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OPPRESSION AND DERIVATIVE ACTIONS

Are the Lines Truly Distinct? Or Are They Blurred?

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While the law in theory distinguishes between oppression and derivative action and provides separate remedies for both these spheres, in practice they are often conflated, and certain wrongs can fall under either of these spheres. This article analyses the law in relation to oppression and derivative action and proposes that a strict dichotomy may not be necessary in practice.

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I. Introduction

1 Minority shareholders occupy an interesting and arguably disadvantageous position in the realm of corporate action and governance. Even though they have a voice in a company by virtue of their shareholdings, that same voice is often drowned out by the louder voices of the majority. It is therefore unsurprising that conflicts often arise when the actions of a company's board are oppressive, commercially unfair, or prejudicial to minority

shareholders. Such actions are often a result of the conflict of interest between majority and minority shareholder factions. Whilst detrimental to minority shareholders, such actions may or may not also be detrimental to the interests of the company. In other words, a personal wrong or oppressive action against a shareholder may concurrently also constitute a wrong against a company.[1]

2 Courts in Singapore have traditionally drawn a strict dichotomy between wrongs against the company (addressed through derivative actions) and wrongs against shareholders (addressed by oppression remedies).[2] However, this paper posits that this dichotomy has been muddled over time and has raised ambiguities for minority shareholders who want to address wrongs that are inter-twined or can be classified both as wrongs against shareholders as well as the company.

3 Courts have recognised that this dichotomy is sound in principle,[3] however, this distinction has its shortcomings, and it is unable to be applied in all situations. This article explores whether such a rigid dichotomy remains relevant today, particularly when we consider that commercial reality often results in wrongs against the company and wrongs against a shareholder being intertwined. However, before delving into this, it would be helpful to first set out the current position and interpretations of the law.

1 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [63]; Paul L Davies & Sarah Worthington, *Principles of Modern Company Law* (London: Sweet & Maxwell, 10th Ed, 2016) at para 20-14.

2 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333; *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723.

3 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [3].

II. Oppression and unfair prejudice remedies

A. The agency problem

4 The conflict between factions of majority and minority shareholders has been described as a classic "agency problem".[4] Such conflict arises when the majority shareholder (the agent) exercises control over the management and affairs of the company, including its day-to-day operations, and while doing so, may fail to consider the interests of the minority shareholders (the principal). To put it differently, "a minority shareholder may therefore find the company run by the majority in a manner that ignores his concerns".[5]

5 Courts have observed that the agency problem is one that the minority shareholders have knowingly bargained for, explaining that "the courts have been slow to intervene in the management of the affairs of companies … on the ground that a minority shareholder participates in a corporate entity knowing that decisions are subject to majority rule".[6] However, one must consider that in a modern global business environment, while decisions are controlled by the majority, it is reasonable for any investor or shareholder to expect that the affairs of the company will be managed with the objective of maximising shareholder

4 Pearlie Koh, "A Reconsideration of the Shareholder's Remedy for Oppression in Singapore" (2023) 42(1) *Common Law World Review* 61; John Armour, Henry Hansmann & Reinier Kraakman, "Agency Problems and Legal Strategies" in *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2nd Ed, 2009).

5 Pearlie Koh, "A Reconsideration of the Shareholder's Remedy for Oppression in Singapore" (2023) 42(1) *Common Law World Review* 61 at 62.

6 *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745 at [82], citing *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227:

> The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked.

value.[7] This would invariably encompass the best interests of the minority shareholder.

6 While the minority shareholder has little choice but to accept the decision-making process of the majority shareholders and its nominated directors, shareholders can be exposed to commercially unfair situations that defeat legitimate expectations of an investor. For example, this may occur when the funds of the company are being used for illegitimate purposes or are being diverted to entities related to the majority shareholder. In such situations, the wrongful actions of the directors of the company could be characterised as a wrong against the shareholder as well as a wrong against the company, particularly when (a) the shareholders concerns are ignored; (b) the majority exercises influence over the directors; or (c) if it exercises its voting powers to approve transactions through shareholder resolutions that are not in the best interests of the company.[8]

7 The likelihood of a minority shareholder being exposed to unfair and prejudicial conduct of the company is higher in private companies, as they do not have an option to easily divest or exit their investments, and the shareholding structure is more closely held. This leads to a situation where directors are balancing between the interests of the company (which are usually aligned with the interests of the minority shareholder) and the interests of the majority shareholder.

8 During the course of the balancing act, it is not uncommon for directors to lose sight of the fact that they owe fiduciary duties to the company and not the majority shareholder(s), especially if a director is appointed by a majority shareholder(s) or acts under their influence for extraneous reasons. The harm

7 Oliver Hart & Luigi Zingales, "Companies Should Maximize Shareholder Welfare Not Market Value" (2017) 2 *Journal of Law, Finance, and Accounting* 247.

8 "This can be seen from [*Low Peng Boon v Low Janie* [1999] 1 SLR(R) 337], where this court, while accepting that the 'repeatedly dismissive treatment of the legitimate queries made on behalf of [the minority shareholder]' amounted to 'an oppression of [the minority shareholder] and a disregard of her interest in [the company]'": *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [193]; *cf Low Peng Boon v Low Janie* [1999] 1 SLR(R) 337.

or consequences of this situation is unfortunately borne by the minority shareholder. The situation becomes further entangled when the majority shareholder also puts on the hat of a director in the company and must then toggle between these two hats. This reality diminishes the view that "shareholders are not trustees for one another, and, unlike directors, they occupy no fiduciary position and are under no fiduciary duties",[9] by virtue of the majority shareholder wearing two hats.

9 While it may be difficult for directors to balance competing interests, when the interests of the majority shareholder(s) are favoured to the detriment of the interests of the minority shareholders or the company, an injury is suffered, either by the company, the minority shareholder or both. Unlike public companies, and subject to the terms of the investment agreement (usually the share purchase or share subscription agreement), minority shareholders do not usually have the easy option of withdrawing their investment and selling their shares in an open market. This necessitates statutory remedies for minority shareholders to redress the oppression, provide recourse to a buy-out remedy,[10] or seek an order from court for winding up the company if the circumstances so warrant.

