Corporate groups in business planning

What are corporate groups? .... ¶4-500
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¶4-001 Introduction

We saw in Chapter 1 that the company limited by shares is a common form of business organisation in Singapore. In this chapter, we introduce other vehicles which may be used for doing business in Singapore and highlight some of the key differences between these and the company as a business organisation. The aim is to facilitate the decision as to which form of business organisation may be the most appropriate form through which to conduct a particular enterprise.

We also explore the different forms that companies may take. Different types of companies are governed by different sets of rules, some of which may be better suited to a particular enterprise than others. This discussion forms the second part of this chapter.

The third part deals with the requirements for registration and the process by which companies are formed. The fourth part looks at listing of a company's shares for trading in a securities market, and the fifth part with the use of corporate groups in business planning.

CHOICE OF FORM OF BUSINESS ORGANISATION

¶4-100 What are the different forms of business organisations?

Companies are one possible vehicle for the conduct of business. Others include sole proprietorship, partnership, limited partnership, limited liability partnership, business trust and unincorporated joint venture. This section summarises some of the key features of these other vehicles, and suggests some criteria according to which a person or persons proposing to carry on a particular enterprise might decide which form to use.

It is important to note that, although our focus in this section is on different types of business organisations, it is possible to have organisations whose primary purpose is something other than conducting a business. Such organisations may also operate as companies[1] or may take on a different organisational form. These non-business organisations may also need to transact in a business environment to facilitate the conduct of their primary purpose. We commence this section with a brief description of these other organisational forms so as to give a better appreciation of the various types of business organisations we describe later in this section.

1 In such cases, they usually take on the form of companies limited by guarantee (see ¶4-200 below).

¶4-110 Other types of organisations

Unincorporated associations

Persons wishing to pursue a common purpose may do so by banding together to form an unincorporated association. Such organisations are usually governed by rules to which members of the unincorporated association agree to be bound. Examples of unincorporated associations included clubs and societies which are formed to carry on various activities. The members of these associations do not aim to make a profit and distribute it to themselves. If they did, the members would be partners in a partnership. A partnership is a form of unincorporated association. However, we see below that a key definition of a partnership is that the partners are carrying on business in common with a view to making profit. Of course an unincorporated association may make a profit as an incidental result of some of its activities. However, this profit must be used for the purposes of the association and cannot be distributed to the individual members of the association.

An unincorporated association is not a separate legal entity. This means that it cannot hold property in its own name (property must be held in the names of the individual members of the association or their trustee(s)) and the association is unable to enter into contracts in its own name. Neither can such associations generally sue or be sued in its own name. The members of an unincorporated association do not have the benefit of limited liability. However, where the members have elected a committee to conduct the management of the association, as a general rule it will be the members of the committee rather than all of the members who are required to defend any legal proceeding brought against the unincorporated association by someone who has been injured by the activities of the association. Unincorporated associations comprising 10 or more persons may register themselves as societies under the *Societies Act* (Cap 311). Upon registration, the societies gain some of the characteristics of incorporated entities such as the ability to sue and be sued in the name in which the society was registered and protection of members' assets from being used to satisfy judgement debts of the society.

Other incorporated organisations

There are several other types of incorporated organisations other than those whose primary purpose is to engage in business. These organisations usually serve a social or other specific function. All of these organisations are incorporated pursuant to, and are governed by, a specific piece of legislation. Examples of these are co-operative societies incorporated under the *Co-operative Societies Act* (Cap 62) and management corporations incorporated under the *Land Titles (Strata) Act* (Cap 158). Some of these organisations (eg the Intellectual Property Office of Singapore) are set up as statutory boards. Statutory boards are organisations that are established by statute (eg the *Intellectual Property Office of Singapore Act* (Cap 140)) and serve a government-related function.

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¶4-120 What are the key forms of doing business apart from using companies?

In Chapter 3, we analysed some of the particular legal and functional characteristics of companies.

Businesses need not operate through the use of a company. Other forms of business organisation are available. We now examine briefly the key characteristics of these other main forms of business organisation.

Sole proprietorship

The expression "sole proprietorship" is used to describe the situation where an individual person owns and carries on a business without the use of a separate and distinct business form. Where a sole proprietorship exists, there is no legal separation between the business and personal assets or obligations of the person conducting the business. The sole proprietor is legally responsible for all the contracts relating to the business, owns its assets and is personally liable for all its debts.

Running a business as a sole proprietorship is the least complex form of doing business. The sole proprietor, being the only owner of the business, has full say in how the business is to be conducted. There is no need to account to anyone else in relation to the affairs of the business. Because the income generated by the business is the income of the proprietor, the proprietor pays tax on the business profits at the proprietor's personal tax rate. The business losses or profits can also be offset against the proprietor's other income.

Sole proprietors who wish to carry on business using a business name must register the business name and comply with the *Business Names Registration Act 2014*. They must also subsequently comply with the administrative requirements under this Act.

General partnership

A partnership may be defined as "the relationship which subsists between persons carrying on business in common with a view to a profit".[2] Businesses operating as partnerships are referred to as "firms".

The key legal rules governing partnerships such as the ability of partners to bind the firm to obligations, the liability of partners, the relationship of partners to one another and the dissolution of partnerships and its consequences are found in the *Partnership Act* (Cap 391).

2 Section 1 of the *Partnership Act*.

There is no need to take any formal legal steps to create a partnership — it simply arises as a matter of law where two or more people are in this relationship. However, usually the terms of the agreement between partners is recorded in a formal legal document referred to as a "partnership agreement". The main elements usually found in such an agreement include details of:

- how profits and liabilities of the firm should be shared amongst the partners
- the responsibilities of the various partners for the running of the business
- the obligations that the partners have to each other (eg to render proper accounts)
- how a partner may leave the firm, and
- how the residual assets of the firm should be distributed should the partnership be dissolved.

Subject to any express or implied agreement between the partners, the following rules apply:

- All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.
- The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him/her in the ordinary and proper conduct of the business of the firm; or in or about anything necessarily done for the preservation of the business or property of the firm.
- A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he/she has agreed to subscribe, is entitled to interest at the rate of 5% per annum from the date of the payment or advance.
- A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him/her.
- Every partner may take part in the management of the partnership business.
- No partner shall be entitled to remuneration for acting in the partnership business.
- No person may be introduced as a partner without the consent of all existing partners.
- Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.
- The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he/she thinks fit, have access to and inspect and copy any of them.[3]

3 Section 24 of the *Partnership Act*.

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A partnership is not a separate legal entity.[4] Like sole proprietors, the individual partners in a partnership own the assets of and incur the obligations relating to the partnership's business personally and in their own names. This means, for example, that if partners in a firm borrow money to expand the firm's business, they would each be personally liable to the lender for the full amount of the debt.[5]

Unlike shareholders in a company, partners do not have limited liability.

Partners are agents[6] for each other with respect to the conduct of the business. This means that an individual partner can incur an obligation for which all the other partners are also responsible. Unless they have agreed otherwise, partners have a right to participate in the management of the business and share in its proceeds equally.

If the identity of the partners changes, for example because a partner resigns or a new partner joins, the original partnership is dissolved and a new one is formed. This may require the transfer of assets and obligations from the retiring partner or to the new partner. This process of transferring assets and obligations can be quite complex. Any single partner can cause the partnership to be dissolved. Further, the right to be a partner cannot be assigned or transferred to another person without the unanimous consent of the other partners (although it is possible to assign the income attributable to a partnership share).

The profits generated by the partnership business are taxable in the hands of the individual partners, and losses suffered can be offset against their other income. Unlike a company, a partnership is not taxed as a separate entity.

