

# THE APPROVED COMPANY SECRETARIES



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**Unpacking Shareholders' Pre-Emptive Rights And Minority  
Oppression: A Case Analysis Of Concrete Parade V Apex Equity**

**Ganging Up Incorporated: Oppression In A Group Company**

**Case Spotlight – When Is A Director Also An Employee?**

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# FROM THE EDITOR'S DESK

Dr. Adissayam Xavier Suseimanikam, FIACS



It brings me great pleasure to connect with all our members through our quarterly newsletters, and I want to extend my warmest greetings to all of you. Welcome to the 3<sup>rd</sup> issue of IACS newsletter for 2024.

First and foremost, on behalf of the IACS Council and staff, I wish all our Hindu members and their families a “Happy Deepavali 2024”

As all of you are aware, the Malaysian Business Reporting System (MBRS) 2.0 went live on 25th September 2024. Members are advised to download the MBRS Preparation Tool 2.0 (mTool 2.0) from SSM website ([www.ssm.com.my](http://www.ssm.com.my)) to make submission of documents via the MBRS Portal 2.0 (mPortal 2.0).

In view of the above development, IACS in collaboration with COMTRAC will be organizing a series of webinars/seminars on MBRS 2.0 (Annual Return and Financial Statements) in various locations, such as Kuala Lumpur, Johor Bahru, Kota Kinabalu, Kuching, Melaka, Penang and Kuantan, as early as possible to cater to the needs of our members. Members are strongly encouraged to attend our webinars/seminars to acquire an in-depth understanding and knowledge of the MBRS 2.0 system, and to be fully equipped in using the system. Do look up our training calendar at our website ([www.iacs.org.my](http://www.iacs.org.my)) which will be made available to you once the details have been finalized.

Our inaugural book publication, IACS Digest (Series) 1, is still available for sale. The IACS Digest contains various important articles selected from our official newsletter “The Approved Company Secretaries”, which will be handy as useful reference especially for the IACS practising members. This publication consists of quality articles on company law and practices, written by experienced practitioners, which are selected after the implementation date of the Companies Act, 2016 in January 2017 until 2022. If you would like to purchase the book, kindly call the Secretariat at 03-40513787 to get a copy of the order form.

In addition to the above, members are reminded to redeem their free webinars, which is an additional benefit for you. To reiterate, members who have attended four (4) webinars will be entitled to (1) free webinar which must be redeemed within twelve (12) months from the 1<sup>st</sup> webinar attended. Kindly call the Secretariat to obtain the Webinar Redemption Form to redeem your free webinar.

Last but not least, the Institute welcomes any ideas or suggestions to increase the membership of IACS or any topics of interest for seminar. Kindly share your suggestions or ideas to us by emailing to [iacsc19@yahoo.com](mailto:iacsc19@yahoo.com). Furthermore, members are encouraged to write to us on any technical or other operational issues as well as enquiries with SSM or other agencies, regarding the company law and corporate practical secretarial issues faced, so that the Technical Advisory Board may respond or discuss them at the proper forums or meetings, and will provide our comments accordingly.

We sincerely appreciate your continuous support. Take care and stay safe



**INSTITUTE OF APPROVED COMPANY SECRETARIES**  
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#### **Contributions of Article**

The Council would like to invite members to contribute articles and news, which may be of interest to company secretaries for publication. However, the Council reserves the right to edit articles for clarity purposes or it shall at its absolute discretion not publish any or all articles or news received from contributors. A fee will be paid for contributions approved by the Board.

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# UNPACKING SHAREHOLDERS' PRE-EMPTIVE RIGHTS AND MINORITY OPPRESSION: A CASE ANALYSIS OF CONCRETE PARADE V APEX EQUITY

By Lum Man Chan (Partner)  
Messrs Halim Hong & Quek

## Introduction

The Federal Court's recent judgment in the case of *Concrete Parade Sdn Bhd v Apex Equity Holdings Bhd & Ors* [2021] 9 CLJ 849 marked the end of a protracted legal battle that reverberated through Malaysia's corporate landscape. In this article, Lum Man Chan and Khew Gerjean provides an overview of the case, shedding light on the complexities surrounding pre-emptive rights of shareholders and the obtaining of shareholder's approval in corporate exercises pursuant to the Companies Act 2016 ("the Act").

In summary, the Federal Court's answers to the legal questions that arise in this case are as follows:

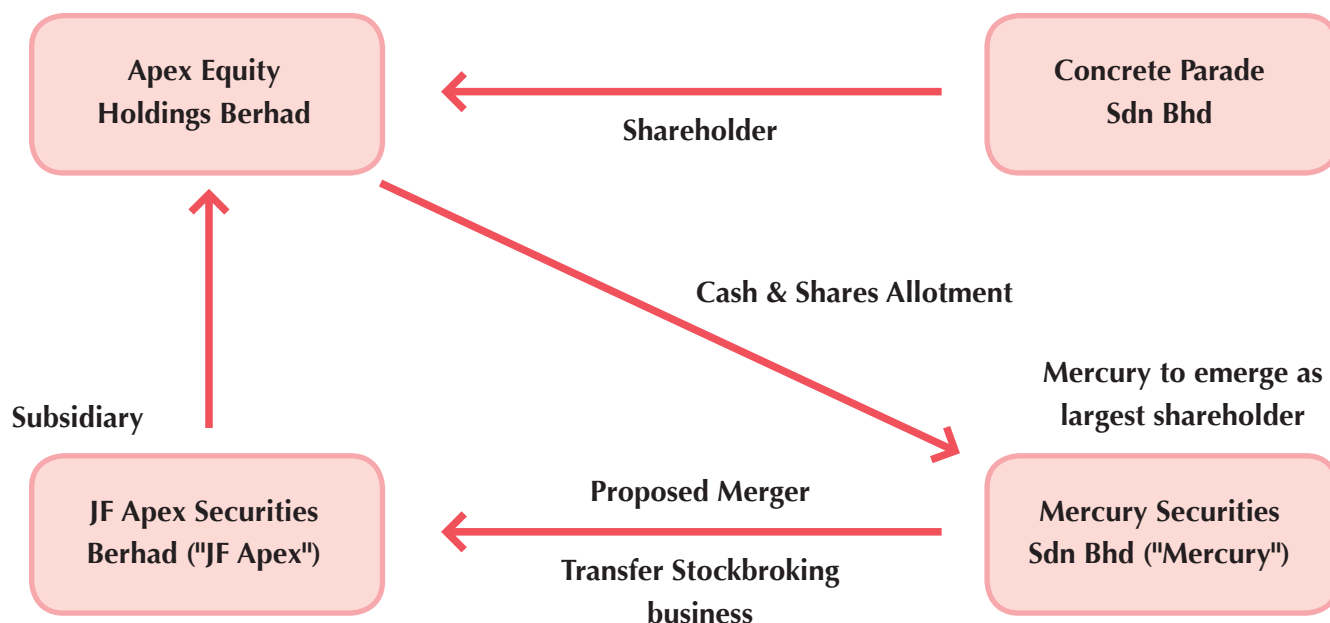
- 1) Under S.85 of the Companies Act 2016 (CA 2016"), pre-emptive rights of the shareholders are not mandatory but subject to the constitution of the company, which may renounce, disapply, or fortify such pre-emptive rights.
- 2) S.223(1)(i) and (ii) of the Act should be read disjunctively, so shareholders' approval could be obtained either before entering into an agreement for the transaction or before the actual transfer of ownership of the asset.
- 3) The oppression action was not properly brought by the Concrete Parade Sdn Bhd because the shareholders who had voted in favour of the corporate exercises were not named in the oppression suit.