B. Statutory remedy for oppression under English law

10 Until 1948, the only remedy that a minority shareholder had in the event of a conflict with the majority was to have the company wound up under the ground of it being "just and equitable" to do so.[11] This situation is interesting as it epitomises the fluid and constantly-evolving nature of the law; the last-resort remedy today (winding up) was once the norm in cases of oppression.[12] Winding up as a remedy for oppression was

9 *Peter's American Delicacy Co Ltd v Heath* (1939) 61 CLR 457 at 503–504, *per* Dixon J; *cf Pender v Lushington* (1877) 6 Ch D 70.

10 *Over & Over Ltd v Bonvests Holdings Ltd* [2009] 2 SLR(R) 111 at [83].

11 Companies Act 1948 (c 38) (UK) s 225(2); Walter Woon Cheong Ming, "A Note On Unfair Prejudice – Section 75 of the U.K Companies Act 1980" (1983) 25(2) Mal LR 396 at 397.

12 "Just & Equitable Winding Up – The Last Resort", *Cripps* (9 May 2021) <https://www.cripps.co.uk/thinking/just-equitable-winding-up-the-last-resort/> (accessed 8 April 2025).

also described as a situation where "the cure was worse than the disease".[13]

11 The Cohen Committee report[14] emphasised that the winding up of a company does not benefit the minority shareholders and proposed that courts must be conferred with "the power to impose upon the parties to a dispute whatever settlement the Court considers just and equitable".[15] This led to the inclusion and enactment of s 210 of the Companies Act 1948[16] which empowered courts to make any such orders as they think fit to bring to an end the matters complained of, including remedies alternative to winding up, such as: (a) regulating the affairs of a company, including by alteration or addition to the company's memorandum or articles; and (b) purchasing the shares of the minority shareholder(s) by the other shareholders or the company.

12 Accordingly, to address such "unfair prejudice", the statutory remedy for oppression, save for the remedy of winding up, was first introduced in England to "strengthen the minority shareholders of a private company in resisting oppression by the majority".[17]

13 The application of s 210 of the Companies Act 1948 was restrictive in nature as it was necessary for a complainant to establish valid grounds that justified winding up pursuant to the "just and equitable rule" and required a course of conduct. Pursuant to the Jenkins Committee recommendations, s 75 was adopted in the Companies Act 1980,[18] which "severed the link with winding up under the just and equitable rule" and replaced the

13 Walter Woon, "Protecting the Minority Shareholder" (1992) 4 SAcLJ 123 at 123.
14 President of Board of Trade, *Report of the Committee on Company Law Amendment* (Cmnd 6659, 1945).
15 President of Board of Trade, *Report of the Committee on Company Law Amendment* (Cmnd 6659, 1945) at para 60.
16 c 38 (UK).
17 President of Board of Trade, *Report of the Committee on Company Law Amendment* (Cmnd 6659, 1945) at para 60.
18 c 38 (UK).

word "oppressive" with the phrase "unfairly prejudicial".[19] The section also empowered courts to make any such order as they deemed fit for giving relief in respect of the matters complained of, specifically:[20]

> (a) regulating the conduct of the company's affairs in the future;
>
> (b) requiring the company to refrain from continuing the act complained of;
>
> (c) permitting civil proceedings to be brought in the name and on behalf of the company on terms the court may direct (derivative action); and
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> (d) the purchase of shares by members of the company by other members, and in this case, the reduction of shares.

14 Section 75 of the Companies Act 1980 paved the way for successive versions of the section, the most recent being s 994 of the Companies Act 2006.[21] This divergence from addressing "oppression" to "unfair prejudice" is the obvious reason and explains why minority shareholder actions are now referred to as the "unfair prejudice remedy" as opposed to an "oppression remedy" in England and Wales. In any case, as pointed out by scholars and affirmed by Singapore's Court of Appeal:[22]

> … any exercise in further defining or refining each of the expressions 'oppression', 'disregard of interests', 'unfair discrimination' or prejudice', in order to ascertain any differences in their meaning and application looks to be a frustrating one. It would be futile, if not impossible, to split pedantic hairs over the precise and exact meaning of the medley phraseology favoured by the legal draughtsman. The fruit of such labour could only add uncertainty and confusion.

19 Walter Woon Cheong Ming, "A Note On Unfair Prejudice – Section 75 of the U.K Companies Act 1980" (1983) 25(2) Mal LR 396 at 397.

20 Companies Act 1948 (c 38) (UK) s 210.

21 c 46 (UK).

22 *Over & Over Ltd v Bonvests Holdings Ltd* [2009] 2 SLR(R) 111 at [71]; Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 2nd Ed, 2007) at pp 120–121.

15 Pursuant to the enactment of s 75 of the Companies Act 1980, one would think that the requirements to prove that the acts complained of were "burdensome, harsh and wrongful" and/or lacking in probity, were done away with.[23] However, unfairly prejudicial conduct was not defined and this invariably left room for interpretation and uncertainty. Initially, case law, as formulated by Slade J in *Re Bovey Hotel Ventures Ltd*,[24] held that the test was not for the minority shareholder to show that the majority shareholder consciously acted in an unfair manner or bad faith and that the test was that of a hypothetical reasonable bystander observing whether the conduct of the majority shareholder against the minority shareholders could be seen as unfairly prejudicial.[25]

16 In *Re Saul D Harrison & Sons plc*,[26] Hoffman LJ emphasised that the fairness under s 994 must be conceived in the context of the commercial relationship regulated by the articles of associations. He elucidated that unfairness:[27]

> … often turns on the fact that the powers which the shareholders have entrusted to the board are fiduciary powers, which must be exercised for the benefit of the company as a whole. If the board act for some ulterior purpose, they step outside the terms of the bargain between the shareholders and the company.

17 Equitable considerations were applied to the terms governing the company's affairs in *O'Neill v Phillips*[28] in which Lord Hoffmann expressed that fairness is not a blanket notion but should be assessed in the light of "traditional" or "general"

23 Walter Woon Cheong Ming, "A Note On Unfair Prejudice – Section 75 of the U.K Companies Act 1980" (1983) 25(2) Mal LR 396 at 398.

24 *Re Bovey Hotel Ventures Ltd* (31 July 1981), unreported but quoted and followed in *Re R.A. Noble and Sons Clothing Ltd* [1983] BCLC 273.

25 *Summit Co (S) Pte Ltd v Pacific Biosciences Pte Ltd* [2007] 1 SLR(R) 46 at [5]; *Re R.A. Noble and Sons Clothing Ltd* [1983] BCLC 273 at 290:

> … it is not necessary for the petitioner to show that the persons who have de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test, I think, is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interests.