Generally, partnerships cannot have more than 20 members. This is because s 17(3) of the *Companies Act* prohibits the formation of an association or partnership that consists of 20 or more members unless it is registered as a company under the Act. The exception to this is where the partnership is formed under another written law in Singapore. Professional partnerships, such as law firms and accounting firms, fall within this exception as they are governed by legislation governing their respective professions.

4 Court rules allow a partnership to sue and be sued in the firm's name. This is done only to simplify procedures by making it unnecessary to name each partner separately. It does not affect the legal nature of the partnership.

5 The liability of partners for the debts and obligations incurred by the firm while they are partners is "joint" while their liability for other wrongful acts is "joint and several". "Several" liability is liability which can be divided among those who have caused some harm or wrongdoing so that each wrongdoer is only responsible for their part of the harm caused. "Joint" liability is where two or more persons are jointly liable for some harm or wrongdoing which means that if one of these persons is unable to pay their share of the liability (eg because they are bankrupt), then the other persons who are jointly liable must pay the entire amount. Where liability is "joint and several", the liability can be enforced individually against one or more of the persons responsible or against all of the persons jointly.

6 An agent is a person who, as a matter of law, can act for another person. Provided the agent acts within the scope of his or her authority, the principal (ie the person on whose behalf the agent acts) is bound by the acts of the agent. Agency in the context of company law is discussed in Chapter 19.

Persons who wish to carry on business in Singapore through a partnership other than through the full names of all of the persons forming the partnership (ie using a business name) must register their business under the *Business Names Registration Act 2014*. They must also subsequently comply with the administrative requirements under this Act.

Limited partnerships

The limited partnership (LP) is the newest form of doing business in Singapore. It was introduced in 2009. An LP is a business organisation consisting of one or more "general partners" and one or more "limited partners" that is registered as a limited partnership under the *Limited Partnerships Act* (Cap 163B). This is the governing Act for LPs. An LP must also be registered under the *Business Names Registration Act 2014* and comply with the requirements laid down by that Act.

As its name suggests, an LP is a modified form of general partnership. The legal rules and principles which apply to general partnerships (including the relevant provisions of the *Partnership Act* (Cap 391) except as modified by the *Limited Partnership Act* (Cap 163B) apply to LPs.[7] Unlike general partnerships, however, the number of partners in an LP is not limited to 20.

The key distinguishing factor of LPs is that this business organisation comprises both "general partners" as well as "limited partners".[8] General partners in an LP have similar rights and liabilities as partners in a general partnership. They are entitled to take part in the management of the LP, are agents of each other and the LP for the purpose of the LP's business and are personally liable for the debts and obligations of the LP.

Limited partners, however, have different rights and liabilities from general partners. A limited partner in an LP is one who, under the terms of the partnership agreement, shall not be liable for the debts or obligations of the firm beyond the amount of his/her agreed contribution.[9] A limited partner thus enjoys "limited liability" and the exposure of a limited partner is limited to his/her agreed contribution to the venture. To be a limited partner, one has to be registered as such under the *Limited Partnership Act* (Cap 163B). Failure to do so will result in the party being treated as a general partner of the firm.[10] Limited partners should not take part in the management of the firm. If they do so, they will again be treated as general partners of the firm in relation to the debts and liabilities incurred by the firm.[11]

7 Section 4 of the *Limited Partnership Act.*

8 Section 3 of the *Limited Partnership Act.*

9 Section 2 of the *Limited Partnership Act.*

10 Section 10 of the *Limited Partnership Act.*

11 Section 6 of the *Limited Partnership Act.*

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Limited partners can also withdraw from the firm without impacting the firm's existence. They can, subject to the partnership agreement, increase, reduce or withdraw their contributions to the firm with the consent of the general partners.[12] The LP is also not dissolved on the death, dissolution, bankruptcy or liquidation of a limited partner.[13]

An LP is essentially a modified form of partnership. The profits generated by the LP business are taxable in the hands of the individual partners, and losses suffered can be offset against their other income.

Limited liability partnerships

The limited liability partnership (LLP) is a relatively new form of doing business in Singapore. It was introduced in 2005. An LLP is a business organisation comprising any two or more persons associated for carrying on a lawful business with a view to profit that is registered as such under the *Limited Liability Partnership Act* (Cap 163A). This is the governing Act for LLPs. An LLP that is carrying on business other than under its registered name must also register the business under the *Business Names Registration Act 2014* and comply with the requirements laid down by that Act.

Despite its name, it is not regarded as a partnership and general partnership law does not apply to an LLP.[14] LLPs, do however, have many of the characteristics of general partnerships. The following are some areas where LLPs are similar to general partnerships.

- Every partner of the LLP is regarded as an agent of the LLP.[15]
- The relationships amongst partners are governed by the LLP agreement and matters which are not covered by the agreement are governed by the provisions of the First Schedule of the *Limited Liability Partnership Act.*[16] These provisions mirror those in the *Partnership Act* that govern general partnerships very closely.
- Each partner in an LLP is taxed individually on their respective share in the LLP's profits.

The main differences between an LLP and a general partnership are, first, that the LLP is a corporate body having its own legal existence.[17] It can sue and be sued in its own name and has its own legal rights and obligations.[18] It will continue to exist until it is dissolved in accordance with the provisions of the *Limited Liability Partnership Act.*[19] Any change in the partners of an LLP shall not affect the existence, rights or liabilities of the LLP.[20]

12 Section 7 of the *Limited Partnership Act*

13 Section 8 of the *Limited Partnership Act.*

14 Section 6 of the *Limited Liability Partnership Act.*

15 Section 9 of the *Limited Liability Partnership Act.*

16 Section 10 of the *Limited Liability Partnership Act.*

17 Section 4(1) of the *Limited Liability Partnership Act.*

18 Section 5 of the *Limited Liability Partnership Act.*

19 See Pt 4 of the *Limited Liability Partnership Act.*

20 Section 4(3) of the *Limited Liability Partnership Act.*

Secondly, the partners in an LLP enjoy the protection of limited liability. Like the participants in a company, participants in an LLP are not liable for the debts of the LLP.[21] In a sense, an LLP is akin to a "hybrid" between a general partnership and a company. It is an appropriate business structure for parties who wish to retain the management structure of general partnerships while enjoying the benefits of limited liability that comes with being a body corporate.

All LLPs must have at least one manager who is a natural person and who is of full age and capacity. Such a manager must also be ordinarily resident in Singapore. Managers are persons who are concerned in or who take part in the management of the LLP. They need not be a partner of the LLP. The managers are the persons who will be held responsible for failure to comply with key administrative requirements of the *Limited Liability Partnership Act*. These include the need to publish the LLP's name, registration number and limited liability status on its invoices and correspondence and the need to register any change in particulars of the LLP.[22]

Partners are at liberty to resign from the LLP in accordance with the terms of the LLP agreement, or in the absence of such an agreement, upon giving 30 days' notice of their intention to resign. They also cease to be partners upon death.[23]

Trusts

Businesses can also be conducted through trusts. Such trusts are sometimes referred to as "business trusts". A trust arises where one person is required to hold or invest property for the benefit of another person. The person who holds the property is the "trustee", and the people who are entitled to enjoy the property and receive the income or other proceeds from it are the "beneficiaries".

A trust is not itself a legal entity. The person who contracts or holds property for a trust is the trustee. Trustees are personally liable for debts incurred on behalf of the trust, although generally the trustee will have a right to be indemnified (or reimbursed) out of trust assets for the amount of the claim. The beneficiaries generally are not liable for the debts incurred by the trustee, unless they have given specific directions to the trustee and the debt arises as a result of the trustee acting in accordance with those directions. Trusts are governed by the general law of trusts and by the provisions of the *Trustees Act* (Cap 337).

