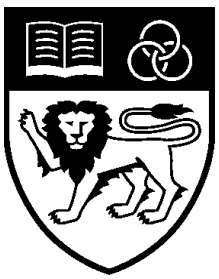

NUS
National University
of Singapore

FACULTY OF LAW

PART A BAR COURSE 2011

COMPANY LAW

PRELIMINARY INFORMATION

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 off-shoot 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. Bear in mind, though, 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.

PRIMARY AND SECONDARY MATERIALS

The primary source of company law in Singapore is the Companies Act (Cap 50). It is strongly recommended that a copy of the Act be procured and kept up to date. The Companies Act will be revised in the near future, though there is as yet no firm date. Therefore, it is pointless to consign large chunks to memory. It is more useful to know where to find the provisions than to spend time memorizing 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 may be referred to in the course of the seminars. Unless instructed otherwise, it is unnecessary to get hard-copies of these statutes.

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.

The main textbook is *Woon on Company Law* (3rd Edition, Tan Cheng Han Ed). 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.

MODE OF ASSESSMENT

There will be a written examination on Saturday 12 November in the morning. The examination will consist of ONE question. There will be no choice. Candidates may bring into the examination hall any materials that they desire. However, no devices that allow communication with outsiders are allowed.

The rationale for the above 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 you become a senior partner in a law firm that you have 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. The only deviation from reality that we make is to prohibit consultation with others, 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.

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 you 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.

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 Abel Tan. He holds 20% of the shares of Golden Fortune Trading Pte Ltd. 30% is held by his half-brother Baker. A further 30% is held by Mdm Doris Yong, 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. Baker, 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 Baker what to do. The board of directors consisted of Baker, Charlie and Eldon Tan (G F's third son, also by his first wife). Abel 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 Abel 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. A suspects that New Fortune is owned by Baker and Charlie but has been unable to obtain confirmation of this. His information was gleaned from conversations with employees of Golden Fortune. Baker 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 Baker was otherwise engaged, but since Charlie's death two years ago, the business has been in Baker'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 2007. 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 2007, his estate was in a mess and Abel 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 Baker Tan is rumoured to have triad connections in Hong Kong, but again he cannot prove this.

Abel 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 the 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 yourself whether you need more information. For instance, the alert student will have noted that the shareholdings of Baker, Doris and your client do not add up to 100%. You might also note that there is very little information about Eldon, beyond the fact that he is a director. What questions would you pose to the client? Why? You must 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 Baker and Charlie (or his successors after his death) should raise some red flags.

(3) Clients do not come to you for a learned exposition of 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?

(4) 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.

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.

A candidate will pass if he deals with the two major issues that would affect the client, viz, the liablility 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 failed to do 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 Baker 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?

A final word of comfort: most candidates will pass, whether on the first attempt or after the supplementary examination.

LECTURE 1: INTRODUCTION AND SEPARATE PERSONALITY DOCTRINE

Tan Cheng Han (ed) *Walter Woon on Company Law* (Rev 3rd edn) Chapters 1 & 2
Some of the cases cited below can be found in Sealy & Worthington *Cases and Materials in Company Law* (8th edn, 2008) (S&W), and David Kershaw *Company Law in Context: Text and Materials* (2009)

1. INTRODUCTION

To a lay person the company is a form of business organisation, much like a sole proprietorship or partnership. This is of course true of most companies. But unlike a sole proprietorship or partnership, a company can be used for purposes other than a business vehicle, for eg, in education, charity or other fields of human activity. A company is a versatile form of organisation, but for the purposes of this course, we shall focus on the company as a business vehicle.

Company law is one of the most dynamic branches of law. It has seen substantial reforms in various jurisdictions in recent years. For example, UK undertook a mammoth review of its Companies Act which culminated in the enactment of its Companies Act of 2006. Closer home, the Company Legislation and Regulatory Framework Committee ('CLRFC') was appointed by the Government in 1999 and submitted its report recommending substantial reforms in 2002. Most of its recommendations have since become law.

But the need to keep our company law updated and our Companies Act coherent requires constant effort. It was before long another committee was appointed to review the Companies Act. Called the Steering Committee for Review of the Companies Act and chaired by Professor Walter Woon, it submitted its report to the Government in April 2011. The Report referred to the review conducted by the CLRFC, stating that although several changes came out of that review, 'no attempt was made to deal with the structural flaws in the Act caused by piecemeal amendment over the years.' The Steering Committee therefore recommended a re-write of our Companies Act. It was guided by two main principles; viz, that foreign legislation could not provide an adequate template for Singapore's needs, and that it would not redraft the Companies Act for the sake of redrafting. Instead, it would retain wording that is well-understood and with which the market is familiar. The main purpose is to streamline and iron out inconsistencies in the Act.

The recommendations of the Steering Committee are currently subject to public consultation. This course will refer to the recommendations where appropriate. Due to the constraints of time, however, it cannot hope to cover all the proposed changes.

The above introduction serves to highlight two points.

- First, it is erroneous to think that our company law is a carbon copy of English law. The colonial roots of our company law cannot be denied. However, it has diverged from English law over the years, and the pace of divergence is set to continue. Those of you who have studied English company law, or for that

matter company law in a Commonwealth jurisdiction, will enjoy a head start over those who have not. However, that is all. You will still have to put in effort to learn our company law, in particular to familiarise yourself with our Companies Act. Failure to do so may lead to grief in the examination.

- Secondly, and more generally, for those of you interested in practising corporate law, and in fact for most of you, it is imperative that you keep yourself informed of the developments in this fast moving branch of law.

2. TYPES OF COMPANIES

There are different ways to classify and compare the different types of companies; for eg:

- a public company versus a private company and an exempt private company;
- a limited company versus an unlimited company; and
- a Singapore company versus a foreign company.

Note that the Steering Committee has recommended that the exempt private company be abolished and replaced by the small company.

3. THE INCORPORATIOIN PROCESS

Section 19 CA
See also process stipulated by Accounting & Corporate Regulatory Authority, Singapore: http://www.acra.gov.sg/Services/Company/

Historically in England companies could only be formed by royal charter or Act of Parliament. This meant that incorporating a company was either a costly affair or available only to those who were well connected. To allow the benefits of incorporation to be made widely available, the simple process of incorporating a company by registration was introduced in England in 1844. This is the process that now applies in Singapore and in many other jurisdictions both common law and civil law, e.g. in China, Indonesia and Vietnam.

4. CORE FEATURES OF COMPANY LAW

It is often said that companies/corporations in different jurisdictions have five basic legal characteristics, namely:

- legal personality;
- limited liability;
- transferable shares;
- delegated management; and
- investor ownership.

Through these basic characteristics it is also said that entrepreneurs are able to run their businesses more efficiently using a corporate vehicle. These five characteristics will be covered variously in the course and this part will focus on the characteristics of legal personality and limited liability.

5. SEPARATE LEGAL ENTITY

Section 19(5) CA
'On and from the date of incorporation specified in the notice issued under subsection (4) but subject to this Act, the subscribers to the memorandum together with such other persons as may from time to time become members of the company shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the functions of an incorporated company and of suing and being sued and having perpetual succession and a common seal with power to hold land but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is provided by this Act.'