26 [1995] 1 BCLC 14.

27 *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 18.

28 [1999] UKHL 24.

equitable principles. The court clarified that while courts exercise discretion, the context and background are important. The court further noted that what might be fair between two competing businessmen may not be fair in the context of a family.[29]

18 In a more recent decision of the High Court of England and Wales (Chancery Division) in *Michael John Isaac v Tan Sri Dato' Seri Vincent Tan*,[30] the court held that an action could be unfair in a general sense but that would not necessarily mean that the action was unfair or unconscionable in a legal sense. This was because there were no legal or equitable restrains on the majority shareholder, who was free to leverage his shareholding or creditor status as he wished.[31]

19 The court referred to *O'Neill v Phillips* and emphasised the importance of context, which it described as "an association of persons together for an economic purpose, usually with some degree of formality", including articles of association and collateral agreements between shareholders.[32] However, the court qualified this by stating that equitable considerations that make it unfair for a company to exercise its strict legal powers are also relevant.[33] The court found that there was no shareholders agreement in that case and consequently, there could be no breach of the terms agreed upon regarding the affairs of the company.[34] Further, distinguishing *Ebrahimi v Westbourne Galleries Ltd*[35] on the facts, the court found no necessity for equitable considerations to come into play as there was no understanding or arrangement binding in equity. In any case, the court concluded that the majority shareholders conduct was not unconscionable.[36]

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29 *O'Neill v Phillips* [1999] UKHL 24.
30 [2022] EWHC 2023 (Ch).
31 *Michael John Isaac v Tan Sri Dato' Seri Vincent Tan* [2022] EWHC 2023 (Ch) at [86]–[88].
32 *Michael John Isaac v Tan Sri Dato' Seri Vincent Tan* [2022] EWHC 2023 (Ch) at [89].
33 *Michael John Isaac v Tan Sri Dato' Seri Vincent Tan* [2022] EWHC 2023 (Ch) at [90].
34 *Michael John Isaac v Tan Sri Dato' Seri Vincent Tan* [2022] EWHC 2023 (Ch) at [91].
35 [1973] AC 360.
36 *Michael John Isaac v Tan Sri Dato' Seri Vincent Tan* [2022] EWHC 2023 (Ch) at [92].

20 As observed above, English law requires either (a) a breach of terms on which the affairs of the company should be conducted (such as articles of association or shareholders agreement); or (b) a breach of mutual agreement, promise or understanding that constitutes the basis of the association between the parties where equity will come into play, notwithstanding its contractual force.[37] Arguably, unconscionable action may also be required for equitable considerations to apply.

21 An interesting question to consider in the context of English law was one posed by Prof Walter Woon in 1983:[38] whether English courts have interpreted "unfair prejudice" in the liberal spirit as intended by the Jenkins Committee, or whether it has been weighed down by judicial interpretations. In the authors' view, this question is relevant even today and requires further consideration in the modern-day context.

C. Statutory remedy for oppression under Singapore law

22 Section 210 of the English Companies Act 1948 is the genesis and origin of s 181 of Singapore's Company Act[39] (and Malaysia's Company Act 1965).[40] However, these provisions have been characterised as "more powerful" as the draftsmen extended the remedy to debenture holders, eliminated the requirement to demonstrate that the circumstances would justify winding up and empowered courts to remedy the matters complained of without resorting to winding up.[41] This section evolved and was amended to become what is now s 216 of the Companies Act 1967 ("CA").[42]

23 Section 216 of the CA provides for minority protection of shareholders where:[43]

37 Alan Dignam & John Lowry, *Company Law* (10th Ed, Oxford University Press, 2018) at p 228.
38 Walter Woon Cheong Ming, "A Note On Unfair Prejudice – Section 75 of the U.K Companies Act 1980" (1983) 25(2) Mal LR 396 at 398.
39 Cap 185, 1970 Rev Ed.
40 No A129 of 2007 (M'sia).
41 Kenneth Polack, "Company Law — Statutory Relief From Oppression: *Re Chi Liung and Son Ltd*" (1969) 11(2) Mal LR 345.
42 2020 Rev Ed.
43 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [80].

> (a) the company's affairs are being conducted or the directors' powers are being exercised: (i) in a manner that is oppressive to one or more shareholders; or (ii) in disregard of the interests of one or more shareholders; or
>
> (b) an act is done or threatened or a member's resolution is passed or proposed which: (i) unfairly discriminates against one or more shareholders; or (ii) is otherwise prejudicial to one or more shareholders.

24 Section 216 is designed to address instances of oppressive, unfairly discriminatory, or prejudicial conduct with the objective of protecting minority shareholders from majority abuse. It confers flexible jurisdiction and wide powers to "do justice and address unfairness and inequity in corporate affairs".[44]

25 The four limbs under s 216 are: (a) oppression; (b) disregard of a member's interest constituting "continuing conduct" injustice; (c) unfair discrimination; and (d) prejudice. However, courts have cautioned that "there is no meaningful distinction between all four limbs".[45] This makes it unhelpful and futile to distinguish between the contours and ambit of these four limbs. What is certain is that an applicant is "not required to identify specific limbs relied on, but needs instead to demonstrate that the conduct complained of amounts to commercially unfair conduct".[46]

26 The common thread between these limbs is "some element of unfairness which would justify the invocation of the court's jurisdiction under s 216"[47] and the applicable test is "a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect".[48] In this context, Singapore's Court of Appeal has concurred with the view of English courts that commercial

44 Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 2nd Ed, 2007) at paras 120–121.
45 *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227, cited with approval in *Low Peng Boon v Low Janie* [1999] 1 SLR(R) 337 at [43].
46 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [81].
47 *Over & Over Ltd v Bonvests Holdings Ltd* [2009] 2 SLR(R) 111 at [68].
48 *Over & Over Ltd v Bonvests Holdings Ltd* [2009] 2 SLR(R) 111 at [57].

unfairness must be assessed objectively in the context of the parties' relationship.[49]

27 It is emphasised that unfairness is distinguishable from unlawfulness. Courts in Singapore have drawn this distinction, highlighting that commercial unfairness may arise even when the majority shareholder has acted lawfully. Conversely, a trivial breach of responsibilities by a director will not amount to commercial unfairness. When assessing unfairness, courts are bound to consider not only the legal rights of the parties but also their legitimate expectations as shareholders.[50] This introduces the element of equitable considerations under Singapore law. Unlike English law, such equitable considerations do not appear to be qualified by a requirement of unconscionability. Instead, the common link is that it depends on the relationship between the parties.

