

Lesson 1: Overview of Business Organisations

Types of Business Organisations

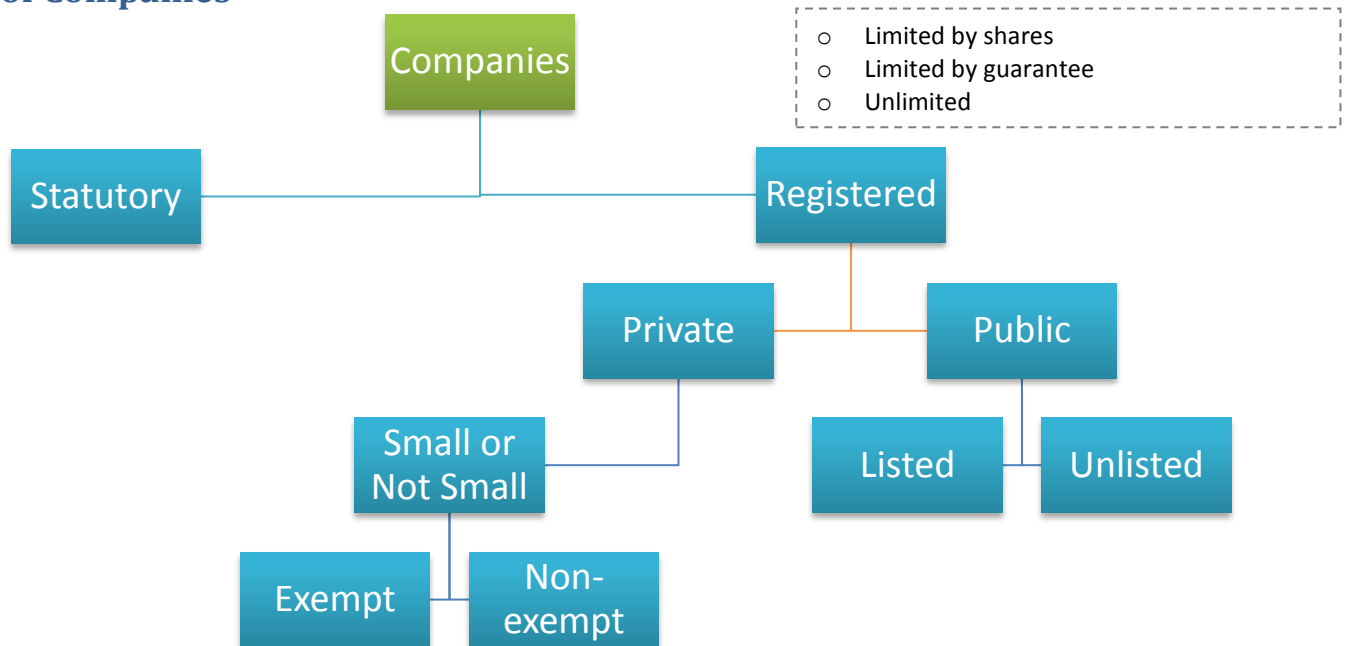
**See handout/notes*

Companies

Company is business entity registered under the Companies Act (Cap 50). It is an *artificial person* created by law, and is governed by:

- **Legislation:** (1) Companies Act (Cap 50); (2) Securities and Futures Act (Cap 289); (3) SGX Listing Manual; (4) Code of Corporate Governance (****only for listed coys**)
- **Case law** (judicial judgments):
 - Gives guidance on interpreting and applying the provisions of the CA
 - Common law or equitable doctrines fills in gaps in areas not dealt with by the CA
- → **Companies Act takes precedence over case law if there is any conflict between the two**

Type of Companies



Private companies

- **Non-exempt private company [s18]**
 - (1) Cannot freely transfer shares → in constitution, usually either require BOD approval prior to transfer or give existing members pre-emptive rights to purchase shares
 - (2) No more than 50 members
 - Can be registered as a private coy or converted into one [s31]
- **Exempt private company [s4]**
 - Must be a private coy, and
 - (1) No corporate members – direct or indirect beneficial i/r (all shareholders are individuals)
 - (2) No more than 20 members
 - *Might be fully owned by govt and declared as EPC by govt in lieu of national interests
 - Exemptions:
 - Not required to file financial statements with annual returns with ACRA [8th]
 - Can loan to director [s162 to s163]
- **Small company [13th schedule]**
 - Private coy throughout the financial year
 - Satisfies any 2 of the criteria for each of the two financial years immediately preceding this FY:
 - Revenue does not exceed \$10m
 - Value of coy's total assets at the end of each FY does not exceed \$10m
 - At end of each FY, have not more than 50 employees
 - Exempted from audit requirements [s205C]

Public companies

Anything that is not private coy

- **Listed company:** shares are listed for trading on SGX
- CA provisions applying only to public coys:
 - **[s64A]:** public coys that wish to issue different class of shares can only do so if such issue + rights attached to each class is provided for in coy's constitution
 - **[s199(2A)]:** public coys required to devise and maintain a system of ICs to provide assurance that assets are safeguarded and that transactions are duly authorized
 - **[s150]:** voting in of directors of public coys must be done individually
 - **[s152]:** directors of public coys can be removed notwithstanding anything in coy's constitution

Laws & Regulations for Private vs. Public Companies

Type	Law and regulations
Listed company	CA + SFA + SGX rules + Code of Corporate Governance
Unlisted public company	CA (most provisions)
Private company	CA but with some exemptions (e.g. ss 64, 78B, 175A, etc)
Exempt private company	CA (private company), with additional exemption in ss 162/163
Small company	CA (private company), with additional exemption in s 205C

Classification according to member's liability

- **Companies limited by shares:** liability of members limited by constitution to the amt, if any, unpaid on the shares respectively held by them (each SH loss is limited by the amt he invested into the coy)
- **Unlimited companies:** members have no limit placed on their liability to contribute to the debts of the coy
- **Companies limited by guarantee:** liability of members limited to the respective amts that the members guarantee to contribute to the property of the coy if it is wound up = 'guarantor' (no need to invest in money when coy is set up)

Corporate Group

- **Holding Coy and Subsidiary [s5]**
 - Company B is a subsidiary of A if:
 1. A controls composition of board of director of B, or
 2. A controls ≥ 50% of voting power (NB: not share capital) of B, or
 3. B is a subsidiary of C, which is a subsidiary of A
- **Ultimate holding coy [s5A]:** not a subsidiary of any corporation
- **Wholly owned subsidiary [s5B]:** all issued shares are held by holding coy or its nominee
- **Related companies [s6]:** either holding-subsidiary, or coy is subsidiary of the holding coy of another corporation
- ***Indirect links are possible** (e.g. C is a subsidiary of B, which is a subsidiary of A) – but chain cannot be broken

Implications of Corporate Group

- **[Pt IV, Div 1]:** need to consolidate financial statements
- **[s163]:** coys cannot grant financial assistance to director-related coys in specified circumstances
- **[s164 to s165]:** directors have to keep coy informed of shares they hold in coy or related coys
- **[s21]:** subsidiary cannot buy shares of holding coy

Lesson 2: Separate Legal Personality

Incorporation

[s27(1)]: Registrar will not register a coy with a name that is (1) undesirable, (2) identical to that of any other coy or biz name, or (3) a name of a kind that the Minister has directed the Registrar not to accept

- Register company name → file incorporation papers → register with ACRA and get Certificate of Incorporation
- Need minimum 1 person to form **[s17(1)]** and **[s20A]**; and minimum 2 directors **[s145(1)]**

Pre-Incorporation Contract

Promoter: person (individual or coys) who undertakes to form a coy with reference to a given project, and to set it going, and who takes the necessary steps to accomplish that purpose

- Owes fiduciary duties: duty to act with reasonable care, not to make any secret profit, disclosures to (potential) investors
 - **[Erlanger v New Sombrero Phosphate Co (1878)]:** In this case, Erlanger bought an island containing phosphates for 55,000 pounds. Later, Erlanger promoted a Company and sold the property to it for 110,000 pounds. All the Directors of that Company were nominees of Erlanger and two of them were directly under his control. Later the old board was replaced by a new board which brought an action to rescind the contract with Erlanger.
→ Court held that Erlanger held fiduciary duties, and should disclose any personal i/r in conflict with coy
- If breach of promoter's duty:
 - **Contract without full disclosure**, company can choose to **void contract**
 - Must account for any **secret profit** arising from a transaction entered into in **breach of fiduciary duty**

[s41(1)]: Company can ratify any contract or transaction that is entered into by or on behalf of the coy **prior to its formation** → once ratified, **coy becomes bound by the contract and entitled to the benefit of it**

[s41(2)]: Person who entered into the contract on coy's behalf is, **in the absence of any express agreement to the contrary**, **personally bound** by the contract and entitled to the benefit of it

- Can void contract if the person adds a clause in the pre-incorp contract: "Contract is conditional upon ratification by coy."

Characteristics of a Company

- Full legal capacity: capable of suing and being sued, owning properties like land, contract with 3rd parties **(pg. 50)**
- Perpetual succession
- Separate legal personality from members/SHs
- Limited liability, up to the amount contributed **(pg. 52)**

Separate Legal Personality **[s19(5)]**

On and from the date of incorporation ... the subscribers to the memorandum together with such other persons as may from time to time become members of the company shall be a body corporate by the name contained in the memorandum capable immediately of exercising all the functions of an incorporated company and of suing and being sued and having perpetual succession and a common seal with power to hold land but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is provided by this Act.

- Law treats coy as being a separate person from its members and those who manage its operations → in terms of assets, rights and obligations (**liabilities**), and contracts (can enter into legal r/s with members and directors)
- In contrast, the SH only owns the shares of the company, not the company assets, and is **not liable** for the company debt.

Founding Case:

[Salomon v Salomon & Co Ltd (1897)]

- Ran a boot manufacturing biz as sole trader initially → later established a company (Salomon held 20,001 shares while his family held 6 shares in total)
- Transferred his biz to the company, and coy paid part of the purchase price → gave Salomon a charge over its assets (such that coy assets have to be used to pay Salomon in full before they can be paid to other creditors)
- Salomon = majority shareholder, managing director
- Coy biz failed, and value of assets were insufficient to pay both Salomon and the coy's creditors
- Creditors argue that Salomon shouldn't be accorded the benefit of charge bcos the degree of control he has over coy
- → Court held that **in principle**, coy was operating biz in its own rights and hence it is treated as a separate legal person from Salomon.

Can a coy enter into contract with its member? Yes, a person can be controlling SH, managing director/employee concurrently.

[Lee v Lee's Air Farming Ltd [1961] AC 12.]

- Mr. Lee was both a controlling shareholder and managing director of a company that operated a business involving aerial top-dressing of farm → was killed in flying accident
- Wife wanted to claim money from worker's compensation insurance for her husband's death
 - → Dpds on whether husband is considered an employee, or in effect "employing himself" which is not allowed.
- → Court held that in principle, coy is a separate legal person from its members (Mr. Lee), and could therefore enter into a contract of service with coy, and be considered an employee

Can member sell or insure a property that belongs to company? No. Members have no equitable interest in company's property

[Macaura v Northern Assurance Co Ltd (1925)]

- The owner of a timber estate sold his timber plantation to a company, which was owned almost solely by him.
- He insured the timber against fire, but in his own name. → failed to transfer insurance policy to coy's name
- When the timber was destroyed by fire, the insurance company refused the claim.
- → Was held that the owner did not hold "insurable interest" in the property, which was owned by the coy

If company suffers a wrong, who can bring a law suit in respect of that wrong? Company alone, not shareholders.

[Foss v Harbottle (1843)]

- Director misappropriated coy's funds → breach of duty
- However, rule in this case provides that individual shareholders have no cause of action in law for any wrongs done to the **corporation** and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through BOD) or by way of a **derivative action**.

Does company ends when if all the members die? No. Perpetual succession [s19(5)]

[Re Noel Tedman Holdings Pty Ltd [1967] QdR 56.]

- Both the shareholders and directors all died in a traffic accident, however, the company still existed.

Exception: Lifting the Corporate Veil

- Corporate veil = legal rules separating company from its participants i.e. **separate legal personality**
- **In principle**, under concept of separate legal entity, members in principle not liable for company's debt and obligation
- But there are **some circumstances** (below) where the law make the company's member liable to the third party

Statutes:

- Wrongful or fraudulent trading **[s339, s340]**
- Failure to indicate corporate name **[s144(2)]**
- Trading for more than 6 month without a Singapore resident director **[s145(10)]**
- Pay dividends w/o available profit **[s403(2)(b)]**

Common law:

- **Per Rogers AJA in [Briggs v James Hardie & Co Pty Ltd (1989)]**: No unified principle for lifting corporate veil under **general law**, accessed on case by case
- **[Manuchar Steel Hong Kong Limited v Star Pacific Line Pte Ltd (2014)]**: Usually applied to **prevent abuse** of corporate structure, established examples:

Both English and Singapore Law

1. Fraud

Where corporate form is used to perpetrate fraud or a wrong

[Re Darby (1911)]:

- Darby and another conspirator incorporated a company (City London of Investment Corporation (CLIC)) to act as a promoter for another company (Welsh Slate Quarries Ltd) → Sold quarrying license to Welsh at inflated price
- When events came to light, Welsh made claim against Darby for an account of profits CLIC made from that sale
- Darby asserted that it was CLIC that was Welsh's promoter, and any claim for breach of promoter's duties should be directed at CLIC as a separate legal entity
- → **In principle**, although coy is a separate legal entity; the court pierced the corporate veil as the **company is used for perpetuating a fraud that was schemed by Darby from the start**, and hence can claim against Darby's personal assets

How to prove fraud?

- **Have to prove that there was INTENTION TO CHEAT** i.e. give info to other person to induce the person to do smth (vs. being negligent) → not easy

2. Evasion of existing legal obligations

Where corporate form is used to avoid an existing legal duty such as those undertaken under a contract (e.g. tax avoidance)

[*Gilford Motor v Horne* (1933)]:

- Mr. Horne was employed as a managing director of Gilford Motor, in which he was bound to a “non-compete” clause signed in his employment contract. → Clause includes that not to solicit customers of Gilford Motor.
- After his resignation, as Horne was afraid of breaching that covenant, → formed a company which was in competition to Gilford
- → Court pierced the corporate veil as it held that company had been **formed for the sole or dominant purpose of avoiding the non-compete clause**

[*Jones v Lipman* (1962)]:

- Lipman agreed to sell land to Jones but later regrets it
- Hence, before completion of sale, Lipman transferred the land to a coy controlled by him, so as to put the land beyond the reach of the purchasers
- → Court pierced the corporate veil and treated the contractual obligation on Lipman to transfer the land as also binding on the coy, since **Lipman has used the coy as a device to avoid his existing legal obligation**

How to prove evasion?

(1) Obligation must be present

(2) Existing at the time when the person created the coy

*Also applicable for creating coy to do illegal or unlawful act

*However, don't confuse this with the use of corporate form as a means to provide limited liability in the ordinary course of biz!

Only Singapore Law

3. Sham or Façade: fictitious company, nothing inside (but doesn't refer to all shell coys)

Corporate form was incorporated or merely used as a mask to hide the real purpose of the corporate controller.

[*Re FG Films* (1953)]:

- FG Films, a British incorporated company, made a film called “Monsoon”
- However, the company had **no premises except its registered office and no employees**
- On the other hand, *Film Group Incorporated (FGI)*, an American company **was the one who provided the finance and all the facilities necessary to make the film**
- FG Films sought to have film registered as British film → claim funds from British govt
- → Court lifted corporate veil and hence prohibit FG Films from enjoying benefits given by British govt, **as the coy did not make the film themselves, and is just a sham of FGI**

[*Children's Media Ltd and others v Singapore Tourism Board* (2009)]

- STB entered into a contract with a UK coy, Children's Media, to stage a mega event
- CM was wholly owned subsidiary of another coy, ML, which in turned was solely owned by an individual, AH
- AH at all material times was a director and CEO of both coys
- Event was not held in the end
- → Court held that **CM and ML “were no more than corporate puppets compliantly dancing to the tune” of AH**, and he has no intention to stage the event when he entered the contract in name of CM. As the monies paid to CM was for a very specific purpose, there was an unequivocal obligation to refund the moneys in full if event was not staged

[*The Saudi Al Jubail Admiralty* (1987)]

- Plaintiffs chartered ship to Orri, however there was a breach of the charter party, and hence monies & damages are owed
- They sought a legal action against Orri
- However, it was purported that when the contract was entered into, the owners of the arrested ship was Omega Shipping Company and Saudi Al Jubail Navigation (owned by Orri)
- Court found that affairs and accounts of the companies were however, not kept separate from one another or from Orri's personal affairs
- → Court pierced corporate veil as it held that Orri was the **beneficial owner of the vessel**, and was merely using the two companies as mere corporate names which he abused as a cover for his own trading and ship owning activities. Orri was held to use these corporate names to mislead other parties as to the identity of the party with whom they have contracted. Thus, the court **treated these companies as mere extensions of the owner Orri**

[*Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988)] Lockhart J in this case stated that:

“A sham is something that is intended to be mistaken for something else or that is not really what it purports' to be. It is not genuine but something made in imitation of something else or made to appear to be something which is not.

4. Alter ego: another you i.e. company is carrying on the biz of its controller, cannot separate the two

[Alwie Handoyo v Tjong Very Sumito (2013)]

- → Court held that Alwie, the sole SH and director of the coy, is personally liable to repay sums which the coy, OAFL, was liable because Alwie was OAFL's alter ego as **Alwie actively procured pmt for OAFL and controlled its bank account**
- **Possible evidence:** controllers don't make any distinction between coy and themselves in relation to the biz being carried on, purpose of set up of coy, no proper separation of funds and accounts btw coy and its controller, and degree to which controller controlled biz of coy (but mere fact that one is a controlling SH is not sufficient to support claim of alter ego)

Summary of Singapore Position

- **DO NOT APPLY SINGLE ECONOMIC ENTITY CONCEPT**
- Recent case laws do not seem to be very keen to lift corporate veil → **ONLY FOR VERY EXCEPTIONAL CASES**
 - [Lim Chee Twang v Chan Shuk Kuen Helina (2010)] Per Quetin Loh JC,
 - Categories of cases where corporate veil would be pierced were not closed
 - But **courts should be slow to create new ones**
 - Line of thinking that a court can pierce veil where "justice of case" demanded should not be followed → vague

Only English Law

5. Single Economic Unit (DO NOT APPLY THIS ANYMORE)

In principle, a parent coy is not liable for the debt of a subsidiary

[DHN Food Distributors Ltd v Tower Hamlets LBC (1976)]: where coys can be treated as partners

- DHN **wholly owned** 2 other subsidiaries with the **same directors** for all
- All 3 coys operate on the same land, and different parts of biz was segregated to the diff coys – in which one subsidiary (Bronze Ltd) owned land used by DHN, and the 2nd one (DHN Food Transport) owned vehicles used by DHN
- Land was subject to compulsory purchase, but council only compensated Bronze → other 2 sue council for money
- → Lord Denning MR said DHN was entitled to claim. The separate corporate personality doctrine was overridden. However, this is **likely to only be followed where the subsidiaries are wholly owned and serve no purpose other than to own the parent company's assets**. Other judges looked at **proprietary interests** for DHN and DHN Food.

*The case has not been applied to make one company in a group liable for the debts of another [Re Southard and Co Ltd (1979)]

[Adams v Cape Industries plc (1990)]

- Subsidiaries NACC and CPC was marketing asbestos that turned out harmful, → sued, however doesn't have enough money
- **"Sue for liabilities"**: Claimant (Adam) hence wants to enforce a US judgement against the parent company in UK (Cape)
- → English Court of Appeal rejected single economic entity argument, corporate veil not lifted:
 1. DHN was a case which concerned statutory interpretation
 2. Cape did not have sufficient control over its US subsidiaries (although it owns 100%, subsi fully ran by Americans)
 3. Court recognized the use of corporate form to control future liability

*This narrowed down the scope for corporate veil using single economic entity → **must have a good reason**

[Prest v Petrodel Resources Ltd (2013)]

- Wife claimed that husband hid properties in some companies to avoid paying matrimonial → **went after coys**
- → Court held that **concealment (hiding)** is ok as long as it does not breach the law, hence corporate veil is not lifted

*NB **concealment vs. evasion**

6. Just and Equitable

Where justice of case requires or where court exercises equitable or analogous discretion

- However, seems to be rejected by Court of Appeal in **Adams v Cape Industries** case
- Doubtful if such discretion should exist as it would lead to substantial uncertainty

Summary of English Position after Prest:

Per Lord Sumption, veil could be lifted if "a person us under an existing legal obligation or liability or subject to an existing legal restriction which he **deliberately** evades or whose enforcement he **deliberately** frustrates by interposing a coy under his control.

- Very narrow doctrine, only **DELIBERATE EVASION** then can lift corporate veil
- **No more single economic entity concept**

7. Agency (not really lifting corporate veil)

Possible for coy to be **agent** or partner of its controller – if coy incurs an obligation or holds a right as agent for its **principal**, then the right or obligation belongs to the principal.

→ **FACTUAL QUESTION: Does the principal authorize its agent to do something on its behalf? Yes / No**

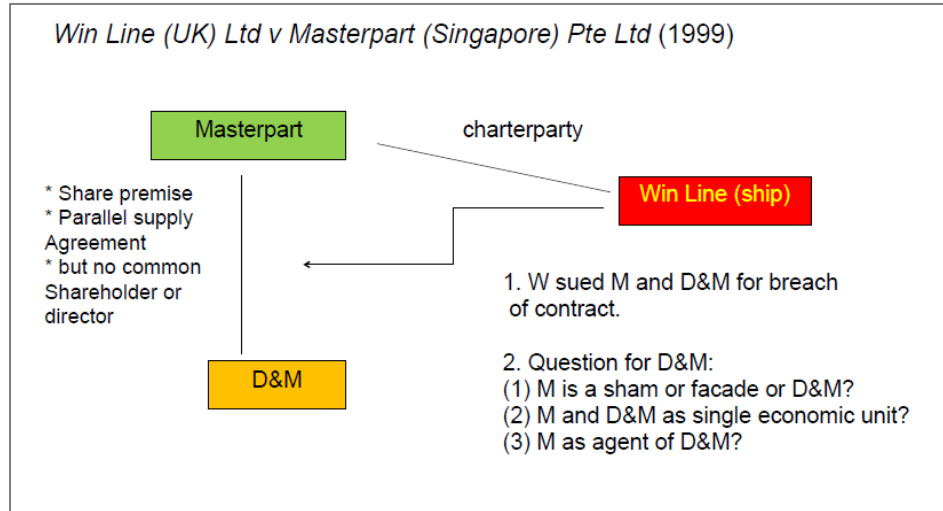
[Smith, Stone & Knight Ltd v Birmingham Corporation (1939)]

- Birmingham Waste, a subsidiary of Smith, occupied the premise owned by Smith to operate the waste paper business

- Birmingham Corporation wanted to acquire the premise owned by Smith, but refused to compensate Smith for disruption to its business as it argued that the 2 coys are separate legal entities
- → Court found subsidiary to be treated as carrying on its biz as agent for parent coy (Smith), entitling Smith to receive compensation too. This is because the court found out **Smith did not transfer ownership of waste paper business and land** to its subsidiary. Therefore, the **waste paper business was still the business of parent company** and it was **operated by the subsidiary as agent** of the parent company.

Consolidated Issues (Singapore)

[Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd (1999)] ***



- Win Line wanted to lift corporate veil to get to D&M
- Don't have the same SHs, but share premise pursuant to agreement to cooperate or share business
 - Court not keen on single economic entity as no common SH or director
- Agency argument is separated from sham of facade.
 - No agency agreement found
- There are business reasons to create M to do business that D&M couldn't
 - M could do biz independently. Not a sham or façade of D&M.
- Should consider many factors. Not just from what parties present on paper.

