3-2013

A Reconsideration of the Shareholder's Remedy for Oppression in Singapore

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Abstract: The statutory remedy for oppression plays an important role in minority shareholder protection in Singapore. Both the scope of its application and the court's jurisdiction to make remedial orders must necessarily be wide in order for the remedy to be effective. Nevertheless, the remedy is not without limits. Indeed, it is crucial that the boundaries of the remedy be made clear so that legitimate rule of the majority is not too often, and erroneously, equated with tyranny by the majority. This paper considers a number of issues as to the scope of the oppression remedy in Singapore through a careful analysis of Singaporean cases, and also references and contrasts the approaches adopted in other common law jurisdictions.

Keywords: company law, minority shareholders, oppression remedy, scope, Singapore

I. Introduction

On the shareholder litigation landscape in common law jurisdictions, the shareholder's statutory remedy for oppression and/or unfair prejudice[1] occupies a pre-eminent position. As companies operate on the basis of the majority rule, the challenges that minority shareholders may potentially encounter are not difficult to contemplate. Controlling shareholders are not subject to any obligation[2] to consider the interests of the minority when exercising their votes. As Dixon J observed in *Peters' American Delicacy Co Ltd* v *Heath*:[3]

> The shareholders are not trustees for one another, and, unlike directors, they occupy no fiduciary position and are under no fiduciary duties. They vote in respect of their shares, which are property and the right to

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1 The remedy is often referred to as a remedy for 'oppression', which term is used as shorthand for the various situations of unfairness contemplated by the section, including conduct that is in disregard of the member's interests and/or discriminatory or prejudicial conduct.

2 Beyond the equitable doctrine of fraud on a power, manifested in company law as the doctrine of fraud on the minority: *Estmanco (Kilner House) Ltd* v *Greater London Council* [1982] 1 All ER 437 (Ch) at 445.

3 (1939) 61 CLR 457 (HCA).

Common Law World Review 42 (2013) 61–90
DOI: 10.1350/clwr.2013.42.1.0247

> vote is attached to the share itself as an incident of property to be enjoyed and exercised for the owner's personal advantage.[4]

This gives rise to a potential conflict of interests between the majority and minority shareholder factions, which, in the jargon of economists, is a classic 'agency problem'.[5] A minority shareholder may therefore find the company run by the majority in a manner that ignores his concerns. In some cases, he may find that he has little choice but to accept the lot of a minority shareholding. However, he might also find himself in a more sinister situation, locked in an investment that has turned out quite differently from what he had initially bargained for, or perhaps far worse, being expropriated by the majority. It is one thing if the unprofitability of the venture for the shareholder is a result of the normal vicissitudes of commerce, but quite another if it was brought about by the unfair acts of the majority. The problem is exacerbated for the minority shareholder in small and privately-held companies who, unlike his counterpart in a public company, does not have the easy option of withdrawing his investment.[6] The statutory remedy for oppression was therefore introduced, first in England,[7] to

4 *Ibid*. at 504. See also *Pender* v *Lushington* (1877) 6 Ch D 70 at 75–6; *Tai Kim San* v *Lim Cher Kia* [2000] 3 SLR(R) 892 (HC) at [62].

5 See generally R. Kraakman *et al*. (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 2nd edn (Oxford University Press: Oxford, New York, 2009) ch. 2. Economists view 'agents' as being parties whose actions affect the welfare of others (referred to as principals). Agency problems arise because the agent needs to be motivated to act in the interests of the principal, and not act in an opportunistic manner to benefit himself. The conflict between minority and majority shareholders exists because the majority (the agent) may not always consider the interests of the minority (the principal) when exercising its control vis-à-vis the company's affairs. This gives rise to agency *costs* because the principal has to engage in monitoring the agent's performance, thereby resulting in a reduction in value of that performance to the principal. As economists consider an overall reduction of costs as efficient, the law is seen as a social tool which should be evaluated and interpreted in a manner that promotes this efficiency. It is acknowledged that there has been a significant movement in legal research towards an interdisciplinary methodology that draws from the perspectives of the social sciences such as economics. The approach adopted in this paper, however, remains the traditional method of legal research which involves close analysis of judicial decisions. This method is adopted mainly because it accords with the legal analysis undertaken by the judiciary and legal practitioners in Singapore, and as a result, provides, it is hoped, research that is of applied utility and significance. However, where relevant, reference will be made to efficiency-driven considerations that move law and economics scholars as this can crystallize our understanding of the law's underlying assumptions. As we shall see, in the context of s. 216, both perspectives yield consistent conclusions.

6 The other statutory exit available to the minority shareholder is the petition to wind-up the company on the just and equitable ground under Companies Act, s. 254(1)(i). See also B.R. Cheffins, *Company Law: Theory, Structure and Operation* (Oxford University Press: New York, 1997) 62–3; 470.

7 The oppression remedy was first introduced in the UK as s. 210 of the Companies Act 1948 (UK). This section provided the inspiration for similar legislation in Australia (now Corporations Act 2001 (Aust), s. 232); Canada (Canadian Business Corporations Act 1985, s. 241); Malaysia (Companies Act 1965 (M'sia), s. 181) and New Zealand (Companies Act 1993 (NZ), s. 174).

'strengthen the minority shareholders of a private company in resisting oppression by the majority'.[8] In Singapore, the remedy is found in s. 216[9] of the Companies Act Cap 50.[10]

Although it has been judicially observed that the law on what constitutes oppression under s. 216 is 'settled',[11] there remain a number of matters with respect to the parameters of s. 216 that may benefit from clarification. For example, whilst the vast majority of cases have affirmed the *personal*[12] nature of the remedy, there appears to be increasing recognition that the utility of the section may extend *beyond* the personal remit to permit the vindication of what are essentially *corporate* rights. It is, however, questionable whether this should be accepted without qualification.

This paper considers this and other issues in connection with the boundaries of s. 216 by analysing Singaporean cases, and also by referencing and contrasting the approach adopted in other common law jurisdictions, in particular England. The purpose here is to determine, by a consideration of the boundaries of s. 216, what the law contained therein *is* and, arguably, should be. Whilst it is true that the specific statutory text of the remedy has deviated across jurisdictions, and at times significantly so, it is nevertheless also the case that the underlying reasons and motivation for the inclusion of the remedy are and remain the same. The utility of a comparative investigation should therefore not be undermined. Indeed, as we shall see, important insight can be gained by adopting this approach in analysing s. 216.

II. Laying the Groundwork – Must 'Unfairness' be *Commercial*?

The court may make an order under s. 216 if and only if 'the court is of the opinion' that the petitioner's case falls within one of the two limbs

8 Report of the Committee on Company Law Amendment (Cmd 6659) of 1945 at [60]. Economists will describe the remedy as a *legal strategy* employed to mitigate the agency costs associated with the tensions between majority and minority shareholders: see Kraakman, above n. 5, ch. 2.

9 Section 216 provides that:

> [A] member . . . of a company . . . may apply to the Court for an order under this section on the ground
>
> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members . . . including himself or in disregard of his or their interests as members . . . of the company; or
>
> (b) that some act of the company has been done or is threatened or that some resolution of the members . . . or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members . . . (including himself).

10 2006 rev edn (Singapore) (hereinafter 'Companies Act'). The rationale for the introduction of s. 216 was to provide a 'remedy to minority interests who are being oppressed by the majority': Companies Bill 1966, Explanatory Statement.

11 *Lim Swee Khiang* v *Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745 (CA) at [80].

12 In the sense that the petitioner is seeking to remedy a wrong that *he* has suffered, or at least perceived to have suffered.

of s. 216(1). If the petitioning member is unable to establish this, the court cannot exercise or assume any jurisdiction to grant relief pursuant to s. 216(2).[13] The two limbs of s. 216(1) stipulate what appear to be four *separate* grounds of: oppression; disregard of interests; unfair discrimination; and prejudicial conduct.[14] This differs from the corresponding provision in the English companies legislation, which provides in essence for the single ground of unfair prejudice.[15] It has, however, been made clear that, notwithstanding the apparently discrete grounds, any attempt to distinguish between them would not be meaningful.[16] As one commentator put it, this would be akin to 'splitting pedantic hairs'.[17] Indeed, it can be readily appreciated that each of the four grounds is really illustrative of the nature of the conduct on the part of the majority or controllers of the company that can found a petition under s. 216. It can therefore be reasonably surmised that, by stipulating these grounds, legislature intended to underscore the *width* of the section, rather than to dictate that the petitioner's case should fall squarely within one or other of them in order to succeed.[18] As the local courts have repeatedly observed, there is a 'common thread'[19] that runs through s. 216.

The courts have, at various times, referred to this common thread as being the element of *commercial unfairness*.[20] Whilst this might be

13 *Hoban Steven Maurice Dixon* v *Scanlon Graeme John* [2005] 2 SLR(R) 632 (HC) at [12].

14 See Companies Act, s. 216(1)(a) and (b).

15 Companies Act 2006 (UK), s. 994(1), which is identical to its predecessor, Companies Act 2006 (UK), s. 459, provides that a member of a company may apply to court for an order on the ground that:
(a) the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interest of its members generally or some part of the members (including himself) or (b) that any actual or proposed act or omission of the company (including any act or omission on its behalf) is or would be so prejudicial.

16 *Over & Over Ltd* v *Bonvests Holdings Ltd* [2009] 2 SLR(R) 111 (CA) at [68]. See also M. Chew, *Minority Shareholders' Rights and Remedies*, 2nd edn (Lexis Nexis: Singapore, 2007) [122].

