



**Part A Bar Examinations November 2016**

**Company Law**

Subject Coordinator:  
Professor Walter Woon SC  
National University of Singapore

**SINGAPORE INSTITUTE OF LEGAL EDUCATION**  
**Part A Bar Examinations 2016****INTRODUCTION**

Part A of the Bar Examination is designed to ensure that graduates of non-Singapore universities are equipped with sufficient knowledge of Singapore law to enable them to take Part B of the Bar Examination on a more-or-less equal footing with their peers who have studied in Singapore. One should never forget that it is essential to know and apply the law of Singapore when practising as a lawyer in Singapore. Singapore law is not a minor offshoot of English or Australian law, and any lawyer who forgets this does his client a major disservice (apart from laying himself open to charges of professional incompetence).

Having said that, Company Law in Singapore has its roots in the common law of England. Many of the provisions of the Companies Act are derived from English or Australian prototypes. However, that the influence of the European Union on the United Kingdom tends to drive English law in a different direction from Singapore, Malaysia and Australia. This should be borne firmly in mind when reading English cases. Malaysian cases on similar provisions are persuasive, but in practice are seldom referred to. Australian cases may on occasion be cited, but again this is comparatively rare. Remember that the only cases that actually matter are cases decided by the courts of Singapore; anything else is of persuasive value only.

The guiding philosophy of this course is that candidates are already graduates and in some cases have had experience in the practice of law. Therefore it is expected that candidates will be able to reach a sufficient standard to pass the examination by relying on the primary materials, text books and reference works.

**PRIMARY AND SECONDARY MATERIALS**

The primary source of company law in Singapore is the Companies Act (Cap 50). This has recently amended. An up-to-date copy of the Act should be procured. The examinations will be set on the basis of the Act as it exists on 3 January 2016. It is pointless to consign large chunks of the statute to memory. No one in his right mind does this. In practice, one should never give advice without checking the actual current text of the statute. It is therefore far more useful to know where to find the provisions than to memorize them.

Although the Companies Act is the primary source of company law, there are many other statutes that impact on companies and the practice of corporate law in Singapore. These will be referred to in the reading list. Candidates may wish to print out hard-copies of the relevant sections for use in the examination.

In practice, much detail is left to subsidiary legislation: regulations, rules etc. These will not figure in the Part A course. It is sufficient to know that they exist.

Case law: the only cases that really matter are those decided by Singapore courts. Obviously, decisions of the Court of Appeal are of the highest authority. High Court cases also are precedents. Generally, the decisions of district and magistrates' courts are not treated as precedents since they bind no one. When giving advice to clients it is necessary to be aware of any binding precedents.

Cases from other jurisdictions (principally the UK and Australia) are often cited as precedents. These are only persuasive until accepted locally by the High Court or Court of Appeal (Privy Council cases reflecting the common law have a special authority if they date from a time when Singapore was still a British colony). Nonetheless, candidates should feel free to draw upon their knowledge of English or Australian law when answering the examination question, bearing in mind that the principles in those cases might not necessarily apply in Singapore.

The main textbooks are *Corporate Law* (Hans Tjio, Perlie Koh & Lee Pey Woan), *Walter Woon on Company Law* (3<sup>rd</sup> Edition, Editor Tan Cheng Han) and *Company Law* (2<sup>nd</sup> Edition, Pearlle Koh). Candidates may choose to rely on any or all of them. The standard reference text is *Woon's Corporations Law* (LexisNexis). Candidates may also choose to use any standard English or Australian textbook, but it should be borne firmly in mind that the differences are considerable. The textbooks are an aid to understanding. Use them in conjunction with the reading lists.

The reading lists may be revised in the course of the year. Updates (if any) to the Reading Lists will be posted on the website of the Singapore Institute for Legal Education. Cases and statutes do change, so it is important that candidates check the website regularly.

## **VIDEO MATERIALS**

In some places the Reading Lists are supplemented by videos. These are not lectures as the term is commonly understood in university. Rather, they are tools to aid in comprehension of particular points of law or practice. Do not expect them to form a comprehensive course. The videos are meant to be used in conjunction with the reading lists and the textbooks. They are deliberately kept short so as to be more easily digestible. Watch them when you get to the topic rather than in one sitting.

## **MODE OF ASSESSMENT**

There will be a written examination sometime in November (please check for the exact date). The examination will consist of ONE question. There will be no choice. The rationale for this is simple: in practice, no one gets a choice. If a client comes with a problem it is necessary to deal with it. It is only when one becomes a senior partner in a law firm that one has the luxury of turning clients away; a legal assistant does not have this privilege. The

examination will be conducted in an open-book format, because in practice no lawyer in his right mind would dare render advice without checking and double-checking. Anyone who tries to do it from memory is asking for trouble. Take note that consultation with others (whether inside or outside the examination venue) is strictly prohibited, as it is necessary for the examiners to determine whether the candidate understands the subject or would benefit from having more time to achieve a basic standard of competence.

Candidates may bring into the examination hall any written or printed materials that they desire. Laptops will be allowed in accordance with the rules governing the examinations. However, candidates are not permitted to communicate with one another or with outsiders. To do so is cheating. Anyone caught cheating (and those who assist them) can expect to be dealt with severely. Dishonesty is a fatal defect in any lawyer.

The examination will be marked on a distinction/pass/fail basis. Candidates are required to show that they can render legal advice in a coherent manner when faced with a legal problem. The fact that candidates have only two hours to do so will be factored into the marking. The idea is to put the candidate in the shoes of a legal assistant who is called to do a first cut of advice for the senior partner of the firm. It is unnecessary to resolve every single issue; indeed, it may not be possible to do so in two hours. It is sufficient to highlight the issues, resolve those that can be resolved and give an indication how to proceed further.

**Candidates will be judged on their ability to coherently expound the law and apply the principles to the case at hand. A cut-and-paste job from textbooks, articles and mugger's notes does not demonstrate anything more than the candidate's mastery of word processing programs.**

**TOPICS TO BE COVERED****Reading List 01: Business Organisations**

- A. Separate entity, perpetual succession & limited liability  
Video 01-100: The concept of limited liability
- B. Partnerships & limited liability partnerships
- C. Companies  
Video 01-200: Groups of companies
- D. Lifting the veil of incorporation  
Video 01-300: Exceptions to the separate entity doctrine

**Reading List 02: Internal Management**

- A. The company's constitution
- B. Membership of a company  
Video 02-100: Share transfer restrictions
- C. Enforcement of the provisions of the constitution  
Video 02-200: Compliance with the constitution

**Reading List 03: Members' Rights**

- A. Meetings and resolutions
- B. Irregularities in proceedings
- C. Voting
- D. Minority shareholders' remedies  
Video 03-100: Corporate divorce

**Reading List 04: Appointment, Removal and Remuneration of Corporate Officers**

- A. The board of directors  
Video 04-100: Board structures  
Video 04-200: Directorship and employment
- B. Company officers
- C. Remuneration of corporate officers  
Video 04-300: Paying directors and officers
- D. Directors' financial dealings with the company

**Reading List 05: Corporate Governance**

- Video 05-100: Civil and criminal proceedings
- A. Civil liability – fiduciary duties
    - *Duty to act in the interest of the company*
    - *Conflicts of interest*
    - *Exercise of directors' powers for the proper purpose*
    - *Consequences of breach of fiduciary duties*
    - *Other officers*
  - B. Civil liability – negligence  
Video 05-200: Skill, care and diligence

- C. Criminal liability
- D. Indemnities and release from liability
- E. De facto and shadow directors
- F. Financial statements and audit

**Reading List 06: Suing and Being Sued**

- A. Vicarious liability
- B. Agency
  - Video 06-100: Authority of corporate agents
  - Video 06-200: Apparent authority and estoppel
- C. Criminal liability
- D. Enforcing Corporate Rights
  - Video 06-300: The section 216A procedure

**Reading List 07: Maintenance of Capital**

**SAMPLE EXAMINATION QUESTION**

The senior partner of your firm has handed you the following file with instructions to prepare a draft opinion for him. He will be meeting the client shortly and needs to have a first cut of the advice that will be rendered.

Your client is Mr Eldon Tan, who holds 20% of the shares of Golden Fortune Trading Pte Ltd. 30% is held by his half-brother Abel. A further 30% is held by Ms Baker, the widow of Charlie Tan, another half-brother. The company was founded by their father, the late G F Tan, who ran it in the usual autocratic Chinese fashion while he was alive. Abel, his eldest son by his first wife, was the Managing Director, a post he continues to hold. During G F's lifetime he would instruct Abel what to do. The board of directors consisted of Abel, Charlie and Doris Tan (G F's third daughter, also by his first wife). Eldon was only appointed to the board three years ago, just before G F's death.

The company's business is the importation of abalone for the Singapore market. This trade depends almost entirely on personal contacts with suppliers in China. When Eldon joined the board he discovered that the Chinese suppliers actually ship the goods to a Hong Kong company, New Fortune Seafood (Hong Kong) Ltd. As far as Golden Fortune's records show, New Fortune is the major supplier to Golden Fortune, accounting for well over 80% of the business on average. It does not appear to be related to Golden Fortune. Eldon suspects that New Fortune is owned by Abel and Charlie but has been unable to obtain confirmation of this. Abel has been the one running the business since G F was incapacitated by a stroke 10 years ago (Your client was in university then and took no part in the family business). Charlie occasionally dealt with suppliers when Abel was otherwise engaged, but since Charlie's death two years ago, the business has been in Abel's hands exclusively.

Your client was busy with his career and paid little attention to the business. He only agreed to become a director because his mother (G F's second wife) had insisted that their family needed to be represented. There have been no formal board meetings since he became a director at the beginning of 2012. Whenever papers were sent to him, he signed them. As he did not keep copies, he has only a vague recollection that these were customs forms and various documents from banks in relation to the financing of the business. He can recall signing off on the company's accounts. When G F died at the end of 2012, his estate was in a mess and Eldon was involved in sorting it out. In the course of this, he became aware that Golden Fortune appears to have been under-declaring the value of the abalone imports, for reasons that he cannot fully understand. He suspects that this may be part of some elaborate tax-avoidance or money-laundering scheme. His half-brother Abel Tan is rumoured to have triad connections in Hong Kong, but again he cannot prove this.

Eldon Tan has approached your firm for advice. He is worried about his exposure should his worst fears be realized and the company is exposed to be carrying on an illegal tax-avoidance or money-laundering scheme. He wants to know what liabilities he might face and what he should do next.

