OWNERSHIP V CONTROL: FAULT LINES IN DIRECTORS-SHAREHOLDERS RELATIONSHIP: A SPECIAL REFERENCE TO MALAYSIAN FAMILY BUSINESS

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Abstract

In an ideal corporate management structure, directors should act in the best interest of the shareholders. In doing so, the directors' actions are governed by certain legislation which specifies their duties and this legislation is also relevant to the shareholders with respect to their rights. Although there are legislations which govern the relationship between directors and shareholders, there are still latent problems. These hidden problems could be regarded as fault lines in the relationship of these two parties. In a family business structure, these fault lines could bring worse effect compared to "non-family" companies as the directors are dealings with shareholders who are also family members. Another arising scenario which could arise is where directors are not part of the family members but have to deal with shareholders/members who are related to the owner of the company. This paper intends to highlight the fault lines which could occur between directors and shareholder in family owned companies. The main term of reference of this paper is the corporate governance principles and practices. This paper also aims to propose some mechanisms, through legislations in which problems which arise from the fault lines could be reduce if not resolved.

Keyword: Directors, Shareholders, Corporate Governance, Family Business, Malaysia

Introduction

The role played by family business or family owned companies in a country's economy development has been significant throughout the globe. According to Cruz (2001), 65 to 80 percent of businesses worldwide can be classified as family business. In the United State of America (USA), family firms made up over 90% of business in the North America and accounted for 78% of all new job creation, 60 % of the nation's employment and 50% of the GDP.[1] In Germany, 84.4% of all manufacturing companies are classified as family business.[2]

It is interesting yet unfortunate to see that most studies on family business are focused on family firms in the developed countries, such as the United States of America, United Kingdom and European countries while for the Asian side, there are many writings on China, particularly on the entrepreneurships culture but as for Malaysia, there are very few writings or statistics which demonstrate the proportion and significance of family business to the nation economy.

The structure of family business is unique compared to the non-family business as it combines three elements together under the name of the business. The family relationships, composition of owners and management structure, which inter-mingle with one another often, give rise to governance issues. This paper intend to discuss one of the issues; the conflicts between ownership and control.

Family Business

There are many writings, which describe and define family business. Generally, it refers to a business structure in which the ownerships, the management and the decision making power are retained and intended to be only for the family members. The restrictions are structured as such from the beginning as it is meant to establish a business legacy of the family name.
According to BDO Stoy Howard, a family business center in UK, a business shall fit in as a family business if at least one of the following conditions applies:[3]

- a single family holds more than 50% of the voting shares, supplies a significant proportion of the company's senior management and is effectively controlling the business.
- more than one generation is involved in the business.
- the family regards the business as a family business.

A website publication of Purdue University,[4] highlighted that to understand family business and its unique character, one have to consider the three different but interrelated components of the structure, namely:

- family,
- business and
- ownerships.

The first component of family refers to a group of two or more persons related by blood (biology) and/or by legal relationship (marriage, adoption, in some states common law marriage). An emotional bond usually accompanies this relationship. The nature of this bond and its strength varies widely among families. The purpose of a family is oriented toward people and relationships. As a result,

[1] Shanker & Astrachan, 1995; Ibrahim & Ellis, 1994; Andersen;1995.
[2] Kayser & Wallau, 2002.
[3] Is yours a family business?; http://www.bdo.co.uk/website/.
[4] "The unique character of family business"; http://www.cfs.purdue.edu/csr/ifb/family/character/html.

family members may tend to approach relationships with one another in the same manner as they do in their family, rather than as they might with a business colleague who is not from the same family.[5]
The second component is business. A business is an economic unit, a commercial enterprise that produces, distributes and/or exchanges goods and services with customers. The purpose of a business is to accomplish specific tasks as efficiently as possible and to realize a reasonable profit from the accomplishment of those tasks. People in business tend to relate to one another in a hierarchical manner based on defined roles (job descriptions, e.g.) that are designed to further the business.[6]

The third component is ownership. An owner is someone who has legal claim to the assets of the business and who may risk his or her own personal assets in hopes of realizing a profit. The purpose of ownership of a business is generally to realize a return on investment and to minimize the risk involved in the investment. In many cases, ownership in a family business may remain in the hands of one family member, or within a small group of family members. In other cases, ownership may include non-family members as when a company has incorporated and sold shares.[7]

In a family business structure, these three components will be overlapping and created three types of domain**.**[8]

In the single domain, it may involve

1. family only; this is referring to family members who do not work in the business or have ownership.
2. Business only: this is referring to non-family employees.
3. Ownership only: this is referring to outside shareholders.

