Ng Kek Wee *v* Sim City Technology Ltd
[2014] SGCA 47

Case Number	: Civil Appeal No 156 of 2013
Decision Date	: 09 September 2014
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Mr Lim Chee San (TanLim Partnership) for the Appellant; and David Chan and Tan Su Hui (Shook Lin & Bok LLP) for the Respondent.
Parties	: Ng Kek Wee — Sim City Technology Ltd

Companies – Oppression

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2013] SGHC 216.]

9 September 2014 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

1 Sim City Technology Ltd ("the Respondent"), a shareholder of Singalab International Pte Ltd ("Singalab International"), commenced Suit No 680 of 2009 ("the Suit") against one Mr Ng Kek Wee ("the Appellant"), who was both a shareholder and the managing director of Singalab International. The Respondent sought personal remedies under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") on the grounds that the Appellant had conducted the affairs of Singalab International and its subsidiaries in a manner that was commercially unfair to it.

2 In *Sim City Technology Ltd v Ng Kek Wee and others* [2013] SGHC 216 ("the Judgment"), the High Court Judge ("the Judge") allowed the Respondent's claim and among other things ordered that the Appellant buy out the Respondent's shares in the Company. The Appellant appeals against the Judge's decision on the grounds that the Respondent had not properly pleaded its claim under s 216 of the Companies Act, and that the Judge had erred in finding that there was commercial unfairness on the facts of the case.

3 For the reasons that follow, we allow the appeal and set aside the orders made by the Judge.

4 The Appellant also argued that the wrongs alleged by the Respondent were not wrongs suffered by the Respondent in its *personal* capacity as a member of Singalab International, and that the Respondent ought not to be entitled to use s 216 of the Companies Act to circumvent the proper plaintiff rule and the reflective loss principle. As will be apparent, we do not think that the determination of this point is necessary to the disposal of the appeal but as the jurisprudence in this area of law is somewhat involved we take the opportunity to clarify the issue.

Background to the dispute

5 The full background to the dispute is set out in the Judgment. Only the facts pertinent to the present appeal will be repeated here.

The joint venture and formation of Singalab International

6 In 2003, the Appellant was the managing director and one of several shareholders of a company known as Beans Fusion Pte Ltd ("Beans Fusion"). Beans Fusion was in the business of providing software and consultancy services in Asia and had four subsidiaries: [note: 1]

(a) Singalab Pte Ltd ("SPL");

(b) Beans Factory Hong Kong Co Limited ("Beans HK");

(c) Beans Factory Pte Ltd ("Beans Factory"), which owned the licensing rights to "Beans Kernl", a programming tool ("the Licensing Rights"); and

(d) Beans Factory Co Ltd (Beijing) ("Beans China").

7 The Appellant had plans for the expansion of the business and to that end, in 2003, he asked Mr Lim Kok Eng ("Mr Lim KE"), the Managing Director of the Respondent, if he was interested in co-investing in the Beans Fusion business. [note: 2] Mr Lim KE said he was keen. Accordingly, their joint venture was structured in this way. First, in early 2004, the Appellant conducted a management buyout of Beans Fusion and thereby became its sole shareholder. Next, on 31 August 2004, Singalab International was incorporated as the parties' joint venture vehicle, along with two other investors as minority shareholders. [note: 3] The shareholding of Singalab International was as follows:

	Shareholder	**Shareholding (%)**
1	Respondent	53.625
2	Appellant	15
3	Accord Perfect Investment Corporation ("Accord Investment")	6.375
4	Atomic International Ltd ("Atomic International")	25

According to the Respondent, Atomic International was actually the nominee of the Appellant. This was disputed by the Appellant.

8 The Respondent averred that there was an understanding between these shareholders encapsulated in a Joint Venture Arrangement ("the JVA"), which was for Singalab International to purchase Beans Fusion's subsidiaries, and with the aid of new investment to expand their businesses with the ultimate goal of selling off or listing the company. It was also agreed that the shareholders would have a personal interest in the shares of each of Singalab International's subsidiary companies in the proportion set out at [7] above. [note: 4] Pursuant to the JVA, an executive committee ("the Exco") was formed in or around October 2004 consisting of the Appellant, two of the Respondent's representatives namely Mr Lim KE and one Mr Ng Han Kim ("Mr Ng HK"), as well as a representative of Accord Investment, Mr Huang Jun Dar ("Mr Huang"). [note: 5]

9 On 31 December 2004 and 13 May 2005, Beans Fusion sold all its shares in Beans HK and SPL to Singalab International for a total consideration of S$630,000. [note: 6] Beans HK and SPL thus became wholly owned subsidiaries of Singalab International. Subsequently, Beans Factory assigned the Licensing Rights to SPL. [note: 7]

The management of Singalab International and its subsidiaries

10 The Appellant was appointed Group Chief Executive Officer, Chief Technical Officer and Managing Director of Singalab International and was put in charge of running its various businesses. Mr Ng HK was also appointed as a director of Singalab International from 1 September 2004 to 30 June 2005. [note: 8]

11 The Appellant was the Chairman of Beans HK from 2004 until its sale on 14 April 2008.

12 The Appellant was appointed Managing Director of SPL on 1 November 2002 and remained so even after Singalab International had acquired the shares of SPL. Mr Ng HK and Mr Huang were initially also directors of SPL but resigned in May and June 2005. In or around 28th October 2005, one Mr Chan Mun Kong ("Mr Chan") was appointed as a director of SPL.

Incorporation of Beans Malaysia and other related companies

13 In June 2006, one Mr Lim Beng Cheang ("Mr Lim BC") was instructed by the Respondent to assist the Appellant to expand Singalab International's business to Malaysia.

14 According to the Respondent, Beans Factory Solutions Sdn Bhd ("Beans Malaysia") was incorporated as a subsidiary of Singalab International. [note: 9] Formally, however, Mr Lim BC held one of the two subscriber shares in Beans Malaysia and the Appellant held the other share; both of them were also the signatories of the bank account of Beans Malaysia. Mr Lim BC and his sister, together with the Appellant, were appointed as directors of Beans Malaysia. According to Mr Lim BC, the Appellant made all the executive decisions for Beans Malaysia.