NOTE: RECENT CASE LAWS IN SINGAPORE DON'T SEEM KEEN TO LIFT CORPORATE VEIL → ONLY IN REALLY EXCEPTIONAL CASES THEN LIFT! OTHERWISE STICK TO ORIGINAL DOCTRINE

Lesson 3: Company's Constitution

- **Company's Act:** External framework to govern how a company is formed, legal rights, and obligations
- **Constitution:** Key characteristics of the coy and its internal workings (**Memorandum + Articles**)
 - **Which one will apply first?**
 - (1) CA is applied NOTWITHSTANDING different provisions in constitution
 - (2) where the CA is SUBJECT TO the constitution

Companies	Law	Non-statutory	
Listed	CA + SFA + CG Code + SGX rules + case law	Constitution (or bylaws)	Other shareholders' agreements or mutual agreements
Public companies (unlisted)	CA + case law		
Private companies	CA (with some exemptions) + case law		
Exempt private companies	CA (private company) + more exemptions in CA + case law		

Before 2014 Amendment

Memorandum	Articles of Association
<p>Deals with external features e.g. name of coy, type of coy (private or public), liability (limited by shares or unlimited), coy structure and aims</p> <p>Object clause [s23(1A)]</p> <ul style="list-style-type: none"> ○ Principle activities and purposes of which coy is formed ○ <u>Not necessary</u> to include in constitution ○ In principal, not permitted for coy to engage in activities not specified by object clause = ultra vires [s25] – not invalidated by reason only that coy was w/o capacity <p>Alteration of Memorandum</p> <p>Before 1 April 2004</p> <p>"The memorandum of a company may be altered to the extent and <u>in the manner provided by this Act but not otherwise.</u>" [s26]</p> <ul style="list-style-type: none"> ○ <u>May be altered, only if the Act allows:</u> <ul style="list-style-type: none"> ○ Name [s28] ○ Change from public to private company and vice versa [s31] ○ Change in objects [s33] ○ Change in share capital [s77] <p>On/After 1 April 2004</p> <p>"Unless otherwise provided in this Act, the memorandum of a company may be altered by <u>special resolution.</u>" [s26(1)]</p> <ol style="list-style-type: none"> Subjected to [s26A] entrenching provision in M&A If provision is commenced before 1 April 2004, need <u>100% members to agree if it is a provision that cannot be altered before 1 April 2004 [s26(1B)]</u> 	<p>Deals with internal administration, or regulation governing the coy e.g. AGM, meetings</p> <p>Table A provides a default set of articles</p> <ul style="list-style-type: none"> ○ Coys can choose to adopt all or any of the articles provided for in Table A ○ If company did not lodge a set of articles with ACRA, will be deemed to be governed by Table A <p>Example of old Table A</p> <ul style="list-style-type: none"> • Classes of shares and class rights (Art 4) • Transfer of shares (Art 20-23) • Alteration of capital (Art 40-42) • General meeting (Art 43-46) • Proceeding of general meeting (Art 47~) • Appointment of directors (Art 63~) • Powers and duties of directors (Art 73-78) • Board meetings (Art 79~) • Dividend (Art 98~) <p>Alteration of Articles</p> <p>"Subject to this Act (in particular section 26A ...) and to any conditions in its memorandum, a company may by <u>special resolution</u> alter or add to its articles." [s37(1)]</p> <ul style="list-style-type: none"> ○ Subjected to [s26A] entrenching provision in M&A

Alteration of object clause

- Special resolution [s33(1)]
- 21 days' notice [s33(2)]
- Members' right to object [s33(5) to s33(8)]

After 2014 Amendment

Constitution

Table A is replaced by "model constitutions"

- Model constitutions prescribed for private companies & companies limited by guarantee [s36]
- Coys can choose to adopt part or whole of model constitutions in force at the time of adoption or as may be in force from time to time (can copy paste from Table A) [s37]
- **Must be lodged with ACRA**

Alteration of Constitution

- Can be altered via **SPECIAL RESOLUTION** [s26(1)]
 - **Special resolution [s184]:** Passed by a majority of **not less than 75% of members**
 - ***Subjected to entrenching provisions under [s26A]**
- **In principle**, alteration will take effect from date of meeting in which special resolution was passed, unless specified a later date in the resolution [s26(1AA)]

Alteration of provisions in memorandum before 1st April 2004

[s26(1B)]: Notwithstanding subsection (1), a provision contained in the **memorandum** of a company **immediately before 1st April 2004** and which could not be altered under the provisions of this Act in force immediately before that date, **may be altered only if all the members of the company agree.**

In memorandum only, provisions that exist before 1st April 2004, anything other than (1) name, (2) change btw private and public coy, (3) object; (4) change btw limited and unlimited status; (5) alteration of capital structure... → **anything else requires 100% approval from SHs in AGM**

Object Clause [s23(1A)]

- Principle activities and purposes of which coy is formed
- Not necessary to include in constitution
- In principal, not permitted for coy to engage in activities not specified by object clause = **ultra vires** [s25] – not invalidated by reason only that coy was w/o capacity

Alteration of Object Clause

- Special resolution [s33(1)]
- 21 days' notice [s33(2)]
- Members' right to object [s33(5) to 33(8)]

Minority protection

- By Bilateral or multilateral contract with another shareholder → can sue the other party
- In the Constitution → entrenching provisions
- In the CA or case law

1. Entrenching Provision [s26A]

→ **Purpose is to make it more difficult or onerous to alter a particular right / rights stated in the Constitution**

A provision to the effect that other specified provisions in the constitution:

- May not be altered by manner (**special resolution**) provided by the act; or
- May not be altered EXCEPT
 - Resolution passed by a **specified majority greater than 75%**
 - **Other specified conditions** are met

An entrenching provision may be

- a) Included in constitution **during commencement**
- b) Later added to constitution if **all member agree**
- c) Altered or removed if **all member agree**

2. Bona Fide Argument (Common Law)

- Aggrieved minority must prove that majority voters voted: not bona fide for the benefit of the whole company
- **"Equitable limitation on majority voting power"** requires members to act bona fide (i.e. in good faith) for the benefit of the company as a whole when voting for an alteration of the constitution

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

- The articles were altered to give the company a lien over the fully paid shares of a member in respect of debts owed by the member to the company. ("**lien**" is a type of security for debts) Prior to the alteration, the company only had a lien over partly paid or unpaid shares.
- One shareholder, who held both fully and partly paid shares, and who owed debts to the company, objected to the alteration → he was the only person adversely affected by the alteration.
- → Court held that the **alteration was valid** because it **benefited the company as a whole** (broadens scope of link to collateral → better chance to recover). Even though it may appear to have a discriminatory effect on a particular shareholder, it was not in fact intended to be discriminatory because it **(potentially) affected all holders of fully paid shares**.

[Sidebottom v Kershaw, Leese & Co (1919, UKCA)]:

- Altering articles to allow the board (majority shareholder) to buy out any shareholder who competes with the company
- → Court held that it is for the benefit for the company not to be obliged to have amongst them members who compete with them in business

[Shuttleworth v Cox Brothers & Co (1927)]: SUBJECTIVE

- Changing an article that allowed a person to be director for life
- → Court held that there is no evidence of bad faith found. The only question is whether or not the shareholders, in considering whether they shall alter articles, **honestly intend to exercise their powers for the benefit of the company**.

**Court generally tends to assume people are in good faith, unless good case for otherwise*

[Greenhalgh v Arderne Cinemas (1950)]: OVERALL STILL SUBJECTIVE

- Mr Greenhalgh was a minority shareholder in Arderne Cinemas and was in a protracted battle to prevent majority shareholder, Mr Mallard selling control to an external party.
- The articles of association contained pre-emptive rights.
 - Provided by cl. 10 (a): "No shares in the company shall be transferred to a person not a member of the company so long as a member of the company may be willing to purchase such shares at a fair value to be ascertained in accordance with sub-clause (b) hereof".
- **The company changed its articles by special resolution in general meeting to remove pre-emptive rights** allowing existing shareholders to offer any shares to person/members outside the company.
- Mr Mallard, the majority shareholder, wished to transfer his shares for 6 shillings each to Mr Sol Sheckman in return for £5000 and his resignation from the board.
- Mr Greenhalgh wished to prevent control of the company going away, and argued that the article change was invalid, a fraud on him and the other minority shareholders, and asked for compensation.
- → Lord Evershed MR held that alteration was legitimate.
 - "... 'bona fide' means ... one thing. It means that the shareholder must proceed upon what, **in his honest opinion, is for the benefit of the company as a whole**.
 - The second thing is that the phrase 'the company as a whole' does not ... mean the company as a commercial entity ..." **it means the corporators as a general body**.
 - **The case may be taken of an individual hypothetical member and it may be asked whether what is proposed, in the honest opinion of those in favor, for that person's benefit. → MORE OBJECTIVE**

[Citco Banking Corp NV v Pusser's Ltd (2007)] SUBJECTIVE

- The company passed a resolution to covert shares own by the chairman (T) into Class B shares, carrying 50 votes per share, effectively magnifying his controlling power by 50 times.
- Chairman did so as coy was in financial trouble, and he had to convince the banks to lend the coy money by showing he has a high stake in the bank
- → The Privy Council adopted a more 'subjective approach' for a rather radical resolution **whether 'reasonable shareholders could have considered that the amendment was for the benefit of the company.'**

In this case, it was held that the correct test was established in Shuttleworth v Cox Brothers and Co (Maidenhead) Ltd and stated that it was **not for the court** to decide the commercial benefits to the company of altering the articles but it was for the reasonable shareholder to consider what would be beneficial. **However compare with...**

***Australian approach:** in Gamboto (1995), held that mere good faith or benefit to coy was not enough. **A legitimate expropriation must be used to prevent detriment to the coy** (e.g. buy-out clause for majority to buy-out minority)

Which test should Singapore court adopt?

1. **Mainly Subjective Approach:** Focus on honesty of person, instead of benefit (although can use to justify honesty) → What are shareholders thinking at that point of time, and whether it is in good faith or not.
2. **But with Objective Approach as a parameter:** More factual, court makes judgment based on hypothetical situations
3. **Otherwise, can use Oppression (objective)**

3. Others

- Procedural safeguards (s392) – KIV
- Oppression (s216) – KIV

Nature of Constitution

[s39]: Subject to the Act, a company's constitution shall when registered **bind the company and the members** thereof ... to observe all the provisions of the constitution

- **"Statutory Contract":** Contract among **all members** AND contract between **coy and its members**
 - As general contract law principles apply, **non-compliance (1) by coy**, member can obtain injunction requiring coy to comply with articles; or **(2) by member**, another member can obtain injunctive relief or damages w/o going through coy
- **[Rayfield v Hands (1960)]:** The articles of a private company provided that if a member intended to transfer his shares he should inform the directors, who would purchase the said shares equally between them at a fair value. The directors denied that they had any liability to purchase the shares of Rayfield, a member, and pay for them.
- → The court held that they were obliged to do so by virtue of the articles.

Outsiders

Non-members **do not** have the right to enforce the provisions of coy's constitution under s39, as they're not privy to contract.

[Eley v Positive Government Life Assurance Co Ltd (1876)]

- Art 118 of the company's articles provided that Mr. Eley to be the company's solicitor.
- The company decided not to hire Mr. Eley as solicitor anymore. Eley sued the company.
- → Court held that **in principle**, 3rd party can't enforce the contract even if it is relevant to him

[Malayan Banking Ltd v Raffles Hotel Ltd (1965-1968)]

- Hotel articles have a provision giving power to its landlord to appoint a director to BOD
- Company however later challenged the landlord's appointment of BOD in court
- → Court held that articles of a company did not constitute a contract btw the company and a 3rd party who was not a member of the company, and thus the provision was not binding on the company

Exception: where there is a separate contract

[Southern Foundries Ltd v Shirlaw (1926)]

- Mr Shirlaw had been the managing director of Southern Foundries Ltd, which was in the business of iron castings.
- But then another company called 'Federated Foundries Ltd' took over the business.
- **The new owners had altered article 8 of Southern Foundries Ltd's constitution, empowering two directors and the secretary (who were friends of Federated Foundries) to remove any director. Then they acted on it, by sacking Mr Shirlaw.**
- **Mr Shirlaw's contract, signed in 1933 stated that he was to remain in post for ten years.** Mr Shirlaw sued the company for breach of contract, claiming for an injunction to stay in office or substantial damages.
- → **Humphrey's J in the High Court awarded £12,000 to Mr Shirlaw for breach of contract.**

Qua-member rule

Because of the statutory contract created by the constitution between company and its members,

- Any member can bring an action against the company to enforce the observance of Articles (and vice versa)
- One member may compel another member to comply with an obligation in the Articles without joining the company as a party to the proceedings **[Rayfield v Hands]**
- A non-member MAY NOT enforce any obligation in the Articles **[Eley v Positive Government Life Assurance Co Ltd]**
- **S39(1) only affects those rights which affect a member in his capacity as a member but not those which affect him in his personal capacity → QUA-MEMBER RULE**

QUA-MEMBER RULE: The general rule in the UK is that a contractual right derived from the articles does not extend to a member in a capacity "other than that of a member". In other words, the right must be qua member.

“Capacity as a member” vs “Personal capacity”

Possible: Personal capacity – Is it applied to everyone?

- Can only enforce provisions relevant to membership rights.

Leading Case: [Hickman v Kent or Romney Marsh Sheep-Breeders' Association (1915)]

- Articles provide that any dispute between member and company can be solved by arbitration
- Hickman brought an action against the company in the courts.
- → Court held that the association were entitled to have the action stayed **as the articles constituted a contract between Hickman and the association in respect of their ordinary rights as members** i.e. Hickman was bound to comply with the company procedure for arbitrating disputes and could not resort to court.

Shareholder's agreement

- Additional to company's constitution, seen as supplement to R&Os among members
- Commonly found in incorporated joint ventures
- May be between:
 - Company and its members
 - All the members among themselves
 - Certain members among themselves only
 - → **Only binds the parties to the shareholder agreement**

Advantage

- Equally binding when compared to constitution, and has its own legal force (**contract law**)
- Hence, cannot be alterable by majority vote
- For any amendments to take place, **all parties to the agreement must agree**

Disadvantage

- Not enforceable by shareholder that is not party to the contract
- Cannot compel company to comply if not incorporated in Articles, can only sue for damages

Lesson 4: Shares

Basic Concepts

Stock / Share capital

is the amount of money or assets contributed to the company by its members when they subscribe for shares in the company.

Shares [s121]

- Movable property
- Transferable in the manner provided by the articles
 - They represent a claim against the company to which the rights set out in the CA and coy's constitution attach

Partly-paid shares [s65]

Shares that are partly paid – i.e. person subscribing for the share pays only part of the subscription price to the coy at the time the share is issued, with the balance to be paid at a later date.

- Governed mainly by constitution (call arrangements, procedures, distribute div based on paid shares, remedies)
- Company can make a **call** at a later time to recover some/all of the balance owing on the share
 - **Exception: [s65(2)]** Unless coy has passed a special resolution providing that coy can only call up uncalled capital during winding up
- **[s250]:** if coy is wound up, members may be liable to contribute the unpaid balance of their shares to the coy

Member vs. shareholder -> Important as many remedies under CA comes from being a member

- Require at least 1 member [s20A]
- Usually used interchangeably, however different meanings

[s19(6)]: The subscribers to the constitution shall be deemed to have agreed to become members of the company and **on the incorporation** of the company shall be entered as members...

[s19(6A)]: Apart from the subscribers referred to in subsection 6, **every other person** who agrees to **become a member** of a company will be entered in the respective register of members...

- **Shareholder** is someone who is rightful owner of shares, **members** are the ones entered into the SH register ‘
 - **Public coys** hold their own register of members [s190]
 - **Private coys** have their register of members held at ACRA (after 2014 Amendment) [s196A]
- Therefore when the buyer brought the share already but have not register his name with the company, then, in between, he will be a shareholder but technically he is not the member

A person will no longer be a member of a company if:

- They transfer their shares to another person
- They transfer shares back to the company under a “share buyback” (*KIV Lesson 9)
- Their shares are cancelled by the company under a reduction of capital (*KIV Lesson 9)
- Their partly paid shares are forfeited when the person fails to pay a call
- The company is dissolved and ceases to exist (*KIV Lesson 11)

Shareholders are residual claimants

- Last in line to claim company assets if company goes bust
- But entitled to various rights (*see below)

Shareholders enjoy certain rights – TB Pg. 424

- **Distribution / CF rights:** to receive dividends during the coy's life, and depending on the terms of issue of the particular share – rights to repmt of principal and to share in any surplus assets of coy on winding up
- **Control rights:** to exercise some control over mgmt of the coy's affairs, generally taking the form of a right to vote on particular decisions affecting the coy
- **Right to receive information:** on the company – e.g. right to inspect the company's registers [s93, s164, s192], right to attend any general meeting and to speak on any resolution before the meeting [s180], inspect the minutes of GM [s189], receive annual FS [s203]
- **Class rights:** *see below: **Classes of Shares**
- **Others:** Right to observance of constitution, restrain coy from ultra vires acts, treated fairly

Par Value of Shares → May still apply to foreign coys

Shares now all have no par [s62A(1)]

"Shares of a company have no par or nominal value." Beginning 30/01/2006 – Apply to all shares

To convert par share to no par [s62B]

(2) Share premium, capital redemption reserve → Share capital

	(A) 29/01/2006	(B) 30/01/2006
Authorised capital	\$100,000	NA
Par Value	\$1.00	NA
No of shares issued	50,000	50,000
Price per share	\$2.00	\$2.00
Issued capital	\$50,000	\$100,000
Paid-up capital	\$50,000	\$100,000
Share premium account	\$50,000	NA
Premium per share	\$1.00	NA

Par Value is the face value of the share i.e. price coy initially offers shares for sale

Authorized share capital is also referred to, at times, as registered capital. It is the total of the share capital which a limited company is allowed (authorized) to issue, specified in its constitution.

- **Shares authorized** = Shares issued + **Shares unissued**

Issued share capital is the total value of the share capital issued (allocated) to shareholders. This may be less or equal to the authorized capital.

- **Subscribed capital** is the portion of the issued capital, which has been subscribed by all the investors including the public. This may be less than the issued share capital as there may be capital for which no applications have been received yet ("unsubscribed capital").
- **Called up share capital** is the total amount of issued capital for which the shareholders are required to pay. This may be less than the subscribed capital as the company may ask shareholders to pay by instalments.
- **Paid up share capital** is the amount of share capital paid by the shareholders in respect of the issued shares. This may be less than the called up capital as payments may be in instalments ("calls-in-arrears")
 - Or: Shares issued = **Shares outstanding** + **Treasury shares**

Issuing New Shares

1) **Primary Market: Issue or allotment directly from company**

- IPO or new float
- Private placement
- Rights issues
- Scrip dividend scheme
- Bonus issues

2) **Secondary Market: Transfer** of shares (i.e. buy from another existing shareholder)

Procedure for Issuing New Shares

Decision to issue shares is initially made by the BOD → constitution may allow BOD to decide #, class and issue price of shares and terms of issue. However...

(1) **Member approval**

The **directors must**:

- **Get PRIOR approval from company at AGM** [s161(1)]
 - Normal resolution
- Can be **general** (within next 6 months issue X shares) or **specific** (issue X shares on 15/05/15) provision [s161(2)]
- Valid till next AGM, or for 1 year (i.e. expiration of period within which next AGM must be held) [s161(3)]

If issue in contravention of CA s 161:

- Void (invalid from the start), considered given for shares issued recoverable [s161(6)]
- Director personally liable to compensate coy or person whom was issued shares if < 2 years [s161(7)]

*In addition, company constitution may also require resolution passed by BOD before issuing new shares

New shareholders NEED NOT pay up full price for new shares up front → **Partly-paid shares [s65]**

Shareholder can also pay in assets other than cash

- However, valuation of the asset might create a problem when it is wrong
- [Re Wragg Ltd (1987)]: **No requirement that such consideration be adequate; unless really grossly inadequate** → BOD might be held responsible for the wrong valuation of asset since they represent the company (*KIV Lesson 9)

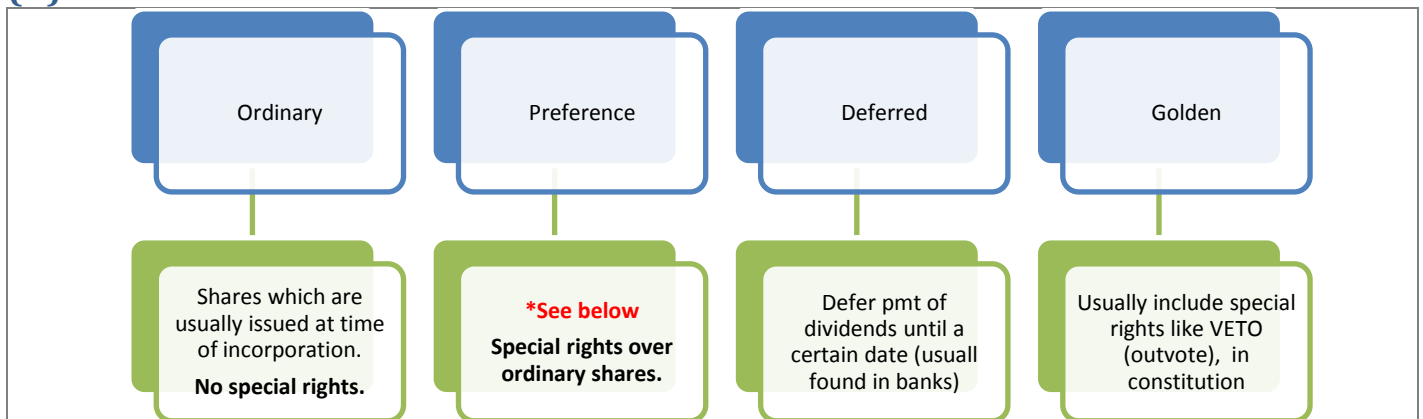
(2) Restrictions to whom shares can be offered

- If the constitution contains pre-emption rights
- Do rules of self-acquisition apply? [s76(1A)]: coy not permitted to own shares in themselves or in entities that control them, except in very limited circumstances
- If special ownership restrictions apply (generally occur in privatised govt enterprises or coys engaged in media)
- If coy wishes to rely on certain exemptions in the SFA to be exempted from prospectus requirements

(3) New class of shares

- Subject to additional rules and procedures

(A) Classes of Shares



What is considered a preference share?

[s75(1)]: Have preferred rights in at least one of these areas in relation to other shares;

- Repayment of capital,
- Participation in surplus assets and profits
- Cumulative or non-cumulative dividends
- Voting right
- Priority of payment of capital and dividend

Or, even if not,

[s70]: Any shares that is liable to be redeemed

5 Types of Preference Shares

1. **Cumulative:** carries forward SH's entitlement to a distribution from one year to the next if no dividend is declared in that particular year (before any dividend is paid to ordinary SHs).
2. **Redeemable:** allow for repmt of principal at a particular time or occurrence of a particular event prior to winding up of coy. → Exception to general principle where coy cannot repay share capital prior to winding up
 - a. [s70(3)]: shares shall not be redeemed unless fully paid up
 - b. [s70(4)]: shares shall not be redeemed unless directors have made solvency statement AND lodged to ACRA
 - c. Can be at option of coy or SH
3. **Convertible:** usually carry a right to preferred, fixed dividend for a particular term and then allow for conversion to ordinary shares at the end of the term
4. **Voting / non-voting**
5. **Participating / non-participating:** If the company achieve certain financial goals, can receive extra dividend?

Issuance of Preference Shares

Rights of holders of **preference shares** to be set out in constitution [s75]

- Preference share **cannot be issued or converted from other shares** unless:
 - Specified in constitution
 - The **specific rights** of the preference S/Hs

Breach by coy and all officers = fine ≤ \$2k [s75(2)]

Rights Attached to Shares & Issuing New Preference Shares

[s64(1)]: In principle, a **PUBLIC COMPANY** shareholders are entitled to only one vote per share

[s64(2)]: Restriction to limit voting of holders of **partly paid shares** provided for by constitution

→ However, **constitution may alter voting structure** to no or multiple voting rights / **issue new class of shares** ONLY IF

[64A(1)] in a **public company**:

- The issue of the class of shares is provided for in the constitution
- The constitution sets out wrt each class of shares the rights attached to it

[s64A(3)]: **Special resolution** is required before issuing shares with **no, multiple, special, or limited voting rights**

- Hence, if a coy wants to issue **new shares with no or multiple voting rights**, need 2 special resolutions
 - One for amendment of constitution, one before issuing the shares
 - *Other than that = ordinary approval is sufficient

[s64(4)]: **Holders of non-voting shares** are entitled to vote (one vote per share) on resolutions to:

- Wind up company voluntarily, or
- Those that vary the class rights of non-voting shares

*** [s64A(6)]: **PRIVATE COMPANY** can do anything, subject to its constitution

(B) Variation of Class Rights

- Is there a separate class of shares? Or is everyone a common shareholder? (covered so far)**
 - If yes, can issue if (1) in constitution and (2) passed special resolution wrt to the issue
 - If no, ordinary resolution
- If there is a separate class, have we varied the class rights?**
 - Is what is being changed a class right?
 - Does the change amounts to a variation or cancellation of class rights?
- How to vary class rights? And where to find remedies?**

(i) What amounts to a variation or cancellation of class rights?

Common law position:

There is a difference between

- Variation of class rights (e.g. change from 8% to 4% dividend rate)
- Variation in enjoyment of the rights (e.g. change in coy's capital structure → creating new class of shares, issuing more shares of the same class)

[Cumbrian Newspapers Group v Cumberland & Westmorland Herald (1986)]

A right or benefit may be a "class right" even if it is not referable to any particular share provided that it is conferred on the member in his capacity as a member:

- The company (CVHNP) issued new shares to the plaintiff (CNG), combined with pre-emptive rights and a right to appoint a director in the company's Articles.
- Purpose of plaintiff was to protect his interest in the coy, preventing future takeovers
- Company wanted to cancel these 2 provisions, and plaintiff argued these were special class rights that could only be varied with its consent.
- → **Scott J held that** the CNG's rights as a shareholder could not be varied without its consent because **they were class rights** when they were conferred '*special rights on one or more of its members in the capacity of member or shareholder*' (i.e. rights were given to investor when he made the investment, constitution was amended to entice him)

[White v Bristol Aeroplane Co (1953)]

- Bonus issue of shares to ordinary shareholders
- Its constitution provided that the rights attached to any class of shares may be '*affected, modified, varied, dealt with, or abrogated in any manner*' with the approval of an extraordinary resolution passed at a separate meeting of the members of that class.
- The preference shareholders argued that an issue of additional shares, both preference and ordinary '*affected*' their voting rights and therefore fell within article 68.

- Company contended that the proposal did not amount to a variation of class rights but rather it was the effectiveness of the exercise of those rights that had been affected and therefore a separate meeting of the preference shareholders was not required.
- → Court held that the dilution of preference shareholdings is **not a variation of class rights**. Lord Evershed MR held that: “There is to my mind a distinction, and a sensible distinction, between an **affecting of the rights** and an effecting of the **enjoyment of those rights**”

[Greenhalgh v Arderne Cinemas (1946)]

- Company had issued 31,000 preference shares and 21,000 ordinary shares each carrying one vote
- → issued further shares to Mr. Greenhalgh that carried sufficient votes to block a special resolution
- After a dispute, other members voted by ordinary resolution to subdivide their shares, greatly increasing the number of shares they held → so as to diminish Mr. Greenhalgh's proportion of votes
- → Court held that this **did not vary the rights** attaching to Greenhalgh's shares **as it retained the same voting rights (one vote for each share)** as they had enjoyed before the resolution was passed.

Exception: When are class rights “deemed” to have been varied under the CA?

In principle, issuing shares of the same kind is not a variation as it only affects the enjoyment.

[s74(6)]

- If issue new preference share *pari passu* (equal standing) with existing preference shares
- Shall be **deemed to be a variation of the rights** attached to those existing preference shares **unless**,
 - The issue of the new shares was **authorised by the terms of issue** of the existing preference shares or by the **articles of the company in force at the time the existing preference shares were issued**.

(ii) Minority Protection

- Alteration of Articles
 - Procedure (have to put rights of new / varied class of shares into constitution first)
 - Entrenching Provision
 - Minority protection issues: Bona fide arguments and Oppression [s216]
- In Articles of Association
 - MOR Clause e.g. Former Art 4 of Table A
- CA s74(1) **only available if there is MOR present**

“Modifications of Rights” (MOR) clause in the constitution

- Sets out the procedure to be complied with before a variation of class rights may be effected
- If not available, simply amend the provision by **amending the constitution (Recall: only special resolution required)**
- If available, varying or cancelling the class rights may only be in accordance with the procedure laid out in the MOR

For example:

Article 4 Table A

“(Class rights of X) may, be varied

- 1) **With the consent in writing of the holders of 75% of the issued shares of that class, or**
- 2) Or with the **sanction of a special resolution passed at a separate general meeting** of the holders of the **shares of the class**. ...

