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Shareholders' reserve powers: implied terms and public policy

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Case:

Lee v TYC Investment Pte Ltd [2015] SGCA 40 (CA (Sing))

*J.B.L. 128 Introduction

It is a modern orthodoxy of company law that a company's management power is usually vested exclusively in its board of directors. Shareholders may not, therefore, interfere with business decisions unless specifically empowered to do so by statute or the company's constitution. What is less clear, however, is whether shareholders are nevertheless vested with reserve or residual powers of management when the board is the primary organ for making management decisions. At common law, a handful of authorities affirm the existence of such residual power.[1] But the juridical basis of such power is by no means clear. Against that backdrop, it is significant that the Singapore Court of Appeal has recently confirmed in *Chan Siew Lee v TYC Investment Pte Ltd* [2] (*TYC Investment*) that shareholders do have residual or reserve management power when the board is deadlocked. Such power is conferred on shareholders by a term implied in the company's constitution on the basis of necessity or business efficacy. This article examines the reasoning in *TYC Investment*. It observes that although the court had identified the issue of reserve powers as one sounding in contract alone, its analysis is ultimately of a hybrid nature that takes on board both contractual as well as public policy concerns. This approach aptly reflects the complex nature of the company's internal workings and warns against a reductionist approach that tackles the issue from a monolithic (contractual) perspective. Before proceeding to consider the facts of holding of the case, it is helpful to first recapitulate the principles and rationale relating to the division of power between the board and shareholders.

Principles and rationale

In *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame*,[3] it was authoritatively decided that directors are not mere agents bound by the instructions of shareholders as principal. Rather, the question as to how management power is to be shared between the board and shareholders is one of constitutional allocation. ***J.B.L. 129*** So, in a typical case where the constitution vests management power exclusively in the board, then it is the board alone that may exercise the power.[4] Shareholders who disagree with the board may not override its decisions by ordinary resolutions, though they may assert indirect control by altering the constitution or reconstituting the board.[5] Since shareholders are free to prescribe in the constitution the desired allocation, it is in theory possible to vest power concurrently in both the board and the general meeting,[6] or to vest broad powers in the general meeting, although courts are traditionally reluctant to adopt interpretations that would vest wide powers in the general meeting.[7]

In both the UK and Australia, the common law principles concerning division of power have now acquired varying degrees of statutory force. In the UK, art.3 of the model articles[8] expressly confers upon directors the power to manage the company's business, while art.4 provides that shareholders may, by special resolution, direct the directors to take or refrain from taking specified action.[9] Since the model articles are not mandatory, it is clear that UK companies are free to depart from this default allocation and stipulate other arrangements in their constitutions. Likewise, in Australia, s.198A of the Corporations Act 2001 (Cth) provides that a company's business is to be managed by the directors, who may exercise all powers of the company except those that are required to be exercised by the general meeting under the Corporations Act or the company's constitution. Once again, companies are not required to adopt this default division as s.198A is expressly designated as a "replaceable rule"[10] that may be displaced by other provisions in the constitution.

A similar development has occurred in Singapore with the enactment[11] of s.157A of the Companies Act.[12] This provision is reproduced here as it is necessary for understanding *TYC Investment*:

> (1) "The business of a company shall be managed by, or under the direction or supervision of the directors.
>
> (2) The directors may exercise all the powers of a company except any power that this Act or constitution of the company require the company to exercise in general meeting."

Although these statutory restatements reflect the common conception of the board as the primary organ responsible for making business decisions, the precise ***J.B.L. 130*** theoretical basis on which the board is conferred with management power remains unclear. At a conceptual level, the broad autonomy that a company enjoys in the allocation of management power is consistent with a *contractarian* view of the corporate vehicle.[13] On this view, the company is not so much an institution but an association of individuals seeking to maximise profits through a complex web of explicit and implicit contracts. This conception of the company has a normative implication for company law: since the objective is to allow participants to form contracts or arrangements that optimise productive activities, company law ought to be characterised by flexible or enabling (as opposed to mandatory and prescriptive) rules that facilitate the participants' bargains. The common law position that management power is determined by the corporate constitution coheres with this model as the constitution is itself a contract by statutory designation.[14] Where the board is conferred the exclusive power to make business decisions, shareholders may not interfere in management by issuing ad hoc direction, for so to do would be a breach of the contract (that is, the constitution). That shareholders are free to change the allocation by altering either the constitution or board composition further underscores the contractual freedom endowed upon shareholders, rendering board authority as conceived a "thoroughly contingent phenomenon".[15]