---

**POINTERS ON ANSWERING THE QUESTION**

Before answering, note the following:

- (1) Clients never give you all the facts from the start, unlike hypothetical questions typically set in examinations. When reading the question, you should ask whether you need more information. For instance, the alert student will have noted that the shareholdings of Abel, Baker and your client do not add up to 100%. What questions would you pose to the client? Why? Explain the significance of what you seek. Knowing what questions to ask is a vital part of the job.
- (2) Do not be afraid to go beyond what the client asks if you see that there is a problem that might seriously affect him. In this case, the client wants to know what his exposure is. But this does not mean that you should not indicate that there is a possibility that the controllers of the company are diverting profits and enriching themselves at the expense of the company. The fact that New Fortune is owned by Abel and Charlie (or his successors after his death) should raise some red flags.
- (3) Too many candidates in previous examinations **did not read the instructions**. Some even mis-identified the client. The examination question requires the candidate to give advice to a particular client. This is not an invitation to regurgitate everything one knows on a particular issue. The use of computers has exacerbated this problem. You get no credit for pasting in a prepared text regardless of relevance. The examination questions are crafted so that this is not a viable strategy.
- (4) Any candidate who does not answer the question posed **FAILS**. Clients pay you for solutions, not erudition. More is not necessarily better. In real life the Senior Partner of your firm will be looking for a coherent exposition of the law as it applies to the case at hand, not an academic thesis on issues you think are interesting.
- (5) Clients do not come to you for a learned article on the law and its current problems. They want advice. You must suggest what they should do next. Give concrete suggestions. Should your client resign as director? How can he get more information about the company's business if his half-brothers refuse to cooperate?
- (6) Do not panic if you do not know the answer to any issue that you spot, nor be unduly disturbed if you feel that you have not covered everything. In practice, it is a rare lawyer who can in two hours at the first sitting deal with every issue that a client's instructions raise. It is enough that you are able indicate the lines for further research. However, you must at least demonstrate that you understand enough of the law to make a tentative stab at an answer. Some candidates in previous examinations merely wrote that 'more research is needed' without even trying to answer. This is a total abdication of your role in practice. Anyone who does this **FAILS** the examination.
- (7) Finally, note that there is such a thing as a wrong answer, despite whatever you may have been told in your undergraduate course. Giving advice that would get a client sent to jail is obviously the wrong answer. Anyone whose advice would result in criminal proceedings against the client **FAILS**, no matter how academically interesting his/her answer may be.

Grading is on a distinction/pass/fail basis. The question is deceptively simple but raises several difficult issues. There is scope for a good candidate to shine. There is also the possibility that an inadequately-prepared candidate will be completely stumped and unable to see any issues. Do not let the open-book format lull you into complacency. An open-book examination means that you do not have to waste energy on memorizing peripheral information like case names or section numbers. Know where to look. Make sure that your material is properly organized for quick access. It is impossible to read-up on the spot. The textbook is a comfort, but if you are not familiar with the principles, the examination hall is not the place to remedy the deficiency.

As regards the sample examination question, a candidate will pass if he deals with the two major issues that would affect the client, viz, the liability of a director where the company is involved in criminal acts and his potential civil liability where he has not been paying attention to the business. A candidate who does not deal with both the issues will fail; he will be no use to his client if he cannot spot the obvious dangers. The client comes to you to be guided. If you do not alert him to the possibility that he could be criminally and civilly liable, you have not done your job.

The difference between a candidate who gets a distinction and one who merely passes lies in the quality of the advice given to the client; this is the difference between someone who will be an excellent corporate lawyer and one who is merely adequate. In giving your advice, you may want to consider the possibility of an oppression action or even winding up of the company if the controlling faction does not give your client the information he needs. Will an application to court to be excused from civil or criminal liability be possible? Is the client at risk of being disqualified from directorship and management of companies if the company is indeed involved in criminal activities? If the Hong Kong company is a front for Abel and Charlie (or whoever took over his share), can the veil of incorporation be pierced? Is there a possibility of bringing a derivative action against the controllers if they have breached their duties to the company?

These issues cannot be resolved adequately in the time given and in the absence of further information from the client. An excellent lawyer will see that these issues will need to be dealt with and will indicate in his advice that he will be exploring these avenues when time permits. This will merit a possible distinction (depending on how well the candidate explains what is involved). A competent lawyer should see some of these and indicate that further research is needed. An incompetent lawyer will be blind to these issues; this will probably result in a fail grade.

---

## READING LISTS

### READING LIST (01)

#### Business Organisations

#### A. Separate entity, perpetual succession and limited liability

1. Before considering the forms of business organisation available in Singapore, it is necessary to understand three concepts: separate entity, perpetual succession and limited liability. Read the relevant portions of the textbooks, both local and foreign. Cases from jurisdictions other than Singapore may be used as analogies and examples.

2. Separate entity. This means that the business organisation (a 'business' for brevity's sake) is treated as a person in law, separate from the human beings that are its members. From this concept flow several important consequences:

- The business can own property.
- That property does not belong to the members.
- The members are not liable for the debts of the business.
- The business can enter into contracts with its members.
- Only the business can sue to enforce obligations owed to it.
- It must be sued separately from the members.

3. The *locus classicus* is *Aron Salomon v A Salomon & Co Ltd* [1897] 1 AC 22 (House of Lords). This has repeatedly been accepted as good law in Singapore. The doctrine of separate entity means that the owner-controllers of a business entity<sup>1</sup> can be guilty of stealing or dishonestly misappropriating the property of the business entity: see, eg, *Lai Ah Kau v Public Prosecutor* [1988] 2 SLR(R) 128 (High Court, Singapore). It has even been held that a company can be guilty of conspiracy with its controlling director: see, eg, *Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR(R) 80 (High Court, Singapore). The doctrine of separate entity also means that only the business entity can sue for wrongs done to it: see *Foss v Harbottle* (1843) 2 Hare 461 (Vice Chancellor's Court, England); this case has repeatedly been accepted as good law in Singapore.

4. Perpetual succession is also a logical consequence of the principle of separate legal entity. If a business entity has a legal personality separate from its members, then that legal personality endures even though there is a change in membership. Logically, the business entity remains in existence even if there are no members.

---

<sup>1</sup> It should be understood that companies are not the only businesses that are entities separate from their owners and managers. Limited liability partnerships similarly are separate entities.

**Video 01-100: The concept of limited liability**

5. Limited liability refers to the obligation of the members of a business organisation to contribute to its funds in the event that it cannot pay all its debts. Limited liability should not be confused with separate entity. If a business is an entity separate from its members, those members are not liable for its debts. Therefore, a creditor will have to sue the business rather than the members to recover his debt. If the business cannot pay, it will become insolvent. This is the point at which limited liability becomes important. If the members do not have limited liability, they are obliged to contribute towards the business's assets in order to pay off the debts in full. If, on the other hand, the members have limited liability, they do not have to contribute more than a specified amount (hence the term 'limited liability').

**B. Partnerships and limited liability partnerships**

1. Generally, the three most common types of business organisations available in Singapore are sole proprietorships, partnerships and companies. There are other types of business organisations – eg, cooperative societies, business trusts – but we will not deal with them in this course.

2. Partnerships are governed generally by the Partnership Act (Cap 391), which is practically a word-for-word copy of the English Partnership Act 1890. Read especially sections 1, 5, 6, 9, 10, 11, 12, 17, 19, 20, 21, 25, 26, 27, 32, 33, 34, 35, 44. Consider these provisions in the light of the concepts of separate entity, perpetual succession and limited liability. It is not necessary to know in detail the rules of partnership for the purposes of this course. A variant of the partnership is the limited partnership (not to be confused with the limited liability partnership, which is a different beast altogether). This is governed by the Limited Partnership Act (Cap 163B). Read sections 3, 4, 6, 7, 8, 16, 27. Order 77 r 1 of the Rules of Court allow a partnership to sue and be sued in the firm's name.

3. Limited liability partnership. This is governed by the Limited Liability Partnerships Act (Cap 163A), which is also based on an English model. Read sections 4, 5, 6, 7, 8, 9, 10, 11, 12, 18, 20, 21, 22, 23, 25, 26, 30, 33, 34, 36, third schedule, fifth schedule. Is this organisation really a partnership?

**C. Companies**

1. These are by far the most common sort of business organisation in Singapore. There are several sub-species:

- Private unlimited company
- Public unlimited company

- Public company limited by guarantee
- Public company limited by shares
- Private company limited by shares

The general law on companies is to be found in the Companies Act. Read Companies Act, sections 17, 18, 19, 30, 31, 32.

2. There is also legislation regulating specific types of companies, eg, banks, insurance companies, finance companies. In addition, some public companies have their shares listed on a stock exchange, generally the Singapore Exchange (SGX). This allows public trading of the shares. Listed companies (as they are known) are also governed by rules issued by the SGX, principally the Listing Rules. This basic course will cover only the general law pertaining to companies and not rules that apply to listed companies (unless otherwise indicated) or special types of companies.

### **Video 01-200: Groups of companies**

3. Like humans, companies also form families. When company H controls company S1 through a majority shareholding, S1 is said to be H's subsidiary. The exact definition is to be found in Companies Act s 5; read also ss 5A, 5B for definitions of 'ultimate holding company' and 'wholly-owned subsidiary'. Companies that share a common ultimate holding company are related; for the exact definition, read s 6. A company and its subsidiaries is commonly referred to as a 'group'. From the legal standpoint, a group is important when it comes to the preparation of financial statements: see s 201(5). Note that in a business context the term 'group' is often used to designate companies that are controlled by common shareholders. This sort of business group has no legal significance.

4. Many of the companies that do business in Singapore are incorporated abroad; they are foreign companies. Foreign companies are not generally governed by our Companies Act, except where a section explicitly is stated to apply to them. Any section that refers to a 'corporation' rather than a 'company' applies also to foreign companies: see the definitions of 'corporation' and 'company' in s 4(1). The governing law for a foreign company is the law of its place of incorporation.

### **D. Lifting the veil of incorporation**

#### **Video 01-300: Exceptions to the separate entity doctrine**

Lift not the painted veil which those who live  
Call Life; though unreal shapes be pictured there,  
And it but mimic all we would believe ...

P B Shelley

1. Companies are not only essential for conducting business, they are also useful as vehicles for fraud, crime and deception. Very often when there are legal proceedings courts are asked to 'lift the veil of incorporation' and ignore the theoretical separate personality of a company in order to prevent abuse of the corporate form. Generally, however, courts tend to decline unless there are strong reasons to do so. These reasons may be classed as follows:

- Purposive interpretation of a statute
- Court exercising equitable or analogous discretion
- Company used as a vehicle for fraud

2. The incorporation of a company hides the identities of the human beings running the business. In Singapore, much of the information about shareholders, directors and managers is a matter of public record and can be obtained online from the website of the Accounting and Corporate Regulatory Authority (ACRA) – [www.acra.gov.sg](http://www.acra.gov.sg). Not every other jurisdiction is so transparent. Thus, companies are often formed in the Cayman Islands or British Virgin Islands (commonly known as BVI) or some other jurisdictions which do not have such transparent or well-regulated registries. These jurisdictions may also be tax havens, used by the rich to shelter their wealth (legitimate or ill-gotten) from the grasp of the tax authorities of their country. Where the assets are held in trust for the controllers of the company (a matter of evidence), the corporate form does not shield them from taxation. Sham transactions between companies may be entered into in order to reduce tax liability. Taxing statutes may contain provisions designed to deal with such circumvention. See, eg, Stamp Duties Act (Cap 312), s 33A.

3. In addition, people often incorporate companies to take advantage of business incentives and tax breaks or to avoid taxes. If these devices are challenged in court, it may be held that such tactics are not legitimate. This result may be reached by application of the purposive approach to the interpretation of statutes; see section 9A of the Interpretation Act (Cap 1), which states:

**9A.—(1)** In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.

4. Companies may also be incorporated in order to avoid certain legal restrictions, eg, on the ownership of properties by foreigners. Statutes are often drafted to cover this sort of situation: see, eg, Residential Property Act (Cap 274), s 2(1) definitions of 'foreign person', 'Singapore company', 'Singapore limited liability partnership'.