Salomon v Salomon & Co Ltd [1897] AC 22 at 51 (Lord Macnaghten)
The company is at law a different person altogether from the subscribers …; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.

Macaura v Northern Assurance Co Ltd [1925] AC 619
Lee v Lee's Air Farming Ltd [1961] AC 12

6. LIMITED LIABILITY

Limited liability used to be available to a businessman only through incorporating a company. In recent years it is available more widely; it may now be obtained by forming a limited liability partnership or a limited partnership.

The idea of limited liability is that when a company goes into insolvent liquidation, its members (or shareholders) are not required to contribute to the assets of the company provided that they have paid for their shares in the company in full. In other words, their liability is capped.

There are several advantages to limited liability:

- Limited liability facilitates the mobilization of capital. It provides companies with a means of raising finance other than through borrowings.
- It also facilitates the development of capital markets. A stock exchange is not feasible without limited liability.
- Additionally, limited liability more easily allows the professionalization of management as investors will be more prepared to allow the company to be managed by others if they are not made responsible for the consequences of decisions made by management.

But limited liability gives rise to its own problems. It increases the risk of creditors. A substantial part of company law is concerned to ensure that creditors' interests are protected, whether through legal rules or self-help remedies.

7. LIMITED LIABILITY AND SEPARATE PERSONALITY

It is necessary to distinguish between separate personality and limited liability. They are distinct concepts.

- It is possible to have separate personality but not limited liability, as in the case of an unlimited company.
- It is also possible for the law to prescribe limited liability but not separate personality, as in limited partnership. In practice, however, separate personality makes it easier for limited liability to operate.

The key concepts associated with separate liability are as follows:

- Separate liability means that the assets and liabilities of a company belong to the company, not its members.
- As the company is separate from its members, a creditor of the company cannot sue the members for an unpaid debt incurred by the company.
- When a company is a going concern, this doctrine protects the members (and directors) from creditors. They need not rely on limited liability. It should be noted however that courts may exceptionally lift the corporate veil and hold a member liable. This will be considered under the section 'lifting of corporate veil'.

Limited liability is only relevant when a company is in winding up.

- If the company is insolvent and it is an unlimited company, members are liable to contribute to the company to put it in funds to pay the company's debts.[1]
- If the company is a limited company, a member holding fully paid shares is not liable to contribute to the company.

8. LIFTING THE CORPORATE VEIL

In exceptional situations, the law is prepared to disregard or look behind the corporate personality and in a sense, to have regard to the 'realities'. This is usually called 'lifting the veil' or 'piercing the veil'. It may be required by statute or adopted by the courts.

8.1 Statutory veil piercing

Companies are statutory creations. It is clearly open to Parliament to prescribe when a corporate veil is to be ignored. Examples of this can be seen in revenue statutes, group accounting, etc. It is a question of interpretation whether the veil should be lifted. In principle, cases concerned with interpreting statues are not useful guides on the issue of lifting of veil by the courts. This was made clear in the leading case of *Adams v Cape Industries plc*. In contrast, the reasoning in earlier cases has proceeded on broader grounds.

Re FG (Films) Ltd [1953] 1 WLR 483
Lee v Lee's Air Farming Ltd [1961] AC 12
DHN Food Distributors Ltd v Tower Hamlets LBC [1976] 1 WLR 852

[1] Note that even here, the creditors cannot sue the members directly; the company and members are distinct entities. What happens is that the liquidator of the company, the person appointed to conduct the liquidation of the company, will enforce the liability of the members to contribute to the company. The company will then be in a position to pay its debts.

8.2 Judicial veil piercing

There is no general principle on when the veil will be lifted. The authorities are inconsistent and the reasoning in most cases is opaque and unhelpful. Listed below are the commonly accepted categories.

Evading existing legal obligations
Gilford Motor Co Ltd v Horne [1933] Ch 935
Jones v Lipman [1962] 1 WLR 832

Agency
If the legal relationship of agency exists between two persons, called the principal and the agent, then the principal is responsible for whatever the agent does within the scope of the agent's authority. It is necessary to distinguish between true agency and imposed agency here.

Smith, Stone & Knight Ltd v City of Birmingham [1939] 4 All ER 116
Adams v Cape Industries plc [1990] Ch 433, 545 – 550 (agency)
Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd [2000] 2 SLR 98

Single economic unit
DHN Food Distributors Ltd v Tower Hamlets LBC [1976] 1 WLR 852
Woolfson v Strathclyde Regional Council 1978 SLT 159
Adams v Cape Industries plc [1990] Ch 433
Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd [2000] 2 SLR 98

Façade or sham that conceals true state of affairs
Adams v Cape Industries plc [1990] Ch 433, 531 - 544
Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd [2000] 2 SLR 98

Interests of justice
It has sometimes been said that the courts may exercise an equitable discretion to ignore the separate personality of a company if it is just in the circumstances to do so, but this was rejected in *Adams v Cape Industries*.

Re a Company [1985] BCLC 333, 337-338
"[t]he court will use its powers to pierce the corporate veil if it is necessary to achieve justice"

Adams v Cape Industries plc [1990] Ch 433, 536
"[s]ave in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v A Salomon and Co Ltd* merely because it considers that justice so requires."

Some recent local cases have used lifting of veil arguments in unorthodox ways; eg,
TV Media Pte Ltd v De Cruz Andrea Heidi and another appeal [2004] SGCA 29, [2004] 3 SLR 543, [141]-[145]
New Line Productions Inc v Aglow Video Pte Ltd [2005] SGHC 118, [98]-[112]

Read Tan Cheng Han's comment on *TV Media Pte Ltd v De Crux* in the 2004 issue of the SAL Annual Review

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LECTURE 2: CORPORATE CONSTITUTION AND ADMINISTRATION

General Reference: *Woon on Company Law* (3rd Ed. Revised, 2009), Chapter 4.

A. MEMBERSHIP AND SHAREHOLDING

1. A member is a person whose name is entered on the register of members: section 19(6). The term "shareholder" is used in common parlance as a synonym, but it is not exact. People who own shares (and are therefore shareholders) do not necessarily have the shares registered in their names. Be aware of the technical definition of "member". See however:

> *Kitnasamy s/o Marudapan v Nagatheran s/o Manogar* [2000] 1 SLR(R) 542 (Court of Appeal)

2. The minimum number of members is one: section 20A. This member does not have to be human. The sole member can be a corporation and often is in practice.

3. Related corporations. Companies, like humans, tend to form families. Note the definitions of holding and subsidiary companies in sections 5, 5A and 5B. Section 6 defines when companies are related to one another. Be familiar with this definition. The business term "associated company" has no legal significance.

B. THE CORPORATE CONSTITUTION

1. The consitution of a company comprises two documents: the memorandum of association and the articles of association (collectively referred to as the "M&A"). In practice, both documents are bound together in one volume. Table A in the 4th Schedule is the template for most companies' articles. Theoretically, they apply unless excluded: section 36(2). In practice Table A is almost invariably excluded.