28 To summarise, Singaporean courts have adopted a broad approach to "oppression", focusing on commercial fairness and shareholders' legitimate expectations. These expectations arise from the company's constitutional documents, agreements between shareholders, or informal understandings.

29 Broadly, s 216(2) of the CA empowers courts to remedy oppression complaints by making such order as it thinks fit. Without limitation, the court may order:

(a) Compulsory buyout of shares: This allows the oppressed minority shareholder(s) to have their shares compulsorily bought out by other shareholders or the company itself, enabling them to exit the company on fair terms. If a court is inclined to grant this remedy, the court is also empowered to order a reduction in the share capital of the company, if required.

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49 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [81]; *cf Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 17–20; Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 2nd Ed, 2007) at paras 4.040–4.042.

50 *Leong Chee Kin v Ideal Design Studio Pte Ltd* [2018] 4 SLR 331 at [48], *per* Vinodh Coomaraswamy J, affirmed by the Court of Appeal in *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [82].

(b) Winding-up: A last resort remedy to put an end to the matters complained of only when other orders, including a buyout, cannot be enforced or has become ineffective.

(c) Direct or prohibit any act or cancel or vary any transaction or resolution.

(d) Regulate the conduct of the company in the future.

30 As evident from the words "such order as it thinks fit" in s 216(2) of the CA, courts are empowered with wide powers and discretion to remedy the matters complained of if either of the grounds in s 216(1) of the CA is satisfied.[51] Interestingly, this also extends to making restitution orders against errant shareholders or directors of the concerned company. In effect, this is the same remedy available in a derivative action initiated under s 216A of the CA.[52] The overlap between these provisions warrants closer examination, which is explored greater detail below.

31 Before that however, the focus is first turned to the Court of Appeal's observations in *Ho Yew Kong v Sakae Holdings Ltd*[53] ("*Sakae Holdings*"). The court emphasised that in an oppression case, the essential remedies are not restitution but orders such as a share buyout or a winding-up order.[54] The use of the phrase "such as a share buyout or a winding-up order" in the decision, indicates that these remedies are not exhaustive and implies that the courts powers in oppression cases may extend beyond these two remedies.[55] However, it may have had the unintended consequence of suggesting that these are essentially the two key remedies available for remedying oppression.

32 It is not surprising if a shareholder complaining of oppression is neither interested in being bought out or in winding up the company (as these may not be in the best interests of the

51 *Kwok Kok Kim v Chong Lee Leong Seng Pte Ltd* [1991] 2 MLJ 129 at 131.
52 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [118]. See also *Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] 2 SLR(R) 304 at [71]–[75]; *Lowe v Fahey* [1996] 1 BCLC 262 at 268; and *Low Peng Boon v Low Janie* [1999] 1 SLR(R) 337.
53 [2018] 2 SLR 333.
54 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [119].
55 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [119].

shareholder). While a minority shareholder may be aggrieved by the acts of the majority shareholder, the minority shareholder may seek to remedy this situation through orders regulating the affairs of the company to ensure a "business as usual" outcome. While courts have ordered cancelled resolutions and transactions to remedy oppression claims,[56] in the authors' view, the limits of judicial activism and creativity to regulate the affairs of a company remain to be tested, which is of course subject to the factual circumstance and the affairs complained of. However, in the authors' view, this may be limited if the signal is that a remedy of share buyout or winding up is reflective of whether the injury complained of is a corporate wrong or a personal wrong.

III. Derivative actions (corporate wrongs)

A. Common law derivative action

33 The rule in *Foss v Harbottle*[57] generally states that where a wrong is done to a company, only the company may sue for the damage caused to it. Shareholders have no right to initiate such action on behalf of the company, even if it was done to protect the value of their shares.[58]

34 This principle flows from the proper plaintiff rule which dictates that one party cannot bring an action against another to recover damages on behalf of a third party. Commentators have observed that this rule stems from a historic reluctance of courts to interfere in disputes concerning the internal management of business ventures.[59]

35 The most common exceptions to the *Foss v Harbottle* rule are when the act amounts to an equitable fraud, particularly

56 *Re Chi Liung & Son Ltd* [1968] 1 MLJ 97.
57 (1843) 2 Hare 461.
58 Victor Joffe *et al*, *Minority Shareholders: Law, Practice, and Procedure* (4th Ed, Oxford University Press) at para 3.09.
59 Victor Joffe *et al*, *Minority Shareholders: Law, Practice, and Procedure* (4th Ed, Oxford University Press) at para 3.10.

when the wrongdoers are in control of the company.[60] In the context of companies, the obvious example is where the majority shareholders attempt to appropriate the company's money or property for their benefit.[61] In such circumstances, the remedy that was available to shareholders was to bring a derivative claim at common law on behalf of and for the benefit of the company for the wrong done to it. Generally, the company would be joined as a defendant so that it could bear the fruits of any orders passed in its favour.[62]

36 In the 1990s, the common law derivative action began to face criticism for being "complex and arcane",[63] with some describing it as "procedural codswallop" that had accumulated over a century.[64]

37 The Law Commission expressed concern that derivative actions raised the risk of wastage in time and cost from unwarranted proceedings. It emphasised that shareholders "should not be able to involve the company in litigation without good cause".[65] The Law Commission advocated for a clear set of rules governing derivative action to ensure greater transparency "in an age of increasing globalisation of investment and growing international interest in corporate governance".[66]

60 Victor Joffe *et al*, *Minority Shareholders: Law, Practice, and Procedure* (4th Ed, Oxford University Press) at para 3.10. "Court of Appeal Rejects Second Major Attempt at a Climate-Related Derivative Action", *Herbert Smith Freehills* (9 November 2023) <https://www.herbertsmithfreehills.com/notes/climatechange/2023-11/court-of-appeal-rejects-second-major-attempt-at-a-climate-related-derivative-action> (accessed 8 April 2025).

61 "A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company, or in which the other shareholders are entitled to participate": *Burland v Earle* [1902] AC 83 at 93, *per* Lord Davey.

