

COMPANY LAW 2021

- Concept and methodology
- Directors' duties and risks

MANAGE YOUR **NEW** SHAREHOLDERS' RIGHTS &
DIRECTORS' RISKS TO AVOID BEING CHARGED



DR CHOONG KWAI FATT

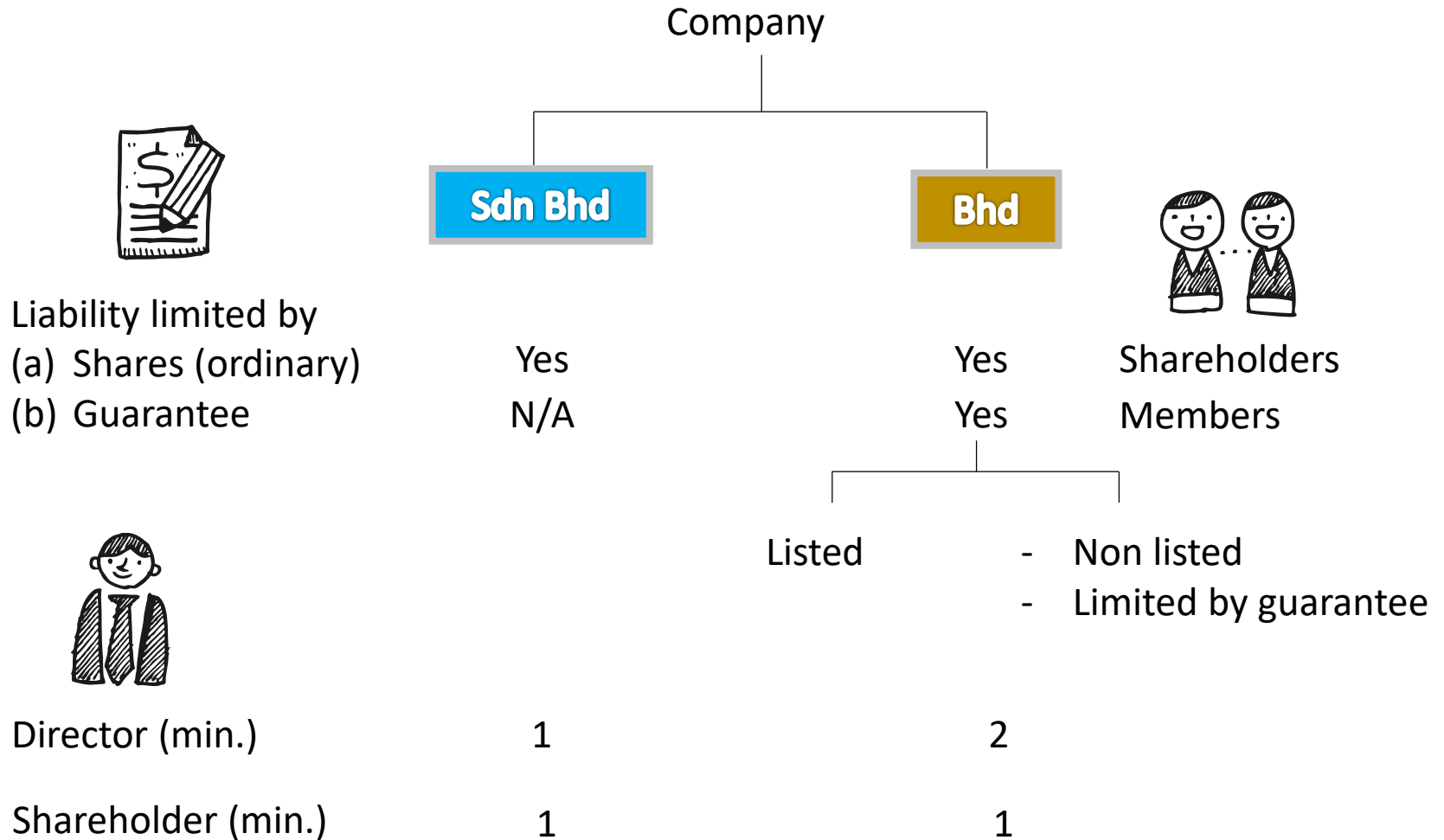