People who are involved in a single domain will probably have less knowledge of the other domains and may have different expectations. For example, a parent who was not involved in the business will tend to support the business without regard to that person's qualifications and experiences and will tend to make decisions based on parental (or other family roles) rather than the basis of a business.

Non-family employees are also single-domain players. They work for the company, but do not have the same interests as owners or family members. They may feel a conflict between their own hopes and dreams and those of family employees, particularly when family employees are promoted or when family members discuss business issues at home, thus excluding non-family employees from the discussion

In the double domain area, the combination could be

[5] Ibid
[6] Ibid
[7] Ibid
[8] Ibid

1. Family + Business; this is commonly referring to employed family members, not owners.
2. Family + Owner; this is commonly referring family shareholders who do not work in the business.
3. Business + Owner; this is commonly referring employee shareholders.

In the Three Domain area, all three components are overlapping; Family + Business + Owner= family members involved in all three domains. Family members who work in the business and are owners have their feet planted in all three domains and probably are the most knowledgeable about the inherent workings of all three domains because they have more frequent and intimate interaction with all three domains, they may feel great responsibility, or exert greater authority when it comes to business issues. While they may do this legitimately, it often leads to conflict with other family members who have a stake in the business, but less access to information and decision-making.

These family members probably have the clearest view about how profits should be divided between salaries, retained earnings and shareholder dividends, but may not understand the viewpoint of others who do not have the perspective of all three domains.

The themes which underpined the family business are relationships and their obligations, particularly those of father to son and brother to brother, and the values of reciprocity and respect.[9] There are two main factors which justify the survival of family business:[10]

- Decisiveness in the marketplace which allows the companies to be aggressive and effective.
- The family ties/relationship ensure cohesiveness and trust that makes such companies formidable adversaries.

Nonetheless, despite its secured tenure in the market place, the extension of family business faced two main threats.[11] Firstly, the inability of succeeding generations to maintain the entrepreneurial spirit and success of the founders. Secondly, the issue of sustainability. A family business is claimed to be able to expand only up to a certain size, and beyond that size, the enterprise can only operate effectively through the application of more universal rules, more impersonal processes, and without reliance on individual links of kinship. [12] This second factor is actually the impetus behind this paper which meant to highight the possible diversion of ownership in the due course of expansion of the family business

[9] Peter Sheldrake, Keeping business in the family, Business Asia, October 31, 1999. Retrieved from http://www.findarticles.com/p/articles/mi_m0BJT/is_21_7/ai_57745787 on 1 September 2006.

[10] Ibid.
[11] Ibid.
[12] Ibid.

Malaysian Family Business.

The report of a national survey covering 225 companies conducted by Grant Thornton and Malaysian Institute of Management in 2002[13], stated that majority of family businesses in Malaysia is small scale enterprises and generally managed by the founder. Manufacturing, retailing or constructions are the notable sectors in which family business ventured most.[14] It is also found that most of the family businesses were initiated by people having six years or more of work experience. This indicates that in Malaysia, people with appropriate experience commenced family businesses.

The report also underlines the characteristics of family business in Malaysia, which can be summarized as:

- 59% of the business is still run by the founder and 30% are run by the second generation, the majority of whom are children of the founder.
- 65% of small scale enterprises are managed by the founders
- 55% of family businesses in the small scale enterprises employ less than 51 persons
- 35% of family businesses in the medium scale enterprises employ between
  51 - 250 persons.
- 10% of family businesses from large scale enterprises employ more than 250 persons.
- Main activity of family business lies in manufacturing (35%), followed by retailing (12.9%) and construction (10%).