5. If a group of companies is run as an integrated business, it may be treated as a single economic entity for the purposes of some statutes (again, this would be an application of the purposive approach to the interpretation of statutes). See, eg: *Hotel Jaya*

---

*Puri Bhd v National Union of Hotel, Bar & Restaurant Workers* [1980] 1 MLJ 109 (High Court, Malaysia). This is not an invariable rule. It depends on the statute and the degree of economic integration of the business. Business people are allowed to structure their operations as separate companies. In the absence of fraud, courts are reluctant to treat the group as a single entity. This has been repeatedly held in relation to 'one-ship' companies in the shipping business. See, eg:

- *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd* [1999] 2 SLR(R) 24 (High Court, Singapore)
- *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 (High Court, Singapore)
- *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 (High Court, Singapore)

6. There is a class of cases where the court is exercising an equitable or analogous discretion. If there is evidence that the controller of the company is abusing the corporate form, the eye of equity is not blind to the reality. See, eg, *Aspatra Sdn Bhd v Bank Bumiputra Malaysia Bhd* [1988] 1 MLJ 97 (Supreme Court of Malaysia). Note that in *Raffles Town Club Pte Ltd v Lim Eng Hock Peter* [2013] 1 SLR 374 the Singapore Court of Appeal ordered the controllers of the company to pay the costs of a failed action personally on an indemnity basis because they were using the company to pursue their own vendetta.

7. It is said that if a company is used as a vehicle for fraud, the corporate veil can be lifted. See, eg, dicta by Judith Prakash J in *Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR(R) 80, [17] (High Court, Singapore). While this is an attractive principle, it should be remembered that a person is always liable for his own torts, frauds and crimes even though a company may also be liable. The fact that a company is interposed does not absolve the human being from responsibility. Read:

- *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 (Court of Appeal, Singapore)
- *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR(R) 543 (Court of Appeal, Singapore)
- *New Line Productions Inc v Aglow Video Pte Ltd* [2005] 3 SLR(R) 660 (High Court, Singapore)

Read also the following sections: Companies Act s 339(3) read with s 340(2); s 340(1).

8. It is necessary for the sake of clarity to distinguish situations where there is no actual 'lifting of the veil' even though the courts may use the term:

- Firstly, if the company does not actually exist. See, eg, '*The Saudi Al-Jubail Asteroid Maritime Co Ltd v The owners of the Saudi Al-Jubail*' [1987] SGHC 71 (High Court, Singapore)

- Secondly, if it holds property on trust for the controller of the company. This is always a question of evidence.
- Thirdly, where the company is acting as an agent or nominee for the controller of the company. Again, this is a matter of evidence.
- Fourthly, if it is necessary to attribute knowledge or intention to a company, of necessity the knowledge or intention of certain human beings will have to be taken as that of the company. See, eg, *New Line Productions Inc v Aglow Video Pte Ltd* [2005] 3 SLR(R) 660 (High Court, Singapore).

In these cases it is not necessary to ignore the corporate personality of the company. Note that it is always a matter of evidence whether the company is a sham or whether a trust or agency exists.

9. There is an amorphous class of cases where the court will ignore the company where the controller has run the company as an extension of himself, treating the business as his own. It is also said that the corporate veil may be lifted where the company is a sham or façade concealing the true state of affairs. The exact ambit of this has not been exhaustively defined. Read:

- *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 (Court of Appeal, Singapore)
- *Children's Media Ltd v Singapore Tourism Board* [2009] 1 SLR(R) 524 (Court of Appeal, Singapore)

10. Finally, it has been said in some jurisdictions (eg, Malaysia) that there is power to lift the veil of incorporation whenever the justice of the case requires. This ambiguous doctrine has not been accepted authoritatively in Singapore.

11. In all cases where it is sought to lift the veil of incorporation, it is necessary to adduce evidence as to the ownership and control of the company. The higher the level of ownership and/or control, the more likely it will be that the veil will be lifted.

**READING LIST (02)****Internal Management****A. The Company's Constitution**

1. The rules that govern the internal management of a company are to be found in its constitution (formerly the memorandum and articles of association or 'M&A'). Section 22 sets out the requirements as to the constitution. This will contain a statement of the liability of the members. In the case of a company limited by guarantee, the amount which each member agrees to guarantee will be set out: s 22(1)(e). In the case of a company limited by shares, there is a simple statement that the liability of the members is limited, which means that they are liable for the amount (if any) unpaid on the shares: s 22(3).

2. Before the coming into force of the Companies (Amendment) Act 2014 a company's constitutional documents were the memorandum and articles of association. These were technically two separate documents but were invariably bound together in one single booklet.

3. It used to be necessary to specify what the objects of the company are; this is no longer the case, though one will still find objects clauses in the memoranda of companies incorporated before 2004 (or even after). The objects clause basically listed the businesses that the company could undertake. If a company does include objects clauses in its constitution, those clauses can be modified as prescribed in section 33. At common law a company had no capacity to enter into transactions which were outside its objects clause. Such transactions were *ultra vires* and void. The *ultra vires* doctrine and its complications are no longer relevant in Singapore (at least as far as companies incorporated in Singapore are concerned) because of sections 23, 25 and 25A. Note that these sections do not apply to foreign companies or to other corporate entities. The *ultra vires* doctrine therefore still survives in these peripheral areas.

4. The articles of association were the rules by which the company was governed. Companies limited by guarantee and unlimited companies have always had to register articles with ACRA. Before the coming into force of the Companies (Amendment) Act 2014, companies limited by shares did not need to do so in theory; the former Fourth Schedule, commonly referred to as Table A, applied unless excluded. In practice, Table A was always excluded as a matter of course. Almost invariably, the articles followed the template in Table A. Section 35(1) now provides that regulations for the internal governance of companies must be contained in the constitution. There is a saving for companies incorporated before the entry into force of the 2014 amendment act; these continue to be governed by their current articles of association. Model constitutions have been prescribed by the Minister for Finance for private companies and companies limited by guarantee: see the Companies (Model Constitutions) Regulations 2015. These models will apply if such companies choose to adopt them: see sections 35–37.

5. The memorandum and articles were a statutory contract between the company and its members and among the members *inter se*. The amended section 39(1) provides that the company's constitution has that same effect. The ramifications of this are further considered below.

6. The statutory contract embodied in the constitution can be changed by a majority vote, unlike normal contracts. To alter the constitution a special resolution must be passed at a general meeting (meetings and resolutions will be dealt with in Reading List 03): sections 26(1), 33(1), 37(1). However, it is possible to entrench certain clauses of the constitution by providing that they cannot be altered, or that the resolution for alteration must be passed by a larger majority than that required for a special resolution: s 26A.

7. In some jurisdictions there is a judge-made rule that amendments to the memorandum and articles (or constitution) must be made bona fide in the interest of the company. This rule has not been adopted in Singapore. However, if an amendment to the constitution discriminates against a member or is otherwise unfair, the affected member(s) may apply for a remedy under section 216 (this will be dealt with in Reading List 03 under Minority Shareholders' Actions).

## **B. Membership of a company**

1. To be a member a person (natural or artificial) must have his name entered in the company's register of members: see sections 19(6), 19(6A), 190(1), 196A.

2. For companies limited by guarantee, the mode of becoming a member and ceasing to be a member will be prescribed by the constitution.

3. For companies with shares, a person becomes a member by acquiring shares (whether by allotment, gift or purchase) and registering himself as the holder. This requires the shareholder to submit an instrument of transfer (a 'transfer form') to the company: section 126(1), 130(1). The person who presents the transfer form for registration warrants that it is genuine. Read:

- *Stanley Yeung Kai Yung v Hong Kong and Shanghai Banking Corporation* [1981] AC 787 (Privy Council on appeal from Hong Kong)

4. In the case of a private company, the transfer is not effective unless notice of the transfer is lodged with the Registrar: section 126(2). The transfer takes effect when the electronic register of members maintained by ACRA is updated: section 126(3). However, in the case of companies listed on the Singapore Exchange (SGX), the shares are immobilised by having them registered in the name of the Central Depository (CDP). The CDP maintains a register of depositors. These depositors are treated as though they were members of the company: see section 81SJ of the Securities and Futures Act. The details of how the CDP system works are unnecessary for the purposes of this course. Nonetheless, candidates

should be aware of the provisions of the Securities and Futures Act governing the transfer of the shares of companies listed on SGX.

5. Section 130AE prescribes that companies must issue share certificates within a specified period. Such certificates are prima facie evidence of title to the shares: section 123(1). Note that there cannot be a transfer of title to shares merely by delivery of the share certificate to a purchaser or donee because of sections 126(1) and 130(1).

6. It is common for people to acquire shares without registering as members; in that case the previous registered shareholder holds them on trust for the new owner. The new owner has an equitable interest pending registration. Read:

- *Jimat bin Awang v Lai Wee Ngen* [1995] 3 SLR(R) 496 (Court of Appeal, Singapore)

7. However, if the seller is not the owner but only has a restricted interest (eg, as a mortgagee), then the buyer can have no better interest than the seller, since the share certificates are not negotiable instruments. The exception is where the owner is estopped from denying the seller's authority to transfer title. Read:

- *Pan-Electric Industries Ltd v Oversea-Chinese Banking Corporation Ltd* [1994] 1 SLR(R) 185 (Court of Appeal, Singapore)

#### **Video 02-100: Share transfer restrictions**

8. Private companies must have a restriction on the transfer of shares: section 18(1)(a). Public companies need not, but might also have such restrictions (listed companies will normally have no restrictions, as a condition for listing). Share transfer restrictions commonly take the form of pre-emptive rights or a discretion given to directors to refuse to register a transfer.

9. A pre-emptive right is a right given to existing members to purchase the shares before they can be offered to a non-member. There is Malayan authority that a sale in breach of such rights is void:

- *Gan Sin Tuan v Chew Kian Kor* [1958] 1 MLJ 62 (Court of Appeal, Federation of Malaya)

It is not clear whether this principle will be accepted in Singapore, but candidates should be aware that this precedent exists when giving advice.

10. Where directors are given a discretion not to register a transfer, they have to exercise that discretion *bona fide* in the interests of the company. Section 129(3) requires the company to state the facts justifying the refusal. Read:

- *Xiamen International Bank v Sing Eng (Pte) Ltd* [1993] 2 SLR(R) 176 (High Court, Singapore)

- 
- *HSBC (Malaysia) Trustee Bhd v Soon Cheong Pte Ltd* [2007] 1 SLR(R) 65 (High Court, Singapore)

### C. Enforcement of the provisions of the constitution

1. A member's principal right is to have the provisions of the constitution complied with, since section 39(1) provides that the constitution is a contract between the company and its members and among the members *inter se*.

2. Several consequences logically flow from this statutory contract. Any member can insist that the company and other members comply with the provisions of the constitution, even if they seem unfair. See, eg:

- *Wong Kim Fatt v Leong & Co Sdn Bhd* [1976] 1 MLJ 140 (High Court, Malaysia)

3. Interpretation of the constitution is like interpretation of any other contract. The court may under certain circumstances construe it to include implied terms. Read:

- *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 (Court of Appeal, Singapore)

4. There is a judge-made rule in England that a member can only enforce rights given to him in his capacity as member. The dicta come from *Hickman v Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch 881, 896-897 per Astbury J (High Court, England):

"... I think that this much is clear, first, that no article can constitute a contract between the company and a third person; secondly, that no right merely purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as, for instance, as solicitor, promoter, director, can be enforced against the company; and, thirdly, that articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively."