## Background of the case

Concrete Parade Sdn Bhd ("Concrete Parade") initiated a minority oppression action under S.346 CA 2016 against Apex Equity Holdings Berhad ("Apex Equity") premised upon the following grievances:

- a) proposed merger transaction between Apex Equity and Mercury Securities which would see Mercury Securities emerging as the largest shareholder in Apex Equity through shares allotment; and
- b) Apex Equity has conducted share buy-back transactions in 2005 to 2017 in violation of its own M&A.

## Proposed Merger Transaction



Apex Equity, along with its subsidiary JF Apex, planned a merger with Mercury. The proposed merger aimed to transfer Mercury's stockbroking business to JF Apex in exchange for:

- i. RM48 million cash
- ii. RM100 million worth of new shares in Apex Equity

The parties entered into a Heads of Agreement (HOA) on 21 September 2018, followed by a Business Merger Agreement (BMA) on 18 December 2018. Additionally, subscription agreements (SAs) were signed with seven places for a private placement of new shares (collectively referred as "**the Merger Agreements**"). After the execution of these documents, the shareholders' resolutions were passed.

### Share Buy-back Transactions

Between 2005 and 2017, Apex Equity undertook multiple shares buy-back transactions ("**the transactions**"). These transactions were conducted based on mandates and approvals granted by the company's shareholders. However, in 2018, Concrete Parade brought to the attention of the Apex Equity's management that the company's Memorandum and Articles of Association (M&A) did not permit such transactions.

Despite the shareholder's objection, the Apex Equity's board sought a further mandate in 2018 to continue with the transactions. However, this resolution was voted against by the shareholders. Hence, Apex Equity filed a proceeding to validate the share buy-back transactions undertaken between 2005 and 2017 and it was eventually allowed by the High Court.

### The Key Issues and the High Court Findings

**1. FIRST ISSUE:** Whether Apex Equity breached S.85 and S.223 of CA 2016. Concrete Parade argued that it was denied its statutory and contractual pre-emptive rights to be offered new shares in Apex Equity. S.85(1) mandates that existing shareholders should be offered new shares before they are offered to outsiders. However, Apex Equity's memorandum and articles of association, particularly Article 11, did not expressly ensure the protection of Concrete Parade's pre-emptive rights.

Article 11 of Apex Equity's memorandum and articles of association stipulated that, subject to any direction to the contrary that may be given it in general meeting, all new shares must be offered to persons entitled to receive notices from Apex Equity in proportion to their existing shareholding

The High Court Judge concluded that there was no breach of pre-emption rights since shareholders had approved the proposed placement. The shareholders would reasonably understand that a private placement would dilute their interest, even without explicit mention in the circular. Thus, the absence of specific language denoting pre-emption waiver couldn't be deemed as oppressive as long as the transaction's effects were reasonably clear to Apex Equity's shareholders.

Further it was held that the shareholder's approval sufficed either through prior general meeting approval or documentation specifying approval as a condition precedent. Since the BMA required shareholder approval for the acquisition of Mercury's business, there was no violation. S.223(1) applies only when transactions create enforceable obligations on a company to acquire or dispose of substantial assets. The HOA, although legally binding, did not commit parties to the sale and purchase, thus not mandating shareholder approval.

Even if the HOA breached S.223(1), it was superseded by the BMA, which complied with shareholder approval requirements. S.223 should be construed in a disjunctive manner to allow for flexibility, stating that it suffices if either the entry into the arrangement is made conditional on shareholder approval OR if the carrying into effect of the transaction is approved by shareholders.

**2. SECOND ISSUE:** Whether the Share Buy-Back Transactions are valid and legal. Concrete Parade contended that the share buy-back transactions were illegal due to the contravention of S.67 of the Companies Act 1965 and/or S.123 of the Companies Act 2016. The directors' actions in seeking

validation from the Court without amending the M&A were a blatant disregard of the company's governing documents. The directors of Apex Equity should have obtained consent and authority from the shareholders before filing for validation proceedings. They argued that the filing of validation proceedings without prior knowledge or approval of the shareholders resulted in unfair prejudice to Concrete Parade, as it impinged upon their substantive rights.

The High Court ruled that the share buy-back transactions undertaken by the Apex Equity between 2005 and 2017 were valid, despite objections raised by the shareholder. While it is acknowledged that Concrete Parade were not notified of the validation proceedings, but it could not establish prejudice to its shareholder rights for recourse under S.346 of the CA 2016.

Dissatisfied with the High Court's decision, Concrete Parade appealed to the Court of Appeal.

### **Court of Appeal Findings**

The Court of Appeal found that Article 11 did not amount to a complete waiver of Concrete Parade's pre-emptive rights. It was held that the Merger Resolutions passed after the execution of several agreements related to the proposed merger did not effectively waive the Concrete Parade's statutory pre-emptive rights. For the Merger Resolutions to constitute an operative direction waiving the pre-emptive rights, specific information regarding the shareholders' rights under the CA 2016 needed to be included. This information should have clarified that existing shareholders had a statutory pre-emptive right to be offered any new shares and that by voting in favour of the Merger Resolutions, they would be indirectly waiving these rights. Since this information was not provided, the court concluded that Concrete Parade's pre-emptive rights had been unfairly denied, resulting in an unjustified dilution of their shareholding.

Next, it was held that S.223 is to be read conjunctively notwithstanding the use of the phrase 'or' between the two provisos. It imposes two separate requirements: one for entering the transaction and another for carrying it into effect. The Court of Appeal found that the Merger Agreements formed one composite transaction. For compliance with S.223, the HOA should have been subject to or contained a condition precedent for shareholder approval. Additionally, since the BMA was executed before shareholder approval was obtained, it failed to comply with the requirement of prior approval. Therefore, the Court concluded that Apex Equity had failed to fulfil the shareholder approval requirement under S.223, rendering the proposed merger invalid. The Court of Appeal imposed a duty on directors to inform shareholders at both the entry and execution stages of the transaction. It held that failure to obtain prior shareholder approval at either stage renders the transaction void.

#### The Impact of the Court of Appeal's Decision

The Court of Appeal's interpretation, where S.223(b)(i) and (ii) are read conjunctively, requires the directors to secure shareholder approval twice: once before entering into any form of agreement for a proposed acquisition or disposal of a substantial asset and again before executing it. This approach seems overly burdensome and impractical, potentially leading to the abandonment of many transactions and necessitating the preparation of two sets of documents. Such a requirement could hinder business operations and create unnecessary complexities.

The Court of Appeal further held that the share buy-back transactions remained illegal despite the validation order granted by the High Court due to the contravention of relevant sections of the Companies Act and the failure to obtain shareholder approval. Moreover, the filing of validation proceedings without prior shareholder consent or approval was unjust and prejudicial to the Concrete Parade's rights. It emphasised the importance of obtaining shareholder authorisation before taking actions that significantly affect the company's operations or financial transactions.

### **Analysis of the Federal Court's Judgment**

#### **1) S.85 – Pre-emptive rights are subject to company's constitution**

S.85(1) grants shareholders the privilege to maintain their proportional ownership by offering them the opportunity to purchase shares before they are issued to outsiders. However, this right is subject to the constitution of the company, which may renounce, disapply, or fortify such pre-emptive rights. The Federal

Court disagreed with the Court of Appeal interpretation that the pre-emptive rights are mandatory and pointed out the Court of Appeal's failure to consider the purpose and intent of the Act in interpreting the provisions.