17 Chew, *ibid*. at [120].

18 When the predecessor to Companies Act, s. 216 was introduced in 1966, the Explanatory Statement to the Companies Bill 1966 stated that the provision was drafted to 'incorporate . . . the improvements recommended by the Jenkins Committee'. In the Report of the Company Law Committee 1962, Cm 1749, the Jenkins Committee had recommended that the *original* oppression remedy stipulated in Companies Act 1948 (UK), s. 210 (which had been restrictively interpreted) be amended to make it clear that the remedy was meant to cover not merely acts which are 'oppressive' in the narrow sense, but also acts which are or have the effect of being unfairly prejudicial to the interests of the complaining members: at para. 204.

19 *Teo Lay Swee* v *Teo Siew Eng* [2001] SGHC 29 at [21]; *Ng Sing King* v *PSA International Pte Ltd* [2005] 2 SLR(R) 56 (HC) at [93]; *Over & Over Ltd* v *Bonvests Holdings Ltd* [2009] 2 SLR(R) 111 (HC) at [68]; on appeal, *Over & Over*, above n. 16.

20 See *Lim Swee Khiang*, above n. 11 at [80]. See also *Tong Keng Meng* v *Inno-Pacific Holdings Ltd* [2001] 3 SLR(R) 311 (HC); *Ng Sing King*, above n. 19 at [93]; *Over & Over*, above n. 16 at [81].

read as suggesting that only unfairness measured against some commercial yardstick is relevant, it is submitted that this is unlikely to be what the courts intend. Indeed, the many instances of oppression found in family-run companies may not have resulted in remedy if any sort of commercial measure was used. As Lord Hoffmann pointed out in *O'Neill* v *Phillips*:[21]

> Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family.[22]

In *Re Kong Thai Sawmill (Miri) Sdn Bhd*,[23] Lord Wilberforce stated the applicable test as 'a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is *entitled to expect*'.[24] Although not explicitly articulated then, it has since been made clear that these standards and expectations are informed by the particular relationship between the members of the company. Thus, where the relationship is one that is personal and premised on mutual trust and confidence, the court has greater leeway to take account of the shareholders' expectations and may, on that basis, conclude that it is unfair for the majority to insist on its strict legal rights under the constitution,[25] the lawfulness of the majority's acts notwithstanding.[26]

The case of *Tang Choon Keng Realty (Pte) Ltd* v *Tang Wee Cheng*[27] illustrates the point. The petitioner, TWC, and his brothers, TWS and TWK, were shareholders and directors in the family company, TCKR, which was founded by their father. TCKR owned certain premises, part of which was rented out to a department store and the remaining part to a hotel. The department store was run by a publicly listed company, CKT, which was managed by TWS and TWK, while the hotel was run by a company, DH, controlled by TWC. A conflict arose between TWC and his brothers in connection with the sale of the premises. TCKR had earlier granted an option to CKT to buy the department store premises from TCKR in exchange for newly issued shares in CKT. Far from according similar favourable treatment to DH as TWC had expected, TWS and TWK exercised their majority votes in TCKR to resolve that TCKR would not sell the hotel premises to DH at any price at all. In addition, TWC alleged that his brothers sought to impede him from carrying on a viable hotel business as DH was

21 [1999] 1 WLR 1092 (HL) (*O'Neill*).
22 *Ibid*. at 1098.
23 [1978] 2 MLJ 227 (UKPC) (*Re Kong Thai Sawmill*).
24 *Ibid*. at 229 (emphasis added). See also *Low Peng Boon* v *Low Janie* [1999] 1 SLR(R) 337 (CA) at [43]; *Over & Over,* above n. 16 at [77].
25 *Ebrahimi* v *Westbourne Galleries Ltd* [1973] AC 360 (HL) at 379.
26 *Over & Over,* above n. 16 at [85]. See also *Re Saul D Harrison and Sons plc* [1995] 1 BCLC 14 (CA) at 19.
27 [1991] 2 SLR(R) 1 (HC). See also *Jesner* v *Jarrad Properties Ltd* [1993] BCLC 1032 (SC); and *Brownlow* v *G H Marshall Ltd* [2000] 2 BCLC 655 (Ch).

treated as an outside tenant and charged commercial rent rates. These acts, asserted TWC, demonstrated a course of conduct that was oppressive towards him as a member of TCKR.

The court took account of the 'larger context of the family relationship',[28] and held that the allegations were capable of sustaining a petition under s. 216. Chan Sek Keong J (as Chan CJ then was) observed as follows:

> These allegations, cumulatively with the other complaints, are capable of being construed as a departure from the standards of fair dealing amongst the brothers in relation to their relative expectations of their entitlement to their inheritance of the family assets.[29]

Judged against a purely commercial yardstick, the conduct complained of may not be considered unfair at all. After all, shareholders with external interests cannot expect to be accorded preferential treatment by the company, treatment which may even arguably be considered to be at the company's expense. However, when considered against the familial background in which the impugned acts occurred, the unfairness may be readily appreciated.

Where, on the other hand, the relationship between the members is purely commercial, or is one which lacks that personal factor, there would be little room to consider, in assessing fairness, matters beyond what is often exhaustively defined by the company's constitution. This was the position reached in *Re Saul D Harrison & Sons Plc*.[30] The essence of the petitioner's complaint was that whilst the company, which was incidentally a family-run concern, had substantial net assets, it had, in recent times, been run at a loss, and therefore ought to have been liquidated to allow the assets to be distributed to the shareholders. The petitioner, a family member, alleged that the directors (who were her cousins) had unreasonably continued to run the business, allowing those assets to be dissipated in losses in order to preserve their own salaries and perquisites. The court, however, found that there was no ground on which to extend the petitioner's rights beyond that which was laid down by the constitution. The petitioner had been given her shares pursuant to a reorganization of the share capital, the terms of which scheme were binding upon her. As there was nothing to bring the company outside the realm of commercial companies, Hoffmann LJ emphasized that fairness was to be assessed in the context of commercial relationships. In the circumstances, therefore, her only 'protectable' expectation amounted to 'no more than an expectation that the board would manage the company in accordance with their fiduciary obligations and the terms of the articles and the Companies Act'.[31] Given that there was no evidence

28 [1992] 2 SLR 1114 (HC) at [26].
29 *Ibid.* at [27].
30 Above n. 26.
31 *Ibid.* at [20].

that the directors had stepped beyond their remit, the petition was accordingly dismissed.[32]

In the final analysis, therefore, the premise upon which s. 216 is predicated is simply unfairness, albeit assessed contextually. The inquiry is a multi-faceted[33] one, and ensures that the non-pecuniary considerations, so often present in cases involving allegations of shareholder oppression, are accorded due consideration. As Chan Sek Keong CJ observed in *Sim Yong Kim* v *Evenstar Investments Pte Ltd*,[34] 'unfairness can arise in different situations and from different kinds of conduct in different circumstances'. The basis of s. 216 is thus in common with that which sustains the equivalent English provision.[35] It is perhaps this shared premise that prompted the Court of Appeal to observe, notwithstanding the significant difference in wording, that the English provision 'corresponds materially'[36] with s. 216. This, however, leads us to the next matter, which has been judicially asserted as being a point of difference between s. 216 and the UK provision.

III. Prejudice as a *Separate Concept* from Unfairness

It has been held in connection with the English provision that the relevant conduct must 'be both prejudicial (in the sense of causing prejudice or harm to the relevant interest) and also unfairly so: conduct may be unfair without being prejudicial or prejudicial without being unfair, and it is not sufficient if the conduct satisfies only one of these tests'.[37] The position is the same under New Zealand's oppression provision,[38] which employs the phrase 'oppressive, unfairly discriminatory or unfairly prejudicial'. In the New Zealand Court of Appeal decision of *Thomas* v *HW Thomas Ltd*,[39] Richardson J, in considering this phrase, made the following observation:

> The three expressions overlap, each in a sense helps to explain the other, and read together they reflect the underlying concern of the subsection that conduct of the company which is *unjustly detrimental* to any member of the company whatever form it takes and whether it adversely affects all members alike or discriminates against some only is a legitimate foundation for a complaint under s 209. The statutory concern is

32 For an example of a case where there is commercial unfairness, see *Over & Over*, above n. 16.
33 *Ibid*. at [81].
34 [2006] 3 SLR(R) 827 (CA) at [31].
35 Lord Hoffmann observed that the English parliament had chosen 'fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief': *O'Neill*, above n. 21 at 1098.
36 In *Lim Swee Khiang*, above n. 11 at [82].
37 *Re Saul D Harrison & Sons*, above n. 26 at 31 (Neill LJ).
38 Companies Act 1955 (NZ), s. 209, presently Companies Act 1993 (NZ), s. 174(1).
39 [1984] 1 NZLR 686 (CA).