This rule has not been explicitly adopted in Singapore and is wrong in principle. It is inconsistent with the words of the statute. See also:

- *Teo Choon Mong Frank v Wilh Schulz GmbH* [1998] 2 SLR(R) 312 (Court of Appeal, Singapore)

5. A right given to a person who is not a member cannot be enforced by that person. Read:

- *Malayan Banking Ltd v Raffles Hotel Ltd* [1965-1967] SLR(R) 161 (Federal Court of Malaysia in Singapore)

6. The corollary of this is that the company cannot justify the breach of a contract with a third party by amending its constitution. Read:

- *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701 (House of Lords) [this case has repeatedly been accepted as good law in Singapore]

#### **Video 02-200: Compliance with the constitution**

7. However, it must be noted that the constitution also has to be complied with when it comes to the issue of whether there has been any irregularity in the appointment and removal of directors or the conduct of meetings. This has nothing to do with enforcement of the statutory contract. Where the proper procedure has not been complied with, a person affected may apply to court for a declaration to that effect and consequential relief, even if he is not a member. Read:

- *Thio Keng Poon v Thio Syn Pyn* [2010] 3 SLR 143 (Court of Appeal, Singapore)
- *Chang Benety v Tang Kin Fei* [2012] 1 SLR 274 (Court of Appeal, Singapore)

8. Members have a right to restrain *ultra vires* transactions and breaches of the Companies Act: see sections 25(2), 409A. This is a particular instance of the principle that the provisions of the constitution must be observed.

#### **D. Reserve powers where the board is deadlocked**

1. In general, the division of powers between the board and the general meeting of members is prescribed in the company's constitution. The usual form of article vests the power of management in the board.

2. However, in some very limited circumstances, where the board is deadlocked the members may authorise transactions where this is necessary in the interests of the company. This reserve power is a restricted one. Read:

- *Chan Siew Lee v TYC Investment Pte Ltd* [2015] 5 SLR 409 (Court of Appeal, Singapore)

3. The usual solution to break a deadlock is for the members to remove the recalcitrant directors, appoint more directors and/or change the constitution. Where these courses of action are available the court will not intervene.

**READING LIST (03)****Members' Rights**

Apart from the crucial right to have the provisions of the constitution observed (see Reading List 02), members have two other important rights, viz,

- The right to attend, speak and vote at general meetings: s 180(1). These rights may be restricted by the constitution.
- The right to be treated fairly.

**A. Meetings and resolutions**

1. In order for a company to take a decision, a resolution has to be passed at a general meeting of the members. The exception is one-member companies, where the sole member may record the resolution and sign the record: section 184G(1). This is a concession to common sense. Where that member is a corporation, the corporation's representative duly authorised by the board may sign a minute to the effect that the resolution in question has been passed: section 179(6).

2. Where there is more than one member, generally a meeting must be held. Every year a company must hold an annual general meeting or AGM: section 175(1). At the AGM routine business is transacted, such as the election of directors, declaration of dividends, fixing of director's fees etc. The constitution may specify what ordinary business may be transacted at the AGM. By law, the company's financial statements are to be laid before the members (note that the financial statements do not have to be approved by them): section 201(1). The other important matter to be dealt with at the AGM is the appointment of auditors, unless exempt from the requirement to do so: sections 205(2), 205A(1), 205B, 205C.

3. Private companies may dispense with AGMs by unanimous consent of all voting members: section 175A. This is a reflection of a practice that has been going on for some time. In reality, small private companies often resorted to 'paper' meetings, in relation to which the company secretary wrote up the minutes as a work of fiction when no meeting was in fact held. Where the AGM is dispensed with, whatever business has to be transacted is done by circulation of written resolutions: sections 184A, 184B, 184C, 184D, 184E, 184F.

4. Alternatively, there is a judge-made rule that if all the members of a company agree, that agreement (if it can be proven) is as binding on the company as a proper resolution would be. Again, this is a concession to reality. If everybody agrees, it is pointless to hold a meeting. Read:

- *Jimat bin Awang v Lai Wee Ngen* [1995] 3 SLR(R) 496 (Court of Appeal, Singapore)

5. Assuming, however, that there is no unanimous consent, a meeting must be called before a resolution can be passed. These meetings are known as extraordinary general meetings (EGM). There are three ways to call an EGM:

- Commonly, the constitution gives the board (or even a single director) the power to call an EGM.
- Members holding not less than 10% of the paid-up shares (or 10% of the voting rights in a guarantee company) may serve a requisition on the directors requiring them to call an EGM: section 176.
- Two or more members holding not less than 10% of the issued shares (or 5% of the members in a guarantee company) may call the meeting themselves: section 177.

Note the differences in procedure between sections 176 and 177.

6. If a meeting is requisitioned by the members, the requisitionists will usually require the company to circulate notice of proposed resolutions: section 183.

7. Certain resolutions require special notice before they can be passed. This is notice to the company from the members who propose the resolution stating that they intend to move it at the AGM or EGM (as the case may be): section 185. A resolution requiring special notice is not a special resolution and should not be confused with it. The Companies Act requires special notice to be given for removal of directors of public companies and auditors: sections 152(2), 205(4). The constitution may make provision for special notice in other situations. Generally, the point of special notice is to allow the target of the resolution the opportunity to defend himself.

8. To inform the members of a meeting, the company must send them notice. This is done so that they can decide whether to attend or not. There are two aspects to this; time and content. Notice must be sent to the members not less than 14 days before the meeting (21 days if a special resolution is to be passed by a public company): sections 184(1), 177(2). The constitution may specify a longer period of notice. The notice should contain sufficient information to allow the members to make an informed choice whether to attend and how to vote. If the notice is inadequate, proceedings at the meeting may be invalidated. See, eg:

- *Hup Seng Co Ltd v Chin Yin* [1962] MLJ 371 (High Court, Federation of Malaya)
- *Lau Ah Lang v Chan Huang Seng* [2001] 2 SLR(R) 503 (High Court, Singapore)

The rules pertaining to board meetings are analogous.

9. Companies may send notice and documents by electronic means rather than snail-mail: sections 387A, 387B, 387C. Companies may also post notices and documents on their websites, but this is for convenience only and does not constitute notice (since it is impossible to prove that a member has read them). However, note that posting on the website constitutes sufficient notice if the member has agreed in writing to this in accordance with section 387B(2).

10. Sections 178 and 179 govern the conduct of meetings. Candidates should familiarise themselves with these general rules. The procedure to be followed during a meeting may also be prescribed in the constitution, which in some instances may override the general rules in the Act. The procedure for directors' meetings is not governed by the Act but is to be found in the constitution.

11. The number of votes that a member has depends on the constitution. The general rule is that each share carries one vote: see section 64(1). However, companies may issue different classes of shares carrying different voting rights (in the case of public companies, note section 64A). For instance, it is common to issue preference shares that carry no voting rights; in return, the holders of such shares get priority in payment of dividends (assuming profits exist to allow such payment). The new sections 64 and 64A clarify that companies may issue non-voting shares or shares that carry multiple votes.

## **B. Irregularities in proceedings**

1. Most companies do not play strictly 'by the book' when conducting meetings. In most cases there are instances of non-compliance with notice requirements or procedure. Most of these are too trivial to complain of. In general, the courts are not sympathetic to members who bring proceedings about irregularities that can be cured by a simple majority of the company. This is known as the rule in *Mozley v Alston* (1847) 1 Ph 790, an ancient case not worth reading. The rationale is explained by Mellish LJ in *MacDougall v Gardiner* (1875) 1 Ch D 13, 25:

In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes.

2. However, where the irregularity causes injustice, a person affected may apply for an injunction to prevent it happening (if he can do so in time) or a declaration to the effect that there has been an irregularity in a proceeding or resolution (generally after the event). The defendant may apply under section 392 to have the court validate the irregularity. Read the following to understand the conditions under which the court will exercise its powers under the section:

- *Golden Harvest Films Distribution (Pte) Ltd v Golden Village Multiplex Pte Ltd* [2007] 1 SLR(R) 940 (Court of Appeal, Singapore)
- *Thio Keng Poon v Thio Syn Pyn* [2010] 3 SLR 143 (Court of Appeal, Singapore)
- *Chang Benety v Tang Kin Fei* [2012] 1 SLR 274 (Court of Appeal, Singapore)

3. Sometimes persistent breach of the constitution and the Act may be evidence that the majority is treating the minority unfairly. This can be remedied by an action under section 216 (see below).

### C. Voting

1. A member's right to vote is fundamental. It is a right of property, to be exercised as he sees fit. Read:

- *North-West Transportation Co Ltd v Beatty* (1887) 12 App Cas 589 (Privy Council on appeal from Canada)

2. A member may enter into a contract restricting his power to vote in certain ways. Such shareholders' agreements are enforceable by injunction. Read:

- *Russell v Northern Bank Development Corporation Ltd* [1992] 1 WLR 588 (House of Lords) [accepted as good law in Singapore]
- *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 (Court of Appeal, Singapore)

3. In England there are judge-made rules to the effect that in some instances the members must vote 'bona fide in the interest of the company' when exercising their voting rights. This applies principally when the articles are amended. This is the rule in *Allen v Gold Reefs of West Africa Ltd* [1900] Ch 656 (Court of Appeal, England). This case has been quoted with apparent approval by the Court of Appeal of the Straits Settlements in *Re Tan Keng Tin and Re Chop Soon Bee* [1932] MLJ 134, but not by the present Court of Appeal of Singapore. It is probably better to deal with cases of this sort under section 216 (see below) rather than create a special rule.

4. A member does not personally have to turn up at a meeting in order to vote. He may appoint an agent (known as a 'proxy') to vote on his behalf: see section 181. The form appointing the proxy is often confusingly also referred to as a 'proxy'. This has to be deposited with the company a certain time before the meeting so that it can be verified: see section 178(1B). It would be logical to assume that the proxy would have to cast the votes in accordance with his instructions; apparently this is not so. Read:

- *Tong Keng Meng v Inno-Pacific Holdings Ltd* [2001] 3 SLR(R) 311 (High Court, Singapore)

---

**D. Minority shareholders' remedies**

1. While the general rule is that the majority shareholders should get their way when it comes to corporate decision-making, courts have generally been wary of untrammelled majority power. There must be a limit to what the majority can do; the problem is to define that limit. The Companies Act provides two statutory remedies to deal with abuse of majority power: the so-called 'oppression' action in section 216 and winding up under section 254(1)(f) or (1)(i).