+ Only after the MOR has been complied with, can the SHs **amend the constitution** (i.e. **special resolution [s26]**) to set out the new rights for the shares, in compliance with **[s64] Issuing Preference Shares**

[s74(7)]:

Alteration of any provision which affects or relates to the manner in which the rights attaching to the shares of any class may be varied → deemed to be a variation of the rights attached to the shares of that class

- If there is an attempt to remove the MOR = deemed to be variation of class rights
- Hence, have to comply with normal procedures for varying class rights
 - (1) MOR procedure (i.e. **SR for Class A holders**); AND
 - (2) Special resolution to alter articles setting out the rights

Entrenching Provisions on MOR

- Before changing MOR, by its normal procedures, **MUST COMPLY WITH ENTRENCHING PROVISION FIRST**
 - Recall: [s26A(4)] Entrenched provision cannot be altered, or altered via > 75% or other specified conditions in the constitution
 - Recall: Entrenching provision can only be removed if **ALL MEMBERS AGREE**

What is considered an entrenching provision?

- Relevant class rights being protected must be contained in a provision in constitution
- The clause is a separate provision from the former
- Should deal with **how that other provision in the constitution is to be altered** (vs. how rights are to be altered) → and in a manner specified by s26A(4)
- Clause is either an existing provision on incorporation OR later inserted by unanimous resolution of all members

Common Law Restraint

Equitable limitations on voting power imposed on shareholders: requires class shareholders, when exercising their voting power, to exercise them in good faith FOR THE BENEFIT OF THE CLASS AS A WHOLE

[Re Holders Investment Trust (1971)]

- Preference shareholders vote to change class rights. However, the majority of preference shareholders were also majority ordinary shareholders. → wanted to get rid of preference shareholders
- → Court held that preference shareholders should consider the welfare of whole preference class when voting,

Possible redress by aggrieved minority S/H [s74(1)]

- (1) If, a company have different classes of shares,
- (2) Variation of rights allowed by provision in constitution = MOR present
- (3) If the **rights** attached such S/H are at any time **varied**
 - → **The holders of not less than 5% of the issued shares of that class may apply to the Court to have the variation or abrogation cancelled**
- Must show unfair prejudice against shareholders of the class in which applicant represents
- The variation or abrogation shall not have effect (i.e. resolution is suspended) until confirmed by the Court.
 - *Court will either disallow or confirm the variation

Oppression [s216]

- Offers general protection against oppression of minority shareholders → unfairly prejudiced by variation of class rights
- Present regardless if there is MOR or not
- Single member can make an application wrt a proposed resolution
- Just need to show its prejudicial to one or more members
- *Court can make such order as it deems fit → exhaustive rights

Interest in Shares

Why does it matter to identify interest in shares?

- Disclosure of substantial shareholders (> 5% interest) to coy [s82]
- Disclosure by directors of any **interests or deemed interests** in the coy or related coys [s164 and s165]
- No loan to coy associated with director [s163]
- Govt power to acquire information as to person interested in shares or debentures [s244]

What is considered an interest in shares?

[s7] Includes shares which are the subject of:

- Having authority to dispose of shares – [s7(1A)]
 - E.g. If Y has power to ask X to do things, then it is deemed to have an interest in shares of X
- Beneficial / equitable interests – [s7(2)]
 - Legal interest vs equitable interest
 - **Legal interest** – Trustee
 - **Equitable interest** – Beneficiaries
 - If the trustee fails to perform his or her duties, then the beneficiary may sue the trustee in equity to perform his or her duties
- Person have interest in coy where:
 - Contract of purchase – [s7(6)(a)]
 - Right to transfer (e.g. under a will) – [s7(6)(b)]
 - Option to purchase – [s7(6)(c)]
 - Right to exercise or control rights attached thereto – [s7(6)(d)]

Excludes:

- Interests in unit trusts (collective investment scheme) – [s7(3)]
- Interests of a bare trustee – [s7(9)(a)]
- Interests of banks/financial institutions held by way of security – [s7(9)(b)]

- Interest held by reason of an office – [s7(9)(c)]
- Shares bought back by company – [s7(9)(ca)]
- Prescribed interests - [s7(9)(d)]

Deemed interests arising from $\geq 50\%$ control [s7(4)]

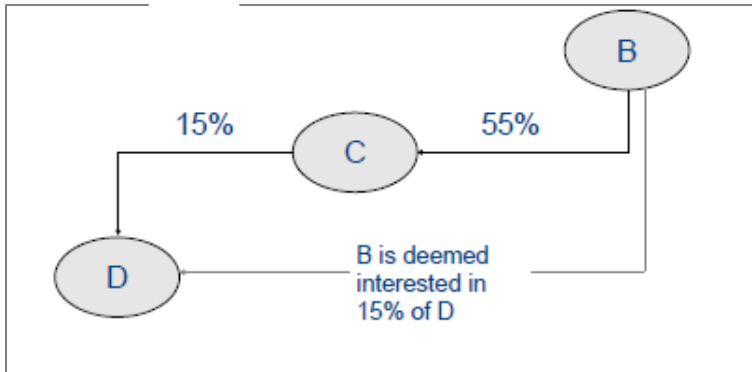
CASE 1

Where a **body corporate (C)** has, or is by the provisions of this section deemed to have, an interest in a **share (in D)** and —

(a) The **body corporate** is, or its **directors** are, accustomed or under an obligation whether formal or informal to act in accordance with the directions, instructions or wishes of a person; or

(b) A **person** has a controlling interest in the body corporate, that person shall be deemed to have an interest in that share.

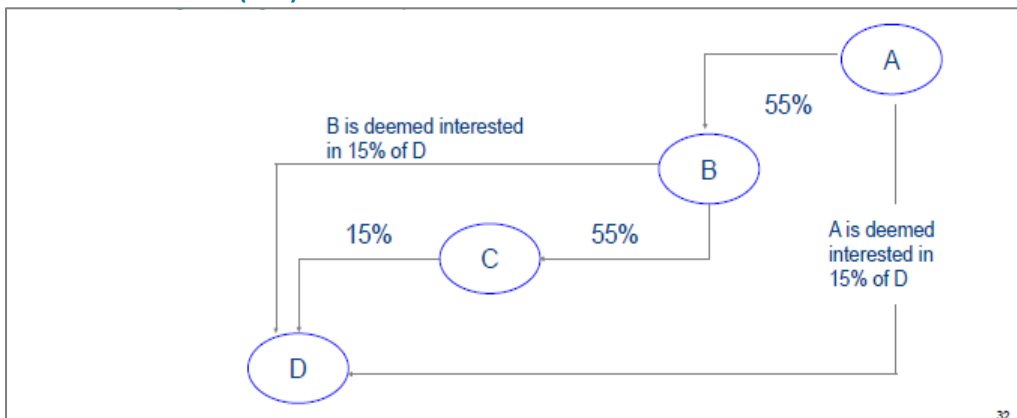
*Person = B



If B has controlling interest in C, then B is deemed to have interest in 15% of D's shares.

CASE 2

[s7(4)] Where a **body corporate (B)** has, *or is by the provisions of this section deemed to have* (includes both s7(4) and s7(4A)) an interest in a **share (in D)** ...



- B is deemed interest in 15% of D as per [s7(4)]
- A has controlling interest in B
- Hence, A is deemed to be interested in 15% of D's shares

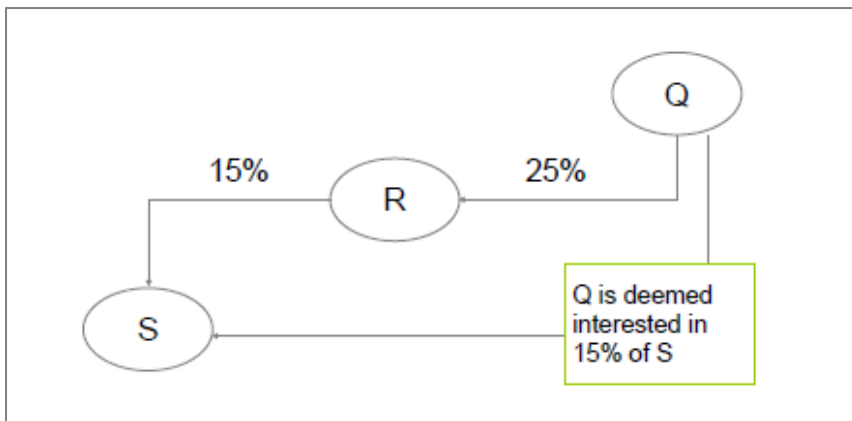
Deemed interests arising from 20% interest [s7(4A)]

CASE 3

Where a **body corporate (R)** has, or is by the provisions of this section (apart from this subsection) deemed to have, an interest in a **share (in S)** and —

- (a) a person is;
- (b) the associates of a person are; or
- (c) a person and his associates are,
- entitled to exercise or control the exercise of not less than 20% of the votes attached to the voting shares in the body corporate, that person shall be deemed to have an interest in that share.

*Person = Q



If Q control **not less than $\geq 20\%$** of R, then it is deem to have 15% interest in S (that share) according to [s7(4A)]

[s7(5)) Who is an associate?

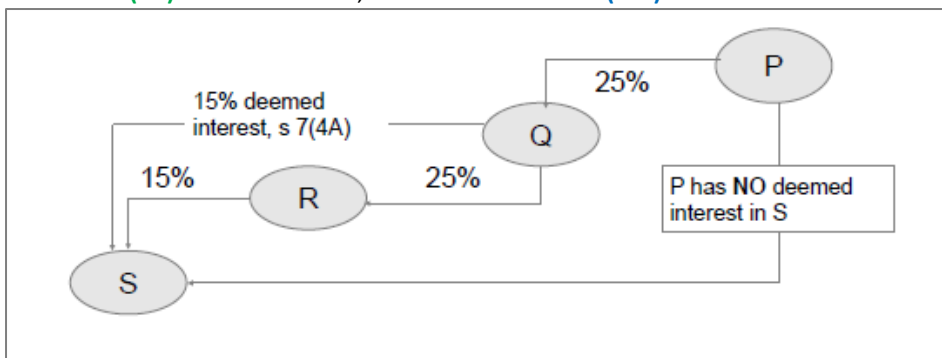
For the purposes of subsection (4A), a person is an associate of another person if the first-mentioned person is —

- a corporation that, by virtue of **section 6**, is **deemed to be related** to that other person;
- a person in accordance with whose directions, instructions or wishes that other person is accustomed or is under an obligation whether formal or informal to act in relation to the share referred to in subsection (4);

... And etc.

CASE 4

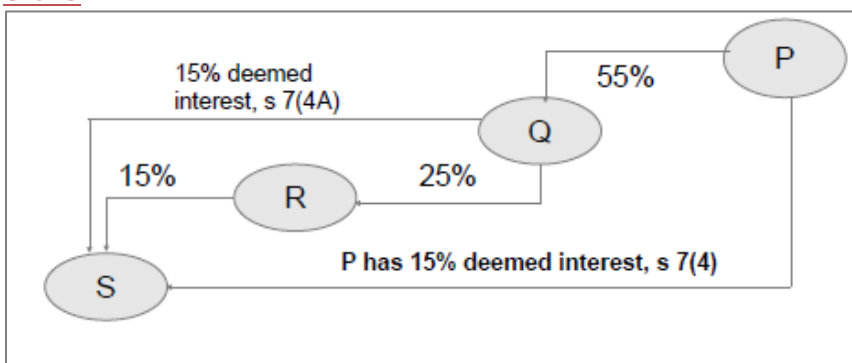
[s7(4A)] Where a **body corporate (Q)** has, or is by the provisions of this section deemed to have (**apart from this subsection**) i.e. **excludes s7(4A)** deemed to have, an interest in a **share (in S)** ...



P deemed to have no interest in S, cannot apply [s7(4A)] twice in the same chain back to back

- But cannot use back to back only!
- E.g. S <--- 15% --- R <--- 25% --- Q <--- 55% --- P <--- 20% --- O
 - O has a deemed interest in S under 7(4A)
 - P has a deemed interest in S under 7(4)
 - Q has a deemed interest in S under 7(4A)

CASE 5



Q Deem to have 15% interest in [s7(4A)], therefore P have deem interest of 15% in [s7(4)]

Lesson 4-2: Management

Introduction

Decision-making power is divided between (1) Board of Directors and (2) Members in general meeting (organs of the coy)

- Sovereign decision-making power between 2 organs (cannot override each other)
- When decision is properly made = treated as decision by company

Division of Power

- **[s157A(1)] In principle**, Board of Directors have a general power of mgmt and make decisions on all matters
- **[s157A(2)] Exception**, matters that are expressly reserved to the GM by the CA itself (matters which directly affect SH rights or i/r) or by express provisions in coy's constitution (can give GM power to override decisions of BOD)

Members cannot override decisions of the board

[Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame (1906)]

- Company's articles of association conferred on directors a general power of mgmt
- This was subject to any qualification of that power passed by special resolution of members
- Mr. McDiarmid, a shareholder, arranged for the sale of the company's assets and undertaking to another company; and convened a meeting of shareholders to pass resolution to instruct BOD to enter the sale agreement and approve it
- Although resolution was passed, directors did not believe the sale was in interest of company
- → Court held court against Mr. McDiarmid, holding that a decision whether to sell company's assets and undertaking was a **management decision that on the terms of the articles, was within the power of the board**. Hence, ordinary resolution by members cannot substitute judgment of board.

[John Shaw & Sons (Salford) Ltd v Shaw (1935)]

- Majority of board resolved that company commence litigation against certain other directors to recover debts owed to the company
- Members in GM, however, at the instigation of defendant directors, resolved litigation to be withdrawn
- → Court held that **decision to commence proceedings was within BOD's general powers of mgmt** provided for in the company's articles and that members could not override the board's decision

Exception: When the board is in a deadlock

[Chan Siew Lee v TYC Investments Pte Ltd (2015)]

- Deadlock cannot be resolved by reforming the board (elect new people or kick out old ones) → then shareholders can takeover to exercise management power

If not, what can the members do?

[John Shaw & Sons (Salford) Ltd v Shaw (1935)] Per Greer LJ:

- A company is an entity distinct from its shareholders and directors.
- Some of its powers may, according to its articles of association, be exercised by directors; certain other powers may be reserved to the shareholders in GM.
- If the **powers of mgmt are vested in the directors, they alone can exercise these powers.**
- **The only way in which the general body of shareholders can control the exercise of powers vested by the articles is**
 - By altering their articles under **[s37]** to require shareholder approval for certain types of transactions
 - Refusing to re-elect the directors of whose actions they disapprove
 - *If directors' decisions constitute oppression, or constitute just and equitable grounds for WU

Officers **[s4]**

- a) Directors
- b) Secretary
- c) Employed in executive position
- d) Liquidator appointed in voluntary winding up
- e) Receiver + manager of any part of undertaking of coy appointed under power contained in an any instrument

And there are specific obligations of officers

- Duty and liability of officers **[s157(2)]**
- Provisions protecting officers from liability **[s172]**

Company Secretary

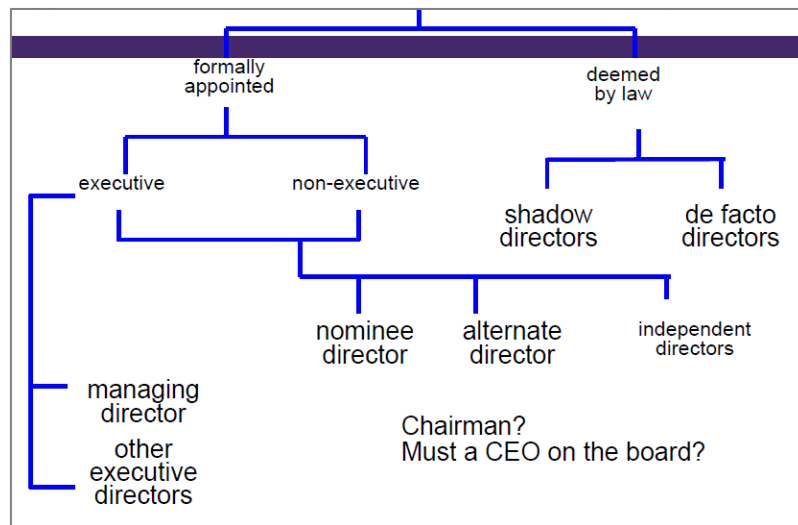
- Need at least 1 [s171], but cannot be same person as director if there is only 1 director in the coy
- Prepare minutes of general meeting and board meeting (record-keeping), signs GM notice, submit documents to ACRA

Chief Executive Officer [s4]

- In direct employment of or arranged with company + principally responsible for management and conduct of part of the part/full biz of company
- *Doesn't owe fiduciary duty to coy, unless he is also the (managing) director of coy

Director [s4]

- (a) Any person occupying the **position of director**
- (b) Includes a person in accordance with whose directions or instructions the directors or the majority of directors of a corporation are accustomed to act = **shadow director**
- (c) And **an alternate or substitute director**
- **Required?** Min 1 ordinary resident in SG [s145(1)] or 3 to form audit committee for listed coys [s201B(2)]
 - Due to divergence of ownership and mgmt → to provide oversight over activities of mgrs. For SHs



Chairman of Board: person whom directors elect to chair their meetings and sign the minutes of the meetings, also usually chair meeting of members

Formally appointed

Executive director: both a director and FT employee of coy

- **Managing:** usually refers to CEO appointed by way of formal contract

Non-executive director: not involved in FT mgmt or work in coy → only attend board / committee meetings to supervise

- **Nominee:** appointed by a particular group (e.g. employees) or another person (e.g. substantial SH) to safeguard their i/r
- **Alternate:** a director appoint temporary substitute to represent himself in his absence
- **Independent:** no r/s with the coy and its related coys, its 10% SHs or its officers (personally and immediate family members) or any other person having a r/s which, would interfere with the exercise of independent judgment [Pg. 198]
 - **Nominating committee** decides whether a director is indpt or not
 - Min under **SGX** is **2**; min under **Corp Governance** is **1/3** (or **1/2** if CEO and chairman is the same person/immediate family member or if chairman is part of mgmt or chairman is not indpt)

Deemed by law:

1. **Shadow director:** another person (can be a coy) who commands multiple / majority of directors (e.g. control 1 out of total 2 directors) how to act → discernible pattern of compliance with occasional departure is sufficient
2. **De factor director:** not called director but acting as a director and fulfilling functions of office
 - Court in deciding if someone is de facto: Person has assumed to act as director OR coy held the person to be a director → has the person perform functions only directors can perform?

→ Both are subject to usual duties of directors (e.g. fiduciary)... BUT

→ Must these directors comply with all rules in CA?

- In principle, no
 - [Heap Huat Rubber Company Sdn Bhd v Kong Choot Sian (2004)]: shadow director did not have to obtain SH approval for remuneration even though s169 of CA requires it → more administrative / procedural rule

→ Determine if the rules applied to shadow / de facto is more **procedural** (won't apply) or **fiduciary** (will apply)

Appointment of director

- **[s149B]** Elected **by (1)** SH through ordinary resolution at AGM, unless constitution provides otherwise **or (2)** elected by BOD if provided for in constitution or **(3)** by creditors / employees (nominee directors)
- **Restrictions for public coys:**
 - **Must be voted on individually**, no “package vote for directors in a bundle” **[s150]**
 - Otherwise, treat as void

Qualifications of directors

- Individual and not company **[s145(2)]**
- Attained age of 18 and full legal capacity **[s145(2)]**
- *Need not be an expert in the business company is in or hold qualifications **(but might affect duties)** unless in banking
- Filed declaration of consent to appt tgt with statement that he is not disqualified from acting as a director **[s146(1A)]** and take up shares in coy **(if constitution requires)** within 2 months of appt with necessary filing of documents **[s147]**

→ **Term of office** of director usually contained within constitution or resolution passed in that director's appt

- Can seek re-election after retirement from office unless constitution provides otherwise
- Although appt for life is possible, director of public coy can still be removed **[s152]**

→ **Office is vacated upon** end of term (retirement), resignation, removal from office, or upon his death

- Resignation by giving notice in writing to company **[s145(4A)]** taking effect from day notice is received by coy or any other stated effective date of resignation within notice
 - **HOWEVER** director cannot resign unless there is **AT LEAST ONE** remaining director = resident of SG
 - **UNLESS** he is disqualified under CA

Removal of director

Public coy

- (1) Members can remove director via ordinary resolution **(notwithstanding anything in constitution)** **[s152(1)]**
 - Special notice of intention must be sent to coy 28 days before meeting in which resolution is to be passed **[s152(2)]**
 - Coy must notify director immediately on receipt, who can send representations to members / speak at the meeting **[s152(2)]**
 - **[Ng Jo Soon v Dovechem Holdings Pte Ltd]**: although remuneration plan document stated Mr. Ng is to retire at age 70, there was no formal board resolution recording his retirement
 - **Procedures for removal of directors must be complied with for removal to take effect**
- (2) Directors cannot remove other directors **[s152(8)]**

Private coy

- (1) Members can remove director via ordinary resolution **(SUBJECT to the constitution)**
- (2) Directors can be removed by other directors dpding on constitution

*Refer to constitution for other cases

Disqualification of director

1. Automatic disqualification

- **Discharged bankrupt** **[s148(1)]**
- **Convicted of (1)** offence involving fraud or dishonesty with imprisonment of 3 months or more, **(2)** offence under Pt XII of Securities and Futures Act (e.g. insider trading, manipulation), or **subject to the imposition of (3)** Civil penalty order under s232 of Securities and Futures Act **[s154(1)]**
- **Being director in not less than 3 coys which were struck off under s344 within a 5-year period** **[s155A]**
- **Persistent default in delivering documents to ACRA** for ≥ 3 times in a 5 year period **[s155]**

2. Discretionary disqualification by court

- **Involvement in coys that have undergone insolvent liquidation** **[s149]** If company has gone into liquidation and was insolvent within 3 years of his cessation as director **AND** if his conduct was unfit for mgmt of coy
- **Commission of certain non-fraudulent offences** **[s154(2)]**
 - In connection with the formation or management of a corporation
 - **Not exercising honesty and reasonable diligence** in the discharge of the duties **[s157]**
 - Not keeping proper books or engaging in wrongful trading **[s339]**
- **Used against national interest or security** **[s149A]** unless can prove that it went without director's consent and director has already conducted due diligence to prevent such use of coy

3. Debarred by ACRA if default continuously occur for 3 or more months

➔ Effect of disqualification:

- It is an offence to breach the disqualification order (whether directly or indirectly concerned with mgmt of coy)

Board meetings

- No legal rules, all procedural rules in **constitution** (can refer to old Table A)
- BOD regulate meetings as they deem fit [Reg 79 Table A], but usually its chairman who calls for board meeting
- **Board resolution:** decisions are made based on simple majority of votes
 - Constitution can provide for > 1 vote for a director in some circumstances, or chairman to have casting vote
 - **Minutes of meetings** must be kept [s188(1)(a)]
 - **NB:** directors **may be precluded from voting on certain matters** (e.g. have i/r in subject matter), if not = vote not counted + may breach fiduciary duty
- Constitution can provide for **written resolutions** (signed by all / majority of directors with no actual meeting held)
- **Irregularities in board meeting (and GM)**
 - (1) **Defect, irregularity or deficiency in Notice sent:** by constitution, if not → reasonable notice of BM to all directors
 - (2) **Quorum not met:** min # of **competent (not precluded)** directors present; by constitution, if not → 2 [Reg 83 Table A]
 - *****[s392(2)]:** A proceeding under this Act is **not invalidated** by reason of any procedural irregularity **unless** the Court is of the opinion that the irregularity has caused or **may cause substantial injustice** that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.
 - Is there procedural irregularity?
 - **In principle**, meeting not invalidated by procedural irregularities
 - **Except** when it caused substantial injustice (very unfair)
 - [Golden Harvest Films Distribution (Pte) Ltd v Golden Village Multiplex Pte Ltd [2007] 1 SLR 940]: JV coy with 3 nominee directors each on a board of 6. One group proceeded with meeting and passed a resolution, after the other group walked out of the meeting halfway due to certain disagreements → Other group sued the former grp → Court held that there was **no procedural irregularity** as quorum was met at the stat of the meeting
 - [Chang Bentley v Tang Kin Fei [2012] 1 SLR 274 (SCA)]: SH agreements + articles require at least 1 PPHL's nominee director to be present to constitute quorum for BM. No nominee director of PPHL attended a BM, which still passed a resolution.
 - ➔ (1) There was procedural irregularity as quorum was breached; (2) In principle, resolution was still valid pursuant to s392; (3) Court held that there was **substantial injustice prima facie** as quorum was put into constitution and SH agreement (other party meant for it to be there, yet still call meeting to bully PPHL)

Director Remuneration

- *Only for their services rendered as a director (vs. executive = employment contract)
 - If under executive employment contract → remuneration determined by board only
- Can be fixed fee with no bonus, stock options, and minimal fees but with incentives etc.... BUT
- Must be expressed in coy's constitution, if not →
- **In principle, no, unless approved by a standalone ordinary resolution**
 - [s169(1)]: A company **shall not** at any meeting or otherwise **provide emoluments or improve emoluments for a director of a company in respect of his office** as such **unless the provision is approved by a resolution** that is not related to other matters and any resolution passed in breach of this section shall be **void**.
 - [s169(2)]: **emoluments** = allowances, pensions, and anything subject to SG income tax in respect to services as director
- **Disclosure of remuneration:** at meeting where resolution under **s169** is passed; **AND** min 10% of coy's members or member(s) with at least 5% of total issued shares can send notice requiring disclosure of directors' remuneration [s164A]
- **Listed coys:**
 - Directors fee = fixed sum and cannot be commission based on percentage turnover [SGX]
 - Must have formal and transparent procedure to determine directors remuneration by remuneration committee etc. and disclose in annual report such policies and procedures [Corp Gov]
 - Have to disclose directors' and key executives' remuneration in annual report [SGX, Corp Gov]

Compensation for loss of office [s168]

[s168(1)] In principle, companies cannot:

- a) Pay any director for loss of his office **as an officer** (executive directors) or in consideration for his retirement from office
- b) Payment in connection with the transfer of the whole or any part of the undertaking (business) or property of the company

- I.e. director cannot earn commission for helping coy sell part of its biz to another coy → conflict of i/r!
- **Unless**
 - (1) details of proposed payment is disclosed to members of company, and
 - (2) approved at AGM via **ordinary resolution**
- **New s168(1A) exception: approval requirement does not apply** for pmts made to director holding salaried employment in which compensation for termination of e/m is pursuant to an **existing legal obligation arising from an agreement made between coy and director** (ok to pay to fire him as an employee subject to contract), as long as
 - Payment don't exceed total emoluments received as director in the preceding year
 - Disclosed to members of coy prior to pmt being made

What payments fall within the scope of s168(1)? → Have to ascertain true nature of payment

(1) [Grinsted Edward John v Britannia Brands (Holding) Pte Ltd [1996]]: Appellant contract provided that would be entitled to be paid his salary and fringe benefits for two years after the termination of the contract of service.