2. The memorandum of association will contain the company's objects clauses. Originally, a company could not engage in any activities that were not covered by the objects clauses. In practice today the objects clauses are drafted so widely that they provide little impediment to any business that the corporators wish to carry on. Sections 25 and 25A mean that third parties who deal with companies are not prejudiced by a lack of capacity or power on the part of the company.

3. The M&A constitutes a contract among the company and members: section 39(1). However, a judicial gloss has been put on this; see:

> *Raffles Hotel Ltd v Malayan Banking Ltd* [1965-1967] SLR(R) 161 (Federal Court)
> *Teo Choong Mong Frank v Wilh Schulz GmbH* [1998] 2 SLR(R) 312 (Court of Appeal)

4. Alteration of the M&A covered principally by sections 26, 26A, 33 and 37. It is common to entrench certain provisions by providing for a special majority or procedure for amendment. There is a judge-made rule that amendments to the M&A must be done bona fide for the benefit of the company; see:

Allen v *Gold Reefs of West Africa* [1900] 1 Ch 656

In Singapore, this principle is probably better subsumed under the general duty of the majority to treat the minority fairly: see sections 216 and 254(1)(i). This duty will be dealt with in more detail later in the course.

C. MEETINGS, RESOLUTIONS AND VOTING

1. In theory, decisions of the company are made through resolutions of the board of directors or general meeting of members. In practice, corporate decisions (especially in large companies) are taken by salaried managers and either ratified or acquiesced in by the directors and/or members. The procedure for calling of meetings will be prescribed in the articles of association. Most follow articles 43-62 of Table A. See sections 173A, 175, 175A, 176, 177, 178, 179, 180, 181, 182, 183. It is unnecessary to memorize all the procedural details.

2. Sufficient notice has to be given of meetings. This is to enable members (or directors, as the case may be) to decide whether or not to attend. Therefore, the notice of the meeting should contain sufficient information about the purposes of the meeting and the resolutions proposed.

Polybuilding (S) Pte Ltd v Lim Heng Lee [2001] 2 SLR(R) 12
Paillart Philippe Marcel Etienne v Eban Stuart Ashley [2007] 1 SLR(R) 132

3. The division of powers between the board of directors and the general meeting will be set out in the articles of association: see eg Table A, art 73. The Companies Act also specifies certain decisions that have to be taken by the board or the general meeting, eg, appointment of auditors (section 205), disposal of the whole of the company's undertaking (section 160), payments to directors for loss of office (section 168). In general, the members may not usurp the powers of the directors or vice-versa.

Credit Development Pte Ltd v IMO Pte Ltd [1993] 2 SLR 370

4. Generally, there are two types of resolutions: general and special. See generally sections 184-187. The M&A may provide for special majorities for particular decisions.

5. Procedural irregularities are not generally fatal and can be cured under section 392 if no injustice is caused.

Golden Harvest Films Distribution (Pte) Ltd v Golden Village Multiplex Pte Ltd [2007] 1 SLR(R) 940 (Court of Appeal)
The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd [2008] 3 SLR(R) 121 (Court of Appeal)

LECTURE 3: CORPORATE GOVERNANCE (1)

General Reference: *Woon on Company Law* (3rd Ed. Revised), Chapter 7

A. THE BOARD OF DIRECTORS

1. The business of the company is managed by the directors: section 157A and see Companies Act Fourth Schedule, article 73 for the typical form of article. Note that in theory the business will be managed collectively by the board. In practice, the larger the company, the more likely it is that one or more directors will be entrusted with powers of management while the others exercise a supervisory function.

2. The Articles of Association will provide for the manner in which the directors are to be appointed. Usually, this will be by voting: see Companies Act Fourth Schedule, articles 63 to 68. Commonly, the board will also have power to fill casual vacancies. However, there are infinite variations on this theme. A closely-held private company may well have articles which allow a particular person to appoint the board. Companies listed on a stock exchange invariably elect their directors. Note sections 150 and 153 in relation to public companies. Read the following and try to understand why the articles were drafted as they were

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

3. The Companies Act now only requires a company to have one director (down from two previously): section 145(1). This director must be ordinarily resident in Singapore. What is the consequence of carrying on business without a director? See section 145. Is there any reason why a company might not be able to find someone willing to be a director?

4. Anyone who is to be appointed as director of a company must consent to the appointment: see section 146. Why is this required? What if that consent is obtained by misrepresentation, undue influence or fraud?

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

(a) human (ie, a corporation cannot be a director of a company; while this is possible in some jurisdictions it no longer so in Singapore);

(b) 18 years of age; and

(c) 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 articles if it exists. What is the consequence of not holding the requisite qualification shares? See section 147. 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. What is the purpose of these disqualifications?

> *Attorney-General v Chong Soon Choy Derrick* [1983-1984] SLR(R) 530 (Court of Appeal)
> *Quek Leng Chye v Attorney-General* [1985-1986] SLR(R) 282 (Privy Council)
> *Lee Huay Kok v Attorney-General* [2001] 3 SLR(R) 287 (High Court)
> *Ong Chow Hong v PP* [2011] SGHC 93 (High Court)

What would happen if a person contravenes one of these sections inadvertently? Is there any way to avoid criminal liability for contravention of a disqualification? Is the validity of his acts or his ability to function as a director affected in any way?

7. A director may vacate office in one of four ways:

(a) Death. No notice need be given and there are no prior formalities.

(b) Resignation. Whether notice need be given depends on the articles. ACRA should be informed. Can a director be prevented from resigning?

(c) Automatic vacation of office by reason of the articles. Listed companies typically provide for the retirement of a number of directors at each AGM.

(d) Removal from office. The procedure for removal of a director will be found in the articles, if it exists. For public companies, see section 152 and *Soliappan v Lim Yoke Fan* [1968] 2 MLJ 21 (Federal Court, Malaysia)

8. Note section 153(2), which imposes an age limit for directors of public companies and their subsidiaries. What is the purpose of this? Why does it not apply to all companies?

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 s407(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.

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

In practice, however, most appointments of officers are done at a management level. Where the smallest companies are concerned, the controlling shareholder often appoints corporate officers.

3. Resignation or dismissal of an officer are governed by normal contractual principles regarding notice, liquidated damages, etc.

> *Alexander Proudfoot Productivity Services Co Singapore Pte Ltd v Sim Hua Ngee Alvin* [1992] 3 SLR(R) 933 (Court of Appeal)

C. REMUNERATION AND FINANCIAL DEALINGS WITH THE COMPANY

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 solicitor).

> *Guiness plc v Saunders* [1990] 1 All ER 652 (House of Lords)
> *Heap Huat Rubber Company Sdn Bhd v Kong Choot Sian* [2004] SGCA 12 (Court of Appeal)

2. Directors may be paid fees for their services as directors, as declared in accordance with the articles. 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.