2. There is now a considerable body of case local law on the oppression action. Generally, the test is that of commercial unfairness. However, fairness cannot be gauged in a vacuum. It is necessary to examine what sort of company is involved and what the legitimate expectations of the members are. It is generally easier to obtain an oppression remedy where the company is closely held than when it is listed on a stock exchange. This is because minority members of listed companies can sell out if they do not agree with the direction the company is taking; this is much more difficult in the case of a company without a stock exchange listing. Moreover, it is normally understood in the case of listed companies that minority members do not have a right of participation in management. Thus, most of the cases deal with private family companies or what is termed a 'quasi-partnership', ie, a business that is a company in form but a partnership in reality. Read the following cases and try to deduce some principles for guidance:

***Family companies***

- *Re Gee Hoe Chan Trading Co Ltd* [1991] 2 SLR(R) 114 (High Court, Singapore)
- *Low Peng Boon v Low Janie* [1999] 1 SLR(R) 337 (Court of Appeal, Singapore)
- *Thio Keng Poon v Thio Syn Pyn* [2010] 3 SLR 143 (Court of Appeal, Singapore)

***Incorporated Partnerships***

- *Lim Swee Khiong v Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745 (Court of Appeal, Singapore)
- *Tan Choon Yong v Goh Jon Keat* [2009] 3 SLR(R) 840 (High Court, Singapore)
- *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 (Court of Appeal, Singapore)

3. Note that the classification of the decided cases into 'family companies' and 'incorporated partnerships' in no way implies that these are the only situations in which relief under section 216 may be obtained. Nor is the list of cases given above comprehensive by any means. Each case must be approached on its own merits. Much depends on the remedy sought. For instance, if the remedy is to prevent the majority from persistently breaching the constitution, the threshold for relief is likely to be lower than if a winding up or buy-out is sought.

4. The alternative of winding up is also possible. However, the presentation of a winding-up petition effectively chokes off a company's credit. It may trigger an event of default in loan documentation which would justify the lender demanding immediate repayment. Therefore, a winding-up petition is a much more serious matter than an oppression action. There is also a considerable body of case law on winding-up on the 'just and equitable' ground in section 254(1)(i). Cases dealing with section 216 can be used (judiciously) as analogies. But the 'just and equitable' ground goes beyond unfairness to the minority to cover matters such as deadlock in management and loss of substratum. Read the following cases:

- *Ebrahimi v Westbourne Galleries Ltd* [1973] 1 AC 360 (House of Lords) [accepted as good law in Singapore]
- *Chua Kien How v Goodwealth Trading Pte Ltd* [1992] 1 SLR(R) 870 (Court of Appeal, Singapore)
- *Ng Sing King v PSA International Pte Ltd* [2005] 2 SLR(R) 56 (High Court, Singapore)
- *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 (Court of Appeal, Singapore)
- *Chow Kwok Chuen v Chow Kwok Chi* [2008] 4 SLR(R) 362 (Court of Appeal, Singapore)

Note that the court has power to order a buy-out of the minority's shares instead of ordering a winding up if the application is made under either section 254(1)(i) or 254(1)(f): see section 254(2A).

**Video 03-100: Corporate divorce**

**READING LIST (04)****Appointment, Removal and Remuneration of Corporate Officers****A. The Board of Directors**

1. The business of the company is managed by the directors or under their supervision or direction: section 157A. In theory the business will be managed collectively by the board. In practice, this is true only of the very smallest companies. Section 145(1) allows a company to have a single director who may also be the sole shareholder. In this case the functions of ownership and management will be united. The business will be run in the same manner as a sole proprietorship, although in legal form it will be a company. The larger the company, the more likely it is that management and ownership will be divorced. Thus, in a company with, say, ten members, it would be unfeasible to run the business by committee. It would be more common for a board to be constituted comprising one or more members (or their representatives, ie, nominee directors). Large boards often form sub-committees for better management. Thus, one finds in the largest companies that there is often an executive committee which deals with day-to-day management, while the rest of the board meets more infrequently (sometimes only once a year). At some point a business may grow too large to be managed by the board. One then sees a delegation of management to employees with a variety of fancy titles – eg, general manager, chief financial officer, group legal counsel, chief operating officer, chief executive officer. These management employees do not invariably have a seat on the board; they manage without being directors. The only members of the board of directors are those named as such in the register of directors maintained by ACRA under section 173.

**Video 04-100: Board structures**

2. Unless the constitution provides otherwise, a company may appoint a director by ordinary resolution: section 149B. However, there are infinite variations on this theme. A closely-held private company may well have constitution which allows a particular person (often the founder of the company) to appoint the board. Similarly, a joint venture (essentially a partnership between corporations) will commonly provide for equal representation of the partners on the board. This is entirely a matter of construction of the relevant provisions of the constitution and joint-venture agreement (JVA). Companies listed on a stock exchange invariably elect their directors. Note section 150 in relation to public companies. Read:

- *Malayan Banking Ltd v Raffles Hotel Ltd* [1965-1967] SLR(R) 161 (Federal Court, Singapore)
- *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 1 SLR(R) 540 (High Court, Singapore)

- 
- *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43 (Court of Appeal, Singapore)

3. The Companies Act only requires a company to have one director: section 145(1). This director must be ordinarily resident in Singapore. As to the consequences of carrying on business without a director, see section 145(7), (8). In practice it can happen that no one is crazy enough to take on the position of director in a company that is in deep trouble, especially since the sole director cannot resign because of section 145(5).

4. Anyone who is to be appointed as director of a company must consent to the appointment: see section 146(1A). No one can be forced to become a director against his will.

5. To qualify for appointment, a person must be:

- human (ie, a corporation cannot be a director of a company; while this is possible in some jurisdictions it is no longer so in Singapore);
- 18 years of age; and
- of full capacity (ie, not certifiably mad)

See section 145(2). Some companies require directors to own qualification shares. This requirement will be found in the constitution if it exists. This is uncommon nowadays. Note that any defect in the appointment or qualification of a director does not invalidate his acts: section 151.

6. A person who acts as a director or participates in the management of a company will commit an offence if he is an undischarged bankrupt (section 148) or subject to a disqualification under sections 149, 149A, 154, 155 or 155A. The principles on which a court will act when imposing disqualifications have been set out in several cases. Read:

- *Attorney-General v Chong Soon Choy Derrick* [1983–1984] SLR(R) 530 (Court of Appeal, Singapore)
- *Quek Leng Chye v Attorney-General* [1985–1986] SLR(R) 282 (Privy Council).
- *Ong Chow Hong v Public Prosecutor* [2011] 3 SLR 1093 (High Court, Singapore)<sup>2</sup>

7. Note that a director must sign a declaration that he is not disqualified before any return is filed with ACRA naming him in the register of directors: section 146(1), (1A).

---

<sup>2</sup> Note that the conviction on which Ong Chow Hong's disqualification was based was eventually quashed, but this does not affect the validity of the principles set out by V K Rajah JA in the judgment.

---

**Video 04-200: Directorship and employment**

8. A director may vacate office in one of four ways:
- Death. No notice need be given and there are no prior formalities.
  - Resignation. A director may resign by giving the company notice in writing, unless the constitution provides otherwise: section 145(4A)
  - Automatic vacation of office by reason of the constitution. Listed companies typically provide for the retirement of a number of directors at each AGM. Other companies may have similar provisions in their constitutions. It is also common that a director may be required to vacate office if he does not declare conflicts of interests or upon the request of the other directors. Before tendering advice, it is always necessary to actually read the provisions of the constitution.
  - Removal from office. A company may remove a director by ordinary resolution: see section 152. In the case of a private company, this is subject to contrary provision in the constitution: section 152(9). Therefore, it is possible to have irremovable directors in a private company, but not in a public company.
9. Read the following cases to get an idea of how the provisions on removal work in practice:
- *Soliappan v Lim Yoke Fan* [1968] 2 MLJ 21 (Federal Court, Malaysia)
  - *Teo Choon Mong Frank v Wilh Schulz GmbH* [1998] 2 SLR(R) 312 (Court of Appeal, Singapore)
  - *Thio Keng Poon v Thio Syn Pyn* [2010] 3 SLR 143 (Court of Appeal, Singapore)
10. The removal of a director from the board does not necessarily terminate his contract of service, if he has one. By the same token, sacking an employee does not automatically result in him vacating office as a director. It is vital to keep the two processes distinct. If a director is removed in breach of contract he will be entitled to damages.
- *Southern Foundries (1926) Ltd v Shirlaw* [1940] 1 AC 701 (House of Lords) [accepted as good law in Singapore]

**B. Company Officers**

1. The definition is found in section 4(1). Note that while all directors are officers, not every officer is a director. The Companies Act is structured so that most of the offence-creating sections apply to officers in general and not to directors specifically. See, eg, section 157(2) as compared to section 157(1). Criminal liability for contravention of the Companies Act is generally placed on an “officer in default” where not otherwise specified: see s 407(3).

2. An officer usually has a contractual relationship with the company, whether formal or informal. In the majority of cases, an officer will be an employee of the company. Matters like remuneration and termination of office will be dealt with by his contract. As to appointment, this depends on the level of the officer. The higher up in the hierarchy he is, the more likely it is that the board or even the general meeting of members will be involved in some way. Read:

- *Cosmic Insurance Corp Ltd v Khoo Chiang Poh* [1979-1980] SLR(R) 703 (Privy Council) affirming [1977-1978] SLR(R) 93 (Court of Appeal, Singapore)
- *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 1 SLR(R) 540 (High Court, Singapore)

3. In practice, however, most appointments of officers are done at a management level. Thus, for example, it is likely that the company's legal manager will be appointed by the CEO (or even someone lower in the hierarchy) rather than by the board as a whole. Where the smallest companies are concerned, the controlling shareholder often personally appoints corporate officers. The practice varies from company to company and the constitution is usually silent. Therefore, the validity of the appointment of an officer is usually an issue of agency, the key question being whether the person appointing him had the actual authority to do so.

4. Resignation or dismissal of an officer are governed by normal contractual principles regarding notice, liquidated damages, etc. See, eg:

- *Alexander Proudfoot Productivity Services Co Singapore Pte Ltd v Sim Hua Ngee Alvin* [1992] 3 SLR(R) 933 (Court of Appeal, Singapore)
- *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 1 SLR(R) 540 (High Court, Singapore)

### C. Remuneration of corporate officers

#### Video 04-300: Paying directors and officers

1. A director is not entitled as of right to remuneration. Make a clear distinction between remuneration *qua* director and remuneration paid by reason of a contract of employment (whether formal or informal) or for services rendered (eg, as a lawyer). Directors typically are paid directors' fees. The constitution usually requires these to be authorised by the general meeting. Employees are paid a salary in accordance with their contracts of service (whether formal or informal). A person who is both a director and an employee (eg, the managing director) will therefore receive a director's fee as well as a salary. Almost invariably the salary far exceeds the fee. Directors who perform professional

---

services for the company (eg, a lawyer) will be entitled to be paid for those services, provided that the payment is properly authorised. Read:

- *Guinness plc v Saunders* [1990] 1 All ER 652 (House of Lords) [accepted as good law in Singapore]
- *Heap Huat Rubber Company Sdn Bhd v Kong Choot Sian* [2004] SGCA 12 (Court of Appeal, Singapore)

2. Directors' emoluments must be approved by the company: section 169. *Quaere*: does this section confuse emoluments as an employee with fees paid in the capacity of director? There is often massive confusion regarding whether a particular payment is a director's fee or not. Read:

- *Heap Huat Rubber Company Sdn Bhd v Kong Choot Sian* [2004] SGCA 12 (Court of Appeal, Singapore)

3. Payments to directors for loss of office (sometimes known as "golden parachutes") are permitted only under strict conditions. Analyse section 168. Read the following cases:

- *Grinsted Edward John v Britannia Brands (Holding) Pte Ltd* [1996] 1 SLR(R) 742 (Court of Appeal, Singapore)
- *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 1 SLR(R) 540 (High Court, Singapore)

4. As far as officers who are not directors as concerned, remuneration and payments upon termination of service are governed by the law of contract.

