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The Oppression Remedy: Clarifications on Boundaries

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Abstract

The impetus behind the introduction of the statutory provision was the perceived need to protect the vulnerable minority shareholder against the unfair manipulation of the majority rule. Its *raison d'être* is clearly personal. And, as it is an important tool in the minority shareholder's arsenal, it is necessary that the scope of its application be sufficiently wide. The provision is therefore couched in expansive terms. This has led to questions being raised as to the scope of its application. Specifically, can a shareholder attempt to vindicate corporate claims through the provision? This short paper considers this issue against the background provided by the recent Singapore Court of Appeal decision of *Ng Kek Wee v Sim City Technology Ltd*.

A. Introduction

The statutory oppression action is undoubtedly one of the most important measures implemented for the protection of the minority shareholder in the common law world. It first appeared as section 210 of the English Companies Act 1948. This legislative prototype, with all its limitations,[1] provided the inspiration for similar provisions to be adopted, in varying permutations, in other common law jurisdictions.[2] Whilst the statutory oppression action is indubitably personal[3] in nature, the breadth of the remedial jurisdiction conferred has given pause to the question whether the utility of the section might extend beyond the personal remit to permit the vindication of corporate claims. This question has been raised in other jurisdictions,[4] but was most recently ventilated before the Singapore Court of Appeal in *Ng Kek Wee v Sim City Technology Ltd*.[5]

B. The Facts and the Decision

Sim City, which controlled almost 54% of the shares in the subject company, had applied for an order, under section 216 of the Companies Act,[6] complaining of commercial unfairness in how Ng, the managing director of the company, had been conducting the company's affairs. The company was essentially a holding company and its business was entirely conducted through a number of wholly owned subsidiaries. The High Court had found for Sim City, on the basis of certain unauthorised transfers that Ng had made to himself of the company's interests in its subsidiaries. The court also took account of the fact that Ng, whilst acting as a director of the subsidiaries, had misappropriated the funds of those subsidiaries.

Ng did not appeal against the court's findings of wrongdoing on his part, but challenged the judge's conclusion that oppression had been established. He contended first that the judge had erred in taking account of Ng's misconduct in connection with the subject company's subsidiaries, since any unfair

conduct must relate, by the express terms of section 216,[7] only to the 'affairs of the *(subject) company* [emphasis added]'. The Court of Appeal considered this contention to be 'off the mark'.[8] Indeed, the relevance of the manner in which the affairs of the subject company's subsidiaries was conducted with respect to the issue of section 216 relief had been expressly acknowledged in the earlier Court of Appeal decision of *Kumagai Gumi Co Ltd v Zenecon Pte Ltd*.[9] Where, as here, the subject company had been incorporated purely as a holding company, the business of the holding company was, in effect, the respective businesses of its subsidiaries.[10] In such situations, the manner in which the affairs of the subsidiaries are conducted is clearly of significance to the holding company.[11] To deny the relevance of the same would be 'overly narrow and legalistic'.[12] Nevertheless, the court recognised that the *Saloman* principle and the text of the section had to be accorded due respect.[13] In the court's view, therefore, an appropriate balance would be achieved by 'a requirement that commercially unfair conduct in the management of a subsidiary would be relevant so long and to the extent that such conduct affected or impacted the holding company whose member was the party claiming relief'.[14]

Ng's further contention was that Sim City ought to have been disentitled from relief under section 216 as it controlled a majority of the votes in the company. It was on this contention that the appeal in fact turned. Although the oppression remedy is often referred to as a minority shareholder remedy, there is in fact nothing in section 216 that precludes a majority shareholder from seeking redress thereunder.[15] Such types of applicant, however, tend to be somewhat uncommon. This is because the very premise of an oppression action is an inequality of power and an unfair or inequitable exercise of the dominant power.[16] Clearly, a majority shareholder is more likely to be in a position of power dominance. The Court of Appeal noted that 'the touchstone is not whether the claimant is a minority shareholder of the company in question, but whether he lacks the power to stop the allegedly oppressive acts'.[17] Given Sim City's majority stake, and there being nothing in the company's articles to constrain the exercise of its votes, it was clearly within Sim City's powers to remove Ng from the boards of the affected companies, hence removing the source of the alleged oppression. In the circumstances, the court held that there could not have been unfairness under section 216.[18]