→ Court of appeal held that these payments were not caught by [168(1)(a)], as was regarded as **part and parcel of the remuneration package**, not intended to be paid with the object of compensating appellant with loss of office or retirement

(2) [Fasi v Speciality Laboratories Asia Pte Ltd (No 2) [1999]]: "severance benefit" in exchange for director's agreement not to engage in any activity in competition with coy for a specified period after termination of service → Court held not under [s168(1)(a)]

[s168(5)] Exceptions for [s168(1)]:

- b) **Agreement particulars** disclosed and approved by **special resolution** (more contractual based, arranged earlier)
- c) Bona fide payment for **damages for breach of contract** (employment contract e.g. tenure of min 5 years breached)
- d) Bona fide payment by way of **pension or lump sum payment in respect of past services**
- e) Any agreement made **before he become director**, used as part of the consideration for the director to take on the job.

*NB: only 168(5)(b) and 168(5)(d) can occur after appointment as director

Loans to directors

[s162(1)] In principle, coy is not allowed to make restricted transactions to directors and their immediate family [s162(8)]:

- (a) Make **loan** or **quasi-loan** to a director of the coy or of a related coy by virtue of s6 (**relevant director**)
 - **Loan**: with lender + borrower, obligation to repay usually with i/r
 - **Quasi-loan**: coy agrees to pay a sum for director OR agrees to reimburse expenditure incurred by director, on terms where director will reimburse the coy afterwards
- (b) Provide any **guarantee** or any **security** in connection with loan or quasi-loan made to a relevant director by any other person
- (c) Enter into a **credit transaction** as creditor for benefit of relevant director
 - **Credit transaction**: coy supplies goods or property under hire purchase / conditional sale agreement OR on the understanding that pmt is to be deferred (**e.g. coy sells house to X and only require pmt 2 years later**)
- (d) Etc.

Exceptions

[s162(2)] Exempt private coy

[s162(3)] Restrictions transactions that are allowed:

- (a) Enable relevant director to meet expenditure for purposes of the coy or perform his duty as officer, but subject to s162(3)(b)
- (b) Director is under FT employment with coy or related coy → coy can lend to buy home but subject to
 - Can only buy 1 home
 - **[s162(4)(b)]:** (a) Needs to be approved by GM or (b) if not, have to be repaid within 6 months
- (c) If director is under FT employment and such loan is also made available to everyone under a scheme approved by GM
- (d) If coy is a bank, can lend to director (subject to special bank rules)

[s162(4) to (5)] If breach,

- Where prior approval not given as in s162(4)(b), directors will be jointly and severely liable for any money unpaid
- Where coy contravenes such section, director authorizing restricted transaction will be liable for (1) Fine not exceeding \$20,000 or (2) Jail not exceeding 2 years

[s162(7)] Company can recover loan even if it violates s162

Loans to persons connected with directors

[s163(1)] In principle, coy is not allowed to:

- (a) Make a **loan** or **quasi-loan** to **another company or LLP**

- (b) Provide any **guarantee** or any **security** in connection with loan or quasi-loan made to another coy or LLP
- (c) Enter into a **credit transaction** as creditor for benefit of another coy or LLP
- (d) Provide any **guarantee** or any **security** in connection with a credit transaction of another coy or LLP

if a **director or directors** of the first-mentioned company is or **together interested in 20%** or more of the **total voting power** in the other company (excluding treasury shares)

**Interest

- Family interest **[s163(5)]**
- Deemed interest **[s7(4)]** or **[s7(4A)]**

[s163(2) to (3)] Rule is extended to companies or LLPs **incorporated outside Singapore**

Exceptions

- **[s163(1)]: Exempt private coys**
- **[s163(1)]: (a)** Approved by GM, and **(b)** interested directors and their family members refrain from voting
- **[s163(4)]: Restrictions transactions that are allowed:**
 - For related companies
 - In the business of banks

New Exceptions for s162 and s163

- **[s163A(1)]:** Coy can lend director to cover expenditure in defending against any criminal or civil proceedings (in connection with negligence, default, breach of duty or breach of trust in relation to coy)
 - Subject to **[s163A(2)]:** director winning the case → if he is convicted, loan has to be repaid
- **[s163B(1)]:** Coy can lend director for the purpose of defending a regulatory action (e.g. ACRA)

Consequences for contravention [163 (6) – (7)]

Disclosure of interest

→ Both directors and CEO have to disclose their interests

[s164(1) and (1A)] “A company shall keep a register showing with respect to each **director / CEO...** the particular of (1) shares in that company or a related corporation... of which the director / CEO is a **registered holder** or **in which he has an interest and/or deemed interest**

(2) debentures in that company or a related corporation

- Not required to show particular of shares in related corporation which is a wholly-owned subsi of the coy **[s164(2)]**
- Disclosure includes interest held by spouse and/or “infant child” (< 18 yo) **[s164(15)]**

[s165(1)] Director and CEO needs to disclose to company via notice in writing the particulars **relating to those shares in s164** within 2 business days after (1) becoming appointed as a director / CEO or (2) become registered holder of acquired interest in the shares

- **[s165(9)] If breached,** Director or CEO will be liable to fine ≤ \$15k or imprisonment ≤ 3 years; and for continuing offence, further fine of \$1,000 for every day which the offence continues after conviction

General Meeting, Procedural Issues, Proxy, and Other Issues

Lesson 5: Directors' Duties

Introduction

All directors (including **shadow** and **de facto**) owe the same duty:

[SM Trading Services v Intersanctuary Ltd (2006)]

Shadow Director

- In this case K had interest in defendant business and was (1) actively involved in the affair on the company, he would also (2) advise the directors of the company and they would rely on this advice.
- **Prakash J held:** Found a **fiduciary relationship** to exist between one K and the defendant company even if he held no formal position in company

Directors' duties fall under **3 parts**:

(1) Common/equity law,

- **Fiduciary duty under equity law, duty of care under common law**
 - Used to interpret statutory law
 - ***Other fiduciaries:** trustee, agents, promoters, ***executives depending on facts of case**

(2) Statutory law,

- **Mostly applies to directors**
 - ***Some apply to other company officers and agents e.g. s157(2)**
- Note that **s157(4)** states that statute doesn't replace common law → they substantiate one another

(3) Contractual – by way of service or employment

Who enforces the duties? (*KIV Enforcement of Corporate Rights)

- **Statutory breach** → enforced by ACRA, or less commonly, **[s409A]** by persons whose i/r may be affected through application to the court for an injunction to restrain director from committing the breach
- **Common law breach** → enforced by company or liquidator (when coy is insolvent)
 - To sue or not to sue is decided by BOD; unless directors themselves are involved...
 - ...Then indiv members via **[s216A]** **derivative action by shareholders** on behalf of coy will be allowed

To whom does a director owe duties to?

In principle, directors do not owe any fiduciary duties to members, only towards the company.

[Percival v Wright (1902)]

- Mr Wright was the chairman of a company, who with two other directors, agreed to buy shares from Mr Percival at £12.50 each.
- Mr Percival then found out the directors had been negotiating with another person for the sale of the whole company at far more than £12.50 a share. The directors had not told Percival.
- Percival claimed breach of fiduciary duty
- → Court held that the **directors owed duties to the company** and not shareholders individually.

Exceptions:

(1) When director act as agent on behalf of a shareholder

[Allen v Hyatt (1914)]

- The directors of a company induced the shareholders to give them options for the purchase of their shares so that the directors could negotiate for the sale of the shares to another company.
- Instead of selling the shares directly to the other company, the directors used the options to purchase the shares themselves and then resold them to the other company.
- → Court held that the directors had made themselves agents for the shareholders in the sale of the shares and must therefore account to them for the profit they had made on the sale.

(2) When director assume a fiduciary obligation towards shareholder

[Coleman v Myers (1977)]

- A father and son were the **only directors of a New Zealand family company**.
- They devised a plan to **acquire the company through** the vehicle of **another company** owned by the son. They planned to pay for the takeover by selling off assets of the family company.
- As directors of the family company, the **father and son recommended to the other shareholders that they should accept the takeover offer**, stating that the offer price for their shares represented their real value. **This was not so.**
- **After the sale of the assets and the repayment of the debt, the directors made a profit of several million dollars. They failed to disclose to the shareholders the likely extent of the profit and the son had stated that the assets of the company would not be sold after the bid.**
- The shareholders challenged the actions of the directors claiming that there had been a breach of fiduciary duty in failing to disclose the inside information to the shareholders when recommending acceptance of the offer.
- → **Court of Appeal decided that although Percival v. Wright was correctly decided on its facts, a fiduciary duty was owed by the directors to the shareholders and therefore they should account to the shareholders**

[Bunninghausen v Glavanics (1999)]

- ✓ When a member is highly reliant upon a director for his information and advice
- B and G were both directors and only shareholders of a company, with B holding the majority shares
- G was a minority shareholder, and was not active in running the company
- Disputes led to G entering an agreement to sell all his shares to B
- However, B did not tell G that he had been approached with a 3rd party to sell off the entire biz at a profit.
- → **Court held that B owed G fiduciary duties as a director which he breached** as B acted in his own i/r and did not disclose of the negotiations to sell the coy biz.
 - A breach of duty was held because B was effectively the sole director and was in a position of considerable advantage in relation to G, and special circumstances (confidential negotiations for selling the biz) allowed the director to take advantage of G as a member (due to G's lack of knowledge)

The Duties of a Director

(A) Loyalty (Fiduciary)

[Bristol and West Building Society v Mothew (1998)]

Per Millet LJ: A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a **relationship of trust and confidence**. The distinguishing obligation of a fiduciary is the obligation of **loyalty and good faith**.

The principal is entitled to the single-minded loyalty of his fiduciary.

This core liability has several facets. (1) A fiduciary must act in good faith; (2) he must not make a profit out of his trust; (3) he must not place himself in a position where his duty and his interest may conflict; (4) he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.

- ✓ good faith in i/r of coy,
- ✓ no personal benefit / secret profit, and
- ✓ no conflict of i/r

(A)(i) Good faith in the interests of the company

The **duty of good faith** has been referred to as the primary obligation owed by a director to a company

What is good faith?

(1) In principle, **Subjective Test**: [Re Smith and Fawcett Ltd (1942)]

According to Lord Green, Directors must **exercise their discretion bona fide in what they consider** – not what the court may consider – **is in the interest of the company**

(2) However, the “outer boundary” or “minimum objective standard” is prescribed by...

Objective Test (“honest and intelligent man test”): [Hutton v West Cork Railway (1883)]

According to Bowen LJ, **Bona fides cannot be the sole test**, otherwise you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly bona fides yet perfectly irrational. The test must be what is reasonably incidental to and within the reasonable scope of carrying on the business of the company.

- i.e. whether or not an honest and intelligent man in the position of directors, taking an objective view, could reasonably have concluded that the transactions were in the interests of the company

(3) Also means that director must act honestly [s157(1)]

[Townsend Henry George v Jenton Overseas Investment Pte Ltd (2006)]

- Held that duty of honesty and duty to act bona fide may be regarded as a composite obligation
- Its statutory equivalent is the duty under **s157(1)**: “A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.”
- **[s157(3)] Consequences of Breach** → prosecuted for criminal offence and fined up to max of \$5,000 or be imprisoned up to 1 year; may be liable for any profits made or detriment suffered by coy due to breach; and may be disqualified from being a director or participating in mgmt of coys under **s154(2)**

Key question is whether a person is honest: [Ho Kang Peng v Scintronix Corp Ltd (2014)]

- A director authorize a fictitious contract with a 3rd party in order to procure another business (i.e. bribery)
- Overall, the director actually believed it's for the interest of the company
- → Court held that he breached his duty as he was **(1) dishonest** – cannot be used to satisfy **bona fide test**; and **(2) “takes risks which no director could honestly believe to be taken in the interests of the company”** since it attracts criminal liability (**objective test**)

What are the company's interests?

1. Members

In principle, this refers to the **collective interests of the shareholders** (i.e. shareholder primacy) **of the company**.

- This **does not** mean directors must always do what **majority** of members want, although it will be mostly the case
- As interests of members may not be the same, a decision made by a director can benefit one class of members but not the other etc. → will not be held to breach if directors have acted fairly with regards to the decision made
- Interest of members might not be the same as interest of company as a commercial entity e.g. stopping a hostile takeover → depends on facts of circumstance (should shareholders be allowed to consider for themselves the offer?)

***This does not mean that directors cannot consider other stakeholders, since in certain cases it will indirectly affect shareholders' value as well...

2. Employees [s159(a)]

When directors exercise their powers they shall include the interest of the company's employees generally, on top of members

Although **priority should not be given to employees over that of company's members**

[Parke v Daily News Ltd (1962)]

- Directors decided to distribute proceeds of selling newspaper business to company's employees who were made redundant
- Minority shareholder challenged the payment to employees
- → Court held that directors breach duty to act in interests of company, given that (1) payment was a **substantial** sum, and (2) payment was made to **former** employees of the coy

3. Creditors

In principle, according to [Tong Tien See Construction Pte Ltd v Tong Tien See (2001)], Tay Yong Kwang JC said:

- (1) **When a company is solvent**, its interest is those of its shareholders, and there would be not divergence of interest between company and its shareholders.
- (2) **When a company is insolvent, the interest of its creditor become the dominant factor** in what constitutes the benefit of the company as a whole

This is further supported by VK Rajah JA in [Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd (2010)]:

- (1) **When a company is insolvent, the creditors' interests come to the fore as the company is effectively trading and running the company's business with the creditors' money.** Because of the limited liability principle, the risk (of trading when insolvent) on shareholders would be minimal, as they would at worst lose only what they have invested in the company.
- (2) **Unsecured creditors** on the other hand may never recover any monies due to them... **and have everything to lose when illegitimate risks are taken. As such, it is only right that director ought to be accountable to creditor for the decisions made when the company is:**
 - **Insolvent, or Perilously close to being insolvent**
- (3) This fiduciary duty is strictly speaking owed to the company. **No duty owed directly to creditors.**
- (4) Individual creditors cannot without the assistance of **liquidators** directly recover from the director for such breaches of duty.

Breach of duty if directors remove assets from an insolvent coy such that they are not available to repay its creditors' debts

[Kinsela v Russell Kinsela Pty Ltd (in liq) (1986)]

- Kinsela family held all the shares in the coy and several family members were directors
- When coy was insolvent, coy granted a lease of its biz premises to two of its directors – which was less than commercial value, and included a clause that directors could purchase the property at any time for a fixed price
- → Court held that the purpose of lease was to have an impt asset of the coy (biz premises) placed beyond reach of creditors → i/r of coy = i/r of creditors as coy was insolvent at the time lease was entered → directors held to have breached their duty to act in the interests of the coy

[Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo and Others (2004)]

- Liquidator brought an action for breach of duties against directors for:
 - Writing off debts owed to related parties and one of the directors
 - Payments of sums to two of the directors
 - Investing a sum of money into another coy and pulling out of investment within a month without taking steps to recover the amount invested
 - Paying out dividends to themselves as shareholders
- While the company was insolvent

4. Group Interests

In principle, **each company in a corporate group is to be treated as having its own interests** even if it's a wholly-owned subsidiary → hence **directors must act in the interests of its direct coy** rather than the parent / related coy

HOWEVER, does not mean automatic breach of fiduciary duty when directors of a group make a decision that is in the interest of the group but compromises the interest of the company.

Use Objective Test ("honest and intelligent man test"):

Key is whether decision can be viewed as benefiting the coy of which they are directors as well

[Intraco Ltd v Multi-Pak Singapore Pte Ltd (1994)]

- Multi-Pak issued shares to Intraco in return for a debt owed to Intraco by City Carton, a company related to Multi-Pak.
- City Carton was however, not likely to repay the debt and so the transaction was not beneficial to Multi-Pak on the face value of it. When the transaction was challenged,
- → **Court recognised that there was a benefit to Multi-Pak in forming the transactions with Intraco and therefore held that there was no breach of directors' duties involved.**
 - The directors of Multi-Pak, who were also directors of City Carton, had **considered the group as an economic entity** and **acted for the benefit of the group as a whole.**
 - An **honest and intelligent man in the directors' position**, taking an objective view, **could reasonably have concluded that the transactions were in Multi-Pak's interests.**

[Equiticorp Finance (in liq) v BNZ (1993)]

- Equiticorp Finance and Equiticorp Financial Services – 2 subsidiaries of Equiticorp Holdings, used their deposits with BNZ to repay part of the \$200m loan by Uruz, another subsidiary of Equiticorp Holdings
- When Equiticorp Group collapsed, liquidators brought an action against the directors for breach of duty

- → Using the **honest and intelligent man test**, court held that the loss of support for the corporate group by BNZ if the 2 companies had not allowed the use of their deposits to repay the loan would have potentially disastrous for all the companies in the corporate group → hence **no breach of duty**

(A)(ii) Duty to avoid conflict of interests

2 main aspects: (1) no-conflict rule; and (2) no secret profit

1. Conflicting Interests & Duties (No-Conflict Rule)

General Law
<p>[Bray v Ford (1896)]</p> <p>Per Lord Herschell: The rule of a court of equity that a person in fiduciary position is not allowed to put himself in a position where his (personal) interest and duty (to act in the interest of the company) conflict</p> <p>What constitutes conflict?</p> <p>[Boardman v Phipps (1967)]</p> <ul style="list-style-type: none"> • Per Lord Hudson: <u>Mere remote possibility</u> is sufficient to constitute conflict of i/r (can win or lose in transaction) • Accepted view by Singapore court <p>→ Unless disclosed and approved by shareholders in GM</p>
Statutory Law
<p>[s156] Reinforces General Law</p> <p>→ Have to disclose and get approval by other directors in BOD meeting</p> <ul style="list-style-type: none"> ○ [s156(14)] Does not replace general law or any provisions in constitution ○ [s156(15)] Consequences of Breach → prosecuted for criminal offence and fined up to max of \$5,000 or be imprisoned up to 1 year

(i) Transactions with the company (self-dealing)

General Law
<p>Where director, <i>directly or indirectly</i>, <u>enters into transaction with coy</u> (e.g. contract to sell property to coy)</p> <p>= Real conflict between the personal interest of the director (to obtain the highest possible price for the property) and director's duty to act in the interests of the coy (to ensure coy buys property at the lowest price possible)</p>

[Aberdeen Railway Co v Blaikie Bros (1854)]: **Have to disclose to shareholders in GM + avoid conflict**

- Aberdeen Railway entered into contract to purchase equipment from Blaikie Bros – in which a director was a partner in
- That same director did not disclose to the other directors that he was a partner in Blaikie Bros
- → Court held that director had breached his duty not to place himself in a position where his personal i/r conflicted with his duty to the company

Other things to note:

- Not necessary that conflict causes loss to the coy or a profit for the director in order to have a breach of duty
- Whether or not informal disclosure of conflicts in transactions is sufficient to discharge formal disclosure obligations depends on interpretation of coy's constitution
 - [Dayco Products Singapore Pte Ltd (in liq) v Ong Cheng Aik (2004)]: not sufficient
 - [Maxz Universal Development Group Pte Ltd v Lian Hwee Choo Phebe (2010)]: sufficient

Statutory Law
<p>(i) Interest in transactions</p> <p>[s156(1)]: Subject to this section, every director and CEO of a company who is in any way, whether directly or indirectly, interested in a transaction or proposed transaction with the company shall as soon as practicable after the relevant facts have come to his knowledge declare the nature of his interest at a meeting of the directors of the company.</p> <p>[s156(3)]: The requirements [in (1)] shall not apply ... where the interest of the director consists only of being a member or creditor of a corporation which is interested in a transaction ... if the interest ... may properly be regarded as not being a material interest.</p> <ul style="list-style-type: none"> ○ → Disclose potential material (own judgment and dpds on facts of case, but controlling i/r is definitely material + 5% substantial shareholder should disclose in practice) conflict of interests to Board of Directors <ul style="list-style-type: none"> ○ Either at BOD meeting, or give a general written notice *with specified details and get approval ○ Also have to disclose spouse/children's interest [s156(13)] ○ General notice to other directors are permitted [s156(5)]

(ii) Conflicting duties

Multiple directorship: Holding office position in transacting companies or competing companies

General Law

- **In principle**, no legal prohibition for holding multiple directorships esp when companies are in different businesses
- However, conflict rule applies where a situation arises which results in there being an actual or substantial possibility of a conflict between the 2 duties
 - When the 2 companies indirectly transact [State of South Australia v Marcus Clark (1996)]:
 - Clark was the CEO of State Bank of South Australia, and director + shareholder of Equiticorp
 - Equiticorp made a substantial loan to APA Holdings, however Equiticorp was in need of funds and APA was having liquidity problems
 - State Bank then acquired a wholly-owned subsidiary of APA Holdings at a substantial price over its true market value
 - → Court held that Clark breached his duty to avoid placing himself in a position of conflict of i/r and duty. His duty required him **(1)** to disclose to directors of State Bank the fact that Equiticorp stood to gain from any pmt made by it to APA Holdings for the purchase of its subsidiary; and also **(2)** not vote at board meetings of State Bank where acquisition of the subsidiary was considered and approved
 - When the 2 companies are competing, director **(1)** should not place himself in conflicting position, **(2)** should not divulge confidential info obtained to either coy; and **(3)** should make appropriate disclosures

Statutory Law

(ii) Position / Possession of property by itself creates conflict

[s156(6)]: Every director and CEO of a company who holds any office or possesses any property whereby whether directly or indirectly duties or interests might be created in conflict with his duties or interests as director shall declare at a meeting of the directors of the company the fact and the nature, character and extent of the conflict.

- → Disclose where diff offices held / property possessed may result in potential conflict to **Board of Directors**
 - Either at BOD meeting, or give a general written notice **with specified details* and get approval
- Need not show person has a personal i/r that gave rise to the conflict [Yeo Geok Seng v Public Prosecutor (2000)]

Nominee directors

General Law

Recall: A nominee director is a person appointed to represent the interests of a particular group or another person. For instance, a nominee director may be appointed to sit in a board by a substantial shareholder or a special class of shareholders. **Nominee directors may often find themselves in a dilemma as to whose interest to represent.**

In principle, nominee director must act in the best interests of the coy of which they are a director, which takes precedence over appointer's interest. This does not mean that the nominee cannot take into account i/r of his appointer while discharging duties. [OCBC v Justlogin Pte Ltd (2004)]

Per Chao Hick Tin JA:

- Every director owes the same responsibility to the company as a whole → no different where a director is the nominee of a group of shareholders or creditors
- Nominee director should not regard himself as a watchdog for those who put him on the board
- A nominee director **should exercise his judgement in the best interest of the company** and should not be bound to act in accordance with the direction of instruction of his appointor
- A nominee director **may take into account the interest of his appointor** if such interest does not conflict with the interest of the company

Statutory Law

[s158(1)] Disclosure of information by nominee director

Statute allows a nominee director to divulge information to his appointer only if the following conditions are fulfilled:

1. Disclosure will not be likely to prejudice the company
2. Disclosure is authorized by BOD with respect to either (i) all or class of info; or (2) specified info by authorization

2. No-Profit Rule & Use of Corporate Opportunity and Information

(i) Secret Profits

General Law

[Bray v Ford (1896)] In principle, a director is **not allowed to make any secret profits** from his position unless expressly provided

Rule substantially overlaps with no-conflict rule, as directors are disloyal when they place themselves in a position of i/r with a view to profit from that position. E.g. accepting bribes or secret commission in performance of director duties, or in [Furs v Tomkies (1935)] where a director obtained additional pmt from a contracting coy which he failed to disclose

However, there are exceptional situations where directors are penalized for making a profit from his position as a director, even though there does not seem to be conflict with coy's i/r:

*****Harsh rule stated in [Regal (Hastings) v Gulliver (1942)]**

- The defendants were the directors of Regal, a company which operated a cinema.
- Regal created HAC, intending it to be a subsidiary, to acquire the leases of two cinemas nearby.
- However, because of lack of money, the directors and solicitors personally paid for 60% of the shares in HAC.
- HAC acquired the cinemas, and then both coys were sold off together to the new owner for a profit.
- The new directors of Regal (representing the new owner) took proceedings against the ex-directors and solicitor, seeking an account of profits made on the sale of their personal shares in HAC.

Lord Russell held:

- The liability of fiduciaries does **not depend on fraud or bona fides**; it **arises from the mere fact of profit, no matter how honest they were**.
- The defendants attracted liability due to their fiduciary relationship with Regal. They obtained their shares merely by reason of their position. Thus, they are accountable for the profits they made out of them.
- The defendants were thus liable to Regal for those profits on the ground that they **had obtained their shares by reason of their position as directors** of Regal and in the course of their office as directors.

(ii) Corporate Opportunity Doctrine

General Law

In principle, directors must not take corporate property, information or opportunities without the permission of the coy.

- **Corporate opportunity** = business opportunity which the coy is considering or one in which the coy might reasonably be expected to be interested, given its current line of business
- **We take the English position of no-profit rule above:** if receive business opportunity, should disclose to coy → only when coy rejects it then can director use it personally

[Bhullar v Bhullar (2003)]

- Family firm divided between BH1 and BH2
- They had an agreement in which the company will not purchase any more investment properties
- BH2 by chance discovered that there was a piece of land adjacent to their property going on sale, hence they set up another coy to acquire the piece of land
- As BH2 did not disclose to the company, BH1 was unhappy and sued BH2 for breach of duties
- → Court held that BH2 breached their fiduciary duties as there was no disclosure and approval obtained on their part. It doesn't matter if coy will take the opportunity up or not, director still have to inform coy if there is potential conflict.

Other Case Law Scenarios

Setting up competing company to take advantage of an opportunity which should have gone to the coy → Breach

[Cook v Deeks (1916)]

- Three out of four directors in a railway company, Toronto Construction, diverted a contract in which the company was interested to another company formed by the three of them, in which the 4th director (Cook) has no interest in.
- **Cook sued them for breach of duty**
- → **Court held that the three directors have breached their duty by placing their personal interests** (which involved taking a corporate opportunity which was the right to build the new railway line) **above their duty to Toronto Construction** (which was to do all they could to ensure that the coy obtained the contract). Contract was held to belong to company, hence the directors were not entitled to expropriate it and an account for profits was thus ordered.

