

Company Law : Boundary Between Oppression Actions and Derivative Actions

LOW CHENG TEIK & ORS V LOW EAN NEE [2024] 5 MLJ 579

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ISSUES

The law provides different avenues for shareholders to protect their rights when directors breach fiduciary duties.

While the derivative action under section 347 Companies Act 2016 (“CA 2016”) allows shareholders to sue on behalf of the company, the oppression remedy under section 346 CA 2016 enables them to sue in their own capacity, but only if the harm suffered is distinct and personal.

The Federal Court decision in **Low Cheng Teik & Ors v Low Ean Nee [2024] 5 MLJ 579** (“**Low Cheng Teik**”) provides valuable guidance in drawing this line.

BRIEF FACTS

- (a) The dispute arose in SNE Marketing Sdn Bhd, where the respondent, Low Ean Nee (“**R**”), held 50% of the company’s shares, while the remaining 50% was held collectively by the appellants (“**A1–A3**”).
- (b) The first appellant (“**A1**”), who was also a chairman, unilaterally executed a Deed of Assignment transferring the company’s registered trademarks (“**SNE Trademarks**”) to another entity, SNE Global Sdn Bhd, for a nominal RM10.
- (c) SNE Global was co-founded by A1, and his daughter held a 50% stake in that company.
- (d) R commenced an oppression action under section 346 CA 2016, alleging that A1–A3 had acted oppressively and in disregard of her interests as a shareholder by causing loss through the wrongful assignment of the SNE Trademarks.
- (e) She sought a buy-out order for her shares.

ISSUES BEFORE THE FEDERAL COURT

The central issue before the Federal Court was whether R's complaint of the wrongful assignment of the company's assets constituted:

- (a) A personal wrong against her as shareholder, actionable under section 346 CA 2016 ("**Minority Oppression**"); or
- (b) A corporate wrong against the company, which could only be pursued by the company itself, or through a derivative action under section 347 CA 2016 ("**Derivative Action**").

The Court also had to consider the principle of reflective loss, namely whether a shareholder may recover personally for losses that merely mirror the company's loss, such as diminished share value or reduced dividends (Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204; Johnson v Gore Wood & Co [2002] 2 AC 1).

DECISION OF THE FEDERAL COURT

The Federal Court unanimously allowed the appeal.

The Federal Court held that the **SNE Trademarks were assets of the company**. Their wrongful assignment caused loss to the company as a whole, not to R personally. The Federal Court also took the opportunity to state the legal test to ascertain whether the shareholder's complaint is actionable under s 346 (Minority Oppression) or more properly on behalf of the company under s 347 of the Companies Act 2016 (Derivative Action):-

"[93] ...The following criteria are proposed as the basis for the formulation of a legal test to ascertain whether a shareholder's complaint is actionable under s 346 of the Act or more properly on behalf of the company under s 347 of the Act:

- (a) *what is the act or omission that one or more of the shareholders complain of? In short, identify the act, series of acts or omissions;*
- (b) *can the act(s) or omission(s) be characterised as being:*
 - (i) *oppressive to;*
 - (ii) *in disregard of the interests of;*
 - (iii) *unfairly discriminatory against; or*
 - (iv) *otherwise prejudicial to one or more of the shareholders?*
- (c) *does the cause of action vest in the shareholder or in the company? who has suffered loss or damage from the wrong done — the shareholder in his capacity as a shareholder, or the company?*

- (d) *is the loss suffered by the shareholder as plaintiff separate and distinct to the plaintiff in his capacity as a shareholder, or is it a loss suffered by all the shareholders?*

...

[130] Applying the elements of the legal test as set out in para 93 above:

- (a) *the wrong or infraction complained of is the wrongful assignment to a third party of the SNE Trademarks which belong to the company;*
- (b) *the wrongful act cannot be said to be oppressive or unfairly discriminatory or otherwise prejudicial to the respondent alone in her capacity as a shareholder. Rather, it is a wrong that affects all the shareholders;*
- (c) *the cause of action vests in the company and not the respondent;*
- (d) *the loss or damage arising as a consequence of the wrongful assignment of the SNE Trademarks to a third party is suffered by the company and not by the respondent alone in her capacity as a shareholder; and*
- (e) *the loss is suffered by all the shareholders and not by the respondent alone.”*

[Emphasis added]

In these circumstances, the proper plaintiff in this case is the company. Any diminution in R's shareholding value or dividends was **reflective loss**, which is not a separate and distinct injury:-