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FCCA(UK), CPA(M), CA(M), ACA(ICAEW),
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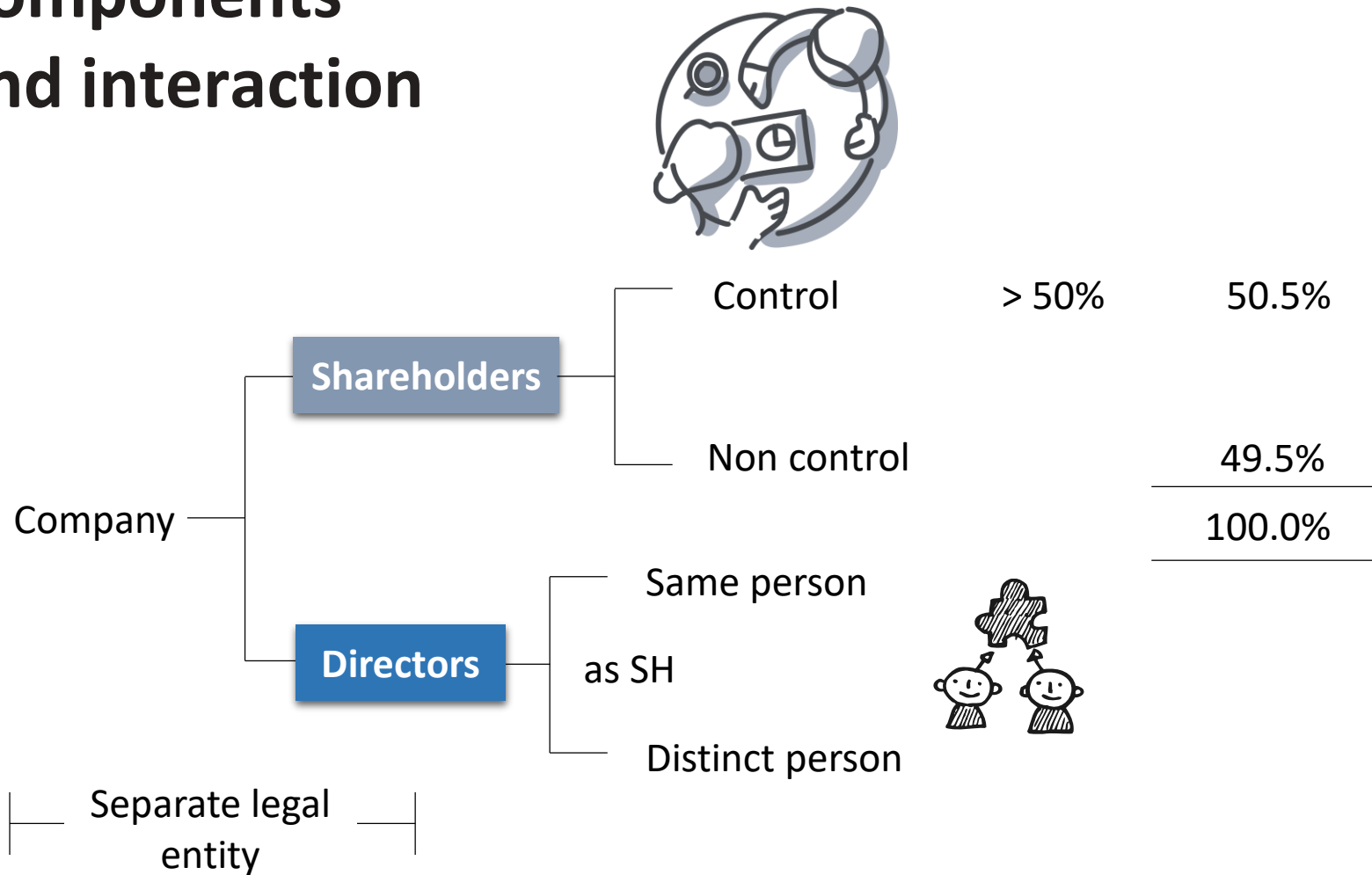
7 January 2021