#### **D. Directors' financial dealings with the company**

1. Loans to directors are regulated by sections 162 and 163. Read and analyse the sections. These sections also extend to quasi-loans and credit transactions. Read:

- *Creanovate Pte Ltd v Firstlink Energy Pte Ltd* [2007] 4 SLR(R) 780 (Court of Appeal, Singapore)

2. The constitution often (but not invariably) requires directors to disclose any interests that they may have in contracts that the company enters into. Section 156 mandates the disclosure of any interest that a director may have in a transaction with the company, as well as of any conflicts of interest that may arise as a result of any property that he owns or office that he holds. This disclosure is to be made to the board of directors. Failure to do so is an offence. In addition, there is a rule of equity that such conflicts of interest should be disclosed to the members and either approved beforehand or ratified after. Read the following:

- *Yeo Geok Seng v Public Prosecutor* [1999] 3 SLR(R) 896 (High Court, Singapore)
- *Dayco Products Singapore Pte Ltd v Ong Cheng Aik* [2004] 4 SLR(R) 318 (High Court)

**READING LIST (05)****CORPORATE GOVERNANCE****Duties and Liabilities of Corporate Officers**

1. Directors may face two types of liability: criminal and civil. Criminal liabilities arise from breaches of specific penal laws, eg, the Penal Code (Cap 224), the Prevention of Corruption Act (Cap 241) and of course the Companies Act itself (Cap 50). Civil liability generally arises when a director breaches his fiduciary duties or is negligent. It is important to distinguish between civil and criminal liability. The difference lies in who may commence legal proceedings against him. In the case of criminal liability, proceedings are instituted by the Public Prosecutor (or ACRA under a fiat issued by the Public Prosecutor for regulatory offences contrary to the Companies Act). Civil proceedings are commenced by a party who has been injured by the director's wrongful acts.

2. A director or officer may face both sorts of liability in respect of the same act or transaction. Thus, a director who misapplies the company's property may be prosecuted for criminal breach of trust as well as face a civil suit for breach of fiduciary duty or breach of trust. When advising a client both sorts of liability should be considered.

**Video 05-100: Civil and criminal proceedings****A. Civil Liability – Fiduciary Duties**

1. A director is a fiduciary of the company on whose board he sits. Note that a director is not a fiduciary of the shareholders. The significance of this is that a suit for breach of fiduciary duties may only be brought by the company and not by the shareholders. This will be dealt with in more detail in Reading List 06.

***Duty to act in the interest of the company***

2. A director's basic fiduciary duty is to act bona fide in the interest of his company. This is his most fundamental duty. There are literally thousands of cases from all over the world illustrating this. It is impossible to reconcile all of them. However, the general principle is that when a director exercises his powers as a director, he must act in what he honestly considers to be the company's interests. Read the following cases as examples:

- *Kumagai-Zenecon Construction Pte Ltd v Low Hua Kin* [1999] 3 SLR(R) 1049 (High Court, Singapore) affirmed [2000] 2 SLR(R) 689 (Court of Appeal)
- *Townsing Henry George v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 (Court of Appeal, Singapore)

3. Courts do not generally impose liability on directors if they are satisfied that an exercise of directorial discretion has been honest, even though mistaken. The essence of entrepreneurship is risk-taking. It would be impossible for businessmen to function if they were called to account for honest but mistaken business decisions (it is a different matter if there was negligence involved, which is dealt with in the next section of this reading list). When a civil action is brought against a director for breach of fiduciary duty the plaintiff must prove on a balance of probabilities that the director did not act bona fide in the interest of the company. Where the transaction looks legitimate to an objective observer, that burden is not discharged unless it can be shown that the director was actuated by some ulterior motive. In contrast, where the actions of the director are not objectively in the interests of the company it would be for the director to justify them. See for example:

- *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 (Court of Appeal, Singapore)
- *Ho Kang Peng v Scintronix Corp Ltd* [2014] 3 SLR 329 (Court of Appeal, Singapore)

4. A director's obligation to act bona fide in the interests of the company has to be seen in the light of commercial reality. It is unnecessary that every transaction should have a direct pecuniary benefit. Intangible benefits like building goodwill, making strategic investments or loss avoidance may all be acceptable. The test is whether an honest person placed in the position of the director could reasonably take the view that the transaction in question was for the benefit of the company. Read:

- *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 (Court of Appeal, Singapore)
- *Heap Huat Rubber Company Sdn Bhd v Kong Choot Sian* [2004] SGCA 12 (Court of Appeal, Singapore)
- *Oversea-Chinese Banking Corp Ltd v Justlogin Pte Ltd* [2004] 2 SLR(R) 675 (Court of Appeal, Singapore)

5. The question is: what are the interests of the company? When the shareholders are split into mutually-antagonistic blocs, the concept of 'interests of the company' becomes meaningless. The matter then is more properly dealt with as an issue of unfairness to the minority. See, eg:

- *Tokuhon (Pte) Ltd v Seow Kang Hong* [2003] 4 SLR(R) 414 (Court of Appeal, Singapore)

6. When a company is part of a larger group, to what extent can the interest of the group be considered when directors make decisions? Businessmen do not always treat each subsidiary within a group as a separate commercial entity. Here is where the theory and practice of company law often collide. Read:

- 
- *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 (Court of Appeal, Singapore)

7. The interplay of the foregoing rules is particularly complex when nominee directors are involved. A nominee director is one who is appointed to represent a particular shareholder (the investor) on the board of a company. Often the nominee is also a director of the investor. From the investor's point of view the nominee is on the board of the company to look after the interests of the investor. The law however demands that the nominee should prefer the interest of the company over that of the investor. This is another area where theory and practice diverge considerably. Read sections 157(2) and 158 and the following cases in order to understand the position of a nominee director:

- *Kwee Seng Chio Peter v Biogenics Sdn Bhd* [2003] 2 SLR(R) 482 (High Court, Singapore)
- *Oversea-Chinese Banking Corporation Ltd v Justlogin Pte Ltd* [2004] 2 SLR(R) 675 (Court of Appeal, Singapore)
- *Townsing Henry George v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 (Court of Appeal, Singapore)

8. A further problem arises where the company is insolvent. In such a case how far are the interests of the creditors to be taken into consideration? Consider sections 340 and 339(3) and the following cases:

- *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089 (Court of Appeal, Singapore)
- *Dynasty Line Ltd v Sukamto Sia* [2014] 3 SLR 277 (Court of Appeal, Singapore)

9. Directors and corporate officers should never give or receive bribes. This would amount to corruption contrary to sections 5 and 6 of the Prevention of Corruption Act (Cap 241). Note that one of the privileges of Singapore citizenship is that a person who is guilty of corruption may be prosecuted even if the offence is committed abroad: section 37(1) Prevention of Corruption Act. Such behaviour would not be in the company's interests. The company may sue the offender to recover the amount of the bribe. See:

- *Mahesan v Malaysian Government Officers' Co-operative Housing Society* [1978] 1 MLJ 149 (Privy Council on appeal from Malaysia)
- *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara* [1994] 3 SLR(R) 312 (Court of Appeal, Singapore)
- *Leong Wai Kay v Carrefour Singapore Pte Ltd* [2007] 3 SLR(R) 78 (Court of Appeal, Singapore)

**Conflicts of interest**

10. There is another rule which developed separately as a principle of equity – that an agent cannot put himself in a position where his interest conflicts with that of his principal. This may also be understood as a different aspect of the director's fundamental duty to act in the interest of the company. Obviously where a director acts in such a manner as to prefer his interests (or those of another party) over those of the company he will not be acting in the company's interests. Directors may not benefit personally from any transaction in which the company is interested, nor may they divert property, contracts or business opportunities to themselves or other persons. Read:

- *Chew Kong Huat v Ricwil (Singapore) Pte Ltd* [1999] 3 SLR(R) 1167 (Court of Appeal, Singapore)
- *Kea Holdings Pte Ltd v Gan Boon Hock* [2000] 2 SLR(R) 333 (Court of Appeal, Singapore)

11. A director who faces such a conflict must disclose the conflict to the company (which generally means the members in general meeting) or run the risk of being held accountable for any profit that he makes. The equitable rule is so strict that it applies even where the company has suffered no loss. Read the following cases, which have been accepted as good law in Singapore:

- *Furs Ltd v Tomkies* (1935) 54 CLR 583, 592 (High Court of Australia)
- *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (House of Lords)

**Exercise of directors' powers for the proper purpose**

12. Directors' powers are to be exercised for the proper purposes and in the company's interests. An abuse of directors' powers is a breach of fiduciary duties. The consequences of such a breach depend on the context of the proceedings brought against the directors and/or the company. Read:

- *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 2 WLR 689 (Privy Council on appeal from New South Wales) [accepted as good law in Singapore]
- *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 (Court of Appeal, Singapore)

**Consequences of breach of fiduciary duties**

13. Where a director has entered into a contract with the company in breach of his fiduciary duty, the general rule is that he cannot enforce it. Read:

- 
- *Lim Koei Ing v Pan Asian Shipyard & Engineering Co Pte Ltd* [1995] 1 SLR(R) 15 (High Court, Singapore)
  - *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 1 SLR(R) 540 (High Court, Singapore)

14. If a director procures a payment to be made by the company in breach of his fiduciary duty, the company may sue him to recover the money. Read:

- *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 (Court of Appeal, Singapore)

15. What effect does a director's breach of fiduciary duty have on transactions with third parties? As a general principle, a third party who knows of the breach cannot enforce the transaction. The third party may also be liable to the company if he has knowingly assisted in the breach of fiduciary duty or received the company's property. Read the following:

- *Cheong Kim Hock v Lin Securities (Pte)* [1992] 1 SLR(R) 497 (Court of Appeal, Singapore)
- *George Raymond Zage III v Ho Chi Kwong* [2010] 2 SLR 589 (Court of Appeal, Singapore)
- *Yong Kheng Leong v Panweld Trading Pte Ltd* [2013] 1 SLR 173 (Court of Appeal, Singapore)

### **Other officers**

16. Senior managers may also owe fiduciary duties to the company. The higher in the corporate hierarchy an employee is, the greater the likelihood that he will be held to be a fiduciary. However, the duties of employees are not as extensive as directors' duties. See for example:

- *ABB Holdings Pte Ltd and others v Sher Hock Guan Charles* [2009] 4 SLR(R) 111 (High Court, Singapore)
- *Scintronix Corp Ltd v Ho Kang Peng* [2013] 2 SLR 633 (High Court, Singapore)

17. Note that in so far as officers are agents of the company, they will be subject to the same no-conflict principle that applies to all agents. Similarly, as employees they will be subject to the duties that the law places on employees. See, eg:

- *Mona Computer Systems (S) Pte Ltd v Chandran Meenakumari* [2011] 1 SLR 310 (High Court, Singapore)

18. Note that the statutory duty to disclose of conflicts of interest now extend to the chief executive officer of the company: section 156(1).

**B. Civil Liability – Negligence****Video 05-200: Skill, care and diligence**

1. The tort of negligence applies to directors. It is clear that a director owes a duty of care to the company. Whenever a director is sued for negligence the issue is whether he has breached the standard of care, not whether a duty of care exists. Here a distinction must be made between executive and non-executive directors. An executive director is one who works for the company, usually full-time as an employee. A non-executive director does not work for the company. He only attends board meetings and is not generally involved in the day-to-day management of the company. It is a question of fact in all cases exactly what a particular director's role in the company is.

