# Oppression vs Derivative Actions: The Court's Wide Discretion Maintained

Section 346 of the Companies Act 2016 ("CA 2016") provides wide powers to the Court to grant remedies as it deems necessary to bring an end to the matters complained of in an oppression action. In *Lee Kai Wuen v Lee Yee Wuen*,[1] the Federal Court refused leave to appeal against the Court of Appeal's decision which found that the Court's powers in an oppression action are wide and unfettered. This includes the power to order restitution to the company, a remedy traditionally seen as belonging to the company.

*Authors*

**Foo Joon Liang** FCIArb, FSIArb, FHKIArb
*Partner*

**Lee Xin Div**
*Senior Associate*

## Facts

The subject company has two shareholders. The Plaintiff (majority shareholder) filed an oppression action against the other shareholder and a third party ("**Oppressors**") anchored on amongst others the allegation of misappropriation of company funds. According to the Plaintiff, upon the hospitalisation and the eventual death of the previous majority shareholder, the Oppressors conspired to cause the creditors to pay to them monies which were supposed to be paid to the company. The Plaintiff has successfully obtained a Mareva injunction to freeze the Oppressors' bank accounts in order to preserve the misappropriated funds while the court action is pending.[2]

Separately, the Oppressors took out an application to summarily strike out the Plaintiff's oppression action, chiefly on the ground of abuse of the Court's process. Basically, the Oppressors argued that, since the Plaintiff is asking for the monies to be returned to the company, the company should sue for monies by way of a derivative action, and not the Plaintiff who is the majority shareholder of the company. It is therefore an abuse of process for the Plaintiff to initiate the oppression action in order to bypass the notice requirement in a derivative action.



[1] *Lee Yee Wuen v Lee Kai Wuen*, Federal Court Civil Application No.: 08(i)-148-07/2020(J).
[2] *Lee Yee Wuen v Lee Kai Wuen* [2020] MLJU 1953 (High Court) – *Inter-partes* Mareva Injunction.

## High Court's Decision

At the first instance, the High Court allowed the Oppressors' application, thereby striking out certain prayers of the oppression action, which asked for the funds to be returned to the company.[3]

The High Court allowed the application principally on the premise that, since the prayers claimed for a relief for the company, they are essentially derivative claims and the Plaintiff is wrong in commencing an oppression action instead of a derivative action. In this regard, heavy reliance was placed by the High Court on the distinction between "personal wrong" and "corporate wrong", or between "personal loss" and "company loss". Namely, when the relief prayed for concerns a company loss, i.e. the misappropriation of the company funds, the company is the proper plaintiff to sue, and not a shareholder

Accordingly, the High Court struck out the prayers for the funds to be returned to the company.

## Court of Appeal's Decision

The Plaintiff appealed to the Court of Appeal. The Court of Appeal reversed the High Court's decision, thereby reinstating the prayers in the oppression action for hearing in the High Court.[4]

### (a) Wide Powers to Grant Remedies

In its Grounds of Judgment, the Court of Appeal considered a plain or natural interpretation to the clear wording in section 346 of the CA 2016, which provides the Court with the discretion to choose from a wide array of remedies and grant the appropriate relief. The Court of Appeal went further to hold that such extensive power even includes the discretion to grant "*relief which has not even been prayed for*". The Court of Appeal used phrases like "*unfettered*" and "*no limits*" to further illustrate the extent of such power.

On the facts of this case, the Court of Appeal considered it to be trite law that misappropriation of monies can constitute an act of oppression. The same applies when the misappropriation was committed against a family company. Otherwise, the Court of Appeal held that it is "*illogical*" and "*incomprehensible*" that, whilst misappropriation can constitute oppression, the Court cannot thereafter grant restitutionary relief for the monies to be repaid to the company.



[3] *Lee Yee Wuen v Lee Kai Wuen* [2019] 1 LNS 1862 (High Court) – Striking Out.
[4] *Lee Yee Wuen v Lee Kai Wuen* [2020] MLJU 1902 (Court of Appeal) – Striking Out.

**(b) Reflective Loss Principle Inapplicable**

Having held that restitutionary remedies are not prohibited by section 346 of the CA 2016, the next main issue was whether the Reflective Loss Principle ("**RLP**") operates to prevent the granting of such remedies. Based on RLP, a shareholder cannot bring a claim for the diminution in value of its shares which results from a loss suffered by the company (company loss) in relation to a wrong done to the company (corporate wrong). The primary justification for RLP is to avoid double recovery.

In delivering the judgment, the Court of Appeal discussed several appellate pronouncements in the Commonwealth jurisdictions, including the Federal Court's decisions of *Re Kong Thai Sawmill (Miri) Sdn Bhd*[5], *Rinota Construction Sdn Bhd v Mascon Rinota Sdn Bhd*[6], Singapore Court of Appeal's decision of *Ho Yee Kong v Sakae Holdings*[7], and the United Kingdom Supreme Court's decision of *Marex Financial Ltd v Sevilleja*[8].

In *Marex*, Sevilleja ("**S**") owned and controlled two companies ("**Companies**"). Marex Financial Ltd ("**M**") obtained a judgment against the Companies. S moved assets from the Companies, thereby disabling the Companies from satisfying the judgment debt. M sued S for tort of causing the Companies to suffer losses by unlawful means. The UK Supreme Court held that RLP applies to shareholders, but not the creditors of the company. As such, M is not prevented by RLP to sue M.

While recognising that RLP remains in the UK pertaining to shareholders, the Court of Appeal questioned its survivability in the future. Nonetheless, for the purpose of this case, the Court of Appeal held that RLP does not apply to an oppression action where restitutionary remedies are sought for the misappropriated monies to be repaid by the wrongdoer to the company, provided that there is no risk of double recovery. In this regard, the Court of Appeal relied on the pronouncement in *Rinota* that RLP has no application to an oppression action where the diminution in share value is due to the oppressive acts. RLP also does not apply when the complainant in an oppression action is not seeking a remedy for itself personally, but is seeking restitution for the company.

Hence, the Court of Appeal concluded that the Plaintiff's prayers for the return of the misappropriated funds are not unsustainable or entirely hopeless. Those prayers were reinstated in the High Court for hearing.



[5] *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 (Federal Court).
[6] *Rinota Construction Sdn Bhd v Mascon Rinota Sdn Bhd* [2018] 1 MLJ 141 (Federal Court).
[7] *Ho Yee Kong v Sakae Holdings* [2018] 2 SLR 333 (Court of Appeal, Singapore).
[8] *Marex Financial Ltd v Sevilleja* [2020] UKSC 31 (Supreme Court, United Kingdom).

## Federal Court's Decision

The Oppressors applied for leave to appeal to the Federal Court and proposed 12 questions of law to challenge the Court of Appeal's decision. The Federal Court dismissed the leave application in total and did not disturb the Court of Appeal's decision.

## Commentary

The wide language used in the oppression provision is crucial in providing the Court with the necessary discretion to formulate remedies which are appropriate and just in the circumstances of a particular case. The outcome of this series of legal battles safeguards such flexibility and judicial discretion. The right of an oppressed shareholder to bring an oppression action is not denied, simply because certain remedies sought are for the benefit of the subject matter company.

*For any enquires, please contact **Foo Joon Liang** (joonliang@ganlaw.my) or **Lee Xin Div** (xindiv@ganlaw.my).*