Heap Huat Rubber Company Sdn Bhd v Kong Choot Sian [2004] SGCA 12 (Court of Appeal)
Raffles Town Club Pte Ltd v Lim Eng Hock Peter [2010] SGHC 163 (High Court)

3. Payments for loss of office (sometimes known as "golden parachutes") are permitted only under strict conditions. Read and analyse section 168.

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

4. Loans to directors are regulated by sections 162 and 163. Read and analyse the sections. What is the mischief at which these sections are aimed? What is the effect of a contravention of these sections?

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

5. The articles often (but not invariably) require 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. Read and analyse the section. Why does this not apply to other corporate officers, who may in fact have more influence over corporate transactions in larger companies?

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

LECTURE 4: CORPORATE GOVERNANCE (2)

General Reference: *Woon on Company Law* (3rd Ed. Revised), Chapter 8

A. DIRECTORS' FIDUCIARY DUTIES

1. Section 157(1) requires that a director shall at all times act "honestly". There is no definition in the Companies Act, but consider sections 23 and 24 of the Penal Code. The Penal Code definition of dishonesty does not apply directly to the Companies Act, but it is likely that anything that is dishonest in the Penal Code sense would amount to a contravention of section 157(1). The question is, what else beyond this might be considered to be a contravention of this provision? Read:

> *Townsing Henry George v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 (Court of Appeal)
> *Cheam Tat Pang v Public Prosecutor* [1996] 1 SLR(R) 161 (High Court)
> *Tan Tze Chye v Public Prosecutor* [1997] 1 SLR(R) 876 (High Court)
> *Lim Weng Kee v Public Prosecutor* [2002] 2 SLR(R) 848 (High Court)
> *Chua Boon Chin v McCormack John Maxwell* [1979-80] SLR(R) 121 (High Court)
> *Kumagai-Zenecon Construction Pte Ltd v Low Hua Kin* [1999] 3 SLR(R) 1049 (High Court) affirmed [2000] 2 SLR (R) 689 (Court of Appeal)
> *Vita Health Laboratories Pte Ltd and Others v Pang Seng Meng* [2004] 4 SLR 162 (High Court)
> *W&P Piling Pte Ltd v Chew Yin What* [2007] 4 SLR(R) 218 (High Court)
> *Liquidator of Leong Seng Hin Piling Pte Ltd v Chan Ah Lek [2007] 2 SLR(R) 77* (High Court)
> *TT Durai v Public Prosecutor* [2007] SGDC 334 (District Court)
> *Creanovate Pte Ltd v Firstlink Energy Pte Ltd* [2007] 4 SLR(R) 780 (Court of Appeal)

2. The directors' 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.

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

3. Do directors of an insolvent company owe duties to the creditors? What is the extent of that duty? Consider sections 340 and 339(3).

Tong Tien See Construction Pte Ltd v Tong Tien See [2001] 3 SLR(R) 887 (High Court) (reversed in part [2002] 2 SLR(R) 94)
Chip Thye Enterprises Pte Ltd v Phay Gi Mo [2004] 1 SLR(R) 434 (High Court)
Chee Yoh Chuang v Progen Holdings Ltd [2010] SGCA 31(Court of Appeal)

4. If a director breaches his fiduciary duty, what effect does this have on transactions with third parties?

Cheong Kim Hock v Lin Securities (Pte) [1992] 1 SLR(R) 497 (Court of Appeal)
Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd [2002] 2 SLR(R) 94 (Court of Appeal)
George Raymond Zage III v Ho Chi Kwong [2010] 2 SLR 589 (Court of Appeal)

5. Some of the fiduciary duties continue even after the director leaves the company. See eg:

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

6. 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.

ABB Holdings Pte Ltd and others v Sher Hock Guan Charles [2009] 4 SLR(R) 111 (High Court)

B. CONFLICTS OF INTEREST

1. As part of his fiduciary duty, a director may not place himself in a position of conflict with the company. Where such conflict exists, he must disclose it. Section 156 (discussed above) has given statutory form to this obligation. He must recuse himself from taking any decisions in such circumstances.

Golden Village Multiplex Pte Ltd v Phoon Chiong Kit [2006] 2 SLR(R) 307 (High Court)

2. Nominee directors are in a particularly difficult position in this regard. A nominee director is one who is appointed to represent the interests of a major shareholder. Obviously, the nominee is supposed to ensure that his patron is kept apprised of what is happening to the investment. What is the position of such a nominee? How much information can they pass on the person they represent? What happens if there is a conflict of interests? See sections 157(2) and 158.

Raffles Hotel Ltd v Rayner [1965] 1 MLJ 60 (High Court)
Kea Holdings Pte Ltd v Gan Boon Hock [2000] 2 SLR(R) 333 (Court of Appeal)
Oversea-Chinese Banking Corporation Ltd v Justlogin Pte Ltd [2004] 2 SLR(R) 675 (Court of Appeal)
Townsing Henry George v Jenton Overseas Investment Pte Ltd [2007] 2 SLR(R) 597 (Court of Appeal)
W&P Piling v Chew Yin What [2007] 4 SLR(R) 218 (High Court)

3. Directors may not benefit personally from a transaction in which the company is interested, nor may they divert property, contracts or business opportunities to other persons or corporate entities.

> *Hytech Builders Pte Ltd v Tan Eng Leong* [1995] 1 SLR(R) 576 (High Court)
> *Dayco Products Singapore Pte Ltd v Ong Cheng Aik* [2004] 4 SLR(R) 318 (High Court)
> *Chew Kong Huat v Ricwil (Singapore) Pte Ltd* [1999] 3 SLR(R) 1167 (Court of Appeal)
> *Kea Holdings Pte Ltd v Gan Boon Hock* [2000] 2 SLR(R) 333 (Court of Appeal)

4. Where corruption is concerned, note sections 6 and 14 of the Prevention of Corruption Act (Cap 241).

> *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)
> *Leong Wai Kay v Carrefour Singapore Pte Ltd* [2007] 3 SLR(R) 78 (Court of Appeal)

5. Can a director who has placed himself in a position of conflict enforce contracts against the company?

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

C. DUTIES OF CARE, SKILL AND DILIGENCE

1. The Companies Act does not require a director to be skillful or careful. Section 157(1) is only concerned with diligence. How diligent a particular director must be depends on whether he is executive or non-executive.

> *Lim Weng Kee v PP* [2002] 2 SLR(R) 848 (High Court)
> *Jurong Readymix Concrete Pte Ltd v Kaki Bukit Industrial Park Pte Ltd* [2000] 3 SLR(R) 1 (High Court)

2. However, the directors owe a general duty of care to the company not to be negligent. They are allowed to rely on others (business would be impossible otherwise), but there is a duty to supervise. See section 157C.

> *Daniels v Anderson* (1995) 16 ACSR 607 (Court of Appeal, New South Wales)

D. INDEMNITIES AND RELEASE FROM LIABILITY

1. A company may indemnify an officer for liabilities that he incurs in the course of his duties for the purposes of the company.

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

2. However, note section 172(1). What is the reason for this section? In practice, companies often pay for directors' liability insurance rather than provide a direct indemnity.