Despite its prominence, however, the contractarian model is an unsatisfactory rationalisation of the corporate structure as it does not account for the company's existence as a separate legal entity but reduces it to a nexus of private associations.[16] Some commentators have therefore advocated the "organic approach" as the more promising doctrinal basis for the board's authority.[17] This approach views the *company* (as opposed to the shareholders) as the provenance of management power, and assumes that the board and the general meeting are two distinct and parallel (rather than hierarchically ordered) decision-making organs. As such, each organ may only exercise those powers granted to it by the company via its constitution, and neither may encroach on matters that are within the other's exclusive purview.[18] Although this approach also envisages that shareholders may alter the allocation by amending the constitution, this would be because the state (through the company) ***J.B.L. 131*** has conferred this power upon shareholders and not because it is a power originating from shareholders.[19]

Conceiving of directors' authority in these different ways may, of course, also lead to distinct analyses of shareholders' reserve powers. Thus, if one accepts that division of powers is solely a question of contractual or private ordering, it would follow that directors' authority is entirely derived from or delegated by shareholders via the articles.[20] On that view, the power vested in the board would logically revert to shareholders when the board is unable to act. This appears to reflect the position in the UK, where it has been said that "British company law manifests deliberate policy choices in favor of allowing shareholders to exercise *residual* and *ultimate* control in companies".[21] In contrast, the organic approach conceives of management power as emanating from the company rather than shareholders, so that each organ may only exercise such power as has been allocated to it but may not usurp any power that has been exclusively allocated to the other. Although this approach does not inexorably exclude the possibility of construing the constitution to vest residual powers in shareholders, the "managerialist philosophy that underpins the constitutional model [would militate] strongly against such a construction".[22] Importantly, this analytical divergence also points to a more fundamental distinction between the two approaches: while the contractual analysis is (or is at greater risk of being) reductionist in characterising shareholders' reserve powers as an issue sounding in

contract alone, the organic approach is premised on the view of company law as a regulatory tool and is therefore more likely to acknowledge the relevance of *policy* considerations.[23] As we shall see, this final distinction is important for apprehending the true reasoning in *TYC Investment*.

In Singapore, uncertainty as to the precise doctrinal underpinning of s.157A of the Companies Act[24] has arisen because, unlike its Australian counterpart,[25] the provision is not statutorily designated as a replaceable rule. Thus, it has been argued that by enacting s.157A(1), the Singapore legislature has intended to *mandate* all companies to vest general management power in the board.[26] It was further argued that since *all* general powers of management have been vested *only* in the board to the exclusion of the general meeting, the general meeting is powerless to act even if the board is deadlocked (except in respect of specific powers expressly reserved to it by the constitution).[27] On this interpretation, s.157A could be understood to have introduced a new conceptual basis that approximates the organic ***J.B.L. 132*** approach in that the board's power is then original and undelegated and derived from statute (through the company's distinct personality).[28]

However, the High Court of Singapore has in *TYC Investment Pte Ltd v Tay Yun Chwan Henry* [29] (the first instance decision from which the appeal in *TYC Investment* arose) rejected the suggestion that s.157A was intended as a statutory division of power. Instead, the trial judge, Lee Khim Shin JC, preferred to view s.157A as a default rule that may be varied by shareholders. In his Honour's view, this interpretation better accords with commercial reality since "corporate structures are so varied that it would be impossible to prescribe a set form of corporate governance".[30] In addition, there was nothing in the secondary materials surrounding the enactment of s.157A to suggest that the Singapore Parliament had intended to effect an inflexible division. On the contrary, the fact that s.157A was introduced to align Singapore's position with those of UK and Australia[31] would suggest that s.157A was predicated on the contractual model. This reasoning was implicitly accepted on appeal, as the appellate court proceeded on the assumption that division of powers is essentially a question of the shareholders' contractual allocation.[32]

Interestingly, while the Court of Appeal affirms the issue of shareholders' reserve powers as one sounding in contract only, it nevertheless invokes a number of policy considerations to bolster its conclusion. This, as explained below, casts doubt on the sufficiency of a purely contractual approach for resolving the issue at hand.