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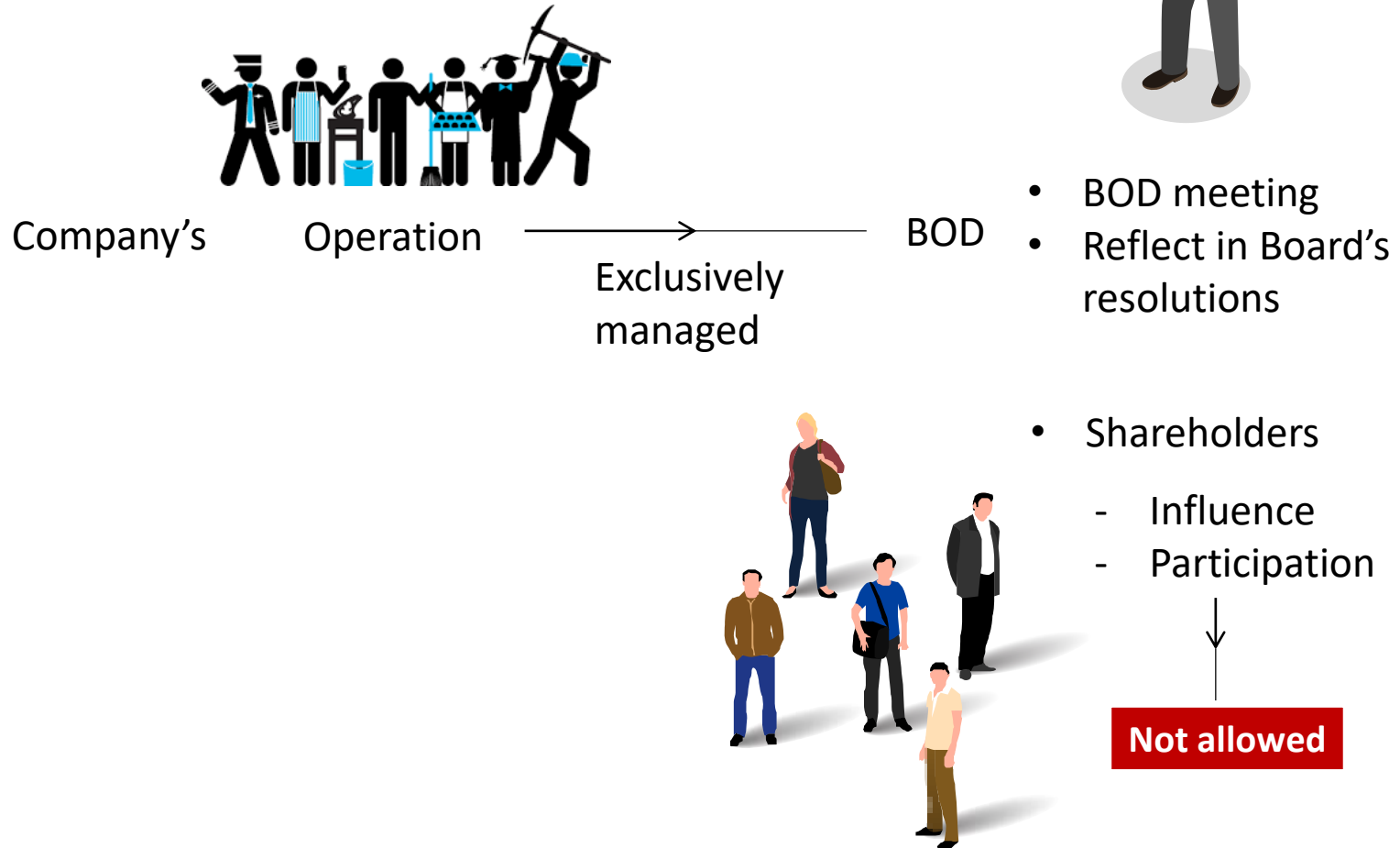
Concept and methodology