*“[132] The proper plaintiff in this case is the company. Any loss suffered by the respondent as a result of the assignment of the SNE Trademarks would be a loss in either the capital value of her shareholding or a loss in the dividends distributable to her. **This is reflective loss in that it reflects the loss sustained by the company to the extent of her shareholding in the company. It cannot constitute a separate and distinct injury resulting in a loss to the respondent in her capacity as a shareholder. As all other shareholders suffer the same loss as a consequence of this wrongful act, it cannot be said that the loss or injury suffered by the respondent is singular and distinct.** As the wrongful act was found to be that of the first appellant, it cannot also be said that the respondent has been unfairly prejudiced by the conduct of the majority shareholders.”*

[Emphasis added]



If those in control refused to act, the correct recourse would be a **derivative action under section 347 CA 2016**, not an oppression claim:-

*“[126] Following from this, **the depletion of the company’s assets due to a wrong done to the company does not amount to a personal injury to its shareholders. It is for the company to initiate an action to recover such loss.** The shareholder is taken to have entrusted the management of the company’s affairs to the majority shareholders. **If the loss to the company is caused by those in control of the company themselves who refuse to take steps to recover such loss, the proper recourse is for the minority shareholder to seek leave from the court to bring a derivative action in order to enforce the company’s rights...**”*

*“[133] **The rule against reflective loss as set out earlier in the judgment therefore bolsters our determination that the respondent ought not to bring an action in her capacity as a shareholder. And this in turn is because the cause of action vests in the company and not the respondent.** This claim should not have been brought by way of an oppression action under s 346. This is not to say that there was no wrongdoing, as indeed there was, but such wrongdoing was done to the company and should have been pursued under s 347 as a derivative action.”*

[Emphasis added]

For a shareholder to succeed under section 346, they must show **separate, distinct, and personal harm**. Wrongful depletion of company assets that affects all shareholders equally does not meet this threshold:-

*“[95] In summary, **the legal ‘test’ provides that where the nature of the act, omission or misconduct is oppressive or unfairly prejudicial to a shareholder, and the resulting injury and loss may be classified as having been suffered directly and specially or separately and distinctly by the shareholder in such capacity, as opposed to loss or injury suffered by the company or all the other shareholders, then oppression is made out and the cause of action vests in the shareholder.** In such an instance, s 346 provides the remedies available.*

“[96] If, however, the act, omission or misconduct is an injury done to the company, resulting in a loss to the company, then the cause of action vests in the company and s 347 is the proper remedy to be utilised. This situation arises commonly where the injury causes loss to all shareholders alike such that it cannot be said that the loss is suffered distinctly, separately or uniquely by any single shareholder.



*[97] Flowing from the above, a minority shareholder who seeks to bring an oppression action must first identify the conduct complained of on the part of the majority and establish that such conduct is unfairly prejudicial to their interests as a minority shareholder. **It must then be shown that the majority's conduct has caused harm to the minority shareholder personally. Finally, the minority shareholder is required to demonstrate that they have been affected in a distinctive and individual manner which is distinct from the other shareholders by reason of the wrongful conduct, usually by the majority or those in control of the company.**"*

[Emphasis added]

The Court thus concluded that the respondent had pursued the wrong course of action in initiating an oppression action and should instead have sought leave to bring a derivative action.

"[134] This appears to have been a difficulty the respondent was alive to. As highlighted earlier, prior to the filing of the oppression action in this case, the respondent issued the statutory notice for leave to commence a derivative action on behalf of the company against, amongst others, the first to third appellants. Notably, the thrust of her complaints in the statutory notice largely revolves around the assignment of the SNE Trademarks. As such, it is apparent that the respondent herself recognises that the remedy to her grievances lies in a derivative action. With respect, the wrong course of action was taken by the respondent in the present case through initiating an oppression action instead of proceeding to file an application under s 347 to seek leave to initiate a derivative action on behalf of the company."

KEY TAKEAWAY

Following the decision, it is important to note that:-

- (a) While shareholders may sue in their own capacity, this is strictly limited to circumstances where the harm is personal, distinct, and separate from the company's loss.
- (b) Where the company suffers the primary injury, the shareholder's recourse is by way of a derivative action, not an oppression claim.
- (c) In practice, this ensures that corporate wrongs are litigated by or on behalf of the company, while section 346 remains available only for genuine cases of shareholder oppression.

If you have any questions or comments on this article, please contact:-

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