

CORPORATE LAW SUMMARY



LAWSKOOL.SG

LAWSKOOL SINGAPORE

Table of Contents

| | |
|--|----|
| 1. Common Law Derivative Action | 8 |
| 1.1 Decision to Sue: <i>Who can sue on behalf of the company?</i> | 8 |
| 1.2 Is it possible to over-ride the board's decision? | 9 |
| 1.3 When there is a disagreement between the board and the members? | 9 |
| 1.4. Common Law-‘Proper Plaintiff Rule’ | 10 |
| 1.5 Justification for ‘proper plaintiff rule’ | 10 |
| 1.6 Actions to which the ‘Proper Plaintiff’ rule does not apply | 11 |
| 1.6.1 Personal Rights: | 11 |
| 1.6.2 Special Majorities: | 12 |
| 1.6.3 Ultra Vires | 12 |
| 1.6.4 Fraud on the Minority Exception | 13 |
| 1.6.5 Other special factors: | 14 |
| 2. STATUTORY DERIVATIVE ACTION: S 216 A | 14 |
| 2.1 Rationale: | 14 |
| 2.2 Remedies under S 216 A: | 14 |
| 2.3 Procedure: | 15 |
| 2.3.1 Notice requirements | 15 |
| 2.3.2 Substantive Requirements | 17 |
| 2.3.3 Ratification | 17 |
| 3. Oppression, Disregard of Member’s Interests and Prejudicial Conduct | 17 |
| 3.1.1 Who may petition under s 216? | 18 |
| 3.1.2 Basis of the petition | 18 |
| 3.2 Examples of Oppression | 19 |
| 3.2.1 Dominant members advancing their own interests: | 19 |
| 3.3 Other relevant factors | 21 |
| 3.4 Possible Court Orders | 22 |
| 3.5 S 216 and Derivative Action | 22 |
| 4. EQUITY CAPITAL | 27 |
| 4.1 OVERVIEW | 27 |
| 4.2 CHARACTERISTICS | 28 |

| | |
|---|----|
| 4.3 Prospectus | 29 |
| 4.3.1 What information?..... | 29 |
| 4.3.2 How much information? | 30 |
| 4.3.3 Disclosure Rationale:..... | 30 |
| 4.4. Old Regime vs. New Regime: | 30 |
| 4.5 Exempt Offerings:..... | 30 |
| 4.5.1 Small offering exemption under s 272A of the SFA | 30 |
| 4.5.2 Private placement exemption under s 272B of the SFA | 30 |
| 4.5.3 Institutional investors under s 274 of the SFA..... | 31 |
| 4.5.4 Accredited investors under s 275 of the SFA..... | 31 |
| 4.6 Liabilities | 31 |
| 4.6.1 Whose knowledge is relevant to the sort of information that must be disclosed? | 31 |
| 4.6.2 Defenses to liability under s 253..... | 32 |
| 4.6.3 Consequences of making a false disclosure..... | 32 |
| 4.6.4 Civil Remedy under S254 of the SFA: | 32 |
| 4.6.5 Tortuous Remedy | 33 |
| 5. Capital Reduction | 34 |
| 5.3 DIVIDENDS PAYMENT | 35 |
| 5.3.1 Offence | 35 |
| 5.4 Rule against Financial assistance | 36 |
| 5.4.1 When is financial assistance given? | 36 |
| 5.4.2 Elements of establishing financial assistance:..... | 37 |
| 5.5 Exceptions..... | 39 |
| 5.5.1 Solvency based financial assistance: | 39 |
| 5.5.2 By passing a SPECIAL Resolution: [s76 (10)] | 40 |
| 5.6 Penalties for breach of s76 | 40 |
| 5.6.2 Criminal | 40 |
| 5.6.3 Civil..... | 40 |
| 6. Debt Financing..... | 40 |
| 6.1 Definition of Debenture: Companies Act | 40 |