TYC Investment—facts and holding

The dispute in *TYC Investment* arose in connection with the divorce of Henry Tay (HT) and Jannie Chan (JC), a high profile couple who co-founded a successful retailer of luxury watches, The Hour Glass Ltd (THG). The couple's interests in THG were held through TYC Investment Pte Ltd (TYC), a family holding company that also owned other family assets. HT and JC's respective equity stakes in TYC were 46 and 44 per cent of TYC. Of the remaining stakes, 5 per cent was held by their son, Michael, and the balance by their two daughters. Following their divorce, the parties executed a number of agreements to settle the division and management of their matrimonial assets. Central to the dispute was cl.10 (the Payment Clause) of one agreement (the SSD), which stipulated that neither HT nor JC would sign a cheque for TYC unless the other had signed a voucher approving the payment. Because HT and JC were the only two cheque signatories for TYC, this meant that their approvals were required for all cheque payments. Although TYC was not a party to the SSD, it subsequently entered into a deed that had the effect of binding it to the terms of the SSD.

Perhaps unsurprisingly, JC subsequently became intransigent and refused to approve a number of cheque payments. To overcome the impasse, HT convened an extraordinary general meeting (EGM) which was attended only by himself and ***J.B.L. 133*** Michael. Numerous ordinary resolutions were passed at the meeting to authorise various payments by the sole signature of HT. By the time of the appeal, however, only three of these payments were in issue: (1) fees payable to KPMG for rendering advice on the tax and accounting issues arising from the divorce settlement agreements (the KPMG fees); (2) legal fees incurred in connection with the EGM (the TSMP fees); and (3) corporate secretarial fees incurred in connection with the holding of the EGM (Express Co fees). The validity of the resolutions authorising these payments turned on whether the shareholders had the relevant "reserve power" to make business decisions when the board is deadlocked.

At trial, Lee Kim Shin JC affirmed the general view that the division of powers between the board of directors and shareholders is a matter of contract as contained in the company's constitution.[33] Where s.157A applies (as was the case in *TYC Investment* [34]), its effect is to vest management power in the

board to the exclusion of shareholders.[35] The reason for this default allocation is obvious—directors are constrained by fiduciary obligations in the discharge of their responsibilities but shareholders are not.[36] Vesting management discretion in the board thus helps to reduce the risk of abuse by the majority. However, this default allocation is predicated on the assumption that the board is willing and able to act. Where this is not the case (because, for instance, the board is deadlocked), shareholders would have the reserve power to act so the company's operations would not come to a standstill. Adopting Hodgson J's analysis in *Massey v Wales*,[37] Lee JC located the source of this reserve power in a term implied in the constitution on the basis of business efficacy or necessity.[38] In his Honour's view, the scope of the implied power is necessarily narrow because a wide doctrine of reserve powers would be inconsistent with the default allocation comprised in s.157A.[39] And since the test is one of necessity, the scope of the term "should ordinarily go no further than what is necessary to break the deadlock".[40] Thus, in the context of a management deadlock, no residual power will devolve to shareholders where other mechanisms (such as the appointment of additional directors) exist to resolve the deadlock.[41]

Noting that the deadlock in *TYC Investment* was not one that could be broken by the appointment of additional directors,[42] Lee JC concluded that it was necessary for shareholders to have the

"limited power to appoint solicitors to commence proceedings to determine the rights and obligations of the relevant parties under the Divorce Settlement Agreement, so as to break the deadlock in management". ***J.B.L. 134*** [43]

However, the general meeting did not have the power to authorise HT to unilaterally sign cheques on TYC's behalf, for to imply such power would be to contradict the express terms of the articles of association, which incorporated the Payment Clause as well as an article prohibiting its amendment except with the approval of all TYC shareholders.[44]