3. An application to court under section 391 is possible if a director has acted honestly and reasonably. This may be done in anticipation of legal proceedings.

Re IDEALGLOBAL.COM Ltd [2000] 1 SLR(R) 804 (High Court)
Tokuhon (Pte) Ltd v Seow Kang Hong [2003] 4 SLR(R) 414 (Court of Appeal)

E. DE FACTO AND SHADOW DIRECTORS

1. Note that the Companies Act definition of "director" in s4(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). It is a question of evidence whether or not a particular person is a de facto or shadow director.

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

2. The terminology is non-standard; different judges and commentators use the terms "de facto director" and "shadow director" in different ways. The important thing to understand is that such persons function or control the directors. They are generally subject to the same fiduciary duties as regular directors. See eg:

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

LECTURE 5: CORPORATE CAPACITY & CONTRACTING

Tan Cheng Han (ed) *Walter Woon on Company Law* (Rev 3rd edn, 2009) 83 – 118
Some of the cases cited below can be found in Sealy & Worthington *Cases and Materials in Company Law* (8th edn, 2008) (S&W), or David Kershaw *Company Law in Context: Text and Materials* (2009)

A. OVERVIEW

In this part of the course we look at how a company enters into a contract. The main difference between a company and a human being in this regard is that the former is an artificial entity. This renders corporate contracting more complicated than the making of contracts by a human being in two aspects: a company by necessity has to act through natural persons, and the capacity of a company, unlike a natural person, has historically been held to be limited.

As a company can only act through natural persons, the law must devise rules to stipulate the circumstances under which an act of natural persons may be regarded as binding on the company. A company principally acts in 2 ways; it can act through its **organs** or its **agents**.

- The two organs of the company are its members in general meeting and its board of directors. When a company acts through its organs, the act is regarded as the act of the company itself.
- More commonly, a company acts through its agents who may be employees of the company or who may be independent contractors engaged to act on the company's behalf in specific transactions. This part of the course will focus on the latter.

Natural persons normally have full legal **capacity**; for example, to make a contract or a gift. English courts in the nineteenth century developed the doctrine that a company, unlike a natural person, does not enjoy full legal capacity. The legal capacity of a company was limited by its objects, and a company was required to include objects clauses in its memorandum of association. Under this doctrine, if a company did an act outside of its objects clauses, the act was said to be ultra vires and void. The ultra vires doctrine used to be extremely important in company law, but that has ceased to be so in Singapore and England.

B. THE OBJECTS CLAUSE AND CORPORATE CAPACITY

The ultra vires doctrine is concerned with the capacity of a company to do an act, not the authority of its agents. Unfortunately, some old cases used the term 'ultra vires' to mean not lack of corporate capacity but lack of authority by an agent to act on behalf of the company. Such loose use of the term has been rejected in the following cases.

Rolled Steel Products (Holdings) Ltd v British Steel Corporation [1984] BCLC 466 (S&W [3.07] 115)
Banque Bruxelles Lambert v Puvaria Packaging Industries (Pte) Ltd [1994] 2 SLR 35

The ultra vires doctrine has been rendered almost obsolete in Singapore due to the following developments.

- First, section 25 of the Companies Act provides that an act shall not be invalid by reason only of the fact that the company was without capacity to do such an act. Any lack of capacity is relevant only *within* the company itself.[1] A contract that is ultra vires the company is thus binding on the company provided the other rules on corporate contracting are satisfied.
- Secondly, a company now has full capacity to carry on or undertake any business or activity, do any act or enter into any transaction, and for those purposes, full rights, powers and privileges: section 23(1). This turns the ultra vires doctrine on its head. However, a company may still choose to restrict its capacity: section 23(1B). A company may do this by stating in the objects clauses in its memorandum that it is not to enter into a particular business. If so, a contract made by the company that infringes the prohibition will be ultra vires; but the effect of that is as stated in the preceding paragraph.

C. CORPORATE CONTRACTING

1. **Introduction**

A company may enter into a contract through its organs; ie, its board of directors or, more rarely, members in general meeting, acting within the spheres of their respective competences. Most contracts are however made at a lower level in the corporate hierarchy, through a managing or executive director, or senior employee. The legal concepts governing the making of contracts by an individual on behalf of a company are drawn from the law of agency.

It is necessary to know some basic rules of agency law. For those of you who have not studied agency law before, the outline below provides an introduction. In any event, some of the leading cases in agency law involved companies, and they are included below. You will get a fairly good idea of the basic rules after reading the cases.

Regardless of whether you have studied agency law before, the challenge here is to apply the general law of agency in a corporate context. It bears repeating that a company is an artificial entity. By its very nature a corporate principal is a very different kind of principal from a human principal. This is especially so where the company is a big organization with many employees and layers of hierarchy. You need to appreciate this to understand the application of general agency law in the corporate context.

2. Outline of agency law

(a) Paradigm case

Agency is a relationship (or set of relationships) which arises when one person, called the principal authorizes another, called the agent, to act on his behalf, and the other agrees to do so. The agent may therefore acquire authority, which means a power to do acts which affect his principal's legal position as regards a third party.

[1] That is, in proceedings against the company by a member of the company, in proceedings by the company against an officer of the company, or in an application by the Minister to wind up the company.

This reasoning is used mostly in the making of **contracts** with third parties. The essence of this paradigm is that the principal consents that the agent should act, and the agent consents to act: this is what gives the agent authority. However, it should be noted that the principal and the agent will be held to have consented if they have what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it: see *Garnac Grain Co Inc v Faure & Fairclough Ltd* [1967] 2 All ER 353, 358 (Lord Pearson).

The paradigm is then extended to cover other situations.

(b) Apparent (or ostensible) authority

A principal may also be held liable because a person appeared (in rare cases) to be his agent when he was not, or more commonly, while certainly being an agent, appeared to have authority to do a particular thing when he had not, for example, because the principal may have told him not to do it. Apparent authority is the authority of an agent as it appears to others. It is also called ostensible authority.

Apparent authority may be defined as follows:

- Where a person (P) by words or conduct, represents or permits it to be represented to a third party (T) that another person (A) has authority to act on his behalf, and
- T deals with A as P's agent on the faith of the representation,
- P is bound by A's acts to the same extent as if A had the authority that he was represented to have, even though he had no actual authority.

(c) Ratification

The doctrine of ratification is concerned with acts performed without authority by an agent in the name of a principal. If someone acts without the authority of a principal, either (i) because he exceeds the bounds of his actual authority, or (ii) because he was never employed as the principal's agent in the first place, the would-be principal may nevertheless be entitled to ratify a transaction effected in his name by the agent. It is for the principal to decide whether or not to ratify such transactions. But if the principal does so, he thereby adopts the agent's unauthorized acts and it is as though he had authorized them *ab initio*.

(d) Summary

In summary, a principal is bound by the transactions on his behalf of his agents or employees if the latter acted within either:

(i) The actual scope of the authority conferred upon them by their principal prior to the transaction or by subsequent ratification; or

(ii) The apparent (or ostensible) scope of their authority.

