodged a copy of the statement with Registrar
- S216(2)(d) – order of Court for **buy-back as a remedy in cases of oppression or injustice**

EXCEPTIONS (76C-E)

S76C-76E (read with ss76B (**coy may acquire its own shares**) and 76F (**coy must be solvent**)) (coy's shares, not holding coy's shares)

76C: coy (LISTED OR NOT) may make an **off-market purchase** of its own shares in accordance with an 1) equal access scheme authorized in advance by the 2) general meeting

- Equal access scheme: where offers made by company to every member to purchase the same percentage of their shares on similar terms

76D: coy (NOT LISTED) may make a **selective off-market purchase** of its own shares in accordance with 1) an agreement authorized in advance by a **special resolution** where 2) persons whose shares are acquired have abstained from voting

76E: coy (LISTED) may make an acquisition of its own shares on the exchange (**a market purchase**) where the acquisition has been authorised in advance by the company in general meeting

76DA: coy (LISTED OR NOT) may make an acquisition of its own shares under a **contingent purchase contract** which has been authorized in advance by a special resolution of the coy

- This is essentially an **option**
- Two types:
  - **Put warrant** (member has option of selling shares to coy)
  - **Call options** (coy has option to buy shares back from members)

PRE-CONDITIONS

The above exceptions in 76C-76E are **subject to various conditions**:

1. Articles expressly permit buy-backs: s76B(1)
2. Payment may be made out of coy's profits or capital as long as coy is **not insolvent** or **will not become insolvent** as a result of purchase: s76F(1) and (4)
3. Can only buyback 10% of shares between two GM (**whereas capital reduction has no limits**)

CONSEQUENCES

- S76A(1)(b): any contract or transaction will be void
- S76(5): **Officer** guilty of offence will be subject to fine and/or imprisonment
- S76(6): There may also be an order for compensation to be made **to the coy or affected persons**
- S76A(4), (5): Court may call for just and equitable orders **against anyone** who was directly involved or knowingly concerned with the contravention – and these orders may include refunds, indemnities against losses, amongst others

TREASURY SHARES (OPTIONAL)

Since 30 Jan '06, shares that are acquired pursuant to ss76B to 76G are no longer cancelled immediately on purchase. Sections 76H-76K allow coy to **hold these shares in treasury**

- S76K: Option to **dispose of treasury shares**
- S76J: Shares held in treasury will have their **voting and rights to dividends suspended**
  - Coy is **registered as member in respect to these shares** as per s76H(2) but will not have the right to attend meetings or vote on them or receive dividends in respect to them: s76J(3) and (4)
  - The freeze on rights attaching to treasury shares **does not extend to fully paid bonus shares** allotted in respect of the treasury shares or the subdivision or consolidation of

it there is no change to the total value of the treasury shares as a consequence: s76J(5)

Maximum permitted holding of 10% of number of shares of the relevant class: s76I(1)

- Any treasury shares which exceed this are known as '**excess shares**'
- Excess shares must be either disposed of or cancelled (under procedure in s76K) within 6 mths of the day when contravention first occurs: s76I(3)

Disposal options (s76K)

- Sell the shares for cash
- Transfer shares for purpose of or pursuant to an employees' share scheme
- Transfer shares as consideration for any acquisitions
- Cancel the shares
- Sell, transfer or otherwise use treasury shares for such other purposes as Minister may by order prescribe

Sale or transfer options not available (except to offeror) where there has been a

- takeover offer for the shares or class of shares of the coy, some of which are held in treasury, and the offeror,
- having received acceptances of 90% or more in value of those shares has
- issued a s215 notice to compulsorily acquire the remaining shares: s76K(3)

NO PAYMENT OF DIVIDENDS

S. 403(1), CA: No dividends may be paid out unless there are profits available for that purpose.

- But **there is no legislative guidance on what constitutes "profits" – must refer to case law**.

Divideneds can only be paid out of profits. However, statute does not define 'profits'. Hence, the confusion in law stems from determining what is or is not profits. Generally, there are two ways of paying out dividends: 1) where there are profits on the revenue (income > outgoing) and 2) where there is an increase in capital assets (subject to condtion that capital is intact).