> directed to instances or courses of conduct amounting to an *unjust detriment* to the interests of a member or members of the company.[40]

This 'twin-prong' requirement that the petitioner has to meet was accepted as applicable to s. 216 by Rubin J in *Ng Sing King* v *PSA International Pte Ltd (No 2)*.[41] However, in the later case of *Over & Over* v *Bonvests Holdings Ltd*,[42] Woo Bih Li J disagreed with Rubin J. Woo J observed that the requirement of prejudice under the English provision was derived from the specific wording of that provision. Given that s. 216 is not couched in identical terms, his Honour was of the view that whilst prejudice is an important *factor* in the overall assessment of unfairness, it is not an essential requirement.[43] Justice Woo's view on this particular point was subsequently affirmed by the Court of Appeal.[44]

But is this the correct interpretation vis-à-vis s. 216? The inquiry should perhaps begin with a consideration of what 'prejudice' means. There has been no conclusive definition, although English courts appear to have adopted the ordinary meaning of the term and in a fairly generous sense. Hence, there is prejudice if the impugned act or conduct results in some adverse impact, actual or potential, on the interests of the petitioning member. The circumstances in which prejudice is manifested thus range from the obvious, involving actual harm to the member's interests, which would include the denial of dividends[45] and damage to the value of the member's shareholding,[46] to the less obvious instances of disappointed shareholder expectations.[47] Situations of the latter type may not be immediately indicative of any harm to the member's interests as such, but are nevertheless considered prejudicial. An illustration of this type of prejudice is provided by the Scottish decision of *McGuinness* v *Bremner plc*.[48] There, a delay of some several months by the board of directors of the company in convening a general meeting requisitioned by the petitioners was considered prejudicial conduct. Lord Davidson opined as follows:

> [T]he right of holders of the requisite amount of share capital to requisition an extraordinary general meeting is one of the most valuable remedies which minority shareholders enjoy. They enjoy that right by virtue of their holding shares of the required number. As a rule they are entitled to expect that that remedy can be exercised by the holding of a meeting within a reasonable period. If the period of notice is, as it is

40 *Ibid.* at 693 (emphasis added).
41 Above n. 19 at [96].
42 Above n. 19.
43 *Ibid.* at [76].
44 *Over & Over,* above n. 16 at [76].
45 See e.g. *Re a Company, ex p Glossop* [1988] 1 WLR 1068 (Ch); *Re Sam Weller & Sons Ltd* [1990] Ch 682.
46 See *Re RA Noble (Clothing) Ltd* [1983] BCLC 273 (Ch).
47 *Re Phoenix Contracts (Leicester) Limited* [2010] EWHC 2375 (Ch) at [107].
48 [1988] BCLC 673 (SC) (*McGuinness*).

> here, of the order of six months, I consider that the petitioners as shareholders are prejudiced because any reasonable bystander would have no difficulty in concluding that such a delay was prejudicial to their interests . . ..[49]

Prejudice to the shareholder is also frequently found when there is a breach of directors' duties. The fact that the prejudice suffered by the member is reflective of the prejudice suffered by the company does not detract from the fact that the member's interests have been adversely affected. A breach of directors' duty is likely to cause damage to the company and hence jeopardy[50] to the value of the member's shareholding, and this is clearly prejudice suffered by the member in his personal capacity.[51] The argument can extend beyond this. In *Re City Branch Group Ltd*,[52] conduct that was inimical to the interests of the company's *subsidiary* was held to be capable of being actually or potentially prejudicial to the interests of the company's shareholders because of the risk of a diminution in value of the company's investment in the subsidiary.[53] However, not all transgressions by a company's directors are of assistance to the petitioner. The English courts draw a line at mere technical breaches of duty that do not cause prejudice or loss to the company. Such breaches of duty do not, by virtue of that fact, cause any corresponding prejudice to the member, and are therefore incapable of sustaining a petition under the English provision.[54]

However, the fact that prejudice was suffered does not necessarily mean that it was suffered unfairly. Whether any particular instance of prejudice is unfair so as to justify remedy is a separate consideration. It is here that the contextual inquiry necessitated by the concept of unfairness begins. In the Scottish decision of *McGuinness* v *Bremner plc*[55] referred to earlier, Lord Davidson considered that unfairness in the circumstances must be judged by reference to the *reasons* given by the directors for fixing the date of the general meeting as they did. On the facts, his Lordship concluded that the reasons advanced were unsound, and the petitioners were accordingly entitled to relief under s. 459 of the Companies Act 1985. The case of *Jesner* v *Jarrad Properties Ltd*,[56] also a Scottish decision, provides a contrasting example of a case involving prejudice that was found *not* to be unfair. The petitioner was a minority shareholder in two companies, Jarrad and

49 *Ibid*. at 679.
50 See also *Re Bovey Hotel Ventures Ltd* (31 July 1981, unreported), referred to in *Re R A Noble*, above n. 46 at 290–291.
51 *Johnson* v *Gore Wood & Co* [2002] 2 AC 1 (HL) at 54 (Lord Hutton), at 66 (Lord Millett).
52 [2004] EWCA Civ 815, [2005] 1 WLR 3505.
53 *Ibid*. at [19].
54 *Re Baumler (UK) Ltd* [2004] EWHC 7673 (Ch), [2005] 1 BCLC 92 at [180].
55 Above n. 48.
56 Above n. 27.

Jesner, all the shareholders of which were members of the same family. The petitioner sought, *inter alia*, a buy-out order for his shares in Jarrad. The acts complained of included certain interest-free loans that were extended by Jarrad to Jesner, and security over property belonging to Jarrad which was granted to a bank to secure Jesner's overdraft. The articles of association of Jarrad required a special resolution before it may charge its assets as security, and although a special resolution, purporting to have been passed by Jarrad at an extraordinary general meeting, was produced, the trial judge found that no such meeting of shareholders had ever taken place. It is fairly obvious, and indeed the judge recognized as much, that these acts, when looked at in isolation, would be prejudicial to the interests of the shareholders of Jarrad, including the petitioner. However, the evidence showed that the two companies had been run as a single business, by common directors, and for the benefit of the family members. The companies were, from inception, run informally 'with a total disregard for company law and the contents of the memorandum and articles of association'.[57] Shareholder meetings were not held, and accounts were not issued. Inter-company loans were made as and when the 'exigencies of business demanded'.[58] The petitioner, who had full knowledge of this state of affairs, and who was, at one point, also a director of Jarrad, had not hitherto raised any objection. In the circumstances, taking into consideration the entire history of transactions between the companies, the court concluded that there was no unfairness to the petitioner.

Albeit rarer, it is also possible for the impugned acts to be unfair without in fact causing any prejudice. The case of *Rock Nominees Ltd* v *RCO (Holdings) plc (in liquidation)*[59] illustrates this situation. The subject company was the target of a takeover bid by ISS. However, ISS's plans to acquire 100 per cent of the company and to de-list the company from the Stock Exchange was thwarted by the petitioner, who refused to sell his 2.48 per cent stake despite the significant premium on the share price offered by ISS. Ultimately, ISS, who had by then acquired more than 90 per cent of the shares in the company, decided that the operating subsidiary of the company should be sold to ISS(UK), a company within the ISS group. The sale was approved by the company's directors, who were also directors of ISS(UK). It may be readily appreciated that the sale was not entirely fair to the minority shareholder, who was thereby deprived of any right to participate in the financial benefits that may accrue to the company via the subsidiary. However, as the evidence showed that the price paid by ISS(UK) for the shares in the operating subsidiary was the 'best

57 *Ibid.* at 1035.
58 *Ibid.*
59 [2004] EWCA Civ 118, [2004] 1 BCLC 439.

price reasonably obtainable'[60] in the circumstances, no harm or prejudice had been caused to the petitioner.[61]

Interestingly, despite the judicial statements which suggest that prejudice is really only a facet of the unfairness that is required under s. 216,[62] the position in Singapore may not, in the final analysis, be all that different. An analysis of the Court of Appeal's actual treatment of the allegations in *Over & Over Ltd* v *Bonvests Holdings Ltd*[63] discloses not only an appreciation of the conceptual difference between prejudice on the one hand, and unfairness on the other, but also strongly suggests at least tacit acknowledgement that unfairness without prejudice may not sustain a s. 216 petition.

O&O, the petitioner, held 30 per cent of the shares in Richvein, whilst U Ltd, controlled essentially by HN, held the majority 70 per cent. Richvein had been incorporated pursuant to a joint venture, originally between O&O and U Ltd, to develop and operate a hotel in Singapore, and HN was appointed to the board of Richvein as a nominee of U Ltd. On the basis of the brevity and informality of the negotiations between the parties, the Court of Appeal[64] considered that Richvein had essentially begun its existence as a quasi-partnership.[65] Unfortunately, the relationship between the parties declined, culminating in a s. 216 petition by O&O. O&O relied on three matters to support its allegation of oppression: first, the transfer by U Ltd of its 70 per cent stake in Richvein to Bonvests Holdings Ltd, a listed company controlled by the family of HN; secondly, a hastily completed rights issue; and finally, the entry into a number of contracts by Richvein with service providers which were companies related to Bonvests.

Vis-à-vis the share transfer to Bonvests, HN contended that this was essentially an 'internal group restructuring'[66] which was not intended to affect the relationship between the parties. However, as the share transfer was to a listed company, and one that was controlled by HN, this meant that HN could readily monetize his investment in Richvein. O&O, on the other hand, was effectively 'locked in a new business relationship with a listed public company that bears no resemblance to the implicit understanding'[67] between the parties as originally envisaged. The move was therefore clearly prejudicial to O&O. The High Court had concluded, on the premise that O&O had consented to the transfer after negotiating for the removal of the pre-emption rights contained in the company's articles of association, that

60 *Ibid.* at [76].
61 [2004] EWCA Civ 118, [2004] 1 BCLC 439 at [79].
62 Above n. 19 at [76], [118].
63 *Over & Over,* above n. 16.
64 The High Court did not conclude on the issue, as it was of the view that it would be unnecessary to do so: *Over & Over,* above n. 19 at [78].
65 *Over & Over,* above n. 16 at [86]ff.
66 Above n. 19 at [18].
67 *Over & Over,* above n. 16 at [103].

the prejudice was not unfair. The Court of Appeal, however, reached the diametrically opposite conclusion that the prejudice was unfair[68] by including the manner in which that consent was obtained into the equation.[69] As VK Rajah JA pointed out, O&O had been presented with 'Hobson's choice',[70] and the fact that O&O made a choice should not be taken as indicating that it was a willing participant, or that it could not 'keep its powder keg dry'.[71]

The rights issue was purportedly necessary to raise funds to repay a bank loan which Richvein had earlier obtained from DBS. There was evidence that Bonvests and HN had made it difficult for O&O, a Hong Kong company, to subscribe for the rights shares by requiring payment within a very tight timeframe. There was also evidence that the rights issue was not commercially justified and had in fact been called with the view to dilute O&O's shareholding in Richvein. In the circumstances, the Court of Appeal concluded that not only was prejudice suffered by O&O (in the form of the 'considerable inconvenience'[72] it had been put through), but also that the prejudice had been unfair, as its real objective was to dilute O&O's shareholding.