| | |
|--|----|
| 6.2 Rights of Debenture holders: | 41 |
| 6.3 Fixed and Floating Charges | 41 |
| 7. Company Administration | 49 |
| 7.1 The Company Secretary | 49 |
| 7.2 Service of Documents | 49 |
| 7.2.1 Service of Documents on a Company | 49 |
| 7.2.2 Service of Documents on a Member | 50 |
| 7. Company Accounts | 55 |
| 8. Receivership | 57 |
| 8.1 . Appointment of a Receiver | 57 |
| 8.2 Effects of Receivership | 59 |
| 8.3 Duties of Receivers (and Lenders) | 60 |
| 8.3.1 Duty to Borrower in Enforcing Security | 60 |
| 8.4 Rights and Liabilities of Receivers | 64 |
| 9. Judicial Management | 65 |
| 9.1 Applying for judicial management | 65 |
| 9.2 Pre-requisites for making a JM Petition | 65 |
| 9.3 When will the courts grant a JM order: | 65 |
| 9.5.1 Statutory Moratorium: | 66 |
| 9.6 Powers of Judicial manager | 66 |
| 9.6.1 General Powers and Duties | 66 |
| 9.6.2 Power to deal with Charged Property | 67 |
| 9.6.3. Protection for Creditors and Members | 67 |
| 9.7 Rights and Liabilities of judicial manager | 67 |
| 9.7.1 Liabilities | 67 |
| 10. Winding Up Part I | 70 |
| 10.1 Winding up by the Court (involuntary) | 70 |
| 10.1.2 Grounds for winding up by the court | 72 |
| 10.2 Voluntary Winding up | 76 |
| 10.2.1 By members (by reason of its liabilities) | 76 |

| | |
|---|----|
| 11. Winding up II..... | 76 |
| 11.1 Consequences of winding up | 76 |
| 11.1.1 Stay of proceedings | 76 |
| 11.1.2. Avoidance of disposition of property | 77 |
| 11.1.3 Director's power | 77 |
| 11.1.4 Effect on business | 78 |
| 11.2 Liquidators' power | 78 |
| 11.2.1 Unfair preference [s329 read with s 99-100 BA] | 78 |
| 11.2.2 Undervalue transactions [s329 read with s 98 +100 BA] | 79 |
| 11.2.3 Avoidance of floating charge created within 6 months of liquidation..... | 79 |
| 11.2.4 Contracts with director[s 331] | 79 |
| 11.3 Order of payments..... | 80 |
| 11.4 Actions against Culpable person | 80 |
| 12. Corporate Groups | 80 |
| 12.1 Definition of a subsidiary: | 80 |
| 12.2 Recognizing the single entity approach:..... | 81 |
| 12.3 Recognizing the single entity approach (economic argument):..... | 81 |
| 12.5 Implications of recognizing a group entity: | 82 |
| 12.6. Directors' Duty: Taking into account the interest of the group as a whole | 82 |
| 12.6.1 Nominee Directors: | 83 |

Cases

| | |
|---|----|
| <i>Alexander v Automatic Telephone Co</i> | 13 |
| <i>Auston International Group Ltd v Public Prosecutor</i> [2007] SGHC 129 | 32 |
| <i>Avel Consultants Sdn Bhd v Mohd Zain Yusof</i> | 8 |
| <i>Barnes v Addy</i> | 35 |
| <i>Belmont Finance Corporation v Williams Furniture</i> | 37 |
| <i>Belmont Finance v Williams Furniture</i> | 35 |
| <i>Bensa Bhd v Malayan Banking Bhd</i> | 40 |
| <i>Borland's Trustee v Steel Bros Ltd</i> [1901] 1 Ch 279 | 27 |

| | |
|--|----|
| <i>Charterbridge Corporation v Llyods Bank Ltd</i> | 82 |
| <i>Cheah Geok Tuan v Lie Khin Sin</i> [2006] 1 SLR 340 | 42 |
| <i>Cook v Deeds</i> | 13 |
| <i>Credit Development Pte. Ltd v IMO Pte. Ltd</i> | 9 |
| <i>DHN Food Distributors</i> | 81 |
| <i>Dresdner Bank AG v Ho Mun-Tuke Don</i> [1992] 3 SLR 307 | 46 |
| <i>Electro Magnetic (S) Ltd v DBS</i> (1994) | 67 |
| <i>Estmanco (Kilner House) Ltd v Greater London Council</i> | 12 |
| <i>Golden Village Multiplex v Phoon CHiong Kit</i> | 82 |
| <i>Howard Smith Ltd v Ampol Petroleum Ltd</i> [1974] AC 821 | 15 |
| <i>In the Matter of the Companies Ordinance, Cap 32 and in the Matter of Power Point Engineering Limited</i> [2000] HKCFI 800 | 69 |
| <i>Johnson v Gore Wood</i> [2002] 2 AC 1 | 11 |
| <i>Kay Hian v Phua Ooi Yong Jon</i> | 45 |
| <i>Kitnasamy v Nagatheran</i> [2000] 2 SLR 598 | 22 |
| <i>Kumagai Gumi v Zenencon Pte Ltd</i> [1995] 2 SLR 297 | 24 |
| <i>Lai Shit Har v Lau Yu Man</i> [2008] SGCA 33 | 69 |
| <i>Lim Swee Kiang v Borden</i> [2006] 4 SLR 745 | 25 |
| <i>Lim Swee Kiang v Borden</i> | 22 |
| <i>Loh Poh Wai v Wei Shen Marine Services Pte Ltd</i> [1977 SGHC]: | 49 |
| <i>Low Peng Boon v Low Janie</i> [1999] 1 SLR 761 | 19 |
| <i>Marra Developments v BW Rofe</i> | 34 |
| <i>Metalform Asia v Holland Leedon</i> [2007] 2 SLR 268 | 73 |
| <i>Multi Pak v Intraco</i> | 35 |
| <i>Multi-Pak Singapore v Intraco</i> | 37 |
| <i>National Provincial and Union Bank of England v Charnley</i> | 46 |
| <i>Ng Wei Teck Michael v Oversea-Chinese Banking Corp</i> | 45 |
| <i>O'Neil v Phillips</i> [1999] 1 WLR 1092 | 20 |
| <i>O'Neil v Phillips</i> 1 WLR 1092 | 23 |
| <i>Pac-Asian services v European Asian Bank AG</i> | 72 |
| <i>Pang Yong Hock v PKS Contracts Services</i> [2004] | 16 |