- Preliminary: bring in doctrine of **separate legal entity** if the director or someone in the coy wants to get the profits for himself

When **dividends are declared**, they become a debt owed by the company to the members. Members however, **have no right to demand a declaration of dividends even if there is a profit**, but may succeed under "commercial unfairness" due to abuse of voting powers under s. 216, CA (oppression remedy)

- Re SQ Wong Holdings (Pte) Ltd (1987)
    - HELD: Commercial unfairness present because directors refused to pay dividends since the paying of dividends will make their shares non-votable and hence losing their dominance.
    - Hence, **voting to not pay out dividends was motivated by self interest**.

** Does that mean that when company winds up,

---

1) PROFIT ON THE REVENUE

- **Profit must be from the company and not other members of a Group** (Industrial Equity Ltd v Blackburn (HCA1977) – separate legal entity
- **Capital NEED NOT be intact** before dividends are paid
    - Even though total assets may be less than original capital subscribed by SH, coy can still declare dividends
- **No obligation to apply revenue to asset depreciation or accumulated losses first**
    - Lost capital carried forward need not be made up by profit before declaring a dividend (Lee v Neuchatel Asphalte Co)

- Doesn't this conflict with capital maintenance rule? CLRFC thus recommends that dividends should only be paid out of accumulated realised gains minus accumulated realised losses as per the UK position

2) INCREASE IN CAPITAL ASSETS

A coy may pay dividend even if there are no revenue profits, provided that there has been an increase in the value of its capital assets. Dividends may be based upon capital profits, provided that there has been an accretion to the capital of the coy (Marra Developments).

3) UNREALISED PROFITS

***Alternatively, if company doesn't want to sell the land, it could still declare dividends using unrealised profits.*

The case of Dimbula Valley held that **unrealised profits resulting from the mere revaluation of fixed assets can be treated as profit for dividend purposes**, but also noted that this is **not normally to be regarded as a wise commercial practice** since value of land could be affected by external economic conditions.

Hence, this allowance is prefaced by certain **checks and balances**, such as 1) being done in good faith by competent valuer and 2) that the revaluation is not subject to short-term fluctuations.

CONSEQUENCES

Payment of dividends is a fiduciary duty.

Directors who wilfully paid or permitted will be guilty of an offence under s. 403(2)(a), CA and will be liable to the creditors of coy for the amount of debts due by coy to them to the extent that dividend so paid have exceeded profits as per **s. 403(2)(b), CA**.

- Marra Development Ltd v. BW Rofe Pty Ltd (1977)
  - HELD: To be guilty, the officer must know facts that would establish that there was no proper declaration of a dividend because of insufficient profits. The material time to assess the officer's knowledge is **at the time of the declaration**, not the time of payment.

If it is discovered that a **dividend has been declared illegally**, the Board **may apply to court** to have the declaration set aside. It is not permissible for the company to declare a unilateral moratorium.

Members who receive dividends knowing that there are no profits out of which to pay them will be liable to refund those dividends.

- They will hold the money as constructive trustees on the basis that they have received and become chargeable with part of the trust fund (Re Cleveland Trust plc).
- They may be made to indemnify the directors who are compelled to restore the sums paid away illegally (Re Alexandra Place)

FINANCIAL ASSISTANCE

LOCUS STANDI*

Cases involving FA are usually brought about by **liquidators** or **new Board of Directors** who noticed discrepancies with past transactions.

If case involves a **former member** of the company, can try and use **s216A** to bring about a **derivative action** on behalf of coy. This would require the court to exercise its discretion on whether said former member could be considered a "**proper person**" under s216A(1)(c), whose reason for bringing up the action could be because of a **wrongful dispossession of his shares.**

- Alternatively, former member could buy 1 share into company and sue (Richardson Greenshields)
- OR get a present member in coy to sue

S1: FINANCIAL ASSISTANCE

The general prohibition against the 1) giving of financial assistance by directors, 2) for the purpose of or in connection with an acquisition of shares is laid out in s. 76(1)(a).

*** If dividends are used…*

One possible view is that once dividends are declared and given to shareholders, they **become personal assets of the shareholder and do not constitute company's funds**. However, we also note that this seems to be covered under the exception of s76(8)(a) which deals with payment of a dividend, so it will likely be subject to the conditions stated in the provision. This will be subsequently dealt with under exceptions.