On appeal, Sundaresh Menon CJ (who delivered the court's unanimous judgment) agreed with Lee JC's analysis of the law. Accepting necessity as the basis of shareholders' reserve powers, the learned Chief Justice clarified that a company's first resort in the face of a management deadlock is to reconstitute the board.[45] Only when such reconstitution is impracticable or ineffective in resolving the deadlock would the court imply a term to vest residual power in shareholders. Applying these principles, the Court of Appeal arrived at conclusions different from those of the trial court. In particular, Menon CJ held that the EGM *did* have the power to authorise TYC to make payments without JC's approval. Contrary to Lee JC's finding, Menon CJ thought that the implication of such power would not contradict the Payment Clause as

"that clause was targeted at safeguarding improper payments rather than at excluding the implication, in limited circumstances, of reserve powers to authorise a payment in the interest of the company in the face of a board deadlock".[46]

However, this did not mean that the general meeting could authorise all payments, for this power is further limited by the twin cumulative requirements that

"(a) the dispute must relate to the performance of a *bona fide* obligation owed by the company to a third party; and (b) there is no material suggesting that it will not be in the company's best interest to honour these obligations." [47]

These requirements serve to limit shareholders' reserve power to the *minimum necessary* for the company's continued operations. Turning to the facts, Menon CJ found that the general meeting could authorise TYC to pay the debts in question as they satisfied these criteria.[48]

In the Court of Appeal, Menon CJ also rejected the argument that the availability of statutory derivative actions under s216A of the Singapore Companies Act [49] ought to bar the implication of a term vesting reserve powers in shareholders. In his Honour's view, this argument wrongly assumes that s.216A serves as an avenue for disgruntled shareholders to challenge the business decisions of the board.[50] It does not. The remit of s.216A is more limited in that it allows minority shareholders to institute legal actions on the company's behalf only when the directors are unwilling to do so because they are themselves the wrongdoers.[51] Although a ***J.B.L. 135*** management deadlock may sometimes involve misfeasance by directors, that is not invariably so. It is thus possible for the board to reach a stalemate even when all directors are acting in good faith, in which event s.216A would not offer an appropriate remedy.[52] Moreover, s.216A is an inapt tool for resolving deadlocks as it is designed to redress existing wrongs but not to forestall future disagreements.[53] For these reasons, the mere fact that s.216A exists should not bar the implication of reserve powers for shareholders.

However, the availability of s.216A would preclude the implication of a reserve power insofar as it relates to authorising legal actions against errant directors. This is because the institution of such actions remains the proper purview of statutory derivative actions.[54] Thus, although Menon CJ held in *TYC Investment* that the general meeting could authorise payments in respect of liabilities that were properly incurred, his Honour also found that such authorisation could not extend to all of the TSMP fees. To the extent that these were legal fees incurred in litigating the claims that JC had breached her fiduciary and contractual duties to the company, they related to matters which ought to have been pursued under s.216A and were therefore not payments that the general meeting exercising its residual power could properly have authorised.[55]

Implied terms and public policy

Although the reasoning in *TYC Investment* is framed assuredly in the language of contracts, it is clear that the decision was ultimately not founded on contract principles alone but also on policy considerations. Thus, Menon CJ observed at the start that shareholders as risk-bearers of economic failure ought logically to have some limited powers to ensure the continuance of the company's functions.[56] The grant of reserve powers is therefore underpinned by the principle that

"a company should not be needlessly hamstrung by a deadlock on the board but should be allowed to get on with managing its affairs provided there is a functioning majority of shareholders".[57]

These observations rightly emphasise shareholders' *property* interests as owners of shares, which may warrant protection that exceed that typically extended to mere contractual rights.[58] By these remarks, the learned Chief Justice also appears to be appealing to the *public* or *general* interests in perpetuating successful businesses. Consistently with such wider interests, the law ought in general to lean in favour of preserving, rather than eroding, valuable economic resources (in this context an asset-rich company). Finally, there is the need to consider the impact of a particular allocation of powers on *creditors*. As Menon CJ incisively noted, questions pertaining to division of powers do not concern only directors and shareholders but also third parties. It is therefore ***J.B.L. 136***

"plainly right that the interests of innocent creditors will have to be considered and will often have a bearing on how the court should strike a balance among competing factions whose disputes *within* the company threaten to paralyse the company and prejudice innocent third parties *outside* it".[59]

