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# SHARE BUYOUT

## *Applicability of Discounts*

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# Liew Kit Fah v Koh Keng Chew

## [2020] 1 SLR 275

### COURT OF APPEAL

**Section 216(2) of the Companies Act (Cap. 50) empowers the court to, amongst other orders, direct for a court-ordered buyout. When would the court's coercive power be enlivened? Under what circumstances (if at all) would relevant discounts be applied to a share buyout? These issues were considered and clarified by the Singapore Court of Appeal in the case of "Liew Kit Fah [2020] 1 SLR 275"**

In **Liew Kit Fah** [2020] 1 SLR 275, the minority shareholders (28.125%) of the Samwoh Group commenced a minority oppression action against the majority shareholders. In that case, however, it was never found that the majority shareholders were actually liable for oppression but instead parties simply agreed, vide a consent order, for the Court to decide whether it was for the minority shareholders to buyout the majority or vice versa.

At the High Court, it was ordered that the majority shareholders be made to buyout the minority. In valuing the shares of the minority shareholders, the issue arose as to whether the minority shareholders' shareholding ought to be discounted for (a) lack of control and/or (b) lack of marketability.

At the High Court, it was decided that the minority shareholders' shareholding was not to be discounted. The majority shareholders appealed.

On appeal, the Court of Appeal (with Justice Belinda Ang dissenting) held that a minority discount for lack of control ought to apply in the valuation of the minority shareholders' shareholding but to leave it to the expertise of the independent valuer to decide whether to apply the "lack of marketability" discount.

#### Court of Appeal's Clarifications

##### **Basis for the court-ordered buyout**

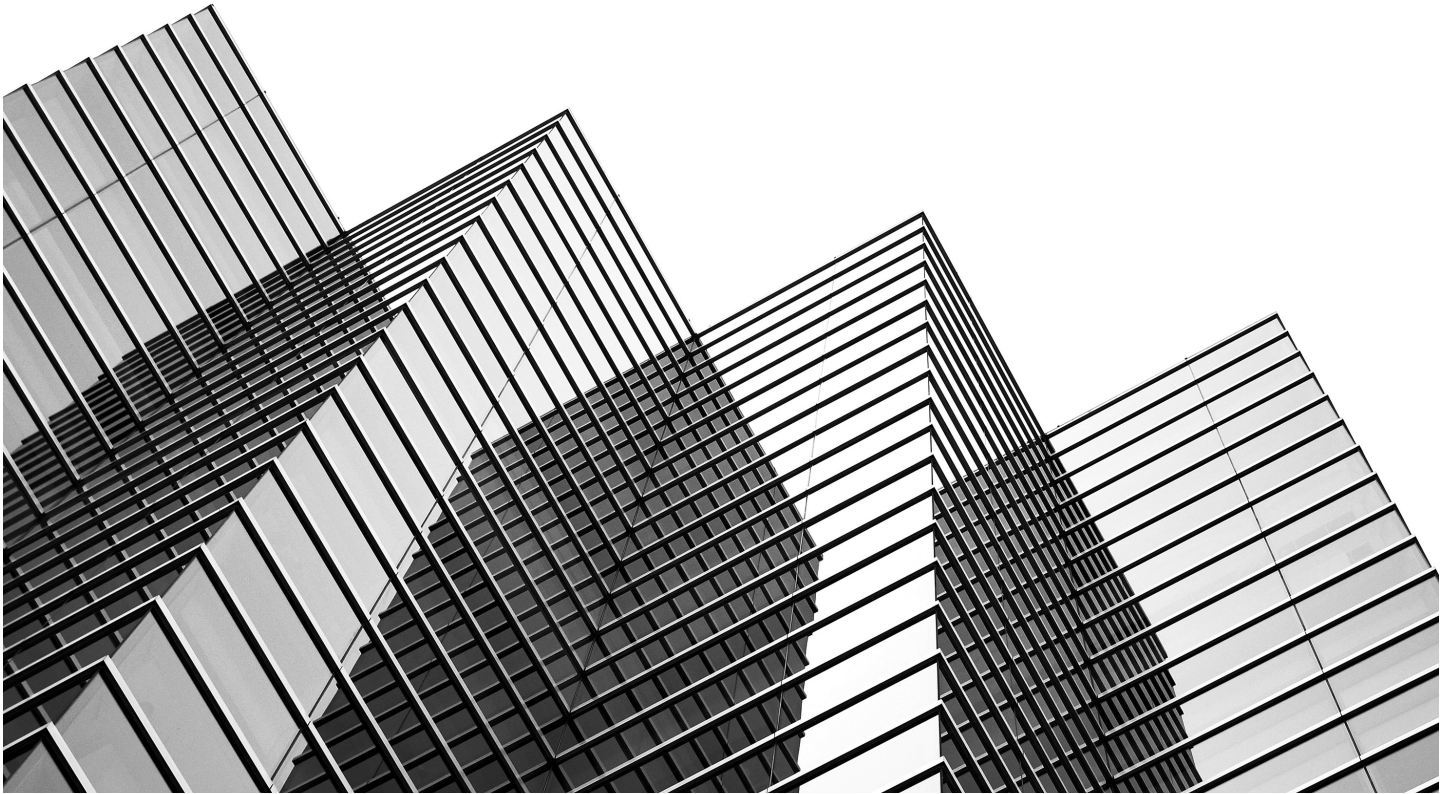
For starters, in the specific case of **Liew Kit Fah** [2020] 1 SLR 275, the Court of Appeal reasoned that because there was never any determination made as to the majority shareholders' liability for minority oppression, the Court had no basis to make any of such orders under section 216(2) of the Companies Act (Cap. 50), including the court-ordered buyout.