15 The Respondent also alleged that, pursuant to the JVA, the Appellant had incorporated other entities in China and Taiwan (henceforth known as "Beans China" and "Beans Taiwan"). The Respondent claimed that although the Appellant was formally the sole shareholder and managing director of these companies, he was holding his shares in the two companies on trust for Singalab International and that those companies were *in fact* its subsidiaries (see above at [8]). [note: 10]

Events leading to the commencement of the Suit

16 In February 2009, the Respondent discovered that Beans Malaysia could not pay its staff their salaries. It further discovered that from August 2006 to February 2009 the Appellant had authorised the withdrawal of over RM1.4m in cash from Beans Malaysia, purportedly in order to pay invoices issued by SPL in respect of labour and skills supplied by SPL for Beans Malaysia's projects in Malaysia ("the Malaysian Cash Withdrawals"). [note: 11] However, SPL's invoices were not reflected in SPL's accounts, [note: 12] and the Malaysian Cash Withdrawals were also unaccounted for in the management accounts of SPL. [note: 13]

17 The Respondent made frequent and repeated offers to assist the Appellant in drawing up and auditing SPL's accounts. Finally, on 18 May 2009, the Appellant agreed to meet representatives of the Respondent. [note: 14] At this meeting, the representatives of the Respondent learnt that the Appellant was holding all the issued share capital of SPL following a transfer of SPL's shares from Singalab International to the Appellant on 28 July 2006 ("the SPL Transfer"). [note: 15] After this meeting, the Respondent made further inquiries and discovered that the Appellant had, on or about 14

April 2008, caused Singalab International's interest in Beans HK to be transferred to one Fong Ho Wan ("the Beans HK Transfer"), which interest was subsequently on-sold by Fong Ho Wan to a third party. [note: 16]

18 According to the Appellant, both the SPL Transfer and the Beans HK Transfer (collectively "the Transfers") had been authorised at a meeting of the shareholders of Singalab International on 12 June 2006 ("the 12 June 2006 Meeting"). [note: 17] The Appellant alleged that Singalab International's entire holding of SPL shares had been transferred to him as security pursuant to a shareholders' agreement that he would obtain bank loans in the name of SPL and put up a personal guarantee for those loans. [note: 18] The Appellant also alleged that the Beans HK Transfer had taken place as Beans HK had been running at a loss. [note: 19] The Respondent and Accord Investment disputed the Appellant's version of events. They claimed that the 12 June 2006 Meeting never took place and that they never agreed to the Transfers.

19 On 20 May 2009, the Appellant sent a letter of apology to the Respondent's representatives. He made certain admissions of fault and offered to purchase the Respondent's shares in Singalab International for US$420,000. [note: 20] The Respondent did not agree to the offer. Instead, it sought to review Singalab International's and SPL's corporate documents and accounts so as to obtain a better understanding of the state of the companies. [note: 21] On 29 May 2009, the Appellant sent the Respondent copies of some, but not all, of those documents sought. From these documents, the Respondent discovered even more irregularities pertaining to SPL:

(a) The Appellant had authorised the withdrawal of substantial funds from SPL's account with DBS Bank, but these withdrawals ("the SPL Withdrawals") were never reflected in SPL's company accounts; neither were there any documents to show what had happened to those funds and why they were taken out of the company. [note: 22]

(b) The Appellant had also authorised substantial payments from SPL to himself and to third parties which were likewise unaccounted for ("the SPL Payments"). [note: 23]

20 The Respondent tried to negotiate a suitable buy-out of its interest in Singalab International and when these attempts failed, it commenced the Suit on 4 August 2009. [note: 24] In addition to the Appellant, Mr Chan was also joined as a defendant. Singalab International, its other shareholders (*ie*, Accord Investments and Atomic International) and SPL were joined but only as nominal defendants to the Suit.

Events after the commencement of the Suit

21 Two events occurred after the commencement of the Suit that are in our view material. The first goes to the issue of whether the Respondent was truly powerless to help itself and therefore entitled to claim relief under s 216. An Extraordinary General Meeting ("EGM") of Singalab International was held on 28 August 2009 and two of the Respondent's representatives were appointed to its board of directors. [note: 25] The Respondent also filed a complaint against the Appellant with the Commercial Affairs Department. We discuss this in more detail later in this judgment at [55].

22 The second event was the incorporation of Beans Group Pte Ltd ("Beans Group") on 26 August 2009. Its sole director and shareholder was the Appellant's 71 year old mother, Mdm Swa Soo Eng. [note: 26] Beans Group also incorporated two related companies in Malaysia and Taiwan. The

Respondent alleged that the Appellant was a shadow director of Beans Group and had wrongfully diverted the assets, business and talent of SPL to Beans Group in breach of his fiduciary duties to SPL. These assets included the Licensing Rights. In other words, Beans Group was the vehicle used by the Appellant to hold his allegedly ill-gotten gains.

23 The business of Beans Group was subsequently sold to HiSoft Singapore Pte Ltd ("HiSoft") for an estimated total purchase price of S$5,460,046.00 pursuant to a Sale and Purchase Agreement dated 17 January 2011 ("the HiSoft SPA"). [note: 27] A Deed of Assignment [note: 28] was executed on the same day, wherein Beans Group assigned to the Appellant all its "rights, entitlement, title and interest whatsoever" that it had under the HiSoft SPA.

24 On 13 February 2012, pursuant to a winding up application brought by a creditor, Beans Group was ordered to be wound up with the Official Receiver being appointed as its Liquidator. However, as at 9 January 2013, no Statement of Affairs had yet been filed for the company.