3. Application of agency law in corporate context

(a) Actual authority

Actual authority can be either express or implied. Express, actual authority is self-explanatory.

Implied, actual authority can arise in a variety of ways. It is usual to analyse implied authority through the following categories:

- incidental authority;
- through appointment to a particular position (sometimes called usual authority, which is to be distinguished from usual authority as a species of apparent authority); and
- by acquiescence.

There can be no implied authority if the agent has specifically been told not to do the act in question.

Hely-Hutchinson v Brayhead Ltd [1967] 3 All ER 98 (S&W [3.09] 125)
SPP Ltd v Chew Beng Gim [1993] 3 SLR 393

(b) Apparent Authority

How is the application of ordinary agency rules on apparent authority made more complicated in the company context? The leading discussion is by Diplock LJ in *Freeman & Lockyer v Buckhurst Park Properties Ltd*, where a company allowed a person to act as managing director. His judgment has been cited with approval by Singaporean courts. It is however crucial to note that those parts of Diplock LJ's judgment on corporate capacity and constructive notice do not apply to Singapore, and in fact has ceased to apply in England as well. The former has been explained. As for the latter, please see section 25A.

Freeman & Lockyer v Buckhurst Park Properties Ltd [1964] 1 All ER 630 (S&W [3.08] 120)
Hely-Hutchinson v Brayhead Ltd [1967] 3 All ER 98 (S&W [3.09] 125)
First Energy v Hungarian International Bank [1993] 2 Lloyd's LR 194
Skandinaviska Enskilda Banken AB (Publc), S'pore Branch v Asia Pacific Breweries (S'pore) Pte Ltd [2011] SGCA 22

(c) Ratification

Normal rules on ratification
For pre-incorporation contracts, see s 41(1) of Companies Act.

(d) Interaction between agency principles and ultra vires doctrine

This part is unique to companies and other corporate entities. Please see the discussion in *Walter Woon on Company Law*.

D. THE INDOOR MANAGEMENT RULE

Royal British Bank v Turquand (1856) 6 El & Bl 327
Mahony v East Holyford Co Ltd (1875) LR 7 HL 869
Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146 (available at the website of the Australasian Legal Information Institute at http://www.austlii.edu.au/)

The indoor management rule (rule in *Turquand's* case), may be stated as follows:

- Persons dealing with a company in good faith may assume that acts within the constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular.

For the interaction between the indoor management rule and the rules of agency, see the discussion in *Walter Woon on Company Law*.

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LECTURE 6: SHAREHOLDERS' REMEDIES (PART 1)

The main topics examined in lectures 6 and 7 are generally addressed Tan Cheng Han ed., Walter Woon on Company Law (Revised Third Edition, 2009) (pp. 163-207, 351-90, and 718-29). You may also want to refer to Margaret Chew, *Minority Shareholders' Rights and Remedies* (Second Edition, LexisNexis, 2007)—which is the leading text in this area of Singapore company law.

1. Overview of the Protection for Minority Shareholders

Policy rationale

- Margaret Chew, *Minority Shareholders' Rights and Remedies*, *2nd edition* (2007) at 1-12

Fundamental issue

2. The Rule in *Foss v Harbottle* and the Common Law Derivative Action

- *Edwards v Halliwell* [1950] 2 All ER 1064

The proper plaintiff principle

- *Foss v Harbottle* (1843) 2 Hare 461

The majority rule principle

- See CA, s 392

- *Foss v Harbottle* (1843) 2 Hare 461
- *MacDougall v Gardiner* (1875) 1 Ch D 13
- *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*[1982] Ch 204

The link between the proper plaintiff and majority rule principles

- Margaret Chew, *Minority Shareholders' Rights and Remedies*, *2nd edition* (2007) at 7

The benefits and costs of the rule in *Foss*

Applicability of the rule in *Foss* and its exceptions

- *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*[1982] Ch 204

Exceptions to the rule in *Foss*

A personal right

- See CA, ss 39, 392, 177, 181, 189, 409A

- *Edwards v Halliwell* [1950] 2 All ER 1064
- *Rayfield v Hands* [1960] Ch 1
- *Pender v Lushington* (1877) 6 Ch D 70
- *MacDougall v Gardiner* (1875) 1 Ch D 13
- *Pullbrook v Richmond Consolidated Mining Company* (1878) 9 Ch D 610
- *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*[1982] Ch 204
- *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1
- *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liq)* [2007] 2 SLR 597
- *Giles v Rhind* [2002] EWCA Civ 1428
- *Hengwell Development Pte v Thing Chaing Chin* [2002] 4 SLR 902

A special majority required

- *Edwards v Halliwell* [1950] 2 All ER 1064
- *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*[1982] Ch 204

Ultra vires

- See CA, s 25

- *Edwards v Halliwell* [1950] 2 All ER 1064
- *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*[1982] Ch 204

Fraud on the minority (aka "common law derivative action")

- *Burland v Earle* [1902] AC 83
- *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*[1982] Ch 204
- *Daniels v Daniels* [1978] 2 All ER 89
- *Pavlides v Jensen* [1956] 2 All ER 518
- *Cook v Deeks* [1916] 1 AC 554
- *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378
- *Mozely v Alston* (1847) 1 Ph 790
- *Smith v Croft (No 2)* [1988] Ch 114
- *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR 197
- *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1

"Justice of the case"

- *Biala Pty Ltd v Mallina Holdings Ltd (No 2)* (1993) 11 ACLC 1082
- *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*[1982] Ch 204

Clean hands requirement

- *Nurcombe v Nurcombe* [1985] 1 WLR 370

Procedure for a common law derivative action

- *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*[1982] Ch 204
- *Wallersteiner v Moir (No 2)* [1975] 1 QB 373
- *Smith v Croft (No 2)* [1988] Ch 114

Practical considerations

3. The Statutory Derivative Action

History of the statutory derivative action

- See CA, ss 216A, 216B

Procedural requirements for bringing a statutory derivative action

- See CA, ss 216A, 216B

- *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR 197
- *Tam Tak Chuen v Eden Aesthetics Pte Ltd* [2010] 2 SLR 667
- *Hengwell Development Pte v Thing Chaing Chin* [2002] 4 SLR 902
- *Re Bellman v Western Approaches Ltd* (1981) 130 DLR (3d) 193
- *Agus Irawan v Toh Tech Chye* [2002] 2 SLR 198

The "good faith" and "interests of the company" test

- See CA, ss 216A, 216B

- *Agus Irawan v Toh Tech Chye* [2002] 2 SLR 198
- *Pang Yong Hock v PKS Contracts Services Pte Ltd* [2004] 3 SLR 1
- *Teo Gek Luang v Ng Ai Tong* [1999] 1 SLR 434
- *Richardson Greenshields of Canada v Kalmacoff* (1995) 123 DLR (4d) 628
- *Teo Gek Luang v Ng Ai Tong* [1999] 1 SLR 434
- *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR 197
- *Tam Tak Chuen v Eden Aesthetics Pte Ltd* [2010] 2 SLR 667

Advantages and disadvantages of a s 216A derivative action

- *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR 197
- *Tam Tak Chuen v Eden Aesthetics Pte Ltd* [2010] 2 SLR 667

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LECTURE 7: SHAREHOLDERS' REMEDIES (PART 2)

1. Oppression Remedy (Commercial Unfairness Remedy)

Who may bring a s 216 claim for commercial unfairness?