A trust is usually created under a document called a "trust deed". Among other things, the trust deed will:

- define the property and the purpose of the trust, and in the case of a business trust, the business to be carried out under the trust
- the duties of the trustee, and
- the entitlements of the trust's beneficiaries.

21 Section 8 of the *Limited Liability Partnership Act*.

22 Section 23 of the *Limited Liability Partnership Act*.

23 Section 11 of the *Limited Liability Partnership Act*.

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Business trusts are often used in family businesses to enable the distribution of income derived from the business to a number of beneficiaries. They are also particularly suited for businesses that involve high initial capital expenditures with strong expected operational cash flows. This is because, unlike companies which can only pay dividends out of accounting profits, business trusts are under no such restriction and can make distributions to beneficiaries out of operating cash flows. Often, a company is incorporated to act as trustee of the trust and to conduct the business for the benefit of the beneficiaries. This is sometimes referred to as "income splitting". Provided the trust income is fully distributed, it is not taxable in the hands of the trustee.

Where it is intended for the business trust to raise funds from the retail public, it must be registered under the *Business Trusts Act* (Cap 31A).[24] Registered business trusts must have a trustee-manager whose role is to safeguard the interests of beneficiaries (referred to as "unitholders" under the *Business Trusts Act*) of the trust and to manage the business of the trust.[25] The trustee-manager must be a Singapore registered company, which is not an exempt private company (see ¶4-240) and whose sole business must be the management and operation of the trust.[26] The duties and responsibilities of the trustee-manager are spelt out under the *Business Trusts Act*. The *Trustees Act* does not apply to registered business trusts.[27]

Although a registered business trust is not a separate entity, it is taxed as such. Unitholders are not taxed on the sums received as distributions from the registered business trust. In addition, the unitholders in registered business trusts are also given certain rights and privileges, some of which may not be available under ordinary trust law. These are very similar to some of the rights and privileges of shareholders in a company and include:

- limited liability[28]
- the right to remove and replace the trustee-manager[29]
- the right to alter the provisions of the trust deed[30]
- the right to apply to the court for relief against oppression or injustice arising from the management of the business trust,[31] and
- the right to bring a representative or derivative action on behalf of the trust.[32]

A summary comparison of the different business organisations discussed thus far may be found in Figure 4.1.

24 It is open to other business trusts to be registered under the *Business Trusts Act* as well. This may occur where the manager of such a trust feels that the targeted investors may prefer to have the assurance of the protection provided for by the Act.

25 See generally Pt III of the *Business Trusts Act*.

26 Section 6 of the *Business Trusts Act*.

27 Section 94 of the *Business Trusts Act*.

28 Section 32 of the *Business Trusts Act*.

29 Section 20 of the *Business Trusts Act*.

30 Section 31 of the *Business Trusts Act*.

31 Section 41 of the *Business Trusts Act*.

32 Section 42 of the *Business Trusts Act*.

Chapter 12

CONFLICTS OF INTEREST

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The general law rules

Overview of the general law rules .... ¶12-100
What is the general law conflict rule? .... ¶12-120
Transactions with the company .... ¶12-140
Taking corporate property, information and opportunities .... ¶12-160
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The company's constitution

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Statutory regulation

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Disclosure of transactions with the company (s 156(1) disclosures) .... ¶12-310
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Consequences of contravention

Contravention of the general law duty .... ¶12-400
Contravention of the statutory provisions .... ¶12-420

¶12-001 Overview of the duty to avoid conflicts of interest

In Chapter 11 we examined the following duties:

- the duty of care
- the duty not to engage in reckless or wrongful trading
- the duty to act in the best interests of the company
- the duty to retain discretions, and
- the duty to act for a proper purpose.

In this chapter we examine the duty to avoid conflicts of interest. There are three levels of regulation applying to this duty. These are:

- the general law
- the company's constitution, and
- statutory provisions in the *Companies Act*.

The general law rules and statutory provisions are different

The duty to avoid conflicts of interest is not a duty where the statutory provisions in the *Companies Act* are identical to the general law duty. In the case of other duties we have examined, such as the duty of good faith and the duty of care, the content of the general law duties and the statutory provisions is more or less the same. However, as we have also seen when we discussed these other duties there are differences in relation to who enforces any breaches of duty and the remedies or penalties for any breach of duty.

In relation to the duty to avoid conflicts of interest, there are two main differences between the general law rules and the statutory provisions. First, the substance of the general law rules and the statutory provisions may not necessarily be the same. In particular, as we will see in some circumstances, the statutory provisions may provide additional regulation to the general law rules. An example is s 163 of the *Companies Act* which prohibits companies (other than exempt private companies) from, amongst other things, granting loans to or from providing financial assistance for the securing of loans taken by "director-related" companies (see ¶12-350). The statutory regulation is a series of specific rules which add to the general law rules. Compliance with the statutory provisions does not necessarily mean that one has not breached one's general law duties. Conversely, just because one is not in breach of one's common law duty, it does not mean that no statutory duty has been contravened.

The second difference between the general law rules and the statutory provisions is that they do not always apply to the same people. The general law rules apply to:

- directors, and
- senior executive officers who, like directors, can be regarded as fiduciaries.

We saw in ¶11-140 that a fiduciary is a person who is expected to act in the interests of another person. The statutory provisions are different in that the duties may apply to different groups of persons.

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For example, s 156(1), which requires the declaration and notification of certain conflicts of interest, apply to directors and the chief executive officers. Section 156(1) is discussed in ¶12-310. However, s 157(2), which prohibits the improper use of information and position applies to all officers. Section 157(2) is discussed in ¶12-340.

THE GENERAL LAW RULES

¶12-100 Overview of the general law rules

The main general law rule relating to conflicts of interest is that directors must not place themselves in a position of conflict where a personal interest conflicts with their duty to act in the interests of the company. A director can only place himself/herself in a position of conflict with the permission of the company.[1] The rule under the general law is that the company can give its consent only through a resolution of the shareholders in general meeting. But, in practice, many companies have a clause in their constitution under which the board of directors has power to permit a director to place himself/herself in specified types of positions of conflict. The clause in the constitution is intended to override the general law rule that shareholder approval is necessary in those specified circumstances. This is discussed in ¶12-200.

There are a number of situations where this rule applies. It most commonly applies where a director enters into a transaction with the company (see ¶12-140). For example, the director may want to sell some property which the director owns to the company. In this situation, there will be a conflict of interest for the director. The director has a personal interest which is to ensure that the director obtains the highest possible price for the property the director owns when selling the property to the company. However, the director also has a duty to act in the interests of the company and this means ensuring that the company buys the property at the lowest possible price.

Another general law rule concerns directors or senior executive officers taking property, information or business opportunities which belong to the company. When a director does this without the permission of the company, the director is placing his/her personal interest above his/her duty to act in the interests of the company. This is discussed in ¶12-160.

Although the general law conflict rule applies most often where a director's personal interest conflicts with the director's duty to act in the interests of the company, the general law conflict rule also applies where a director has conflicting duties. For example, a person may be a director of two companies and the two duties conflict in relation to a particular matter or transaction (see ¶12-180). Finally, there may be other potentially conflicting interests that may arise in the context of competing companies and nominee directors. These are discussed in ¶12-190 and ¶12-195.

1 *Dayco Products Singapore Pte Ltd v Ong Cheng Aik* [2004] 4 SLR(R) 318.

¶12-120 What is the general law conflict rule?