The Court of Appeal is not, of course, saying that a majority shareholder is, by virtue of his majority stake alone, precluded from bringing a section 216 application. A majority shareholder might well find himself in a vulnerable position, for example, if he or she had surrendered some aspect of his rights of control by agreement with the other shareholders, or where he or she had agreed to a grant of specific veto powers to the minority.[19] In such cases, as Woo Bi Lih JC noted in *Tong Keng Meng v Inno-Pacific Holdings Ltd*,[20]

C. The Oppression Action and Corporate Wrongs

Ng's further, and arguably more theoretically significant,[22] contention was that as the wrongs that underpinned Sim City's claim were corporate wrongs, so it ought not to have been permitted to make the application under section 216. The statutory remedy for oppression was, of course, not intended to address wrongs to the company. The avowed reason given when it was first introduced was to 'strengthen the minority shareholders of a private company in resisting oppression by the majority'.[23] It was and is, therefore, first and foremost, a personal remedy. Nevertheless, notwithstanding the proper plaintiff rule, it is generally accepted that relief may be obtained pursuant to the oppression action even where the matters complained of are, strictly speaking, wrongs to the company. This is a necessary concession, as it is often through the medium of such wrongs that oppression is inflicted upon the hapless minority shareholders.[24] The fact that the derivative route is also available is no bar to the shareholder's personal access to the oppression remedy. As Lord Wilberforce stated pointedly in *Re Kong Thai Sawmill (Miri) Sdn Bhd*,[25] 'if a case of "oppression" or "disregard" is made out, the section applies and it is no answer to say that relief might also have been obtained in a minority shareholders' action'.[26]

The question whether these corporate wrongs may themselves be vindicated via the statutory oppression action is, however, quite a different matter. The Court of Appeal affirmed that this should not be permitted under section 216. The court gave two inter-related reasons to support its view. First, an expansive reading of section 216 to accommodate this would run counter to the legislative scheme for shareholder action under the Companies Act.[27] The Act has provided, since 1993, a statutory procedure in section 216A by which a shareholder may apply to the court for leave to bring proceedings on the company's behalf.[28] The juxtaposition of the sections together with the specific amendment to include the descriptor 'personal remedies' to the marginal note to section 216 was 'indicative of the legislative intention to clarify the distinction between the action for *personal* relief under s 216 … and the action for *corporate* relief under s 216A'.[29] Further, the shareholder is required, under section 216A, to satisfy the court as to specified standing and substantial preconditions[30] First, the complainant must have given 14 days' notice to the directors of the company of his intention to apply to the court if the directors of the company do not bring, diligently prosecute, defend or discontinue the action. Secondly, the complainant must be acting in good faith. Thirdly, it must appear to be prima facie in the interests of the company that the action be brought, prosecuted, defended or discontinued: Companies Act 2006 (S'pore), s 216A(3).View all notes before the court will grant leave for the bringing of a derivative action. As the court noted:

These requirements are important built-in safeguards that ensure that any litigation brought by a shareholder to pursue corporate claims is guided by the legitimate interests of the company and would result in an increase in the corporate value … Parliament could not have intended for shareholders to sidestep these requirements by characterising a claim for corporate relief as a personal claim.[31]

Secondly, permitting corporate actions to be pursued via section 216 would sanction an improper circumvention of the rule in *Foss v Harbottle*.[32] This echoes the view expressed by Lord Scott of Foscote[33] in connection with Hong Kong's statutory oppression action[34] in *Re Chime Corp Ltd.*[35] At the time of the decision, Hong Kong had yet to introduce the statutory derivative action, and the shareholder's right to bring derivative proceedings was then governed solely by the common law. As is well known, the common law route is rather strictly circumscribed by the rule in *Foss v Harbottle*.[36] Allowing the oppression action to embrace corporate wrongs will undoubtedly go some way towards alleviating the minority shareholder's plight.[37] There is, in fact, some judicial sympathy for this view.[38] Nevertheless, the sound policy reasons that sustained, and continue to sustain, the rule in *Foss v Harbottle* militate against such a move. The proper plaintiff principle, a necessary corollary of the separate legal personality, is, as the Court of Appeal noted, 'far from … a legalistic procedural obstacle'.[39] As Choo Han Teck J had earlier observed in *Ting Sing Ning v Ting Chek Swee*:[40]

