Minority Protection Doctrines: From Company Law and Equity to Strata Title

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Abstract:
This paper explores the application of minority protection doctrines in company law and equity to strata title developments in Singapore and New South Wales. As majority rule is used in matters of governance in both companies and strata title developments, there is a corresponding need for minority protection which is particularly evident in strata title because of the social and economic impact of the home. While current Australian case-law suggests that the doctrine of 'fraud on the minority' is applicable to strata title, this paper demonstrates that this view is superficial and conceptually inadequate. Instead, this paper seeks to demonstrate that the doctrine of fraud on a power should be accepted instead as being more conceptually rigorous and practically useful. It concludes that fraud on a power has value in supplementing the remedies available to minority subsidiary proprietors under statute to provide more comprehensive protection for minority subsidiary proprietors.

Keywords:
Company law, Equity law, Minority protection, Property law, Strata title

1 Introduction

The law of strata title is becoming of increasing importance in today’s world as existing land is subject to much competition for use by offering another way to maximize land use by partitioning the horizontal division of airspace. While both companies and strata title utilize majority rule for governance, little consideration has been given to the applicability of company law minority protection doctrines to strata title. The sparse current academic work on this area has generally accepted Australian authority supporting the proposition that the company law doctrine of ‘fraud on the minority’ is applicable (Gray et al, 2007; Bradbrook, et al, 2007; Ilkin, 2007; Alford and Sommer, 2005; Tan et al, 2009), or has accepted ‘fraud on a power’ without justification despite relying on the same Australian authority (Teo, 2009). These accounts are superficial and fail to grapple with the conceptual nature of the body corporate in strata title law as well as considerations peculiar to strata title law. This essay seeks to address this gap by investigating the doctrines of fraud on the minority and fraud on a power, evaluating Australian case-law and then comparing the applicability of the doctrines in strata title from a conceptual perspective in the context of Singapore and the Australian state of New South Wales. These two jurisdictions have been selected because of the complexity and thoroughness of their strata title laws which were necessitated by high
population densities in these two jurisdictions. Close analysis demonstrates that the
Australian authorities are muddled and that ‘fraud on the minority’ is conceptually
inappropriate in strata title law. Instead, the equitable doctrine of ‘fraud on a power’ has
judicial support and is more theoretically defensible and practically effective and thus should
be adopted.

2 A Hypothetical Situation

We start with the following hypothetical scenario as a framework for understanding the role
and utility of protection of minority doctrines. A strata title development has a clearly
differentiated majority and minority, with the majority holding 80% of the total share value
and the minority holding 20%. At a general meeting of the management corporation, a
resolution is passed to enter into a contract with a related company to carry out certain
services for the strata title development, such as renovation works, though the exercise of
voting power by the majority, where all the procedural requirements for the calling of the
meeting were complied with. Some questions come to mind: can the minority invalidate the
resolution, and if so, under what circumstances? Can the minority obtain rescission of the
contract if it has already been entered into? Who can bring the action, and who pays the costs
of the litigation? Does it make any difference if the contract price was at fair market value
and there is no loss to the minority?

In both Singapore and New South Wales, alternative dispute resolution bodies established
under statute are unable to provide a remedy as they may not make orders invalidating
proceedings if there was no prejudice or if the same result would be obtained. This
hypothetical scenario will returned to later to verify the solutions proposed in the course of
this paper.

2.1 System of Strata Title Ownership

While the precise nature of strata title ownership is determined by the specific wording of the
governing statutes in a particular jurisdiction, the underlying idea behind strata title
ownership is the subdivision of high-rise buildings such that the flats therein can be owned by
different legal persons under the Torrens system of land registration. Upon the registration of
the strata scheme, a management corporation is incorporated to manage and maintain the
development and common property after it was developed. Strata title units will have a share
value or unit entitlement which will determine, inter alia, the voting rights of the proprietor
during special resolutions and the amount of contributions levied by the management

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1 See s5-6, Singapore Companies Act (Cap. 50, 2006 Rev. Ed.) [“Companies Act”]; Part 1.2, Division 6, Australia
2 Section 103, BMSMA (Singapore); Section 153, SSMA (New South Wales).
3 The main statutes governing strata title are the Land Titles (Strata) Act (Cap. 158, 1999 Rev. Ed.) [“LTSA”] and the
Building Maintenance and Strata Management Act (Cap 30C., 2008 Rev. Ed.) [“BMSMA”] in Singapore and the Strata
Schemes Management Act 1996 [“SSMA”] in New South Wales.
4 Section 2 of the LTSA and section 46(1), Land Titles Act (Cap. 157, 2004 Rev. Ed.) (Singapore), ss6(1) and 7(1) of the
New South Wales Strata Schemes (Leasehold Development) Act 1973 (New South Wales)
5 Section 10A(1), LTSA and section 24(1), BMSMA (Singapore); sections 8-9, SSMA (New South Wales)
6 Section 30(2)(a), LTSA and Section 62(1)(a) BMSMA (Singapore); section 17-18 of Schedule 2, SSMA (New South
Wales)
The primary duty of the management corporation is the management of the development, though in practice, some or all of the management corporation’s powers and duties are delegated to a managing agent or manager. The use and enjoyment of the strata title development is governed by the by-laws of the development. Majority rule plays an important role in the management of the strata title development as it is the primary basis on which resolutions are passed at general meetings, the members of the management council or executive committee elected and the by-laws enacted. Under the current statutory framework, it is not possible simply to use the provisions applying to companies to the bodies corporate established by strata title legislation as the provisions of the Singapore Companies Act or Australia Corporations Act are either expressly or impliedly excluded.

Both Singapore and New South Wales have specialized dispute resolution methods for strata title developments, namely the Strata Titles Boards in Singapore and the Strata Schemes Adjudicator and Consumer, Trade and Tenancy Tribunal in New South Wales.