What if company is doing a different business from the opportunity? → Still must disclose to coy or else breach

[Seaspan Agencies Pte Ltd v Chin Siew Seng (Ho Syn Ngan Joanne and another, third parties) and another (2010)]

What if company cannot take the opportunity? → Still must disclose to coy or else breach

[Regal (Hastings) v Gulliver (1942)] and [Hytech Builders Pte Ltd v Tan Eng Leong (1995)]:

- Tan, a director of Hytech, diverted a business opportunity to his own company
- He claimed that Hytech was not qualified to take advantage of the opportunity (as it did not meet the qualification requirements at that time) and therefore it should be open to him to take the opportunity up
- → Court held that he breached his duty and should account for the profits he obtained due to the tender

What if director resigns to take up corporate opportunity? → Dpds on facts of case

Generally, when a director resigns to take up a corporate opportunity → would be held breach of duties if:

- **Resignation was prompted by a desire to acquire the opportunity** sought by the coy (i.e. director has knowledge of the opportunity when he was still a director at the coy)
- It was the **director's position with the coy** rather than a new initiative **that led the director to the opportunity**

[Industrial Development Consultants Ltd v Cooley (1972)]

- Cooley resigned first to take up opportunity
- → However, court held him to be liable for breach of duty to company as **(1)** he only got info of the opportunity while he was a director for the coy, and **(2)** his clear intention was to circumvent the law when he resign just to take it up

[Canadian Aero Service Ltd v O'Malley (1973)]

- Defendants were senior officers in Canadian Aero.
- Canadian Aero was interested in a certain project and the defendants were initially conducting negotiation on behalf on Canadian Aero.
- **Later, they form a new company and resigned from Canadian Aero when the negotiation was still in progress. Their new company subsequently obtained that contract.**
- → Court held that the defendants were liable to pay damages to the plaintiff on the basis that **they had breached their fiduciary duty to Canadian Aero** by allowing a conflict of interest. The fact that they had resigned when the contract was awarded to their new company was irrelevant as it had been **influenced by the wish to take the contract for their own** and it was **their position with Canadian Aero** rather than any new initiative **that led them to the opportunity.**

What if the opportunity was rejected by the coy? → Then no breach of fiduciary duty

[Peso Silver Mines Ltd v Cropper (1966)]

- Peso was approached by a prospector to buy some of his mining claims, but BOD rejected the offer
- Cropper was then approached to form a syndicate to acquire the claims which was first offered to Peso
- Later, Cropper was dismissed as mgmt of Peso changed, and the new mgmt sued Cropper for breach of duties
- → Court held that Cropper was not in breach of duties as Peso had made a good faith business decision to not buy claims which Cropper later purchased. He also obtained the info just like any prospective buyer would have obtained.

What if the opportunity comes to director's knowledge in his personal capacity? → Disclose to coy or resign to take up opp.

[Bhullar v Bhullar (2003)]

Statutory Law

(iii) [s157(2)] *Duty not to make improper use of position or company information*

An officer or agent of a company shall not make improper use of **his position as an officer or agent of the company or any information** acquired by virtue of his position as an officer or agent of the company to **(1) gain, directly or indirectly, an advantage for himself or for any other person** or to **(2) cause detriment to the company.**

- **[s157(4)]**: this is in addition to common law or any other written law
- **Examples**: insider trading, releasing trade secrets or confidential info without coy's knowledge and consent, any other use of info which would be a breach under general law
- **[s157(3)] Consequences of Breach** → prosecuted for criminal offence and fined up to max of \$5,000 or be imprisoned up to 1 year; may be liable for any profits made or detriment suffered by coy due to breach; and may be disqualified from being a director or participating in mgmt of coys under **s154(2)**

(B) Duty to Act within Powers

(B)(i) For proper purposes

In principle, a director must exercise his powers for the purpose for which such power was conferred.

Even if the directors **honestly** believe his decision is **bona fide** in the interest of the company, if the purpose of the transaction is **outside the purpose for which power was conferred on him, then it is still considered breach of duty.**

[Howard Smith Ltd v Ampol Petroleum Ltd [1974]]

- Ampol and its associate owned approximately 55% of the shares in Miller, and were engaging in a hostile takeover.
- The directors of Miller did not wish to lose their jobs, and so they issued shares to Howard Smith.
- **The effect of the share issue was to dilute Miller's share capital so as to turn Ampol's majority shareholding in Miller into a minority interest** and thereby make Howard Smith's bid more likely to succeed.
- Ampol sought a declaration from the court that the share issue was undertaken for an improper purpose.

Objective test to determine "proper purposes"

Per Lord Wilberforce:

1. **Legal purpose**: Start with consideration of the power and ascertain the **nature of the power**
2. **Actual purpose**: Examine the **substantial purpose**
3. **Determine if such substantial purpose is proper or not** by considering the *bona fide* opinion of directors (if it exists)

→ **Court Held**: Although directors have acted honestly, the **shares were issued for an improper purpose** because it was primarily engaged in to dilute the majority shareholdings and to enable Howard to proceed with a takeover of the company. This

was contrary to the purpose for which the power to issue shares was given, which is to raise capital → issue of shares was invalidated

[HSBC (Malaysia) Trustee Bhd v Soon Cheong Pte Ltd (2007)]

- P (as trustee of beneficiaries) had some shares in D company. P requested to effect a transfer of shares to other beneficiaries, which D's director refused. P then brought a claim to compel D to rectify its register of members.
- (1) What was the power in question? Power to decline transfer of shares
 - In Table A Art 22: "The directors **may decline** to register any transfer of shares..."
- (2) What was the substantial purpose? Directors refused to register on the ground that number of members would exceed 50, which would cause co to convert from a private to public company
- (3) Is such purpose proper or not? Court was satisfied that directors' concern of losing its status as a private company (will lose a lot of exemptions) was not fanciful but bona fide and legitimate → Proper purpose was held

[Hogg v Cramphorn Ltd (1967)]: Director's failure to act for proper purpose can be ratified by shareholders

- Mr. Baxter approached the board of directors of Cramphorn Ltd. to make a takeover offer for the company.
- **The directors** (including Colonel Cramphorn who was managing director and chairman) **believed that the takeover would be bad for the company.**
- So they issued 5707 shares with ten votes each to the trustees of the employee's welfare scheme (Cramphorn, an employee and the auditor). This meant they could outvote Baxter's bid for majority control.
- A shareholder, Mr. Hogg, sued Cramphorn, alleging the issue of the shares was ultra vires.
- Cramphorn argued that the **directors' actions were all in good faith**. It was feared that Mr. Baxter would sack many of the workers.

→ **Buckley J Held:** The new shares issued by the directors are invalid.

(1) The directors violated their duties by **issuing shares for the purpose of preventing the takeover.** **(2)** The power to issue shares creates a fiduciary duty and **must only be exercised in order to raise capital** and not for any other purposes such as to prevent a takeover. **(3)** **The act could not be justified on the basis that the directors honestly believed that it would be in the best interest of the company.** **(4)** The improper issuance of shares can only be made valid if the decision is ratified by the shareholders at a general meeting, with no votes allowed to the newly issued shares.

(C) Duty of Care, Skill & Diligence (NB: Not fiduciary duty!)

Reasonable Standard Approach (Not used anymore)

Subjective Test: [Re City Equitable Fire Insurance Co (1925)]

Per Romer J.: In principle, when exercising duties, directors must:

- Exercise with a **degree of skill and diligence an ordinary man might be expected to take**
- But he **need not** perform a **greater degree of skill than may reasonably be expected from a person of his knowledge and experience**. In other words he is not liable for error in judgement
- He is **not bound to give continuously attention to the affairs of his company**, and his duties are of **intermittent nature performed at periodical board meeting**
- In respect of all duties that ... **may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly**

**Individual Standard Approach

General Law
<p>Objective Test: Per Yung Pong How CJ in [Lim Weng Kee v PP [2002]]</p> <p>"The civil standard of care and diligence expected of a director was objective, namely, <u>whether he had exercised the same degree of care and diligence as a reasonable director found in his position</u>. However, <u>the standard will not be lowered to accommodate any inadequacies in the individual's knowledge or experience</u>. It will be raised if he held himself out to possess or in fact possessed some special knowledge or experience"</p> <ul style="list-style-type: none"> • (a) Compare director's conduct with that expected of a reasonably diligent person having the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that direction in relation to the company → director needs to alleviate himself if his standard is lower • (b) Compare director's conduct with his own expertise. If he possesses a higher degree of qualifications or skills, he will be judged by how he applies such knowledge and skills. → if his std is higher, then std of care will also be higher
Statutory Law
<p>Statutory equivalent in s157(1):</p> <p>"A director shall at all times act honestly and <u>use reasonable diligence</u> in the discharge of the duties of his office."</p> <ul style="list-style-type: none"> • Courts don't distinguish it from duty of care • This, however, relates more to <u>amount of time and effort</u> which a director puts in to monitor the affairs of the co or deal with a particular situation

- To at least allow themselves to be familiar with operations of coy's biz and be updated on its financial status
- Expected to seek advice of other directors or professional advisors on matters he is not familiar with
- Not to make unwarranted assumptions about conduct of coy's biz without making proper inquiries
- Attendance at meetings (*necessary but not sufficient to totally exempt breach of duty of care*)

Other facts of **[Lim Weng Kee v PP [2002]]**:

- Lim was the managing director of three pawnshops and had been in the business for 20 years.
- A lady, whom is a friend of Lim, had pawned \$4 million worth of jewellery at the pawnshops as pledges for loans.
- When she was asked to settle the outstanding interest due, she asked to redeem the jewellery and issued a cheque in favour of one of the pawnshops. **Lim allowed her to redeem the jewellery even before the cheque had been cleared. The cheque was later dishonoured.** The pawnshops and their shareholders suffered substantial losses.
- ➔ Court held that although Lim had not acted with dishonesty, he was found guilty of offences committed under **s157(1)** for failing to exercise reasonable diligence as a managing director (with 20 years of experience, he should have done due diligence on the cheque first) and was fined \$4,000 on each of 3 charges; as well as breaching duty of care.
- ➔ **There is no significant difference between the statutory duty of care and the general law duty of care**

Delegation of director's work to other officers or subordinates

In principle, directors can delegate his power to other officers or subordinates.

[Vita Health Laboratories Pte Ltd v Pang Seng Meng (2004)]

Per VK Rajah JC:

1. It is wholly impractical to expect direction to be omniscient or to personally discharge all corporate powers and functions
2. The director must reasonably believe that his subordinates will competently discharge their duties in the coy's interest
3. **AND ALSO, in [Re Barings plc (2001)]:**
 - a. Directors have a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them to properly discharge their duties as directors
 - b. While directors are entitled to delegate particular function to mgmt, and to trust their competence to a reasonable extent, **this does not absolve a director from duty to supervise the discharge of the delegated function**

Role of director after delegating: **[Ong Chow Hong v PP (2013)]**

- Company has to make a public disclosure to stock exchange, and document was to be signed by Mr. Ong
- Other directors prepared the document, which he signed without reading it first, or making any inquiries
- As document contained the wrong info, SGX sued him for sending false information
- ➔ Court held that he has breached his duty of care as he did not properly supervise the delegated function

Director relying on advice of other professionals

[s157C]: Use of Information and Advice

(1) Directors may rely on reports, statements, financial data, and other info prepared; and on professional advice given by:

- (a) Employees of the coy** if he believes on reasonable grounds to be reliable and competent,
- (b) Professional adviser or an expert in the relevant matters** if he believes no reasonable grounds that the matter is within the expert competence of the person, or
- (c) Any other directors** where the relevant matter was within his designated authority

Subjected to various conditions in **[s157C(2)]**:

- Acts in good faith, makes proper inquiry where facts of circumstances indicate the need, and no knowledge that such reliance is unwarranted

Business judgment rule

Courts do not like to 2nd guess directors' business decisions on hindsight (i.e. they do not review the biz judgments made by directors and do not substitute their own judgement in place of directors)

[Vita Health Laboratories Pte Ltd v Pang Seng Meng (2004)]

Per VK Rajah JC: it is the role of the market place and **not the function of the court to punish** and censure directors who have in good faith, made incorrect commercial decisions.

- Focus on **process of decision-making**, rather than its merits ➔ i.e. did the director take steps a reasonable businessman would take in making his decision?

[Business judgement rule in the US]

Rule will only be overturned if it's a very good case, where directors did not make decision in honest belief that it was for the best i/r of the coy, there was conflict of interest, never collect information and etc.

After breach of duties

Consequences of Breach and Remedies Available

Statutory duty

- **Page 305 of TB: Criminal penalties** enforced by ACRA or other persons through court
 - **[s157(3)]**: May be liable for any profits made or detriment suffered by coy due to breach + fined up to max of \$5,000 or be imprisoned up to 1 year;
 - **[s149], [s154(2)]**: May be disqualified from being a director or participating in mgmt of coys (for insolvent coys, and s157 and s339)
 - **[s399]**: Order compliance with the statute

General Law duty

Civil remedies include depends on...

Breach of fiduciary duty

- **When coy suffers losses**
 - **Damages**: compensation for actual losses incurred by the coy
- **When director makes profits** (e.g. if self-dealing at fair value, coy suffered no loss but director will have a profit)
 - **Disgorgement of profits**: account/ pmt of director's profits to company
- **When director enters into contract for coy which results in breach** (e.g. undisclosed self-dealing)
 - **Rescission of contract by the coy**: avoid contract and return parties to original position, **but depends on lapse of time & honest reliance by 3rd parties**
- **When as a result of breach director possess property belonging to coy** (e.g. steal \$ from coy)
 - **Return of properties**: court can order director hold property on trust for coy (i.e. cannot sell)
- **When breach is continuing** (e.g. diverting business away)
 - **Injunction**: restraining order on director to stop doing smth or undertake particular action to remedy breach
- **Disqualification**

Breach of duty of care

- Only **compensation of damages**

Ratification

- Yes, by shareholders in general meeting → cannot sue directors as no longer considered breach of duty
- Except in these cases:
 - If **oppressive** and can be challenged by **s216**
 - Result is to **prejudice creditors** bcos **coy is insolvent** when ratification took place
 - Breaches **equitable limitation on majority voting power**
 - Results in **personal right of member** being eliminated
 - Results in misappropriation of coy's property
 - Members acted for the **same improper purpose** as directors (e.g. when delinquent director owns > 50%)

Relief from liability & indemnity from breach of duty

Can a director bargain with the company for:

(1) Exemption from all liabilities using contract

- In principle, no by **[s172(1)]**: any provision that purports to exempt an officer of a coy from any liability ... is void

(2) Whenever director is liable for breach of duties, company will indemnify the liability

- In principle, no by **[s172(2)]**: any provision by which a coy directly or indirectly provides an indemnity for an officer of the coy against any liability... is void
- But exception in **[s172B]**: if liability is due to a **(1)** fine in criminal proceedings, or **(2)** sum payable to ACRA etc. due to non-compliance of a regulatory nature, or **(3)** defending against criminal proceedings in which he is convicted already

(3) D&O insurance purchased by coy for director

- In principle, yes by **[s172A]**

Court has power to release directors from liability:

[s391]: If in any proceedings ... against a person to whom this section applies, it appears to the court that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the ... the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.

- **NB**: can exempt from all or part of the liability including claims for damages, accounts of profits, and other civil proceedings; **BUT NOT criminal liability**

- Main consideration is person has acted honestly and in good faith + reasonably taking into account all relevant circumstances → is it fair for court to exercise its discretion?

Lesson 6: Enforcement of Corporate Rights

Recall previously:

Who enforces the duties?

- **Statutory breach** → enforced by ACRA, or less commonly, **[s409A]** by persons whose i/r may be affected through application to the court for an injunction to restrain director from committing the breach
- **Common law breach** → enforced by company or liquidator (when coy is insolvent)
 - To sue or not to sue is decided by BOD; unless directors themselves are involved...
 - ...Then indiv members via **[s216A]** **derivative action by shareholders** on behalf of coy will be allowed

→ However, the decision to sue is normally vested with **board of directors** (**unless [s157A(2)]** constitution reserves such power to the general meeting...

Proper Plaintiff Rule

In principle, only a proper plaintiff, aka the company, can enforce a corporate right

However, this might be abused when fault is with majority of directors or when there is collusion etc.

Exception: Member's Derivative Action

A legal action is derivative when the person who brings the action relies not on a cause of action which belongs to them personally, but on a cause of action belonging to someone else = **member on behalf of company**

(1) Derivative Action in Common Law ("Fraud on Minority") → not important

Leading Case: [Foss v Harbottle (1843)]

(i) Proper plaintiff rule (1st Limb)

→ **Coy is the proper plaintiff to bring an action wrt corporate wrong**

- The legal rationale for the proper plaintiff principle is that a company is a separate legal entity
- As a company is an entity separate and apart from its members, a **member may not sue to enforce a company's rights**
- Therefore, **the "proper plaintiff"** in an action for a wrong alleged to have been done to the company (e.g., a breach of contract or where directors have breached their duties to the company) **is the company itself**

(ii) Majority rule principle (2nd Limb)

→ **Individual member cannot sue if wrong is one which can be adopted by simple majority of members**

- The rationale for the majority rule principle is that it would be fruitless to allow a shareholder to commence an action based on an irregularity where the irregularity can be cured by majority ratification
- Therefore, according to the common law, **the court should not intervene where a majority of the shareholders may lawfully ratify the irregularity** that forms the basis for the shareholder claim
- The practical effect of the **majority rule principle is that it restricts minority shareholders from commencing an action with respect to mere irregularities – even if those irregularities are breaches of a minority shareholder's prima facie personal/members' rights**

(iii) Rule doesn't apply to cases of personal rights, ultra vires / illegal transactions, nv follow special procedures

(iv) Exception to the Proper Plaintiff Rule: Fraud on Minority

- ✓ Shareholder may bring an action against wrongdoers in his own name

[Bruland v Earle (1902)]: What is "fraud on minority"?

(1) Fraud: serious wrong doing

- "where the majority are endeavouring directly or indirectly to appropriate themselves money, property or advantages which belong to the company"
- However, no clear line to determine how serious wrong-doing must be (e.g. sufficient if director is simply negligent?)
 - Possible tests:
 - **Ratifiability test** = i.e. in situations where company does not have right to forgive or ratify
 - Breach of duty to act for proper purpose → **Ratifiable** [Hogg v Cramphorn (1967)]
 - Misappropriation of corporate asset → **Not Ratifiable** [Cook v Deeks (1916)]
 - Negligent breach of duty → **Ratifiable** [Pavlides v Jensen (1956)]
 - **Benefit / loss test** = (1) majority obtained some sort of benefit; (2) benefit was obtained at expense of company or some loss or detriment was caused to the coy

(2) Wrongful control

- Plaintiff need not prove wrongdoer has control of majority voting rights
 - **[Prudential Assurance Co Ltd v Newman Industries Ltd (1980)]**: either majority of votes, **or** the wrongdoer himself causes others to vote with him due to his influence and apathy
- Key question is whether plaintiff is being improperly prevented from bringing these proceedings on behalf of coy
 - **[Smith v Croft (No 2) (1988)]**: When coy decided not to sue, was the decision making process proper?

(2) ***Statutory Derivative Action [s216A and s216B]

Applies to **all companies and **arbitration proceedings***

[s216A(1)]: Who can apply?

- any member of a company
- the Minister
- any other person who, in the discretion of the court, is a proper person to make an application under this section

[s216A(2)]: How to bring a derivative action

- apply to the court for leave (permission) to bring an action in name / on behalf of the coy, or
- intervene in an action to which the coy is a party for the purpose of prosecuting, defending, or discontinuing the action
 - → When court agrees, then can proceed to go on trial

[s216A(3)]: Conditions to be satisfied

1. 14 days' notice to board, but no action taken by board

- Unless complainant can prove 14 days is impracticable **[s216A(4)]**

2. Complainant acting in good faith

- **[Ang Thiam Swee v Low Hian Chor (2013)]**:
 - Court ought to **assess motivations** of applicant to determine if he was acting in good faith
 - HOWEVER, questionable motivation (i.e. acting in self-interest) does not equate to bad faith
 - Bad faith = Only when motivations constituted a **personal purpose** which indicates that coy's i/r won't be served
- **[Urs Meisterhans v GIP Pte Ltd (2011)]**:
- **Per Tay Yong Kuwang J**: Generally assume complainant is in good faith unless proven otherwise by defendant
 - → Demonstrate that the complainant was "so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations"
 - → Good faith may be best demonstrated by the existence of a legitimate claim which the company's directors are "unreasonably reluctant to pursue with the appropriate vigour or at all"

3. Action is prima facie in the interest of the company

- **[Urs Meisterhans v GIP Pte Ltd (2011)]**:
 - Requires complainant to show that there is a reasonable basis for the complaint and that the intended action is a legitimate or arguable one (i.e. it has a reasonable semblance of merit and is not one which is frivolous, vexatious or bound to be unsuccessful)
 - → Company will stand to gain substantially in money or money's worth from the intended action if succeeded
 - But no need to demonstrate that the intended action will be likely to succeed
- **[Ang Thiam Swee v Low Hian Chor (2013)]**: Court refused to assume every party with a reasonable and legitimate claim was acting in good faith

Other issues

1. Effect of ratification by members [s216B(1)]

- Court won't dismiss application by virtue of the fact that the alleged breach of duty or right has been ratified
- However, it will take the ratification as a factor to make its decision whether to approve the leave

2. Power of court to make orders regarding costs [s216B(3)]

- Court has the power to allocate costs where necessary → i.e. order coy to pay interim costs to complainant

(3) Minority Oppression

Lesson 7: Minority Oppression

*Can be applied to **many areas** → e.g. amendment of articles, breach of directors' duties, oppressive conduct by majority

*Can also be applied to **all companies** → although small coys use this more often than larger coys

Recall previously:

For breaches of **director duties** or **oppressive conduct** the aggrieved may:

1. **Bring derivative action via "fraud on minority" or s216A** → **LEGAL ACTIONS ARE BROUGHT ON BEHALF OF COY**
2. **Apply for relief via S216 on the basis that he was unfairly treated** → **LEGAL ACTIONS ARE BROUGHT ON A PERSONAL CAPACITY BASIS**

Oppression [s216]

[s216(1)] Who can apply for 216?

- **In principle**, only (1) member of the company, (2) debenture holder (i.e. bond holder) or (3) minister in pursuant of Part IX
 - **Hence**, beneficial owners in shares or oppressed member who had sold all shares → NOT CONSIDERED UNDER (1)
- **Exception: Doctrine of Estoppel** [Kitnasamy v Nagatheran (2000)]
 - In this case the petitioner was not a registered shareholder of the company; therefore he was not a member.
 - **He had agreed to become a shareholder of the coy and rendered valuable services to the coy** due to the belief.
 - **The company represented to him that he was a registered shareholder**
 - In the end coy did not put him on register of members, and he sued for oppression
 - → **Court held that the company was estopped** from denying the petitioner from using s216.

[s216(1)] Any member or holder of a debenture of a company or... the Minister may **apply to the Court** for an order under this section on the ground –

- The affairs of the company have been conducted or the directors' power are exercised:
 1. In an **oppressive** manner to the member; or
 2. In **disregard of the member's interests**, or
- An act is done or threatened or a member's resolution is passed or proposed which
 3. **Unfairly discriminates** against one or more members, or
 4. Is otherwise **prejudicial** to one or more members

In **[Over & Over Ltd v Bonvests Holdings Ltd (2009)]**, Per Woo Bih Li J:

"There is **no meaningful distinction between all four limbs in s216**, the common thread is **SOME ELEMENT OF UNFAIRNESS** "

→ Court of Appeal also iterated that either a course of conduct OR a single act may amount to oppression

Relevant principles to apply for oppression

1. Must arise from the conduct of company's affairs

- May apply where the affairs of a subsidiary are conducted in a manner so as to impact its holding coy, thereby affecting members of the holding coy
 - i.e. member of holding coy apply s216 against subsidiary
 - [Kumugai Gumi Co Ltd v Zenecon Pte Ltd (1995)] and [Ng Kek Wee v Sim City Technology Ltd (2014)]

2. Petitioner must have been prejudiced qua-member → oppressed in capacity as a member

- Broader meaning as compared to contrail effects of constitution!
- Member's rights here not restricted to strict constitutional and statutory rights, but **extend to his legitimate expectation as a member**
- [Re Chi Liung & Son Ltd (1968)]: other members remove the petitioner as a manager, although he still remains as a member → 2 forms of oppression (removal of office and as member) → as he was able to show oppression in capacity as member, he can also seek redress for actions that affect him as an officer (or other capacity)

3. Domination & control → remedy is available for majority shareholders as well

- Does not necessarily equate to majority ownership of shares
- Minority shareholders can oppress other shareholders by blocking resolution at a general meeting and etc.

4. Member should not be in a position to remedy the oppression → must have lack of powers to stop the oppressive acts

What is unfairness? *very factual specific, need to analyse why it is unfair

In the leading case **[O'Neill v Philips (1999)]**,

Lord Hoffmann mentioned two situations where unfairness may arise and the courts may intervene when:

1. **Violation of member's legal rights** (from CA, constitution, S/H Agreement etc.) **or**
2. **Deviation of legitimate expectation** (from contract or informal understandings / assumptions / promises)

→ Therefore, in fairness or equity the courts should intervene.

[O'Neill v Philips (1999)]

- O was employed by the company, of which P owned all the shares.
- In 1985, P gave O some shares and appointed him as a director.
- In late 1980s, P showed that he would like to increase O's role in the coy. They talked about profit sharing and increase of O's shareholding.
- But later, P broke up the negotiation, and O was no longer MD and not entitled to the share of profits
- O sued under oppression for failure to share profits and repudiation of contract to increase his shares
- → **Court was held against O'Neill as** (1) O does not have a right in CA, nor was there a contract; and (2) there should be no legitimate expectation as there was no contract or agreement / promise of any sort

What constitutes "legitimate expectations"?

[Re Kong Thai Sawmill (1978)], **Per Lord Wilberforce**

- Must have **visible departure from the standards of fair dealing and a violation of the conditions of fair play** which a shareholder is entitled to expect before a case of oppression can be made
- → There are some general standards people agree on how to run biz

[Eng Gee Seng v Quek Choon Teck (2010)], **Per Chan Seng Onn J:**

- The company's formal documents lay down the basis of the association exhaustively.
- HOWEVER, there can also exist agreements, understandings or promises as between members of an association, which are not in those formal documents, but which may give rise to reasonable or legitimate expectations on the part of minority members
- Accordingly, unfair conduct can be established by showing **(a)** there are certain expectations between shareholders; **(b)** conduct complained of is contrary to or has departed from such expectations to the extent that it has become unfair

Examples of oppressive conduct

There could be more than one factor or events in a case → must look at the conduct of controllers of the coy as a whole to determine the unfairness → **Focus should be on the CONDUCT of the coy's affairs being unfair; not conduct which resulted in breach (as more appropriate remedy would be derivative action)*

1. Dominant members advancing own interests

- **[Re Bright Pine Mills Pty Ltd]** Dominant members diverting business away from company to themselves
- **[Scottish Co-operative Wholesale Society Ltd V Meyer (1959)]** Dominant members decide to kill off company
 - Majority advantaged themselves and disadvantaged the minority by **refusing to continue to supply the company with raw material** → hence starving the coy to death
 - The **nominee directors** representing the majority S/H knew of the plan but did nothing to warn the company → breach of fiduciary duties
 - → **House of Lords held** that this amounted to oppression and order a remedy.