Components and interaction



Business decision



Components of directors

Sdn Bhd



1

Bhd



2

1. Min. director (threshold)

- Distinct from company
- Separate from shareholders

2. Company's decision

- BOD meeting
- Cumulative decision (collectively)
- MD has extra vote in tiebreakers situation



Company's decision

A. Revenue

B. Expenses

Company seal (option)

- Sale of goods
- Provision of services



- Acquisition of plant and machinery
- Employment of related parties
- Engagement of services from related parties



Company's decision

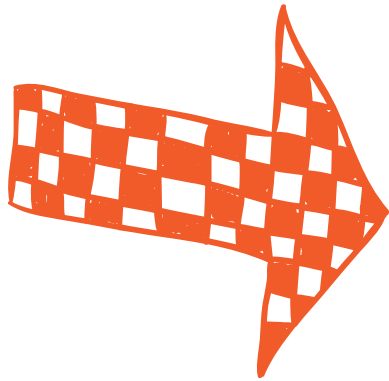
- C. Fulfillment of business judgment test [s 213(1)]



Company seal (option)

- (i) Proper purpose
- (ii) Good faith
- (iii) In the best interest of the company

Directors are high risk employment



1. Legal suit by shareholders
2. Legal suit by shareholders on behalf of company

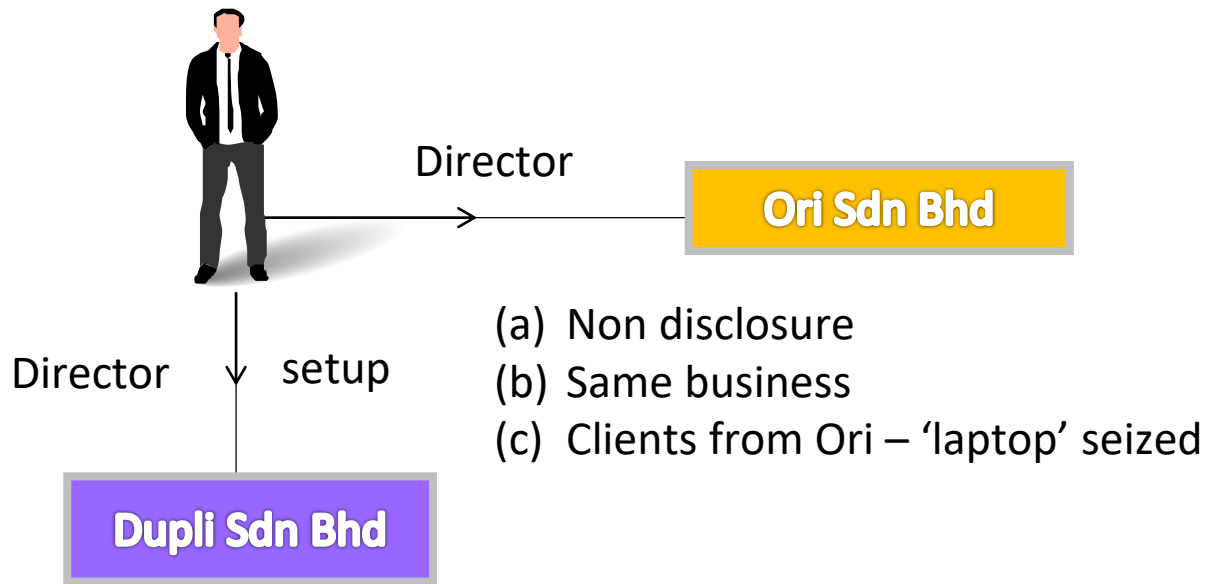


Directors personally liable

+

Joint liability with other defaulting parties

Practical illustration 1



1. 'Duty to act in good faith and not to make a profit out of the trust.'
2. As a director she must therefore, at all time, exercise the powers vested in her as a director honestly and diligently.
3. Precluded from acting in a manner which will bring her personal interest into conflict with the company.