3 Rationale for Majority Rule

3.1 Company Law

Under company law, the default method of governance is by majority rule through an exercise of voting power by the members at general meeting. Although the day-to-day management of the company is performed largely by the directors, directors are typically also elected by the members in general meeting. The principle of majority rule is supported largely from a contractarian perspective where minorities are theoretically minorities through an exercise of free will - as minorities choose their extent of risk exposure in the corporate enterprise, they should be content with the corresponding level of clout. Majority rule also theoretically encourages profit maximization as the majority has the greatest incentive to prioritize profit-making as an objective of the company.

However, the contractarian view of corporate membership is inaccurate as minorities may be minorities due to external factors, like a lack of financial means to purchase a larger shareholding, a lack of available shares on the open market for purchase, and restrictions on transfer of shares under the company’s memorandum and articles. Also, the majority’s interest in profit-maximization is probably for the majority themselves and not the company.

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7 Section 30(2)(c), LTSA and Section 40(2) BMSMA (Singapore); section 78(2) SSMA (New South Wales)
8 Section 29, BMSMA (Singapore); Ch 3, SSMA (New South Wales)
9 Section 66-68, BMSMA (Singapore); section 9(b) of the SSMA (New South Wales)
10 Section 32, BMSMA (Singapore); Ch 2 Part V, SSMA (New South Wales)
11 Section 53(1), BMSMA (Singapore); Section 16, SSMA (New South Wales)
12 Section 32(3), BMSMA (Singapore); Chapter 2, Part 5, Division 3, SSMA (New South Wales)
13 Section 11(2), SSMA (New South Wales)
14 In Singapore, the exclusion of the Companies Act appears to be implied by section 24(1), BMSMA.
15 Governed by Part VI of the BMSMA.
16 Chapter 5, SSMA (New South Wales)
17 There is a conceptual distinction between membership and holding shares in the company, though in the vast majority of cases a shareholder will also be a member. The words ‘member’ and ‘shareholder’ are used interchangeably in this essay to refer to members. A shareholder who is not a member is not entitled to exercise membership rights, including the right to vote (Tan, 2009).
The strongest reason for majority rule is simply one of pragmatism in enhancing administrative efficiency and allowing for timely corporate action to be taken when necessary (Chew, 2007). In situations involving a grouping of persons, differences of opinion will inevitably arise and some mechanism has to in place to ensure that the company is not paralyzed by disagreements between different individuals (Koh, 2009). Majority rule thus has value as a useful practical business administration mechanism, although its juridical basis is left in some doubt.

3.2 Strata Title

The contractarian perspective is usually less dominant in strata title because it is impractical and unrealistic for the average individual homeowner to purchase multiple units in a development simply to ensure that his rights are protected from abuse by the majority. Furthermore, the contractarian theory is flawed even in the case of a company where the interests are purely commercial. Instead, the focus should be on majority rule as a practical means of ensuring that the management corporation can function smoothly in carrying out its obligations with minimal delay in ensuring the due administration, control and maintenance of the common property (Tan, 2002).

4 Rationales for Minority Protection

Majority rule is an efficient governance mechanism but formulaic application of majority rule will inevitably cause injustice in some situations. The rationale for minority protection is difficult to ascertain, but vague notions of fairness or justice should be avoided for their lack of clarity. While both company law and strata title law share certain grounds justifying minority protection, the home ownership context has a stronger claim for minority protection.

4.1 Company Law

The protection of valuable proprietary rights is an important factor in protection of minority rights. While shareholders do not have any legal or beneficial interest in the property of the company, shares in the company are movable property and confer rights on the shareholder, in particular the right of participation on the terms of the memorandum and articles of association and in accordance with general law and statute (Tan, 2009). Some of these rights associated with membership are proprietary ones and deserve protection in line with the common law’s traditional emphasis on the importance of property. In addition, protection of the shareholder’s property rights also protects the shareholder’s stake in the corporate enterprise. The right to minority protection is relatively weak compared to that of strata title because of a deep-rooted reverence for majority rule as the norm for dealing with intra-corporate affairs in light of the main role of the company as a profit-making enterprise. This is reinforced by the general policy of judicial non-interference with business decisions.

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18 Eg. Chew, 2007 at 7 (“Where majority rule results in unfairness or injustice, it is submitted that it is natural, for want of a better description, to assert that the minority has higher rights to justice and fair treatment that will take precedence, although the basis of such an assertion often remains conveniently undetermined.”)

19 Macaura v. Northern Assurance Co Ltd [1925] AC 619

20 Vita Health Laboratories Pte Ltd and others v Pang Seng Meng [2004] 4 SLR(R) 162 at [17]; ECRC Land Pte Ltd v Ho Wing On Christopher [2004] 1 SLR(R) 105 at [49]; Intraco Ltd v Multi-Pak Singapore Pte Ltd [1994] 3 SLR(R) 1064 at [30]
4.2 Strata Title

In contrast to company law, strata title has greater justification for the intervention of the courts in minority protection. Similarly to company law, the proprietary angle in strata title is one of the strongest reasons for minority protection. The traditional conception of land was that it was the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. While this conception has been overtaken by the concept of property as a bundle of rights rather than absolute ownership (Gray and Gray, 2009), the subsidiary proprietor is still the sole proprietor of his own lot and as such has the right to use it as he pleases, subject to statute and the by-laws of the estate (Tan, 2002). Subsidiary proprietors also hold the common property as tenants-in-common.\(^{21}\) The concept of a man’s home as his castle has been eroded statutorily by allowing for termination of the strata scheme by non-unanimous collective sales in Singapore\(^{22}\) and compulsory acquisition of land (Tang, 2007).\(^{23}\) However, these are limited statutory exceptions and do not warrant withholding minority protection during the continuance of the strata development.

There are also wider socio-political implications to home ownership. An individual’s personhood may become intimately bound up with his or her proprietary possessions (Radin, 1982). Homes satisfy social and psychological needs, acts as a physical framework for family life, is a place of self-expression and provides a feeling of security (Fox, 2002). Home ownership is also seen as a social and cultural unit (Fox, 2002), while being property with commercial value. Home ownership thus has a wider social and political aspect than companies which are focused on commercial profit, justifying greater minority protection in strata title.