The concerns in Family Business

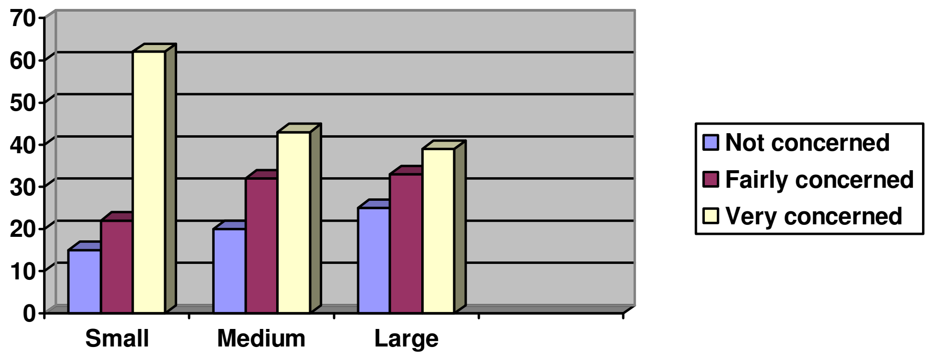
Report of the survey highlighted **two main concerns** in a family business structure:

1. Means to finance the business
2. Involvement /Participation of family member

Although this two factors are seen to be distinct, in practice they are actually interrelated with one another. In starting up, carrying out and exapnding the business, often family business faced not only the challenge of getting sufficient financing but also the appropriate source of finance.

[13] Shamsir Jasani, Report on Malaysia's Family Business, The Family & The Business International Survey, Grant Thornton & Malaysian Institute of Management
[14] Ibid.

Chart 1 : Concerns over losing control if outsiders were to involve in financing the business



The above chart showed that it is in the small scale business that members are most concerned about losing control if they obtain external finance. For the large scale busiess, the concern on external participation is not much on the financing aspect but rather on the possibility of change in the management system. 52% of the respondents from the large scale business express their concern on the possibility of changes in the way the business is run if outsiders come into the picture.

Family Relationship

As regards to family involvement, the survey's report stated that 48% of the large scale enterprises seemed to be less concerned about bringing family members into business as compared to the small scale (31%) and the medium scale enterprises (29%). Nevertheless, majority of the respondents, regardless sizes of business, strongly agree that:

1. Children should be introduced to the business at an early age
2. Children's education should be geared towards the business needs.
3. There can only be one management successor
4. Criteria should be set up to decide how family members join and leave the business
5. The business is stronger with family members involved
6. Parents should retire when the children are ready to take over the business
7. Founder and subsequent generations should always have a formal role in the business
8. Family and business affairs should be kept separate-
9. Professional advisers should understand the unique issues facing the family business.

For the children's participation, the report highlighted that:

- 21% of the respondents wanted their children to be involved in the business

- Of the 24% of children involved in the family run business:
  - 46.5% is the first child
  - 28.2% is the second child
  - 13.7% is the third child
  - 11.4% is the fourth child.
- 52% of respondents are in the opinion that their children should join the business only if they wanted to and this was especially derived from respondents in the large scale enterprises (69%).

The survey also seeks responses on outsiders' participation in the family business. It was found that only 39% of the respondents from the large scale business were concerned about outsiders coming into the business and take control of the business whilst in the medium scale businesses, 43% of the respondents expressed their concern about external participation in the family business. On top of that, 44% of the respondents in the medium scale business expressed their worry over losing control if outsiders are allowed to be in the family business.

Statistics produced by the 2002 Report highlighted the main issue which is meant to be discuss in this paper; the conflicts between control and ownership.

Control and Ownership

The dichotomy of control and ownership, which is the essence of directors-shareholders relationship, is the main spectrum of the fault lines. Thus, it would be essential to elaborate the dichotomy of control and ownership in a company before discussing the fault lines evolving from it.