2. Disregard of minority's rights and interest

- **[Re HR Farmer Ltd (1958)]** Founding director acted as if the company belong to him alone
 - **Jenkins LJ** "If a person, relying on majority control in a point of voting power dispenses with the proper procedure for producing the result he desires to achieve, and simply insists on this or that being done or omitted, his conduct is **oppressive** because it deprived the minority of shareholders of their right as members of the company to have its affairs conducted in accordance with its articles of association"
- **[Kumagai Gumi Co Ltd. v Zenecon Pte Ltd (1995)]**
 - Low, a JV partner ran the business of a subsidiary of the JV like his own
 - The directors of the JV's subsidiary were **Low and his nominees**, Kumagai has no representation
 - They **made an investment with made no commercial sense, and it was entered into for Low's purpose**
 - **Held:** The courts found his actions to be oppressive, ordered the JV and the subsidiary to be wound up, and **Low had to compensate the JV for the losses made in investment**

3. Expropriation of member's property → if you force minority to sell out

- [Dafen Tinplate Co. Ltd. V Llanely Steel Co (1907)]

4. Unfairly restricting dividends

- [Low Peng Boon v Low Jamie & Ors (1999)]
 - Majority refused to declare dividends with deliberate intention of hoarding profits and earning interest on such profits, and then benefiting from this by obtaining a salary from the interest earned
 - **Distinguish this from coy adopting conservative financial policy and hence don't pay high dividends*

5. Improper exclusion from management

- [Tullio v Maoro (1994)]
 - M invited T to assist him in re-activating a dormant coy M owned
 - As part of the arrangement, T invested 50% in the share capital of the coy
 - **There was a understanding that T would be made director of the coy and have an equal role in running it**
 - However, M refused to pass the resolution required
 - → Court held that there was oppression as there was a breach of an understanding that T was to be made director
- [Eng Gee Seng v Quek Choon Teck (2010)]
 - In this case the company remove Eng, the minority S/H as a director, and stop paying him his fees → 216 allowed

6. Unfair schemes devised with the intention of retaining control over the coy

- [Re SQ Wong Holdings Pte Ltd (1987)]
 - Company has 90,000 preference shares and 48 ordinary shares
 - Articles in the coy provided that preference shareholders are not allowed to vote unless their dividends remained unpaid or remained in arrears
 - One of the directors, M, holds all the preference shares, and a minor portion of ordinary shares
 - Majority shareholders brought s216 action asserting directors refused to pay preferential dividends so that M can use voting rights attached to its preference shares to entrench the directors in their office
 - → Court held that there was oppression, and directors did not exercise its discretion to pay preferential dividends honestly as coy was able to pay these dividends

7. Oppressive conduct of board meetings

- [John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'asia) Pty Ltd (1991)]
 - Plaintiff who held minority shares alleged that defendant, who was MD and majority shareholder:
 - Refused to provide board with proper budgets
 - Would bring forward significant matters which concerned the minority interests w/o sufficient notice
 - Restricted speaking time available to directors (some representatives of minority) at board meetings when significant matters need to be discussed
 - Made major decisions without reference to BOD

8. Issuing shares in circumstances where main purpose is to reduce a member's ownership i/r in the coy

- [Kokotovich Constructions Pty Ltd v Wallington (1995)]
 - Coy have 2 shareholders, W and K – of which K has special voting rights
 - Later K used his special voting rights to remove W as a director
 - K also issued additional shares to himself and members of his family
 - → Court found that purpose of the issue of shares by K was to reduce W's ownership interest and was oppressive

9. Failure of directors to act in the interest of the company

- [Lim Swee Kiang and Another v Borden Co (Pte) Ltd and Others (2006)]
 - Failure to collect royalties from a coy associated with a majority shareholder
- [Low Peng Boon v Low Jamie & Ors (1999)]
 - Minority shareholder alleged director for hoarding profits by not declaring dividends

Remedies for Oppression

[s216(2)]: the Court may "make such order as it thinks fit and, ..., the order may —

- (a) direct or prohibit any act or cancel or vary any transaction or resolution;
- (b) regulate the conduct of the affairs of the company in future;
- (c) authorize civil proceedings to be brought in the name of or on behalf of the company by such person or persons and on such terms as the Court may direct;

(d) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(e) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(f) provide that the company be wound up.

- → Court exercises discretion to bring an end or remedy the matters complained of
 - (a) Injunction
 - (c) overlaps with derivative action in s216A → i.e. can use s216A by proving oppression
 - (d) most popular, court orders majority to buy out minority → no uniform solution for valuation of shares
 - (e) complements ^
 - (f) also popular remedy, overlap with s254 (**KIV Lesson 11: Winding Up**)

Lesson 8: Corporate Contracting

Although companies are **separate legal persons** from its members, it is incapable of acting on its own. Thus, it enters into contractual relations with 3rd parties through relying on human beings. This brings us to 3 issues:

1. The Company's Capacity

Does the company itself have the capacity to enter into the particular transaction?

Doctrine of Ultra Vires

- When company acts beyond its capacity, which is defined by its **object clause (purpose)**, act is said to be *ultra vires*
- Past: Such acts are void under common law, and are not capable of being ratified
- To protect shareholders and creditors (so that coy don't randomly do other biz that might affect repayments)
- *Distinguish this from an act beyond agent's authority
 - i.e. **[s23(1B)]** Restriction on the power of the coy or BOD (e.g. *constitution says coy can't sign guarantee without general meeting approval, but director went to sign guarantee anyway*)

Under **[s23(1)]**:

- (1) Company is presumed to have full capacity to carry on any business or activity → **no need to have object clause**
- (1A) A company may have the objects of the company included in its constitution → **can have objects if coy wishes to**
 - Past: If outside object clause, however, contract will be treated **void ab initio**

Now under [s25], law reverses void ab initio effect of ultra vires:

- (1) Company lack of capacity alone is not enough to invalidate transactions entered by the company
- (2) Company, members, holders of debentures, trustees, and ministers can assert the lack of capacity
- (3) **If the courts thinks it is fair and equitable, it may restrain performance of contract and may order compensation to the company or the 3rd party (anticipated profits not allowed)** under application of s25(2)

When an action is within the objective of coy, but not within board's power → ultra vires?

English Court: [Rolled Steel Products (Holdings) Ltd v British Steep Corp (1986)] and

SG Court: [Banque Bruxelles Lambert v Puvariaia Packaging Industries (Pte) Ltd (1994)]

Narrow view: action is ultra vires only when it clearly falls outside the objectives of the company

2. The Company's Decision-Making Power

Even if (1) falls within the company's object clause, are there legal requirements as to **who has the power** to make the decision?

→ Refer to **Lesson 4-2: Management**

- **[s157A]** Board usually main organ for making management decisions, unless reserved by CA or constitution
- → Decisions made by board resolutions or general meeting resolutions
- HOWEVER, there are certain cases where **individuals** are made to represent the company...

3. The Human Agent's Capacity

The company has to act through a **human agent** in order to sign contracts.

(i) Direct corporate contracting

Through application of company seal (constitution usually sets out procedure for its application – including which director has to sign etc., and this is kept usually by company's secretary), *after resolution for authorization of transaction is passed*

(ii) Contracting through agents

Not every act of the company would be subject to resolution of BOD or GM. Hence, company will use appoint **agents**, whose actions will be **binding** on company only if they act within the scope of their authority given to them by the company.

→ Company can ratify transactions without authority through GM or BOD resolution depending on constitution

Types of Agent Authority

1. Actual authority

1. **Express authority:** actual delegation of power to agent by principal, conferred orally or in writing

- E.g. provision in coy's constitution, express authorization (resolutions / service agreements) after delegation by BOD or other agents having actual authority, from provision in employment contract or coy's internal documents
- However, does not extend to fraudulent actions on part of the agent **[Skandinaviska Enskilda Banken AB, Singapore Branch v Asia Pacific Breweries (Singapore Pte Ltd (2009))** → Court held that coy is not bound by fraudulent acts

2. Implied authority, arises:

- When **reasonably incidental** to express actual authority
- Implied by **agent's position** usual authority
 - **Managing director / CEO**: depends on what is customary for CEO in a similar coy → **usual functions include dealing with everyday matters, supervising daily running of coy, other senior managers, being in-charge of coy biz BUT NOT selling coy's main biz or entering into a non-ordinary trading transaction**
 - **Other executive directors**: depends on whether it is **relevant to their type of job / department (not whole coy)**
 - **Non-executive director (e.g. chairperson of BOD)**: main function is to oversee coy's operations and supervise → **no implied actual authority to transact with 3rd parties**
 - **Company's secretary**: implied authority to **sign administrative matters relevant to his job but not things pertaining to senior management**
- By **conduct** or **custom ("acquiescence")**: when person has been doing it for v long but other directors (or those with actual express authority) did not say anything → unauthorized actions treated as being "ratified"
 - [SPP Ltd v Chew Beng Gim [1993]]

[Willis Faber & Co Ltd v Joyce (1911)]

Even if the principal has subsequently revoked the agent's authority they may still be liable for the actions of the former agent unless they have informed third parties who had previously dealt with the agent about the new situation

2. Apparent authority

Main idea here is **estoppel**

[Freeman & Lockyer v Buckhurst Park Properties Ltd [1964]]

Apparent/ostensible authority arises when:

- There must be a representation (express or by conduct) made to the 3rd party that agent has authority to transact on behalf of the company
 - Conduct that leads to implied authority can constitute as a representation
 - i.e. [HSBC v Juro Engineering Ltd (2000)] implied usual authority and/or acquiescence
- Representation is made by someone with authority
 - [Skandinaviska Enskilda Banken AB, Singapore Branch v Asia Pacific Breweries (Singapore Pte Ltd (2009))]
 - **Per Chan CJ**: a person who does not have actual or apparent authority to enter into a particular transaction also does not have the authority to make valid representations that the coy has approved the transaction
 - Unless he was given **specific** authority to make such representations
- The 3rd party have relied on the representation
 - Induced by representation to enter into contract
- The 3rd party has NO actual or constructive notice of the lack of authority
 - **Actual notice**: yes/no question
 - **Constructive notice**: where 3rd party does not actually know, but ought to know the lack of authority
 - [s25A]: Notwithstanding anything in constitution, 3rd party not deemed to have constructive notice merely due to the availability of the constitution
 - When nature and circumstances of the transaction **raises suspicion**, and in such situation, 3rd party ought to have made enquiries

Ratification

- Who can ratify? Depend on constitution
- If transaction is entered into by agent who does not have the authority to do so, coy can choose to adopt or ratify it.
- By so doing, an agency relationship arises retrospectively and the company assumes full contractual obligations wrt to the past transaction → transaction will be binding on company
- Can be express or implied from conduct

Indoor Management Rule

[Royal British Bank v Turquand (1856)]

Principle: Persons dealing with a company in good faith **may assume that matters of internal management and procedure as required by constitution have been duly complied with.**

Facts: The directors of the company gave a guarantee to their bankers for borrowing without complying with their company's usual requirement of a shareholders' general resolution of approval. The company sought to rely on the absence of shareholder approval to avoid payment.

Held: The Court rejected this and found for the bank on the basis that the bank was entitled to assume that the borrowings were duly authorized.

Exception: When there is **actual notice** or **constructive notice** (circumstances or facts which would put him on inquiry, [s25A] also applies) that the necessary procedure or arrangement has not been complied with

Codified by [s25B]:

(1): Director's power to bind the coy deemed to be unlimited in favor of person dealing with the cy in good faith

→ Deem director's power to be unlimited when contract is signed, regardless of the internal procedures

(2): Counterparty has no obligation to enquire and is presumed to be in good faith (unless contrary is proved)

→ Onus is on company to inform the counterparty

(3) & (4): Does not prevent members from bringing a proceeding against a director for breach of constitution and etc.

Complemented by [s25C] i.e. indoor mgmt rule doesn't apply for contracts between director/connected persons and coy:

(3) If transaction is entered by company with

→ A director of the company or its holding company

→ A person connected with any such director defined in [s25D]

Then transaction is **voidable** by the company

Subjected to:

(5) Transaction ceases to be voidable if restitution of the money or asset of the transaction is no longer possible, coy was already indemnified of its losses, 3rd party was in good faith and had no notice of lack of powers would be adversely affected, or transaction was affirmed by the coy

(4) Director authorizing such transaction will be liable for damages or accounting of profits

Lesson 9: Protection of Creditors (Capital Mntce & Reduction)

1. Capital Maintenance

In principle, a company is generally prohibited from returning capital to shareholders (or doing things that have a similar effect) whilst company is still a going concern. Creditors of a company are said to give credit to the company on the faith that the capital of the company will be applied only for the purposes of the business and therefore have a right to insist that such capital be kept and not returned to the shareholders.

(a) Rules concerned with raising capital

i. Refer to Lesson 4: Shares

ii. Can a company issue shares for consideration other than cash?

In principle, yes – power to decide valuation lies with the Board.

[Re Wragg Ltd (1897)] Court won't inquire into adequacy of consideration

Facts: Mr Wragg and Mr Martin **sold their business** to a newly incorporated company for £46,300. The company paid by issuing **debentures and fully paid shares** to Mr Wragg and Mr Martin. The liquidator of Wragg Ltd claimed that the company was (in return for the share issue) was worth £18,000 less than the board had decided to pay.

Lindley LJ held that the transaction was wholly legitimate. "The value paid to the company is measured by the price at which the company agrees to buy what it thinks it worth it while to acquire."

If a company had issued shares for grossly inadequate non-cash consideration, **other possible remedies** would include using directors' duties to see if they breach their duty of care or fiduciary duty.

(b) Rules which ensure that capital is not returned to shareholders ahead of winding up

Financial Dealings Regarding a Company's Own Shares

General principles:

- A company **cannot acquire or purport to acquire its own/holding coy's shares** **[s76(1A)(a)]**
- A company cannot **lend money on the security of its own/holding coy's shares** **[s76(1A)(b)]**
- A company **cannot give any financial assistance** for any (proposed) acquisition of its own/holding coy's share **[s76(1)]**
- **Definition**
 - "Financial assistance" **[s76(2)]**
 - "Purpose of acquisition" **[s76(3)]**
 - "In connection with" – So long as the company know that the financial assistance will help the person buy its own shares; it is deemed to be in connection with. **[s76(4)]**

(1) Prohibited Acquisition of Company's Own Shares & Shares of its Holding Company (Share Buyback)

[s76(1A)] In principle, a company cannot, directly or indirectly,

- Acquire or purport to acquire shares in the company
- Acquire or purport to acquire shares in a holding company, or ultimate holding company **[s21(1)]**
 - **Exception:** subsidiary can acquire shares of holding coy as treasury shares within period of 12 mths **[s21(4)(b)]**
- → This applies to all companies

Contravention of **[s76(1A)]**

- Company not guilty of offence
- **Each officer who is default shall be guilty and liable.** Fine ≤ \$20K and/or Prison ≤ 3 years **[s76(5)]**
- In addition, courts may also order convicted person to **compensate aggrieved party/coy** **[s76(6)]**
- **Effect on contract: void ab initio** **[s76A(1)]** → **Except for [s130M] listed shares**
 - ♣ Court may order refund or return of property if just & equitable to do so **[s76A(4) – s76A(5)(a)]**

Exceptions for Share Buyback **[s76B – s76G]**

***And only if the procedures prescribed by specific CA sections are complied with:**

Types of Permitted Share Buybacks:

1. **Off market equal access** **[s76C]**

An offer to buy the same percentage of shares from all shareholders of the same class on the same terms, authorized in advanced by **normal resolution**

- Must specify maximum # of shares, maximum price paid, time horizon, and source of funds to buy the shares **[s76C(2)]**
- All members should have *reasonable opportunity to accept the offer made to them* **[s76C(6)]**

2. Selective off-market acquisition [s76D]

Purchase from specified shareholders pursuant to an agreement approved by **special resolution** in advance

- This special resolution **cannot be voted by** any member or his associate (spouse, child, step child) whose shares are proposed to be purchase [s76D(2)]
- Special Resolution must specify time horizon, and sources of funds to be used
- If contravene, **void** [s76D(12)]

3. Contingent purchase contract [s76DA]

A contract under which a company does not agree to purchase shares outright, but buys only upon occurrence of certain contingent event

- Approval by **special resolution** in advanced
 - Special Resolution must specify time horizon
 - Copy of the proposed contingent purchase contract must be available for inspection by all members of the company [s76DA(4)]

4. Market acquisition [s76E]

Company buys its own shares from SGX approved by **normal resolution** in advanced

- Normal resolution must specify max # of shares, max price, time horizon and source of funds
- Only for listed company

Safeguards – Special rules governing share buyback

[s76B] Prevent Abuse or Manipulation by Company

A company may acquire its own shares if:

- Constitution must “expressly allow” share buyback [s76B(1)]
- In aggregate, cannot exceed 20% of total ordinary shares (*disregarding treasury*) **btw 2 consecutive AGM** [s76B(3)]
 - Higher of
 - On the date of last AGM
 - Or as at date of resolution passed with regards to permitted share buyback
 - Note that under SGX Listing Rules, cap is still 10% for listed companies
 - Unless, company has reduced share cap by special resolution under s78B or s78C
- Approved by shareholders in AGM
- Disclosure requirements

[s76F] Payments to be made only if Company is Solvent

- [s76F(2)(b)] Buyback not lawful if company is **insolvent** or **will be insolvent** as a result of such a buyback → **Solvency test**
 - Director need to issue “solvency statement” [s7A]
 - [s76F(4)] **Solvency Test**
 - a) **There is no ground on which the coy could be found unable to pay its debts, if:**
 - i. It is intended to commence winding up of the coy within 12 mths immediately after date of pmt: coy will be able to pay its debts in full within 12 mths after date of commencement of winding up
 - ii. It has no intention of winding up: coy will be able to pay its debts as they fall due during the period of 12 mths immediately after the date of payment; **and**
 - b) **Assets ≥ Liability (including contingent liability)**
Even after the proposed purchase
- **Contravention** – director/manager who approve knowing that the company is no solvent, guilty of offence, fine is ≤ \$100k or prison ≤ 3 years [s76F(3)]

After Share Buyback



*[s76B(5)] If not held as treasury shares, shall be **deemed to be cancelled immediately** according to [s76K]

1. [s76H] Keep as treasury shares

- Company owns the shares [s76H(2)]
I.e. is registered as the member
- Treasury share ≤ 10% total share cap [s76I(1)]
 - If excess, either sell or cancel according to s76K [s76I(3)]
- No dividends/voting rights [s76J(2) – s76J(4)]

- Although the company is a member as per [s76H(2)], it has no voting rights nor can it receive dividends
- **Impact: Lower requirement to pass resolution**
- **Disposal and cancellation of treasury share [s76K]**
 - Sell, transfer (ERIS), transfer, cancel
- 2. **[s76K(1C)] Treasury shares: disposal and cancellation**
 - a. Sell the shares for cash
 - b. Transfer the shares for the purpose of employees' share scheme
 - c. Transfer the shares as consideration for acquisition of shares in or assets of another coy / person
 - d. Cancel the shares
 - e. As what minister prescribes
 - **[s76G] Effect:** Reduction of capital/profits

Other Exceptions for Proposed Acquisition of Company's Own Shares

1. **[s70] Preference shares:** Shares on term that they may be redeemed at the option of the coy.
 - Issue of preference shares must be authorized by articles
 - Redemption:
 - Can only be redeemed on terms as provided by articles
 - Redemption can be out of profits or capital → but if out of capital, directors need issue solvency statement
2. **[s216(2)(d)] Court Order under Oppression:** Where application is made to court under s216, and court made an order for coy to purchase shares from member who is oppressed.

(2) Lending Money on the Security of Coy's / Holding Coy's Shares

[s76(1A)(b)] In principle, a company cannot lend money on the security of its shares or the shares of its holding coy:

- If defaulted, it is almost like a share buyback
- Treat like extension of [76(1b)] , which is to pre-empt a situation where the company lands up holding its own shares when the borrower default on loans

Contravention of [s76(1A)]

- Company not guilty of offence
- **Each officer who is default shall be guilty and liable.** Fine ≤ \$20K and/or Prison ≤ 3 years **[s76(5)]**
- In addition, courts may also order convicted person to **compensate aggrieved party/coy [s76(6)]**
- **Effect on loan and/or collateral: void ab initio [s76A(1)] → Except for [s130M] listed shares**
 - ♣ Court may order refund or return of property if just & equitable to do so [s76A(4) – s76A(5)(a)]

(3) Prohibited Financial Assistance

[s76(1)] In principle, a company shall not:

1. Directly or indirectly
 2. Provide **financial assistance** to any person
 3. **For the purpose of, or in connection with**
 4. The **acquisition** or proposed acquisition **of shares in the company or its (ultimate) holding company**
- **→ This applies to:**
 - Public company; or
 - Company whose holding company or ultimate holding company is a public company

1. FA can be given directly or indirectly:

[Selangor United Rubber Estate Ltd v Craddock (1968)]

- Selangor had substantial liquid assets but not business.
- Craddock wish to buy the company, used the puppets on Selangor's board to lend \$232,500 to itself:
 - **Selangor → Third party → Craddock**
- The money was used to pay for cost of takeover.
- Net effect is that **Selangor had lent money to Craddock through a third party to acquire its own shares.**
- **→ Court held: breach of CA prohibiting financial assistance for purpose of acquisition of shares**

2. What amounts to "financial assistance"

[s76(2)] Definition of FA:

- Company makes a loan to person to be used to acquire shares
- Company guarantees a loan by 3rd party to person who will use the funds to acquire shares
- Company provides a security in relation to a loan by 3rd party to a person who will use the funds to acquire shares
- Company release person from an obligation or debt

Examples of FA Cases

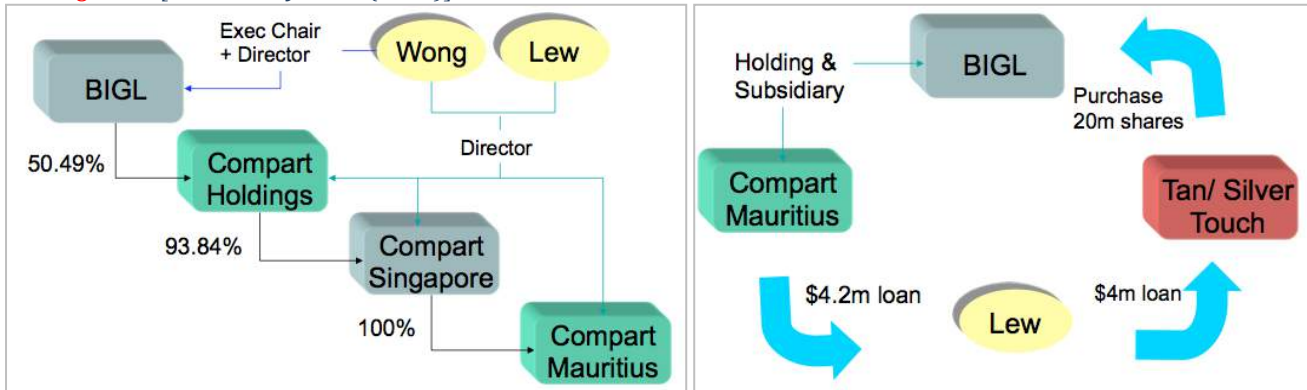
1. [EH Dey Pty Ltd v Dey (1966)] Release of debt owing to coy resulting in lower price payable for purchase of shares

- Dey was a shareholder and owes the company money.
- Another shareholder Paul, wants to buy Dey's shares.
- An agreement was made to deem that Dey repaid his debt, in exchange for the reduction of price for Dey's shares
- → Court held that FA was given to Paul to help him buy the company's shares

2. [Belmont Finance Corp v Williams Furniture (1980)] Acquisition of assets for purpose of financing acquisition of coy's shares

- Grosscurth wants to buy Belmont. Grosscurth owns a company called Maximum, which he sold entirely to Belmont.
- Using the money from the sale, he buys shares of Belmont.
- Net effect is that he now owns shares of Belmont, which wholly owns Maximum.
- → Courts held that transaction was a device to enable G to use Belmont's own funds to acquire Belmont's shares

Leading Case: [PP v Lew Syn Pau (2006)]



- FA defined in CA is not exhaustive definition
- **Facts:** In this case, a loan by the overseas subsidiary to one of its directors, which monies were to be lent to a subscriber for purchase of shares in the parent company. Criminal proceedings were brought against the parent company, and not the subsidiary, as Section 76 does not cover transactions by foreign companies.
- **Held:** The Court held that the assets of the parent company had not been used, nor had these assets been put at risk. Accordingly, there had been no financial assistance by the parent company.