5 Fraud on the minority

5.1 Origin, Function and Rationale

Fraud on the minority is also known as the common law derivative action\(^{24}\) and is actually a development in equity; the reference to ‘common law’ distinguishes it from the statutory derivative action.\(^{25}\) It originated under the court’s inherent equitable jurisdiction with respect to civil procedure in a piecemeal fashion. As a derivative action, it is pursued by a shareholder of a company but in respect of loss suffered by the company or an infringement on the company’s rights rather than damage suffered by the shareholder himself. The shareholder’s entitlement to bring a derivative action is therefore derived from the company’s right of action; this is merely a procedural device and is not a new substantive cause of action.

\(^{21}\) Section 13(1), LTSA (Singapore); *Houghton v Immer (No 155) Pty Ltd* [1997] NSWSC 608 (New South Wales)

\(^{22}\) Part VA, LTSA (Singapore).

\(^{23}\) See Section 5 of the Land Acquisition Act (Cap. 152, 1985 Rev. Ed) (Singapore); Section 41, Lands Acquisition Act 1989 (No. 15 of 1989) (Australia)

\(^{24}\) Despite the common misuse of ‘fraud on the minority’ to refer interchangeably with the statutory ground of oppression found in Section 216, Singapore Companies Act and Section 232, Australia Corporations Act, this will be avoided in this paper to prevent conceptual confusion. While the common law derivative action is merely a procedural tool, oppression is a substantive cause of action.

\(^{25}\) Section 216A, Singapore Companies Act; Part 2F.1A, Australia Corporations Act
conferring new rights. This was developed as an exception to the proper plaintiff rule in *Foss v Harbottle* that the proper plaintiff in an action in respect of a wrong alleged to be done to a company is *prima facie* the company. The issue of whether the plaintiff-member has *locus standi* to bring the action is to be determined as a preliminary issue prior to the main trial. It follows from the nature of the common law derivative action as a procedural device that establishing the ground of fraud on the minority only confers *locus standi* on the member who then has to raise a substantive cause of action as a ground for obtaining relief from the company.

### 5.2 Application in Company Law

The starting point is that the phrase ‘fraud on the minority’ has elucidated no authoritative exposition and has been described as a term of art, although it is clear that ‘fraud’ is used in its wider equitable sense; it is not limited to common law fraud requiring an element of dishonesty. While it is possible to compile a list of examples when fraud on the minority would arise, these discrete categories do not provide much guidance as principles for novel situations. For example, it has been suggested that appropriation of the company’s money, property or opportunities, the majority obtaining a benefit at the expense of the company or the majority preventing an action being brought are groups of cases where fraud on the minority has been found (Tan, 2009). However, these categories do not appear to be at all similar in formulation at first glance.

The common law derivative action suffers from fundamental conceptual uncertainty, as well as a lack of a clearly defined procedure and inherent uncertainty as a matter of equitable discretion (Tan, 2009). It is unclear whether the focus is on act of wrongdoing instead of the effects of wrongdoing as experienced by the company. The leading Singaporean text supports the latter view by formulating a three-limbed test that the majority must have obtained some sort of benefit; the benefit was obtained at the expense of the company or that some loss or detriment was caused to the company; and that the majority used their controlling power to prevent an action being brought against them in court (Tan, 2009; Chew, 2007). However, case-law in Singapore appears to focus on the act of wrongdoing instead, as seen by the adoption of a test where it is necessary to show wrongdoing, majority control or being in the ‘seat of power’ and an exercise of that control or power to prevent an action being taken by the company. In conclusion, the common law derivative action “may be treated as moribund (if not actually dead) in Singapore” (Tan, 2009) due to the increasing use of the statutory derivative action and oppression actions. In Australia, the death of the common law derivative action has already occurred when it was statutorily abolished in 2001.

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26 (1843) 2 Hare 461
27 This is the position in the UK in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204. The *prima facie* approach has also been expressly adopted in Singapore for s. 216A of the Companies Act.
28 *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd* [1995] 3 MLJ 417, cited with approval in *Ting Sing Ning (alias Malcolm Ding) v Ting Chek Swee (alias Ting Chik Sai) and ors* [2008] 1 SLR(R) 197 at [13].
29 *Esmanco (Kilner House) Ltd v Greater London Council* [1982] 1 WLR 2, cited with approval in *Ting Sing Ning (alias Malcolm Ding) v Ting Chek Swee (alias Ting Chik Sai) and ors* [2008] 1 SLR(R) 197 at [13].
30 *Derry v Peek* (1889) 14 App Cas 337
31 *Ting Sing Ning (alias Malcolm Ding) v Ting Chek Swee (alias Ting Chik Sai) and ors* [2008] 1 SLR(R) 197 at [13]-[14].
32 Section 236(3), Australia Corporations Act 2001. The remedies now available to a minority shareholder in Australia are an action under the personal rights exception to *Foss v Harbottle* (preserved by Note 3 to s. 236 Corporations Act), a statutory minority shareholders action under s. 232 Corporations Act, a statutory derivative action under Part 2F.1A, Corporations Act and an application for winding up.
6 Fraud on a power

6.1 Origin, Function and Application

The history of the equitable doctrine of fraud on a power is distinguished, originating in the middle of the 18th century (Matthews, 2007). The doctrine was developed in cases relating to the exercise of special powers of appointment, but there is little doubt that other powers now fall within the scope of the doctrine (Thomas, 1998). The doctrine is part of a regulatory web of principles imposed by equity on the exercise of powers (Matthews, 2007) and applies to both fiduciary powers and non-fiduciary powers.

The doctrine of fraud on a power will apply when the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power.\(^{33}\) Fraud here does not require fraud at common law or any conduct that could be described as dishonest or immoral.\(^{34}\) It is necessary to distinguish between the existence and scope of a particular power from the purpose for which it was exercised as fraud on a power does not capture situations where the exercise of power exceeded the limits of the power granted; such situations are instead captured by the *ultra vires* doctrine (Thomas, 1998).