Separation of control and ownership occurs in a situation where shares are widely dispersed or where the shareholders are not involved in management of the company. This situation would be inevitable in a public company. The shareholders who own shares in the companies are known as the owners whilst the directors who manage the companies are said to have control over the entities. Berle and Means have earlier discussed the concept of control and ownership in their book *The Modern Corporation and Private Property*.[15] The writers averred that a greater dispersion of share ownership would cause a decrease of the shareholders' power and interest in the company.[16] This is known as a separation of ownership from control. They argued that as a result of the separation of ownership from control, shareholders would no longer have charge of the direction of the company and the directors are vested with wider power in developing the company.[17]

[15] Adolf A. Berle & Gardiner C.Means, *The Modern Corporation and Private Property,* (New York, 1933).
[16] Ibid, also in Edward S.Herman, *Corporate Control, Corporate Power,* (Cambridge University Press, 1981) at 5.
[17] Dr Saleem Sheikh and Prof SK Chatterjee, Perspectives on Corporate Governance, in Dr Saleem Sheikh and Prof William Rees(eds), *Corporate Governance & Corporate Control,* (Cavendish Publishing Limited, London, 1995) at 38.

Consequently there will be a divergence of interest between the managers and owners in certain situation. According to Dr Saleem Sheikh and Professor SK Chatterjee

The divergence of interest between ownership and control had created a division of functions. Within the corporation, shareholders had only interests in the enterprise while the directors had power over it. The position of the shareholders had been reduced to that of having a set of legal and factual interests in the enterprise.[18]

When there is a separation between the owners and the controllers in a company, there is a possibility that the interests of the shareholders would not be carried out since they have no control over the running of the company. In other words such divergence would cause the company to depart from the traditional theory of profit maximising behaviour.[19] This is because the directors who are the managers have the control, and would act towards maximisation of their own lifetime incomes.[20] Control according to *Edward S. Herman*[21] relates to power -

> *the capacity to initiate, constrain, circumscribe, or terminate action, either directly or by influence exercised on those with immediate decision-making authority.*

Thus the directors might disregard the interests of the shareholders which should be their paramount consideration. Though the directors may own some shares, their ownership is usually the result of their executive positions rather than the cause of their holding such positions.[22] Therefore these directors who operate the business of the company are primarily motivated by their own self-interest, which may not coincide with the interest of the owners.[23]

Moreover, the separation of ownership from control limited owners to being satisfiers instead of maximisers.[24] This means the shareholders will be satisfied with the dividend received without participating in the management of the company for the purpose of obtaining maximum profit. When the owners lack control of the company, they become unfamiliar with the policies engaged by it.[25] As a result, the managers may aim at achieving steady growth of earnings instead of maximising profits for the owners.[26] This situation is also known as shareholders passivity. Cohen Committee acknowledged that the lack of active

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[18] Ibid at 40.

[19] Above note 3,at 41. Also in Monsen and Downs, A Theory of Large Managerial Firms, *The Journal of Political Economy,* (1965) Vol LXXIII, 221.

[20] Above note 3, at 42.

[21] Edward S.Herman, *Corporate Control, Corporate Power,* (Cambridge University Press, 1981) at 17

[22] Ibid

[23] These views have been objected by Herman who contended that his survey revealed that the broad objective of both large managerial and owner-dominated firms tended to be profitable growth and that motive has not been affected by the rise of control.

[24] Above note 3,at 42.

[25] Ibid.

[26] Above note 3, at 42.

participation from the shareholders was due to the separation of ownership from control.[27] Furthermore the dispersion of capital among an increasing number of small shareholders made them pay less attention to their investments and they are content with the dividends which are forthcoming.[28] However the Cohen Committee averred the need for a separation of ownership from control:

> *Executive power must inevitably be vested in the directors and is generally used to the advantage of the shareholders. There are, however, exceptional cases in which directors of companies abuse their power and it is, therefore, desirable to devise provisions which will make it difficult for directors to secure the hurried passage of controversial measures…*[29]