Black Point Design Sdn Bhd v Ng Lee Peng & 5 Ors
[2017] 2 AMR 829

Directors are high risk employment

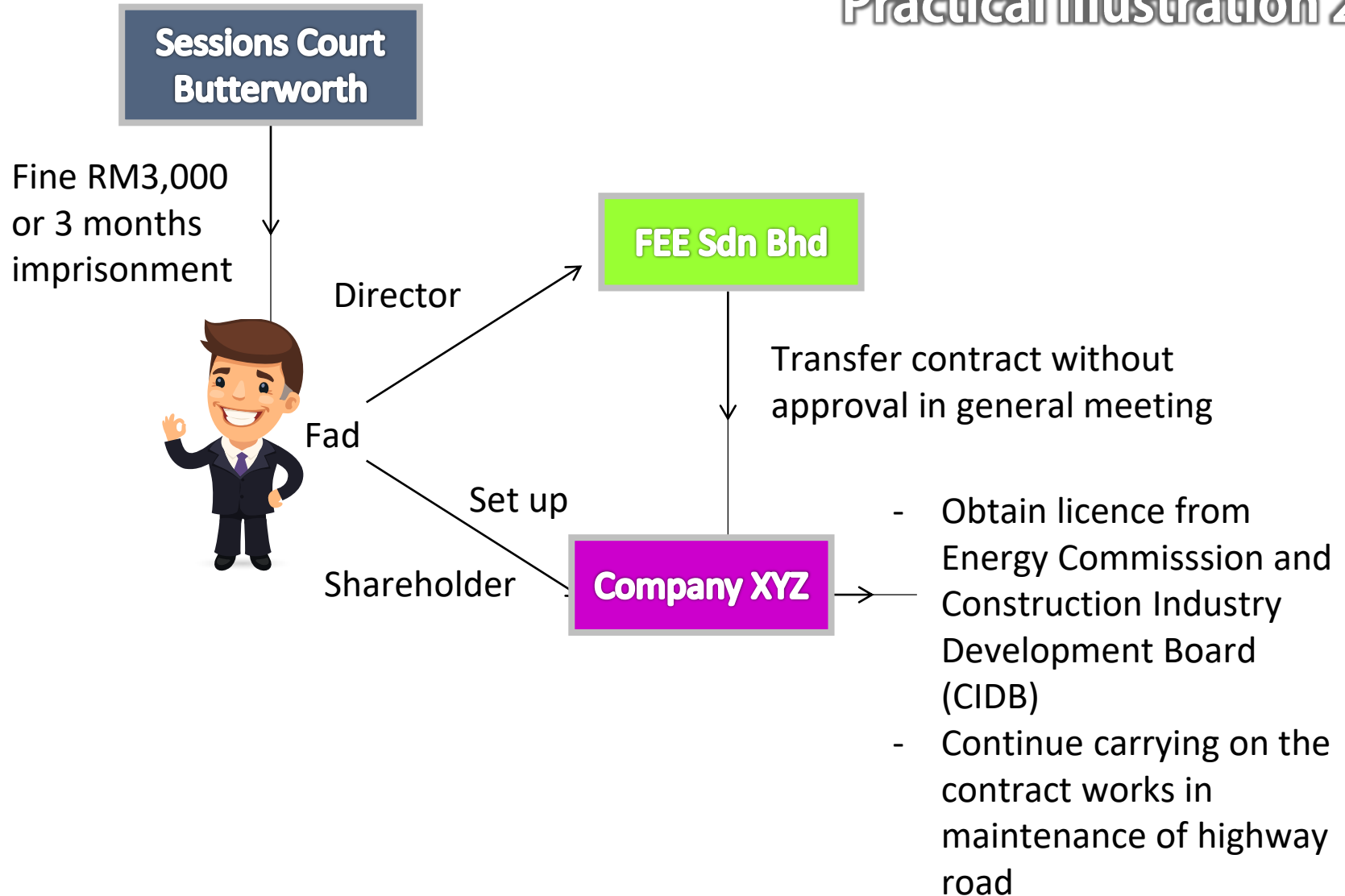


3. Prosecution by SSM
4. Upon conviction,
 - (a) Imprisonment ≤ 5 years
 - (b) Fine \leq RM3 million
 - (c) Both

[ss 213(3), 218(2)]