Impoverishment Test

- **Per Menon JC:**
- "It does not matter whether the purchased gained control of the target company. FA was not about the commercial reasons or economic position before and after a transaction. Rather, the real issue was whether the assets of the company in fact been used or been put at risk for the purpose of the intended acquisition."
 - The question is not whether the person has received FA. → **Should view from perspective of company**
 - **Key question is whether company gave the FA / is the source of funds. Did company:**
 1. Suffer actual depletion of assets (*affects current balance sheet of coy*)
 - Loans, gifts, purchase of assets at inflated prices
 - *Paying an existing debt back to purchaser is not a depletion
 2. Place its assets at risk of future depletion (*no outflow at the beginning, but possibly later*)
 - Guarantees, provision of security, other forms of contingent liability
 - Assistance given must be **financial in nature** → doesn't include case of exposing coy to liability (tort, breach)
 - Assistance may be **indirect** → need not establish a single uninterrupted causal link btw FA and acqn of shares

3. Was the FA for the purpose of / in connection with the acquisition of shares in the company?

[s76(3)] Coy will be taken to have given FA for the purpose of acquisition or proposed acquisition shares in subsection 1 (= relevant purpose), if:

- Company gave FA for purposes that **include the relevant purpose**
- Relevant purpose was a **substantial purpose**
 - **"But for" test:** if not for this purpose, the financial assistance would not have taken place

[s76(4)] Coy will be taken to have given FA in connection with acquisition or proposed acquisition of shares in subsection 1, if:

- When FA was given, company **was aware** that the FA would financially assist
 - The acquisition by a person of shares in the coy; OR
 - Where shares in the coy has already been acquired → pmt by person of any unpaid amt for the shares

Leading Case: [Wu Yang Construction v Mao Yong Hui (2008)]

Case facts:

- VGO agreed to purchase biz of one of K's wholly owned subsidiaries (SW) based on its NAV, so as to expand its biz.
- Hence, VGO allotted to K its own shares, which exceeded the NAV for SW as consideration for the purchase.
- Alleged later that VGO provided FA to K to enable the latter to acquire shares in VGO
- → Court held that the **purpose of the transaction** was the expansion of the defendant's business. Hence, it was not caught by Section 76 → **financial assistance not for the purpose of helping someone buy its own shares**

However, court rejected Intraco's principle that commercial interests can be used to justify FA:

In **determining the purpose** of the financial assistance, the Court drew a distinction between:

1. **"Reason"** – the immediate purpose of the transaction
2. **"Purpose"** – The commercial justification for the transaction

Per Chan CJ: "Section 76 also required the court to determine, assuming financial assistance was indeed given, whether it was given for the purpose of or in connection with the acquisition of shares in the target company. The expression "financial assistance" suggested any form of material assistance to which a monetary value could be ascribed, **without which the party acquiring a company's shares would have been unable to acquire the shares.**"

4. The acquisition or proposed acquisition of shares in the company or its (ultimate) holding company = TRIGGER PT

Exceptions to FA

*Not important to know

- s76(8):
- s76(9)(a): Banks and financial institutions
- s76(9)(b): employee share option scheme
- s76(9)(c): permitted share buy-backs
- s76(9A): for up to 10% of company's paid up equity
- s76(9B): approved by all shareholders
- s76(9BA): New in 2014 amend → general exemption if financial assistance would not prejudice shareholders or the coy
- s76(10) – (15): by special resolution

(4) Consequences of Contravention on Financial Dealing Rules

Provision	Officer's Liability	Effect on Transaction	
Financial assistance [s76(1)]	[s76(5)] If officer guilty of offence: ○ Fine ≤ \$20K and/or Prison ≤ 3 years	[s76A(2)]: Loan and related transaction are voidable at option of company	* Company not guilty of offence! [s76A(4) – s76A(5)(a)]: When contract is avoided , Court may order refund or return of property if <u>just & equitable to do so</u>
Share buy-back [s76(1A)]	[s76(6)] In <u>addition</u> , courts may also order convicted officer to compensate aggrieved party/coy who suffered loss ○ [s76A(6)] Exempt from liability ○ [s76A(13)] May seek s391 relief if acted honestly and reasonably	[s76A(1)(a)]: Buy-back is void ○ Exception: listed shares s130M	
Lending on security of own shares [s76(1A)]		[s76A(1)(b)]: Loan & security are void ○ Exception: listed shares s130M	
Buy-back when coy is insolvent [s76F(1)]	[s76F(3)]: Officer who authorizes buy-back guilty of offence: ○ Fine ≤ \$100k or prison ≤ 3 years	[s76F(2)(a)]: Purchase of shares is not lawful – voidable? [s76F(2)(c)]: Release of debt wrt share purchase is void	
*Common law remedies:	<ul style="list-style-type: none"> • Breach of director duties • Constructive trust • Civil conspiracy 		

(c) Exception: Dividends

[s403(1)]: Dividends can only be paid out of profits

- Profits must be available at **time of declaration**, rather than time of actual pmt of dividends
 - CA did not clarify definition of profits, however it is definitely NOT = availability of cash;

- Under common law = revenue profits even if coy accumulated losses > profit, can include unrealised gains
- Under UK Companies Act = accumulated realised gains – accumulated realised losses
- Two types of dividends:
 - **Final** – Creates a debt upon declaration
 - **Interim** – Provisional, may be revoked any time before payment
- **Cannot be paid from:**
 - **[403(1A)]** Any profits used to purchase of own shares **[s76B-76G]**
 - **[403(1B)] Exception:** Selling price – Gain from sale of treasury shares may be paid out as dividend
 - **[403(1C)]** Any gain from the sale or disposal of treasury shares
- **Any contravention:**
 - **[403(2)(a)] Criminal offence**
Director/ Manager who wilfully pays dividend in contravention shall be guilty of an offence ≤ \$5k or prison ≤ 12 months **and...**
 - **[403(2)(b)] Breach of fiduciary duties → Liability to compensate creditors**
The same manager/director also liable to the creditors of the coy for the **amt of dividend paid exceeding the profit**

2. Capital Reduction

[s78A(1)] Definition: Results in issued capital of the company being reduced, such as:

- Cancel or reduce liability on shares in respect of share capital not paid up
 - E.g. holders of partly paid shares are liable to pay balance of issue price following a call, but if coy later finds that it no longer requires all of the outstanding uncalled amt, it can reduce capital by reducing the amt the members are liable to pay on call
- Cancel share capital no longer represented by available assets; or
 - E.g. when coy loses money in trading activities, such that its capital don't reflect value of its assets accurately
- Return paid-up capital to members that is no longer required by the company
 - E.g. to return excess capital following sale of substantial part of biz operations

[s78A(2)] General prohibition for company to reduce share capital **unless...**

- ***[s78A(3)]:** Firstly, company's articles should not prohibit reduction of capital

1. Court sanctioned reduction of capital [s78G]

[s78G(1)]:

- (1) Pass special resolution
- (2) Application to court for approval
 - **[s78I(2)]:** Have to consider wrt to each **qualifying creditors**
 - He has consented to the reduction
 - His debt or claim has been secured or he has other adequate safeguards for it, or
 - Security or other safeguards are unnecessary in view of the assets the coy would have after the reduction
 - ***[s78H(6)]: What are qualifying creditors?** Creditor of coy who is entitled to any debt or claim which, if the coy were in winding up, would be admissible in proof against the company

2. Members' approval and declaration of solvency by directors [s78B and s78C]

Safeguards [s78B] for private companies and **[s78C]** for public companies:

- Company must pass a special resolution to reduce capital
- Directors must make a solvency statement **[s7A]** in relation to reduction of capital
 - **Exempted** if reduction of share capital doesn't involve the following:
 - Reduction or distribution of cash or other assets by coy
 - Release of any liability owed to coy
- Publicity of reduction as prescribed (e.g. newspaper advertisement) and lodgement of documents to ACRA
- Creditors may object within 6 weeks from date of resolution, for resolution to be cancelled **[s78D]**

3. Transactions which are exempted from reduction of capital rules

- s71(1)(e):** Cancellation of shares not taken up or forfeited
- s76B(5):** Cancellation of repurchased shares from permitted share buyback (**s76B to s76G**)

Consequences for Breach / Possible Remedies

- **Effect on transaction:**
 - s216: member or debenture holder can oppose to reduction of capital via oppression
 - s74: if reduction affect class rights, those affected can oppose resolution
- **Officers:**
 - s78H(5): offence for officer to conceal name of qualifying creditor **or** intentionally / aid in misrepresenting the nature or amt of debt of any creditor
 - s7A(6): offence for officer if make solvency statement without reasonable grounds
 - Can sue directors for breach of duty so they may be liable to replace money misapplied

Lesson 10: Debt Financing

Borrowing Powers

- **In principle**, a company is empowered to borrow money under its objects set out in its constitution
 - **[s23(a)]** states that company has full capacity to undertake any business or activity, do any act or enter into any transaction
 - **Exception**, when specifically restricted by constitution
- **In principle**, a director has the power to decide whether to raise debt:
 - **[s157A]** "The directors may exercise all powers of a company"
 - **[s157A(2)]** **Except**: powers that this act or the constitution that requires company to exercise in GM

Ways to Raise Debt

1. **Loan**: borrow from a bank / private lender
 - E.g. **Residential mortgage**: bank lends money to purchase house, and house = collateral
2. **Syndicated loan**: borrow from a group of banks, usually there is a lead bank that will get repmt first
3. **Issue redeemable preference shares**: deemed as loan under law
4. **Issue (non-convertible) bonds or other debentures** : can be private placement or public offer
5. **Issue convertible bond**: either call option (at option of bondholder) or put option (at option of issuing coy)
6. **Issue perpetual bond**: no maturity date

Features of Debt:

- **Secured v unsecured**: Secured debt is one which the company has given special rights over its property to a creditor, that can be used by a creditor to recover the amt owed to it if the coy defaults (either principal or interest when due)
 - i.e. **secured** = have collateral to secure the performance of an obligation; **unsecured** = no collateral
- **Senior v subordinated**: Senior debt is one which have priority in repmt over the subordinated ones

Debenture

Common law: an instrument issued by a company, which acknowledges or creates a debt

[s4] Statutory law:

- Includes debenture stock, bonds, notes and any other securities of a corporation whether constituting charge or not.
- Does not cheque, letter of credit, order for pmt of money, bill of exchange, promissory note ≥ \$100k and maturity of ≤ 12 mths, and etc.

→ Includes **both secured and unsecured debt**

→ **Difference from loans** is that debentures typically are **securities that have a corresponding prospectus**

Special Status Given to Debenture Holders:

1. **[s25(2)]**: Right to restrain ultra vires act (only for debenture secured by floating charge)
2. **[s33(3)]**: Right to 21 day notice of general meeting for the change of objects
3. **[s76(10(f) and (g))]**: Right to receive notice of proposal by coy to provide FA for the acqn of its own shares
4. **[s76(12)]**: Right to oppose to coy FA for the acqn of its own shares
5. **[s203(2)]**: Right to be furnished with copies of coy's latest audited FS and audit reports on request
6. **[s216(1)]**: Right to seek remedies for oppression

Receivership

"Receivership is the situation in which an institution or enterprise is being held by a receiver, fulfilling the custodial responsibility for the property of others usually in cases where a company cannot meet its financial obligations or enters bankruptcy."

Who is a Receiver?

- Only approved liquidator or office assignee (usually accounting firms)
- **Receiver** = take charge on specific assets, so just sell assets + recover debts (not considered officer)
- **Receiver and manager** = take control of all the coy's property and manage the coy biz, considered officer under s4

The power to appoint receiver comes from 2 sources:

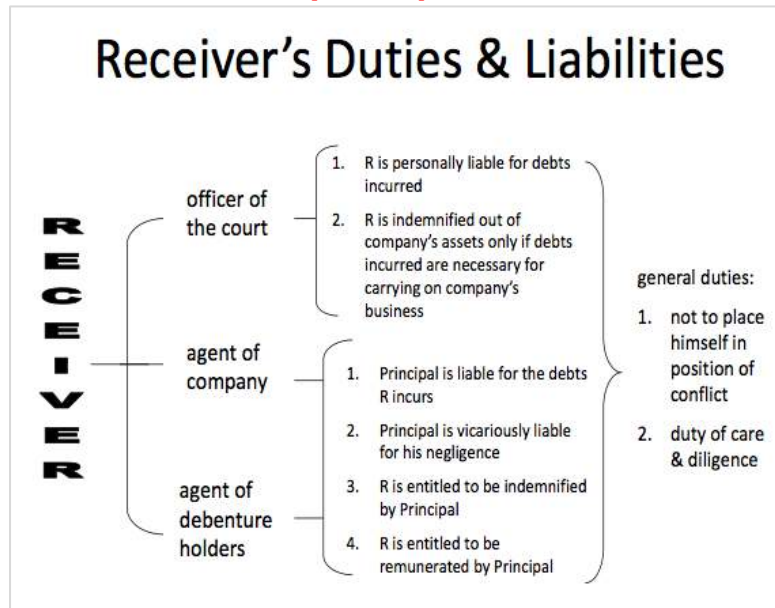
- **Statutes**: s266(5)(d) of the Securities and Futures Act
- **Contract**: where the debt created by the debenture is **secured**, it is usual for the debenture document to provide that the lender has the right to appoint a receiver in the event of default → receivership occurs when the creditor enforces the security by the appt of a receiver

→ **Who can appoint?** (1) **Court** on application of debenture holder **[s4(10)]**; or (2) **Secured creditor** who wish to enforce security

Duties of a Receiver:

1. Run the company in order to maximize the value of the company's assets, sell the company as a whole, or sell part of the company and close unprofitable divisions.
2. Manage the affairs of the company in order to resolved debts owing.

*For more information see [s217-227]



Secured Indebtedness

Secured debt is one which the company has given special rights over its property to a creditor, that can be used by a creditor to recover the amt owed to it if the coy defaults (either principal or interest when due)

- i.e. **secured** = have collateral to secure the performance of an obligation; **unsecured** = no collateral

Security interest arise when a creditor has a right to appropriate a debtor's property to fulfil any outstanding obligation when such property is used as a **collateral** for the loan given → i.e. creditor has security interest in debtor's property

- **Key features:**
 - A right given by a debtor to a creditor in an asset
 - A right by way of *grant* of interest, not by way of reservation of title to the creditor
 - Given for the purpose of securing an obligation
 - Not an outright transfer
 - Debtor's right to deal with asset is restricted

Types of Security

(i) Consensual vs. Non-Consensual

Consensual security: security which is created through the parties' consent or agreement

Non-consensual security: arises by operation of law

(ii) Legal vs. Equitable

Refers to whether the particular type of security interest was, historically developed by common law or by equity

→ Will affect repmt priority

(iii) Personal security vs. Proprietary interests

Personal security = guarantees → a guarantor makes a promise to cover a debt, when a debtor fails to repay his debt

Proprietary security:

	Explanation	Transfer of Ownership (i.e. you own the asset)	Transfer of Possession (i.e. you control the asset)
Legal Mortgage	A borrow from Bank B to buy condo, loan is secured by property	Yes	No
Equitable Mortgage	3 years later, A borrow more money from Bank C, secured by the same condo	Yes	No
Pledge (legal)	When you leave a ring at a pawnshop, which it may sell in the event of non-payment	No	Yes

Charge (equitable)	Create Incumbrance on security (create a burden on the security e.g. can only sell house with approval of creditor) *See below	No	No
Lien (equitable)	Confers a right (<i>non-consensual</i>) to retain the lawful possession of a property owned by another person until the claim by the person in possession against the owner has been met E.g. goods in transit, warehousing: A provides storage space for B's goods at \$500/month. A may withhold goods in event of non-payment	No	No transfer, but usually already possessed by creditor

Company Charges

[s4] Statutory law: includes a mortgage and any agreement to give or execute a charge or mortgage whether upon demand or otherwise (*wider in scope compared to common law definition*)

Common law: A charge is an interest created in and over an asset(s) by its owner to secure the performance of his obligation to another party.

- The person who creates the charge is the *chargor*, and the person in whose favour was security created is the *chargee*
- It entitles the *chargee (creditor)* to exercise a right of sale over the asset(s) to recover sums owed.

***We use common law definition**

1. Fixed Charge

A **fixed charge** is one that is created over a specific or identified asset which restricts the owner of the asset from dealing with it without the charges consent (e.g. if you want to sell the asset, chargee must approve first)

- **[Holroyd v Marshall (1862)]** Specified asset may be in existence now OR to be acquired in the future
- If asset was transferred w/o consent of chargee, the charge will follow the asset
 - **Unless** bona fide purchaser of asset has no notice of existence of charge → retain good title to asset

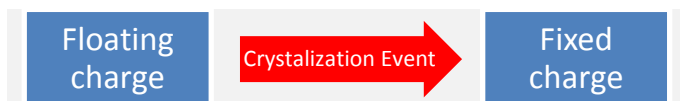
Civil Law Act (Cap 43) s13: A person can charge an amount in his bank account to secure the liabilities he owes to the same bank

Distinguish from **agreement of sale & leaseback / sale and buyback**

- Recharacterisation risk → is it a true sale or a loan disguised in this form?
 - If court re-characterize to loan, creditors of the lessee can seize the asset
 - If it remains as a "sale", creditors of the lessee can't touch the asset, as it belongs to the lessor
 - Depends on intention of the parties → did the lessee have the intention to transfer the asset to the lessor? Or was the purpose to make use of the asset to secure a loan (lump sum payment)?

2. Floating Charge

A **floating charge** is a present equitable charge which is not specific but shifting until **crystallization**, when it settles and becomes a fixed charge.



Common Law Definitions:

[Re Yorkshire Woolcombers Association Ltd (1903)]

Per Romer LJ: A floating charge has 3 characteristics:

1. A charge **on a class of assets** of a company **present and future**;
2. If that class is one which, in the **ordinary course of business** of the company, would be **changing from time to time**; and
3. If you find that by the charge it is contemplated that, **until some future step is taken** by or on behalf of those interested in the charge, **the company may carry on its business in the ordinary way** as far as concerns the particular class of assets I am dealing with."

[National Westminster Bank plc v Spectrum Plus Limited (2005)] Per Lord Scott of Foscote,

The essential characteristic of the floating charge, that distinguishes it from a fixed charge, is that the asset subject to the charge is not finally appropriated as security for the pmt of the debt until the occurrence of some future event (i.e. crystallization). In the meantime, the chargor is left free to use the charged asset and to remove it from the security

What all these means is:

- **Flexible for borrower:** if charge is over raw materials, can still use raw materials to manufacture goods
- Key feature is that borrower can still control and manage the charged assets and withdraw them from the security without needing to obtain the chargee's consent
 - Can sell old assets + acquire new assets which will be under floating charge; freely
- **Until crystallization event happens → Becomes fixed charge over all property within the range of charge applied**

[Re City Securities (1990)] Court has the discretion to re-characterize a particular instrument as a floating charge:

- Parties purported to create charges over securities in a stockbroking coy's possession as set out in daily certificates furnished by coy to the bank
- Securities were not identified by serial numbers
- → Court held that as daily certificates did not specifically identify the securities charged, the coy was free to substitute new securities for existing ones each day without the consent of the chargee bank → hence floating charge
- → **Per Chao JC:** Court will consider all circumstances in determining the true character and effect of an instrument
 - **Retention of title clauses, and letters of hypothecation** (pledge of certain assets without transferring the title or possession of the assets to the pledgee) → held to create floating charges

Crystallization of a Floating Charge:

The transformation of a floating charge into a fixed charge over assets within the class of assets that are subject to the charge:

- Until a floating charge crystallises, the chargor is at liberty to use the assets charged in the ordinary course of business.
- The crystallisation of a floating charge converts it into a fixed charge **over whatever assets are within the class at the time of crystallisation**. These assets must be owned by the coy at the time of trigger event.
- **Usually stipulate "events of default"** upon the happening of which the chargee may crystallise the charge
- **In the absence of such stipulations** the charge may also crystallise when the creditor takes steps to take possession of the security or generally upon the winding up of a company or its business

Examples of crystallization events:

- **Liquidation**
- **Appointment of receiver**
- **When creditor enforces or take possession of assets as per [Dresdner Bank AG v Ho Mun Tuke Don [1992]]**
- **Cessation of business**
- **Occurrence of event specified in debenture, like a negative pledge or debt-to-equity ratio covenant**

Registration of Charges

[s131(1)]: Charge falling within [s131(3)] must be registered with ACRA ≤ 30 days after creation of charge

- Only a statement of particulars need to be lodged, not the instrument creating the charge
- If never register, **charge will be void as against the liquidator and other creditors**
 - Void here means "Unenforceable against liquidator and other creditor"
 - On a good day this doesn't really matter as company will have enough assets to pay creditors
 - But when company is insolvent, whether one has a valid security interest matters as it would affect the pool of assets available for unsecured creditor
- → Hence common to put **negative pledge**: restrictive provision whereby the coy is restricted from giving any charge that ranks with, or is priority over, the floating charge – without the consent of the chargee

[s131(3)] Charges that have to be registered?

- Charge to secure any issue of debentures
- Charge on uncalled share capital of company
- Charge on shares of subsidiary of company
- Charge on land (but not including for rent or other periodical sum issuing out of land)
- Charge on book debts of the coy
- Floating charge on the undertaking or property of a company
- Charge on goodwill, patent, license or trademark
- And etc.
- *Note that some legal structures mimic the effect of a loan secured by a charge → **HAVE TO BE REGISTERED**

[s132(1)]: Who can register the charge?

- **Chargor company or any person interested can register the charge**
- → Secured creditors (unsecured creditors have no interest in assets of a company)
- **[s132(2)]** If never register, coy and every officer who is in default will be liable to conviction of fine ≤ \$1k and default penalty

The Court has the power under certain conditions to extend the time within which a charge may be registered: **s137**.

Effects of Registration

- **[s134(2)]** Registrar's certification is conclusive evidence that requirements of registration have been complied with
- Registration → **CONSTRUCTIVE NOTICE** to existence of charge
- Can a subsequent chargee be imposed with constructive notice of **negative pledge** merely bcos the clause has been registered or lodged with ACRA? Not conclusive as in **[Kay Hian & Co (Pte) v Phua Ooi Yong Jon (1988)]**

What effect does non-registration have on the charge?

[Ng Wei Teck Michael v OCBC (1998)] What does it mean by "creditor" is s131?

When company is of going concern,

- **Unsecured creditor** have no right to object to any enforcement of unregistered charge against the company, as they have no interest in the assets of the company
- ***Secured creditor** can enforce void of claim of unregistered charge at any time → **takes priority over unregistered charge even if it comes later**
- → **Creditor = secured creditors only**

Exception: when company winding up

- **Per LP Thean JA:** The state of affairs which prevails while the coy is a going concern ceases on the presentation of a winding up petition (**winding up order made or resolution passed for voluntary winding up**)
- In our judgment, on the presentation of a winding up petition, an unsecured creditor acquires sufficient interest in the subject matter of the unregistered charge so as to qualify as a 'creditor' for the purposes of s131(1).
- → **Creditor = unsecured and secured creditors**

Payment Priorities

Ranked in the following order:

1. Between same kind, the **earlier charge prevails**
2. **Legal charge > equitable charge** on the same property
 - **Exception:** If the legal charge was created after the equitable charge with notice of the earlier equitable charge
3. **Fixed priority over floating charge** even if fixed charge created after floating charge with notice of prior floating charge
 - **Exception:** when there is **negative pledge: borrow hereby agree with lender that it shall not create any further charge or security over its asset... and fixed chargee had notice of this clause**
4. **Secured prior to unsecured**
 - Between unsecured creditors, they rank *pari passu*

*If between floating charges over the same assets, depends on specific terms of instruments creating the charge

**If between floating charge over the whole of a coy's undertaking, and a 2nd one over specified class of assets, depends on whether first charge allows subsequent charges to be created with an equal or higher priority

General approach:

1. **What does the company own?**
2. **Is there any valid security interest attached to a specific asset? If so, what kind of security it is?**
3. **Determine the ranking of claim by sorting out of the priority if there are more than one interests attached to a specific property.**
4. **Be aware of the issue about registration.**
5. **Sell and distribute the money according to ranking.**
6. **If a secured creditor is not satisfied, he will then join the pool of unsecured creditors for the remaining unpaid debt.**

Lesson 11: Arrangements, Judicial Mgmt & Winding Up

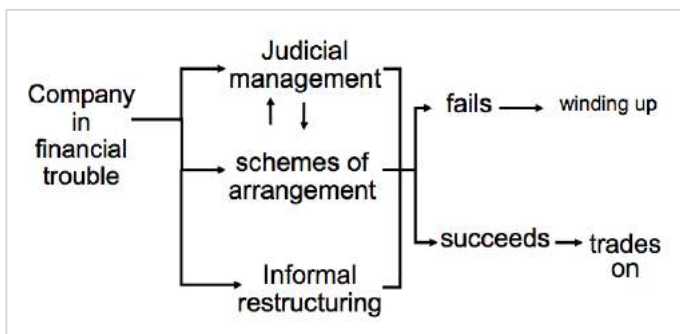
*Recall definitions:

- **Insolvent:** when a company is unable to pay its debts as and when they become due and payable [s254(2)]
- **Creditor:** someone to whom the company owes money
 - **Secured creditor:** a creditor whose debt is protected by a security interest
 - **Security:** a charge or other legally recognised interest in a company's property that gives some kind of protection to a person who lends money (or provides goods or services on credit) to a company
 - **Unsecured creditor:** a creditor whose debt is not protected by a security interest

1. How to Revive a Company's Business?

When a company becomes insolvent, → goes into receivership and liquidation.