This is indeed true since not all shareholders have the knowledge to manage the business of the company and it will be more appropriate to hand over that matter to more qualified persons like the directors. The directors should therefore be treated as mere managers of the company and should manage the company in conformity with the policies approved by the shareholders.[30] Therefore the Cohen Committee as well as the Jenkins Committee which was set up in 1962 has recommended disclosure of the company's activity to remedy any possible abuse of powers by the directors. The latter had also agreed that the existence of separation of control from ownership was essential for the general good of the company.[31] Thus the report in the Jenkins Committee focused more on the directors' powers and shareholders' control. It has been observed that the Jenkins Committee was concerned with the issue whether shareholders who contribute the equity of a company should really be involved in the management of a company and the directors should perform their duties without being involved in the ownership of the company to avoid any conflict of interest.[32] In other words the separation of ownership from control is something inevitable, but the directors should not abuse the control and the shareholders should be allowed to monitor it only to a certain extent so as not to interfere with the directors' freedom i.e. to do what they think best in the interest of the company. This is supported by Lipton and Rosenblum[33] who viewed that the relationship between managers and shareholders is a problematic one in the modern public company and there should be a system where these two parties may work co-operatively towards the company's long-term success.

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[27] In Board of Trade, *Report of the Company Law Committee* (1945) Cmnd 6659 (Cohen Committee)
[28] Ibid at 135
[29] Ibid
[30] Above note 3, at 10.
[31] Ibid and above note 13.
[32] Above note 3, at 11.
[33] Above note 3, at 45. Refer also Lipton and Rosenblum, A New System of Corporate Governance: The Quinquennnial Election of Directors, *The University of Chicago Law Review* (1991) 87.

General power to manage

Generally, companies would adopt article 73 of Table A of Fourth Schedule in its articles of association. The article speaks about on whom lays the power to manage the company. The article provides:

> *The business of the company shall be managed by the directors who may exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting…*

There are two main points in this article. The first limb prescribes the directors' general power to manage a company whilst the second limb explains the limitations to that power. The former indicates that if the management of a company is vested with the directors, the members i.e. the shareholders may not give instruction to the directors or override their decision.[34] Harman J. in *Breckland Group Holdings Ltd v London Suffolk Properties Ltd & Ors*[35]confirmed that the powers of the board are independent of the shareholders and further held:

> *The principle, as I see it, is that the articles confides the management of the business to the directors and in such a case it is not for the general meeting to interfere...If the board does not adopt it, a general meeting would have no power whatever to override that decision of the board and to adopt it for itself.*[36]

This denotes that directors having a general power to manage have control over the company. The second limb which provides limitation regarding directors' power to manage had been subject to certain argument. The majority viewed that directors have autonomous powers to manage the company and they were against any interference by the owners in managing the company.[37] Those with this view are more inclined to leave matters relating to the management of the company in the hands of the directors. Nevertheless, in certain cases shareholders are allowed to interfere to limit the directors' powers to manage,[38] however this view had not been taken up and developed and had even been ignored.

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[34] Walter Woon, *Company Law,* Second Edition, (FT Law & Tax Asia Pacific, 1997) at 142.
[35] [1989] *BCLC* 100
[36] Ibid at 106.
[37] Refer cases like Automatic Self-Cleansing Syndicate Co Ltd v Cunninghame [1906] 2 Ch 34, John Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113, Dato Mak Kok & Ors v See Keng Leong & Ors(1990) 1 MSCLC 90,357, NRMA v Parker (1986) 4 ACLC 609,Queensland Press Ltd v Academy Instrument(No 3) Pty Ltd (1987) 11 ACLR 419.
[38] Refer Marshall's Valve Gear Co Ltd v Manning Wardle & Co Ltd [1909] 1 Ch 267, Credit Development Pte Ltd v IMO Pte Ltd [1993] 2 SLR 370, D Goldberg, Article 80 of Table A of the Companies Act 1948, *Modern Law Review,* [1970] Vol 33, 177 at 178. G. R. Sullivan, The Relationship between the Board of Directors and The General Meeting In Limited Companies, *The Law Quarterly Review* ,[1977] Vol 93, 569 at 572. Ronald Choo Han Woon, Division of Powers

Refusal to Register Transfer of Shares

It has been provided by section 98 of the Companies Act 1965 that shares of any member in a company shall be movable property, transferable in the manner provided by the articles. However the right of the shareholder to transfer its shares would subject to restrictions stated in the Companies Act 1965 and also in the articles of association.[39] Though these restrictions are meant primarily for the private companies,[40] it would be essential to discuss the issues here since family owned companies could also be in the form of private company.