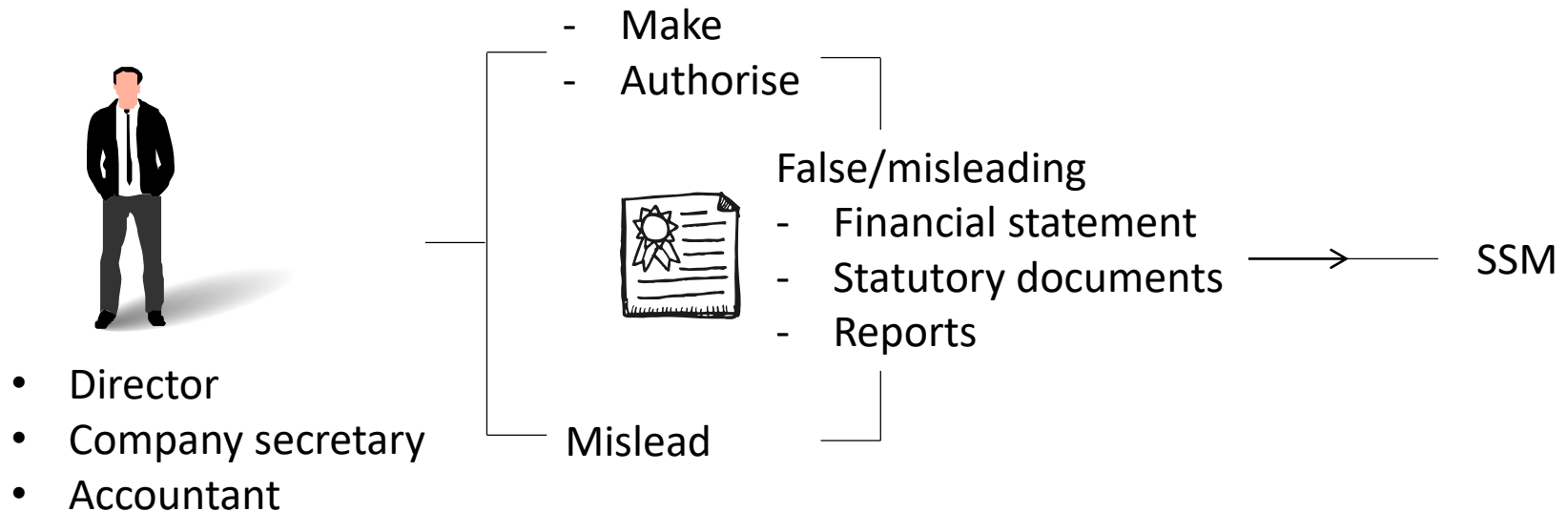
Practical illustration 2



[SSM media release: 29.7.2019]