Vis-à-vis the related party contracts, the articles of association of Richvein prohibited any of its directors from voting in respect of any contract in which he had an interest.[73] However, despite his interest in the contracts, HN caused Richvein to enter into the contracts without reference to the Richvein board, effectively depriving O&O of the opportunity, through its nominee on the board, to consider and disapprove of the same. In the context of a quasi-partnership, this 'conscious bypassing'[74] of the articles is unfair. However, there was no harm suffered by the shareholders as, on the evidence, Richvein's entry into these contracts may in fact have benefited the joint venture partners.[75] O&O had therefore suffered no prejudice. In the circumstances, the Court of Appeal recognized that, on its own, this particular aspect of O&O's complaint would not be sufficient to sustain a claim of oppression.

The Court of Appeal was clearly appreciative of the different considerations that underpin the related albeit separate concepts of prejudice and unfairness. Indeed, it is suggested, with respect, that some measure of prejudice suffered by the member is in fact inherently required by the statutory language employed in s. 216. Whilst any attempt to closely define the four concepts adopted in s. 216 is, as alluded to earlier, rightly eschewed, an understanding of what each

68 *Ibid*. at [105].
69 *Ibid*. at [102].
70 *Ibid*.
71 *Ibid*. at [103].
72 *Ibid*. at [127].
73 *Ibid*. at [33].
74 *Ibid*. at [98].
75 *Ibid*.

entails does provide useful clues as to the correct direction our inquiries should take. The term 'oppression' has been said to refer to a concept that is narrower than 'unfair prejudice'.[76] Oppression is said to occur when dominant shareholders conduct the company's affairs in a manner that is '"burdensome, harsh and wrongful" to the other members of the company or some of them, *and* lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs'.[77] The fact that the impugned conduct is 'burdensome, harsh and wrongful' to the other members of the company is suggestive of the presence of prejudice. The second ground, that of disregard of a member's interest, was considered by the Privy Council in *Re Kong Thai Sawmill (Miri) Sdn Bhd*.[78] Lord Wilberforce, delivering the judgment of the Board, stated as follows:

> '[D]isregard' involves something more than a failure to take account of the minority's interest: there must be *awareness of that interest* and *an evident decision to override it or brush it aside* or to set at naught the proper company procedure.[79]

This manner of disregard is also indicative of prejudice. The expression 'unfair discrimination' conveys the idea of a bias or differentiation that is not positive in impact for those who are subject to the bias or differentiation. And this is quintessentially 'prejudice'. The fourth and final ground, that of prejudice, speaks for itself. Indeed, the juxtaposition of the word 'other' with the word 'prejudice' suggests that it is prejudice that is common to the other grounds and that it is prejudice to the member's interests that is prompting the petitioner to complain. In the absence of prejudice thus, there can be no complaint.

Interpreting s. 216 so as to demand the presence of prejudice, as Rubin J did, may also be supported beyond purely textual grounds. The commitments parties make contractually are generally considered from an economic perspective to be 'high cost' items as parties put considerable effort into crafting the contract terms which govern the relationship between them.[80] The company's constitution is one such 'high cost contract', which, in a closely-held company, is likely to have resulted from actual bargaining between the parties. If a court resolves disputes in deference to terms which have been explicitly agreed to by the parties, this is consistent with efficiency considerations for at least two reasons. First, as the outcome of any dispute between the parties is determined by the contract and hence predictable, the costs of resolution of the dispute are thereby reduced. And

76 See Board of Trade, *Report of the Company Law Committee 1962*, Cm 1749 (the Jenkins Report) para. 212(c).
77 *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042 (CA) at 1059 (emphasis added). See also *Low Peng Boon* v *Low Janie* [1999] 1 SLR 761 (CA) at [42].
78 Above n. 23.
79 *Ibid.* at 229 (emphasis added).
80 Cheffins, above n. 6 at 274–5.

second, the potential reduction in costs should encourage parties to pay closer *ex ante* attention to the terms of their agreement so as to result in a virtuous circle of efficient utilization of resources.[81] Yet it is trite that relief may be granted under s. 216 even if the majority shareholders have acted within their strict legal rights and in accordance with the statutory contract.[82] This intervention is often justified on the ground that the actual 'contract' is imperfect as a result of bargaining deficiencies that must be present in reality, with gaps which s. 216 is intended to plug.[83] How should this 'gap' be plugged in an efficient manner? It is submitted that this is where 'prejudice' comes in. Unfairness *per se* is simply too nefarious a concept to justify any bypassing of the actual bargain between the parties. Relying only on unfairness would result in the law being overly protective of the minority, which might have the undesirable effect of deterring investments in ventures with minority holdings. Requiring that the petitioner suffer some form of loss or harm before relief may be available to him offers a balanced approach that takes account of both the majority and minority perspectives. This, it is submitted, better approximates the parties' bargain, even one that is hypothetically determined, and provides a reasonable basis for judicial intervention.

IV. Qua Member Interests Requirement?

One factor which is thought to have contributed to the 'emasculation'[84] of s. 210 of the UK Companies Act 1948 was the judicial reading

81 See generally, C.A. Riley, 'Contracting Out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Court' [1992] 55 MLR 782; Cheffins, above n. 6 at ch. 6.

82 Relief has been granted, for example, where a shareholder was removed as director even though this was within the majority's legal rights: see *Tulio* v *Maoro* [1994] 2 SLR 489 (CA); *Kitnasamy* v *Nagatheran* [2000] 2 SLR 598 (CA). See also cases involving share issues: *Over & Over*, above n. 16; *Re Cumana Ltd* [1986] BCLC 430 (CA); and cases involving the declaration of dividends: *Re Gee Hoe Chan Trading Co Pte Ltd* (1991) 2 SLR(R) 114 (HC); *Re a Company, ex p Glossop* [1988] 1 WLR 1068 (HC). See also above n. 26.

83 Economists explain that in the real world, parties are unlikely, whether by reason of information asymmetry, transaction costs or other bargaining-related limitations, to contract in a manner which ensures the most efficient allocation of resources. Indeed, to attempt to do so would escalate costs of transaction astronomically. As such, legal rules are necessary to 'fill the gaps'. Much of company law rules may therefore be evaluated on this 'gap-filling' basis—giving rise to the 'hypothetical bargaining model'. This model or framework requires consideration of what rational parties, be they shareholders, creditors or other corporate players, would contract for in ideal conditions, i.e. the hypothetical bargain. The statutory oppression remedy may be analysed as one such 'standard contract term' supplied by companies legislation. The views on this are, however, not homogenous. See Riley, above n. 81, for a consideration of the issue. See also C.A.E. Goodhart, 'Economics and the Law: Too Much One-Way Traffic?' (1997) 60 MLR 1.

84 L. Sealy, 'Problems of Standing, Pleading and Proof in Corporate Litigation' in B.G. Pettet (ed.), *Company Law in Change, Current Legal Problems* (Stevens: London, 1987) 15.

into the section of a requirement that any oppression or prejudice suffered by the petitioner must be suffered qua member and not in any other capacity. A member's exclusion from management or expulsion from the board, for example, would technically not satisfy the requirement. Such a complaint, as was held in *Re Lundie Brothers*,[85] would have 'nothing to do with [the petitioner's] status as a shareholder in the company at all', as it related *not* to the petitioner's status as a shareholder, but to his status as a director, of the company. Such a rigid conceptualization of the requirement would undoubtedly constrain the operation of the remedy, especially since complaints of oppression often include a shareholder's removal from the office of director.[86]

Although s. 216 does not overtly so state, the manner in which the section is couched does suggest that it is meant to protect the petitioning member[87] *because* of his status as a member. Thus, the section provides that the conduct complained of must be 'oppressive *to* one or more of the *members* . . . or in disregard of his or their interests *as members* . . . or unfairly discriminates *against* or is otherwise prejudicial to one or more of the *members*'.[88] This textual interpretation is in fact consistent with the rationale for the introduction of the remedy as seen from the perspective of economists. Despite their dominant position in the company, shareholders' interests are often difficult to protect by purely contractual means.[89] This difficulty may be attributed to the fact that, unlike other corporate players, their interests are defined by a long-term relation with the company and with each other which is, as a general proposition, not subject to periodic review.[90] The long-term nature of the relation means that it is difficult for the parties not only to foresee or appreciate all future contingencies so as to expressly provide for them,[91] but also to anticipate changes in circumstances that might render the application of the agreed terms out of sync with their original intentions. Legal provisions that protect shareholders' interests are therefore necessary to fill this perceived contractual gap,[92] and the oppression remedy, as such a gap-filler, should be interpreted so as to achieve this purpose. The outside interests of a shareholder, on the other hand, stand on a different footing. These interests are either already protected by other legal rules (such

85 [1965] 1 WLR 1051 (Ch).
86 See e.g. *Tullio* v *Maoro* [1994] 2 SLR(R) 501 (CA); *Kitnasamy* v *Nagatheran* [2000] 1 SLR(R) 542 (CA); *Lim Swee Khiang*, above n. 11.
87 It should be noted that s. 216 may be availed not only by members, but also by holders of debenture stock issued by the company. The comments here are, however, confined to applications by members.
88 Emphasis added.
89 Kraakman, above n. 5 at 15.
90 O. Williamson, 'Corporate Governance' (1984) 93 Yale LJ 1197, 1210.
91 See Riley, above n. 81 at 786.
92 See above n. 83. See also Cheffins, above n. 80 at 466.