- See CA, s 216

The test in s 216(1) is "commercial unfairness"

- *Over & Over Ltd. v Bonvest Holdings Ltd* [2010] 2 SLR 776
- *Ng Sing King v PSA International Pte Ltd* [2005] SGHC 5
- *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] SGCA 33
- *Westfair Foods Ltd v Watt* (1991) 79 DLR 48
- *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692

"Commercial unfairness" under s 216 is determined by the written agreement and legitimate expectations between the shareholders

- *Over & Over Ltd. v Bonvest Holdings Ltd* [2010] 2 SLR 776
- *Thio Keng Poon v Thio Syn Pyn* [2010] 3 SLR 143
- *Tan Choon Yong v Goh Jon Keat* [2009] 3 SLR(R) 840
- *O'Neill v Phillips* [1999] 1 WLR 1092
- *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC 14
- *Re a Company (No 00477 of 1986)* [1986] BCLC 376
- *Ng Sing King v PSA International Pte Ltd* [2005] 2 SLR 56
- *Ebrahimi v Westborne Galleries Ltd* [1973] AC 360
- *Low Peng Boon v Low Janie* [1999] 1 SLR 761
- *Re Gee Hoe Chan Trading Co Pte* [1991] 3 MLJ 137

"Commercial unfairness" under s 216 is determined on an objective standard

- *Re a company (No 005134 of 1986) ex parte Harries* [1989] BCLC 383
- *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14
- *O'Neill v Phillips* [1999] 1 WLR 1092

"Commercial unfairness" under s 216 may be avoided by an offer to purchase the minority's shares

- *O'Neill v Phillips* [1999] 1 WLR 1092

Examples of commercial unfairness under s 216

Dominant member advancing their own interests

- *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] SGCA 33
- *Low Peng Boon v Low Janie* [1999] 1 SLR 761
- *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227

Abuse of voting power

- *Re SQ Wong Holdings (Pte) Ltd* [1987] 2 MLJ 298

Exclusion from management

- *Ng Sing King v PSA International Pte Ltd* [2005] 2 SLR 56
- *Kitnasamy v Nagatheran* [2000] 2 SLR 598
- *Re a Company (No 04377 of 1986)* [1987] BCLC 94

Serious mismanagement

- *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227
- *Re Tri-Circle Investment Pte Ltd* [1993] 2 SLR 523
- *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354

No or inadequate dividends (and/or excessive directors' compensation)

- *Re Gee Hoe Chan Trading Co Pte* [1991] 3 MLJ 137

Loss of substratum

- *Over & Over Ltd. v Bonvest Holdings Ltd* [2010] 2 SLR 776
- *O'Neill v Phillips* [1999] 1 WLR 1092
- *Ng Sing King v PSA International Pte Ltd* [2005] 2 SLR 56

<u>Remedies available under s 216(2)</u>

- *Over & Over Ltd. v Bonvest Holdings Ltd* [2010] 2 SLR 776
- *Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] 2 SLR 297
- *Low Peng Boon v Low Janie* [1999] 1 SLR 761
- *Kung v Kou* (2004) 7 HKCFAR
- *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] SGCA 33
- *Re Gee Hoe Chan Trading Co Pte* [1991] 3 MLJ 137
- *Tullio v Maoro* [1994] 2 SLR 489
- *Yeo Hung Khiang v Dickson Investment (Singapore) Pte Ltd* [1999] 2 SLR 129
- *Profinance Trust SA v Gladstone* [2002] 1 WLR 1024

2. Just and Equitable Winding Up

Winding-up under s 254

- See CA, s 254(1)(i)

The relationship between s 254(1)(i) and s 216(2)(f) winding up

- *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR 827

Strategic considerations when choosing between s 254(1)(i) and s 216(2)(f)

- Margaret Chew, *Minority Shareholders' Rights and Remedies*, *2nd edition* (2007) at 299-300

- *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR 827
- *Summit Co (S) Pte Ltd v Pacific Biosciences Pte Ltd* [2007] 1 SLR 46

Determining when a winding-up is "just and equitable"

- *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR 827
- *Summit Co (S) Pte Ltd v Pacific Biosciences Pte Ltd* [2007] 1 SLR 46
- *Ng Sing King v PSA International Pte Ltd* [2005] 2 SLR 56
- *Re Thomas Edward Brinsmead & Sons* [1897] 1 Ch 406

The consequences of commencing a s 254(1)(i) application

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TUTORIAL QUESTIONS:

THE PROTECTION OF MINORITY SHAREHOLDERS

Questions 1 to 4 are a single hypothetical (i.e., facts from one question can be used to answer the others)

1. Homer, a beer aficionado, started a small micro-brewery, Duff Beer La ("DBL"), in Springfield Quay—a new development next to Tampines. DBL's Indian Pale Ale, which had a very distinctive copper glow, enjoyed a cult-like customer following at Springfield Quay Hawker Centre. As Homer was not a man of pint-sized ambition, he sought to expand his business island-wide by entering into a partnership with three other beer aficionados: Moe, Barney and Lenny. Under the partnership, DBL's Pale Ale became the beer of choice at hawker centres throughout Singapore.

Intoxicated by their success, the partners decided to incorporate the business on the informal understanding that they would all continue to play a central role in management. All of the partners were 25% shareholders, directors and senior executives in Duff Beer La Pte Ltd receiving equal compensation through employment income and directors' fees. Each of the partners provided an unconditional personal guarantee to the bank for DBL's debts. To stay true to its beer aficionado roots, DBL adopted an objects clause limiting its business to "activities directly related to producing, marketing, distributing and/or selling beer".

After three extraordinarily profitable years, Homer was approached by his former employer, Nuclear Power Plant Pte Ltd ("NPP"), to invest most of DBL's retained earnings in what appeared to be a lucrative uranium mining project in Kazakhstan. Homer, Barney and Lenny were giddy about the enormous potential profits that the project offered. Moe, however, was suspicious of NPP's motives and staunchly opposed DBL investing outside of the core beer business in such a risky venture—especially in light of his personal guarantee.

- *Moe wants to maintain his interest in DBL but prevent it from investing in the uranium project. Advise.*

2. Despite continued protest at board meetings, Moe decided not to take legal action. DBL and NPP incorporated Fair Price Uranium Pte Ltd ("FPU") in Singapore for the purpose of carrying out their joint venture mining project in Kazakhstan—with DBL holding 60% and NPP holding 40% of FPU's shares. To comply with Kazakhstan's mining regulations, FPU incorporated a wholly owned subsidiary company in Kazakhstan, Tarob Bruno Cohen Inc ("TBC"), to develop the mine. The Joint Venture Agreement between DBL and NPP included the following terms:

- DBL and NPP shall appoint 3 and 2 nominee directors respectively to FPU's 5 member board
- No FPU board meeting will have a quorum without at least 1 nominee director from each DBL and NPP
- No legal proceedings can be commenced by FPU without approval from the board of directors
- The management of TBC will be carried out by NPP managers under the direction of the CEO of NPP who will be TBC's sole director on its one person board

Homer, Barney and Lenny were DBL's nominee directors on the FPU board. Montgomery and Waylon, the CEO and CFO of NPP, who were also its two largest shareholders, were NPP's nominee directors on the FPU board.

