

NATIONAL UNIVERSITY OF SINGAPORE

**EXAMINATION FOR PART A
COMPANY LAW
2009**

4 November 2009

Time Allowed: 2 Hours (plus 10 minutes reading time)

INSTRUCTIONS TO CANDIDATES

1. This examination paper contains **THREE (3) questions** and comprises **4 printed pages**, inclusive of this cover page.
2. The point value of each question is indicated at the start of each question. The total value of all three questions is 100 (i.e., the exam will be marked out of 100).
3. Use **SEPARATE ANSWER BOOKS** for each question and leave a **space between each line** (i.e., double-spaced).
4. This is a **CLOSED-BOOK** examination. You are not allowed to bring any materials into the examination room.
5. Use of any electronic device is **strictly prohibited**.

QUESTION 1 [Point value: 20]

You must answer either question “A” or “B” below (but NOT both):

A. “For practical purposes, the *ultra vires* doctrine is dead in Singapore”

Indicate whether you agree or disagree with the above statement and provide reasons to justify your position.

OR

B. Explain the meaning of the phrase ‘lifting the corporate veil’ and briefly describe some situations where the court will take this approach.

QUESTION 2 [Point value: 60]

In 2005, Anne started a small restaurant called Makhan Lah near NUS Bukit Timah Campus. Shortly after opening, Makhan Lah’s reputation for the most delectable chilli crab in Singapore made it an enormous success—leading Anne to dream of expanding her restaurant business island-wide. Unfortunately for Anne, her culinary skills far exceeded her financial resources and business acumen. As such, Anne convinced her good friends Bart, Carl and David to quit their jobs and invest their time and money in Makhan Lah as equal partners. For the next two years, the four partners all worked tirelessly (Anne as the executive chef; Bart as the financial manager; Carl as the operations manager; and David as the marketing manager), opened five successful locations and enjoyed an equal share of the restaurant’s ample profits.

In 2007, prior to opening ten new Makhan Lah outlets, the partners decided to incorporate the business under the name Makhan Lah Pte Ltd (hereinafter “ML”). It was understood by all of the partners that after incorporation each of them would continue to play their same respective roles in ML’s expanding business and share equally in the profits. To ensure equality, each partner received 25% of ML’s shares and was a director on the board. All of the directors assumed an equal amount of risk by each providing an unconditional personal guarantee to secure ML’s bank loans.

Anne was nervous about the increased risk of the huge expansion and wanted to ensure that she maintained her position as executive chef. Using her culinary prowess as leverage, Anne persuaded the other partners that upon incorporation ML would adopt Table A as its Articles of Association with the following amendments:

Article 1: Anne shall have a lifetime position as the executive chef of ML and have veto power over hiring any other executive chef

Article 2: ML shall not enter into any agreement involving a consideration exceeding S\$20,000 without the unanimous approval of the board of directors

Article 3: Articles 1 and 2 above, shall not be amended without unanimous approval of the shareholders at general meeting

After incorporation, ML’s business boomed making it a juggernaut in Singapore’s insatiable chili crab industry. Ed, who was the sole shareholder of Singapore’s second largest chili crab

restaurant, Shiok Claws Pte Ltd (hereinafter “SC”), could no longer take the heat of the competition and approached ML with an offer to sell all of his SC shares. After completing its due diligence, ML’s board unanimously decided not to acquire SC. A few weeks after the board meeting Bart, Carl and David, without informing Anne, each acquired 25% of SC’s shares—which subsequently tripled in value on the back of its new signature Shiok Spicy Crab Cakes. In an act of over exuberance, Ed (who still held 25% of SC’s shares and was its managing director) ordered too many crabs from SC’s supplier. To help Ed out, Bart, acting on behalf of ML, entered into a contract under which ML would purchase the excess crabs from SC—rather than from its regular supplier—at the fair market value of S\$25,000 (the “Crab Contract”).

Anne was furious when she discovered on a chili crab internet blog that Bart, Carl and David were major shareholders in SC (even though they played no role in SC’s management). The animosity between Anne and the other directors made it impossible to continue to jointly run ML. As such, on 13 days’ notice, Bart, Carl and David called an extraordinary general shareholders meeting at which they removed Anne as a director and used their 75% shareholdings to amend the Articles by deleting Articles 1, 2 and 3 (see above). At a subsequent board meeting, Bart, Carl and David unanimously passed resolutions to remove Anne as executive chef, ratify the Crab Contract, and reconfirm that ML has (and had) no interest in purchasing any SC shares.

Bart, Carl and David have offered Anne fair market value for her shares less the market rate minority discount. Anne vehemently refuses to sell the shares in the company she started and wants to either be reinstated as ML’s executive chef/director or force ML to be wound-up. Anne also wants to use the full force of the law to make Bart, Carl, David and SC pay for what she sees as their conniving actions. Advise Anne of the relevant legal issues and her possible remedies (if any).