It was held that S.85(1) allows for discretionary application of pre-emptive rights based on the company's constitution. The constitution prevails over statutory pre-emptive rights, allowing shareholders to determine whether to relinquish or retain such rights. Shareholders have the flexibility to determine the extent of their pre-emptive rights, as reflected in the constitution. Parliament did not intend to restrict directors' powers or mandate pre-emptive rights but provided shareholders the freedom to decide through general meetings.

**Interpretation of S.75 and 85:** The Federal Court discussed the relationship between sections 75 and 85. S.75 deals with the power of directors to allot shares, requiring prior approval by the company before directors can proceed. However, exemptions in S.75(2) allow for issuance without general meeting approval for certain purposes, such as financing acquisitions.

When read together, S.75 and 85 establish the framework for pre-emptive rights of existing shareholders in the issuance of new shares. S.75 guarantees the general principle of pre-emptive rights, while S.85 allows companies to specify the details of these rights in their Articles of Association. The Articles of Association, as mentioned in S.85, can provide exceptions or modifications to pre-emptive rights, subject to the company's constitution.

**Interpretation of Article 11:** The Court of Appeal interpreted the phrase "subject to direction to the contrary by the company at general meeting" as requiring the company to inform shareholders of their pre-emptive rights before any proposed issuance of new shares for raising capital. This interpretation imposes obligations on the company to seek explicit consent from shareholders before deviating from standard procedures regarding share issuance. However, the Federal Court disagreed with this interpretation. It asserted that pre-emptive rights are discretionary and can be applied based on the company's constitution. The Federal Court emphasised that the phrase allows flexibility for the company to adapt its operations or decision-making processes as required by specific circumstances. Rejecting the imposition of additional conditions on the company could hinder its ability to efficiently conduct corporate transactions.

## **2) S.223 should be read disjunctively and there is no requirement for 2-tier approval**

The Federal Court disagreed with the Court of Appeal's interpretation. It argued that the word "or" should be read disjunctively, meaning that compliance with either sub-paragraph (b)(i) or (b)(ii) sufficed. According to this interpretation, shareholders' approval could be obtained either before entering into an agreement for the transaction or before the actual transfer of ownership of the asset.

The Federal Court reasoned that requiring compliance with both sub-paragraphs would lead to impractical consequences for companies. It emphasised the importance of upholding the purpose and intent of the Companies Act, which aims to balance regulatory requirements with the efficient operation of businesses. This interpretation aligns with the overarching goal of ensuring transparency and shareholder awareness without unduly hindering corporate activities.

In conclusion, the Federal Court held:

- S.223(1)(i) and (ii) of the Act can be read disjunctively, meaning compliance with either sub-paragraph suffices.
- At least one agreement forming a composite transaction must contain an express condition precedent requiring shareholder resolution, and shareholder approval in a general meeting satisfies S.223(1)(ii).
- S.223(1) of the Act does not impose an incumbent duty on directors to inform shareholders of an intention to enter into or carry out an acquisition or disposal of substantial assets based on previous court decisions.

## **3) Was Concrete Parade unfairly prejudiced?**

The Federal Court disagreed with the Court of Appeal's assessment of whether the Concrete Parade suffered unfair prejudice compared to other shareholders. The Federal Court argued that since the majority of shareholders had approved the merger, there was no unfair prejudice. It suggested that the oppression claimed may have been more indicative of a management versus shareholder conflict rather than a minority-majority shareholder dispute. Additionally, the Federal Court questioned the Court of Appeal's decision not to

include the majority shareholders, who approved the transactions, as parties to the oppression action. This omission, according to the Federal Court, could have influenced the assessment of whether the Concrete Parade was unfairly prejudiced. It emphasised the principle of majority rule in corporate governance and stated that claims of oppression under S.346 of the CA 2016 cannot be used to circumvent legitimate decisions made by the majority.

#### **4) Was the oppression action properly brought by Concrete Parade?**

Given the lack of established contraventions of relevant sections of CA 2016 and the failure to conclusively establish illegality regarding the share buy-back transactions, the Federal Court questioned the suitability of the oppression remedy.

It was asserted that an oppression finding couldn't be made under S.346 when shareholders had the opportunity to vote on transactions, approved them, and weren't party to oppression proceedings. The Federal Court highlighted the failure of the Court of Appeal to grasp this fundamental issue.

Concrete Parade's failure to join the majority shareholders, who allegedly oppressed them, was deemed fatal to the oppression action. By solely targeting the directors, Concrete Parade's complaint lacked grounds for oppression action, suggesting it should have been brought against the officers or directors for contravening CA 2016. The Federal Court argued that Concrete Parade's grievance was essentially against majority rule, disguised as an oppression action, constituting an abuse of statutory remedy.

The conduct of Concrete Parade was scrutinised, particularly its decision to pursue an oppression action despite majority approval of transactions. The Federal Court questioned whether the action was filed to hinder the proposed merger rather than to address actual unfair prejudice. Concrete Parade's failure to demonstrate how it uniquely suffered prejudice, coupled with its attempt to hold directors accountable for majority decisions, indicated an abuse of the statutory process.

In essence, the Federal Court concluded that Concrete Parade's oppression action lacked merit and appeared to serve a collateral purpose, constituting an abuse of the statutory process under S.346 of the Act.

#### **5) S. 582: Share Buy-Back Transactions are not illegal under CA 2016**

The Federal Court upheld the High Court's decision. Despite finding that the transactions lacked proper authorisation under CA 2016, the Federal Court disagreed with Court of Appeal conclusion that they were unlawful and void. Instead, the Federal Court criticised the Court of Appeal's legal interpretation, arguing that the transactions, while ultra vires, did not automatically constitute illegality.

The Federal Court refrained from definitively addressing whether S.582(3) could rectify an illegality, citing the conclusion that oppression wasn't established. Nonetheless, Federal Court acknowledged the general view, that S.582 should not rectify illegality. It was highlighted that uncertainty regarding whether the lack of authorisation for share buy-backs amounted to illegality under S.67A and 127 of the Act. Since the focus was on whether the transactions unfairly prejudiced Concrete Parade, this issue wasn't deemed crucial for resolution.

Regarding the High Court's validation order, the Federal Court emphasised that while certain aspects of the transactions were unauthorised, it didn't automatically render the entire process void. Ultimately, even if the transactions are contravened the company constitution/ rendered as void, there is no oppression on Concrete Parade because this would affect all the shareholders instead of Concrete Parade alone.

#### **6) The Importance of Accurate Legal Citations in Judicial Proceedings**

Federal Court also took the opportunity to address an important issue regarding the citation of legal precedents. They highlighted a case where incorrect and outdated decisions were cited to the Court of Appeal, potentially leading to an erroneous judgment. Such errors, they emphasised, could have significant consequences, impacting corporate transactions and potentially causing confusion in legal interpretations.

Federal Court stressed the responsibility of legal counsel to ensure the accuracy and relevance of cited cases, emphasizing the importance of thorough research. They noted that failure to do so could range from mere oversight to misleading the court, which is unacceptable conduct for any legal practitioner.

Federal Court also referenced a previous case to underscore the importance of well-researched advocacy, particularly in appellate proceedings. It is emphasised that judges rely heavily on the arguments and authorities presented by counsel, and any inaccuracies could lead to misinterpretations of the law and undermine the administration of justice.

In Malaysia, where legal professionals can appear before courts at various levels, maintaining high standards of advocacy is crucial for ensuring the accuracy and integrity of legal proceedings.

## Conclusion

In complex transactions like mergers, the interpretation and application of provisions in CA 2016 require careful consideration of legal nuances and procedural requirements. The Federal Court's analysis provides clarity on the scope and application of the provision, guiding companies and legal practitioners in navigating the intricacies of company law.