62 Victor Joffe *et al*, *Minority Shareholders: Law, Practice, and Procedure* (4th Ed, Oxford University Press) at para 3.10.

63 Sarah Watkins, "The Common Law Derivative Action: An Outmoded Relic?" (1999) 30 *Cambrian Law Review* 40.

64 Victor Joffe *et al*, *Minority Shareholders: Law, Practice, and Procedure* (4th Ed, Oxford University Press) at para 3.14.

65 Law Commission, *Report on Shareholder Remedies* (Law Com No 246, 1997) at para 1.9(v).

66 Law Commission, *Report on Shareholder Remedies* (Law Com No 246, 1997) at para 6.9.

38 The Law Commission arrived at three conclusions. First, the rule in *Foss v Harbottle* should be replaced by a "simple and modern procedure". Second, courts must have powers to streamline minority shareholder litigation to reduce costs and complexity. Third, there should be a provision of a "self-help remedy" to avoid the need for shareholders to resort to litigation.[67]

39 Ultimately, and in line with the recommendations made by the Law Commission, legislation introducing a statutory derivative action was enacted in England, Wales and Northern Ireland through Pt 11 of the Company Act 2006[68] ("UK CA"). This not only provided for a clear statutory process dealing with derivative actions but also had the effect of abolishing the common law derivative action which had come under significant criticism for its unnecessarily confusing and arcane jurisprudential bases.

B. Statutory derivative action under English law

40 A derivative action under the UK CA can only be brought by a member or a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.[69]

41 Further, the derivative claim "may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company".[70] As such, a derivative claim may be brought in respect of an alleged breach of any of the general duties of directors,[71] including the duty to exercise reasonable care, skill and diligence.[72]

42 Derivative claims against third parties would be permitted only in very narrow circumstances, where the damage suffered by

67 Law Commission, *Report on Shareholder Remedies* (Law Com No 246, 1997) at para 1.11.
68 c 46 (UK).
69 Victor Joffe *et al*, *Minority Shareholders: Law, Practice, and Procedure* (4th Ed, Oxford University Press) at para 4.16.
70 Companies Act 2006 (c 46) (UK) s 260(3).
71 Companies Act 2006 (c 46) (UK) Pt 10, ch 2.
72 Companies Act 2006 (c 46) (UK) s 174.

the company arose, for example, from an act involving a breach of duty by the director.

43 For a statutory derivative action to continue under the UK CA, the court must approve the continuance of the claim and must refuse to do so:

> (a) where the actual breach of duty has been authorised or ratified by the company, or where the proposed breach of duty has been ratified by it;[73] and also
>
> (b) where a person acting in accordance with his duty to promote the interests of the company would not seek to continue it.[74]

44 For the latter, the court would consider the duty of a director to promote the interests of the company, and the court will not be bound by the views of the shareholder who initiates proceedings.

45 If the above negative requirements are satisfied, the court must take further considerations into account before deciding whether to permit the derivative claim to continue.[75]

46 These considerations are not exhaustive. The court is further required to consider questions such as whether the shareholder seeking to continue the action is acting in good faith and not for an ulterior purpose[76] and/or whether another satisfactory remedy exists, for example placing the company in liquidation.[77]

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73 Companies Act 2006 (c 46) (UK) s 239.

74 Companies Act 2006 (c 46) (UK) s 263(2)(a). See also *Langley Ward Ltd v Trevor* [2011] EWHC 1893 (Ch), *per* David Donaldson QC (sitting as a deputy High Court judge).

75 Companies Act 2006 (c 46) (UK) s 263(3).

76 *Barrett v Duckett* [1995] 1 BCLC 243; *Portfolios of Distinction v Donald Ian Laird* [2004] 2 BCLC 741.

77 *Franbar Holdings Ltd v Patel* [2009] 1 BCLC 1. The existence of an alternative remedy under s 994 of the Companies Act 2006 (c 46) (UK) was an important factor in the court's decision to refuse permission to continue a derivative claim. See also Derek French, Stephen Mayson & Christopher Ryan, *Mayson, French & Ryan on Company Law* (26th Ed, Oxford University Press, 2009) at p 553.

C. Statutory derivative action under Singapore law

47 Section 216A of Singapore's CA is a statute-based derivative action. The statutory derivative action was first introduced in Singapore in 1984 by legislating what is now s 216(2)(*c*) of the CA.[78]

48 Sections 216A and 216B of the CA were first introduced through the Companies Amendment Act 1993[79] and were inspired by the provisions of Canada's Business Corporations Act,[80] and adopted with relevant modifications.[81] The provision was introduced "to alleviate the difficulties associated with the rule in *Foss v Harbottle* … such that genuinely aggrieved minority interests may be protected, and justice be done to the company".[82]

49 The Report of the Select Committee on the Companies (Amendment) Bill[83] ("Select Committee") makes clear that the intention of the committee was to: (a) provide a more effective remedy to minority shareholders, in comparison to the common law remedy, so that they could bring, defend, prosecute or discontinue an action on behalf of their corporation;[84] and (b) confer on courts the discretionary power to extend the application of the provision to any person they deem fit.[85]

50 While the intention was to provide a more effective remedy, it was not intended to abolish or replace the common

78 Walter Woon, "Protecting the Minority Shareholder" (1992) 4 SAcLJ 123 at 124.
79 Act 22 of 1993.
80 RSC 1985, c C-44 (Can).
81 Pearlie Koh Ming Choo, "The Statutory Derivative Action in Singapore: A Critical and Comparative Examination" (2001) 13(1) *Bond Law Review* 64 at 70.
82 *Tan Chun Chuen Malcolm v Beach Hotel Pte Ltd* [2023] 3 SLR 1312 at [27].
83 *Report of the Select Committee on the Companies (Amendment) Bill (Bill No 33/92)* (Parl 2 of 1993, 26 April 1993).
84 *Report of the Select Committee on the Companies (Amendment) Bill (Bill No 33/92)* (Parl 2 of 1993, 26 April 1993) at p viii, para 44.
85 *Report of the Select Committee on the Companies (Amendment) Bill (Bill No 33/92)* (Parl 2 of 1993, 26 April 1993) at p ix, para 49.

law derivative action.[86] However, the statutory remedy has made derivative actions more streamlined, making it unusual and perhaps impractical for a complainant to disregard s 216A of the CA and instead initiate a common law action. This is especially true considering that the statutory derivative action does not require the complainant to demonstrate a "fraud on the minority". While the remedy exists, it may require delving into the intention of such action and if the complainant does not initiate the action with clean hands, then it could amount to an abuse of process.[87]

51 It is interesting to note that the provision was originally intended to apply to public corporations as well. However, pursuant to representations made to the Select Committee, it decided to exclude the application to public corporations as their members have an avenue to sell their shares in the open market.[88] However, this position was amended in 2014, pursuant to the Steering Committee's recommendation that s 216A apply to listed companies in Singapore as well as Singapore companies listed on foreign stock exchanges.[89]

(1) Leave to sue or commence arbitration on behalf of the company

52 Section 216A(2) of the CA enables a complainant to apply to court for leave to: (a) commence an action in the name of or on behalf of the company; or (b) to intervene in any action or arbitration in which the company is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.