as is the case with creditors) or are arguably better protected contractually (as is the case with employees).[93] Accordingly, it is the petitioner's interests *as a member* that s. 216 aims to protect.[94] This has been judicially affirmed. In *Tan Choon Yong* v *Goh Jon Keat*,[95] Tan Lee Meng J stated that for the purpose of relief ordered under s. 216, the allegedly unfair conduct 'must affect a member *in his capacity as member*'.[96]

This interpretation of s. 216 is consistent with that which currently prevails in the UK. Despite the legislative changes made to the oppression remedy there, the qua member requirement was not removed nor overtly re-defined by the unfair prejudice provision that replaced s. 210. In fact, the continued applicability of the requirement in the UK to the present unfair preference provision has been repeatedly affirmed by the English courts. Auld LJ's observation in *Re Phoenix Office Supplies Ltd, Phoenix Office Supplies Ltd* v *Larvin*[97] is representative of the general sentiment:

> [The English provision is] designed for the protection of the members of companies. It is in that capacity that they seek its protection, not as directors or employees . . .[98]

This notwithstanding, it is clear that, in the UK, the qua member requirement is no longer construed as narrowly as it was before. Specifically, it is accepted that members' interests, for the purposes of the unfair prejudice remedy, may extend beyond the strict legal rights as defined by the companies legislation and the company's constitution. The reason for this, as Lord Wilberforce explained in *Ebrahimi* v *Westbourne Galleries*,[99] is that:

> [A] limited company is more than a mere legal entity, with a personality in law of its own: . . . there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights,

93 Cheffins, above n. 6 at 62–3; 470.
94 See also *Re A Company (No 00477 of 1986)* [1986] BCLC 376 (Ch) at 379.
95 [2009] 3 SLR(R) 840 (HC) (*Tan Choon Yong*).
96 *Ibid.* at [34] (emphasis added). See also C.H. Tan (gen. ed.), *Walter Woon on Company Law*, rev 3rd edn (Sweet & Maxwell: Singapore, 2009) [5.60].
97 [2002] EWCA Civ 1740, [2003] 1 BCLC 76.
98 [2003] 1 BCLC 76 at [27]. See also *Re A Company (No 004475 of 1982)* [1983] Ch 178 where Lord Grantchester QC explained what this means in the following terms (at 189):
> . . . Parliament did not intend to give a right of action to every shareholder who considered that some act or omission by his company resulted in unfair prejudice to himself. In argument, an example was advanced of a shareholder who objected to his company carrying out some operation on land adjoining his dwelling house, which resulted in that house falling in value. It is not difficult to envisage an act or omission on the part of a company rendering an asset of a shareholder, other than his shares, of lesser value. In my judgment [the unfair prejudice provision] is to be construed as confined to 'unfair prejudice' of a petitioner 'qua member'; or, put in another way, the word 'interests' in [the provision] is confined to 'interests of the petitioner as a member'.
99 [1973] AC 360 (HL). This well-known case was a decision on the rights of a member to obtain a winding-up order on just and equitable grounds.

> expectations and obligations inter se which are not necessarily submerged in the company structure.

Recognizing this has allowed the English court to widen the scope of a member's protectable interests to cover certain expectations that may have arisen out of some understanding or informal agreement between the shareholders. Thus, a shareholder may be given to understand that he will be able to participate in management. That this expectation may, in certain circumstances, translate into a qua member right was accepted by Hoffmann J (as Lord Hoffmann then was) in *Re A Company (No 00477 of 1986)*.[100] His Lordship explained the position as follows:

> [I]n the case of the managing director of a large public company who is also the owner of a small holding in the company's shares, it is easy to see the distinction between his interests as a managing director employed under a service contract and his interests as a member. In the case of a small private company in which two or three members have invested their capital by subscribing for shares on the footing that dividends are unlikely but that each will earn his living by working for the company as a director, the distinction may be more elusive. The member's interests as a member who has ventured his capital in the company's business may include a legitimate expectation that he will continue to be employed as a director and his dismissal from that office and exclusion from the management of the company may therefore be unfairly prejudicial to his interests as a member.[101]

This limited extension of the qua member requirement is arguably also consistent with the idea of the oppression remedy fulfilling a gap-filling role, as effect is given to the expectations and understandings between shareholders that undergird their association, but which, for reasons associated with the limitations of bargaining, are not included or reflected in the express contracts between them.[102]

Although it was Lord Hoffmann who first used the phrase 'legitimate expectations' to demarcate the constraints placed by the statutory remedy on the exercise of majority power,[103] his Lordship has since deprecated the use of the phrase.[104] The preferred locution is now 'equitable considerations'.[105] Nevertheless, as a concept, there has been no change and the same considerations continue to move the court in unfair prejudice cases. Therefore, as long as 'legitimate expectations' is used in the sense intended by Lord Hoffmann, it is a pithy phrase that quickly conveys the idea behind the concept. Indeed,

100 [1986] BCLC 376 (Ch).
101 *Ibid.* at 379.
102 See above n. 83.
103 See also *Re Saul D Harrison & Sons*, above n. 26 at 19.
104 In *O'Neill* v *Phillips*, his Lordship thought that it 'was probably a mistake to use this term': above n. 21 at 1102.
105 *McKillen* v *Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch), [2012] All ER (D) 71 at [635].

that could be why the phrase has continued to be used by the courts in Singapore.[106] It is, however, important to be clear as to the boundaries of the concept and not be distracted by the potential width suggested by the ordinary meaning of the phrase. It is not *every* expectation that a minority shareholder harbours that is a legitimate expectation, giving rise to equitable considerations. Expectations that are merely factual, and there would be many instances of this, cannot extend a member's protectable interests under the section. In *O'Neill* v *Phillips*,[107] Lord Hoffmann made it clear that the legitimate expectation is a 'correlative right'[108] which places an equitable restraint on the majority's legal powers. This means that, when such a right exists, any exercise of majority power, even if in compliance with the constitution and the law, and therefore technically proper, may nevertheless be potentially unfair if it denies this shareholder's right. The correlative right exists only because the nature of the relationship between members is such that equity considers it unfair for the majority to exercise the legal rights which are conferred upon it by the constitution of the company. As the legitimate expectation is 'a consequence, not a cause, of the equitable restraint',[109] the first matter that must be established, therefore, is that the relationship between the members is one to which such equitable considerations may apply so as to give force to any understanding between the parties that is extraneous to the company's constitution.[110] In many companies, shareholders associate on the basis of a formal structure that is defined by the applicable legislation, the corporate constitution and any formal shareholders' agreement between them. There is usually no room in such companies for 'supra-structural' expectations.[111] However, in some companies, companies which, as Lord Wilberforce put it, are 'more than' mere legal entities, the relationship between the shareholders may not be exhaustively defined by the formal structure. What manner of relationships are these then?

Lord Hoffmann provided at least two signposts. First, his Lordship made reference to the fact that company law had developed seamlessly from the law of partnership, which imposes a duty of utmost good faith[112] on every partner that is due to every other partner. This fact provides the background and context to the unfair prejudice

106 See e.g. *Over & Over*, above n. 16 at [78]; *Lim Chee Twang* v *Chan Shuk Kuen Helina* [2010] 2 SLR 209 (HC) at [78] and [79].
107 Above n. 21.
108 *Ibid.* at 1102.
109 *Ibid.*
110 See also *Sim Yong Kim* v *Evenstar Investments Pte Ltd* [2006] 3 SLR 827 (CA) at [40]ff and *Eng Gee Seng* v *Quek Choon Teck* [2010] 1 SLR 241 (HC) at [6]ff.
111 *Ebrahimi*, above n. 25 at 379.
112 *Blisset* v *Daniel* (1853) 10 Hare 493.

remedy. Second, Lord Hoffmann agreed with Jonathan Parker J (as he then was) who had said in *Re Astec (BSR) plc*[113] that:

> . . . in order to give rise to an equitable constraint based on 'legitimate expectation' *what is required is a personal relationship or personal dealings of some kind* between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former.[114]

Such relationships have been described as 'quasi-partnerships'. Although it is often easier to establish that the company is a quasi-partnership where it was in fact converted from a pre-existing partnership,[115] or where its members are all members of a family,[116] this does not mean that there cannot be a quasi-partnership between 'savvy, experienced investors' as *Over & Over Ltd* v *Bonvests Holdings Ltd*[117] amply demonstrates.

Returning then to Tan J's statement[118] in *Tan Choon Yong* v *Goh Jon Keat*,[119] the question is what this qua member requirement entails for s. 216. Clearly his Honour's statement should not be read literally, as this could potentially mean a return to the narrow interpretation that plagued the remedy during the era of s. 210. Indeed, as the reasoning and analysis applied by the English courts, especially in the cases of *Ebrahimi* and *O'Neill*, have been accepted locally,[120] s. 216 must therefore also embrace the broadening of the qua member rights by reference to the concept of legitimate expectations. This notwithstanding, Lord Hoffmann's exhortation not to allow the concept of a legitimate expectation to 'lead a life of its own' ought to be kept firmly in mind. It should be reiterated that it is the existence of such a personal relationship that allows the concept of qua member interests in the unfair prejudice remedy to be extended, if at all, to embrace legitimate expectations which fall technically outside of its remit. As Chan Seng Onn J recognized in *Eng Gee Seng* v *Quek Choon Teck*,[121] except for

113 [1998] 2 BCLC 556 (Ch).
114 *Ibid*. at 588 (emphasis added). See also *Ebrahimi*, above n. 25 where Lord Wilberforce referred (at 379) to equitable considerations 'of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way'. Lord Wilberforce's explication of the principles on which the court exercises its jurisdiction to order a winding up on the just and equitable ground was considered by Lord Hoffmann to be equally applicable to the unfair prejudice remedy.
115 *Ebrahimi*, above n. 25 at 379.
116 See e.g. *Low Peng Boon*, above n. 77; *Lim Swee Khiang*, above n. 11; *Sim Yong Kim* v *Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 (CA); cf. *Loh Kwok Kee* v *Foo Hee Toon Gilbert* [2011] SGHC 116 at [29].
117 [2010] 2 SLR 776 (CA) at [85].
118 See above n. 96.
119 Above n. 95.
120 See e.g. *Sim Yong Kim*, above n. 110; *Lim Swee Khiang*, above n. 11; *Over & Over*, above n. 19; *Eng Gee Seng* v *Quek Choon Teck*, above n. 110.
121 [2010] 1 SLR 241 (HC) at [17].

cases involving quasi-partnerships founded on mutual trust and confidence, it should not 'ordinarily be easy to establish the existence' of such legitimate expectations as the court should be mindful of rewriting the terms that underpin the formation of any company. In the light of this, it is suggested with respect that the actual decision of *Tan Choon Yong* v *Goh Jon Keat*[122] may not be readily reconcilable with established principles.