The rule is a useful one because it avoids the multiplicity of actions by individual members by giving the right of action to the company itself; and thus, and in many instances, prevents a minority from oppressing the majority by inflicting vexatious and unwarranted legal action.

To allow an individual shareholder to take charge of corporate litigation is to vest in him the 'extraordinary power'[41] to subject the company, and to commit its resources, to 'a position of legal conflict'[42] even when a majority of the company, acting through the board of directors or some other corporate process dictated by the company's constitutional documents, is not supportive of the action. This clearly offends the principle of majority rule, which is the basic premise of corporate operations generally. In light of this, the threshold requirements for a derivative action, whether at common law or statutorily dictated, take on especial significance, serving to 'filter'[43] out, and hence prevent, vexatious or frivolous actions.[44]

It should be noted that, in concluding that corporate actions should not be entertained under section 216, the Court of Appeal is not denying the court's jurisdiction to order direct relief to the subject company.[45] The width of statutory language employed in the oppression action is universally acknowledged. Section 216(2) is typical in providing for a non-exhaustive list of potential orders that the court may make which is expressly stated to be 'without prejudice' to the court's jurisdiction to 'make such order as it thinks fit'. The only limitation to this jurisdiction, as noted by the Court of Appeal in the earlier decision of *Kumagai Gumi Co Ltd v Zenecon Pte Ltd*,[46] is that the order must be made 'with a view to bringing to an end or remedying the matters complained of'. What the court's conclusion does mean, however, is that the court's jurisdiction to order corporate relief should only be exercised if the complaint was, in the first place, a personal one of oppression or unfair prejudice. Only such complaints fall properly within the ambit of section 216. As Lord Scott pointed out in *Re Chime Corpn Ltd*,[47] '[t]he fact … that the terms of a statute create or confer a jurisdiction in very wide terms does not necessarily mean that the courts have an unlimited jurisdiction to make any orders that are within the wide statutory terms'.[48] It is, however, possible to envisage situations where an order for corporate relief may be appropriate, or even necessary, in order to provide the applicant with the remedy that will 'bring to an end or remedy the matters complained of'. For example, the shareholder may, for personal reasons, prefer to buy out the oppressor.[49] In such a case, the court may make a concurrent order that the errant respondent should compensate the company for such losses as he or she had caused the company to suffer. Similarly, in situations where the court considers that the company ought properly to be wound up,[50] it may be appropriate that restitution in respect of the wrongs be first made to the company.[51]

The remaining question is: where should the line that divides the personal from the derivative be drawn?[52] The Court of Appeal acknowledged that there will always be 'grey areas'[53] and that, as much will depend on the particular factual matrix pertaining to each case, hard and fast rules are of little utility.[54] The court referred to two judgments, one from the UK and the other from Canada, for assistance. In the English decision of *Re Charnley Davies Ltd (No 2)*,[55] Millett J had opined that the distinction lay, not in the particular acts or omissions of which complaint is made, but in the nature of the complaint and the remedy necessary to meet it. If the true complaint had been the unlawfulness of the impugned conduct, which could be adequately addressed by an order for restitution to the company or some other substantive corporate remedy, the complaint should be classified as derivative. On the other hand, if the complaint was mismanagement of the company's affairs in disregard of the applicant's interests, and the unlawfulness was raised as evidence of this,[56] the complaint should be classified as personal. In the Canadian case of *Pappan v Acan Windows Inc*,[57] the court utilised the concept of 'incidental injury'[58] to draw the distinction. If the shareholder's injury was not distinct from the company's injury but was necessarily incidental thereto, the action was derivative. Drawing from these observations, the Court of Appeal concluded that:

'in order to succeed in a minority oppression action, the minority shareholder has to show something more than the unlawfulness of the defendant's conduct and further that the shareholder's injury does not merely reflect that suffered by the company'.[59]

Given that the complaints in the present case were all allegations of wrongs to the company,[60] the court considered that the essence of Sim City's complaint was derivative in nature and that it was in reality seeking restitution of the sums wrongfully appropriated by Ng. In the circumstances, the action ought to have proceeded by way of a section 216A application.