Together, these considerations lend credence to a strong presumption in favour of residual management powers for shareholders. As *TYC Investment* demonstrates, this is a presumption that cannot be rebutted except by the most explicit of terms. On the facts, it is clearly arguable that HT and JC had sought to establish impregnable control by conferring on themselves absolute control over the board[60] as well as their constitutional rights.[61] The incorporation of the Payment Clause in the constitution (together with its entrenchment against amendment) was but a further step in cementing that control. That being the case, it is arguable that *viewed as a whole*, the management structure was designed to vest control in HT and JC alone, and at no material time was it contemplated that the remaining minorities would have a say in the company's business. Nevertheless, the Court of Appeal was unmoved. More had to be done to denude shareholders of their residual powers. At the same time, however, the court laid particular stress on the need to narrowly circumscribe such implied powers on the basis of necessity, not only because of the need to respect the parties' contractual allocation in the constitution, but also because it would make no commercial sense to vest management power in shareholders who are not constrained by fiduciary duties.[62] This latter concern is, it is submitted, yet another example of a policy-type consideration factored into the court's deliberations.

So while *TYC Investment* affirms in no uncertain terms that reserve powers are a matter of contractual allocation, it is also clear that the approach taken by the court was not exclusively contractarian. This observation illustrates the larger reality that the contractarian analysis is not by itself a sufficient or complete rationalisation of company law. This is not to deny that company law does accord to shareholders large spheres of contractual autonomy in the ordering of the company's affairs,[63] but to point out the error in presupposing that such autonomy may be satisfactorily explicated by conventional contractual principles.[64] Thus, even though directors' powers are derived from the constitution, it does not unquestionably follow that their limits are defined exclusively by contractual principles. While it is true that the constitution is a type of "contract", it is unlike a conventional contract in that its contractual status is acquired primarily by force of statute.[65] That being the case, its content, interpretation and enforcement are governed not only by principles of

contract but also by statutory and common law ***J.B.L. 137*** rules.[66] That the constitution is a "public" document that binds future members and may be relied upon by third parties has also led the courts to modify the application of contractual principles relating to rectification,[67] implied terms[68] and vitiating factors[69] in this context. These modifications are necessary because the constitution is not merely a record of a private bargain but also a statutory tool for fostering particular policy goals.[70] In particular, there is increasing recognition among academic commentators that company law performs, in addition to the facilitation of transactions, a critical role in constituting and protecting property (i.e. share) rights.[71] And even while shareholders enjoy considerable liberty in structuring management control, the modern approach of the law is to respect such arrangements only to the extent that they do not negatively affect third-party rights.[72] Against this understanding, it is not surprising that the Singapore Court of Appeal should regard it relevant to consider the need to safeguard shareholders' as well as creditors' interests.[73]

What is therefore suggested is that, while purporting to analyse the problem through a purely contractual lens, the Court of Appeal in *TYC Investment* had in fact adopted a hybrid analysis infused by both private (contractual) as well as public (policy) concerns. So, although the doctrine of implied terms is principally concerned with the contracting parties' *presumed intention*,[74] such intention was established not solely by construing the documents to determine the the purposes of the protagonists (HT and JC), but also by considering the impact of their agreements on minority shareholders and creditors, as well as the general policies and strictures of the law. This does not, of course, mean that the court had covertly adopted the organic model in substitution of the contractual analysis. Nevertheless, the recognition that there may be policy considerations at work is important for highlighting the inadequacy of a purely contractual model in the corporate context. The constitution may be a type of contract but it is not invariably interpreted as a conventional contract. ***J.B.L. 138***

Conclusion

Despite its conceptual shortcomings, the contractual model does in general comport well with the modern conception of company law as a facilitative and enabling domain. Specifically, it also makes sense for the law to accord investors optimal freedom to design a company's management structure, for they are, after all, the best judges of how their businesses should be run. To impose a rigid allocation of management power would, therefore, be counteractive and obstructive. Nevertheless, the company is ultimately a complex legal construct. Though metaphorically a "person", its decision-making processes are diametrically different from those of a natural person. In delimiting the rules for these processes, the law has to be cognisant of their impact, not only on those directly involved in making the decision but on other stakeholders as well. The Singapore Court of Appeal's judgment in *TYC Investment* may be seen as a useful illustration of these complexities at work.