The plaintiff Tan was a minority shareholder in the company ARG. Tan had been persuaded by the defendants, who controlled a majority of the votes in the company, to leave his employ with a diagnostic testing company to be the chief executive officer of ARG. The directors of the company were initially Tan and his wife, and the defendants. The company applied for and obtained listing on Phillips Securities' Over-the-Counter Capital to raise funds for the company's business. The fact that Tan was to helm the operations of ARG was capitalized upon for the purposes of the listing application. Shortly thereafter, the defendants, using their majority shareholding, caused Tan to be removed from the position of chief executive officer, and ensured that neither he nor his wife were reappointed as directors to the board. The facts suggest a possible plan by the defendants to misuse the investor funds raised to pay themselves excessive salaries, and the court found that the defendants were in breach of their duties to the company where their employment contracts and their entitlement to these salaries thereunder were concerned.

Whilst an abuse of power by the directors who represent the company's majority shareholders may amount to oppression,[123] it is obvious that this was not the main plank of Tan's case. Instead, it was Tan's removal as the company's chief executive officer contrary to the 'legitimate expectation and understanding that he would have an important role in the management of the company'[124] that was the focus of the petitioner's case and which formed the primary basis of the court's decision.[125] The court found that there was indeed such an understanding between the parties, and consequently, the attempts by the defendants to renege on the understanding amounted to oppressive conduct which entitled Tan to relief under s. 216. Undoubtedly, Tan was possessed of a factual expectation of having significant managerial involvement. It is, however, less obvious that this expectation was legitimate in the sense that Lord Hoffmann intended. It is not apparent that ARG was a quasi-partnership or that there was anything especially personal in the relationship between Tan and the majority shareholders. Indeed, the formality of the relationship is reinforced by

122 Above n. 95.
123 *Over & Over*, above n. 16 at [122].
124 *Tan Choon Yong*, above n. 95 at [40].
125 See *Tan Choon Yong*, above n. 95 at [46], [105] and [111].

the fact that Tan had an employment contract with the company on the basis of which he had pursued a separate action for wrongful dismissal.[126] In arriving at the conclusion that Tan's expectation was legitimate, the court placed considerable emphasis on Tan's professional qualifications and capabilities, and that these were major factors in securing the company's listing. However, these matters, with respect, say little about the peculiar relationship between the shareholders, an understanding of which, as we know from *O'Neill* v *Phillips*, is of fundamental importance before any conclusion can be made as to the existence of that 'second tier of rights and obligations'[127] that are known as legitimate expectations.[128] In such circumstances, it is arguable that the interests that Tan sought to protect were in fact not qua member rights. Tan should not, with respect, have therefore succeeded in his application.[129]

In conclusion, therefore, although the oppression remedy is indeed couched in the most generous terms in order to confer on the courts a wide discretion to do what is just and fair, it is nevertheless subject to clear, albeit limited, constraints. One of these constraints is the imposition of the qua member requirement. This will, where a member seeks to call the section into operation, limit the class of protectable interests under s. 216. Although our courts will not adopt too technical a construction of the requirement, and are clearly prepared to extend the nature of interests so as to embrace even those which are not traditionally considered qua member interests, it is nevertheless important that any extension is allowed only after due consideration of the minority's legitimate expectations, which are themselves born of the understanding that predicates the members' association. And so long as these interests are, in Walker J's words, 'an absolutely essential part'[130] of the arrangements between the parties, they would undoubtedly fall to be protected under s. 216. Such an approach would certainly be consistent with the welfare-maximizing and

126 *Tan Choon Yong*, above n. 95 at [7].

127 See *Re J E Cade & Son Ltd* [1992] BCLC 213 (Ch) at 227.

128 See also *Eng Gee Seng*, above n. 120 at [17], where Chan Seng Onn J observed that, except for cases involving quasi-partnerships founded on mutual trust and confidence, it should not 'ordinarily be easy to establish the existence' of such legitimate expectations as the court should be mindful of rewriting the terms that underpin the formation of any company. See also *Ng Sing King*, above n. 19 at [95].

129 In some respects, the Privy Council decision in *Gamlestaden Fastigheter AV* v *Baltic Partners Ltd* [2007] UKPC 26, [2008] 1 BCLC 468 presents similar difficulties. As the subject company was not likely, on the evidence, to be a quasi-partnership, it is questionable whether the court should have recognized that the shareholder's rights should have been extended beyond its strict qua member rights to include its rights qua creditor. See further T. Singla, 'Unfair Prejudice in the Privy Council' (2007) 123 LQR 542; R. Goddard, 'The Unfair Prejudice Remedy' (2008) 12 Edin LR 93.

130 *R & H Electric Ltd* v *Haden Bill Electrical Ltd* [1995] 2 BCLC 280 (Ch) at 295.

efficiency-driven agenda that is promoted by the hypothetical bargaining model.

V. Corporate Wrongs and Personal Rights

One of the issues raised in *Gamlestaden Fastigheter AV* v *Baltic Partners Ltd*[131] was whether an order could be made, under the unfair prejudice provision, for substantial relief to be awarded not to the petitioning shareholder, but to the company whose affairs have allegedly been conducted in an unfairly prejudicial manner. There are several strands to the issue. There is, first, the logically preceding question, which asks whether the unfair prejudice provision, and its oppression equivalents, ought to apply at all when the matters complained of effectively comprise wrongs to the company. Whilst not all complaints of unfair prejudice, or of oppression, will involve wrongs against the company, it is not uncommon to find a petition founded upon facts which also disclose a concurrent wrong against the company, usually a breach of directors' duties.[132] As is well-known, the rule in *Foss* v *Harbottle*[133] dictates that, subject to a tightly constrained exception, only the company itself may sue for a wrong done against it. The exception, which determines when individual shareholders may be permitted to sue derivatively on the company's behalf, is notoriously restricted in its application because of the majority rule. The law, in general, respects the will of a majority of the company's shareholders. Hence, '[I]f a mere majority of the members of the company . . . is in favour of what has been done, then *cadit quaestio*. No wrong has been done to the company . . . and there is nothing in respect of which anyone can sue'.[134] If left to the devices of the majority therefore, there will certainly be some direct wrongs to the company, committed with the blessings of the majority, that will go unremedied. It is in such circumstances that the unfair prejudice remedy has had its greatest impact.

What then if the common law derivative action is in fact available? The courts have generally refused to accept that this would afford any bar to an unfair prejudice petition. In *Re Kong Thai Sawmill (Miri) Sdn Bhd*,[135] the Privy Council considered s. 181 of the Companies Act 1965 of Malaysia, which is *in pari materia* with Singapore's s. 216. Lord

131 Above n. 129.

132 See e.g. *Kumagai Gumi Co Ltd* v *Zenecon Pte Ltd* [1995] 2 SLR(R) 304 (CA); *Lim Swee Khiang*, above n. 11; *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354 (Ch); *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420 (Ch); *Clark* v *Cutland* [2004] 1 WLR 783 (CA). See also H.-C. Hirt, 'In What Circumstances Should Breaches of Directors' Duties Give Rise to a Remedy Under ss 459–61 of the Companies Act 1985?' (2003) 24 *Company Lawyer* 100; S. Griffin, 'Shareholder Remedies and the No Reflective Loss Principle—Problems Surrounding the Identification of a Membership Interest' [2010] 6 JBL 461 at 470–1.

133 (1843) 2 Hare 461.

134 Famously *per* Jenkins LJ in *Edwards* v *Halliwell* [1950] 2 All ER 1064 (CA) at 1066.

135 Above n. 23.

Wilberforce, who delivered their Lordships' advice, stated that 'if a case of "oppression" or "disregard" is made out, the section applies and it is no answer to say that relief might also have been obtained in a minority shareholders' action'.[136] This must be right, for many a corporate wrong provides the very means by which oppression is inflicted by the majority upon the complaining minority shareholders. As Hoffmann LJ observed in *Re Saul D Harrison & Sons Plc*,[137] '[e]nabling the court in an appropriate case to outflank the rule in *Foss* v *Harbottle* was one of the purposes of the section'.