D. Conclusion

The Court of Appeal's decision in *Ng Kek Wee v Sim City Technology Ltd* contributes to our understanding of the boundaries of the oppression remedy in section 216. It is also in part cautionary, as it

tells us that, whilst intended to be more wide than narrow in its scope of application, section 216 is nevertheless not the panacea for all the corporate ills that a minority shareholder might encounter. Whilst the oppression remedy does, to some extent, allow the courts to look beyond the formal structure of the company,[61] this cannot be taken so far as to ignore the corporate–personal divide entirely. The boundaries of section 216 remain, it would appear, ultimately defined by the *Saloman* principle.

Notes

1 See L Sealy, 'Problems of Standing, Pleading and Proof in Corporate Litigation' in BG Pettet (ed), *Company Law in Change, Current Legal Problems* (Stevens, 1987) 15.

2 Corporations Act 2001 (Australia), s 232; Canadian Business Corporations Act 1985, s 241; Companies Ordinance (Cap 32) (Hong Kong), s 168A, Companies Act 1965 (Malaysia), s 181; Companies Act 1993 (New Zealand), s 174; Companies Act 2006 (Cap 50) (Singapore), s 216. The present provision in Companies Act 2006 (UK) utilises the formulation 'unfair prejudice' rather than 'oppression'.

3 In the sense that the petitioner is seeking to remedy some wrong that he or she has suffered.

4 See, eg *Gamlestaden Fastigheter AV v Baltic Partners Ltd* [2007] UKPC 26, [2008] 1 BCLC 468; *Re Chime Corpn Ltd* [2004] 3 HKLRD 922. See also EM Iacobucci and KE Davis, 'Reconciling Derivative Claims and the Oppression Remedy' (2000) 12 Supreme Court Law Review (2d) 87.

5 [2014] SGCA 47, [2014] 4 SLR 723.

6 Cap 50, 2006 rev edn.

7 Companies Act (S'pore), s 216 provides that:

[A] member … of a company … may apply to the Court for an order under this section on the ground

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members … including himself or in disregard of his or their interests as members … of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members … or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members … (including himself).

8 *Sim City* (n 5) [39].

9 [1995] SGCA 52, [1995] 2 SLR(R) 304. See further *Low Peng Boon v Low Janie* [1999] SGCA 8, [1999] 1 SLR(R) 337; *Lim Chee Twang v Chan Shuk Kuen Helina* [2009] SGHC 282, [2010] 2 SLR 209.

10 *Sim City* (n 5) [43].

11 See also *Lim Chee Twang v Chan Shuk Kuen Helina* [2009] SGHC 282, [2010] 2 SLR 209, [97]; *Gross v Rackind* [2004] EWCA Civ 815, [2005] 1 WLR 3505, [26]; *Re Norvabron Pty Ltd (No 2)* (1986) 11 ACLR 279.

12 *Sim City* (n 5) [39].

13 *Salomon v A Saloman & Co Ltd* [1897] AC 22 (HL).

14 *Sim City* (n 5) [42].

15 The same observation has been made in respect of the cognate remedy in other jurisdictions: see, eg *Re Richardson & Wrench Holdings Pty Ltd* (2013) 97 ACSR 351, [36]; *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171, 179, 196.

16 See *Tong Keng Meng v Inno-Pacific Holdings Ltd* [2001] SGHC 294; [2001] 3 SLR(R) 311, [33].

17 *Sim City* (n 5) [48].

18 A similar result had been reached in the English decision of *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171, 198–99.