Restriction to transfer shares could be in the form of Article 22 of Table A where directors may decline to register any transfer of shares to a person whom they do not approve or which the company has a lien. However, in most cases companies have adopted an article which goes far beyond Article 22. For instance in *Re Smith & Fawcett Ltd*[41] the article provided that " the directors may at any time in their absolute discretion and uncontrolled discretion refuse to register any transfer of shares". The court of appeal in this case upheld this article and added that it would not be necessary for the directors to give reasons. Such a decision was later reinforced in the Malaysian case of *Kesar Singh v Sepang Omnibus Co Ltd*[42]. In the above circumstances directors are left with wide discretion and absolute power to refuse to register a transfer of shares. When the directors were empowered by the article with" absolute discretion and unlimited power and without assigning any reasons" to refuse the registration of any shares they can be said to have a veto power on that matter and would be difficult for anybody not even the owners (i.e. the shareholders) of the company to challenge it. The unlimited power to refuse to register the transfer of shares exercised by the directors may affect directors-shareholders relationship.

Nevertheless the exercise of such power by the directors is limited by their fiduciary duty to exercise it bona fide in the best interests of the company as pointed out by Lord Greene MR in *Re Smith & Fawcett Ltd*[43]. This means dissatisfied shareholders may challenge the directors' action by proving mala fide. However as averred by M.T. Lazarides[44] bad faith is difficult to be proved in the absence of a requirement to give reasons (for the refusal to register transfer of shares). It is only when reasons are given, either required or not, the court will

Between the General Meeting and the Board of Directors in a Company, *Singapore Academy Law Journal,* (1995) 360 at 362.

[39] Refer section 15 of the Companies act 1965.

[40] It should be noted that in Four Seas Enterprise Corporation Sdn. Bhd v Yap Tean Cheong [1995] 1 LNS 273, Zakaria M Yatim J mentioned that non-listed public company may impose restrictions on the right of transfer if its articles of association so provide.

[41] [1942] 1 *All ER* 542.

[42] (1964) 30 MLJ 122

[43] Above note 27 .Lord Greene MR held that '*In the present case the article is drafted in the widest possible terms, and I decline to write into that clear language any limitation other than a limitation, which is implicit by law, that a fiduciary power of this kind must be exercised bona fide in the interests of the company.'*

[44] M.T. Lazarides, Directors' Powers in Relation to Transfers of Shares, *ICCLR,* [1994] Vol 7 252 at 256.

examine its legitimacy. In *Lim Ow Goik & Anor v Sungei Merah Bus Co Ltd*[45], the court had examined the reasons given though it was not required and held that it was an improper exercise of power by the directors. Also in *Re Bells Bros Ltd*[46], Chitty J. had ordered for the registration of the proposed transfer since the reason given was not justifiable. In this case the directors refused to register a transfer on the grounds that the transferee was not a member of the Bell family and the court considered that the directors, in rejecting the transfer based on the policy of keeping shares within the family had exercised the power on a wrong principle and for reason not within the legitimate purposes of their power.

In the absence of the requirement to provide reasons for the refusal to register a transfer of shares by the directors, the rights of the shareholders might be jeorpadised. To leave the directors with absolute power and uncontested discretion would be unfair to the shareholders who own the company. Thus appropriate provisions would be necessary to balance the absolute power, which is normally given to the directors who control the company

Power to File Winding Up Petition

A company may be wound up by way of voluntary winding up or compulsory winding up. The latter which have been discussed by Section 217(1)(a) of the Companies Act 1965, needs to be initiated by a petition filed by the company concerned. However, the provision is silent on whether the shareholders' approval is necessary before a company files the winding up petition. In other words the word 'company' stated in that provision refers to whom; the board of directors or the shareholders or both.The interpretation on that issue is given by case laws and it can be divided into two i.e. those which require the shareholders' sanction and those which do not. Some of the Australian cases like *In re Standard Bank of Australia*[47] and *In re Birmacley Products Pty Ltd*[48], the court held that it was necessary to obtain the shareholders' approval before a petition to wind up a company could be made. In coming to this decision the courts referred to the old English case of *Smith v Duke of Manchester*[49] where Bacon VC held that on such an important question of whether a company should be destroyed or not, the shareholders should have a right to express their views. *In re Standard Bank of Australia*[50], Hodges J in discussing the fight of a company file for a winding up petition had also elaborated that the article which rendered powers to the directors to manage the business of the company did not include the power to destroy the