To accept that the grounds upon which an oppression claim may be made out can comprise essentially corporate wrongs is, it should be pointed out, quite a different matter from saying that corporate claims may be pursued via an oppression petition. There is, however, some English authority, in respect of the pre-2006 UK unfair prejudice provision, which appears to be sympathetic towards this latter possibility. In *Clark* v *Cutland*,[138] an unfair prejudice petition was brought on the premise of a director's breach of his duties in misappropriating significant sums from the company. Although the petitioner had initially commenced a derivative action on the company's behalf, this action was 'consolidated' with the unfair prejudice proceedings he subsequently brought. The lower court had, upon a finding of unfair prejudice, ordered the acquisition of the respondent's shares. This result would not demand especial attention but for the judge's view that 'there was a wide jurisdiction under s. 461 to give relief against third parties which could have been granted in a derivative action'[139] and further that 'it was appropriate for him to treat the petition *as if it were a derivative action*'.[140] Arden LJ's unqualified acknowledgement of the trial judge's views may be read as tacit acceptance that the unfair prejudice provision may be utilized to vindicate essentially corporate claims.[141] Sending similar signals is the almost contemporaneous decision of *Bhullar* v *Bhullar*.[142]

136 *Ibid*. at 229. See also *Re Stewarts (Brixton) Ltd* [1985] BCLC 4 (Ch); *Re A Company (No 005287 of 1985)* [1986] 1 WLR 281 (Ch).
137 Above n. 26 at 18.
138 Above n. 132.
139 *Ibid*. at [8].
140 *Clark*, above n. 132 at [35] (emphasis added).
141 See also *Lowe* v *Fahey* [1996] 1 BCLC 262 (Ch) at 268; *Anderson* v *Hogg* 2002 SC 190, [2002] BCC 923. But see *Re Chime Corp Ltd* [2004] 3 HKLRD 922 (HKCFA) at [24] (*per* Bokhary PJ).
142 [2003] 2 BCLC 241 (CA). The court at first instance (HC, 25 March 2002) had rejected many of the petitioning shareholders' allegations of unfairly prejudicial conduct but found eventually for the petitioners, primarily on the basis of the respondents' alleged breach of directors' duties. John Behrens QC declined to grant the primary relief, of an order for the sale to the petitioners of the respondents' shares, sought by the petitioners. Instead, the learned judge held that the respondents were in breach of their directors' duty to avoid a conflict of interests, and declared that the properties acquired in breach be transferred to the company at cost. Given the limited grounds upon which unfair prejudice was found, it would be fair to say that the case stood more for the vindication of the

This potentially expansive view of the boundaries for application of the unfair prejudice provision was rejected by Lord Scott in the decision of the Hong Kong Court of Final Appeal in *Re Chime Corp Ltd*.[143] His Lordship expressed the view that it would not be appropriate for the court, on an unfair prejudice petition, to entertain what would, in effect, be a corporate action to redress a corporate wrong against the company by its directors.[144] This, in Lord Scott's words, is an attempt to circumvent the rule in *Foss* v *Harbottle*[145] and would be an abuse of process. Any such wrong should be established in a derivative action.

Lord Scott's point, with respect, should apply with greater force in Singapore. There are two justifications for this view. First, the legislative *context* of s. 216 demands so. The oppression action has coexisted with the statutory derivative action found in s. 216A of the Companies Act since 1993.[146] Many of the difficulties associated with the derivative action at common law, which, some have argued, may have provided impetus for the path adopted by the English courts,[147] are therefore of far less consequence for the minority shareholder in a Singapore company.[148] Although the relationship between the two sections is not explicitly addressed, their juxtaposition does provide a fairly obvious indication that s. 216 should not be interpreted as an alternative or additional route to 'outflank'[149] the statutory derivative action—on the contrary, the distinction between personal oppression proceedings and corporate derivative proceedings is to be judiciously maintained. This view is buttressed by the fact that when the Companies Act was amended to include s. 216A, the marginal note to

corporate wrong, than of a personal grievance. The appeal related only to the relief granted in respect of the property, and the English Court of Appeal considered only the directors' duties point and did not address the propriety of the relief ordered.

143 Above n. 141. Section 168A of the Companies Ordinance Cap 32, which is Hong Kong's unfair prejudice provision, is similar in material aspects to the UK provision.

144 *Ibid.* at [61].

145 (1843) 2 Hare 461.

146 The UK introduced the statutory derivative action in 2006 (Companies Act 2006 (UK) Pt 11, ss 260ff), whilst Hong Kong introduced the procedure in 2004 (ss 168BA to 168BI were added to Hong Kong's Companies Ordinance (Cap 32) by the Companies (Amendment) Ordinance).

147 See generally B. Hannigan, 'Drawing Boundaries between Derivative Claims and Unfairly Prejudicial Petitions' [2009] 6 JBL 606.

148 At least not for the shareholder in an *unlisted* company: s. 216A is limited in its application to unlisted companies. It should be noted that the Steering Committee for the Review of the Companies Act has recommended that s. 216A be amended to extend the statutory derivative action in its application to Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas: Ministry of Finance, *Report of the Steering Committee for the Review of the Companies Act (2011)* recommendation 2.30.

149 Or, as Professor Kershaw put it, as a 'functional equivalent' of a derivative action: D. Kershaw, *Company Law in Context* (Oxford University Press: Oxford; New York, 2009) 636.

s. 216, which then read 'Remedies in cases of oppression or injustice', was amended to read '*Personal* remedies in cases of oppression or injustice'.[150] In addition, the specific inclusion of an order to 'authorise 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' in s. 216(2)(c), as one of the remedial orders that the court may make on an oppression petition, underscores the distinction.[151]

The second justification arises, interestingly, from an efficiency perspective. The statutory derivative action is often rationalized as a mechanism for corporate governance. In providing the procedure for shareholders to take on litigation decisions on the company's behalf, it allows for shareholder enforcement of directors' duties. This, the argument goes, mitigates not only the agency costs associated with the monitoring of management, but also those associated with majority-minority shareholder conflict of interests.[152] However, allowing derivative actions by shareholders does, paradoxically, give rise to a different agency problem, one that arises between the company, as principal, and the litigating shareholder, as agent. This problem arises because the agent (i.e. the shareholder) may be tempted to use the derivative action in an opportunistic, self-serving manner.[153] To deal with the agency costs associated with this problem, the statutory derivative action has built-in safeguards that serve to ensure that any litigation brought by a shareholder to pursue corporate claims is guided by the legitimate interests of the company and not for vexatious or other extraneous reasons. When so constrained, the use of the derivative suit should ultimately result in a general increase in corporate value.[154] This of course benefits all the stakeholders in the company and promotes their overall welfare. The oppression remedy possesses no such safeguards. Further, the very basis for the pursuit of the oppression remedy is diametrically opposed to that which supports the statutory derivative action. Considerations that move the

150 Companies (Amendment) Act 1993 (No. 22 of 1993), s. 21 (emphasis added). The relevance of marginal notes as aids to the interpretation of legislation is dealt with by the Interpretation Act (Cap 1). Section 9A provides for the consideration of 'all matters not forming part of the written law that are set out in the document containing the text of the written law as printed by the Government Printer', which would include the marginal note, to 'confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law'.

151 Cf. Jennifer Payne, 'Sections 459–461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 CLJ 647, 653.

152 This latter cost arises because of the risk of the majority exercising their power to prevent litigation against errant management who have so acted to further the majority's interests at the minority's expense. See n. 5; see also D.W. Puchniak, H. Baum and M. Ewing-Chow (eds), *The Derivative Action in Asia—A Comparative and Functional Approach* (Cambridge University Press: Cambridge; New York, 2012) 13–14, 27.

153 See above n. 5.

154 R. Kraakman, H. Park, S. Shavell, 'When Are Shareholder Suits in Shareholder Interests?' (1994) 82 *Georgetown LJ* 1733, 1736.

court are therefore necessarily fundamentally different for each case. Whilst the statutory derivative action mandates a consideration of whether the intended litigation would be 'prima facie in the interests of the company',[155] an oppression petition is to be assessed primarily from the perspective of the minority shareholder. To allow corporate claims to be pursued via the oppression remedy would effectively denude the statutory derivative action of much of its intended effect.

For these reasons, careful attention would have to be paid to the derivative-personal divide to ensure that s. 216 is not being used to vindicate corporate claims. To maintain this divide as a matter of practice, it would be necessary to subject the initial pleadings to careful scrutiny. Where, however, should the line be drawn? The judgment of Millett J (as Lord Millett then was) in *Re Charnley Davies Ltd (No 2)*[156] may provide some assistance. The learned judge had considered the overlap between the personal and corporate actions and opined that the distinction does not lie in the particular acts or omissions of which complaint is made, but in the *nature of the complaint and the remedy necessary to meet it*. The question is what 'the whole gist'[157] of the complaint was. The learned judge made the following observations:[158]

> It is a matter of perspective. The metaphor is not a supermarket trolley but a hologram. If the whole gist of the complaint lies in the unlawfulness of the acts or omissions complained of, *so that it may be adequately redressed by the remedy provided by law for the wrong*, the complaint is one of misconduct *simpliciter*. There is no need to assume the burden of alleging and proving that the acts or omissions complained of evidence or constitute unfairly prejudicial management of the company's affairs. It is otherwise if the unlawfulness of the acts or omissions complained of is not the whole gist of the complaint, so that it would not be adequately redressed by the remedy provided by law for the wrong. In such a case it is necessary to assume that burden, but it is no longer necessary to establish that the acts or omissions in question were unlawful, and a much wider remedy may be sought.