First, assistance must be **financial in nature**. Where coy gave any other type of assistance that was not financial assistance, it was simply not in the prohibition (PP v Lew Syn Pau).

S2: DEPLETION OF ASSETS

The court in Lew Syn Pau held that before financial assistance can be found, there must be actual or a potential depletion of assets.

*** Examples:*

- *Coy releases an obligation or debt owed by A to coy*
- *Company buys asset from B at undervalue*
- *Loan that is not repaid*
- *Guarantee that is called upon*
- *Security that is resorted to*

However, the test has been criticised: 1) the link between capital maintenance and financial assistance remains unclear, and 2) in Belmont Finance, even where company bought the asset at fair price, financial assistance was still held to be found when there was arguably no depletion of assets.

It is hence submitted that the better position would be to accept the depletion of assets rule as evidence supporting the finding of financial assistance, but depletion of assets per se is insufficient to establish any wrongdoing.

S3: DIRECT OR INDIRECT

FA is prohibited even if it is not directly given to the purchaser of the shares (Lew Pau Syn).

Paradigms

- Direct: money from company used to acquire own shares
- Indirect: involvement of subsidiary companies, external parties

*** Establish what the link is in this case*

S4: FOR THE PURPOSE OF OR IN CONNECTION WITH THE ACQUISITION OF SHARES

For the purpose of

S76(3): Purpose does not have to be sole one, but must be substantial OR

In connection with

S76(4): Company is aware of how transaction would financially assist the acquisition of shares

*** Establish main purpose/collateral purpose and then decide whether the collateral purpose is still substantial*

*** Also include whether coy is aware*

E.g. Main purpose is to allow Dinah to retire rich from dividends, but collateral purpose of allowing sons to gain beneficial shares of Dinah is also substantial. It is also clear that coy is aware of how transaction would financially assist acquisition of shares because…

*** Comment on the two approaches local courts have taken*

In Intraco, it was stated in obiter that if the purpose was bona fide in the interests of the company, financial assistance would be allowed.

*** Any bona fide reasons? Land unused? Huge profits? Management renewal?*

However, the Court of Appeal in Wu Yang adopted a strict stance and stated in obiter that having bona fide intentions is insufficient – so long as there was purpose to give someone funds to acquire shares in the company, there was financial assistance.

*** What's your view?*

Although both positions were stated in obiter, it is submitted that in practice courts are more likely to follow Wu Yang since Wu Yang considered Intraco in detail and did not conflate the rules in directors' duties and financial assistance unlike Intraco.

S5: EXCEPTIONS

S76(8)(a): that the **payment of a dividend** by a company in good faith and in the ordinary course of commercial dealing

- Good faith may be satisfied but unlikely to satisfy "in the ordinary course of commercial dealing" because this dividend is over and above the dividend that is customarily paid to shareholders
- What is over and beyond or special? **One-off transactions**
    - Biz terms: Typically, special dividends are distributed if a company has **exceptionally strong earnings that it wishes to distribute to shareholders** or if it is **making changes to its financial structure**, such as debt ratio

This exception is **less likely to apply to…**

- Large, listed companies: what the SH does with the dividend is of no consequence to the coy (e.g. small SH using its dividends in Singtel, Singtel can hardly be bothered)
- Less likely to apply to a situation where all SH are in control of the coy

---

S6: AUTHORISATION OF FA

There are three ways in which financial assistance may be authorized – and this is otherwise known as the process of **whitewashing**.

1. S. 76(10) **OLD METHOD**: **directors' resolution + Special Resolution + Court's approval**
    a. However, creditors, members or debenture holders may object to the court
2. S. 76(9A) **NEW METHOD**: **directors' resolution + s. 7A solvency statement**
    a. Consent of members not required
    b. However, the amount that can be provided is **capped at 10%** total paid up capital and reserves (if assistance <10% of total paid up capital of coy)
3. S. 76(9B) **NEW METHOD**: **directors' resolution + s. 7A solvency statement + unanimous approval of shareholders**
    a. This is **not subject to the 10% cap**.
    b. Creditors and debenture holders have no right to apply to court to reject the giving of financial assistance

How does new method compare with the old?