| | |
|--|----|
| <i>PP v. Lee Syn Pau</i> _____ | 37 |
| <i>Prudential Assurance v Newmann Industrial</i> _____ | 11 |
| <i>Re Bintan Lagoon Resort Ltd</i> [2005] SGHC 151 _____ | 67 |
| <i>Re Cosmotron Electronics</i> [1989] _____ | 69 |
| <i>Re Dayang Construction and Engineering Pte Ltd</i> [2002, High Court] _____ | 72 |
| <i>Re Great Eastern Hotel</i> [1989] 1 MLJ 161 _____ | 71 |
| <i>Re Kong Thai Sawmill</i> [1978] 2 MLJ 277 _____ | 24 |
| <i>Re Lin Securities</i> [1988] 1 SLR (R) 220 _____ | 42 |
| <i>Re Northwest Forest Products Ltd</i> [1975] 4 WWR 724 _____ | 15 |
| <i>Re Sampete Builders</i> (1989) 1 MLJ 393 _____ | 71 |
| <i>Re Sampete Builders</i> (1989) 1 MLJ 393] _____ | 71 |
| <i>Re Severn and Wye and Seven Bridge Railway Co</i> _____ | 34 |
| <i>Re Thundercrest Ltd</i> [1994 EWHC] _____ | 49 |
| <i>Re Wragg</i> [1897] 1 Ch 796 _____ | 27 |
| <i>Re Yorkshire Woolcombers Association</i> _____ | 41 |
| <i>Roberto Building Material Pte Ltd v OCBC</i> [2003 SGCA], _____ | 59 |
| <i>Scottish Co-operative Wholesale Society v Meyer</i> [1959] AC 324 _____ | 18 |
| <i>Seah Eng Lim v P & O Banking Corp</i> [1933] SSLR 236 _____ | 41 |
| <i>Selangor United Rubber Estates v Craddock</i> _____ | 35 |
| <i>Shaw v Shaw</i> [1935] 2 KB 113 _____ | 9 |
| <i>Sim Yong Kim v Evenstar</i> [2006] 3 SLR 827 _____ | 18 |
| <i>Sim Yong Kim v Evenstar Investments Pte Ltd</i> [2006] 3 SLR 827 _____ | 26 |
| <i>Tarling v PP</i> [1981 SGCA], _____ | 56 |
| <i>Tong Keng Meng v Inno-Pacific Holidays</i> [2001] 4 SLR 485 _____ | 24 |
| <i>Tong Tien See Construction v Tong Tien See</i> [2002] 3 SLR 76 _____ | 71 |
| <i>Towers v African Tug Boat</i> _____ | 35 |
| <i>United Investment & Finance v Tee Chin Yong</i> _____ | 8 |
| <i>Waddington v Chan Chun Hoo</i> _____ | 83 |
| <i>Wilson v Kelland</i> _____ | 45 |
| <i>Win Line (UK) v Masterpart</i> _____ | 80 |

| | |
|---|----|
| <i>Wu Yang Construction v Mao Yong Hui</i> | 38 |
| <i>Wuu Khok Chiang George v ECRC Land Pte Ltd [1999 SGCA]</i> | 54 |

1. Common Law Derivative Action

1.1 Decision to Sue: *Who can sue on behalf of the company?*

Qn: 'Which person or body of persons is the company for the purpose of authorizing the litigation?'

(1) *Reference to the Articles of Association:*

- If the articles specify that a certain person or body may authorize litigation on the company's behalf, that person is the company for the purpose of suing and defending. However, usually nothing of this sort is stated in the articles.