6.2 Application in Company Law

While company law does not often overtly employ the doctrine of fraud on a power, it can be seen as underpinning various principles which have developed to restrict both shareholder and director action. These principles are better seen as examples illustrating the general doctrine rather than as disparate free-standing doctrines of their own.\(^{35}\) Cases where fraud on a power have been frequently invoked fall into three broad categories: the appropriation of rights, advantages and property belonging to the company; expropriation of rights, advantages and property belonging to other shareholders; and ratification of breach of duties on the part of directors. This list is non-exhaustive and merely illustrative of fraud on a power (Loh, 1996).

One of the clearest examples of such a principle is the proper purposes doctrine under which company directors must exercise their powers for proper purposes. Powers vested in company directors are no different from those which trustees possess and must be exercised only for the purposes for which they were granted (Mok, 2002). They are fiduciary powers conferred by the office of directorship rather than a bare power which is conferred on an individual in a personal capacity (Thomas, 1998). The proper purposes doctrine is now an independent ground of liability for directors from the duty to act *bona fide* in the best interests of the company. The better view is that the proper purposes doctrine embodies a general equitable obligation owed to persons who might suffer detriment from an improper exercise of power rather than a fiduciary duty owed solely to the company (Mok, 2002). In fact, the proper purposes doctrine can be seen as being a particular illustration of the doctrine of fraud on a power.


\(^{34}\) *Vatcher v Paull* [1915] AC 372.

\(^{35}\) There is some limited support for this proposition in the authorities. See e.g. Teo, 2009 at p 433, fn 259: “The application of [the doctrine of fraud on a power] to the exercise of powers conferred on a majority of shareholders at a general meeting is well-established.”; Loh, 1996 at pp 97-123, which clearly links fraud on a power to limitations on the exercise of voting power by shareholders. Note, however, that for the latter, the discussion of ‘fraud on the minority’ appears to be used descriptively and interchangeably with fraud on a power, rather than the strict technical meaning of a common law derivative action.
Another area in company law where fraud on a power can be seen is in the alteration of the articles of association which may generally be effected through a special resolution. A member’s voting rights are property rights and generally may be exercised by the member as he thinks fit in his own interest, as the member owes no duty to the company or to anyone else when he exercises his voting rights. Courts generally will interfere more readily with an alleged abuse of directors’ powers than with an alleged abuse of majority shareholder voting power because directors’ powers are fiduciary while the right to vote is proprietary (Loh, 1996). However, the courts have intervened to limit the power of the special majority to alter the articles of association in certain circumstances, though the exact basis on which they have done so is often unclear, demonstrating that there are still limits placed on a shareholder’s rights to vote. The widely accepted position is that the shareholders have to vote ‘bona fide for the benefit of the company as a whole’, though this has also been criticized for not providing sufficient guidance as to when and on what basis courts will intervene to restrict the rights of the special majority to vote. Some attempts to reformulate this test by defining the company to refer to the corporators as a general body or to replace the test have been criticised (Chew, 2007; Davies, 2008). Notably, in Gambotto v WCP Ltd, the High Court of Australia has rejected the ‘bona fide for the benefit of the company as a whole’ test where a distinction was made between cases depending on the existence of an expropriation of valuable proprietary rights. Where the resolution was to amend the articles other than to allow for a power to expropriate proprietary rights, resolutions to alter the articles would be valid unless they were, inter alia, beyond any purpose contemplated by the articles. However, a resolution to amend the articles to provide for the power to expropriate could only be allowed if the power was exercisable for a proper purpose and if its exercise would not operate oppressively. This area can be better viewed as an example of the doctrine of fraud on a power, with the conventional ‘bona fide for the benefit of the company as a whole’ test being the definition of what is a proper purpose. The Australian approach also supports the doctrine of fraud on a power since the exercise of the power to amend the articles will be restrained when it was for an improper purpose, whether or not such exercise was related to the expropriation of proprietary rights.

The preceding discussion demonstrates that the concept of fraud on a power has well-established application to restraining action by the directors and shareholders in general

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36 Section 26(1), Singapore Companies Act. An exception is where the articles of association are subject to entrenching provisions; see section 27, Singapore Companies Act.
37 Nguerli Ltd & Anor v McCart (1953) 90 CLR 425 at 439.
38 Allen v Gold Reefs of West Africa Ltd [1900] 1 Ch 656
39 Minority Shareholders’ Rights and Remedies at 64-65
40 Greenhalgh v Arderne Cinemas Ltd [1951] Ch 286 at 291 per Lord Evershed (Court of Appeal, UK). Cf. Peter’s American Delicacy Co Ltd v Heath (1939) 61 CLR 457 (High Court, Australia) per Dixon J: “To say that the shareholders forming the majority must consider the advantage of the company as a whole in relation to such a question seems inappropriate, if not meaningless, and at all events starts an impossible inquiry. The ‘company as a whole’ is a corporate entity consisting of all the shareholders”.
41 Greenhalgh v Arderne Cinemas Ltd [1951] Ch 286 at 291 per Lord Evershed: “That is to say, the case may be taken of an individual hypothetical member and it may be asked whether what is proposed is, in the honest opinion of those who voted in its favour, for that person’s benefit. I think that the matter can, in practice, be more accurately and precisely stated by looking at the converse and by saying that a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between majority shareholders and the minority shareholders, so as to give the former an advantage which the latter were deprived”.
42 [1995] HCA 12 ["Gambotto"].
43 Gambotto at [25]-[26] per Mason CJ, Brennan, Deane and Dawson JJ. The court continued to hold that “an expropriation may be justified where it is reasonably apprehended that the continued shareholding of the minority is detrimental to the company, its undertaking or the conduct of its affairs - resulting in detriment to the interests of the existing shareholders generally – and expropriation is a reasonable means of eliminating or mitigating that detriment.”
meeting and has outgrown its origins in discretionary trusts. The time is ripe for fraud on a power to be considered as a method for restraining majority power in strata title, similar to the role it plays in company law.

7 The Australian Experience

The Australian experience so far has been instrumental in recognizing the applicability of company law doctrines in strata title. However, the current jurisprudence on the application of minority protection doctrines is unclear and theoretically confused. While the authorities have ostensibly applied the ‘fraud on the minority’ or the ‘expropriation of property’ grounds in vindicating the interests of the minority, it is clear upon close analysis that they were actually applying the ‘fraud on a power’ ground. Thus, there is judicial support for the applicability of the doctrine of ‘fraud on a power’ in strata title.

