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Can Non-Members Complain About the Affairs of a Subsidiary Company?

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Majority shareholders hold the decision-making power of a company.[1] Consequently, minority shareholders often find themselves at the mercy of the majority shareholders. While the courts have traditionally been slow to interfere with the internal management of a company,[2] an exception to avail the minority shareholders can be found in s 346 of the Companies Act 2016, which provides a statutory protection in the face of oppression by the majority shareholders.

Broadly, there are four established categories of oppression: oppressive conduct, conduct in disregard of interests, unfairly discriminatory conduct or prejudicial conduct.[3] These categories are now commonly known as "*commercial unfairness*".[4] To succeed in a minority oppression action, an aggrieved shareholder would need to show, among others, that the "*affairs of the company*" are being conducted in such a manner as to amount to commercial unfairness affecting his rights as a shareholder.

Who may bring an action?

From the get-go, it is a rudimentary requirement that the petitioner must be a "*member or debenture holder*" of the company to fall within the purview of s 346. By "*member*", it means a shareholder whose name is in the register of members of the company.[5] The significance of such a requirement cannot be overstated, and the courts have held that a petitioner who does not come squarely within the operative provisions ought not to be entertained.[6] This is so as the petitioner's lack of standing and interest in the company will be called into question.

Oppressed by subsidiary

However, when a shareholder in a "holding" company is aggrieved by the conduct of the "subsidiary", can the shareholder bring an oppression action even though he is *not* a shareholder of the subsidiary?

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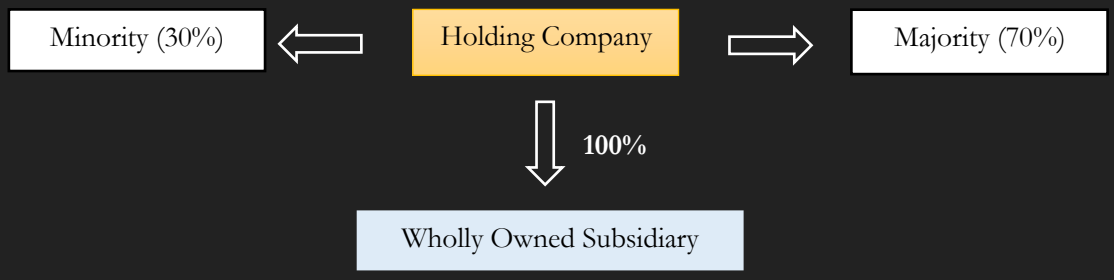
1 *Foss v Harbottle* (1843) 67 ER 189
2 *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 (FC)
3 *Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corporation (M) Bhd & Anor* [2010] 6 CLJ 721 (FC)
4 *Jet-Tech Materials Sdn Bhd & Anor v Yushiro Chemical Industry Co Ltd & Ors and another appeal* [2013] 2 MLJ 297 (FC); *Lim Swee Khiang and another v Borden Co (Pte) Ltd and others* [2006] 4 SLR 745
5 Companies Act 2016, s 2
6 *Soh Jiun Jen v Advance Color Laboratory Sdn Bhd & Ors* [2010] 5 MLJ 342 (CA); *Danny Tan Yew Chon v Skyboard Media Sdn Bhd & Ors* [2019] 9 MLJ 802 (HC)

This is best illustrated by the diagram below.



In *Tob Chee Hoong*,[7] the petitioner, as a minority shareholder in an investment holding company, filed an oppression action against the majority shareholders on the grounds that the holding company and its wholly owned subsidiary were operated and managed in a manner that was oppressive and prejudicial to the petitioner's rights.

The majority shareholders took issue with the fact that the petitioner's complaints consisted of allegedly oppressive conduct in relation to both the holding company as well as the subsidiary, when the petitioner was not a registered member of the subsidiary.

In allowing the petitioner's oppression action, the High Court reasoned that the term "*affairs of the company*" must not be strictly interpreted and may encompass matters which not only affected the holding company but also matters arising from the subsidiary, if those were matters which impacted the holding company. It is apposite to highlight the salient determining factors as emphasised by the High Court:

(a) The subject company is merely an investment holding company, and its entire business constitutes the operations of its wholly owned subsidiary.

(b) The majority shareholders sit as directors in the holding company. Two of them are also the only directors in the wholly owned subsidiary. In this regard, they collectively control the boards of both entities.

(c) Due to its corporate structure, the majority shareholders in the holding company are the controlling minds of the wholly owned subsidiary.

(d) If the affairs of the wholly owned subsidiary are excluded from consideration, the petitioner would be left with no remedy. To adopt such an approach would result in a serious lacuna in law.

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7 *Tob Chee Hoong v Tob Chee Choong & Ors* [2017] MLJU 1303 (HC). We understand there was an appeal against the High Court decision, but the appeal was dismissed by the Court of Appeal.

(e) In all the circumstances, the affairs of the wholly owned subsidiary have become that of the holding company.

Across the causeway, in *Ng Kek Wee*,[8] the Singapore Court of Appeal aptly remarked that a practical rather than narrow and legalistic approach in the reading of the words "*affairs of a company*" is to be preferred:

> "42 … Legitimate claims for relief from oppression should not be defeated by technical and legalistic objections relating to the company's shareholding structure; at the same time the doctrine of separate legal personalities and the strict words of the statute ("the affairs of the company" [emphasis added]) must be respected. In our view, the balance between these competing interests would be properly drawn by a requirement that commercially unfair conduct in the management of a subsidiary would be relevant so long and to the extent that such conduct affected or impacted the holding company whose member was the party claiming relief from oppression. The purpose and policy behind s 216 of the Companies Act is, above all, to grant relief from the oppressive behaviour to shareholders who would otherwise be unable to stop that abuse: see below at [49]."

Authors' comments

The liberal approach adopted above is welcomed with much emphasis placed on the commercial realities of group companies[9] and the composition of the board.[10]

In conclusion, although it is often facts-centric, the courts may take into consideration the affairs of the subsidiary in an oppression action concerning the holding company if the petitioner can show that the affairs of the subsidiary affected or impacted the holding company or vice versa.

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8 *Ng Kek Wee v Sim City Technology Ltd* [2014] SGCA 47
9 *Re Dernacourt Investments Pty Ltd* [1990] 2 ACSR 553
10 *Re Citybranch Group Ltd Gross and others v Rackind and others* [2004] EWCA Civ 815