[45] [1969] 2 MLJ 101. In this case the article of the corporation was similar with Article 22 of Table A. The directors refused to register the transfer because they alleged that the transferor had hostile designs actuated by motives to sell the shares to the detriment of the company's interest. B.T.H. Lee J ruled that since the directors had given a reason for their refusal, the court had to examine it and held that there was an improper exercise of power by the directors as the company's articles empowered the director to object the transferee's qualifications or disqualifications and not the transferor's qualifications and his alleged motives.
[46] (1891) 65 *L.T.* 245
[47] (1898) 24 *V.L.R.* 304
[48] [1942] *A.L.R.* 276
[49] [1883] 24 *Ch D* 611
[50] Above note 33 at 306

company. Therefore before filing for a winding up petition, the directors must first obtain the shareholders' consent.

On the other hand, cases like *Re Inkerman Grazing Pty Ltd*[51], *Spicer & Anor v Mytrent Pty Ltd & Ors*[52] and *Re New England Agricultural Corporation Ltd*[53], allowed the directors in the absence of the shareholders' sanction to file a winding up petition. Street J in *Re Inkerman Grazing Pty Ltd*[54] viewed that directors have the power to file a winding up petition on behalf of the company by virtue of Article 73 of Table A (which discussed about directors' power to manage the corporation) and during financial crisis it would be justified for the directors to resolve to that procedure without seeking the approval of the shareholders.

In Malaysia, VC George in the case of *Miharja Development Sdn Bhd & 8 Ors v Loy Hean Heong & 9 Ors*[55] upheld the decision of Street J. According to the learned trial judge, the effect of and the practice in respect of Section 217(1)(a) of the Companies Act 1965 was that the directors of a company may petition for the winding up of a company without obtaining the sanction of the shareholders. According to Choong Yeow Choy[56] this should not be conclusive since it was only a High Court decision and the court in construing the articles of association of a company should be mindful of the fact that the shareholders as owners of the company should have a say in a crucial decision like winding up.[57] Loh Siew Cheang[58] who disagreed with the reasoning given in *Re Inkerman Grazing Pty Ltd*[59] and *Spicer v Mytrent*[60], opined that directors as persons who manage the financial affairs of the company might be the one who trigger the company's financial crisis and it is not right to let them wind up the company without consulting the shareholders.[61]

The above are examples of the fault lines in which may happen in family owned companies. These fault lines are the result of the ambiguity concerning the locus of certain powers in a company. Failure to resolve them may affect the standard of corporate governance that may cause the collapse of the corporation in the long term.

[51] (1972) 1 *ACLR* 102
[52] (1984) 2 *ACLC* 214
[53] (1982) 1 *ACLC* 557
[54] Above note 37 at 106
[55] [1995] 1MLJ 101
[56] Choong Yeow Choy, Who has the right to terminate the life of a company- shareholders or the board of directors?, *The Company Lawyer* (1996) Vol 17 No 2, at 64.
[57] Ibid.
[58] In *Corporate Powers- Control, Remedies and Decision-mak*ing (Malayan Law Journal, Sdn. Bhd, Kuala Lumpur, 1996) at 16
[59] Above note 37
[60] Above note 38
[61] Above note 44

Conclusion

The separation of ownership from control would result the directors or managers more dominant than the owners or the shareholders. The definite meaning of the provisions concerning control and management is essential to ensure that the directors will not abuse their authority and powers. It is necessary to determine whether or not the power is absolute and whether or not it allows for the interference and control by the shareholders. It is also necessary to determine if the shareholders are allowed to interfere in the management of the company , to what extent this may affect the power of directors. If not alleviated these fault lines may disrupt the corporate governance of a corporation. Since separation of ownership from control is something, which is obscure in family owned companies the practices of corporate governance principles, such as accountability and disclosure are essential to formulate an acceptable standard of transparency as a means of check and balance between directors and shareholders.