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86 *Report of the Select Committee on the Companies (Amendment) Bill (Bill No 33/92)* (Parl 2 of 1993, 26 April 1993) at p ix, para 49 and p B8, para 23. See also *MCH International Pte Ltd v YG Group Pte Ltd* [2017] SGHCR 8.

87 *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1022 at [71]. See also Walter Woon, *Woon's Corporation Laws* (LexisNexis, 2019) at para 557.

88 *Report of the Select Committee on the Companies (Amendment) Bill (Bill No 33/92)* (Parl 2 of 1993, 26 April 1993) at p ix, para 45.

89 Dr Tan Lay Hong, *The Annotated Singapore Companies Act* (Sweet & Maxwell, 2nd Ed, 2024) at para 216A.16 on p 732, relying on the Companies (Amendment) Act 2014 (Act 36 of 2014) and *Report of the Steering Committee for Review of the Companies Act* (June 2011) ch 3 and paras 143–148.

53 Section 216A(1) defines a complainant to include: (a) any member of the company; (b) the Minister, in case of a declared company under Pt 9 of the Act; or (c) a person deemed to be a "proper person" at the discretion of the court.

54 Due to the broad discretion conferred on the court, the Select Committee found it unnecessary to expressly include directors and debenture holders within the scope of the section.[90] However, authors have argued that "proper person" must be construed in the context of minority shareholders to include persons who have a financial interest in the management of the company but have limited ability to influence its management, for example, nominee directors.[91]

(2) Requirements to seek leave of the court

55 Section 216A(3) sets out three positive requirements that a complainant must satisfy in order to obtain leave of the court to commence a derivative action:

> (a) the complainant has given 14 days' notice to the directors of the company of the complainant's intention to apply to the court if the directors of the company do not bring, diligently prosecute or defend or discontinue the action or arbitration;
>
> (b) the complainant is acting in good faith; and
>
> (c) the action *prima facie* appears to be in the interest of the company.

(3) Notice requirement

56 The objective behind the 14-day notice requirement is "to give the company, acting through its board of directors, the opportunity to evaluate the complaint and consider its rights

90 *Report of the Select Committee on the Companies (Amendment) Bill (Bill No 33/92)* (Parl 2 of 1993, 26 April 1993) at p ix, para 49.

91 *Tan Chun Chuen Malcolm v Beach Hotel Pte Ltd* [2023] 3 SLR 1312 at [9]; *cf* Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at p 446.

and appropriate course of action".[92] If the company agrees to pursue the complaint on its own, the leave application would become redundant, and no further legal costs would be incurred or wasted in dealing with the issue of whether leave ought to be granted.

57 Section 216A(3)(*a*) of the CA is however silent on whether the notice must be in writing as the Select Committee was focusing on the time period of such notice rather than its form and had adopted the provision from Canada's Business Corporations Act, which is also silent on whether the notice must be in writing.

58 Courts have observed that *prima facie* there is no requirement for a written notice. However, given the need for sufficient particulars, it may be practical and prudent to issue a written notice so that the particulars are accurately conveyed, unless the facts are so simple that they can be conveyed accurately without writing.

59 Section 216A(4) of the CA gives the court the power to dispense with notice or to make such orders as the court thinks fit for the giving of notice if it is not expedient to give notice prior to the commencement of the action. It has been opined that "[i]n cases where the giving of 14 days' notice is not practicable, the complainant may give less notice or none at all before the application is made".[93] Accordingly, the burden falls on an applicant to show why notice, as required under s 216A(3)(*a*) of the CA, could not have been given or that it was not practical.[94]

60 Determining impracticability would require an inquiry, which would be a question of fact, and the court would be entitled to look at the totality of the circumstances to determine whether impracticability existed, including matters after the complaint was made.[95] One example of impracticability is when

92 *Tan Chun Chuen Malcolm v Beach Hotel Pte Ltd* [2023] 3 SLR 1312 at [16].
93 Walter Woon, *Woon's Corporations Law* (LexisNexis, Looseleaf Ed, 1994, March 2010 release) at para 602.
94 *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 at [13].
95 *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 at [17].

there is reasonable suspicion that a director would tamper with or destroy relevant evidence.[96]

(4) The requirements of good faith and prima facie *in the interest of the company*

61 There are two main facets to the "good faith" requirement that a complainant must discharge in order to obtain leave of the court.

62 The first relates to the merits of the proposed derivative action. The complainant must reasonably believe that a good cause of action exists for the company to prosecute. The corollary is that an applicant may be found to lack good faith if it is shown that no reasonable person in the same position would believe that the company had a good cause of action to prosecute.[97]

63 Secondly, a complainant may be found to be lacking in good faith if it can be demonstrated that he is bringing the derivative action for a collateral purpose. The onus is on the complainant to demonstrate that he or she is "genuinely aggrieved", and that the alleged collateral purpose is consistent with the interests of the company and not to abuse the statutory remedy.[98] For example, merely because shareholders are in dispute and are acting out of spite or have a personal vendetta against each other will not be sufficient to allege bad faith. It must also be shown that the action is devoid of legitimacy and lacks basis.