The Court of Appeal's failure to recognize the significance of majority rule in the context of the merger approval is a critical oversight. By overlooking the fact that shareholders collectively voted in favor of the merger at a general meeting, the Court of Appeal failed to grasp that any alleged prejudice suffered by Concrete Parade would have affected all shareholders equally.

Moreover, it is essential to emphasise the paramountcy of majority rule in corporate governance. While S.346 of the CA 2016 introduces a statutory mechanism to address oppression, it is incumbent upon claimants to substantiate claims of unfairly prejudicial conduct. Attempting to invoke S.346 to circumvent situations where majority rule legitimately prevails, as demonstrated in this case, undermines the integrity of corporate decision-making processes.

In essence, the principle of majority rule serves as the cornerstone of corporate governance, and statutory remedies for oppression should not be misused to challenge bona fide decisions made by the majority of shareholders.

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## GANGING UP INCORPORATED: OPPRESSION IN A GROUP COMPANY

By Rachel Ng Li Hui (Principal Associate) & Tan Zec Kie (Researcher)  
Messrs. Thomas Philip

### Introduction

In many instances, the interest of the minority (or even majority) shareholders will be blatantly ignored or disregarded. To prevent unfair prejudice, S346 of the Companies Act ("CA") allows an oppressed shareholder to bring an action against the his/her/its oppressors.

Oppression can also occur in a group company context. An example of this is when an oppressive conduct of a holding company has adversely affected the interests of the shareholders in the subsidiary.

### The Concept of Oppression

**S346(1) of CA** provides for what amounts to oppression.

1. *Any member or debenture holder of the 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 or debenture holders including himself or in disregard of his or their interests as members, shareholders or debenture holders of the company;*
  - b. *That some act of the company has been done or is threatened or that some resolution of the members, debenture holders 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 debenture holders, including himself.*

The remedies are provided under **S346(2) of CA**, where the court may make an order to

- a. *Direct or prohibit any act or cancel or vary any transaction or resolution*
- b. *Regulate the conduct of the affairs of the company in the future*
- c. *Provide for the purchase of the shares or debentures of the company by other members or debenture holders of the company or by the company itself*
- d. *In the case of a purchase of shares by the company, provide for a reduction accordingly of capital of the company*
- e. *Provide that the company be wound up*

To establish that there is an oppression under S346 of CA against the shareholder, the test provided in the case of **Re Khong Thai Sawmill (Miri) Sdn Bhd v Ling Beng Sung [1978] 2 MLJ 227** shall be fulfilled. It must be satisfied that there is a visible departure from standards of fair dealing and violation of conditions of fair play which the shareholder is entitled to expect.

*"It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which shareholder is entitled to expect before a case of oppression can be made"*

## Application of S346 of CA in a Group Company Context

Courts recognize that the definition of “affairs of the company” in S346(1) of CA includes the affairs in the subsidiary company or holding company. The authorities below demonstrate that oppression at the subsidiary company level (where it affects the holding company) can become the affairs of the holding company.

In **Tob Chee Hoong v Tob Chee Choong & Ors [2017] MLJU 1303 per Mohd Nazlan Mohd Ghazali J (as His Lordship then was)**, the High Court found that the affairs of the subsidiary company are also that of the parent company:

*[50] the phrase ‘affairs of the company’ found in Section 181(1) of the CA (and the new but identically worded Section 346(1) of the Companies Act 2016) should be construed widely, to encompass the affairs of entities which are not themselves the subject of the oppression action, but which affairs of those entities, affect the subject company in the nature and to the extent which is beyond the inconsequential, be it a parent or a subsidiary.*

*[54] This provide much support to a wide reading of ‘affairs of the company’ which is wholly in line with the design of the law to ensure that in circumstances where oppressive conduct could be proven, legal redress to those unlawfully aggrieved is available and not impeded by the artificiality or in the complexity of corporate structures. Otherwise, wrongdoers in corporate world would be encouraged to strategize and build upon more complex conglomerate-like structures and perpetuate such unlawful and oppressive conduct in a fashion orchestrated to defeat the application of Section 181 (1) (Section 346 (1) of the Companies Act 2016), and almost literally employing the section as an engine of fraud. The law will fail in its true objective and the ends of justice will be far from being served if such a grim scenario is allowed to transpire, if not already manifest and flourishing.*

*[55] It bears repetition that the existence of the holding and subsidiary structure may not necessarily mean that the affairs of the latter will always be those of the former in all cases (or vice versa). It is still a question of evidence. It is fact-sensitive. The predominant question must thus turn on whether it can be shown that the affairs of the subsidiary actually truly affected the holding company.*

*[56] Accordingly, in the instant case, it is my finding that the phrase ‘affairs of the company,’ stated in Section 181 (1) (a) of the CA, which is the affairs of the subject fourth defendant company, must include the affairs of Orchard Circle because of the former’s 100% ownership of the latter, the common directorship of two directors from the controlling block as well as the fact that the parent is purely an investment holding company and that the subsidiary, which is a property development company, is its one and only business investment.*

Interestingly, in **Nuraslina bt Zainal Abidin v Dagang Net Technologies Sdn Bhd & Ors [2022] MLJU 2670**, Ong Chee Kwan J clarified that the Courts will intervene even if the oppression occurs at the subsidiary company level and where it also affects the holding company:

*[116] In fact, the Courts will intervene even when the oppressive conduct takes place at the subsidiary of a holding company where the plaintiff is the shareholder if the same impinges or affects the affairs of the holding company. For all intents and purposes the oppression at the subsidiary level has become the affairs of the holding company.*

***[119] The upshot was that the phrase ‘affairs of the company’ found in Section 346(1) of the CA 2016 be construed widely, to encompass the affairs of entities which are not themselves the subject of the oppression action, but which affairs of those entities, affect the subject company in the nature and to the extent which is beyond the inconsequential, be it a parent or a subsidiary.***

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

## The Test of Oppression and Examples

The same test of commercial unfairness as laid down in **Re Khong Thai Sawmill [1978] 2 MLJ 227** is equally applicable to the oppression in a group company context.

Although an identical test of commercial unfairness is being applied in the cases of oppression in a group company context, the test operates in a slightly differing way due to the involvement of the corporate structure and the complexity of the case.

Below are a few examples of how the court determine whether there is an oppression in group company context:

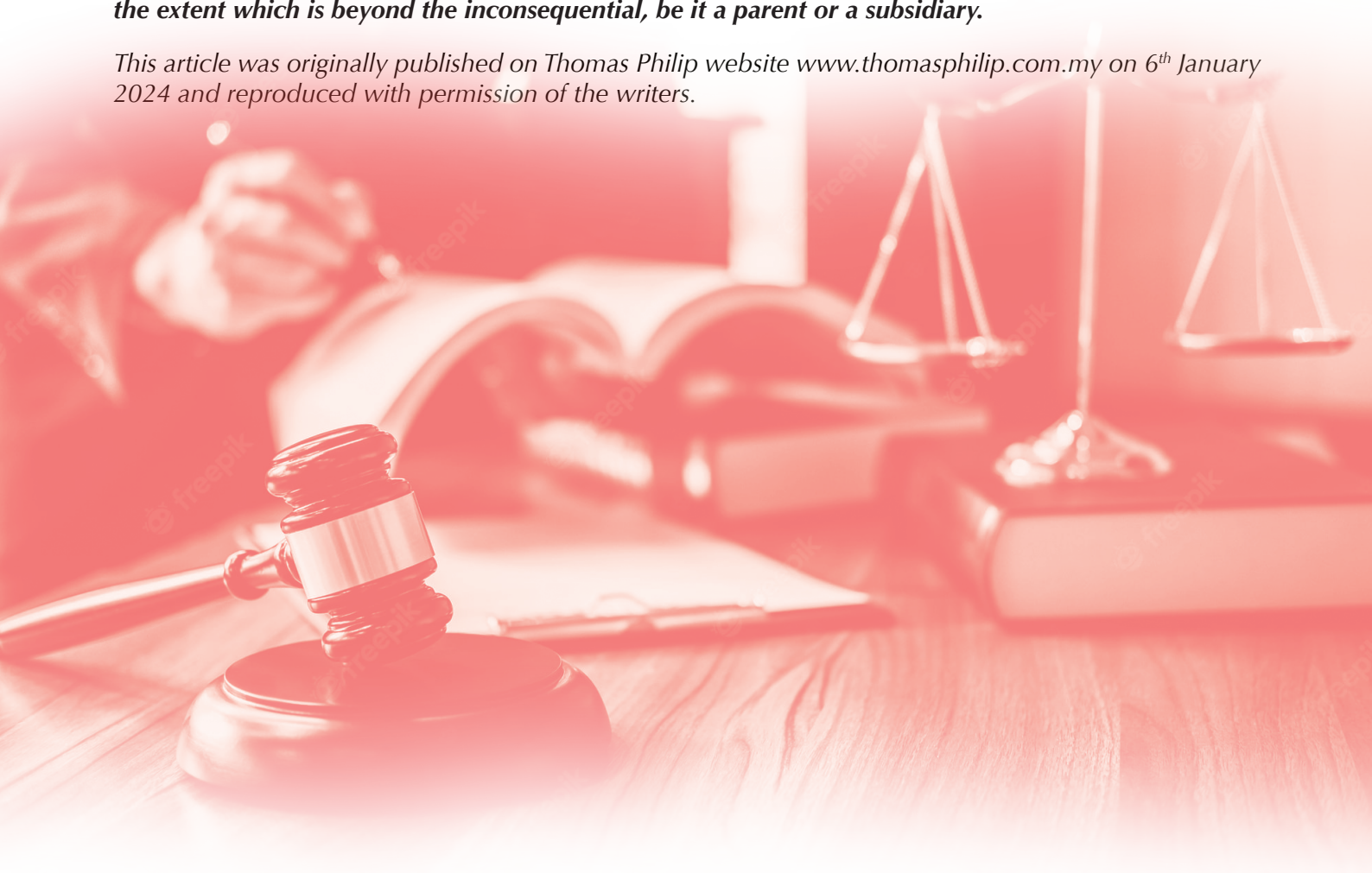
1. In **Datuk Kasi a/l KL Palaniappan v Menara Embun Sdn Bhd & Ors and another [2018] MLJU 1439**, the court explained that oppression occurs when the shareholder's right in the subsidiary company as specified in the shareholders' agreement is being declined.
2. In **LGB Engineering Sdn Bhd & Ors v Rayston Resources Sdn Bhd [2023] 1 MLJ 649**, the shareholder in the subsidiary company commenced an oppression action against the investment holding company for procedural irregularities in holding the member's meeting. The court held that there was no oppression as the irregularity is curable by subsequent members' written resolution.

## Conclusion

The affairs of a subsidiary company will be that of a holding company in ascertaining the presence of oppression if the affairs of the subsidiary company affect the holding company. Ong Chee Kwan J in **Nuraslina bt Zainal Abidin v Dagang Net Technologies Sdn Bhd & Ors [2022] MLJU 2670** aptly sums this concept:

***[119] The upshot was that the phrase 'affairs of the company' found in Section 346(1) of the CA 2016 be construed widely, to encompass the affairs of entities which are not themselves the subject of the oppression action, but which affairs of those entities, affect the subject company in the nature and to the extent which is beyond the inconsequential, be it a parent or a subsidiary.***

*This article was originally published on Thomas Philip website [www.thomasphilip.com.my](http://www.thomasphilip.com.my) on 6<sup>th</sup> January 2024 and reproduced with permission of the writers.*



## CASE SPOTLIGHT – WHEN IS A DIRECTOR ALSO AN EMPLOYEE?

By Leow Ho Eng (Associate)

Messrs Donovan & Ho

Only employees can file a complaint of unfair dismissal under the Industrial Relations Act 1967 (“IRA 1967”). A question arises as to whether a director or shareholder who “works” for a company can also enjoy such rights. There have been occasions where the courts have held that directors can also be employees and therefore may receive the protections under the IRA 1967. The lines between employees, shareholders and directors can therefore become increasingly blurred in a world where individuals are sometimes expected to carry out multiple functions and roles.

The recent Court of Appeal decision of *Gopala Krishnan Chettiar A/L Muthu v Sealand Marine Inspection and Testing (M) Sdn Bhd & Ors* [2022] MLRAU 303 provides some helpful insight on this issue, when considering the case of a director (who is also a shareholder) who filed a complaint of unfair dismissal.

### **Brief Facts**

- The Appellant joined the Company as an Operations Director. He was also the second largest shareholder in the Company.
- The Appellant did not have a contract of employment with the Company, but was paid a sum of RM 20,000 monthly that was labelled as director’s fees. This payment was subject to EPF and SOCSO deductions.
- The Company alleged that the Appellant was responsible for the resignation of several employees of the Company. This led to the Appellant claiming constructive dismissal and lodging a representation for reinstatement.
- At the Industrial Court, one issue was whether the Appellant can be a “workman” under the IRA 1967. The Industrial Court held that the Appellant is a workman, as he had been performing the duties of an employee (eg: reporting to the other director, carrying out site visits etc). Even though the Appellant was holding the position as an Operations Director, he was not the controlling mind of the Company. Ultimately, the Industrial Court held that he was dismissed without just cause or excuse.
- The High Court quashed the Industrial Court’s award because the Appellant was a director and was not entitled to the statutory protection under the IRA 1967. The High Court relied on several factors such as the Appellant’s monthly remuneration being described as a director fee (as opposed to salary) and that he was the second largest shareholder of the Company.
- The Appellant appealed to the Court of Appeal.

### **Court’s Findings**

The Court of Appeal allowed the Appellant’s appeal and reinstated the Industrial Court award:

- Although the Appellant was a director/shareholder, he was nevertheless carrying out functions or duties as a workman in his capacity as an Operations Director. There was no evidence that the Appellant was an independent contractor.
- Even though the Appellant had described himself as a “director” in his police report (where he claimed that he was being constructively dismissed), this does not ipso facto result in him abandoning or waiving his rights as an employee.
- If the Appellant was truly in total control of the Company or was the directing mind and will of the same, it was peculiar that others could still try and force him to resign even though he is the second largest shareholder of the Company.

- The Company also announced that the Appellant had been “terminated/removed”. This meant that he left his position as Operations Director; yet there is no position in the board of directors as Operations Director. Therefore, it was obvious from the evidence that although he was both a shareholder and a director, the Appellant was in reality an employee carrying out executive functions as an Operations Director.
- That his monthly payment was labelled as director’s fees does not detract from there being no evidence that the Appellant had discharged any corporate duties as would be the case if he was just a director.
- The Appellant was a “workman” and could have recourse under the IRA 1967. As for the Industrial Court’s factual findings that he was unfairly dismissed, the Court of Appeal was of the view that no error was committed.