(2) *Board of Directors:*

- Since, such a power is never expressly written down, the power to manage is usually vested with the board of directors. It is arguable that the managing director has the implied authority to commence legal proceedings in the name of the company. It is impossible to require the board or general meeting of a company to meet and specifically authorize the managing director to commence litigation for recovery of a debt.
- However, every suit brought by the Managing director has to be exercised in the interests of the company. The managing director may not commence litigation in order to further his own personal interests. If the lawsuit is not in the company's best interest or it is being brought to further the director's own personal interest, it should not be authorized. This is because a managing director has only the implied authority to do things that are in the company's interest.

Avel Consultants Sdn Bhd v Mohd Zain Yusof [VC George] held that 'in the absence of express limitation to the contrary, the managing director of a company has the implied authority to commence legal proceedings in the name of the company'.

United Investment & Finance v Tee Chin Yong [Chua J] held that the managing director did not have the power to authorize the proceedings unless that power had been vested in him by the board.

Woon on Company Law opines that the decision in *Avel Consultants* is correct for it is inefficient to require the board or general meeting to convene just so to authorize the managing directors to commence litigation. Also, the solicitor demanding a board resolution before commencing every single routine debt collection and litigation would be inefficient and ridiculous. Thus, the position should be that the managing directors have the implied authority to commence legal proceedings in the name of the company. The power to institute and defend legal actions is a subset of the power of management and since the managing director has the power to manage, he necessarily has such powers (start and stop suit).

1.2 Is it possible to over-ride the board's decision?

Shaw v Shaw [1935] 2 KB 113

Facts:

Defendants who were directors and were indebted to the plaintiff company had agreed to a Settlement term that the 1st respondent would resign as governing directors and together with the other 2 defendants, be ordinary directors. The company's articles were altered so as to provide the defendants with no control over their debts. Later a special resolution was passed that provided the ordinary directors with no right in respect of the company's financial affairs and other businesses which they only held rights of voting and control which was conferred upon them by the permanent directors.

Holding:

"I think the judge was also right in refusing to give effect to the resolution of the meeting of the shareholders requiring the chairman to instruct the company's solicitors not to proceed further with the action. A company is an entity distinct alike from its shareholders and its directors. *Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers.*

The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove.

They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders. The law on this subject is, I think, accurately stated in Buckley on Companies as the effect of the decisions there mentioned: see 11th ed., p. 723"

1.3 When there is a disagreement between the board and the members?

- Usually, the courts would not interfere with the decision of the directors if they had been exercised in *bona fide* in the interest of the company. Factors such as cost of proceedings outweighing the damages recoverable; defendant may have been a long time customer or supplier of the company which would be damaging to the business relationship; adverse publicity are all taken into consideration.

John Shaw v Shaw: Members cannot over-ride the director's decision.

Credit Development Pte. Ltd v IMO Pte. Ltd: Previous form of article vesting management powers in the board does allow the members to give instructions to the board under certain circumstances.

Powers of directors

157A. —(1) The business of a company shall be managed by or under the direction of the directors.

(2) The directors may exercise all the powers of a company except any power that this Act or the memorandum and articles of the company require the company to exercise in general meeting.

- S 157 A: Its instatement does confirm that the business of the company shall be managed by the directors and the directors may exercise all the powers of a company except any power that the CA or MA expressly reserved by the company. Thus, the general meeting cannot by passing a resolution instruct the directors what to do without first amending the articles or the MA.

1.4. Common Law-‘Proper Plaintiff Rule’

*Usually invoked to prevent members suing to enforce corporate rights.

Foss v Harbottle:

Richard Foss and Edward Starkie Turton were two minority [shareholders](#) in the "Victoria Park Company". The company had been set up in September 1835 to buy 180 acres of land near Manchester. This became [Victoria Park, Manchester](#). The claimants alleged that property of the company had been misapplied and wasted and various mortgages were given improperly over the company's property. They asked that the guilty parties be held accountable to the company and that a receiver be appointed.

Holding:

The Vice-Chancellor held that the conduct with which the defendants were charged was not an injury to the plaintiffs exclusively; it was an injury to the corporation as a whole. The corporation and the members are not the same thing. Accordingly, the action could not be maintain by the plaintiffs.

The court dismissed their claim and held that when its directors wrong a company it is only the company that has standing to sue. In effect the court established two rules:

First, the "*proper plaintiff rule*".

The Court stated as such: *First, the proper plaintiff in an action in respect of a wrong alleged done to a company ... is prima facie the company itself.*

Second, the "*majority rule principle*": It states that if the alleged wrong can be confirmed or ratified by a simple majority of members in a general meeting, then the court will not interfere.