64 The requirements of good faith and *prima facie* in the interest of the company are intertwined.[99] The court must be satisfied that the company's claims would be legitimate and arguable[100] and this requires an examination of whether it would be practical and in the commercial interests of the company for

96 *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 at [15].
97 *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 at [29]–[30]; *Maher v Honeysett and Maher Electrical Contractors* [2005] NSWSC 859 at [28].
98 *Jian Li Investment Holdings Pte Ltd v Healthstats International Pte Ltd* [2019] 4 SLR 825 at [42]–[43].
99 *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 at [55].
100 *Teo Gek Luang v Ng Ai Tiong* [1998] 2 SLR(R) 426 at [18].

the action to be brought.[101] The relevant test in this regard is not whether the complainant is likely or bound to succeed but whether there is a "reasonable semblance of merit".[102]

(5) The dichotomy between personal wrongs and corporate wrongs

65 Sections 216 and 216A of the CA overlap, at least, in terms of remedies.[103] The same set of facts which cause harm or damage to the minority shareholders could also cause harm or losses to the company.[104] In such situations, it may be difficult to draw a fine distinction between corporate wrongs and personal wrongs. For example, a majority shareholder who is diverting company funds for its own benefit, despite concerns from the minority shareholders, is likely to be committing wrongs against the company and the minority shareholders, assuming that the wrong affects the interests of the minority shareholders in an unfairly prejudicial manner.[105]

66 Further, it does not help the case for a strict dichotomy as under s 216(2)(*c*), courts are, in any case, empowered to grant reliefs in favour of the company under both provisions, including restitution orders.[106]

D. Distinction between the provisions

67 The core distinction between ss 216 and 216A lies in the realm of their operation and the harm that they seek to remedy. This is apart from the differences in the procedural and substantive requirements.[107] The overlap exists mostly with respect to the available remedies and that the harm intended to

101 *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 at [56].
102 *Tan Chun Chuen Malcolm v Beach Hotel Pte Ltd* [2023] 3 SLR 1312 at [50].
103 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [90].
104 Paul L. Davies & Sarah Worthington, *Principles of Modern Company Law* (London: Sweet & Maxwell, 10th Ed, 2016) at para 20–14.
105 Paul L. Davies & Sarah Worthington, *Principles of Modern Company Law* (London: Sweet & Maxwell, 10th Ed, 2016) at para 20.014.
106 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [119].
107 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [91].

be remedied can be classified into both buckets. The differences between these two sections are elaborated in the table below:

Factor	Section 216 (oppression)	Section 216A (derivative action)
Purpose and substance of cause of action	Intended to enable minority shareholders to bring an action in their own names to protect themselves from being unfairly prejudiced by majority shareholders who use their dominant power to subject them to commercially unfair treatment.[108]	Intended to enable minority shareholders to bring an action in the company's name to right the wrong done to *the company* where those in control of the company are causing harm to the company or are breaching their duties to the company and thus cannot be counted on to cause the company to take steps to protect or advance its interests.[109]
Proper plaintiff	Minority shareholders	The company itself, but if the company does not do so, the shareholders need to seek leave of the court to sue on behalf of the company.
Purpose	Remedies personal harm to the shareholder's interests, *eg*, exclusion from management, diversion of opportunities. Protects individual shareholders from unfair exclusion, discrimination, or breach of legitimate expectations.	Remedies corporate harm that affects the company's assets, reputation, or operational integrity. Preserves the company's ability to recover and address wrongs that harm the company as a whole.

108 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [89].
109 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [89].

Procedural requirements	None	(a) Leave of the court must be sought. (b) The company must be provided with a notice of at least 14 days. If notice is not given, the burden lies on the complainant to demonstrate why it was impractical to provide the 14-day notice.[110]
Substantive requirements	The act(s) complained of must be commercially unfair against the interests of the minority shareholders, which can be demonstrated through breach of relevant agreements, constitution or through a breach of legitimate expectations.[111]	The act(s) complained of must be a wrong done to the company and the complainant must demonstrate that the action is initiated in good faith and in the interest of the company.[112]
Reliefs available	Personal relief such as: (a) buy-out orders and alter share capital, if required; (b) injunctions to prevent oppressive conduct; (c) modify, vary or cancel transactions and/or resolutions; (d) orders to regulate future company affairs; (e) authorise civil proceedings to be bought in the name of the company; and (f) winding up, as a last resort, if any appropriate and/or buy-out orders cannot be enforced.	Corporate relief, if proceedings are authorised to be brought in the name of the company: (a) recovery of misappropriated funds; and (b) damages or compensation to restore the company's position.

110 *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 at [13].
111 *Over & Over Ltd v Bonvests Holdings Ltd* [2009] 2 SLR(R) 111 at [78].
112 *Tan Chun Chuen Malcolm v Beach Hotel Pte Ltd* [2023] 3 SLR 1312 at [50].

Example of abuse of process	Attempting to bypass seeking leave of the court under s 216A and seeking remedies that only address wrongs against the company.	Using s 216A for personal grievances or vendetta for disputes between shareholders that have no connection with the interests of the company.

68 Keeping the above distinctions in mind, courts have warned that s 216 of the CA should not be used to vindicate wrongs which are, in substance, wrongs committed against a company.[113] It is rather clear that the distinction between a corporate wrong and a personal wrong is not always straightforward. However, the legal inquiry is whether the real injury complained of, in relation to the company's affairs, was committed in disregard of the interests of the minority shareholder and which cannot be adequately addressed by the remedies provided under s 216A of the CA.

E. Analytical framework for distinction

69 The Singapore Court of Appeal in its decision in *Sakae Holdings* has laid down the following analytical framework to ascertain whether an oppression claim that is being pursued under s 216 is an abuse of process:[114]

(a) **Injury**

(i) What is the real injury that the plaintiff seeks to vindicate?

(ii) Is that injury to the plaintiff distinct from the injury to the company and does it amount to commercial unfairness against the plaintiff?

(b) **Remedy**

(i) What is the essential remedy that is being sought and is it a remedy that meaningfully vindicates the real injury that the plaintiff has suffered?

113 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [85].
114 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [116].

(ii) Is it a remedy that can only be obtained under s 216?