19 In Singapore, the majority controls the power to issue shares: Companies Act 2006 (S'pore), s 161. A majority shareholder in Singapore is therefore less susceptible to being the 'victim' of unfair intra-corporate machinations. See also UK Companies Act 2006, ss 550 and 551. In some jurisdictions, such as Australia and Canada, the power to issue new shares is, in the first instance, vested in the board. If control over the issue of shares is ceded to the board, a majority shareholder who is either not on the board or is a minority on the board, may find him- or herself unable to stop a fresh share issue which will severely dilute his or her control over the company. This was the predicament a 90% shareholder found himself in in the Ontario High Court case of *Yok Wing Hui v Yamato Japanese Steak House Inc* [1988] OJ No 9 [QL] (unreported).

20 [2001] SGHC 294, [2001] 3 SLR(R) 311.

21 For successful applications by majority shareholders in other jurisdictions see, eg *Gillespie v Overs* 1987 CarswellOnt 3404, (1987) 5 ACWS (3d) 430, [1987] OJ No 747; *Parkinson v Eurofinance Group Ltd* [2001] 1 BCLC 720; *Re Richardson & Wrench Holdings Pty Ltd* [2013] NSWSC 1990, (2013) 97 ACSR 351.

22 The court had decided to do so as the point was, in its view, of 'general interest': *Sim City* (n 5) [59].

23 *Report of the Committee on Company Law Amendment* (Cmd 6659, 1945) [60].

24 See, eg *Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] SGCA 52, [1995] 2 SLR(R) 304; *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] SGCA 33, [2006] 4 SLR(R) 745; *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354; *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420; *Clark v Cutland* [2003] EWCA Civ 810, [2004] 1 WLR 783. See also HC Hirt, 'In What Circumstances Should Breaches of Directors' Duties Give Rise to a Remedy under ss 459–461 of the Companies Act 1985?' (2003) 24 *Company Lawyer* 100; S Griffin, 'Shareholder Remedies and the No-Reflective Loss Principle—Problems Surrounding the Identification of a Membership Interest' [2010] *Journal of Business Law* 461, 47071.

25 [1978] 2 MLJ 227. The Privy Council was considering the oppression remedy contained in Malaysia's Companies Act 1965, s 181.

26 *Ibid*, 229. See also *Re Stewarts (Brixton) Ltd* [1985] BCLC 4; *Re A Company (No 005287 of 1985)* [1986] 1 WLR 281; *Re Saul D Harrision & Sons Plc* [1995] 1 BCLC 14, 18.

27 *Sim City* (n 5) [64].

28 The UK introduced the statutory derivative action in 2006 (see UK Companies Act 2006, pt 11, ss 260–64), whilst Hong Kong introduced the procedure in 2004 (ss 168BA–168BI were added to Hong Kong's Companies Ordinance (Cap 32) by the Companies (Amendment) Ordinance).

29 *Sim City* (n 5) [64] (original emphasis).

30 First, the complainant must have given 14 days' notice to the directors of the company of his intention to apply to the court if the directors of the company do not bring, diligently prosecute, defend or discontinue the action. Secondly, the complainant must be acting in good faith. Thirdly, it must appear to be prima facie in the interests of the company that the action be brought, prosecuted, defended or discontinued: Companies Act 2006 (S'pore), s 216A(3).

31 *Sim City* (n 5) [64].

32 *Sim City* (n 5) [65].

33 Sitting as a Non-Permanent Judge in the Hong Kong Court of Final Appeal.

34 Companies Ordinance, Cap 32, s 168A is Hong Kong's unfair prejudice provision, and is similar in material respects to the UK provision.

35 [2004] 3 HKLRD 922.

36 (1843) 2 Hare 461. The majority principle is one aspect of the rule in *Foss v Harbottle* (the other being the proper plaintiff rule) and was explained by Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER 1064, 1066–67 in the following terms: 'if a mere majority of the members of the company … is in favour of what has been done, then *cadit quæstio.* No wrong had been done to the company or association and there is nothing in respect of which anyone can sue.'

