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Removal of Directors & Non-Payment Of Dividends – Oppression under Section 346 Companies Act 2016?

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Companies operate under the principle of ‘majority rule’, where decisions made by the majority shareholders prevail to reflect corporate democracy.¹ However, section 346 of the Companies Act 2016 (CA 2016) introduces an exception to this principle. It enables courts to grant a wide range of reliefs to aggrieved shareholders in cases involving oppression, unfair discrimination, prejudice, or disregard of shareholders’ rights and interests.

The liability for oppression under section 346 depends on the specific circumstances of each case. This alert explores the applicability of section 346 in relation to two scenarios:-

- (a) the removal of directors; and
- (b) the non-distribution of dividends to shareholders.

¹ *Re Kong Thai Sawmill (Miri) Sdn Bhd v Ling Beng Sung* [1978] 2 MLJ 227

Removal of Directors

When it comes to the removal of directors, shareholders often assert their right or legitimate expectation to either remain as directors or have their nominees appointed. Removal of directors in violation of such rights can lead to claims of oppression under s. 346.

The general principle is that companies are governed strictly by their constitution,² which typically allows for the removal of a director in a private company through an ordinary resolution by shareholders.³ Courts have in several cases held that where a director is removed in accordance with the company's constitution, there is no oppression within the meaning of s. 346.⁴

However, exceptions arise in the case of a 'quasi-partnership',⁵ where courts look beyond the constitution to determine if the removal of a director breaches any fundamental understanding or agreement between shareholders upon which their association is based. If breach is established, the removal of directors can be considered oppressive under s. 346.⁶

Quasi-partnerships usually involve companies which satisfy one or more of the following conditions:-

- (a) it is formed on personal relationships of mutual trust and confidence;
- (b) there is an agreement or understanding that some or all of its shareholders will participate in the business's conduct; and
- (c) there are restrictions on share transfers.⁷

² Also known as Memorandum of Association & Articles of Association. See *Beh Chuan Chuan v Paloh Medical Centre Sdn Bhd* [1999] 3 MLJ 262; *Jet-Tech Materials Sdn Bhd & Anor v Yushiro Chemical Industry Co Ltd & Ors* [2013] 2 MLJ 297; *Tuan Hj Ishak bin Ismail & Ors v Leong Hup Holding Bhd* [1996] 1 MLJ 661

³ See section 31 and 206 of CA 2016. See also Article 67 of Table A, Fourth Schedule of Companies Act 1965

⁴ *Ting Teck Sie v Wong Sen Chiew* [2001] MLJU 639

⁵ See cases noted in footnote (2) above and *Eng Man Hin @ Ng Mun Heng & Anor v King's Confectionery Sdn Bhd & Ors* [2006] 4 MLJ 421; *Dato' Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Ors* [2007] 7 MLJ 727

⁶ *ISM Sdn Bhd Queensway Nominees (Asing) Sdn Bhd* [2021] 7 MLJ 506

⁷ *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360

Family-based companies and those formed from pre-existing partnerships are typical examples of quasi-partnerships. Nonetheless, each case should be decided based on its specific facts. For instance, express provisions in shareholders' agreements may negate the classification as a quasi-partnership. Also, the fact that the company is a joint venture does not necessarily mean that it is a quasi-partnership.

Non-Payment of Dividends

Distribution of dividends is a matter within the management's decision and discretion.⁸ Under the CA 2016, a company is not obligated to declare dividends solely based on recording profits in a specific financial year.

There is no oppression within s.346, if a company has justifications for the non-distribution of dividends. For instance, in the case of **Lee Ah Kong (HC)**, the non-declaration of dividends was justified due to the company's indebtedness to directors and financiers. Similarly in the case of **Zarimah (HC)**,⁹ dividends were not declared as prior consent was required from financiers under an overdraft facility agreement. The court ruled that oppression was not established in these cases as there were no evidence of ulterior motives behind the company's retention of profits.

Non-distribution of dividends can be considered oppressive if it specifically targets certain shareholders. For example, in **Re Gee Hoe Chan Trading Co Ltd (HC)**,¹⁰ the Court found that the non-distribution of dividends was a means to punish the minority shareholders – these shareholders had received minimal returns from their shareholding over the course of 6 years, while the majority shareholder (who were also directors) received substantial directors' fees, salaries and bonuses.

⁸ *Lee Ah Kong @ Lee Muk Sang v Wings Logistics Sdn Bhd & Anor* [2015] 7 MLJ 408

⁹ *Zarimah binti Abdul Rahim & Anor v Zarifah binti Abdul Rahim* [2020] MLJU 816

¹⁰ *Re Gee Hoe Chan Trading Co Ltd* [1991] 3 MLJ 137

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Conclusion

In conclusion, the removal of directors and non-distribution of dividends have the potential to give rise to actionable oppression under s. 346 CA 2016. It is crucial to manage these matters effectively to avoid unnecessary liability. Companies and individuals facing issues in this area of law are therefore advised to seek legal advice promptly.

If you have any queries please contact partner, [Chan Mun Yew](#) (myc@lh-ag.com) who has extensive experience in dealing with corporate and shareholders' disputes.