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1. See, e.g., *Barron v Potter [1914] 1 Ch. 895 Ch D*; *Isle of Wight Railway Co v Tahourdin (1883) 25 Ch. D. 320 CA* at 333.

2. *Chan Siew Lee v TYC Investment Pte Ltd [2015] 5 S.L.R. 409*.

3. *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame [1906] 2 Ch. 34 CA*.

4. *Shaw & Sons (Salford) Ltd v Shaw [1935] 2 K.B. 113 CA*; *Scott v Scott [1943] 1 All E.R. 582 Ch D*; *Bamford v Bamford [1970] 1 Ch. 212 CA (Civ Div)* at 218–223, per Plowman J. at first instance; *Breckland Group Ltd v London and Suffolk Properties Ltd [1989] B.C.L.C. 100 Ch D* at 106.

5. *Shaw & Sons (Salford) [1935] 2 K.B. 113* at 134.

6. For example, the constitution often vests the power to appoint directors to fill casual vacancy concurrently in both the board and the general meeting. In the event of conflict, the decision of the general meeting will prevail: see *R.*

Pennington, Company Law, 8th edn (London: Butterworths, 2001), p.697.

7. This attitude is exemplified by the cases interpreting art.80 of Table A of the Companies Act 1948 (UK), which stated that "The business of the company shall be managed by the directors … subject … to such regulations, not being inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting". Thus, in *Scott v Scott [1943] 1 All E.R. 582*, it was held that the general meeting may not, pursuant to an article similar to art.80, pass resolutions as to financial affairs as these concern powers vested exclusively in the board.

8. See Model Articles for Private Companies Limited by Shares, as prescribed by the Secretary of State under s.19 of the Companies Act 2006 c.46.

9. The same article clarifies that such directions would not affect the validity of any act done prior to the passing of the resolution.

10. Corporations Act 2001 (Cth) (Australia) s.141.

11. Companies (Amendment) Act (No.8 of 2003).

12. Companies Act Cap. 50, 2006 Rev. Ed (Singapore).

13. See, e.g., M. Jensen and W. Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 J. Financ. Econ. 305; F. Easterbrook and D. Fischel, "The Corporate Contract" (1989) 89 Colum. L. Rev. 1416.

14. See, e.g., Companies Act (Singapore) s.39(1); Companies Act 2006 (UK) s.33(1); Corporations Act 2001 (Cth) s.140.

15. See M. Moore, "Private Ordering and Public Policy: The Paradoxical Foundations of Corporate Contractarianism" (2014) 34 O.J.L.S 693, 717.

16. See R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 C.L.J. 554, 565. More generally, the contractarian paradigm also fails to explain the mandatory features of company law: see M. Eisenberg, "The Conception that the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm" (1999) 24 J. Corp. L. 819, 823–824. See also S. Worthington, "Shares and Shareholders: Property, Power and Entitlement (Part 1)" (2001) 22 Company Lawyer 258, 264.

17. *Ford's Principles of Corporations Law, edited by R.P. Austin and I. Ramsay (Australia: LexisNexis, Online, 2002, June 2015 update), para.7.070.3*; Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 C.L.J. 554, 564–566; R. Grantham, "The Reserve Power of Company Shareholders" (2004) 63 C.L.J. 36, 37.

18. This view of the division as a *constitutional* matter finds support in *Howard Smith Ltd v Ampol Petroleum Ltd [1974] A.C. 821 PC* (Australia) at 837. See also *Eclairs Group v JKX Oil & Gas Plc [2014] Bus. L.R. 835 CA (Civ Div)*, where Briggs LJ (dissenting but only in respect of the application of the law) held (at [100]–[102]) that the proper purposes doctrine could not be analysed by applying contractual principles because the duty is founded not on contract but on the constitutional divide between the board and the general meeting. This view has since been endorsed by the Supreme Court in *Eclairs Group v JKX Oil & Gas Plc [2015] UKSC 71* at [30].

19. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 C.L.J. 554, 566. But it has also been cogently argued that "[it] has never been the price of incorporation that shareholders exclude themselves from management decisions. If shareholders do involve themselves in management then they run the same risks as directors, and they may also find themselves in fact deemed to be directors under s 126 of the [New Zealand Companies Act 1993]": see *P. Watts, "The Power of a Special Majority of Shareholders, or of All Shareholders Acting Informally, to Override Directors—Att-Gen v Ririnui" (September 21, 2015), p.7, SSRN*, http://ssrn.com/abstract=2663797 or http://dx.doi.org/10.2139/ssrn.2663797 [Both accessed 8 December 2015].

20. *Gower & Davies' Principles of Modern Company Law, 9th edn, edited by P. Davies and S. Worthington (London; Sweet & Maxwell, 2012), p.384*.

21. R.C. Nolan, "The Continuing Evolution of Shareholder Governance" (2006) 65 C.L.J. 92, 94 (emphasis added).

22. Grantham, "The Reserve Power of Company Shareholders" (2004) 63 C.L.J. 36, 38.

23. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 C.L.J. 554, 579 and 584–587.

24. Companies Act Cap. 50, 2006 Rev. Ed.

25. Australian Corporations Act 2001 (Cth) s.198A, on which s. 157A of the Singapore Companies Act was modelled: see Table of Derivatives appended to the Singapore Companies (Amendment) Bill (No.3 of 2003).

26. See P. Koh, "The Great Divide—Considering Section 157A of the Singapore Companies Act" (2004) 6 Aust. J. Asian L. 231.

27. Koh, "The Great Divide" (2004) 6 Aust. J. Asian L. 231, 242.

28. Koh, "The Great Divide" (2004) 6 Aust. J. Asian L. 231, 242, although it should be noted that the organic approach does not inexorably exclude reserve powers for shareholders as it is ultimately still a question of constitutional construction:

see Grantham, "The Reserve Power of Company Shareholders" (2004) 63 C.L.J. 36, 38.

29. *TYC Investment Pte Ltd v Tay Yun Chwan Henry [2014] 4 S.L.R. 1149*.

30. *TYC Investment v Tay Yun Chwan Henry [2014] 4 S.L.R. 1149* at [87].

31. See *Report of the Company Legislation and Framework Committee (Singapore: October 2002), Ch.3, paras 4.7.1 to 4.7.2*.

32. On the uncertainty of the scope of such contractual autonomy and other implications, see E. Boros, "How Does the Division of Power Between the Board and the General Meeting Operate?" (2010) 31 Adel. L. Rev. 169.

33. *TYC Investment [2014] 4 S.L.R. 1149* at [88].

34. TYC's articles of association contained an article identical to s.157A of the Singapore Companies Act 2006: see ibid, at [74].

35. *TYC Investment [2014] 4 S.L.R. 1149* at [89].

36. *TYC Investment [2014] 4 S.L.R. 1149* at [90]. Shareholders who interfere excessively in management may, however, incur liability as shadow or de facto directors: see *Gower & Davies' Principles of Modern Company Law (2012), p.389 n.25*.

37. *Massey v Wales (2003) 57 N.S.W.L.R. 718* at [47].

38. *TYC Investment [2014] 4 S.L.R. 1149* at [108].

39. *TYC Investment [2014] 4 S.L.R. 1149* at [107].

40. *TYC Investment [2014] 4 S.L.R. 1149* at [108].

41. *TYC Investment [2014] 4 S.L.R. 1149* at [108].

42. This was because even if it were possible for additional directors to be appointed without JC's approval, the Payment Clause would still apply so that JC's approval would still be required for cheque payments: see *TYC Investment [2014] 4 S.L.R. 1149* at [113]–[114]. The shareholders' inability to break the deadlock by appointing or removing directors was also noted by the Court of Appeal: see *TYC Investment [2015] SGCA 40* at [72].

43. *TYC Investment [2015] 5 S.L.R. 409* at [122].

44. *TYC Investment [2015] 5 S.L.R. 409* at [154]–[155].

45. *TYC Investment [2015] 5 S.L.R. 409* at [44].

46. *TYC Investment [2015] 5 S.L.R. 409* at [77].

47. *TYC Investment [2015] 5 S.L.R. 409* at [45].

48. *TYC Investment [2015] 5 S.L.R. 409* at [80].