The duty to avoid and disclose conflicts of interest is a facet of the fiduciary duties owed by directors. As highlighted above, there are many ways through which a director may face a conflict of interest. We will discuss the subject in the context of specific situations where such conflict may arise below. A close examination of the different situations will reveal subtle differences in the application of the rule prohibiting directors from placing themselves in a position of conflict. As a broad general description, the conflict rule under the general law is that a director or senior executive officer must not place themselves in a position where there is an actual or substantial possibility of a conflict between a personal interest and their duty to act in the interests of the company unless the permission of the company is obtained (sometimes referred to as the "no conflict" aspect of the rule).[2] It is not any possible conflict which results in the general law rule applying. There must be an actual conflict or a real sensible possibility of conflict.[3] Consider the following two examples:

> The directors of Company A Pte Ltd decide to have SingTel Ltd provide the company's long distance telephone service. A director of Company A owns shares worth $2,000 in SingTel. The general law conflict rule would not apply to the director. The director's shareholding in SingTel represents only a very small number of shares in one of the largest Singapore companies. The director's shareholding is too small to mean that there is an actual or substantial possibility of a conflict between the personal interest of the director (represented by the shareholding in SingTel) and the director's duty to act in the interests of Company A.
>
> The directors of Company A decide to renovate its head office and select another company which specialises in renovations — Company B — to do this. A director of Company A owns 50% of the shares in Company B. The general law conflict rule will apply to this director. The director's shareholding in Company B is so substantial (50%) that there is an actual or substantial possibility of a conflict between the director's personal interest (which is to ensure that Company B gets as much business as possible and at the highest prices) and the director's duty to act in the interests of Company A (which is to ensure that Company A obtains the best possible deal in relation to renovating its head office).

Where the general law conflict rule applies to a director, the director must disclose his/her interest in the potential conflict situation to the company. This means that the interest must be disclosed to the company at the general meeting. If the interest is not disclosed, there is a breach of the duty to avoid a conflict of interest. The inconvenience of this rule is much alleviated by the fact that in practice, many companies' constitutions usually provide that this rule will be deemed to have been complied with should disclosure be made to the company's board (see ¶12-200) in specified circumstances.

2 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 103; *Phipps v Boardman* [1967] 2 AC 46 at 124. The rule also prohibits directors from secretly profiting from their position as such (sometime referred to as the "no profit" aspect of the rule).

3 *Bhullar v Bhullar* [2003] BCC 711.

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A second aspect of the duty to avoid conflicts of interest places an obligation on directors not to make any secret profits which may arise from the director's position as such (sometimes referred to as the "no profit rule"). Circumstances under which such a duty may arise include situations where directors are paid a commission by third parties or where they profit from opportunities brought to their attention through their office as directors. The "no conflict rule" and "no profit rule" are clearly inter-related aspects of the duty to avoid conflicts of interest. A director who sells property to a company and makes a profit from it has infringed both the rules.

Let us now examine the various main situations where conflicts of interest may arise.

¶12-140 Transactions with the company

The most common situation where the general law conflict rule applies to a director is where the director enters into a transaction with the company. For example, the director enters into a contract to sell property to the company or buy property from the company. In the case of a contract to sell property to the company, there is a conflict between the personal interest of the director (which is to obtain the highest price possible for the property) and the director's duty to act in the interests of the company (which is to ensure that the company buys the property at the lowest price possible).

A director may indirectly contract to buy or sell property to the company. For example, a director may buy or sell the property through a partnership or another company. This happened in *Aberdeen Railway Co v Blaikie Bros*.[4]

> Aberdeen Railway Co entered into a contract to purchase equipment from a partnership which conducted business under the name Blaikie Bros. A director of Aberdeen Railway did not tell the other directors that he was a partner in Blaikie Bros. The court held that the director had breached his duty to not place himself in a position where his personal interest conflicted with his duty to the company. The court stated that the conflict was that the director's personal interest was to have Blaikie Bros sell the equipment to Aberdeen Railway at the highest price possible. However, the director's duty to act in the interests of Aberdeen Railway imposed on the director the duty of obtaining the equipment at the lowest possible price. As a result of the breach of duty by the director, the court held that Aberdeen Railway was entitled to have the contract with Blaikie Bros set aside.

The courts regard the general law conflict rule as so important that they have held that it is not necessary that a conflict between interest and duty cause either a loss to the company or a profit for the director in order for there to be a breach of duty.[5] In most cases where a director transacts with the company,

4 (1854) 1 Macq 461.

5 *Gemstone Corp of Australia Ltd v Grasso* (1994) 12 ACLC 653; 13 ACSR 695. See also the comments of *Yong* CJ in *Yeo Geok Seng v PP* [2000] 1 SLR 195 on the matter in relation to disclosure of transactions under s 156(1).

it can be expected that the director will make a profit on the contract. However, even if the director does not make a profit, there will still be a breach of duty if the director does not disclose his/her interest in the transaction.

Is informal disclosure to the shareholders or knowledge informally acquired by them about the conflict sufficient to absolve the director from being in breach of this duty?

In *Dayco Products Singapore Pte Ltd (in liquidation) v Ong Cheng Aik*,[6] a director of Dayco Products Pte Ltd (Dayco Products) arranged through an elaborate scheme for the company to sell certain goods to two companies which he had an indirect interest in. The director was sued for breach of his fiduciary duties. He argued that he had informally discussed the matter with a representative of Dayco Products' parent company and that this representative had informally agreed to the arrangement. The court, however, held that this was insufficient for the purpose of the director fulfilling his obligation to make appropriate disclosure of conflicts of interest as there was in fact no such disclosure made to the board of Dayco Products itself. More significantly, for the purpose of this discussion, the Court also opined that the proposition that informal disclosure or knowledge informally acquired is sufficient to satisfy the disclosure requirements pertaining to breach of directors' duties was unsustainable in law.[7]

However, doubts have been cast on the proposition put forward by the *Dayco Products* case in *Maxz Universal Development Group Pte Ltd v Lian Hwee Choo Phebe*.[8] One of the issues in that case was whether or not the defendant, Lian Hwee Choo Phebe, acted in breach of the no conflict rule by causing her company, Corporate United Limited, to extend a $1m standby letter of credit in favour of the plaintiff at a cost of $53,664. The court found, as a matter of fact, that the rest of the directors of the plaintiff knew that the defendant was the owner of Corporate United Limited and had sought assistance from the defendant to cause CUL to provide financial aid to the plaintiff.

Lai Siu Chiu J found in favour of the defendant and held that "(w)here the directors of a company know of another director's interest in a particular transaction, the failure of that director to make a formal disclosure to the other directors does not make the director liable for breach of his fiduciary duties" and took the view that there should not be any reason why informal disclosure should be insufficient to satisfy the requirement of disclosure for the purposes of disclosure obligations in the context of directors' transactions with the company.[9]

It is submitted that whether or not informal disclosure of conflicts in transactions is sufficient to discharge disclosure obligations in the context of directors' transactions with a company depends on an interpretation of the company's constitution. Under the general law, directors who transact with the company are to disclose their conflict of interest to the company at general

6 [2004] 4 SLR 318.
7 *Dayco Products Singapore Pte Ltd (in liquidation) v Ong Cheng Aik* 4 [2004] 4 SLR 318 at para 18.
8 [2010] SGHC 64.
9 Ibid at paras 35–39.

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meeting (see ¶12-200). The reason why disclosure to an independent board is an acceptable alternative mode of disclosure is because a company's constitution may provide this to be the case. Thus, if a company's constitution requires formal disclosure at a board meeting or strict compliance with s 156(1) (which specifically makes reference to disclosure at a meeting of the directors; see ¶12-310), then formal disclosure is necessary.

It is, however, submitted that where there has been informal disclosure and assent by all the shareholders of the company to the transaction, the principle that members of a company are bound by decisions on which they all agree even where the formalities required for a general meeting have not been complied with (ie the doctrine of unanimous assent) (see ¶8-580) should apply and proper disclosure should be regarded as having taken place.[10]

¶12-160 Taking corporate property, information and opportunities

What is the rule?