2. In view of the minimal qualifications for directorship, there is no rule that a director must display a minimum level of skill. However, a director is expected to take the trouble to familiarize himself with the company's business. If he has any special expertise (eg, as a lawyer or accountant) he is expected to display a reasonable level of competence in the affairs of the company. Section 157(1) requires that directors should be reasonably diligent in the discharge of their duties. What is reasonable depends again on the particular director's role in the management of the company. See for example:

- *Lim Weng Kee v Public Prosecutor* [2002] 2 SLR(R) 848 (High Court, Singapore)

3. The bigger a company grows, the more difficult it becomes for the board of directors to directly oversee the details of the business. They are allowed to rely on others (business would be impossible otherwise), but there is a duty to supervise. See section 157C.

4. Directors may in general rely on advice given to them by professionals, in the absence of grounds for suspicion.

- *Madhavan Peter v Public Prosecutor* [2012] 4 SLR 613 (High Court, Singapore)

Note however that such advice can be manipulated. If the information provided to a lawyer or accountant by the company does not disclose all material facts, the advice given will be flawed. The general principle is 'rubbish in, rubbish out'.

**C. Criminal Liability**

1. Directors and officers are almost invariably entrusted with control over the property of the company. If they use the company's property for their own benefit or for the benefit

---

of others, they may be guilty of dishonest misappropriation of property or criminal breach of trust (CBT). See Penal Code (Cap 224), sections 23, 24, 403, 405, 406 and 409 and the following cases as examples:

- *Lai Ah Kau v Public Prosecutor* [1988] 2 SLR(R) 128 (High Court, Singapore)
- *Tan Tze Chye v Public Prosecutor* [1997] 1 SLR(R) 876 (High Court, Singapore)

2. While all cases of CBT involve a breach of fiduciary duties, the converse is not true. A breach of fiduciary duty is not *ipso facto* sufficient for conviction on a charge of CBT. Read:

- *Cheam Tat Pang v Public Prosecutor* [1996] 1 SLR(R) 161 (High Court, Singapore)

3. Apart from the Penal Code offences of cheating, any director (or officer) implicated in fraudulent business practices may be convicted under section 340 of the Companies Act. See, eg:

- *Phang Wah v Public Prosecutor* [2012] 1 SLR 646 (High Court, Singapore)

4. The Companies Act also creates a slew of offences affecting directors. Note in particular section 157(3). A director commits an offence if he does not act honestly or with reasonable diligence. Neither term has been defined in the Companies Act. There has been some attempt at judicial definition; see:

- *Cheam Tat Pang v Public Prosecutor* [1996] 1 SLR(R) 161 at [19] (High Court, Singapore)
- *Lim Weng Kee v Public Prosecutor* [2002] 2 SLR(R) 848 (High Court, Singapore)

Are these judicial definitions satisfactory? Does section 157(3) criminalise all breaches of fiduciary duty? Is the word “diligence” in section 157(1) to be equated with the concept of civil negligence?

#### **D. Indemnities and Release from Liability**

1. A company must indemnify an officer for liabilities that he incurs in the course of his duties for the purposes of the company. However, he might disentitle himself from relief if he has acted in breach of his fiduciary duties. Read:

- *SPP Ltd v Chew Beng Gim* [1993] 3 SLR(R) 17 (Court of Appeal, Singapore)
- *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 (Court of Appeal, Singapore)

However, note sections 172(1) and 172A. In practice, companies often pay for directors' liability insurance rather than provide a direct indemnity.

2. A company may release a director from the consequences of a breach of fiduciary duties or negligence. There has to be fully informed consent on the part of the company. See for example:

- *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (House of Lords) [accepted as good law in Singapore]
- *Raffles Town Club Pte Ltd v Lim Eng Hock Peter* [2013] 1 SLR 374 (Court of Appeal, Singapore)

3. However, the directors may not use their own votes as shareholders to misappropriate the company's property or contracts:

- *Cook v Deeks* [1916] 1 AC 554 (Privy Council on appeal from Ontario)

cf:

- *North-West Transportation Co Ltd v James Hugh Beatty* (1887) 12 App Cas 589 (Privy Council on appeal from Canada)

4. An application to court under section 391 for relief from civil liability for breach of fiduciary duty or negligence is possible if a director has acted honestly and reasonably. This may be done in anticipation of legal proceedings.

- *Tokuhon (Pte) Ltd v Seow Kang Hong* [2003] 4 SLR(R) 414 (Court of Appeal, Singapore)

## **E. De Facto and Shadow Directors**

1. Note that the Companies Act definition of "director" in s 4(1) goes beyond those who are named as the company's directors to catch "any person occupying the position of director by whatever name called" (ie, a de facto director) and "a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act" (ie, a shadow director). The terminology is non-standard; different judges and commentators use the terms "de facto director" and "shadow director" in different ways. The recent amendments to the Companies Act make it clear that a person who does not control the majority of the board is not to be considered as a director. It is a question of evidence whether or not a particular person is a de facto or shadow director. See for example:

- *SPP Ltd v Chew Beng Gim* [1993] 3 SLR(R) 17 (Court of Appeal, Singapore)

2. In general, de facto and shadow directors are probably subject to the same fiduciary duties as regular directors. Therefore it is not possible to escape liability for breach of fiduciary duties by interposing puppets whom the shadow director controls. However, whether the term "director" in the Act or the constitution includes de facto and shadow directors is a matter of construction of the relevant provision. See for example:

- 
- *Heap Huat Rubber Company Sdn Bhd v Kong Choot Sian* [2004] SGCA 12 (Court of Appeal, Singapore)

## F. Financial Statements and Audit

1. All companies are obliged to keep accounting records: s 199(1), (2). From these records, financial statements must be prepared annually. The financial statements must present a “true and fair view” of the company’s profit and loss and financial state. This is the opportunity cost of incorporation. In practice, the preparation of financial statements is usually left to accountants, who will do so in accordance with the prevailing Financial Reporting Standards prescribed by the Accounting Standards Council. The financial statements must be laid before the members at the company’s annual general meeting: s 201. Contrary to popular misconception they do not have to be approved.

2. The consequences of signing off on financial statements that do not present a true and fair view of the company’s financial state can be dire. Directors have been jailed for deliberate breach of their obligations in this respect. See, eg:

- *Tarling Richard Charles v Public Prosecutor* [1981–1982] SLR(R) 1 (Court of Appeal)
- *Khoo Ban Hock v Public Prosecutor* [1988] 3 MLJ 22 (Court of Appeal, Brunei)

3. In order to allow directors to fulfil their duties in this regard, they have the right to inspect the accounting records of the company: s 199(4). The company cannot refuse them access unless there is evidence that they are abusing their powers. Read:

- *Wuu Khok Chiang George v ECRC Land Pte Ltd* [1999] 2 SLR(R) 352 (Court of Appeal, Singapore)

4. In general, the financial statements have to be audited before being presented to the members: s 201(8). However, see ss 205B and 205C for exceptions. The company’s auditor also has a right of access to the company’s accounting records and registers in order to allow him to fulfil his statutory duties: s 207(5).

5. The auditor is a vital check on the integrity of the financial statements. He has a statutory duty to form an opinion on whether the financial statements present a true and fair view of the company’s financial state: s 207(2). He also must report breaches of the Companies Act and serious offences involving fraud or dishonesty: s 207(9), (9A). It is clear that he owes a duty of care to the company. He can be sued for negligence if he does not perform his duties to the requisite standard. Read:

- *Ikumene Singapore Pte Ltd v Leong Chee Leng* [1993] 2 SLR(R) 480 (Court of Appeal, Singapore)
- *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong* [2007] 4 SLR(R) 460 (Court of Appeal, Singapore)
- *PlanAssure PAC v Gaelic Inns Pte Ltd* [2007] 4 SLR(R) 513 (Court of Appeal, Singapore)

**READING LIST (06)****SUING AND BEING SUED****A. Vicarious Liability**

1. A company is vicariously liable for the acts of its employees and agents on the normal common law principles. This is how a company becomes liable in tort. The test is whether there is a sufficiently close connection between the acts done and the employee's functions so that it is fair and just to hold the company liable for them. Read:

- *Skandinaviska Enskilda Banken AB v Asia-Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540 (Court of Appeal, Singapore)

2. Note that in the tort of conspiracy, the intention and knowledge of the company's agents may be attributed to the company. The question is, which agents? The higher up in the hierarchy the agent is, the more likely that his knowledge would be treated as the company's (see also Criminal Liability below). It is possible to sue a company for conspiracy between itself and the person who controls it. See, eg:

- *Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR(R) 80 (High Court, Singapore)

3. Where the agent or his confederates are the subject of the suit, his knowledge and intention are not attributed to the company. Thus, a fiduciary who has breached his duty to the company cannot plead that his knowledge was the company's knowledge. This would be tantamount to allowing a wrongdoer to take advantage of his own wrongdoing. Read:

- *Ho Kang Peng v Scintronix Corp Ltd* [2014] 3 SLR 329 (Court of Appeal, Singapore)
- *Singapore Swimming Club v Koh Sin Chong Freddie* [2016] 3 SLR 845 (Court of Appeal, Singapore)

**B. Agency****Video 06-100: Authority of corporate agents**

1. In order to conclude a contract, the company acts through human agents. The company is bound by the contract on the principles of agency. In a corporate context, problems of agency may be resolved by applying the following approach:

---

(a) Was the transaction within the actual authority of the agent? If the answer is yes, the company is bound by the transaction. If the answer is no, one proceeds to the next question.

(b) Was the transaction within the apparent or ostensible authority (the two terms are synonymous and are used interchangeably) of the agent? If the answer is no, then the company is not bound by the transaction. If, yes then the next question arises.

(c) Was there anything to put the third party on notice as to the agent's lack of authority? If yes, then the company is not bound. If the answer is no, then the company will be bound by the transaction on the basis that it is estopped from denying the authority of its agent.

2. Express actual authority may be conferred by statute (very rare), the company's constitution (rare), a resolution of the members (comparatively rare) or a resolution of the board (common). Probably the most common situation is where a duly-authorized agent (eg, an executive director) gives authority to someone below him in the corporate hierarchy.

3. A resolution conferring authority does not have to be in writing (refer to our previous discussion on corporate resolutions in Reading List 03). In the case of small companies, very often the authority is conferred by informal agreement. The problem in such cases lies in proving the existence of the agreement and the terms of what was actually agreed. Read:

- *SAL Industrial Leasing Ltd v Lin Hwee Guan* [1998] 3 SLR(R) 31 (Court of Appeal, Singapore)

4. The most common form of actual authority is usual authority, viz, the authority that comes with a particular post. Eg, where a person is appointed as managing director he is impliedly conferred whatever authority is usual for a managing director. This is a matter of evidence as to the practice within the company and industry. In well-run companies there is often a corporate document setting out the limits of authority of various employees. A single director has no actual authority to bind the company, not even if he is chairman of the board. See, eg:

- *Dart Sum Timber (Pte) Ltd v Bank of Canton Ltd* [1981-1982] SLR(R) 376 (Court of Appeal, Singapore)

5. Very often actual authority is conferred by the acquiescence of the board, the members of the company or the agent's superior within the corporate hierarchy. Again, however, it is a question of evidence as to whether there was indeed acquiescence and how far that acquiescence meant approval. Read:

- *SPP Ltd v Chew Beng Gim* [1993] 3 SLR(R) 17 (Court of Appeal, Singapore)

**Video 06-200: Apparent authority and estoppel**

6. If the agent does not have actual authority (whether express or implied), the principal is only bound if it is estopped from denying the agent's authority. An estoppel arises under the following circumstances:

- (a) There must be a representation by the company to some person that the agent in question has authority to do the act in question.
- (b) The representation must have been made by someone who has authority to make such representations on behalf of the company.
- (c) The person who wishes to enforce the contract against the company must have relied on the representation.