49. Companies Act 2006.

50. *TYC Investment TYC Investment [2015] 5 S.L.R. 409* at [59].

51. *TYC Investment [2015] 5 S.L.R. 409* at [58] although it should be noted that the text of s.216A in requiring only proof that it is "prima facie in the interests of the company that the action be brought" is broad enough to encompass even actions unrelated to directors' misfeasance. Nevertheless, the narrow construction preferred by Menon CJ is arguably more consonant with authorities and Parliamentary intention: see the materials cited at [58] and [64].

52. *TYC Investment [2015] 5 S.L.R. 409* at [61].

53. *TYC Investment [2015] 5 S.L.R. 409* at [62].

54. *TYC Investment [2015] 5 S.L.R. 409* at [64].

55. *TYC Investment [2015] 5 S.L.R. 409* at [81]–[83].

56. *TYC Investment [2015] 5 S.L.R. 409* at [40].

57. *TYC Investment [2015] 5 S.L.R. 409* at [44].

58. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 C.L.J. 554, 582–583.

59. *TYC Investment [2015] 5 S.L.R. 409* at [47] (emphasis in original).

60. Not only were their mutual approvals required for the appointment and removal of directors, all other directors were also obliged to conform to the directions of HT and JC: see *TYC Investment [2014] 4 S.L.R. 1149* at [13].

61. Given their respective shareholding, neither would have the statutory majority to unilaterally amend the constitution.

62. *TYC Investment Pte Ltd [2015] 5 S.L.R. 409* at [36].

63. See Nolan, "The Continuing Evolution of Shareholder Governance" (2006) 65 C.L.J. 92.

64. For to do so would be to erroneously equate an "is" with an "ought": see Eisenberg, "The Conception that the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm" (1999) 24 J. Corp. L. 819, 824.

65. See See, e.g., Companies Act (Singapore) s.39(1); Companies Act 2006 (UK) s.33(1); Corporations Act 2001 (Cth) s.140.

66. For example, the constitution differs from conventional contracts in that it may be amended by a three-quarters majority rather than unanimous agreement of all contracting parties: see Companies Act 2006 (Singapore) s.26(1); Companies Act 2006 (UK) s.21(1). In addition, not all the provisions of the constitution are directly enforceable by its members but those which confer rights upon them "*qua* member": *Hickman v Kent or Romney Marsh Sheep-Breeders' Association [1915] 1 Ch. 881 Ch D*.

67. The court has no jurisdiction to rectify a mistake in the constitution as such an error can only be corrected by the statutory procedure for amending the constitution: see *Scott v Frank F Scott (London) Ltd [1940] Ch. 794 CA*.

68. Since the constitution is a "public" document that may be relied upon by third parties who are not privy to the circumstances in which the document was drafted or formed, its provisions may not always be interpreted with the aid of those extrinsic evidence: see *Egyptian Salt & Soda Co Ltd v Port Said Salt Association Ltd [1931] A.C. 677 PC* (Egypt); *Bratton Seymour Service Co Ltd v Oxborough [1992] B.C.L.C. 693 CA (Civ Div)*.

69. So the constitution cannot be vitiated on the grounds of misrepresentation, mistake, undue influence or duress: *Bratton Seymour v Oxborough [1992] B.C.L.C. 693* at 698.

70. Or, as Moore put it, "the very formal status of the constitution as a supposedly 'private' contractual document rests paradoxically on a *public* statutory basis": see Moore, "Private Ordering and Public Policy" (2014) 34 O.J.L.S 693, 719 (emphasis in original).

71. See, e.g., P. Ireland, "Property and Contract in Contemporary Corporate Theory" (2003) 23 L.S. 453 (arguing that company law plays a critical role in constituting property rights in shares).

72. Eisenberg, "The Conception that the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm" (1999) 24 J. Corp. L. 819, 824; best demonstrated, perhaps, by the law's steady retreat from the ultra vires doctrine in the UK and other common law jurisdictions including Singapore.

73. Discussed in text to fnn.56–59 above.

74. *The Moorcock (1889) 14 P.D. 64 CA* at 68; *Sembcorp Marine Ltd v PPL Holdings Pte Ltd [2013] 4 S.L.R. 193* at [93].