There is another general law rule which builds upon the general law conflict rule. This rule (which is sometimes referred to as the "no profit" aspect of the conflict rule) states that directors must not take corporate property, information or opportunities without the permission of the company. A corporate opportunity is a business opportunity which the company is considering or one in which the company might reasonably be expected to be interested, given its current line of business. This rule builds upon the general law conflict rule because where a director takes corporate property, information or opportunities without the permission of the company, the director places his/her personal interest over his/her duty to act in the interests of the company.

The following is an example of a director breaching his/her duty by setting up a competing company to take advantage of an opportunity which should have gone to the company of which he/she was a director.[11]

> Compaq had arranged to engage Personal Automation Mart ("the company") as its service agent in relation to an information technology project referred to as "GEMS". The negotiations were managed by the company's managing director, Tan. An internal dispute arose between Tan and the majority shareholder of the company which prompted Tan to resign and to set up another business called "Newstead". She took with her some of the company's employees who had assisted on the GEMS project. The court found that Tan had deliberately caused Compaq to cease its dealings with the company and to transfer the

10 See *Chin Siew Seng v Quah Hun Kok Francis and another appeal* [2010] SGCA 44, where the Court of Appeal held a director not to be in breach of his duty to avoid conflicts in the context of the taking of corporate opportunities because all the directors and shareholders knew and consented to the action being complained of.

11 *Personal Automation Mart Pte Ltd v Tan Swe Sang* [2000] SGHC 55.

GEMS project to Newstead. It held that Tan had breached her fiduciary duties by setting up a competing company to take advantage of a contract that should have gone to the company. She was ordered to pay damages in respect of the breach.

The court in *Seaspan Agencies Pte Ltd v Chin Siew Seng (Ho Syn Ngan Joanne and another, third parties) and another* suit held that a director would still be in breach of duty if the company which obtained the benefit of the opportunity and the company seeking a remedy for breach were in different businesses, particularly if the reason why the latter was unable to take advantage of the opportunity was because the director had diverted the opportunity. The fact that the opportunity was introduced to the company in the first place by the director concerned was also an irrelevant consideration.[12]

The following is an example of several directors breaching their duty by taking a corporate opportunity.[13]

> Toronto Construction Co had built several railway lines for the Canadian Pacific Railway Co. Disagreements arose between three of the directors of Toronto Construction (who held approximately three quarters of the shares of Toronto Construction) and the fourth director — Cook (who held a quarter of the shares of Toronto Construction). These three directors decided that Cook should not be allowed to participate in any new business.
>
> They commenced negotiations with Canadian Pacific Railway about the construction of a new railway line. Although, in the early stages of the negotiations, they said they were acting on behalf of Toronto Construction, when the negotiations for the contract were completed, the directors formed a new company, Dominion Construction Co, in which Cook was neither a shareholder nor director, and had this new company carry out the contract for building the new railway. The three directors called a general meeting of the shareholders of Toronto Construction and, using their own votes, had resolutions passed which declared that Toronto Construction had no interest in the new contract and which also approved the sale of some of Toronto Construction's equipment to Dominion Construction. Cook sued the other directors for breach of duty.
>
> The court held that they had breached their duty by placing their personal interests (which involved taking a corporate opportunity which was the right to build the new railway line) above their duty to Toronto Construction (which was to do all they could to ensure that Toronto Construction obtained the new contract).

12 [2010] SGHC 38. It should be noted that while the decision was reversed on appeal by the Court of Appeal, this was primarily on their disagreement with the factual conclusions of the High Court and the Court of Appeal did not comment on this legal proposition put forward by *Lai Siu Chiu* J.

13 *Cook v Deeks* [1916] 1 AC 554.

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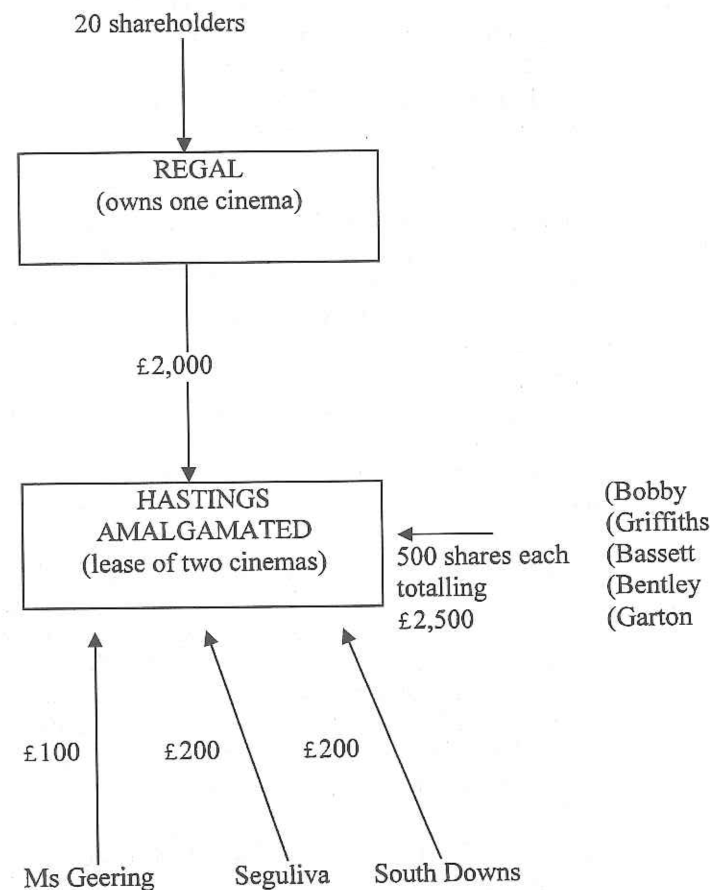
What if the company cannot take the opportunity?

We have seen that a director must not take a business opportunity which the company is currently considering or in which it might reasonably be expected to be interested, given its current line of business. What if the company is unable to take up the opportunity because, for example, it does not have the financial resources to do so? In these circumstances, is a director of the company able to take up the opportunity without there being a breach of duty? The courts have applied the rule strictly in these circumstances to still decide there is a breach of duty.

Consider the following case,[14] the facts of which are illustrated in Figure 12.1.

FIGURE 12.1 — REGAL (HASTINGS) v GULLIVER



> Regal (Hastings) Ltd owned a cinema. It had 20 shareholders and its directors were Gulliver (the chairperson of the board), Bobby, Griffiths, Bassett and Bentley. Garton was the solicitor for Regal. The directors of Regal decided to acquire leases of two other cinemas and formed a

14 *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378.

subsidiary, called Hastings Amalgamated Cinemas Ltd, to obtain the leases of the two cinemas. The owner of the two cinemas required that the capital of Hastings Amalgamated needed to be at least £5,000. Regal had invested £2,000 in shares issued by Hastings Amalgamated and it was said that this was all that Regal could afford to invest. In order to provide the extra £3,000 of capital, four directors of Regal each invested £500 and obtained 500 £1 shares in Hastings Amalgamated. These directors were Bobby, Griffiths, Bassett and Bentley. The solicitor for Regal, Garton, also invested £500 and obtained 500 £1 shares in Hastings Amalgamated. Although the chairperson of the board of Regal, Gulliver, did not personally invest in shares in Hastings Amalgamated, two companies in which he owned shares, Seguliva AG and South Downes Land Co Ltd, bought 200 £1 shares each and a Ms Geering acquired 100 £1 shares at the nomination of Gulliver. In this way, an additional £3,000 of capital was raised by Hastings Amalgamated.