In other words, "absent a finding of oppression, the court cannot make any buyout order under s 216(2)" and was not permitted to "examine the case on an innocent minority-delinquent majority premise".

That said, in the specific factual circumstances of **Liew Kit Fah** [2020] 1 SLR 275, the Court of Appeal nonetheless determined that the High Court could still make such a buyout order, save that the source of the court's jurisdiction was derived from parties' consent order and not the Companies Act (Cap.50).

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### **Court of Appeal's Clarifications**

#### **Whether the value of the minority shareholders' shareholding ought to be discounted**

##### **(a) Discount for lack of control / "minority discount"**

The rationale for applying a discount towards the valuation of a minority shareholder's shareholding for "lack of control" stems from the fact that such minority shares sold will not confer to its buyer the "ability to exert control over management decisions of the company."

Issues of such a discount were typically debated in cases where there was a finding of oppression that led to a buyout order or where the company was a quasi-partnership.

In the specific case of **Liew Kit Fah** [2020] 1 SLR 275, however, where the minority shareholders were treated akin to willing sellers of their shares (i.e. pursuant to a consent order), the issue was whether a "minority discount" would still be applicable.

The Court of Appeal clarified that the discount for lack of control should apply.

Simply, the Court of Appeal noted that such a discount is "common" and "expected" even in voluntary commercial sales. In freely negotiated transactions, a discount for lack of control is "to be expected".

The Court of Appeal further made the following observation:

"49 ... cases in which the courts have declined to apply a minority discount for lack of control are often cases where there has been a finding of minority oppression. ... if it is established that the minority shareholder has unjustifiably been on the receiving end of unfairly prejudicial conduct, the courts will almost invariably order a buyout on terms that do not include a minority discount for lack of control. This is to reflect the fact that it would not be "fair, just or equitable" in these circumstances for the minority shareholder to be bought out on terms that do not allow him to realise the full value of his investment; that it would also not be "fair, just or equitable" for the oppressor to benefit from a buyout on discounted terms is but the flip side of the same coin."



### **Court of Appeal's Clarifications**

#### **Whether the value of the minority shareholders' shareholding ought to be discounted**

##### **(b) Discount for lack of marketability**

A discount applied towards the valuation of shareholding for "lack of marketability" stems from the difficulty of selling shares in a private company as a result of various possible transfer restrictions.

Such a possible discount is not restricted only to the context where it is the minority shareholding that is being sold.

In the specific case of **Liew Kit Fah** [2020] 1 SLR 275, the Court of Appeal made clear that a discount for lack of marketability should not be treated in the same way as minority discount for lack of control.

The Court of Appeal further clarified that because lack of marketability is "industry specific", it would be best for the experts (or the valuer) to decide whether to apply such a discount in the given circumstances.