→ **3 broad options** to rescue company's businesses in times of financial difficulty



(A) Scheme of Arrangement

- To avoid liquidation, the company can negotiate compromises and settlements with all its creditors
- → Not easy to achieve as it would require company to obtain agreement of each and every creditor

→ Law creates **(creditor's) scheme of arrangement** that enables company to propose a compromise that would BIND ALL CREDITORS without requiring the approval of ALL creditors, in which the coy's obligations to creditors are deferred, rearranged or extinguished

[s210(1)] Scheme of arrangement

Where a compromise or an arrangement is proposed between:

- a) A company and its creditors or any class of them; **= creditor's scheme (our focus)**
- b) A company and its members or any class of them; **= shareholder's scheme (for M&A, reorg of share capital etc.) or**
- c) A company and holders of units of shares (e.g. options, convertibles) of the company or any class of them

The court **may order a meeting of the creditors** ... to be summoned in such manner as the Court directs

[s210(2)] People who can apply:

- In the case of a coy being wound up, the **liquidator, and**
- The **company**, or
- Any **creditor, member, or holder of units of shares** in the company

Procedure for Scheme of Arrangement under [s210]:

- a) On the application of persons in s210(2), the court orders meetings of creditors to be convened
- b) Scheme of compromise is approved by:
 - A majority in numbers (of the creditors) representing $\frac{3}{4}$ in value (of the total debt outstanding), **and after**,
 - The court, if it finds that 3 conditions are satisfied:
 - i. Court must be satisfied that the statutory provisions have been complied with
 - ii. Those who attended the meeting were fairly representative of the class of creditors, and there was no coercion by the statutory majority
 - iii. The scheme is one of which a man of business or an intelligent and honest man, being a member of the class concerned, would reasonably approve
 - iv. **Creditors are **allowed to challenge the scheme before court sanction** and to point out why it should not be sanctioned, by showing they're aggrieved and any of the above conditions are not met*
- c) Lodgement of court order with ACRA (s212)

(B) Judicial Management

- Judicial management order creates a **Moratorium**
 - A period of time during which creditors are not allowed to take further actions to enforce their rights (of winding up) against the company
- This **Moratorium** buys the company some time to rehabilitate, and to realise better values of the company's assets

Procedure for Judicial Management:

1. Apply to court for JM order

[s227A] If the **company** (BOD resolution, not shareholders), or **creditor(s)** consider that:

- (a) The company is or will be unable to pay its debt, **and**
- (b) There is a reasonable probability of reviving the company, or value is better preserved this way compared to winding up

Then they may apply to the court for JM under **[s227B]**

[s227C] Effects of application for judicial management:

1. No resolution can be passed at AGM to authorize winding up
2. No creditor can take steps to enforce any charge on or security on company's assets
3. No legal proceeding shall be commenced or continued against the company in this period (stay of legal proceedings)

[s227B(1)] Courts will only grant JM if:

- (a) It is satisfied that the company really cannot pay its debt,
- (b) And the JM is likely to achieve any one of the following purpose:
 - a. The survival of the company
 - b. The approval under **s210** of a compromise or arrangement btw the company and any relevant persons
 - c. Realise more value from the company asset compared to winding up

If approved, effects of JM order:

1. **Judicial manager will be appointed by the courts** → takeover BOD functions and powers **[s227B(2)]**

[s227D(1)] Immediate

2. Any receiver / receiver and manager vacates the office
3. Application for winding up company will be dismissed

[s227(4)] During period of JM

4. No resolution can be passed to authorize winding up
5. No receiver and manager shall be appointed
6. No legal proceeding shall be commenced or continued
7. No creditor can take steps to enforce any charge on or security on company's assets unless JM consents/leave of court

If not approved:

- (a) **Return to normal operations**
- (b) **Try other ways of revival**
- (c) **Or wind up**

Other Related Issues

Powers of judicial manager

1. Take into custody all asset that appears to belong to company **[s227G(1)]**
2. All powers and duties of directors shall be exercised and performed by the judicial manager **[s227G(2)]**
3. Judicial manager can dispose of any property, **even if subjected to security/charge**, if the court is satisfied that the disposal satisfy the purpose of the JM order **[s227H]**

Judicial manager is an agent of the court, not an officer of the company **[s227I]**

Proposal to creditors' meeting

Upon appointment as a judicial manager, need to:

1. Send ACRA and all creditors **proposal** to revive the company **within 60 days** **[s227M(1)(a)]**
2. Lay a copy of this statement with **creditors meeting within 14 days' notice** **[s227N(1)]**
 - At this meeting, creditors need to vote whether to accept the proposal (with or without modification) **[s227N(2)]**
 - JM then need to report to the courts about the update **[s227N(3)]**
 - If no agreement, courts may order discharge of judicial management order **[s227N(4)]**
3. Send a copy of the statement to all members

Protection of interest of members, creditors and employees

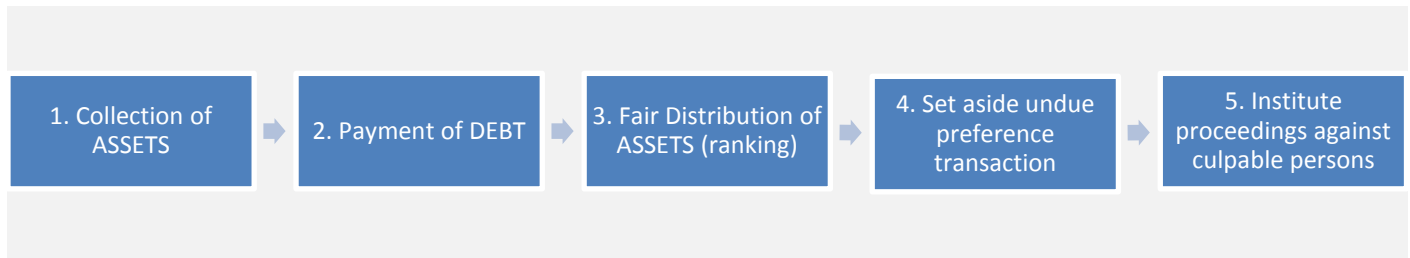
- If when JM order in force and any **creditor or member of the company** find that the **judicial manager** is **unfairly prejudicial** to certain groups of people, **can apply to courts under:**
 - **Protection of interest of creditors and members [s227R]**
- Employees are also creditors as company likely owe them wages **[s227S]**

2. How to dissolve and liquidate a company?

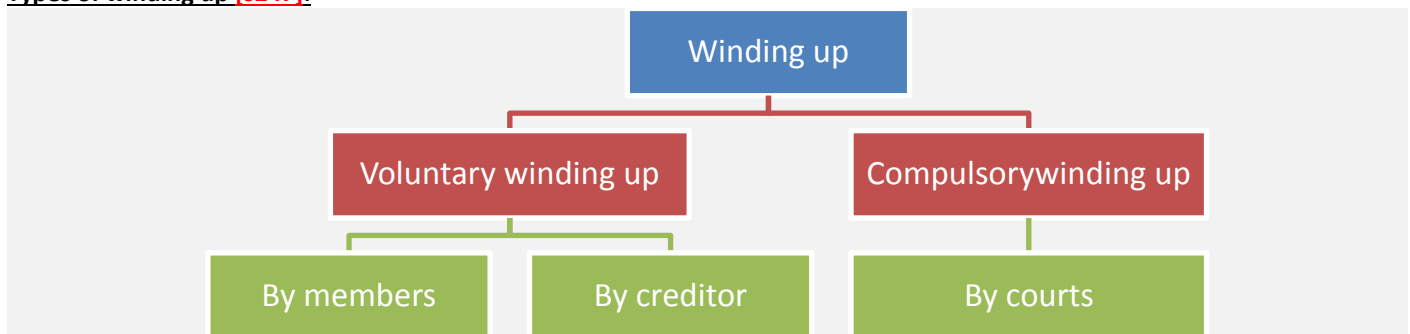
Winding up involves an insolvency practitioner (i.e. liquidator) selling off a company's assets and distributing the company's assets among its creditors – and if there are any leftovers – among its members.

Main objectives of winding up:

- Ensure company assets are distributed in a **fair and orderly manner**
- At this stage, **interest of creditors are of utmost importance** (director duties)



Types of winding up [s247]:



(A) Voluntary winding up (VWU)

For whatever reasons, a solvent company may seek VWU if it no longer wishes to continue as a company

By Members

Requirement 1 – [s291] Resolution needed

- **[s290(1)(a)]** If there was a clause in constitution providing that company to be dissolved after a certain period/event
 - → **Normal resolution in AGM**
- **[s290(1)(b)]** If there was no clause in constitution
 - → **Special resolution in AGM**

Requirement 2 – [s293] Declaration of solvency

- **Majority of director must make a declaration** saying that they made an inquiry into the affairs of the company **and:**
- They **believe they company can pay its debt in full <12 months after** winding up starts.

→ At the GM members will appoint a liquidator **[s294(1)]**

→ Company must be **solvent** for member to apply for VWU.

→ **[s295]:** If liquidator at any time forms the opinion that the coy will not be able to pay off its debts in full within the 12 mth period → summon meeting of creditors under **creditors VWU**

By Creditors

Usually when the company is insolvent, creditor VWU initiated by management but approved by creditors

2 types of creditors VWU:

- (1) Where there is a declaration of inability to continue business → provisional liquidator appointed **[s291]**
- (2) Simply never issue declaration of solvency

Requirement 1 – [s291] Resolution needed

- [s290(1)(a)] If there was a clause in constitution providing that company to be dissolved after a certain period/event
 - → Normal resolution in AGM
- [s290(1)(b)] If there was no clause in constitution
 - → Special resolution in AGM

Requirement 2 – [s296] Meeting of creditors

- Meeting for creditors needs to be summoned on the same day or next day following which coy holds GM to pass VWU
- → Then at the meeting creditors will decide the liquidator [s297]

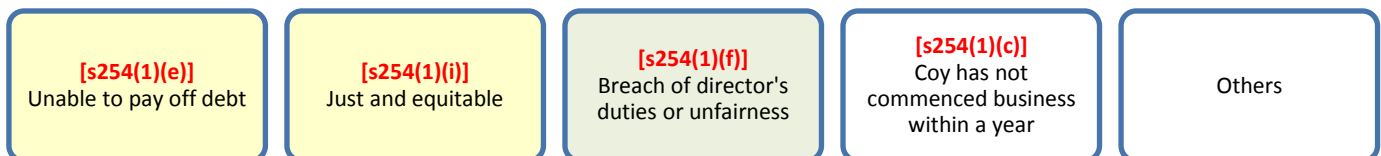
(B) Compulsory winding up (CWU)

[s253(1)] Who can apply to court for CWU?

- Company (through BOD)
- Creditors, including contingent or prospective creditors
- Contributory (a member / past member who is liable to contribute to coy's property on winding up)
- Liquidator
- Judicial manager
- Government

[s254] However, need to have proper grounds for winding up.

[s254(1)] Grounds for Compulsory Winding Up by Court



Two main grounds for CWU:

1. Company unable to pay its debts [s254(1)(e)]

[s254(2)] Statute's Definition of Inability to Pay Debts

A company shall be **deemed** to be unable to pay its debt if any of the following:

- (a) A creditor to whom the coy owes > \$10,000 which is **due**, and creditor has **served a demand** (notice/legal document, cannot be email) **requesting for the payment due**, and **coy fails to pay** (or secure, or compound debt) **after 3 weeks**
- ✓ *****Debt MUST BE certain** → If there is **dispute over the liability** (vs. quantum) **for the debt**, cannot rely on 254(2)(a)
[United Fiber System Ltd v China National Machinery & Equipment Import & export Corp (2011)]
Per Quentin Loh:
"The presumption of insolvency under s254(2)(a) of the CA arises only if the debtor does not comply with a statutory demand for 3 weeks. 3 weeks means 21 clear days excluding the day of service. I am of the view that a bona fide action brought to dispute to debt must have effect of suspending the running time for payment until dispute is resolved. **Non-payment of disputed debt cannot logically give rise to presumption of insolvency.**"
 - ✓ **Demand issued MUST NOT contain any major defect**
[Pan Asian Services Pte Ltd v European Asian Bank AG (1987)]
- (b) Where a judgment debt owing to a creditor **has not been fully settled** even **after execution has been levied** against the coy
- (c) It is **proved to the satisfaction of the court** that the **company is unable to pay its debts**, and it will take into account **contingent** (e.g. guarantees) and **prospective liabilities** (e.g. potential fines)
= General Criteria of Inability to Pay Debts

(1) Cash flow insolvency test ("test for insolvency")

= Company has no liquidity to pay debts falling due from time to time

[Tong Tien See Construction Pte Ltd v Tong Tien See (2001)]

Tay Yong Kwang JC: "A company is insolvent or unable to pay its debt when:

- It is unable to meet current demands, **irrespective** of whether the company is possessed of assets, if realized, would enable it to discharge its liabilities in full

- However, proof that a **creditor's debt have not been paid per se** does not establish an inability to pay debt within the meaning of 254(2)(c)
- **A temporary lack of liquidity does not tantamount to insolvency"**

[Re Dayang Construction and Engineering Pte Ltd (2002)]: If a company is not able pay an undisputed judgment debt, 254(1)(e) is held, irrespective of whether a statutory demand was issued under s254(2)(a)

[Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd (1980 – 1981)]: A company is commercially insolvent if it does not have **available assets** to meet its current liabilities, **notwithstanding** that it has wealth locked up in investments not presently realisable. The fact that coy's assets > its liabilities is **IRRELEVANT**.

(2) Balance sheet test

Not sufficient for company to be able to meet its current obligations if total liabilities cannot ultimately be met by the realisation of its assets (A < L) → contingent and prospective liabilities will be taken into account

→ Even if all these are fulfilled, court still has discretion whether to order a coy to wound up

- When approved, court will appoint the liquidator **[s293]**

2. Just and equitable [s254(1)(i)]

Guiding principle for such an order being made is the notion of unfairness, hence extremely wide discretion.

Some successful cases / situations:

1. Loss of substratum

In situations where a company no longer / is not able to conduct the business which it was **originally set up to conduct**.

[Re German Date Coffee Co (1882)]

- The company was incorporated for the purpose of making coffee substitute out of dates.
- To do this, the first object is to get a patent
- Turns out, patent was not granted
- Since company was set up with the aim of working on a specific patent, and since that has failed, shareholder can say that they no longer want to carry on business,
- **Company was wounded up**

→ NB: If investor puts in money without agreement to what kind of business the coy shall conduct, then cannot rely on this.

[Re Trivoli Freeholds Ltd (1972)]

- Company was established to conduct entertainment biz – by acquiring theatre properties & conducting entertainment
- However, when it came under the control of a majority member → **made coy sell a number of its theatre properties**, and lend money to himself for the purpose of **corporate raiding** (buying below asset-value shares of other coys and sell their assets or restructure them to sell for a profit)
- Minority members applied to have coy wound up
- → Court held that it was just and equitable to wind up coy, as the coy undertook business which was regarded as entirely outside what is the general intention and common understanding of the members when they became members = coy would continue in entertainment biz and for coy to lend > 70% of funds for corporate raiding was outside that general intention and common understanding

[Re Goodwealth Trading Pte Ltd (1991)]

- Petitioner invited his friend, appellant to continue business with him.
- Appellant later become major shareholder and co-director
- **A tussle over control broke out, and petitioner refuse to attend director meeting to prevent Chua from overriding him → Deadlock in management**
 - No corporate decision could be made
 - Company failed to submit tax returns or hold AGM
- **Landlord wanted to redevelop the site, served notice to tenancy**
- **Petitioner wants to wind up company, but appellant disagreed**

Yong Pung How J: → Ordered to company to be wound up based on:

- I. **There was practical deadlock in management**
- II. **Substratum of the company was gone:**

- “A company’s substratum is the object which it was formed to achieve. If the main object was to carry on a certain business, and it no longer able to carry on that business, its substratum is gone and any member may petition for winding up order on just and equitable grounds.”
- Even if the majority of shareholder wants to keep the company, it does not prevent dissenting shareholder from petitioning for a winding up order.

2. Fraud or misconduct

If the company was established so as to commit a fraud on investors, or where there is misconduct in its operations.

[Re Thomas Edward Brinsmead & Sons (1897)]

- John Brinsmead and Sons were well known piano makers
- 3 employees of the company set up another coy, similar name, to make pianos and **pass off the product as originals**

Vaughan Willaims J Held: Company was formed **for the purpose of defrauding Thomas Edward & Sons. Shareholders have been misled into believing that the company had the right to use the name and good will of Brinsmead, and were entitled to reused to continue business in a fraudulent business → ordered winding up of company**

3. Incorporated Partnership

When there is a **deadlock in management**, often happens in small companies as members are equally divided and decisions cannot be made.

[Re Sen Art Pte Ltd (2001)]

Court must find that differences among members are unlikely to be resolved, and therefore it is appropriate that the coy be wound up and the members receive back their investment.

[Re Goodwealth Trading Pte Ltd (1991)]

4. Oppression or unfair prejudice

- Overlaps with **[s216]** Oppression
 - [Sim Yong Kim v Evenstar Investments Pte Ltd (2006)]
 - “...we also recognize that these two jurisdictions, **though distinct**, do in fact overlap in many situations since they are both predicated on the court’s jurisdiction to remedy any form of unfair conduct against a minority SH
 - In this regard... the **concept of unfairness is common to both sections**
 - In such overlapping situations, we agree...that in order to reconcile...the degree of unfairness required to invoke the “just and equitable” jurisdiction should be as onerous as that required to invoke “oppression”
→ Concept of legitimate expectation also applicable here
- **Aggrieved minority may choose to pursue under both [s216] and [s254(1)(i)]**
 - Even if s216 is successful, it may not result in courts ordering a winding up as s216 is seen as a *remedy of last resort*, esp if the coy is solvent and has a future [Tang Choon Keng Realty (Pte) Ltd v Tang Wee Cheng (1992)]
 - Hence, more appropriate for member to make application under s254(1)(i) if he intends to WU coy
- On the other hand, it may be “just and equitable” to wind up a company **even if there is no oppression or commercial unfairness**

5. Breakdown in mutual trust & confidence in companies that are quasi-partnerships

A company might be established on the basis that the members have mutual trust and confidence in each other and this trust and confidence is reflected in each being involved in the mgmt of the company = *typically small companies with few member*.

If, because of breakdown in r/s, there is no longer any mutual trust, and this leads to a member being treated unjustly or being excluded from being involved in the mgmt of the coy, court can order coy to be wound up.

[Ebrahimi v Westbourne Galleries (1973)]

- E and N established a company which imported and sold carpets.
- They were equal shareholders and the coy’s two directors.
- Later, N’s son became a director and shareholder, and the coy was very successful in its business – **profits were distributed as directors’ remuneration, and not used to pay dividends.**
- Later, disagreement led to N and his son removing E as a director. E applied to wind up coy under this ground.
- → Court found that coy was established on the understanding that **(1)** E and N were to be in a personal relationship involving mutual trust and confidence; and **(2)** both E and N were to participate in the mgmt of the coy → these common understanding was breached. Also, **this was unfair** as although E remained a shareholder, his financial returns was significantly affected as he no longer received any remuneration as a director → Company wound up

*After 2014 Amendment, court would also have the power to order other shareholders to buy out the applicant in the case of CA s254(1)(f) – breach of director's duties & unfairness; and s254(1)(i) just and equitable ground.

Commencement of winding up

Winding up is **deemed to have started** from the following dates:

Voluntary winding up [s291(6)]

Earlier of:

- Date of lodgement of statutory declaration under creditor's VWU [s291(1)] → after which directors shall immediately appoint a liquidator to be the **provisional liquidator**
- Or passing of resolution to windup, even if coy is subsequently wound up by court

Compulsory winding up by courts [s255]

Earlier of:

- (1) Date of resolution passed under VWU initially,
- (2) Or date of making of application for winding up

Consequences of winding up

Upon presentation of winding up petition

1. Stay of all proceeding against company [s258]

Company or creditor or contributor may apply to the court to stay or restrain further proceedings

On or after commencement of winding up

1. Stay of legal proceedings

Only for VWU by creditors [s299(2)]

No action or proceeding can be proceeded / commenced against the coy except by leave of the Court

Only for CWU [s262(3)]

When WU order made or provisional liquidator appointed, no action or proceeding against coy except by leave of Court

2. Disposition of assets void [s259]

Only for CWU, Cannot:

- Dispose / sell of company's property
- Transfer shares
- Alter status of member

→ Or else will be considered **void**

3. Execution and attachment void / Enforcing of security interests void

- Any attachment, sequestration, distress or execution put in force against the estate or effects of the coy = **void**
 - **Only CWU [s260]**
 - **Only VWU by creditors [s299(1)]**

4. Cessation of business [s292(1)]

Only for VWU:

- After commencement of voluntary winding up, business must cease to carry on, **except** to the extent the liquidator believes is necessary for the beneficial disposal or WU of the biz

Only for CWU:

- Business can still continue

5. Transfer of shares void

Only for VWU: [s259]

After commencement of voluntary winding up, any transfer of shares will be **void**

Only for CWU: [292(2)]

Any transfer not made to/with sanction of the liquidator will be **void**

6. Notification that company is in liquidation [s319]

For any kind of wind up, after commencement:

- Every invoice, business letter etc. **must have the words "in liquidation"** behind the company name
- Failure to do so → Fine \$400 [s319(2)]

7. Avoidance of floating charges created within 6 months prior to commencement of winding up [s330]

Any floating charge was created within **6 months prior to commencement of winding up** shall be invalid

Except:

- It can be proven that the company was solvent immediately after creation of the charge
- When **cash** was paid in consideration for the charge, then creditor can enforce the charge to that amount, with interest of 5% per annum

Liquidators

○ Who is not qualified to act as liquidator? [s11]

- When he is not an approved liquidator
- When he is indebted to company / related coy in an amount > \$2,500
- If he is:
 - an officer of the company
 - partner / employer / employee of an officer of the company
 - partner / employee of an employee of an officer of the company
- Un-discharged bankrupt
- Convicted of fraud or dishonesty

○ Who appoints a liquidator?

- Court, company (appointed by GM), or creditor (in creditors' meeting) depending on type of winding up
- ***Note:** only liquidators appointed by members VWU are **officers of the company (s4)**

○ What is the main job of a liquidator?

- Collection of company's assets, and then try to **maximise the value of and "realise" these assets**
- To work out what debts are payable by the coy, and what valid claims exist against the coy (e.g. for damages for breach of contract) → **repay debts**
- To **distribute the proceeds** of the realised assets among the creditors and others with legitimate claims against the coy
- If there are any **surplus funds to distribute among the members**,
- **To set aside some unfair transactions or institute proceedings against culpable persons**, and
- To eventually bring about the **dissolution** of a company

○ What are the powers of liquidators?

Discretionary power [s272(2)]

- Bring or defend any action or other legal proceeding in the company's name → *however cannot commence litigation which had no prospect of succeeding and not allow himself to be manipulated by creditors for collateral objectives*
- Sell company's property or dispose of it in some other way
- Do things that are necessary to wind up the affairs of the company and distributing its assets [s272(2)(j)]

Require court approvals or committee of inspection [s272(1), s305(1)]

- Carry on business but only to the extent necessary for the beneficial disposal of the business
- Subject to s328 pay any class of creditors in full
- Make compromise or arrangement with creditors etc. **under scheme of arrangement**
- Compromise calls and liabilities to call
- Etc.

Specific salient powers on voidable transactions

1. Disclaimer of onerous property [s332]

Onerous: burdensome, not value maximizing

Where any part of the property of a company consists of:

- (a) any estate or interest in land which is **burdened with onerous covenants**;
- (b) shares in corporations;
- (c) unprofitable contracts; or
- (d) any other property that is **unsaleable, or not readily saleable**, by reason of its binding the possessor thereof to the performance of any **onerous act**, or to the payment of any sum of money,
→ Liquidator can write to the courts/committee of inspection within 12 months (commencement of winding up or knowledge of property, if not known earlier) to **disclaim the property = strike out** e.g. restriction on transfer of shares clause → where coy cannot sell its shares of a subsidiary for 50 years

2. Voidable Transactions: Undue preferences and transactions at an undervalue

= Certain kind of transactions entered into by a company in the period leading up to its winding up

- i.e. company was insolvent or became insolvent as a result of such transactions
- Liquidator can apply to court to prove that a transaction is voidable – **so as to recover property by undoing the transaction or ordering an equal sum paid**
- Such transactions can be avoided as they **tend to benefit some creditors at the expense of others**

Apply to both winding up [s329], and judicial management [s227T], and both refers to:

- Bankruptcy Act (Cap 20) = **BA**
- Companies (Application of Bankruptcy Act Provisions) Regulations = **Regulation**

A. When the company enters into transaction at an undervalue BA [98]

BA [98(1)] Subject to this section and s100 & s102: When company is **adjudged bankrupt** and it has at the relevant time entered into a transaction with any person at an undervalue, the liquidator may apply to the court for an order under this section

What order will the court make for undervalued transactions? BA [98(3)]

- Order as it deems fit for restoring the position to what it would have been if the company did not enter into the transaction

What is “undervalue”? BA [98(3)]

For the purposes of this section and sections 100 and 102,

An individual enters into a transaction with a person at an undervalue if:

- (a) Company makes a **gift** and **receives no consideration**;
- (c) Company enters into a transaction with a person for **a consideration the value of which**, in money or money's worth, **is significantly less than the value**, in money or money's worth, **of the consideration provided by the company**
 - Company pays significantly more than market rate when purchasing asset; or
 - Receives significantly less than market rate when selling asset

What is the time frame? BA [100(1)(a)]

Liquidator can apply to recover as long as within 5 years prior to winding up

Regulation 6: This is not applicable if it is in good faith to carry on business and there is reasonable ground to benefit the company

[Show Theatres Pte Ltd v Shaw Theatres Pte Ltd (2002)]: Show Theatres, which underwent liquidation, purchased shares in Shaw Theatres at a premium. However, director involved was able to give evidence that he had concluded the price paid for the shares as fair and reasonable, and that **commercial benefits** could be obtained by the company from the purchase

→ Courts try to apply retrospective view

B. When company has given unfair preference to some of its creditors BA [99]

When is there an unfair preference?

BA[99(3)] The company gives an unfair preference to a person if

- a. That person is one of the company's **creditors** or **a surety or guarantor for any of his debts, and**
- b. The company does something which has the **effect of putting that person into a position which**, in the event of the company winding up, **will be better than the position that person would have been in if that had not been done**

BA[99(4)] The company was influenced by the **desire to benefit and give preference to the creditor or guarantor**

- **[Soh Gim Chuan v Koh Hai Keong (2002)]**: have to prove “desire to prefer”, and not sufficient to show that there was an intention to make payment
- **[Lee Kiang Leng Stanley v Lee Han Chew (2004)]**: debtor must intend to prefer the creditor concerned, and payment pursuant to court order is not unfair preference **as debtor will be compelled to pay** (vs. any other instance he wasn't did not resist a claim where he should have done so)
 - **BA [99(5)]** Such desire is **presumed** where the creditor or guarantor = **associate of the company**

Examples include: paying a debt owed to a creditor in full when other creditors who were similarly pressing for payment remained unpaid, giving unsecured creditor a security over the company's assets, and etc.

***Other cases (pg. 598 to 601)**

What is time frame?

- **[BA[100(b)]** Associate → 2 years
 - **Regulation 4**: Persons connected to company
 - **BA [101] and Regulation 5**:
 1. Companies **controlled** by the insolvent company

- **Control** = 1/3 or more of voting power in GM **and/or** power to instruct directors
- 2. Another company that is controlled by the same person as that of insolvent company
- **[BA100(c)] Not associates → 6 months**

Summary of CA s329

- Is the company insolvent / became insolvent; or under JM?
- Is there an undervalued transaction or does the transaction gives undue preference to a creditor?
- Did the transaction occur within the relevant time frame?
 - Determine if the creditor was an associate at time of transaction
- → If all yes, then court will strike out the transaction

3. Transaction with directors [s331]

Liquidator may recover any **excess cash consideration paid wrt acquisition of property/biz/undertaking**

- If the transaction was with either:
 - Director of the company at time of buying
 - Another company sharing the same director(s), **and**
- It was bought within 2 years prior to winding up
- **[s331(4)]** Cash consideration = **consideration for such acquisition or sale payable otherwise than by the issue of shares in the company**

4. Actions against culpable persons

A. Wrongful trading [s339(3)] and [s340(2)]

- Contracting debt at time when there is no reasonable ground of expectation that company can repay
- Criminal liability + **personal liability** for defaulting officer **[s340(2)]**

B. Fraudulent trading [s340]

- Carry on with intention to defraud creditors,
- Person knowingly a party to the fraud **personally liable** for company debts
- Criminal offence **[s340(5)]**

C. Misfeasance of the company's officers [s341]

Order of Payments

Upon liquidation, company liabilities shall be discharge in the following order:

1. Secured creditors

- Exception: Money owed to employees take priority over floating charge claims **[s328(5)]**

2. Preferred creditors **[s328(1)]**

- Winding up costs - including to liquidator
- Unpaid wage or salary (up to cap set by MOF in **s328(2)**)
- Unpaid retrenchment benefit or ex gratia payment (up to cap set by MOF in **s328(2)**)
- Work injury compensation
- Contribution payable under a provident fund contribution or any approved supeannuation scheme for nxt 12 mths
- Unpaid vacation leave
- Unpaid tax and all GST to IRAS

3. Unsecured creditors

- Everyone here is ranked *pari passu*, including secured creditors for unclaimed amounts
- *Paid proportionately if amount is insufficient

4. Shareholders