7.1 Influence of Company Title Home Ownership

Prior to the introduction of strata title legislation in New South Wales, company title was the most common way of accommodating the horizontal division of airspace in Australia. Under the company title scheme, entitlement to live in a residential home unit building is through share acquisition in a company which owns the building. The purchase of shares in the company would usually give the purchaser only a personal right against the company, though a licence or a lease may also be granted by the company to allow the purchaser the exclusive use and occupation of a specified part of the building and the right to use other parts of the property in common with other shareholders. Company title ownership has significant disadvantages, notably a lack of security of separate title and ownership and the possibility of the shareholder being deprived of the right of occupation of the unit in event of certain breaches if the articles of association are altered.

Company title ownership may be seen as a middle ground between company law and strata title, with the strata title company being run and managed similarly to other commercial companies, but where the interests at stake are those in home ownership. The past use of the corporate structure in home ownership is likely to have influenced courts in Australia to be more willing to apply company law principles in home ownership.

7.2 Confusion: Fraud on the Minority and Fraud on a Power

The Supreme Court of New South Wales Court of Appeal held in the landmark case of Houghton & Anor v Immer (No. 155) Pty Ltd that the doctrine of fraud on the minority was of general application in equity and could apply to strata title ownership, notwithstanding the existence of statutory provision governing strata title ownership generally. Houghton concerned the proprietors of a strata title plan which held 80% and 20% of the aggregate unit


45 LexisNexis, Halsbury’s Laws of Australia (at 9 June 2010) 355 Real Property ‘IV Multiple Ownership’, [355-9010] (online); Report on Disputes in Company Title Home Units at [2.5] and [2.8].

46 [1997] NSWSC 608 (“Houghton”). Special leave to appeal the decision to the High Court of Australia was denied in Houghton and Anor v Immer (No. 155) Pty Ltd and Anor [1998] HCATrans 273.
entitlement respectively. The appellant majority proprietors used their voting power at a series of general meetings of the body corporate (equivalent to the management corporation in Singapore) to pass resolutions authorizing them to construct 2 penthouses in a lot and the roof, enacted a by-law authorizing the construction and allowing the appellant to retain the consequent improvements, and finally authorized the body corporate to transfer its interest in the penthouse lots derived from the use of the roof as common property for $1. The authorization of the transfer of property for $1 was held to be a fraud on the minority as the doctrine of fraud on a power would apply to the powers of the subsidiary proprietor (or the shareholder in the company context) exercisable at general meetings. In Singapore, this situation could be caught by s. 36 of the BMSMA which gives dissatisfied subsidiary proprietors redress pertaining to, *inter alia*, the transfer of common property.

In the subsequent case of *Young and Ors v The Owners – Strata Plan 3529 and Ors*, the plaintiffs owned a lot in the strata plan which conferred a right to two car parking spaces in an adjoining property but not to any residential rights therein. The defendant body corporate foreshadowed the passing of an exclusive use by-law which would permit the use of a swimming pool and common property only to those who held residential rights in the adjoining property, thus excluding the plaintiffs. The court held that if express consent was required to effect such an extinction of the rights of the plaintiffs, the absence of such consent would make the extinction of rights a fraud against the minority, being a fraud on the power to vote at general meetings and the by-law would hence be invalid. In Singapore, written consent by the subsidiary proprietor and an appropriate resolution is also necessary to pass exclusive use by-laws. There is no statutory recourse in such a situation in Singapore since section 36 of the BMSMA only deals with transfers of common property, transfers of land to become common property, and amalgamation of the common property of two management corporations.

Further confusion was demonstrated in *Radford v The Owners of Miami Apartments, Kings Park Strata Plan 45236*, which followed *Houghton and Young*. The learned judge considered that fraud on the minority operated such that the interests of the minority subsidiary proprietors qualified the power of alteration of the by-laws. He then continued to describe the juridical basis behind fraud on the minority as fraud on a power, which was then correctly recognized to be a general rule relating to the construction of powers. The discussion in *Radford* again shows the lack of distinction between the doctrines of fraud on the minority and fraud on a power and the lack of clarity in conceptual reasoning between the two.

Overall, current Australian case-law is useful to the extent that it shows us the willingness of the courts to intervene to restrain improper exercises of voting power by the majority in general meeting. However, the implementation of company law doctrines has been unsatisfactory. The loose usage of the phrases ‘fraud on the minority’ and ‘fraud on a power’ lead to uncertainty as to the exact legal principles involved. This uncertainty is particularly troubling when established doctrines from one field of law are transplanted into another, as any differences in application may be due either to misunderstanding of the doctrines themselves or to legitimate adaptation necessary to fit the contours of the recipient. As earlier discussed, fraud on the minority refers to a common law derivative action which operates solely as a procedural device to give the minority *locus standi*, while fraud on a power is an

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47 [2001] NSWSC 1135 (“*Young*”).
48 Section 33, BMSMA (Singapore).
49 [2007] WASC 250 (“*Radford*”).
equitable substantive cause of action which can be relied on in event of an improper exercise of the power in question. Yet, a plain reading of the cases demonstrates the two doctrines being discussed interchangeably. In Houghton, the discussion of the issue of fraud on a power both commenced and concluded that the resolution authorizing the transfer of common property for $1 was a fraud on the minority. In Young, the court held that the doctrine of fraud on the minority was applicable and the use of a by-law to expropriate the minority’s property would be a fraud on the power, being from an improper purpose. Given the conceptual differences between the two doctrines and their practical implications, it is submitted that Houghton, Young and Radford are not strong authority for the application of the fraud on the minority ground in the sense of a common law derivative action to strata title developments. On the contrary, the substantive discussion of the doctrines in Houghton and Young suggest that the courts were in substance applying the doctrine of fraud on a power, since most of the discussion centered on fraud on a power and none of the pre-conditions for fraud on the minority were discussed. In summary, it appears that judicial support in substance swings in favour of the doctrine of fraud on a power.