The decision below

25 We will only summarise that part of the Judgment which concerns the present appeal. The Judge made the following findings of fact. First, the Judge accepted the Respondent's case that the Transfers had been made without the necessary approvals required under s 160 of the Companies Act. In this regard, the Judge found that the 12 June 2006 Meeting did not take place and that there was no evidence that the Respondent or Accord Investment knew of, let alone authorised, the Transfers. Second, the Judge found that the Appellant had misappropriated the funds of and mismanaged the accounts of SPL, and he was accordingly in breach of his duty to SPL at common law as well as his duty under s 157(1) of the Companies Act to act honestly in the interests of SPL. Finally, the Judge found that the Appellant was the controlling mind behind Beans Group and that the Appellant had diverted assets, business and talents of SPL to Beans Group in breach of his duties to SPL.

26 The Judge also found that the Respondent had made its case that it was the victim of commercial unfairness and was therefore entitled to a remedy under s 216 of the Companies Act. Such commercial unfairness would have been made out *solely* on the basis that the Transfers were wrongful. However, the Judge also found that as a matter of law she was entitled to take into account the Appellant's misconduct of the affairs of SPL in the assessment of whether the Appellant's conduct of the affairs of Singalab International was such as to amount to commercial unfairness. On this alternative basis, the Judge found that the Respondent was also entitled to a remedy under s 216.

27 On the issue of the remedies that would be available, the Judge considered that under s 216(2) of the Companies Act she had ample discretion to tailor the relief to the facts before her and that she was not bound by the relief pleaded for by the Respondent. Accordingly, she made the following orders:

(a) The Deed of Assignment was to be set aside and the Appellant was to hold all the monies and shares due from Hisoft to Beans Group under the HiSoft SPA on trust for Beans Group and the latter should in turn hold the same on trust for SPL.

(b) The Appellant should, within 30 days of the Judgment, compensate SPL for the losses it suffered and was to make good to SPL the following sums which the Judge found had been improperly withdrawn:

(i) RM1,433,383.80, being the Malaysian Cash Withdrawals;

(ii) S$4,476,646.00, being the SPL Withdrawals;

(iii) S$495, 836.40, being the SPL Payments; and

(iv) the adjusted profits of S$94,599 made by SPL for the period between 1 April 2007 and 31 March 2008.

(c) The transfer of Singalab International's interest in SPL was to be set aside.

(d) Once the Appellant had complied with these orders, he was further required to purchase the Respondent's shares in Singalab International within 30 days ("the Buyout Order"). The price and other terms of the buyout was to be determined taking into account the fact that the Appellant would, by this stage, have complied with the other orders above.

(e) In the event that the Appellant did not comply with the Buyout Order within the 30-day period, the Respondent was entitled to apply for the winding up for Singalab International, with the costs of the winding-up borne by the Appellant.

(f) Costs of the Suit were awarded to the Respondent to be agreed or taxed on a standard basis with disbursements to be paid on an indemnity basis.

The issues before this Court

28 The Appellant does not challenge the Judge's findings that the Transfers were wrongful, that he had mismanaged the accounts and misappropriated the funds of SPL, and that he had set up Beans Group in breach of his fiduciary duties to SPL. Instead his main contentions are as follows:

(a) The Respondent's claim was improperly pleaded because it had not expressly pleaded that it was bringing a claim for relief under s 216 of the Companies Act;

(b) The Judge had erred in finding that commercial unfairness had been made out on the facts;

(c) The Respondent's claim could not properly be characterised as being for a personal wrong; and

(d) The Judge had erred in purporting to exercise her discretion to grant unpleaded relief under s 216(2) of the Companies Act.

Our decision

Was the oppression claim satisfactorily pleaded?

29 The Appellant contends that since the Respondent did not expressly plead that its claim was for relief under s 216 of the Companies Act, it was therefore not open to the court to grant relief under that provision.

30 We disagree. We are not aware of any authority whatsoever for that proposition. Neither the Companies Act nor the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the ROC") states that relief

under s 216 may be granted only if that section is specifically invoked in the pleadings. Order 88 r 2(4) of the ROC states that an application under s 216 of the Companies Act "shall be made by writ". That is the only procedural requirement and it was undoubtedly fulfilled in this case. The Appellant also could not cite a single case as authority for the proposition it advanced.

31 In any case, as a matter of principle, we cannot see why there ought to be such a requirement. The general position with regard to pleadings is that stated in O 18 r 7(1) of the ROC, which is that "every pleading must contain, and contain only, a statement in a summary form of *the material facts on which the party pleading relies for his claim* or defence" (emphasis added). The objective behind this general rule is to ensure that neither party is taken by surprise in relation to the case that he must meet at trial. We are satisfied that in the present case, there could have been no question of any surprise because, in our judgment, the Respondent had adequately pleaded the material facts which it was relying on for its claim. In its statement of claim (Amendment no 2) ("SOC Amendment no 2"), the Respondent stated as follows:

> 39. The [Respondent] further avers that the foregoing demonstrates that the affairs of the Singalab/Beans Group are being conducted in a manner oppressive to the [Respondent] and/or in disregard of the [Respondent's] interest.
>
> 40. The [Respondent] further avers that [the] conduct of the [Appellant] was clearly designed to unfairly discriminate the [Respondent] as a member of [Singalab International].

The above clearly sufficed to put the Appellant on notice that the Respondent's claim was one for relief under s 216 of the Companies Act.

32 We also find that the Respondent had, in any event, validly amended its SOC to make express reference to ss 216(*a*) and (*b*) of the Companies Act in the paragraphs quoted above, [note: 29] so that even if the pleadings were originally defective, such defects were cured by the amendments. The Respondent applied for and was granted leave to amend its pleadings in this regard [note: 30] following the observation made in the course of the trial by the Judge that s 216 of the Companies Act had not been expressly pleaded anywhere in the Respondent's SOC Amendment no 2. [note: 31] We do not take the Judge's observation as laying down any principle of law that s 216 must be expressly pleaded in every claim mounted for relief from oppression. In any case, Mr Lim Chee San ("Mr Lim"), counsel for the Appellant here and below, did not raise any objections to the amendment and did not file an appeal against the Judge's decision to allow the amendment. It is trite that a court has a wide power to allow amendments to pleadings at any stage of the proceedings which would enable the real issues between the parties to be ventilated, unless the amendment would cause injustice or injury to the opposing party: *Wright Norman and another v Overseas-Chinese Banking Corp Ltd* [1993] 3 SLR(R) 640 at [6]. We do not see how that power was in any way improperly exercised by the Judge in allowing the amendments; neither can we see how that would cause the Appellant any injustice or injury. Accordingly, we hold that the Respondent's claim for relief under s 216 of the Companies Act was adequately pleaded.