Thus, whether the 'whole gist' of the complaint is derivative or personal requires a concurrent consideration of the remedy sought: if the complaint may be adequately addressed by an order for restitution to the company or some other substantive corporate remedy, the petitioner's complaint should be classified as derivative. In such cases, the

155 Companies Act Cap 50 (Singapore) s. 216A(3)(c).
156 [1990] BCLC 760 (Ch). The case involved a petition under the English Insolvency Act 1986, s. 27, presented by 11 of the creditors of the company alleging that the company's affairs had been managed by the company's administrator in a manner which was unfairly prejudicial to the creditors of the company.
157 *Re Charnley Davies Ltd*, above n. 156 at 783.
158 *Ibid.* (emphasis added).

s. 216A derivative action, and not the s. 216 action, would be appropriate. It may be helpful to illustrate the difference by reference to two local decisions. In the first case, *Low Peng Boon* v *Low Janie*,[159] the petitioner JL was a minority shareholder and director in the subject company. She alleged, *inter alia*, that the respondent, who was the *de facto* controller of the company, had conducted the affairs of the company in a manner that was oppressive towards her. The factual allegations made to support her petition disclosed various breaches of directors' duties involving mainly the misuse of corporate funds. Although these were clearly corporate wrongs, and therefore capable of being the subject matter of a derivative action, the Court of Appeal found that the unlawful acts constituted oppressive conduct vis-à-vis the petitioner. This was, with respect, a correct treatment of the case, as the petitioner's primary complaint was that the respondent had been dismissive of her legitimate concerns, making her continued involvement in the company meaningless. To paraphrase Millett J,[160] the petitioner relied on the respondent's breaches of duty, not to found her action as such, but as evidence of the manner in which the company's affairs had been conducted for his own benefit and in disregard of her interests as a minority shareholder. She accordingly wanted relief from oppression and sought to be bought out. She was not seeking a remedy for breach of duty.

Contrast these facts with *Kumagai Gumi Co Ltd* v *Zenecon Pte Ltd*.[161] The petitioner, Kumagai, was a shareholder in a company, KZ, which was incorporated in pursuance of a joint venture. The other party to the venture was Zenecon, a company controlled by one Low, which held 51 per cent of the shares in KZ. The board of directors of KZ comprised four nominees appointed by Kumagai and three Zenecon nominees, including Low, who was also made managing director of KZ. Kumagai complained of a number of transactions that Low had engineered vis-à-vis KZ and its subsidiary, and argued that Low's conduct in connection thereto was oppressive to Kumagai. It sought, *inter alia*, orders requiring Low to make restitution to KZ for the losses it had suffered as a result of the impugned transactions. The petitioner prevailed at trial and Low was ordered to pay compensation to KZ. This is, of course, corporate relief. The Court of Appeal agreed with the lower court that Low had acted in breach of his directors' duties to KZ and that this was conduct oppressive to Kumagai as a shareholder of KZ.[162] Taken in isolation, this conclusion, in itself, may be unobjectionable for, as alluded to earlier, the presence of corporate wrongs often is evidence of oppression. The difficulty,

159 Above n. 24.
160 *Re Charnley Davies Ltd*, above n. 156 at 783.
161 Above n. 132.
162 *Ibid*. at [57].

however, lies with the fact that the petitioner Kumagai had the majority on the board of the company.[163] It was therefore in the position to have pursued a corporate action via the normal route without resort to s. 216. Indeed, the main thrust of the complaints was the breach of the duties owed to the company KZ by Low, rather than oppression of the minority shareholder Kumagai as such. Within this factual matrix, therefore, there may not be oppression or unfairness in the sense envisaged by s. 216, and the complaints would have been more appropriately dealt with as a derivative claim.

The final strand to the issue posed at the start of this section relates to the jurisdiction of the court, in a petition under s. 216, to make an order for corporate relief. This very question was raised but only briefly considered by the Court of Appeal in the case just considered.[164] Counsel had argued that the court had no jurisdiction under s. 216 to make such an order. The Court of Appeal disagreed, holding that, subject to the limitation that the order made must be 'with a view to bringing to an end or remedying the matters complained of' as dictated by the section, the jurisdiction to make orders under the section was 'very wide'[165] and that an order to make good the loss suffered by the company was 'in principle . . . within the purview of s. 216'.[166]

That the court has jurisdiction to make an order for corporate relief cannot be seriously doubted. This is amply justified by the oft-emphasized width of the statutory language employed in s. 216. Section 216(2) provides for a non-exhaustive list of potential orders that the court may make, which list is expressly stated to be 'without prejudice' to the court's jurisdiction to 'make such order as it thinks fit', provided, as the Court of Appeal noted in *Kumagai*,[167] that the order is made 'with a view to bringing to an end or remedying the matters complained of'. This leaves room for the court to make other orders, including, undoubtedly, an order for corporate relief. The issue, however, is not only whether the court *has* the necessary jurisdiction to make such orders. There is a necessary postliminary question, and that is whether the court should, in any particular case, exercise its jurisdiction in this manner. As Lord Scott pointed out in *Re Chime Corpn Ltd*,[168] '[t]he fact . . . that the terms of a statute create or confer a jurisdiction in very wide terms does not necessarily mean

163 *Kumagai*, above n. 161 at [5]. The shareholders' agreement between the parties in fact provided for equal representation with no provision for a casting vote. The company's articles on the other hand did not appear to have accorded with the agreement, and the board ultimately consisted of four Kumagai nominees against Zenecon's three.

164 *Kumagai*, above n. 161.

165 *Ibid*. at [71].

166 *Ibid*. at [77]. Ultimately, however, the court did not affirm the lower court's order as it considered that there was insufficient evidence to show that the loss sustained by the company was the result of Low's wrongful acts.

167 *Ibid*. at [71].

168 Above n. 141.

that the courts have an unlimited jurisdiction to make any orders that are within the wide statutory terms'.[169] In any given case, it may not be appropriate or proper, notwithstanding the court's undoubted possession of the jurisdiction in the strict sense to make orders for corporate relief, for the court to make such orders. There are undoubtedly situations, albeit not so commonplace, where an order for corporate relief is necessary to provide the petitioning shareholder with the most appropriate remedy. For example, a petitioner, especially one who may have emotional ties with the company, may spurn the more usual remedy of having his shares bought by the respondent in favour of a reverse order that the respondent *sell* his shares in the company to the petitioner.[170] In such a case, a concurrent order that the errant respondent should compensate the company for such losses as he had caused the company to suffer will be necessary to 'bring to an end or remedy the matters complained of'. Similarly, where the petitioner is seeking to wind up the company, or where the court considers that the company ought to be wound up,[171] it may be proper that the errant directors make restitution to the company first, so that the realized assets of the company more accurately reflect its worth.[172] These examples, it is submitted, illustrate the true purpose for which the jurisdiction to order corporate relief should be exercised in an oppression petition, and that is to complete the main order for personal relief. Such orders can therefore only be supportive, and should not be the main act.

VI. Conclusion

The oppression remedy contained in s. 216 of the Companies Act plays an important role in minority shareholder protection in Singapore. This is evidenced by the significant increase in the number of s. 216 petitions in recent years.[173] As such, it is necessary that both the

169 Lord Scott drew a distinction, as did Bokhary PJ, who gave the only other reasoned judgment, between these two senses in which the term 'jurisdiction' may be understood—the strict or theoretical sense, and the wider, practical sense which embraces considerations of the propriety of exercising that jurisdiction in a particular case: *Chime Corp*, above n. 168 at [39]–[41] and [9].

170 The English case of *Clark* v *Cutland* [2003] EWCA Civ 810, [2004] 1 WLR 783 at [1] provides an illustration of precisely such a situation.

171 Which was what occurred in *Low Peng Boon* v *Low Janie*, above n. 24.

172 Even in these situations, Lord Scott would advocate a cautious approach. In *Re Chime Corpn Ltd* (above n. 141), his Lordship thought that, as a general rule, the court should not exercise its jurisdiction to make any order for corporate relief, unless the order 'corresponds to the order to which the company would have been entitled had the allegations in question been successfully prosecuted in an action by the company (or in a derivative action in the name of the company)' (at [62]). Further, Lord Scott was of the view that the court should not allow a prayer in the petition, that compensation or restitution be made by the allegedly errant director to the company, to stand unless 'it is clear at the pleading stage that a determination of the amount, if any of the director's liability at law to the company can conveniently be dealt with in the hearing of the petition': *ibid*.

173 Puchniak *et al*., above n. 152 at 360.

scope of its application and the court's jurisdiction to make remedial orders are sufficiently wide in order to most effectively protect the minority in the diverse situations of oppression and unfair conduct that may arise in the corporate context. Nevertheless, the company is an amalgam of different interests, rights and expectations that have to be kept in harmony, and it is important, in any attempt to protect the minority, that the balance is not tilted too far in favour of the minority so as to be counter-productive. Majority rule is and remains the norm, and legitimate rule of the majority ought not, unless there are valid grounds, be too readily equated with tyranny by the majority. In this context, hence, any uncertainty as to the scope of the oppression remedy or question as to its limits ought to be recognized and clarified. In this regard, this paper contributes to the current state of understanding by advancing the following propositions in respect of s. 216:

(1) The provision is primarily aimed at providing a remedy for any unfairness, assessed contextually, that may be suffered by a shareholder as a result of the conduct of the company's affairs. Circumscribing this broad concept by reference to a *commercial* yardstick, as may have been suggested by a number of judicial statements, would be clearly undesirable and should be avoided.
(2) The concepts of prejudice and unfairness are discrete requirements that have to be separately satisfied. Prejudice needs to be unfair before it can be justiciable, and unfairness requires a context (i.e. prejudice) with which to ground it. The presence of the one without the other should not be enough to invoke s. 216.
(3) The scope for the application of the section is constrained inherently by its purpose, which is to protect shareholders' rights and interests. Thus, although the class of protectable rights and interests may be extended beyond the traditional, any such extension should be allowed only after due consideration of the shareholder's legitimate expectations, as defined and circumscribed by the parties' underlying association.
(4) To reconcile the juxtaposition of ss 216 and 216A, it is important that the personal-derivative divide be maintained. Section 216 was not intended as an alternative route for the vindication of corporate wrongs, and all attempts to use it thus should be checked.