37 See generally B Hannigan, 'Drawing Boundaries between Derivative Claims and Unfairly Prejudicial Petitions' [2009] Journal of Business Law 606.

38 See, eg *Clark v Cutland* [2003] EWCA Civ 810, [2004] 1 WLR 783, where Arden LJ acknowledged the lower court judge's view that 'there was a wide jurisdiction under section 461 to give relief against third parties which could have been granted in a derivative action' and further that 'it was appropriate for him to treat the petition *as if it were a derivative action*' (*Ibid*, [35]). See also *Bhullar v Bhullar* [2003] EWCA Civ 424, [2003] 2 BCLC 241; *Lowe v Fahey* [1996] 1 BCLC 262, 268; *Anderson v Hogg* 2002 SC 190, [2002] BCC 923.

39 *Sim City* (n 5) [65].

40 [2006] SGHC 192, [2007] 1 SLR(R) 369, [1]; appeal was allowed ([2007] SGCA 49, [2008] 1 SLR(R) 197), but Choo J's comments on the rationale for the rule remains valid.

41 *Tremblett v SCB Fisheries Ltd* (1993) 116 Nfld & PEIR 139, [61] per Puddester J.

42 *Ibid*.

43 See *Waddington Ltd v Chan Chun Hoo* (2008) 11 HKCFAR 370, [10]–[20], [47]–[57].

44 A similar conclusion was reached in Hong Kong in *Re Shun Tak Holdings*, [2009] 5 HKLRD 743, a decision of the court of first instance that occurred after the introduction of the statutory derivative action in Hong Kong.

45 *Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] SGCA 52, [1995] 2 SLR(R) 304, [77]. See also *Gamlestaden Fastigheter AV v Baltic Partners Ltd* [2007] UKPC 26, [2008] 1 BCLC 468.

46 [1995] SGCA 52, [1995] 2 SLR(R) 304, [71].

47 [2004] 3 HKLRD 922.

48 Lord Scott drew a distinction, as did Bokhary PJ, who gave the only other reasoned judgment, between these two senses in which the term 'jurisdiction' may be understood—the strict or theoretical sense, and the wider, practical sense which embraces considerations of the propriety of exercising that jurisdiction in a particular case: *Chime Corp* [2004] 3 HKLRD 922, [39]–[41] and [9].

49 The English case of *Clark v Cutland* [2003] EWCA Civ 810, [2004] 1 WLR 783 provides an illustration of precisely such a situation.

50 Which was what occurred in *Low Peng Boon v Low Janie* [1999] SGCA 9, [1999] 1 SLR(R) 337.

51 Even in these situations, Lord Scott would advocate a cautious approach. In *Re Chime Corpn Ltd* [2004] 3 HKLRD 922, his Lordship thought that, as a general rule, the court should not exercise its jurisdiction to make any order for corporate relief unless the order 'corresponds to the order to which the company would have been entitled had the allegations in question been successfully prosecuted in an action by the company (or in a derivative action in the name of the company)' ([62]). Further, Lord Scott was of the view that the court should not allow a prayer in the petition, that compensation or restitution be made by the allegedly errant director to the company, to stand unless 'it is clear at the pleading stage that a determination of the amount, if any of the director's liability at law to the company can conveniently be dealt with in the hearing of the petition': *Ibid.*

52 *Sim City* (n 5) [66].

53 *Ibid*.

54 *Ibid*.

55 [1990] BCLC 760. The case involved a petition under the English Insolvency Act 1986, s 27, presented by 11 of the creditors of the company alleging that the company's affairs had been managed by the company's administrator in a manner which is unfairly prejudicial to the creditors of the company.

56 [1990] BCLC 760, 784.

57 (1991) 2 BLR (2d) 180.

58 Drawn from the judgment of Traynor CJ in the California decision of *Jones v H F Ahmanson & Co* 460 P 2d 464 (Cal 1960).

59 *Sim City* (n 5) [70].

60 Sim City had in fact sought authorisation to commence a derivative action: [2013] SGHC 216, [103].

61 See *Ebrahimi v Westbourne Galleries* [1973] AC 360, 379.