Secondly, where the alleged wrong is a transaction which might be made binding on the company ... on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of the company ... is in favour of what has been done then cadit question the matter admits of no further argument.

1.5 Justification for ‘proper plaintiff rule’

- (1) Possibility of a multiplicity of suits by individual shareholders on the same subject, matter may be avoided.
- (2) It avoids the situation whereby the alleged wrongdoing may be ratified by the majority subsequently by passing a resolution and therefore resulting in the suit being brought in vain.
- (3) It prevents vexatious actions begun by one or two minority shareholders trying to blackmail the company.

1.6 Actions to which the 'Proper Plaintiff' rule does not apply

- This is when the minority member sues in his own name to enforce the company's rights. The member is not suing to enforce his own rights but rather that of the company.
- However, the action could be struck out by the Courts if it is argued that the company's cause of action is not vested in a member. This could be avoided if the plaintiff can show that the case falls within one of the exceptions to the rule in Foss v Harbottle.
- It is contentious whether the rules stated below can even be considered rules. *Woon* at para 9.26 stated that below are the situations when the rule is not applicable. Calling them exceptions is misleading as for something to be an exception only when the rule is applicable and they are waived for particular reasons. Also, personal rights exception is not an exception but falls out of the ambit of the Foss v Harbottle rule. The member is seeking to enforce his own rights and cannot be subjected to the rule in *Foss*. The 'justice of the case exception' was doubted in the Prudential Assurance v Newmann Industrial case.

Below are the following exceptions which can be gleaned from case law:

1. *Ultra Vires acts*
2. *Fraud on the minority*
3. *Special majorities*
4. *Personal rights*
5. *Where the justice of the case requires it*

1.6.1 Personal Rights:

- This is not an exception *per se* but rather it falls outside the ambit of the rule in *Foss v Harbottle*.
- Also, personal rights exception isn't an exception but falls out of the ambit of the *Foss v Harbottle* rule. The member is seeking to enforce his own rights and cannot be subjected to the rule in *Foss*.

Where the harm suffered could support both a corporate action and a personal action

- Though the courts could not stop a member from pursuing his own personal action, this is now subject to the rule laid down by the HOL in Johnson v Gore Wood [2002] 2 AC 1, that a shareholder cannot recover a loss which is simply reflective of the company's loss, even though the shareholder's cause of action is independent of the company's.
- **Reflective loss principle:** It is justified on the grounds of preventing the wrongdoer having to compensate twice for essentially the same loss, since a diminution of share value is merely a natural result of a depletion of the company's assets. The basis is to prevent an abuse of the process and to avoid a windfall to the shareholder, since the loss can be made good by replenishing the company's assets through an action by the company against the wrongdoer.

Also, the HOL went on to add that the rule shall bar a shareholder from taking a personal action 'even if the company, acting through its constitutional organs has declined or failed to make good that loss'. Thus, if the shareholders decided to settle for a lesser remedy or not follow with the litigation, the shareholders only have a right to sue the board for negligence and not the wrongdoer.

Unless of course it can be proven that: [situation whereby the principle is not applicable]

- (1) Where a company suffers a loss but has no cause of action to sue to recover that loss, the shareholder may sue in respect of it.
- (2) Where the shareholder suffers a loss that is separate and distinct from that suffered by the company caused by a breach of duty independently owed to the shareholder, the shareholder, then, may sue to recover his loss.

1.6.2 Special Majorities:

- It is a subset of the personal right discussion. Where the Articles specifies 80% majority is required and if this requirement is ignored than any member may complain to court.

1.6.3 Ultra Vires

- If the majority members contravene the MA and are threatening to do an act or enter into a transaction that is ultra vires, a member may sue to restrain it. It is an action to which the rule of *Foss v Harbottle* does not apply. The minority members may sue to restrain the company on the basis that the M&A is a contract among the members *inter se*: S 39 (1).
- At common law the rule in *Foss v Harbottle* has no application where act complained of is wholly *ultra vires*. This is because an *ultra vires* act cannot be ratified at common law and thus a member would be allowed to recover the company's property from a 3rd party to whom it had been transferred to under the *ultra vires* agreement.
- In Singapore, an *ultra vires* exception is not void because of the application of s 25(1). Thus, the question of recovering the property from a party to the *ultra vires* agreement will never arise. Secondly, the action to restrain the *ultra vires* act will not be prevented by the rule in *Foss v Harbottle* as the member would be suing to enforce his own personal rights.



To order the complete version of the lawskool Corporate Law Summary please visit
www.lawskool.sg