### **Key Takeaways**

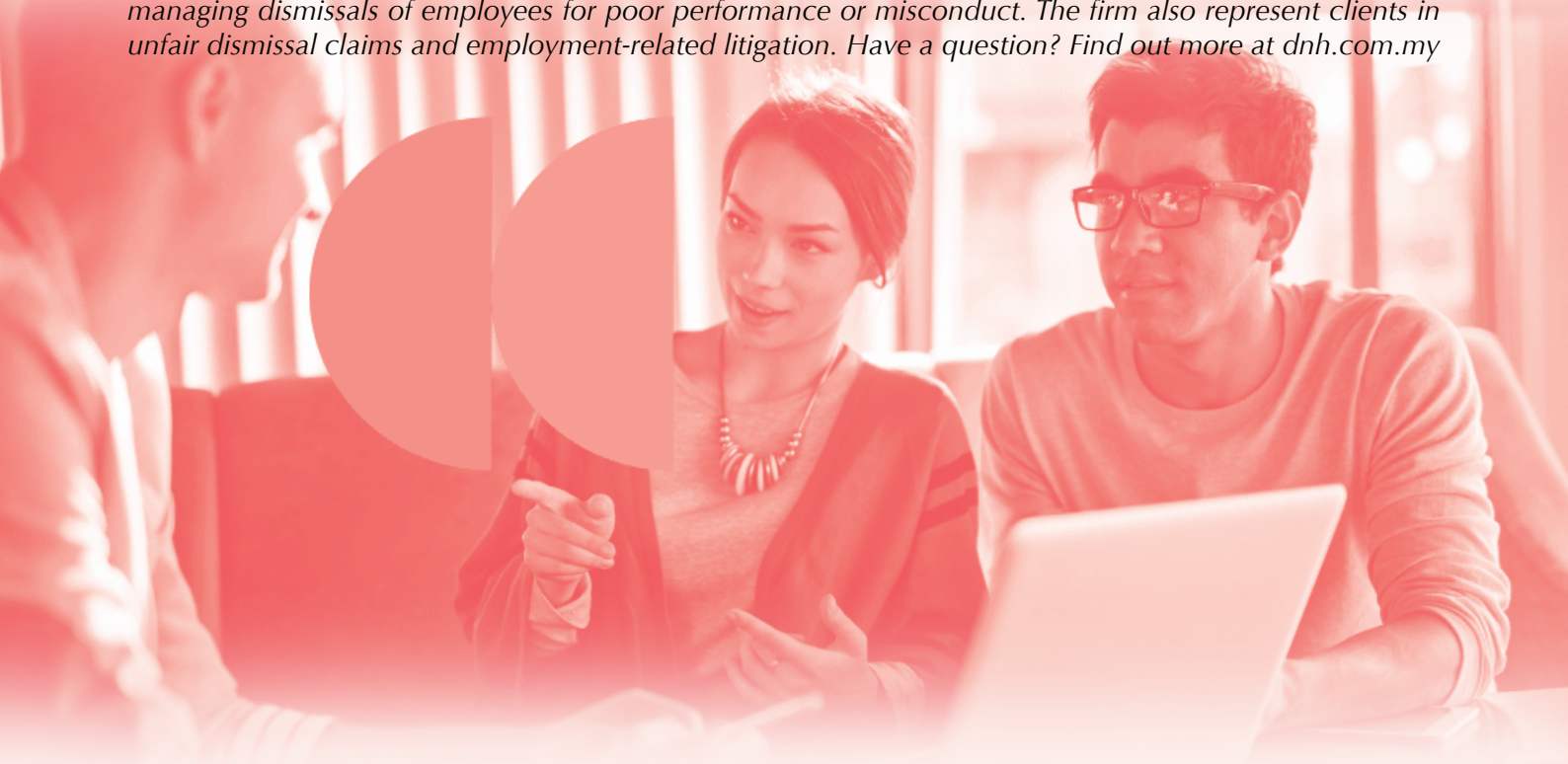
The Court of Appeal’s decision follows the general principle that merely being a company director does not preclude a person from carrying out functions and duties as an employee, and to be remunerated as such. A person can wear two hats – ie: one as a director, and one as an employee. In those circumstances, the label of “director” will take a back seat and the Industrial Court will forensically examine the nature and function of the person to determine whether he was working under a contract of service (workman) or under a contract for services (independent contractor).

As held by the Federal Court in Court in ***Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687*** (referred to by the Court of Appeal in this case), the central issue to whether a person is an employee was the nature, degree and extent of control of his duties and functions, which are not limited to the terms of a written contract. It includes the conduct of the parties at all relevant times.

In a world where there is a plethora of impressive job titles and increasingly complex organizational structures, employers would need to take greater care to ensure that individual employees or directors are appropriately classified and treated as such. As evident from this case, the mere absence of an employment contract or some tweaks in the labelling of directors may not withstand the courts’ scrutiny of the parties’ true relationship.

*This article was originally published on Donovan & Ho website [www.dnh.com.my](http://www.dnh.com.my) on 30<sup>th</sup> June 2023 and reproduced with permission of the writer.*

*This article was written by Leow Ho Eng (Associate) from Donovan & Ho’s employment law practice. Donovan & Ho is a law firm in Malaysia which provides advice on employment law and industrial relations including review of employment contracts, policies and handbooks, advising on workforce reductions, and managing dismissals of employees for poor performance or misconduct. The firm also represent clients in unfair dismissal claims and employment-related litigation. Have a question? Find out more at [dnh.com.my](http://dnh.com.my)*



# SUSPECTING A DIRECTOR OF MISAPPROPRIATING CORPORATE FUNDS! HERE'S YOUR GAME PLAN

By Jesselyn Tham, Corporate Lawyer  
Messrs Jesselyn Tham

As a director or company secretary, you're entrusted with the critical task of safeguarding your company's financial integrity. If you suspect a director is misappropriating corporate funds, it is essential to act swiftly and discreetly to avoid alerting the suspect.

In this article, we will reveal to you strategic blueprint to identify loopholes, gather evidence and take action before the wrongdoers can erase any trace of their misconduct.

## **Preparatory Work for Legal Action: Key Steps before You Strike**

### *1. Directors' Right to Inspect Company Accounts*

As a director, your first step should be to seek an inspection of the company's accounts to clear any doubt about your suspicions. Under **Section 245 of the Companies Act 2016 (CA 2016)**, directors have a statutory right to inspect the company's documents. The purpose of this right is to ensure that directors can fairly discharge their responsibilities for the benefit of the company and its members. A director must be kept informed about the company's activities and decisions, and this information should be readily accessible at all times.

In ***Dato' Tan Kim Hor v Tan Chong Consolidated Sdn Bhd [2009] 2 MLJ 527***, the Court of Appeal affirmed that directors do not need to provide any specific reason to exercise this right. A director's right to inspect the company's accounting records is absolute and remains unaffected by his level of involvement in the company, even if they are a 'sleeping director'.

### *2. When Inspection is Denied*

If you are denied access to the company's records, you may seek a court order to enforce your right to inspection. However, it is important that this request is made without any ulterior or improper motive that could harm the company. The court has the discretion to refuse the right of inspection if granting the director's access to the company's accounts would be detrimental to the company's interests.

### *3. Assistance from an Auditor*

If you encounter difficulties understanding the company's accounts, **Section 245(8) of the CA 2016** allows you to inspect the records with the assistance of an approved company auditor. The director must provide a written undertaking that any information obtained will only be disclosed to the director and the auditor.

## **Appropriate Decision-Making in Corporate Funds Utilization**

For public companies, a circular must be published detailing the proposed use of proceeds raised from the public market. As a shareholder, you have the right to verify whether these funds have been allocated for their intended purposes as stated in the circular.