Did the Judge err in finding that commercial unfairness had been made out?

33 Section 216(1) reads as follows:

> **Personal remedies in cases of oppression or injustice**
>
> **216**.—(1) Any member or holder of a debenture of a company or, in the case of a declared

company under Part IX, the Minister 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 or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(*b*) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures 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 or holders of debentures (including himself).

34 On the words of the subsection there are a number of limbs under which a claim for relief may be brought, but the common thread between all of them is the element of commercial unfairness which would justify the invocation of the court's jurisdiction under s 216: *Over & Over Ltd v Bonvests Holdings Ltd and another* [2009] 2 SLR(R) 111 at [68].

35 On the question of whether there was commercial unfairness in the present case such as to justify an order under s 216, two issues were raised for our decision. The first is the Appellant's argument that because the Respondent's claim was brought *qua* its position as a member of Singalab International, the Judge was not entitled, under s 216, to have any reference whatsoever to any prejudicial manner in which the activities of Singalab International's *subsidiaries* were conducted, in particular, SPL. The words "affairs of the company" in s 216(1)(*a*) ought to be read strictly to refer only to the affairs of that company whose member or members were seeking relief under s 216, and not to the affairs of that company's subsidiaries.

36 The second issue is whether the Respondent is disentitled from relief under s 216 because it is the majority shareholder of Singalab International.

37 We consider each in turn.

The Appellant's conduct in relation to the affairs of the subsidiaries

38 The Appellant contends that the Judge should not have taken into account matters which pertained to the conduct of the affairs of SPL and that by doing so, the Judge had deprived the Appellant of his right to raise a defence or bring a counterclaim against SPL. We note here that the Judge had held that *solely* on the basis of the wrongful Transfers there was commercial unfairness in the conduct of the affairs of Singalab International that was prejudicial to the Respondent. If the Judge were correct in holding this, it would not have made a difference to the outcome if the Judge had taken into account matters that pertained to the conduct of the affairs of SPL.

39 In our judgment, the Appellant's contentions are off the mark. In the context of groups of companies, our courts take a practical rather than narrow and legalistic approach in construing the words "affairs of a company" in s 216. In *Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] 2 SLR(R) 304 ("*Kumagai*"), the appellant had sought relief under s 216 of the Companies Act in respect of a joint venture company ("KZ"), of which the appellant was a 49% shareholder and the respondent was a 51% shareholder. KZ had a subsidiary company ("KPM"). This court rejected the argument that the appellant had to show that the oppressive conduct or unfair discriminatory acts complained of were in respect of the affairs of KZ and not KPM and stated at [44] that:

> … It seems to us that counsel has adopted a much too legalistic approach relying on the separate legal personalities of KZ and KPM. KPM is a subsidiary of KZ and the affairs of KPM were very much under the control of KZ and both were managed and run by Low and his group.

40 A similar approach was taken in the case of *Low Peng Boon v Low Janie and others and other appeals* [1999] 1 SLR(R) 337 ("*Low Peng Boon*"). In that case, the respondent was the minority shareholder of a company which was the holding company of profitable subsidiaries in Malaysia and Hong Kong. She sought relief under s 216 of the Companies Act, alleging amongst other things that the managing director of the holding company had used the funds of the Hong Kong subsidiary to pay for his personal travel expenses and had deliberately hoarded the profits of the Hong Kong subsidiary (by refusing to declare dividends) so as to maximise his own bonus. This court took into account the commercially unfair acts that took place in respect of the affairs of the subsidiary as well.

41 Finally in *Lim Chee Twang v Chan Shuk Kuen Helina and others* [2010] 2 SLR 209 ("*Lim Chee Twang*"), Quentin Loh JC (as he was then) observed that the doctrine of separate legal personalities could not to be invoked as a shield for clearly oppressive and commercially unfair conduct in a group of companies, where this could lead to a serious gap in the remedies available to an aggrieved minority shareholder (at [98]). However, in the final analysis, the plaintiff had to be able to show, on the facts, that the affairs of the subsidiary "actually affected or impacted the holding company" (at [97]).

42 We think that the approach adopted in the above cited cases is sound and we also agree that, in the final analysis, the question that must be answered in this regard is whether the affairs of the subsidiary affect or impact the holding company: *Lim Chee Twang* at [97]. 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]. If the affairs of the subsidiary do not affect or impact the holding company, shareholders and members of the latter could hardly complain that their interests were therefore prejudiced.

43 Turning to the present case, Singalab International had clearly been incorporated as a holding company and its *sole* assets were shares in its wholly owned subsidiary companies. The business of the holding company was therefore, in practical terms, comprised wholly of the businesses of its subsidiaries. Thus the way in which the Appellant conducted the business of the subsidiary SPL would undoubtedly have impacted Singalab International. The evidence showed that the parties did not intend or in fact treat Singalab International and its subsidiaries as separate corporate entities. This is evinced by the understanding between the various shareholders that the shareholding structure in Singalab International was also to be applied to its subsidiaries and the fact that the Appellant managed both Singalab International and its subsidiaries (under the supervision of the Exco) (see above at [7]–[8]). Thus, we find that the Judge did not err in taking into account the Appellant's conduct of the affairs of SPL, an operational arm of Singalab International.