7. Sometimes the representation is by conduct of the company (often referred to as 'holding out'). The company may act in such a way as to mislead the other party into believing that the agent is authorised. Read:

- *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (Court of Appeal, England) [accepted as good law in Singapore]

8. The agent's own conduct or representations do not effectively preclude the company from disputing his authority. Read:

- *Skandinaviska Enskilda Banken AB v Asia-Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540 (Court of Appeal, Singapore)

9. It is also necessary that the other party to the contract should rely on the representation. Estoppel depends upon the other party being misled as to the agent's authority. If the other party knew or ought to have known of the agent's lack of authority, there can be no estoppel. Contrariwise if there was nothing to put the party on notice as to a defect in the agent's authority. Read:

- *Banque Bruxelles Lambert v Puvaria Packaging Industries (Pte) Ltd* [1994] 1 SLR(R) 736 (Court of Appeal, Singapore)

10. A party who deals with a company does not have to check whether the company's internal rules as to authorisation of agents have been complied with. There is a presumption of regularity. This is known as the 'indoor management rule' or 'the rule in *Turquand's case*', after the case in which it was first articulated, viz, *Royal British Bank v Turquand* (1856) 6 E & B 327 (Court of Exchequer Chamber, England) [no need to read this ancient case]. However, if the party knows or ought to have known of the internal irregularity, the rule in *Turquand's case* will not help him.

11. There may also be restrictions on the powers of agents to bind the company found in the company's constitution (formerly the memorandum and articles of association or

'M&A'). There used to be a rule that all the world had 'constructive notice' of the contents of the M&A. The rationale was that the M&A was a public document and could (in theory) be checked. Note section 25A, which now provides that there is no constructive notice of the terms of the constitution. This does not mean however that a party dealing with a company is never deemed to have notice of restrictions on agents' powers contained in the company's constitution. For instance, if in the course of a 'due diligence' check during negotiations for a contract the party's solicitor examined the constitution, that party would have deemed knowledge of those terms.

12. In so far as the powers of the directors collectively are concerned, section 25B(1) now provides that a person dealing with the company in good faith is not affected by any limitations on those powers contained in the constitution. This also is the case when the limitations are found in a resolution of the company or any shareholders' agreement: see section 25B(3). 'Good faith' is not defined. Presumably if the party actually knows that the directors' powers are limited he is not acting in good faith if he chooses to enter into a transaction beyond the authority of the directors. Note that as far as directors and their families are concerned, this 'good faith' principle is not applicable when they enter into transactions with the company. Read and analyse sections 25C and 25D in conjunction with section 25B.

### C. Criminal Liability

1. The issue is when the acts of corporate officers and employees can be attributed to the company so as to render it liable as well. For the purposes of analysis, offences can be classified as follows:

- Strict liability offences
- Offences involving negligence
- Offences requiring knowledge
- Offences requiring intention

2. Crimes that do not require *mens rea* do not generally pose a problem. Most of these tend to be regulatory offences. However, even in strict liability offences intention may still be relevant in sentencing. See, eg:

- *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 (High Court)

3. Where an offence requires negligence, there is in theory also no great problem in attributing criminal liability to the company. Thus, for example, supposing that a company runs a luge as an amusement ride. No one checks the sleds as each employee thinks that it's someone else's job (say that fellow in charge resigned without briefing anyone). A sled malfunctions and causes the death of a rider. Prosecuting an employee or officer under section 304A of the Penal Code would be problematic, since it would not be possible to

---

prove beyond reasonable doubt that any particular human being had the responsibility for checking the sleds. Prosecuting the company would be feasible, because the company as an entity is responsible for ensuring the safety of the ride and clearly failed in its duty, thereby causing death.

4. Where offences require knowledge, the problem is: whose knowledge? Clearly if the board of directors knows something collectively, that knowledge can be attributed to the company. Read:

- *New Line Productions Inc v Aglow Video Pte Ltd* [2005] 3 SLR(R) 660 (High Court, Singapore)
- *The 'Dolphina'* [2012] 1 SLR 992 (High Court, Singapore)
- *Ho Kang Peng v Scintronix Corp Ltd* [2014] 3 SLR 329 (Court of Appeal, Singapore)

5. What of the knowledge of a single director? What if the directors do not know, but employees in charge of the particular activity have the knowledge? Since offences are all created by statute, it must be determined whether attributing the knowledge of a particular officer or employee to the company accords with the purpose of the statute. Read:

- *Meridian Global Funds Asia Ltd v Securities Commission* [1995] 2 AC 500 (Privy Council on appeal from New Zealand)
- *Tom-Reck Security Services Pte Ltd v Public Prosecutor* [2001] 1 SLR(R) 327 (High Court, Singapore)

6. When it comes to offences requiring intention, the same problem recurs. Very seldom is there evidence that a criminal act (note section 33 Penal Code regarding the definition of 'act') has been authorised by the board as a whole. Usually, the act is perpetrated by an officer. The issue is whether that officer's intention can be attributed to the company. There would be little problem when the officer is high in the corporate hierarchy, eg, the CEO. If the CEO causes the company to cheat (which requires dishonesty), it is likely that his intention will be that of the company. But where is the line to be drawn? If a sales agent cheats a client on behalf of the company, is his dishonest intention to be attributed to the company? Perhaps the solution would be to modify the rules regarding vicarious liability in tort. As to these, read:

- *Skandinaviska Enskilda Banken AB v Asia-Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540 (Court of Appeal, Singapore)

If a company is not vicariously liable in tort for the acts of a corporate officer, it is unlikely on principle that it would be criminally liable for those acts. But it does not follow that if a company is vicariously liable, it would be *ipso facto* criminally liable. What factors might be relevant in determining when criminal liability would be imposed? Note that in some statutes there is specific provision for attribution of a state of mind of particular persons. See, eg, section 52 of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act.

**D. Enforcing Corporate Rights**

1. Normally, the power to authorise litigation to enforce corporate rights is vested in the board of directors or any other executive who has been sub-delegated this power. When the company is in liquidation, the liquidator is the one who has power to commence litigation on the company's behalf. There is no reserve power vested in the members to authorise proceedings to be brought on behalf of the company if the board is deadlocked:

- *Chan Siew Lee v TYC Investment Pte Ltd* [2015] 5 SLR 409 (Court of Appeal, Singapore)

2. Exceptionally, where the board will not act (eg, because they or their cronies are the intended defendants) a member may bring the action in his own name in order to enforce the company's rights. This is known as a derivative action. It is an exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461 (Vice-Chancellor's Court, England) or 'proper plaintiff rule'. Read the following for a clear exposition by Lord Denning MR as to what this involves:

- *Wallersteiner v Moir (No 2)* [1975] 1 QB 373 (Court of Appeal, England)

3. The exception comes into play when there is a fraud on the minority and the defendants are in control of the company. To establish this, generally the following must be shown:

- (a) the majority obtained some sort of benefit;
- (b) the benefit was obtained at the expense of the company or that some loss or detriment was caused to the company; and
- (c) the majority used their controlling power to prevent an action being brought against them by the company.

4. Because of the existence of the statutory procedure in s 216A, the common law derivative action is only relevant when a foreign company is suing. Read:

- *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR(R) 197 (Court of Appeal, Singapore)
- *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 (High Court, Singapore)

**Video 06-300: The section 216A procedure**

5. Section 216A now provides a procedure by which a member (or other appropriate person) may obtain leave to commence an action in the name of the company. Despite the reference in the short title to 'representative or derivative actions', such an action is in law a corporate action. There are two steps: first the complainant must apply to court under s 216A for leave to commence an action in the name of the company. The company is named as the defendant in this application. Second, after the court has granted leave, the

complainant instructs solicitors on behalf of the company to commence the action proper against the defendants. The company is named as plaintiff in the action. Read:

- *Pang Yong Hock v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 (Court of Appeal, Singapore)
- *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 (Court of Appeal, Singapore)

6. Note also that under s 216(2)(c) the court has power in an oppression action to authorise civil proceedings to be brought in the name of the company. This might usefully be done where the minority shareholders want to remain in the company rather than be bought out. However, this is the exception rather than the rule. Read the following to understand the relationship between s 216(2)(c) and s 216A:

- *Ng Kek Wee v Sim City Technology Ltd* [2014] SGCA 47 (Court of Appeal, Singapore)

---

**READING LIST (07)****MAINTENANCE OF CAPITAL**

1. In return for the privilege of limited liability, it is necessary that a company be precluded from returning assets to its members. This is to ensure that the creditors have something to proceed against in the event that the debts are not paid as they fall due. There were four general rules:

- (a) Dividends cannot be paid unless there are profits.
- (b) The company traditionally could not purchase its own shares.
- (c) The company cannot give financial assistance in connection with the acquisition of its shares.
- (d) There can be no return of assets to members except by way of capital reduction.

These four rules have been elaborated and much modified by statute over the years. They will probably be modified again as company law evolves.

2. Dividends: read and analyse s 403. Note the personal liability of the directors under s 403(2). There are no local cases authoritatively interpreting what is meant by “profits” in this context. Generally, companies tend to leave the answer in the hands of accountants. Older cases should be treated with great caution in the light of the evolution of accounting standards. Nor should it be assumed that cases from other jurisdictions provide a sure guide to what is legal in Singapore.

3. The rule against a company purchasing its own shares has been effectively abrogated over the years. Acquisition by a company of its own shares and those of its holding company is governed by ss 76B–76K. Note also s 21 on membership in the holding company. It is unnecessary to memorise all the details of the various sections; a general understanding of the scope of the prohibitions is sufficient.

4. Financial assistance in connection with the acquisition of shares is governed by ss 76 and 76A. This is an area of massive confusion. Note that the recent amendments to the Companies Act have reduced the significance of these prohibitions considerably as they now only apply to public companies and their subsidiaries. Read the following cases for some guidance as to what constitutes financial assistance:

- *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 (Court of Appeal, Singapore)
- *Public Prosecutor v Lew Syn Pau* [2006] 4 SLR(R) 210 (High Court, Singapore)
- *Wu Yang Construction Group Ltd v Mao Yong Hui* [2008] 2 SLR(R) 350 (Court of Appeal, Singapore)

5. Giving back what the members have invested in the company is prohibited. There is a clear distinction between equity and loan capital.

- *Merchant Credit Pte Ltd v Industrial & Commercial Realty Co Ltd* [1983–1984] SLR(R) 13 (Privy Council on appeal from Singapore)

6. Capital reduction is permissible only under the conditions stipulated in the Act, viz, ss 78A–78K. Again, detailed knowledge of the procedure is unnecessary. It is sufficient to note the methods by which a reduction of capital may be done.