In private companies, shareholders can verify if the funds have been utilized according to the approvals given during general meetings. The minutes of these meetings should accurately document the discussions and the shareholders' consent regarding the use of funds. The company secretary plays a crucial role in ensuring that these decisions are faithfully recorded in the minutes and resolutions.

## **Taking the Leap: Launching an Action Against the Wrongdoer**

If you have solid evidence but suspect that the necessary documents are in the hands of the company or its directors, you can seek **pre-action discovery** to obtain these documents before initiating a legal suit. This step can be crucial in building a case against the directors responsible for misappropriation.

Once you have gathered sufficient evidence, you can then proceed with filing a legal claim. At this stage, it may be crucial to take further steps to protect the company's assets from being drained while the case is ongoing.

### **Mareva Injunction: Blocking Directors from Draining or Transferring Company Funds**

A **Mareva injunction** is a powerful tool that can be used after you have initiated legal action. It temporarily restrains the director from disposing of company assets, ensuring that the funds remain intact until the resolution of the lawsuit. By seeking this injunction, you prevent the director from transferring money out of their account, safeguarding the company's assets during the legal process.

Although the company and its directors are legally separate entities, the court may decide to "lift the corporate veil," holding the directors personally liable for company debts. This makes it crucial to preserve their assets to ensure you are not left with no recourse if the company turns into an empty shell.

A Mareva injunction can be applied for on an ex parte basis, meaning the director won't be aware of the application until the order is served. However, obtaining such an injunction has a high threshold. You must demonstrate to the court that:

1. You need to show that your case has merit and is likely to succeed.
2. You must prove that there is a genuine concern the director might dispose of their assets before the case is resolved.
3. You must undertake to compensate the director for any losses incurred if the injunction is later found to be unjustified.

Ultimately, the goal is to obtain a favorable court ruling that confirms the breach of the director's duties. By this time, the Mareva injunction should have effectively preserved the director's assets, ensuring there are adequate funds available to compensate the company for any losses incurred.

By understanding and leveraging your legal rights and options, you can enhance your chances of recovering losses and preventing the director from absconding with the company's funds.

## **IACS NEW MEMBERS**

We are pleased to welcome the following new members:-

| IACS No. | Names                              | Membership Category | State           |
|----------|------------------------------------|---------------------|-----------------|
| M 2666   | Ms. Katherine Chung Mei Ling       | Ordinary            | Sabah           |
| M 2667   | Mr. Tan Yi Feng                    | Ordinary            | Selangor        |
| M 2668   | Mr. Gan Kong Chian                 | Ordinary            | Selangor        |
| G 2669   | Mr. Wong Yi Shen                   | Graduate            | Selangor        |
| A 2670   | Dr. Shashi Kumar A/L Kanesan       | Associate           | Negeri Sembilan |
| M 2671   | Ms. Koo Yann Nee                   | Ordinary            | Kuala Lumpur    |
| M 2672   | Mr. Wong Kien Yew                  | Ordinary            | Selangor        |
| M 2673   | Ms. Elizabeth Nelson Siruvainathan | Ordinary            | Kuala Lumpur    |
| M 2674   | Mr. Mohd Amirul Ashraf Bin Mazli   | Ordinary            | Selangor        |
| M 2675   | Ms. Lee Nyun Ken                   | Ordinary            | Sabah           |
| M 2676   | Mr. Choong Sze Chieh               | Associate           | Penang          |
| M 2677   | Ms. Law Shu Zhen                   | Ordinary            | Selangor        |

In the meantime, we take this opportunity to thank you for the support given to the Institute. We look forward to your active participation in all activities of IACS for the development of the company secretarial profession.

# E-INVOICING: SELF-BILLING OR TO BE BILLED

By Choong Hui Yan

B.Acc(Hons)(Malaya), ACCA (UK), Licensed Secretary

## Introduction

E-invoicing has taken effect 1 August 2024 for taxpayers with turnover more than RM100 million. The Inland Revenue Board of Malaysia (IRB) informs that 520,000 e-invoices have been received in MyInvois portal by noon hour of 1 August 2024, the first day of implementation.

## Update

The Income Tax (Issuance of Electronic Invoice) Rules 2024 [P.U.(A) 265/2024] is gazetted on the 30 September 2024, taking effect 1 October 2024. The 6-month interim relaxation period announced on the 26 July 2024 continues and with implementation dates as followed:

| Taxpayers with annual turnover | Commencement date | Interim relaxation period |
|--------------------------------|-------------------|---------------------------|
| > RM100 million                | 1 August 2024*    | up-to 31 January 2025     |
| RM25 million – RM100 million   | 1 January 2025    | up-to 30 June 2025        |
| All other taxpayers            | 1 July 2025       | up-to 31 December 2025    |

\*The Income Tax (Issuance of Electronic Invoice) Rules 2024 [P.U.(A) 265] sets 1 October 2024 the effective date for taxpayers with annual turnover more than RM100 million, later than their commencement date

During the interim relaxation period, all taxpayers are allowed to issue consolidated e-invoices for all activities and transactions, including self-billed e-invoices. Such consolidated e-invoices do not need reference numbers of receipts, statements and bills and can input any information or details at the 'Description of Product or Service' field. For taxpayers that are practising to issue consolidated e-invoices for all activities and transactions, no individual e-invoice to be issued even if it is requested by customers.

Taxpayers will not be prosecuted under Section 120 of the Income Tax Act 1967 during the interim relaxation period for non-compliance on the e-invoice requirements if they issue consolidated e-invoices or consolidated self-billed e-invoices for all activities and transactions.

This article intends to clarify whether the e-invoices are to be self-billed or to be billed for rental and commission expenses.

## Rental expense – self-billed or to be billed

Whether rental expense is to be self-billed or to be billed e-invoices depending on whether the landlord is carrying on business.

Landlord who is carrying on business will issue e-invoices to tenant. Tenant whose landlord is not carrying on business, will need to issue self-billed e-invoices as proof of expense and claim tax deduction.

Joint property owners will be taxed based on ownership arrangement (%) for tax declaration purpose. The issuance of e-invoices will be based on such ownership arrangement (%), the same applies to tenants who issue self-billed e-invoices.

For example, Sunshine Sdn Bhd is renting an office premise which is owned by Ida and Eda on equally share. The monthly rental is RM10,000 per month. Ida and Eda are not carrying on businesses, thus Sunshine Sdn Bhd has to issue self-billed e-invoice amounting to RM5,000 each on behalf of Ida and Eda respectively.

Sunshine Sdn Bhd also rents a warehouse from Moonlight Sdn Bhd for RM15,000 a month. Moonlight Sdn Bhd will issue e-invoice of RM15,000 rents to Sunshine Sdn Bhd on monthly basis.

Upon entering into a new tenancy agreement, earnest deposit requires e-invoice, but issued by the estate agent instead of the landlord. On the other hand, no e-invoice required for security and utility deposits that are refundable in nature.

### Commission payment – self-billed or to be billed

Whether the commission payer needs to issue self-billed e-invoice or to be billed, it depends on the nature of transaction and arrangement.

When the company or individual is the agent, dealer or distributor of another company, no e-invoice need to be issued by the agent, dealer or distributor for the commission income earned. The commission payer company will issue self-billed e-invoice for the commission paid as proof of expense incurred.

When there is no agency, dealership or distributorship relationship, a company may issue e-invoices to bill for the commission earned. It is however, payer company paying commission to non-business individual who is neither agent, dealer nor distributor, would still need to issue self-billed e-invoices for tax deduction purposes.