44 The Appellant says that as a consequence of the Judge's error in taking into account the prejudicial manner in which SPL's affairs were conducted, the Appellant had been deprived of his right to raise a defence or bring a counterclaim against SPL. As we have said above, the first part of this

proposition is erroneous; it follows that the Appellant's entire argument on this point must fail. But the second part to the proposition is, in our judgment, wholly without merit as well. The Appellant had been given ample opportunity to defend himself against the allegations that he had acted in breach of his fiduciary duties to SPL and did in fact avail himself of such opportunities. As we pointed out to Mr Lim during the hearing, there was nothing to preclude the Appellant from pleading that in the event he should be found to have acted oppressively or in an unfairly prejudicial manner, there were amounts owing to him by SPL that ought to be set off against any order made against him in favour of SPL. The Appellant was clearly in the best position and had ample opportunity to put forward these claims, yet he did not do so. A reasonable inference would be that there was no such debt owing by SPL to the Appellant. In any event, we reiterate our observation made during the hearing that if SPL were in fact a debtor of the Appellant, the orders made in this proceeding would not preclude the Appellant from bringing a fresh action against SPL for the sums owing to him. Plainly, the Appellant has not been prejudiced in pursuing his alleged legal rights against SPL.

45 The inescapable corollary to our finding at [43] above that the assets of Singalab International were comprised wholly of the businesses of its subsidiaries is that the effect of the Transfers was to denude Singalab International of all its value and to reduce it into an empty shell company. The Appellant thereby enriched himself at the expense of the company.

Control of Singalab International

46 The second issue is whether the fact that the Respondent is the majority shareholder in Singalab International would preclude it from claiming relief under s 216 of the Companies Act. The Judge found that it would not.

47 As a preliminary point, we note that the Appellant does not appear to challenge this finding, but as this is a question of law, we do not think we are constrained from considering this issue. The Court of Appeal has broad powers to determine the real issues in the dispute that is placed before it: see generally s 37 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). We would add that this issue of control is not a new argument — the point was pleaded in the Appellant's defence [note: 32] and the parties' arguments on this issue were fully canvassed with the relevant evidence led at the trial below. As the point was not raised in the Appellant's case, the Respondent did not prepare written submissions addressing it, but in the course of the hearing before us, we gave counsel for the Respondent Mr Chan an opportunity to present oral submissions.

48 In our judgment, the touchstone is not whether the claimant is a minority shareholder of the company in question, but whether he lacks the power to stop the allegedly oppressive acts. Section 216(1) of the Companies Act states only that "any member…of a company" may bring an action for relief under that provision; there is no further requirement that only members who are minority shareholders are so entitled. Having regard to the purpose underlying s 216, we think the correct position is that where a member is able to remedy any prejudice or discrimination he has suffered through the ordinary powers he possesses by virtue of his position, the conduct of the defendant cannot be said to be unfair to him: see also the dicta of Knox J in *Re Baltic Real Estate Ltd (No. 2)* [1993] BCLC 503 at 507. Section 216 of the Companies Act is, save for a few minor amendments, based on s 210 of the UK Companies Act 1948 (c 38) (UK) ("the UK Companies Act 1948") and s 186 of the Australian Companies Act 1961 (which was also essentially identical to the English provision): see clause 181 of the Companies Bill 1966, which became our Companies Act (Act 42 of 1967). Section 210 of the UK Companies Act 1948 came about following a recommendation made by the Cohen Committee of 1945 that the position of *minority shareholders* of a private company in resisting oppression by the majority shareholders or the controllers of a company should be strengthened: *Report of the Committee on Company Law Amendment* (Cmnd 6059, 1945) at para 60. The effective

protection of minorities was again emphasised in the report of the Jenkins Committee some years later in respect of possible amendments to the section: *Report of the Company Law Committee* (Cmnd 1749, 1962) ("the Jenkins Report") at para 200. In *Re Legal Costs Negotiators Ltd* [1999] BCC 547 ("*Re Legal Costs*"), Gibson LJ examined these English oppression provisions, which, as we have shown above, are directly relevant to our s 216, and concluded that:

> …there is academic and judicial consensus as to the meaning of the section and as to the mischief which it was intended to cure, viz. the abuse of power *to the prejudice of shareholders who lack the power to stop that abuse*. [emphasis added]

49 We think this is correct in principle. It would be contrary to the purpose and intent of s 216 of the Companies Act to permit a shareholder to seek relief where he possesses the power to exercise self-help by taking control of the company and bringing to an end the prejudicial state of affairs: see *Re Legal Costs* at 552. As was observed by Margaret Chew in *Minority Shareholders' Rights and Remedies* (Lexis Nexis, 2nd Ed, 2007) ("*Chew*") at pp 219–220:

> The pertinent issue is to ascertain whether an applicant alleging oppression under section 216 of the Companies Act has control over the affairs of the company, for there is good sense in saying that an applicant ought to lack such control. *Evidently, an applicant that is in control of the affairs of the company cannot convincingly allege to have been oppressed…* [emphasis added]

While the learned author used the narrower term "oppression", in our judgment, the principle stated in the emphasised portion of the passage above is one that is of general applicability whenever commercial unfairness is alleged in a claim for relief under s 216 (see above at [34]; see also *Ng Sing King and others v PSA International Pte Ltd and others* [2005] 2 SLR(R) 56 at [93] and *Lim Swee Khiang and another v Borden Co (Pte) Ltd and others* [2006] 4 SLR(R) 745 at [80]–[82]).

50 It is always a question of fact whether in a particular case a shareholder claiming relief ought to be considered to lack control over the affairs of the company. In ordinary cases where the shares carry equal voting rights, a majority shareholder will generally have the power to end the unfairly prejudicial conduct of the company's affairs: see *Re Legal Costs* at 553. However, this might not be the case where, for example, there is a separate shareholder agreement amongst the shareholders which confers managerial powers solely on the minority shareholder. Thus in *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789 the Malaysian High Court held that a claim for relief from oppression was (at p 808):

> … available to majority shareholders who are not in control of the management of the company and who, for any given reason, are unable to control the board, *eg* because they have agreed to a management power sharing formula in a separate agreement among the shareholders.