- First, where amount < 10%, **consent** of the members **is not required**.
- Secondly, both new methods bar creditors, members or debenture holders from **applying to court** to object to the giving of the financial assistance.

However, even if one of these three methods have been adopted, a director may still be liable for any breach of duties **with respect to making solvency statements with reasonable grounds**. If breached, such a director would be **liable under s. 76(9D)** and will be found guilty of an offence – punishable by a fine and imprisonment. In addition, a director may still be liable to the company if his involvement in the matter constitutes a breach of duties to the company (s. 76(15)).

S7: CONSEQUENCES

Where financial assistance under s. 76(1)(a) has been found, the transaction that constitutes the financial assistance will be rendered **voidable** at the **option of the company** (s. 76A(2)).

- While the company will not be liable for any offence, the director or officer that sanctioned the provision of assistance will be guilty of an offence under s. 76(5), and may face imprisonment and/or a fine.
- There may also be an order for compensation to be made to the company or affected persons (s. 76(6)),
- and the court may order just and equitable orders against anyone who was directly involved or knowingly concerned with the contravention – and these orders may include refunds, indemnities against losses, amongst others. (s. 76(A)(4) and (5)).

SOLVENCY TESTS APPROACH

S7A SOLVENCY STATEMENT

The solvency statement consists of the opinions of the directors on **4 solvency tests**:

- [1] As regard to the company's situation at the date of the statement, there is **no ground to think that the company could not repay its debts**.
- [2] If it is intended that the company is to be wound up within a period of 12 months after the date of the statement, that the **company will be able to pay its debts in full for a further 12 months on winding up**.
- [3] If it is not intended that the company is to be would up, that the **company will be able to pay its debts as they fall during the period of 12 months after the date of the statement**.
- [4] That the **value of the company's assets is not less than the value of its liabilities** and **will remain so after the proposed capital reduction**, redemption or giving of financial assistance.

Hence, the directors need to know that the company is **cash-flow solvent** (pay debts at time of statement and 12 mths after; short-term), **balance sheet solvent** (assets = liabilities; long-term) and even if the company is intended to be wound up, that the company remains balance sheet solvent for 12 more months.

Tests in s. 7A, CA are complex and impose onerous demands on the directors.

- Directors need not only assess the company's current financial position (including the valuing of its assets and estimating its contingent and prospective liabilities) but also a forecast on those matters for next 12 months.
- Consequences of making a mistake are serious.
- Independent directors lack intimate knowledge of the company's financial position and business prospects and may decline to make solvency statements (remember that **all directors must make the solvency statement**). This will compel the company to have no choice but to rely on court sanctioned capital reduction or the whitewash procedure for financial assistance.

S76F SOLVENCY REQUIREMENT FOR SHARE BUYBACK

- S. 76F, CA: Also 4 solvency tests.
  - [1] Company is able to pay its debts in full at the time of the payment of the shares.
  - [2] Company is able to pay its debts in full as they fall in the normal course of business during the period of 12 months after the payment of the shares.
  - [3] Value of the company's assets not less than its liabilities before the proposed purchase.
  - [4] Value of the company's assets will not be less than its liabilities after the proposed purchase.
- Seems that the **solvency requirement for share buyback is not as strict as the s. 7A**, CA solvency statement, although **not clear whether these differences will mean much in practice**.

PROBLEMS IN THIS AREA OF LAW

There is a questionable linkage between the notion of financial assistance and the doctrine of capital maintenance, and this is due to the fact that, as mentioned earlier, there are two different rationales for having the prohibition. Moreover, the role that the prohibition on financial assistance plays in the law is such that it can be subsumed by the laws on directors' duties in general. Wee Meng Seng's article suggests the possibility of a complete shift from the doctrine of capital maintenance and its methods of protecting capital, to the usage of solvency tests; and considers whether or not the prohibition on providing financial assistance ought to be a matter that is handled by directors' duties or wrongful trading and market abuse provisions instead.

Ultimately, Singapore's approach is tending towards the reduction of regulation and the increase of flexibility. While Singapore currently straddles between the doctrine of capital maintenance and solvency tests, it is unable to make a complete shift to the latter because of how ambiguities

remain in the area of solvency tests, and how the test in s. 7A
is rather onerous and complex.