Both monetary and non-monetary payments to agent need to be included in the self-billed e-invoices. Examples of non-monetary payment are gifts or incentive trip. This would mean the total value of self-billed e-invoices issued within a calendar year would be equivalent sum to the CP58 statement issued. The non-monetary payment can be included in e-invoices when the amount is quantifiable or following the accounting treatment of the company, i.e. at the point of accrual or payment made.

Besides, the self-billed e-invoices for agents can be net of commission income earned. For example, individual Agent A has unpaid rents of RM2,000 to the Direct Selling Company A, while the company needs to pay commission of RM20,000 to agent A. So company A will be issuing a self-billed e-invoices amounting to RM18,000, showing the commission to pay and rents to be collected.

E-invoices are soon the main proofs of incomes and expenses for tax declaration of all taxpayers. Thus, the roles and duties of e-invoice issuance lies on the payer or payee taxpayers, need to be clear to avoid duplicated record in IRB's data and causing unnecessary tax risks, such as audit or penalties.

*The article is drafted based on law and updates as at 30<sup>th</sup> September 2024*

## BOOKS FOR SALE

|  | Book Price<br>(RM) | Self-collect<br>(IACS Office) | With Shipping –<br><b>Add RM10</b><br>(West Malaysia) | With Shipping-<br><b>Add RM15</b><br>(East Malaysia) |
|--|--------------------|-------------------------------|---|--|
| <b>The Approved Company Secretaries Digest: Series 1</b><br><br>A Practical Companion for the Approved Company Secretary | <b>15.00</b>       | <b>15.00</b>                  | <b>25.00</b>  | <b>30.00</b>   |

If you are interested to purchase, kindly call IACS office at 03-40513787/40510033 or email to iacstraining@yahoo.com to get a copy of the order form.

# EVENT HIGHLIGHTS

## IACS CPD Seminar in Kuantan on 7th June 2024

The seminar was held at AC Hotel by Marriott Kuantan, Pahang. The speaker was Mr. Kenneth Foo and the topic of the seminar was *"Update on the Beneficial Ownership Reporting Framework – Assessing SSM's Revised Guideline, Case Studies and Illustrations on BO"*.



## IACS CPD Seminar in Penang on 3rd July 2024

The seminar was held at JEN Penang Georgetown by Shangri-La, Penang. The speaker was Mr. Kenneth Foo and the topic of the seminar was *"Update on the Beneficial Ownership Reporting Framework – Assessing SSM's Revised Guideline, Case Studies and Illustrations on BO"*.



## Majlis Peluncuran Buku Kod Etika Korporat SSM

The launch was held on 2nd August 2024 at SSM Kuala Lumpur and was attended by our Council Members, Pn. Nolida Md Hashim and Dr. Adissayam Xavier.



## IACS CPD Seminar in Johor Bahru on 8th August 2024

The seminar was held at Grand Paragon Hotel Johor Bahru, Johor. The speaker was Mr. Kenneth Foo and the topic of the seminar was *"Beneficial Ownership Reporting of Companies –Overcoming Challenges To Identify The BO"*



# How to become a member of Institute of Approved Company Secretaries?



## 1) IACS

INSTITUTE OF APPROVED COMPANY SECRETARIES (IACS) was incorporated in Malaysia on 16 May, 1996 as a company limited by guarantee and not having a share capital under the Companies Act.

## 2) OBJECTS OF IACS

- a) To coordinate and co-operate with all the regulating authorities in enhancing the professionalism of company secretaries;
- b) To provide an avenue for company secretaries to get together to improve and advance their interest and professional status and to provide a vehicle for regulating the conduct and professional ethics of company secretaries;
- c) To conduct seminars, conference, and meetings for the presentation of papers, delivery of lectures, and for the acquisition and dissemination by other means of information connected with the profession of company secretaryship and other related corporate practice.
- d) To print and publish newsletters, periodicals, books or otherwise that are desirable for the benefits of members and the public with the approval of the authority concerned.

## 3) VISION STATEMENT OF IACS

"To be the Premier Professional Body for Approved Company Secretaries in Malaysia"

## 4) MISSION STATEMENT OF IACS

- To uphold the highest professional ethical standards and integrity for its members.
- To raise the profile and the professional status of its members in company secretarial practice, corporate governance and other related corporate practice.
- To support, promote and advance the profession of company secretaryship in cooperation with the relevant authorities and other akin professional bodies, universities, colleges, industry and the general public.
- To provide continuing professional development training and seminars for its members, and publications on company law and practice and related areas.

## 5) MANAGEMENT OF IACS

The Management of IACS is vested in the Council (the Board of Directors). The powers of the Council are governed by the provisions of the Constitution of IACS and the Companies Act 2016.

## 6) CATEGORIES OF MEMBERSHIP AND THEIR DISTINGUISHING LETTERS

The composition of membership of the Institute shall be classified as follows:-

- (a) Fellow Member – FIACS
- (b) Ordinary Member – MIACS
- (c) Honorary Member – HIACS
- (d) Associate Member – AIACS
- (e) Graduate Member – GIACS
- (f) Student Member

## 7) GUIDELINES FOR MEMBERSHIP APPLICATION

- (a) Membership of IACS is by application on the prescribed form.

- (b) The subscribers to the Constitution and such other persons as shall be admitted to membership in accordance with the provisions hereinafter contained shall, subject as provided by these present, be Members of the Institute.

- (c) All applications shall be accompanied by the following:-

- Certified copy of valid Company Secretary Licence issued by CCM under Section 20G of the Companies Commission of Malaysia Act 2001 or Practising Certificate issued by the Registrar under Section 241 of the Companies Act 2016 by any other Company Secretary or Auditors or Commissioner for Oaths (applicable to Ordinary members only)
- Copies of other certificates of qualifications or membership in relevant associations/ bodies (if available). For Associate, Graduate and Student members, the copies of certificates must be certified by any other Company Secretary or Auditors or Commissioner for Oaths
- Two driving licence-size photographs.
- Photocopy of National Registration Identity Card.
- The registration fee and annual subscription shall be such sums as the Council may from time to time prescribe.

- (d) The respective registration fee and annual subscription for the time being are as follows:

| CATEGORY OF MEMBERSHIP | REGISTRATION FEE | ANNUAL SUBSCRIPTION |
|------------------------|------------------|---------------------|
| FELLOW                 | RM 150.00        | RM 250.00           |
| ORDINARY               | RM 150.00        | RM 200.00           |
| ASSOCIATE              | RM 100.00        | RM 150.00           |
| GRADUATE               | RM 100.00        | RM 150.00           |
| STUDENT                | RM 50.00         | RM 50.00            |

\* Members applying for upgrading to Fellow/Ordinary Members are required to pay a sum of RM170.00 being registration fee (RM150.00) and nominal upgrading fee (RM20.00).

## 8) PRIVILEGES AND RULES OF MEMBERSHIP

- (a) A Member is entitled to use the distinguishing letters as indicated in para 4 after his/her name.

- (b) Members shall be entitled to:-
  - Receive notices and circulars of IACS pertaining to latest news relating to Secretarial Practices from CCM and other regulatory bodies.
  - Attend IACS' general meetings.
  - Vote at IACS' general meetings (applicable to Ordinary & Fellow Members)
  - Receive a Certificate and I.D. of Membership.
  - Participate in seminars, schemes and privileged to enjoy reduced fee and other benefits.

- (c) All Members shall adhere to the provisions of the Constitution, the Code of Ethics and regulations in force and any amendments or changes thereof by the Institute.