The following concluding remarks made by the Court of Appeal are also particularly important:-

"60 We conclude by stating that outside the minority oppression context, the courts cannot be an avenue through which a minority shareholder obtains a price higher than what he could have obtained had he gone through the usual process of selling his shares to the remaining shareholders. When a minority shareholder is dissatisfied with the manner in which the company is managed by the majority, he essentially has three options: (a) accept the status quo and remain in the company; (b) invoke the articles of the company and offer to sell out; and (c) commence a minority oppression action under s 216(2) to secure a court-ordered buyout. Clearly, the third option is the most difficult to establish but it typically comes with certain benefits such as the non-application of minority discounts in order not to confer any windfall on the delinquent majority shareholder. It seems to us to be somewhat incongruous that a minority shareholder such as the respondents should be placed in the same favourable position as regards the application of minority discounts having abandoned their case for minority oppression. If this is endorsed, it may encourage a disgruntled minority shareholder to tactically commence an oppression action and subsequently compromise the action by way of a similar consent order with a view to improve his position had he invoked the process under the company's articles instead. That cannot be right as a matter of principle."





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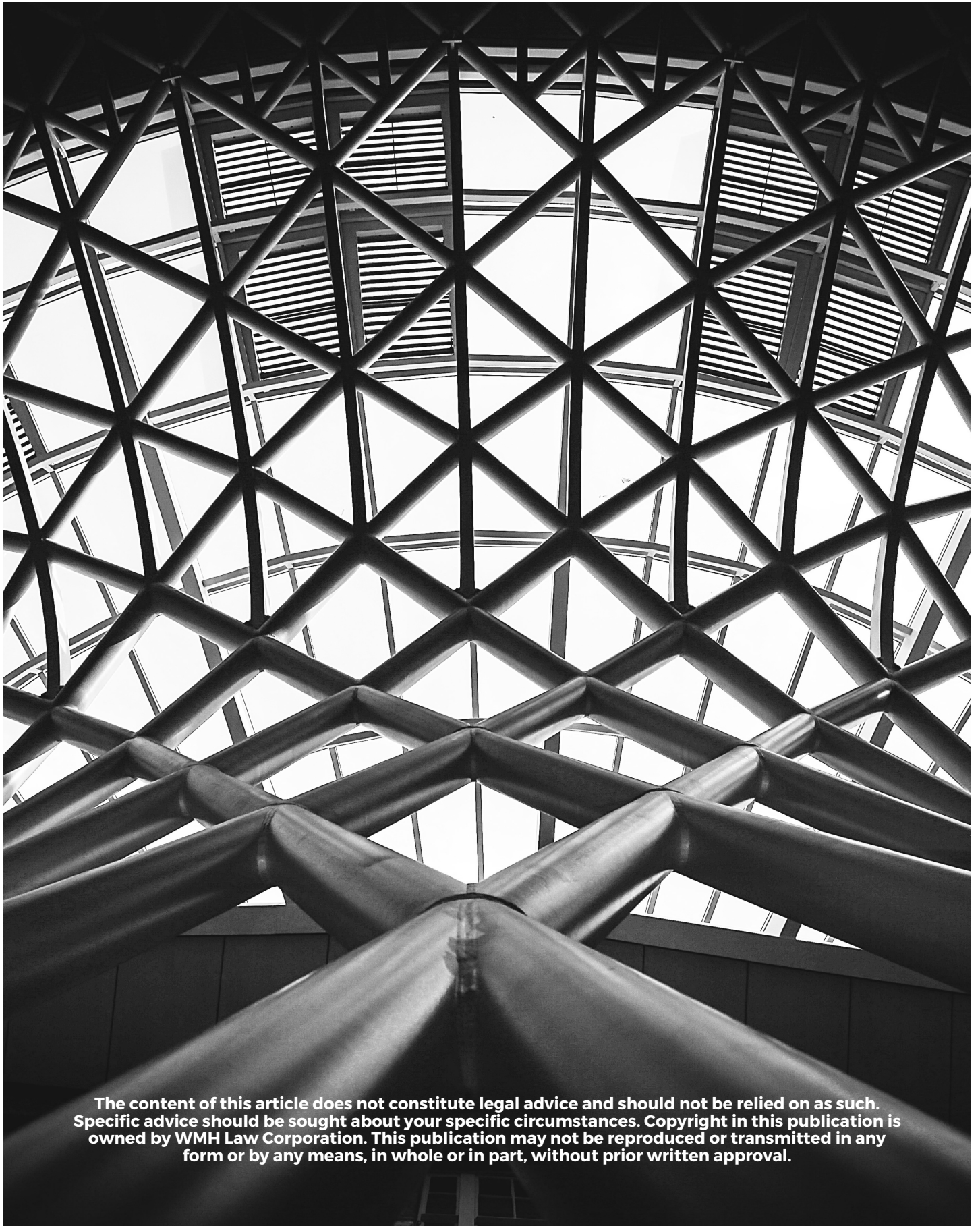
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