Barney discovered that Montgomery recently arranged for the sale of all of TBC's uranium stockpiles to NPP at one-tenth of their actual market value and that Montgomery had made misrepresentations to FPU's board to cover up the below-market transaction. As a result of the below-market transaction, the value of the TBC shares held by FPU decreased by 90% which caused the value of FPU's shares held by DBL and NPP to decrease by the same. Barney contacted G-Ali, an expert in Kazakhstan law, and discovered that it is not possible for TBC to sue Montgomery in Kazakhstan. Barney has called a meeting of the FPU board, but Montgomery and Waylon have said they will likely not attend.

- *DBL's board wants to commence an action in Singapore against Montgomery to recover the loss in the value of its FPU shares. Advise.*

3. During the DBL board meeting in which Barney revealed the losses suffered in the joint venture project, Moe went into an apoplectic rage. He threatened to sue the directors for making "such a stupid business decision that was clearly outside of the objects of the company". At the same time, largely as a result of Moe convincing DBL to open a new chain of pubs called Duffwerkz, DBL's beer business was booming.

Homer, Barney and Lenny felt that Moe's constant threats and griping at board meetings was impeding their ability to run the business. They called an EGM on insufficient notice at which they removed Moe from his position as a director and amended the memorandum to delete the objects clause. However, they allowed Moe to keep his executive position and put him in charge of expanding the Duffwerkz pub chain. Moe was furious because he felt he had been deprived of his director's fees (which accounted for 40% of his total compensation), was frozen out of DBL's inner management circle and was put at a disadvantage because he had insufficient time to prepare for the EGM.

- *Moe wants to be reinstated as a director on the board. Advise Moe whether this is possible and what other remedies (if any) he may consider.*

4. In a follow-up meeting with Moe, he informed you that DBL's sales had plummeted as a result of news reports that DBL had been adding a chemical to its Indian Pale Ale to give it its distinctive copper glow. Also, Moe mentioned that he had inadvertently forgotten to tell you that a month before he was removed from the board, Homer had discovered that he was having an affair with Homer's wife, Marge, and that this was likely the real cause for removing him from the board. Moe wanted to "take his 25% of the company and leave" to start up his own Indian Pale Ale Company. Homer, Barney and Lenny wanted to challenge the media claims and try to rebuild the business.

- *Considering these new facts, advise Moe on his best course of action and likelihood of success.*

LECTURE 8: CORPORATE GOVERNANCE (3)

A. ACCOUNTS AND AUDIT

General Reference: *Woon on Company Law* (3rd Ed. Revised, 2009), Chapter 10, pp413-421; Woon, *Company Law* (2nd Ed, 1997), pp379-399.

1. All companies are obliged to keep accounting records: s199(1), (2). From these records, a balance sheet and profit and loss account must be prepared annually. This is the opportunity cost of incorporation.

2. The accounts must be laid before the members at the company's annual general meeting, or if that has been dispensed with, sent to the members: s201.

3. In practice, the preparation of accounts is usually left to accountants, who will do so in accordance with the prevailing Financial Reporting Standards prescribed by the Accounting Standards Council. The accounts must present a "true and fair view" of the company's profit and loss and financial state. The directors are obliged to sign a statement to that effect: s201(15).

4. The consequences of signing off on accounts that do not present a true and fair view of the company's financial state can be dire:

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)

5. In order to allow directors to fulfil their duties in this regard, they have the right to inspect the accounting records of the company: s199(4). The company cannot refuse them access unless there is evidence that they are abusing their powers.

Wuu Khek Chiang George v ECRC Land Pte Ltd [1999] 2 SLR(R) 352 (Court of Appeal)

6. In general, the accounts have to be audited before being presented to the members: s201(4). However, see ss205B 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: s207(5).

7. The auditor is a vital check on the integrity of the accounts. He has a statutory duty to form an opinion on whether the accounts present a true and fair view of the company's financial state: s207(5). He also must report breaches of the Companies Act and serious offences involving fraud or dishonesty: s207(9), (9A). It is clear that he owes a duty of care to the company.

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

8. As to whether a company's auditors may be sued by other persons who have relied on the audit report, see:

Caparo Industries plc v Dickman [1990] 2 AC 605 (House of Lords)
Standard Chartered Bank v Coopers & Lybrand [1993] 3 SLR(R) 29 (High Court).

Has the Court of Appeal's judgment in *Spandeck Engineering (S) Pte Ltd v Defence Science and Technology Agency* [2007] 4 SLR(R) 100 made any difference to auditors' liability to third parties?

B. PROTECTION OF CREDITORS

General Reference: *Woon on Company Law* (3rd Ed. Revised, 2009), Chapter 12, pp479-522.

1. In return for the privilege of limited liability, it is necessary that the 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 cannot 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 s403. Note the personal liability of the directors under s403(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. Acquisition by a company of its own shares and those of its holding company is governed by ss76(1)(b), 76B-76G. Note also s21 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 ss76 and 76A. This is an area of massive confusion. Read the following cases:

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

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 [1983-84] SLR(R) 13 (Privy Council on appeal from Singapore)

Capital reduction is permissible only under the conditions stipulated in the Act, viz, ss78A – 78K. Again, detailed knowledge of the procedure is unnecessary. It is sufficient to note the two methods by which a reduction of capital may be done.

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LECTURE 9: CORPORATE CRIME

General Reference: *Woon on Company Law* (3rd Ed. Revised, 2009), Chapter 3, pp118-124; Yeo, Morgan & Chan *Criminal Law in Malaysia and Singapore* (2007), Chapter 37

1. Crimes that do not require *mens rea* do not generally pose a problem. Most of these tend to be regulatory offences. Even in strict liability offences intention may still be relevant to sentence. See eg:

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

2. Where the board of directors deliberately authorises the commission of an act that amounts to an offence, there can be little doubt that the company has committed the offence. Similarly, if the members have unanimously authorised an act, it would be difficult to argue that the company has no committed the offence.

3. The real problems arise where a director or executive officer of the company is responsible for commission of the act. Can his state of mind be attributed to the company? 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)

4. Whether the offence is committed deliberately, recklessly or negligently is relevant for sentencing purposes. Is it ever appropriate to impose a deterrent sentence on a company?

Angliss Singapore Pte Ltd v Public Prosecutor [2006] 4 SLR(R) 653 (High Court)
Auston International Group Ltd v Public Prosecutor [2008] 1 SLR(R) 882 (High Court)
Lim Kopi Pte Ltd v Public Prosecutor [2010] 2 SLR(R) 413