7.3 Further Confusion: Expropriation of Property

Another alternative ground raised in the cases is the expropriation of property by the majority through a resolution of the company or body corporate. In Australia, the principles relating to the expropriation of property or proprietary rights are found in the High Court of Australia decision of Gambotto where it was proposed that the articles of association of the company be altered to allow the shareholder holding 90% or more of the issued shares to compulsorily acquire the shares of the minority owners. The proposed article was held to be invalid.

In Young, the New South Wales Supreme Court held that the passing of a by-law which conferred exclusive use of common property on residential lot owners constituted an expropriation of the plaintiffs’ proprietary interest as tenant-in-common of the common property under the Gambotto principle, hence invalidating the by-law. This finding was in alternative to the ground of fraud on the minority, which has been discussed earlier. Young was followed by Lin and Anor v The Owners – Strata Plan 50276, where the body corporate rejected applications to connect improvements in the plaintiffs’ shops to the exhaust ventilation system, drains and waste lines, which were common property. The body corporate argued that the exhaust ventilation system was incapable of servicing the plaintiffs’ shops because it was overloaded, but this did not justify their rejection of the applications because they had the statutory duty to renew or replace common property. In Lin, the court applied the Gambotto principle in the present case where the plaintiffs’ equitable rights were destroyed by the defendant’s refusal to allow the applications. Young was also considered in Radford, where the learned judge accepted as the law that the doctrine of applying to resolutions authorizing the expropriation of valuable proprietary rights associated with shares appeared to be capable of separate application to equitable interests apart from the discussion of fraud on the minority and fraud on a power. Confusingly, Radford later held that a resolution authorizing expropriation of valuable proprietary rights was recognized as a form of fraud on the minority in Young.

Once again, the discussion of the Gambotto principle is confused. It is often unclear whether the Gambotto principle is a separate ground or a subset of a wider doctrine. The confusion

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50 [2004] NSWSC 88 ("Lin").
51 Section 62(2), SSMA (New South Wales). The equivalent in Singapore is section 29(1)(b) of the BMSMA.
relating to fraud on the minority has been exacerbated by the further grafting of the Gambotto principle onto an already conceptually unstable base. It has been demonstrated earlier that the Gambotto principle dealing with expropriation of property rights can be and is better seen as a specific application of the general doctrine of fraud on a power in the company law context. It then follows that the line of cases in strata title law which have relied on the Gambotto principle support the doctrine of fraud on a power in controlling the exercise of powers by the majority. Reducing the principles and understanding them as specific applications of a broad theory has the benefit of clarity and consistency in reasoning and should be preferred.

8 The Better Approach: Fraud on a Power

8.1 The Illusory Problem of Foss v Harbottle and Locus Standi

The most vexed issue is also the preliminary one – who has locus standi to bring the action? Yet, the issue of locus standi is in fact the very reason why the doctrine of fraud on the minority is unnecessary in strata title law. This is due to conceptual differences between the legal structure of the company and management corporation and their relative strength of separate legal personality.

Both the company and the management corporation are corporate bodies established under statute which have formal separate legal personality status and are regarded as distinct legal individuals. The company has relatively strong separate legal personality status. The main consequences of incorporation are the existence of a body corporate, the capacity to sue and be sued, perpetual succession, power to hold land and liability on the part of the members to contribute to the assets of the company in event of winding up to the extent provided by statute. The separate legal personality doctrine has been affirmed from the pedigree of Salomon v A Salomon & Co Ltd to the effect that the company and its members are regarded as legally distinct. There remain some exceptional circumstances where the court has ‘pierced the corporate veil’ to disregard the separate legal personality of the company from its shareholder or directors, though the precise boundaries of when the court can do so are hotly debated. As an artificial juristic person which must act through its constituent organs, the company’s interests are not clearly aligned with any particular group of interests, except potentially when the company is nearing insolvency.

In contrast, the management corporation has much more limited separate legal personality status, despite being bodies corporate with perpetual succession and legal capacity to sue and sued. Firstly and most fundamentally, the management corporation is comprised of the

52 Section 19(5), Companies Act (Singapore) and section 119, Corporations Act 2001(Australia) which incorporates the common law of corporations except in so far as it has been modified by the Corporations Act: Austin & Ramsay, ‘Ford’s Principles of Corporations Law’, 13th ed, (Australia: LexisNexis Butterworths, 2007) at [4.020]-[4.080].
53 [1897] AC 22. The doctrine has been repeatedly affirmed; see e.g. Bowman v Secular Society Ltd [1917] AC 406; Macaura v Northern Assurance Co Ltd [1925] AC 619; Re Application by Yee Yut Ee [1977-1978] SLR(R) 490; [1978] SGHC 32.
54 Sir James Smith’s case (1691) Carth 217; 90 ER 730; HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd [1957] 1 QB 159.
55 Nearing insolvency, the company’s interests may be identified with creditors’ interests: Walker v Wimbbourne (1976) 137 CLR 1; Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia (No 2) [1998] 1 WLR 294. Creditors’ interests may even become dominant: W & P Piling Pte Ltd v Chew Yiu What [2007] 4 SLR(R) 218.
56 RSP Architects Planners & Engineers v Ocean Front Pte Ltd and anor appeal [1995] 3 SLR(R) 653; [1995] SGCA 79 at [12] (Singapore); Section 11, SSMA (New South Wales)
subsidiary proprietors of all lots comprised in the strata title plan. This shows that any separation of the interests of subsidiary proprietors and of the management corporation is illusory despite the presence of the management corporation’s formal separate legal personality. Secondly, the strong connection between the interests of the management corporation and those of subsidiary proprietors is reinforced from the ‘reverse’ representative action under statute. Such representative actions allow the management corporation to take proceedings on behalf of some or all of the proprietors without requiring the satisfaction of any other requirements such as good faith or that the action would be in the best interests of the corporate body, in contrast to the statutory derivative action under company law. Also, the management corporation has an unlimited liability structure as the subsidiary proprietors comprising the management corporation guarantee debts of the management corporation lawfully incurred in the course of the exercise of any of its powers or functions or the carrying out of its duties or obligations. The ‘flow through effect’ of legal liability from the management corporation to the subsidiary proprietors further demonstrates the lack of an actual separation of legal interests between the two. Lastly, the management corporation has limited powers and functions which are confined by statute to certain restricted circumstances. All these factors in totality demonstrate that the management corporation’s legal personality is relatively weak despite its formal existence and that the interests of the subsidiary proprietors are so intimately related to those of the management corporation’s that there is no real distinction between the two.