At the same time that the directors of Regal were negotiating to acquire the leases of the two cinemas, the directors were also negotiating to sell the one cinema owned by Regal and also sell the leases of the two cinemas to be owned by Hastings Amalgamated. This plan changed. Three weeks after the directors of Regal and the others invested the £3,000 in Hastings Amalgamated, all of the shares in Regal and Hastings Amalgamated were sold to a new owner. Those who had originally bought shares in Hastings Amalgamated made a profit of more than £2 per share when the shares were sold.

When the shares in Regal were sold, the directors were replaced by directors representing the new owner. The new directors had Regal sue Gulliver, the four other directors, and Garton (Regal's solicitor) claiming that they had breached their duties and that the profit that they had made on the sale of their shares in Hastings Amalgamated belonged to Regal.

The court held that the four directors (Bobby, Griffiths, Bassett and Bentley) had breached their duties. They had taken an opportunity (which was to make a very profitable investment in the shares of Hastings Amalgamated) with the result that the shareholders of Regal received a reduced proportion of the sale price of Hastings Amalgamated. In the court proceedings, the directors of Regal argued that they should not be held to have breached their duties because Regal did not have the financial resources to invest more than £2,000 in shares of Hastings Amalgamated.

However, the court still held the directors to be in breach of duty. The principle underlying the decision is a concern that if directors are permitted to justify taking a corporate opportunity on the basis that the company does not have the financial resources to take up the opportunity, then directors might be tempted to refrain from exerting their best efforts on behalf of the company.[15]

15 H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law*, (10th edn, 2001), 9.240.

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The court held that Garton, the company's solicitor, did not have to pay to Regal the profit he made on the sale of his shares in Hastings Amalgamated. This was because he was requested by the directors to purchase the shares. The chairperson of the board of Regal, Gulliver, was held not to have breached his duty because he had not invested personally in the shares of Hastings Amalgamated.

The decision in *Regal (Hastings)* has been criticised on the basis that while the four directors were held to have breached their duties, the two people who were most closely associated with the transaction (Gulliver and Garton) were able to avoid liability. Even though Gulliver did not personally invest in the shares of Hastings Amalgamated, he was a shareholder in two companies which profited by buying shares in Hastings Amalgamated. In addition, the new owner of Regal and Hastings Amalgamated, by proving a breach of duty by the four directors of Regal, was able to obtain a windfall profit. Although the new owner had paid what was a fair price for the shares of both companies, by establishing a breach of duty by the four directors, the profits made by the four directors had to be paid to Regal which was to the financial benefit of the new owner. The old shareholders of Regal did not receive any of these profits even though they were shareholders at the time the directors breached their duties.

The principle that directors cannot take advantage of a corporate opportunity without proper disclosure even if the company is not in a position to do so was, however, adopted in the example of *Personal Automation Mart v Tan Swe Sang* discussed earlier. In its decision, the court went on to suggest that even if Compaq had doubts about continuing to engage the company for the GEMS project upon Tan's departure from the company, Tan should still steer clear of the project.[16]

The principle is again illustrated in the following local case.[17]

Hytech Builders Pte Ltd intended to enter into a joint venture with a Taiwanese company, Kung Sing, to tender for a construction project in Taipei referred to as "Contract 220". Unfortunately, Hytech did not meet the necessary qualification requirements at the time. The board of Hytech then decided to tender for the contract using the name of one of its associated companies, Sibelco. Hytech owned 50% of the shares of Sibelco. Tan, a director of Hytech, was asked to oversee the tender. There was some difficulty in getting the other shareholders in Sibelco to agree to the arrangement. According to Tan, he was pressured by time and consequently arranged for Evergreat, a family owned company that he controlled, to engage in the tender with Kung Sing and another company. The tender was successful.

Hytech Builders brought an action against Tan for breach of fiduciary duties in diverting a business opportunity that belonged to it to benefit himself. One of the defences that Tan raised was that Hytech was not

16 See note 5 above at para 60.

17 *Hytech Builders Pte Ltd v Tan Eng Leong* [1995] 2 SLR 795.

PART H — PROBLEM SETS AND SELECTED LEGISLATIVE EXTRACTS

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PROBLEM SETS

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INTRODUCTION TO THE CASE STUDIES

¶25-001 Introduction to the case studies

This section of the book contains three case studies. The case studies concern:

- Listco Limited (Listco), a widely held listed public company,
- Subco Limited (Subco), a partly owned subsidiary of Listco that is an unlisted public company, and
- Smallco Pte Ltd (Smallco), a private company that is jointly owned and run by a husband and wife who operate a small business.

The case studies are followed by a series of questions and problems that relate to the legal principles discussed in the book. You should work through the questions and problems as your reading progresses. This will help you to apply the legal principles to real scenarios involving the day-to-day operations of different types of companies.

BACKGROUND INFORMATION

¶25-050 Background information

Listco Ltd

Listco is a public company. Its ordinary shares are listed for quotation on the SGX. The core businesses of Listco are the production, processing and distribution of food. Listco is the sixth largest diversified food and agribusiness company in the world, with substantial operations in Singapore, Canada, the United Kingdom and China.

The company traces its history back to the 1930s, when it was established by two brothers who made and sold bread from a small bakery. The business was successful and grew over several decades largely through the acquisition of other local bakers, grain companies and millers. Shares in the company operating the business, Collingwood Foods Ltd, were held by members of the founders' families until the 1960s. In 1968, shares in the company were offered to the public, and the company was listed on the stock exchange.

Collingwood Foods was acquired by Oldsmith Ltd in a 1983 take-over. Oldsmith was a diversified investment corporation with interests in, among other things, construction, brewing, merchant banking and commercial property. During the 1980s, Oldsmith pursued an aggressive growth strategy, acquiring a number of assets in Singapore and overseas that were not directly related to its core businesses. These assets included commercial property and a sizeable investment in a large number of other listed companies including construction and technology companies. Oldsmith borrowed heavily to fund the acquisitions.

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Following the share market crash in 1997 and the collapse of the commercial property market in the late 1990s, the company went through a significant restructuring, including a change in management, the sale of a number of non-core assets, and a significant debt reduction program. In 2000, the company changed its name from Oldsmith Ltd to Listco.

By the mid-2000, its corporate focus had returned to food production and processing. In 2001, to strengthen its distribution capacity, it acquired a controlling interest in Wong Supermarkets Ltd. Various other smaller retail operations have since been added to its portfolio. These retail operations are consolidated in an operating subsidiary called Subco.

Listco's assets comprise, for the most part, shares in various companies that carry on different parts of the enterprise. Organisationally, the Group is divided into three divisions:

- food production and processing,
- retail, and
- transport and logistics.

Listco's 2014 financial statements show that it has over 200 wholly-owned subsidiaries (that is, companies in which all the issued shares are owned by Listco). There are a further 11 companies in which Listco has a controlling interest but that are not wholly-owned subsidiaries. These include Subco, which is 73% owned by Listco.

Listco and its controlled entities are referred to collectively as the "Listco Group".

Capital structure

Listco's most recent financial statements show that its issued capital consists of 1,141,788,759 ordinary fully paid shares. The current market price of each ordinary share is $4.45.

Its ordinary shareholders comprise the following:

Number of shares held	*Number of ordinary shareholders*
1–1,000	27,686
1,001–5,000	37,709
5,001–10,000	5,743
10,001–100,000	3,799
100,001 and over	118

The single largest shareholder in Listco is Weldone Grain Ltd, with 239,775,639 ordinary shares, or 21% of the issued capital. Weldone is an unlisted public company, in which Richard Ross, the flamboyant industries entrepreneur, has a significant stake.