51 The position may differ where the company has issued shares of different classes, some of which may carry voting rights and some of which may not. For instance, in the case of *In re HR Harmer Ltd* [1959] 1 WLR 62 ("*Harmer*"), the father and patriarch of the company, along with his wife, controlled a preponderance of the class "B" shares, which carried all the voting power, but only a minority of the class "A" shares, which carried the right to divisible profits but no voting power. Jenkins LJ held that the sons, who had the majority of the class "A" shares, were not thereby barred from claiming relief from their father's oppressive behaviour. His Lordship also rejected the father's contention that the acts complained of might have been restrained by an injunction, in so far as they were acts done without the authority of the board. Having found that the father was in control of the company and that his conduct amounted to oppression of the other shareholders, Jenkins LJ considered that it did not lie in the mouth of the controlling party *ie*, the father, to argue that other

causes of action were also available to the oppressed parties.

52 The Judge cited *Chew* at p 219–220 (see [99] of the Judgment), which passage relied on *Harmer*, as authority for the proposition that:

> … majority shareholders cannot be considered to have effective management control by the mere fact of being in the majority. In particular, where wrongdoing by directors is concerned, it ought not to be a defence by the wrongdoing directors that their wrongdoing could have been restrained by injunction or addressed by an action for breach of duty by the company, because by virtue of being the majority shareholders, the majority could have moved the company to take action against the directors. Such an argument by counsel for the wrongdoer in *Re H R Harmer Ltd* was not well received by Jenkins LJ who said:
>
> > [C]ounsel for the father said that the acts complained of might have been restrained by injunction so far as they were acts done without the authority of the board. As to this, I do not think that a wrongdoer in this field can well complain that the person wronged might have chosen another remedy.

53 Applying this principle, the Judge found that the fact that the Respondent had majority control of Singalab International could not be held against it in a claim for relief under s 216.

54 We disagree. In our judgment, this passage in *Chew* and the construction placed on it by the Judge are incorrect and clearly run counter to the intent and purpose of s 216 of the Companies Act. On the authority of *Harmer*, it will not lie in the mouth of a defendant who is in control of the company *and* who has been found guilty of oppressive conduct to say that the claimant ought to have taken other remedies that might have been available to him. But if, on the facts, the claimant was entitled, for instance, to change the board of directors or otherwise to take control of the company, then such a claimant would *not* be entitled to relief under s 216. In such a case, the defendant *may* legitimately claim that the claimant ought to have exercised his right to take control of the company instead of coming to court for relief under s 216.

55 That, in our view, is the crux of the present case, and in our judgment, the fact that the Respondent has the majority voting power and was able to use it to take control of the company disentitles it from claiming relief under s 216. The Judge was correct in observing that as managing director of Singalab International, the Appellant had effective day-to-day control over the company. This, however, should not have been the end of the analysis. As the Judge noted, the Respondent, being the majority shareholder of Singalab International, could have voted its representatives onto its board of directors and *did in fact do so after the commencement of the Suit* (see above at [21]). Once it had effective control of the Board and the affairs of Singalab International in its hands, it could have removed the Appellant from the Board, or caused the company to claim against the Appellant for the assets which had been improperly siphoned away.

56 We note also that there is nothing in the Memorandum or Articles of Association of Singalab International conferring special powers of control on the Appellant as Managing Director or precluding the participation of the Respondent in the Board. Table A of the 4th Schedule to the Companies Act was adopted wholesale in the company's constitutional documents. [note: 33] Under cross-examination, Mr Lim KE conceded that the Respondent, by virtue of its position as majority shareholder, had voting control of Singalab International and that it could have removed the Appellant as a director of the company at any time, notwithstanding their conscious decision to give the Appellant day-to-day control of the company. [note: 34]

57 Apart from the formal arrangements evidenced by the Articles and Memorandum of Singalab International, the Judge also found that there was an understanding between the parties that the Appellant was to run and manage Singalab International although he was to report to the Exco. Whilst we concur with this finding, we do not think that this understanding had the effect of precluding the Respondent from participating in the Board of Singalab International. Apart from Mr Lim KE's own evidence above at [56], Mr Ng HK had been appointed as a director of the Singalab International from 1 September 2004 to 30 June 2005, which was *after* the Exco had been formed.

58 To Mr Chan's credit, he conceded at the hearing before us that with the benefit of hindsight, the Respondent could have commenced proceedings for a different kind of relief. We note in this regard that Mr Chan and his firm were not involved in the trial below. He submitted, however, that the issue of whether the Respondent had control over the company was a "technicality" that did not cause any prejudice to the Appellant. With respect, this submission was misconceived. The requirement that the shareholder (here the Respondent) claiming relief under s 216 must be otherwise powerless to change its fate by taking control of the company is a substantive one that goes to the very heart of the s 216 process.

59 For the foregoing reasons, we find that the Judge erred in holding that the Respondent had successfully made out its claim under s 216 of the Companies Act. This finding would suffice to dispose of the appeal. However, we would like to discuss briefly a further issue raised by the Appellant which may be of general interest.

The distinction between wrong done to the company and a personal wrong suffered by a shareholder

60 The Appellant submits that the wrongs alleged here are wrongs done to Singalab International, *viz* its subsidiaries, and not a wrong suffered by the Respondent in its *personal* capacity as a member of Singalab International. He argues therefore that the Respondent should not be allowed to use s 216 of the Companies Act to circumvent the proper plaintiff rule and reflective loss principle and that a derivative action should have been pursued by the Respondent instead.

61 The proper plaintiff rule in *Foss v Harbottle* (1843) 2 Hare 461 ("*Foss*") provides that in an action for a wrong alleged to have been done to a company (*ie* a corporate wrong) the proper plaintiff is *prima facie* the company itself. The reflective loss principle is a variant of the proper plaintiff rule: *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR(R) 597 at [78]. Where the shareholder's loss merely reflects the company's loss that would be made good if the company had enforced its full rights, the proper party to recover the reflective loss is the company and not the shareholder: *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 ("*Johnson*"), *per* Lord Bingham at 35. Section 216 of the Companies Act, however, provides for a remedy for a wrong suffered in the member's *personal* capacity. The individual member sues *in his own right* to protect his interests as a member of the company: see *Edwards v Halliwell* [1950] 2 All ER 1064. Thus, s 216 of the Companies Act is not a true exception to the proper plaintiff rule but rather a situation where the proper plaintiff rule does not apply: see Tan Cheng Han ed, *Walter Woon on Company Law* (3rd ed, Sweet & Maxwell, 2005) ("*Woon*") (at paras 9.25–9.26).