70 The transactions in question in *Sakae Holdings* appeared at first blush to be wrongs against the company as they related to funds diverted from the company to related entities, unauthorized loans, and sham transactions.[115] However, the remedy Sakae Holdings Ltd sought was either a winding up of the joint-venture company or a buyout of its shares in the joint-venture company.[116]

71 The appellants contended (amongst other things) that Sakae Holdings Ltd's claims were essentially in respect of corporate wrongs and could be brought under s 216 of the Companies Act[117] and further that Sakae Holdings Ltd could have remedied the situation through self-help measures which were not taken.[118]

72 While the court drew the distinction between corporate wrongs and personal wrongs for the purposes of setting out a framework for ss 216 and 216A of the CA, it ultimately affirmed that the action for oppression under s 216 was properly constituted as a plaintiff shareholder can rely on the unlawfulness of an errant director's conduct as evidence of the manner in which the company's affairs are conducted in disregard of the plaintiff minority shareholder.[119]

73 In respect of remedy, it was held that winding up or share buyouts were the only ways in which Sakae Holdings could exit the joint venture with as little loss as possible and thereby meaningfully vindicate its injury, *ie*, the misuse of its investment and the breach of its expectations. These remedies were available only in an oppression action under s 216 of the CA, and not under a statutory derivative action under s 216A of the CA.[120]

115 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [12]–[26].
116 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [128].
117 Cap 50, 2006 Rev Ed.
118 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [32].
119 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [39(a)] read with [53].
120 *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333 at [128].

F. The blurred lines: Is it necessary?

74 As seen above, the distinction between corporate wrongs and personal wrongs under Singapore law often hinges on the remedy sought, particularly whether it falls under s 216 of the CA. This remedy-focused differentiation suggests that the lines between these categories are blurred, raising questions about whether the distinction is substantive or merely procedural. It is, after all, a reasonable expectation of shareholders that the company's affairs will be managed competently, and that shareholder value will be maximised.

75 One of the original purposes of derivative actions was to prevent multiple shareholders from initiating duplicative legal proceedings for the same cause of action. However, class action lawsuits are not uncommon to Singapore.[121] A well-structured class action regime designed specifically for minority shareholders can not only minimise the duplication of proceedings but also lower litigation costs for both companies and shareholders, fostering a more efficient and inclusive approach to shareholder grievances.[122]

76 For instance, consider a scenario where a company wrongfully transfers $10,000 to a majority shareholder. If minority shareholders collectively initiate a class action at a shared cost of $500, this approach incentivises collective participation and ensures broader access to justice.[123] Conversely, requiring individual shareholders to bear the full litigation cost individually would only favour the wealthiest and the most bitter shareholders.[124] Such a framework creates a chilling effect on shareholders, enabling directors and majority shareholders

121 Under O 4 r 6(1) of the Rules of Court 2021 and O 10 r 19(1) of the Singapore International Commercial Court Rules 2021, which provide that where numerous persons have a common interest in any proceedings, such persons may sue or be sued as a group with one or more of them representing the group.

122 Edward Iacobucci, "Reconciling Derivative Claims and the Oppression Remedy" (2000) 12 *Supreme Court Law Review* 87 at 94.

123 Edward Iacobucci, "Reconciling Derivative Claims and the Oppression Remedy" (2000) 12 *Supreme Court Law Review* 87 at 92–94.

124 Walter Woon, "Protecting the Minority Shareholder" (1992) 4 SAcLJ 123 at 132.

to exploit the inertia among dispersed shareholders. A divide-and-rule strategy, often justified by the argument that derivative actions are "bad for business", undermines corporate accountability. If courts were more willing to enforce the rights of minority shareholders without strictly confining them to derivative remedies, that would provide sufficient deterrence against autocratic corporate leaders from engaging in egregious conduct. This, in turn would encourage them to maximise shareholder value, and help deter needless litigation.[125]

77 Additionally, shareholders pursuing oppression claims under s 216 often concurrently advance derivative claims under s 216A. The practical overlap between these actions means that the distinction often lacks meaningful application, as aggrieved shareholders commonly seek relief that encompasses regulating company conduct, undoing harmful transactions, or securing a buyout.

78 The procedural requirement for obtaining leave of court to pursue derivative actions, intended to filter out frivolous claims, inadvertently bifurcates the proceedings into two stages. The first stage involves determining whether the claim is *prima facie* valid and brought in good faith, while the second adjudicates the substantive merits. This process not only prolongs litigation but also adds unnecessary complexity, detracting from the efficiency it purports to serve. The Singapore Rules of Court 2021 provides for striking out of frivolous and vexatious claims and in the authors' view, there is no good reason why corporate litigation should be treated differently.[126]

79 Critiques similar to these have been voiced by Canadian academics, and many of their observations appear to resonate with the practical challenges faced in Singapore.[127] The subjective and uncertain demarcation of corporate versus personal wrongs leaves minority shareholders in a precarious position, compelled

125 Walter Woon, "Protecting the Minority Shareholder" (1992) 4 SAcLJ 123 at 132.
126 Rules of Court 2021 O 9 r 16.
127 Edward Iacobucci, "Reconciling Derivative Claims and the Oppression Remedy" (2000) 12 *Supreme Court Law Review* 87.

to strategise their legal recourse based on the remedy sought or to pursue overlapping claims – both of which risk inefficiency and judicial resource wastage.

80 In the authors' view, it may be time to reconsider the rigid distinctions between ss 216 and 216A of the CA. A unified statutory framework addressing both personal and corporate wrongs could streamline remedies while addressing the practical overlap between these provisions. Furthermore, incorporating mechanisms to encourage class actions would mitigate the risk of fragmented proceedings, reduce costs, and enhance access to justice for minority shareholders.

IV. Conclusion

81 The interplay between oppression and derivative action claims under the CA highlights the challenges of balancing shareholder rights with corporate governance. While the distinction between corporate wrongs and personal wrongs is theoretically sound, its practical application often proves to be complex and inefficient, particularly in cases of overlapping grievances.

82 As Singapore's corporate landscape evolves, the rigid dichotomy between ss 216 and 216A may no longer serve its intended purpose. Instead, a unified framework that addresses both personal and corporate wrongs could provide clearer guidance and reduce the procedural hurdles that hinder access to justice. Additionally, introducing mechanisms for collective action, such as class actions, would empower minority shareholders to act collectively, reduce costs, and promote accountability.

83 Ultimately, revising and updating the CA to reflect modern commercial realities would not only streamline legal recourse for minority shareholders but also strengthen the overall framework of corporate governance in Singapore, which would assure foreign investors that their interests would be well safeguarded.

84 Until such reforms are considered, solicitors and courts are left with no other option but to navigate the blurred lines

and conduct a factual inquiry, with a focus on the injury and remedy sought, to determine whether the injury complained of is a personal wrong against a shareholder or a corporate wrong against the company, as opposed to focusing on the harm caused and remedying the harm.