Management structure

The board of directors of Listco has eight members, and consists of two executive directors and six non-executive directors. The directors are:

- Mr Abe Addis, Chairperson. Mr Addis is the former chief executive of a listed construction company and holds a number of non-executive board positions in large Singapore listed companies. He is aged 65.
- Mr Barry Boon, Deputy Chairperson. Mr Boon is a former senior partner of a "big five" accounting firm. He also holds several non-executive board positions. He is aged 69.
- Mr Charlie Chee. Mr Chee is a partner of a well-known law firm. He is aged 48.
- Professor Dawn Driver. Ms Driver is a Professor of Management at a local business school. She is aged 52.
- Mr Eddie Erwanti. Mr Erwanti is the former chief executive of the Singapore operating subsidiary of an international retailing company. He is aged 57.
- Mr Frank Foo. Mr Foo is the Managing Director and Chief Executive Officer of Listco. He has held that position since 2006 and is aged 54.
- Mr Gary Goh. Mr Goh is the Finance Director and Chief Financial Officer of Listco, a position he has held since 2008. He is aged 46.
- Mr Richard Ross. Mr Ross is the controlling shareholder in Weldone Grain Ltd which owns 21% of the issued capital of Listco.

The company secretary of Listco is Ms Helen Ho.

The management structure of Listco is illustrated in the following diagram:

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Subco Ltd

Subco is an unlisted public company that owns and operates a chain of supermarkets and specialty food and beverage stores throughout Malaysia and Singapore.

Listco owns 73% of the ordinary shares in Subco. The balance of the ordinary shares in Subco are owned by eight other shareholders, all of whom are members of or associated with the Wong family. Subco acquired the Wong Supermarket business from the Wong family in 2001.

As at 30 June 2002, Subco had net assets of $198m and borrowings of $60m. The business has been operating at a loss for several years.

Capital structure

Subco has 234,685,000 ordinary shares and 32,814,300 cumulative preference shares. Its ordinary shareholders are:

• Listco Ltd	171,320,050	(73%)
• Tommy Wong	23,468,500	(10%)
• Rufus Wong	11,734,250	(5%)
• Six other Wong family shareholders	28,162,200	(12%)

Its preference shareholders are:

• Institution A	10,500,576	(32%)
• Institution B	14,766,435	(45%)
• Institution C	7,547,289	(23%)

Management structure

The board of directors of Subco has five members. They are:

- Mr Frank Foo,
- Mr Barry Boon,
- Ms Jenny Johnson, Managing Director, Subco,
- Mr Tommy Wong, who was Chief Executive Officer of Wong Supermarkets Ltd before it was acquired by Subco, and who is now retired, and
- Ms Sally Sim, a lawyer who was a non-executive director of Wong Supermarkets before it was acquired by Subco.

The company secretary of Subco is Ms Helen Ho.

Smallco Graphics

Smallco Graphics is a business owned and operated by Mr Mal Mah, which specialises in graphic design and corporate imaging. Mah began the business in 1993 and it has expanded steadily since that time. Mah employs two part-time illustrators, and an office manager who comes in three days per week and handles the paper work and accounts.

In 2007, Mah married Lisa Lim. Lisa is an accountant who works in a small accountancy practice, specialising in tax. She is 35 years old. Mah is 40 years old.

Mah has an overdraft with LargeBank of $25,000. Last year, the net profits of the business amounted to $55,000.

Recently an old school friend of Lisa's approached Mah with a proposal that Smallco Graphics take over the corporate imaging and graphic design work for his rapidly growing computer company. The contract would represent a substantial growth opportunity for Smallco Graphics, but would require extra staff, a move to larger premises and a fairly sizeable investment in additional computer and drawing equipment.

Mah is keen to take up the opportunity. Lisa proposes that, before doing so, they form a company in which she and Mah are both shareholders, and transfer the business to it. Once the new company is established, she proposes to leave the accounting firm and join Smallco Graphics full time as its business manager. Their intention is that ownership and control will be shared between them equally.

Lisa and Mah decide to incorporate a private company to run the business, called Smallco Pte Ltd. They decide that:

- each will own five ordinary shares in the company, and
- each will be appointed a director.

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PROBLEM SET 1

¶25-100 Problem Set 1

The following problems and questions should be answered after you have read Chapters 1 and 2.

(1) Listco Ltd is a listed public company, and Subco is an unlisted public company. What is the difference between a listed company and an unlisted company?

(2) "Companies developed as a vehicle for collective action but are now used predominantly for other purposes." Discuss.

(3) What are some of the sources of "hard" and "soft" law regulating companies in Singapore?

(4) What is ACRA? What are the main functions and responsibilities of ACRA?

(5) What is the SGX Listing Manual? To which of the companies in the case study do they apply?

PROBLEM SET 2

¶25-150 Problem Set 2

The following problems and questions should be answered after you have read Chapters 3 and 4.

(1) What are the advantages for Mah and Lisa in conducting the Smallco Graphics business through a company? What are the disadvantages?

(2) Would you advise Mah and Lisa to use a public company or a private company to carry on their business? Why?

(3) Summarise the steps necessary to register Smallco Pte Ltd as a private company limited by shares.

(4) Is Listco a subsidiary of Weldone Grain Ltd? Is it an associated company of Weldone Grain Ltd? Is Subco a subsidiary or an associated company of Listco? Explain your answer by reference to the relevant definitions in the relevant statutes/regulations.

(5) Lisa and Mah have been told by a friend that the main advantage to carrying on business through a company is that their personal assets are protected by the legal principle of "limited liability". After Smallco is registered, the following occur:

- Smallco executes a one-year lease for new premises for the business.
- Smallco borrows RM30,000 from LargeBank to fund expansion of the business. LargeBank will agree to lend the money to Smallco only if Lisa and Mah personally guarantee repayment of the loan. At the Bank's request, Lisa and Mah agree to give the bank a mortgage over their house to secure their obligations under the guarantee.
- Smallco agrees to purchase some computers from a supplier called ComCo. Under the terms of the purchase agreement one-third of the purchase price is payable on delivery, with the balance payable in equal monthly instalments over the following two years.

If, six months after the agreements are entered into, Smallco were unable to make the payments required under the agreements, would Lisa or Mah be personally liable to the landlord, the Bank or ComCo? How would your answer differ if Lisa and Mah carried on the business as partners, and each of the agreements had been entered into by them as partners?

(6) Listco has over 200 subsidiaries. What are the advantages and disadvantages for a company like Listco in operating its businesses through different subsidiaries?

(7) Under what circumstances (if any) could Listco become liable for the debts of Subco?

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PROBLEM SET 3

¶25-200 Problem Set 3

The following problems and questions should be answered after you have read Chapters 5 and 6.

(1) Is Smallco required to lodge its constitution with the ACRA upon incorporation? What are the implications if it does or so if it does not do so? What is the status of the memorandum and articles of association of companies which were incorporated prior to the commencement of operation of the *Companies (Amendment) Act 2014*?

(2) Lisa and Mah would like Smallco's constitution to provide that each is entitled to be a director of the company, and cannot be removed against their wishes. They would also like to include a provision that all business decisions involving expenditure of more than $10,000 must be agreed to by both directors. Can they do so? If so, what is required? Is there any thing else that they can do to preserve these rights?

(3) Subco has a constitution that have been in force since it was incorporated in 1993. Can Subco alter its constitution? If so, what are the necessary procedures?

(4) Assume for the purposes of this question that Subco's constitution contains a clause limiting its objects to food and beverage retailing and related activities (including owning shares in companies that operate primarily in food and beverage retailing). In breach of that restriction, Subco enters into an agreement with another company to buy a chain of bookstores. What, if anything, is the effect of the breach? Can any party take action to stop Subco from entering into such an agreement in breach of the restriction?