62 In reality, the distinction between personal and corporate wrongs is rarely clear. The lack of clarity is compounded in the context of s 216 of the Companies Act because the concept of commercial unfairness also appears to embrace wrongs done to the company. In this regard, we think it pertinent to note that s 216(1)(*a*) of the Companies Act is drafted in terms of the claimants' "interests as members, shareholders…" It is plain to us that a wrong done to the company may affect the interests of its members. The Jenkins Report clearly recognised this (at para 206):

> In addition to these direct wrongs to the minority, there is the type of case in which a wrong is done to the company itself and the control vested in the majority is wrongfully used to prevent action being taken against the wrongdoer. In such a case the minority is indirectly wronged.

63 Thus, whilst not all complaints 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, which would usually be a breach of director's duties. For example, in *Kumagai*, the defendant's breach of his director's duties to the said company was found also to amount to oppressive conduct as against the claimant. In *Low Peng Boon*, the factual allegations made to support the claimant's petition disclosed various breaches of director's duties mainly involving the misuse of corporate funds; these acts were found to constitute oppressive conduct as against the petitioner. That being said, we emphasise that this is quite separate and distinct from permitting s 216 of the Companies Act to be used to vindicate essentially corporate wrongs.

64 We do not think the latter should be permitted, for two broad reasons. First, an overly permissive interpretation of s 216 of the Companies Act would run counter to our present legislative scheme which provides for the commencement of a statutory derivative action pursuant to s 216A of the Companies Act. In "A Reconsideration of the Shareholder's Remedy for Oppression in Singapore" (2013) CLWR 42 1 (61), Associate Professor Pearlie MC Koh observes that when the Companies Act was amended to include s 216A, the marginal note to s 216 which then read "Remedies in cases of oppression or injustice" was amended to read "*Personal* remedies in cases of oppression or injustice". We agree with her that this was indicative of the legislative intention to clarify the distinction between the action for *personal* relief under s 216 of the Companies Act and the action for *corporate* relief under s 216A of the Companies Act. The distinction between the two is further highlighted by the inclusion of s 216(2)(*c*) of the Companies Act which provides that the court may, as a remedy in a *personal* action, "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", *ie*, a derivative action. Were it permissible for s 216 of the Companies Act to be used to vindicate essentially corporate claims, s 216(2)(*c*) of the Companies Act would be rendered nugatory. It is further pertinent to note that there are standing requirements under s 216A(3) of the Companies Act that must be satisfied before a complainant can apply to court for leave to commence a statutory derivative action. These requirements are important built-in safeguards that ensure that any litigation brought by a shareholder to pursue corporate claims is guided by the legitimate interests of the company and would result in an increase in the corporate value. In our judgment, Parliament could not have intended for shareholders to sidestep these requirements by characterising a claim for corporate relief as a personal claim.

65 Further, and related to the above, allowing an essentially corporate claim to be pursued under s 216 of the Companies Act would be an abuse of process as it amounts to an improper circumvention of the proper plaintiff principle which, far from being a legalistic procedural obstacle, is the consequence of the fundamental doctrine of separation of legal personality that underpins company law. Where a wrong has been done to the company, the interests of other shareholders of the company as well as the company's creditors will have been similarly affected. The claimant shareholder should not be allowed to proceed by way of a *personal* action and recover at the expense of these other similarly affected parties. Related to this is the danger that defendant may face a multiplicity of suits from different claimants for essentially the same wrong done to the company. This is evidently problematic and economically inefficient.

66 Where then should the court draw the line? We acknowledge that there will always be grey areas that do not lend themselves to easy categorisation. Much will depend on the facts of each

case and we do not think it useful to formulate a fast and hard rule. Nevertheless, we think it may be of some assistance to set out an analytical framework.

67 In the English case of *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760 ("*Charnley*"), Millett J (as he then was) perceptively articulated the distinction between unlawful conduct and conduct that is unfairly prejudicial (their equivalent to our notion of commercial unfairness) to the petitioner's interest (at 783):

> An allegation that the acts complained of are unlawful or infringe the petitioner's legal rights is not a necessary averment in a s 27 petition [the equivalent of our s 216]. In my judgment it is not a sufficient averment either. The petitioner must allege and prove that they are evidence or instances of the management of the company's affairs by the administrator in a manner which is unfairly prejudicial *to the petitioner's interests*. Unlawful conduct may be relied on for this purpose, and its unlawfulness may have a significant probative value, but it is not the essential factor on which the petitioner's cause of action depends. [emphasis added]

68 At 784, Millet J further discussed the application of this principle to the issue of distinguishing between an action for relief from oppression and a derivative action:

> The very same facts may well found either a derivative action or a s 459 petition [*ie* equivalent to our s 216]. But that should not disguise the fact that the nature of the complaint and the appropriate relief is different in the two cases. Had the petitioners' true complaint been of the unlawfulness of the respondent's conduct, so that it would be met by an order for restitution, then a derivative action would have been appropriate and a s 459 petition would not. But that was not the true nature of the petitioners' complaint. They did not rely on the unlawfulness of the respondent's conduct to found their cause of action; and they would not have been content with an order that the respondent make restitution to the company. They relied on the respondent's unlawful conduct as evidence of the manner in which he had conducted the company's affairs for his own benefit and *in disregard of their interests as minority shareholders*; and they wanted to be bought out. They wanted relief from mismanagement, not a remedy for misconduct.
>
> [emphasis added]

69 Hence, an action for s 216 is appropriately brought where the complainant is relying on the unlawfulness of the wrongdoer's conduct as *evidence* of the manner in which the wrongdoer had conducted the company's affairs in disregard of the complainant's interest as a minority shareholder and where the complaint cannot be adequately addressed by the remedy provided by law for that wrong. We agree with these views.