The proper plaintiff rule under Foss and its exceptions envisage a situation where it is possible to clearly differentiate loss between the company and a minority shareholder such that the company should sue for the former. However, it is difficult to draw this line in strata title law. As the sum total of all the subsidiary proprietors, the management corporation would suffer loss whenever a minority proprietor has suffered loss. If the loss between the management corporation and a subsidiary proprietor cannot be meaningfully distinguished, there is no room for operation of the general rule under Foss or of the true exceptions to Foss. In fact, the Foss principle would conflate with the personal injury ‘exception’, which comprises various causes of action under general law, including fraud on a power. There is hence no room for the operation of fraud on the minority or the doctrine of Foss in strata title and the subsidiary proprietor should be able to sue under actions at general law, including fraud on a power. The more conceptually defensible route is to dispense with the procedural tool of fraud on the minority in favour of the substantive action of fraud on a power since the former is superfluous in the context of strata title.

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57 Section 10A(1), LTSA (Singapore); Section 11(1), SSMA (New South Wales)
58 Ss. 85(1)-(2) BMSMA (Singapore); Section 227, SSMA (New South Wales). This is a reverse representative action as the corporate body may represent constituent member(s) in an action. A representative action under company law usually refers to constituent member(s) representing the corporate body. In Singapore, the reverse representative action is often used in actions against developers or architects for defects in the common property; examples of such cases include: RSP Architects Planners & Engineers v Ocean Front Pte Ltd and anor appeal [1995] 3 SLR(R) 653; [1995] SGCA 79; Management Corporation Strata Title Plan No 1938 v Goodview Properties Pte Ltd [2000] 3 SLR(R) 350; [2000] SGCA 56; Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd [2005] 2 SLR(R) 613; [2005] SGCA 16. In New South Wales, actions for structural defects which affect or are likely to affect the support or shelter provided by that part of the building to any other part of the building or its site should be taken under Section 228 of the SSMA instead.
59 Section 216A, Companies Act (Singapore); Section 237, Corporations Act (Australia).
60 This is clearest in the Singapore provision: Section 44(1), BMSMA. In New South Wales, this appears to be the case pursuant to a court order as to costs in proceedings brought by one or more owners of lots against an owners corporation or vice versa: Section 229, SSMA.
61 While unlimited companies do exist, but are seldom used in commercial life because limited liability is one of the most attractive features of the corporate structure. Unlimited companies are often incorporated to comply with legislative requirements for specific purposes or functions.
62 Section 24(2), BMSMA (Singapore); Section 12, SSMA (New South Wales)
8.2 Application of Fraud on a Power to Strata Title

8.2.1 Supplementary Role in Dispute Resolution

The doctrine of fraud on a power has a supplementary role to the statutory duties and rights provided for in the respective strata title statutes. In Singapore and New South Wales, the rights or remedies which a subsidiary proprietor, mortgagee of a lot, or a management corporation might have under general law in relation to any lot or common property are preserved. In Houghton, it was held that in light of this provision, the doctrine of fraud on a power is not excluded by the comprehensive provisions of the statute. The same position should be adopted in Singapore as it is clear that the statutory framework seeks to broadly regulate the respective rights and duties in relation to the strata development but not to abrogate additional rights and duties under the common law.

In Singapore, fraud on a power may be raised either before the STB or before civil courts, since the STB does not oust either the jurisdiction of the subordinate courts or that of the High Court. The position in New South Wales appears similar, as the cases on fraud on the minority and fraud on a power were heard at first instance by the Supreme Court of New South Wales. Also, an Adjudicator will often have jurisdiction over disputes involving fraud on a power except, inter alia, where the dispute relates to the exercise, or the failure to exercise, a function conferred on an owners corporation which may be exercised only in accordance with a unanimous or special resolution. Where the Adjudicator does not have jurisdiction over the dispute, the only recourse appears to be to the Supreme Court.

Subsidiary proprietors may prefer proceedings before the STB or the Adjudicator for practical reasons such as lower cost and the greater possibility of peaceful settlement of disputes in line with the spirit of neighbourliness which is surely beneficial since the parties will continue to interact on a regular basis. However, proceedings before the STB or the Adjudicator also have their drawbacks as the STB and Adjudicator have limited jurisdiction. Even when these bodies have jurisdiction, the remedies available are often less extensive than those at general law under an action of fraud on a power. For example, while STB or the Adjudicator may order the invalidation of any resolution or council election, no order for invalidation will be made where the failure to comply with the provisions did not prejudicially affect any person and compliance with those provisions would not have affected the result of the election. A civil action for fraud on a power is thus perfectly compatible with the alternative dispute resolution mechanisms offered by statute in both New South Wales and Singapore as it has a wider scope providing for different remedies.

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63 Section 123, BMSMA (Singapore); Section 226, SSMA (New South Wales)
64 Teo Kim Hui and Anor v Kwok Wai Hon [2008] SGHC 232.
66 Section 138(1), SSMA (New South Wales)
67 Section 138(3)(c)
68 Sections 101-115, BMSMA (Singapore); Chapter 5, Part 4, SSMA (New South Wales)
69 Section 103(1), BMSMA (Singapore); Section 153(1), SSMA (New South Wales)
70 Section 103(2), BMSMA (Singapore); Section 153(2), SSMA (New South Wales)
8.2.2 In which situations?