(5) The board of directors of Subco has been considering expanding its operations into North America. While on a trip to Canada, Frank Foo identifies what he believes to be a suitable investment opportunity for Subco. At the next board meeting of Listco, the Listco board passes a resolution instructing Subco to buy the business. However, three of the members of the Subco board do not believe that the acquisition is in Subco's best interests. Frank tells the Subco board that it must do as Listco wishes, because Listco is Subco's majority shareholder. Is this correct? What options are available to Listco if Subco refuses to follow its instructions?

(6) What are the roles of the board of directors, other officers of the company and the company secretary?

(7) What do you understand by the phrase "good corporate governance practice"?

PROBLEM SET 4

¶25-250 Problem Set 4

The following problems and questions should be answered after you have read Chapters 7 and 8.

(1) Does Richard Ross have a controlling interest in Listco based on the facts given? What is the degree of "control" which he has over the company? What is his deemed interest in the company based on the given facts? What other factors need to be examined to determine the whole of Richard Ross's interest in Listco?

(2) Listco has been holding secret negotiations with TLG Ltd to sell its transport and logistics business. This business accounts for about one-quarter of Listco's assets, and one-fifth of revenues. Would the sale of this business require the approval of Listco's shareholders?

(3) Rufus Wong is unhappy with the way Subco is being run. The company has not made a profit or paid a dividend since 1998. Rufus attends Subco's annual general meeting (AGM), where he asks a number of questions about Subco's operations and criticises the performance of the company's executive directors. After about 45 minutes, the Chairperson refuses to take further questions from Rufus. Is this allowed?

(4) Rufus subsequently realises that the notice of meeting which was sent to him was actually sent late and did not comply with the requirement that he be given at least 14 days' notice of the meeting. What is the impact of this fact on the validity of the meeting and all resolutions passed at the meeting?

(5) After the AGM, Rufus decides that his best chance of influencing the future direction of Subco is to remove Barry Boon as a director and have himself appointed in Barry's place. He decides to request that the directors of Subco call a members' meeting to put the resolutions to a vote. Rufus seeks your advice on the following:

- Is he entitled to request a meeting?
- What procedural requirements apply to that request?
- The board of Subco replies to his request by saying that the meeting would be a waste of money, because Listco will vote against the resolutions and therefore they cannot be carried. It therefore refuses to call the meeting. Rufus would like the meeting to go ahead nevertheless. What can he do?

(6) The board of Subco feels that having to conduct AGMs every year is not productive. They wish to not have to have such meetings in the future. Can they arrange for this? If this is done, how would the board arrange for resolutions to be passed?

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PROBLEM SET 5

¶25-300 Problem Set 5

The following problems and questions should be answered after you have read Chapters 9 and 10.

(1) A number of the shareholders of Listco are managed investment schemes (public unit trusts), each with their own investors. At a meeting of the Listco board, Eddie Erwanti expresses concern that the responsible entities (ie the companies that operate the schemes) of the managed investment schemes may vote their shares in Listco without consulting what the director refers to as the "ultimate owners" of Listco; that is, the investors in the schemes.

Mr Erwanti argues that this is a denial of shareholder democracy, and suggests that Listco amends its articles so that any shares held by a managed investment scheme can only be voted if the responsible entity of the scheme has consulted the scheme's investors. Would this be a valid amendment of Listco's articles?

(2) How do amendments made by the *Companies (Amendment) Act 2014* address the concerns of investors who use their CPF to invest in listed companies under the CPFIS in relation to their ability to attend and vote at company meetings?

(3) Is it correct to say that shareholders who hold majority voting power in a company can do as they please in relation to the affairs of the company?

(4) Which of Listco's directors are:

- executive directors,
- non-executive directors, and
- independent directors?

(5) Lisa's mother is considering investing some money in Smallco. However, she has stated that, if she were to invest, she would like to be appointed as a director. Mrs Lim is aged 73. She has no formal business qualifications. Until several years ago, she was a director in all her husband's companies but was not really involved in their management or running. In 2011, she was convicted under the *Parking Places Act* for displaying tampered parking coupons and was fined $500. Is she eligible to be appointed as a director of Smallco?

(6) Mr Boon's three-year appointment as a director of Listco comes to an end at the conclusion of the company's AGM in 2015. Can he offer himself for re-election at that meeting?

(7) Frank Foo and Jenny Johnson are aware that Rufus Wong is unhappy with the management of Subco, and that he has raised his concerns with other Wong family shareholders. They decide to hold a meeting with the other directors (excluding Tommy Wong) to discuss the situation. They do not tell Tommy about the meeting.

At the meeting, the directors in attendance decide to appoint Gary Goh as an additional director of Subco. Can they do so?

Sally Sims warns that Gary's appointment may not be valid, if the meeting is not a properly constituted board meeting. Is the meeting properly constituted?

Frank Foo argues that, if all the directors other than Tommy Wong are in favour of the appointment, the resolution would be carried at a board meeting in any event, so they need not worry about the formalities. Is this correct?

(8) In Problem Set 3, we saw that Subco was considering acquiring a business in North America. The proposal is reformulated and put to the Subco board again and this time the majority of directors vote in favour of the acquisition.

Following this decision, the Wong family members become convinced that the Subco board has become little more than a "rubber stamp" for Listco, automatically approving operating and financing decisions made by Listco's management.

The Wong family's solicitor tells them that, in these circumstances, Listco may be treated as a director of Subco, and made subject to the statutory duties that apply to company directors. Is this correct?

(9) Listco is thinking to have Jenny Johnson removed from the Subco board and from her executive position as managing director of the company. How is this supposed to be done? Assume that Jenny Johnson has a clause in her contract of appointment which states that she should be paid 36 months' salary upon early termination of her appointment as managing director. Can such a payment be made to her?

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PROBLEM SET 6

¶25-350 Problem Set 6

The following problems and questions should be answered after you have read Chapter 11.

(1) The financial statements for the 2001–2002 financial year show that Subco has again made a significant loss. The following factors have contributed to that loss:

- Subco invested heavily in setting up a mail order wine distribution business. The executive appointed by the board to manage the project was a wine expert but had no experience in sales. The project was running at a loss but the executive exaggerated the sales figures in his monthly management reports and otherwise concealed the full extent of the problem.
- On Jenny Johnson's recommendation, the board of Subco renegotiated the leases on a number of key supermarket sites, to fix its rental payments for a period of five years. Jenny believed that rents would rise substantially over that period. In fact, market rents fell and Subco, as tenant, was worse off than it would have been if it had not renegotiated the leases.
- A food contamination scare substantially affected sales by Big Bakers Pte Ltd, a wholly-owned subsidiary of Subco. Subco was not insured against the losses sustained. It would be considered normal prudent business practice to take out insurance of this kind.

Do any of these factors amount to a breach of the duty of care, skill and diligence by the directors of Subco?

(2) At the Listco end-of-financial-year party, Tommy Wong overhears a discussion in the men's room between Frank Foo and Gary Goh. Frank tells Gary that the Listco board is considering making an offer to acquire the shares in Subco held by the dissident Wong family shareholders. He mentions a figure of between 85 cents and $1.20 per share.

The next day Tommy telephones several members of the family and, without revealing what he has heard, offers to buy their shares in Subco for 85 cents per share. Several elderly members of the family, who trust him implicitly and rely on him for investment advice, accept his offer immediately.

If Listco were to go ahead with its offer at a price higher than 85 cents per share, would the family members who sell to Tommy have any claim against him as a director of Subco or otherwise? You can ignore the provisions of the Singapore Code of Take-overs and Mergers in answering this question.