70 We turn next to a Canadian case, *Pappan v Acan Windows Inc* (1991) 2 BLR (2d) 180. There, the Newfoundland Supreme Court adopted the following analytical framework set out in Michael St P Baxter "The Derivative Action under the Ontario Business Corporations Act: A Review of Section 97" (1982) 27 McGill LJ 453 at p 457 to determine whether the complaint was of an essentially personal nature:

> The concept of incidental injury serves a useful purpose in the resolution of the threshold question of whether the action is personal or derivative. The answer involves two considerations. *First, is the individual's injury distinct from the corporation's injury in that it does not occur simply because the corporate injury exists? Second, is the individual's injury in an area where the shareholders by their own representative actions are exercising a power in bad faith, or the*

directors are abusing a duty owed to the minority shareholders different from that owed to the corporation?

If the answer to either consideration is affirmative, then a personal cause of action will exist. Admittedly, there may, in some circumstances, still be uncertainty as to the nature of the cause of action. …

[emphasis added]

The suggestion in this passage, which is similar to that set out by Millett J in *Charnley* (see above at [67]), is that in order to succeed in a minority oppression action, the minority shareholder has to show something more than the unlawfulness of the defendant's conduct and further that the shareholder's injury does not merely reflect that suffered by the company.

71 In the instant case, the Respondent's complaint was premised on three wrongs it alleged was committed by the Appellant, namely:

(a) the illegal Transfers;

(b) the mismanagement of SPL's accounts and moneys; and

(c) the diversion of SPL's business, assets and talents to the Appellant's own company, Beans Group.

We observe that these appear to be corporate wrongs that could have been pursued by the Respondent by way of a derivative action under s 216A of the Companies Act and the Respondent was, in essence, seeking restitution of the amounts thereby siphoned off by the Appellant from Singalab International. However, given that we have already disposed of the appeal on another ground, there is no need for us to come to a firm landing on this issue.

Conclusion

72 For the reasons we have given at [55]–[59] above, we allow the appeal and set aside the orders made by the Judge.

73 On the question of costs, we depart from the general principle that costs should follow the event, as we are well entitled to do: see O 59 r 3(2) of the ROC and *Tullio Planeta v Maoro Andrea G* [1994] 2 SLR(R) 501. In our judgment it is appropriate to take into consideration the matters leading up to the present litigation that in the circumstances of the case some other order should be made: *Ho Kon Kim v Lim Gek Kim Betsy and others and another appeal* [2001] 3 SLR(R) 253 at [12]. In this regard, it is apparent to us that the Appellant's conduct was clearly dishonest and reprehensible. In *Lee Seng Choon Ronnie v Singapore Island Country Club* [1993] 1 SLR(R) 557, although the appellant succeeded in his appeal and obtained the declaration he sought pertaining to the retention of his club membership, the court nevertheless deprived him of the costs of the appeal and the hearing below to record their disapprobation of his conduct. The court observed that the appellant's conduct was "really inexcusable and show a cavalier attitude and disregard of the club's rules" (at [31]).

74 In the present case, we have no doubt that in wantonly stripping Singalab International of its assets to enrich himself the Appellant had breached almost every conceivable duty of fidelity to the companies in question. We note also that the Judge below had awarded the Respondent its disbursements on an indemnity basis due to the Appellant's "disregard for his disclosure obligations

and his unreasonable and dishonest conduct of his defence" (at [109] of the Judgment). In the premises, we are of the view that the Appellant should not have his costs and we therefore make no order as to costs here and below.

[note: 1] Record of Appeal ("ROA") Vol III (A) at p 221.

[note: 2] Respondent's Supplemental Core Bundle Vol I ("1RSCB") at p 19.

[note: 3] 1RSCB at p 61.

[note: 4] ROA Vol III (A) at p 16, para 20.15.

[note: 5] ROA Vol III (A) at p 17, para 21.4 and ROA Vol III (B) at pp 79 – 84.

[note: 6] 1RSCB at pp 63 – 70.

[note: 7] ROA Vol III (B) at pp 101 – 105.

[note: 8] ROA Vol III (A) at p 18, para 21.8.

[note: 9] SCB Vol I at pp 74 – 75.

[note: 10] ROA Vol III (A) at pp 18–19, paras 21.9 and 21.11.

[note: 11] 1RSCB at pp 76 – 139.

[note: 12] 1RSCB at pp 140 – 141.

[note: 13] 1RSCB at pp 147 – 148.

[note: 14] ROA Vol III (A) at p 60, para 34.2.

[note: 15] ROA Vol III (F) at p 7.

[note: 16] 1RSCB at pp 154 – 161.

[note: 17] ROA Vol III (J) at p 295, para 9.

[note: 18] Ibid at para 11

[note: 19] Ibid at para 6

[note: 20] 1RSCB at pp 162 – 163.

[note: 21] ROA Vol III (F) at pp 64 – 70.

[note: 22] 1RSCB at pp 165 – 171.

[note: 23] 1RSCB at pp 172 – 175.

[note: 24] 1RSCB at pp 178 – 180.

[note: 25] ROA Vol III (F) at pp 98 – 102.

[note: 26] 1RSCB at pp 181 – 183.

[note: 27] 1RSCB at pp 185 – 225.

[note: 28] Respondent's Supplemental Core Bundle Volume II ("2RSCB") at pp 54 – 65.

[note: 29] SOC Amendment No. 3 dated 18 April 2013

[note: 30] 2RSCB at p 33; NE 16.04.2013 p 676 lines 1 – 31.

[note: 31] 2RSCB at p 30; NE 15.04.2013 p 437 lines 14 – 18.

[note: 32] Defence Amendment No 3 at para 7.

[note: 33] ROA Volume III (B) at pp 44 – 56.

[note: 34] ROA Vol 3(L) at p 54 lines 22 – 28 and p 55 lines 1 – 3.

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