The clearest situation where fraud on a power could apply is where the majority subsidiary proprietors have misused their voting power, whether to pass resolutions, enact by-laws, make appointments and so on, by exercising the power for a purpose or with an intention beyond the scope of the instrument creating the power. The purpose which the subsidiary proprietors at general meeting should act for should follow the dominant English test for company law, namely whether exercise of the power was bona fide for the interests of the management corporation as a whole, as discussed earlier. In strata title, the practical difficulties in company law in determining who the company is in this test are avoided since the interests of the management corporation and the subsidiary proprietors conflate. The Australian approach in Gambotto which makes a fundamental distinction based on the expropriation of proprietary rights should be rejected in the strata title context. The majority in Gambotto ultimately sought to make a distinction between expropriations aimed at conferring a benefit on the company and those which did not (Davies, 2008). Yet, it is difficult to think of any situation where an expropriation of subsidiary proprietors’ proprietary rights will be justified on the ground that the continuing holding of such proprietary rights will be detrimental to the management corporation.\(^{71}\) A distinction based on expropriation of proprietary rights is unnecessary. Unlike companies where proprietary interests are more limited in scope, proprietary interests are at the core of strata title ownership and most cases involving misuse of voting power will also involve proprietary rights. The better view is that the ‘bona fide for the interests of the management corporation’ test should be adopted instead.

8.2.3 Remedies

Various remedies are available, depending on the factual scenario and stage at which legal proceedings are instituted. There is a difference in emphasis between remedies under company law and in strata title. In company law, the most frequent remedies are either a forced buy-out of the minority’s shares or a winding-up of the company, i.e. a termination of the minority’s participation in the enterprise. This is practicable because these are often the only long-term remedies in a situation where the majority and minority are hostile and because corporate participation is essentially for the pursuit of mere financial profit. In contrast, the forced termination of the minority’s participation in the strata title development is clearly unpalatable because of the primary aim of home ownership. Minimizing damage to the social fabric by encouraging neighbourliness and restraining improper misuse of power is preferable. Fraud on the power can also pre-emptively deal with misuse of voting power before any damage has occurred by rendering the resolution or by-law void in equity.\(^{72}\) As such, it is submitted that fraud on the power can be used to invalidate resolutions passed; to invalidate by-laws; the granting of a mandatory injunction against the passing of a by-law;\(^{73}\) or to obtain rescission of a contract entered into subsequent to a resolution.\(^{74}\) In addition, equitable compensation\(^{75}\) may be sought. If damages are awarded from the management corporation, the subsidiary proprietors either guarantee the debts of the management

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\(^{71}\) Gambotto at [26]

\(^{72}\) Re Cohen [1911] 1 Ch 37; Wong v Burt [2005] 1 NZLR 91. Cf. Houghton & Anor v Immer (No. 155) Pty Ltd [1997] NSWSC 608 that such a resolution or by-law would be merely voidable.

\(^{73}\) Young and Ors v The Owners – Strata Plan 3529 and Ors [2001] NSWSC 1135

\(^{74}\) As suggested in Houghton & Anor v Immer (No. 155) Pty Ltd [1997] NSWSC 608, though on the facts of that case, the resolutions had been acted on and the defendants had been able to complete the construction of additional lots and register the lots. It was thus too late to obtain rescission.

\(^{75}\) Houghton & Anor v Immer (No. 155) Pty Ltd [1997] NSWSC 608
corporation lawfully incurred in the course of the exercise of any of its powers or functions or the carrying out of its duties or obligations, or may be ordered to pay any monies ordered by the courts in actions between subsidiary proprietor(s) and the management corporation. However, insofar as proceedings by a subsidiary proprietor are successfully brought against the minority, in Singapore, the court has a discretion to specify that any moneys payable are paid by certain lots in certain proportions, thus avoiding a situation where a subsidiary proprietor would be called to make contributions for damages owed to himself. The position is even clearer in New South Wales, where the management corporation may not levy contributions in respect of such proceedings against the successful subsidiary proprietor. The doctrine of fraud on a power is thus flexible enough to respond to varied circumstances with a range of appropriate remedies, further demonstrating its superiority over the fraud on the minority ground.

8.2.4 A Hypothetical Situation Revisited

Returning to earlier hypothetical situation posited at the beginning of this paper, fraud on a power can deal with the situation adequately. The minority will be able to invalidate the resolution on proof that that when the majority had exercised their voting power in favour of the resolution to grant contracts to a party related to the majority, they had not done so bona fide for the interests of the management corporation. It is thus important to examine all the circumstances surrounding the passing of the resolution. Whether the contract price was at fair market value will be an important but not a decisive factor in determining whether the majority had acted bona fide. Other factors which should be considered in such a situation include whether the majority has received direct financial gain from their exercise of majority power, whether quotations were obtained from other competitors and considered, and whether the related party who was granted the contract is reputable in carrying out the services contracted for.

In other situations where fraud on a power may apply, different factors should be taken into consideration. For example, where common property was transferred or exclusive use-by-laws are passed pursuant to a resolution, the adequacy of compensation and location, type and purpose of the common property in question should be considered. Overall, a sensitive and careful approach should be taken to prevent over-protection of the minority which may hamper the smooth functioning of the management corporation.

9 Conclusion

This essay has attempted to demonstrate the applicability of the doctrine of fraud on a power to strata title developments and its practical and conceptual superiority over the doctrine of fraud on the minority. It has demonstrated that contrary to the general superficial understanding of Australian case-law, a closer analysis reveals conceptual confusion regarding the application of fraud on the minority. A closer examination of both doctrines in light of the unique legal nature of a management corporation yields the conclusion that fraud on a power is the far superior doctrine. While a detailed statutory framework in Singapore

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76 Section 44, BMSMA (Singapore). It is unclear whether this provision would extend generally to ultra vires acts as these would obviously not be lawfully incurred in the exercise of the management corporation’s powers.
77 Section 229, SSMA (New South Wales)
78 Section 87, BMSMA (Singapore)
79 Section 230(1), SSMA (New South Wales)
and New South Wales is able to provide minority protection in many cases, there are residual situations where fraud on a power has great value in ensuring a comprehensive system of minority protection. It is hoped that this essay has provided a modest starting point by illuminating the conceptual differences between companies and management corporations and the dangers of transplantation of doctrines without careful consideration.

10 References