QUESTION 3 [Point value: 20]

Three good friends, X, Y and Z, were the only directors and shareholders of ABC Pte Ltd (“ABC”). X borrowed heavily from Fair-Weather Bank (“Bank”) to speculate in the stock market. He suffered heavy losses in the recent financial crisis. The Bank asked X for increased security, and X agreed to pledge his shares in ABC with the Bank. He deposited the share certificates and duly executed blank transfer forms (i.e., leaving the transferee blank) with the Bank.

ABC was also hit by the financial crisis. Worried about ABC’s viability, the Bank asked for and obtained a mortgage over the company’s factory and a fixed charge over its book debts. The security document prohibited ABC from assigning or factoring the book debts, and required ABC to pay the proceeds of the book debts into an account with the Bank. The document also provided that ABC was entitled to draw on the account, unless the Bank served a notice on ABC that the proceeds of one or more book debts should be paid into a blocked account.

Advise the Bank whether the mortgage or charge has to be registered.

One year later, X defaulted on his repayment obligation to the Bank. The Bank sought to register the shares in its name but was unsuccessful. Y and Z informed the Bank that, since the Bank had a very bad reputation for mis-selling investment products to elderly people, ABC could not have such an irresponsible corporate citizen as a member. The Bank was furious and came to you for advice on its rights.

END OF PAPER

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 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.

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.

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 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.

NATIONAL UNIVERSITY OF SINGAPORE

PART A OF THE SINGAPORE BAR EXAMINATION

2010

COMPANY LAW

November 2010 – Time Allowed 2 Hours

INSTRUCTIONS TO CANDIDATES

1. This examination paper contains **ONE** question and comprises **THREE (3)** printed pages inclusive of this cover page.
2. This is an **OPEN BOOK** examination.

Instructions: Your client, an institutional investor, is a minority shareholder in Alpha Centauri Engineering Ltd, a company listed on the Stock Exchange of Singapore.

In 2005 Alpha Centauri Engineering formed a wholly-owned subsidiary Proxima Centauri Pte Ltd to handle its business in Azerbaijan. It was bidding for contracts to supply equipment for a proposed natural gas pipeline from Baku (on the Caspian Sea) to Western Europe. Proxima Centauri was managed as a division of Alpha Centauri Engineering. The directors of Proxima Centauri were senior employees of Alpha Centauri Engineering. One was a Vice-President and Head of Alpha Centauri Engineering's Hydrocarbon Trading Division and the other was an Assistant-Vice President in the Engineering Division. They reported to the CEO of Alpha Centauri Engineering. Although normally resident in Singapore, they made many trips to Baku to negotiate with the various parties in Azerbaijan. Proxima Centauri was registered as a foreign company in Baku and had an office and a small administrative staff of locals, headed by a Russian, one Boris Tipoff.

Proxima Centauri was awarded several substantial contracts by the government of Azerbaijan, which proved lucrative and contributed materially to the profits of Alpha Centauri Engineering. Unfortunately, there was a falling out with Boris Tipoff, who turned whistle-blower and reported to the Azeri authorities that Proxima Centauri had obtained the contracts by paying bribes. The result was that the contracts were cancelled, Proxima Centauri was fined a substantial amount and barred for 10 years from tendering for any further public sector contracts in Azerbaijan. A warrant for the arrest of the two Singaporean directors of Proxima Centauri was issued in Baku, but not executed since they had the good sense not to go anywhere near the place.

The Commercial Affairs Department in Singapore commenced investigations as well. Charges were eventually laid against Alpha Centauri Engineering for abetment of corruption, an offence under section 29 of the Prevention of Corruption Act (Cap 241). Alpha Centauri Engineering pleaded guilty and was fined \$100,000. The Statement of Facts, which Alpha Centauri Engineering admitted to without qualification, revealed that the operations of Proxima Centauri were overseen by the Exco of Alpha Centauri Engineering. The Exco consisted of the CEO (who is a director of Alpha Centauri Engineering) and two non-executive directors representing the major shareholders. The negotiations for the pipeline contracts were personally overseen by the CEO. He was not called upon to give evidence, however, since the company had pleaded guilty.

The Statement of Facts also reveals that the decision to enter into the contracts was made by the full Board of Directors of Alpha Centauri Engineering, not by the Exco. A paper setting out the details of the project, signed jointly by the two Singaporean directors of Proxima Centauri, was presented to the Board of Alpha Centauri for their approval. In that paper there was a statement that: "It will be necessary to pay consultancy fees to certain parties in Baku in order to facilitate our tender. These fees will not exceed 1% of the value of the contracts eventually awarded." Again, no director was called upon to testify as to what the Board understood by this.

Your client is outraged that there has been no accountability. No one has been fired and no director has resigned. As an institutional investor, the client is interested in ensuring that proper standards of good corporate governance are adhered to. The company's Caspian Sea business is in ruins, since the the scandal has given Alpha Centauri a bad name not only in Azerbaijan but also in Kazakhstan, Turkmenistan, Iran and Russia, where they had hoped to gain a commercial beachhead.

Your firm has been retained and the file passed to you for advice. The client wants to see heads rolling. Who can be held legally liable for this debacle and how? State what further information (if any) you require and why.

-END OF PAPER-