False and misleading statement to SSM

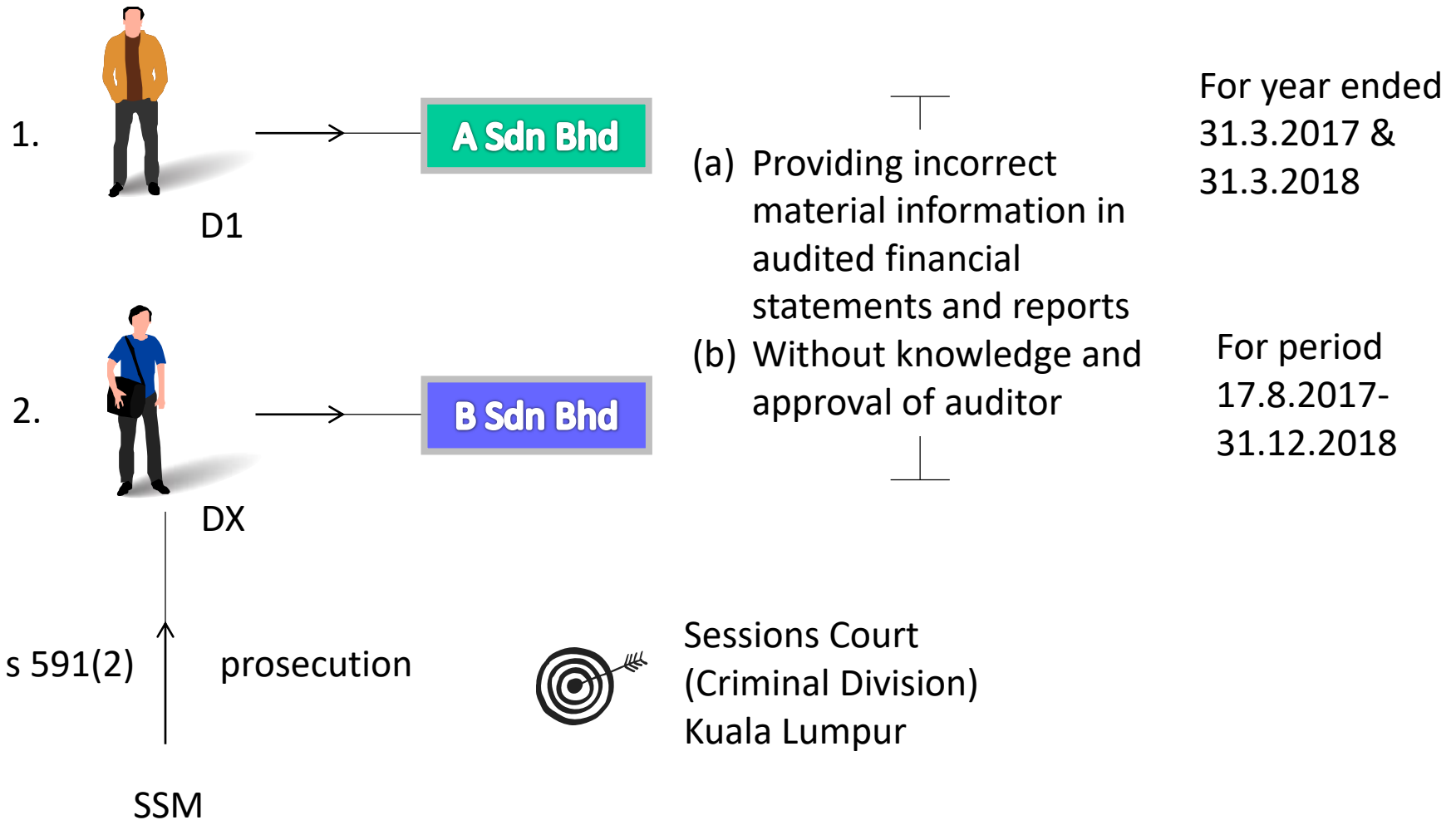
[s 591(2)]



Upon conviction,

- (a) Imprisonment \leq 10 years;
- (b) Fine \leq RM3 million;
- (c) Both

Practical illustration 3



(SSM media release: 31.10.2020)

Practical illustration 4

Financial statement

- Lodgement to SSM
- 7 months from year end
- [s 259(1)(a)]



False information

Year ended 31.12.2016

Sessions Court Shah Alam



C (Age 32)

Directors



K (Age 44)

R Sdn Bhd

SSM

(SSM media release: 9.9.2020)

Practical illustration 5

Financial statement

False information on

	RM
• Revenue	973,050
• Cost of sales	963,000

year ended 31.12.2013

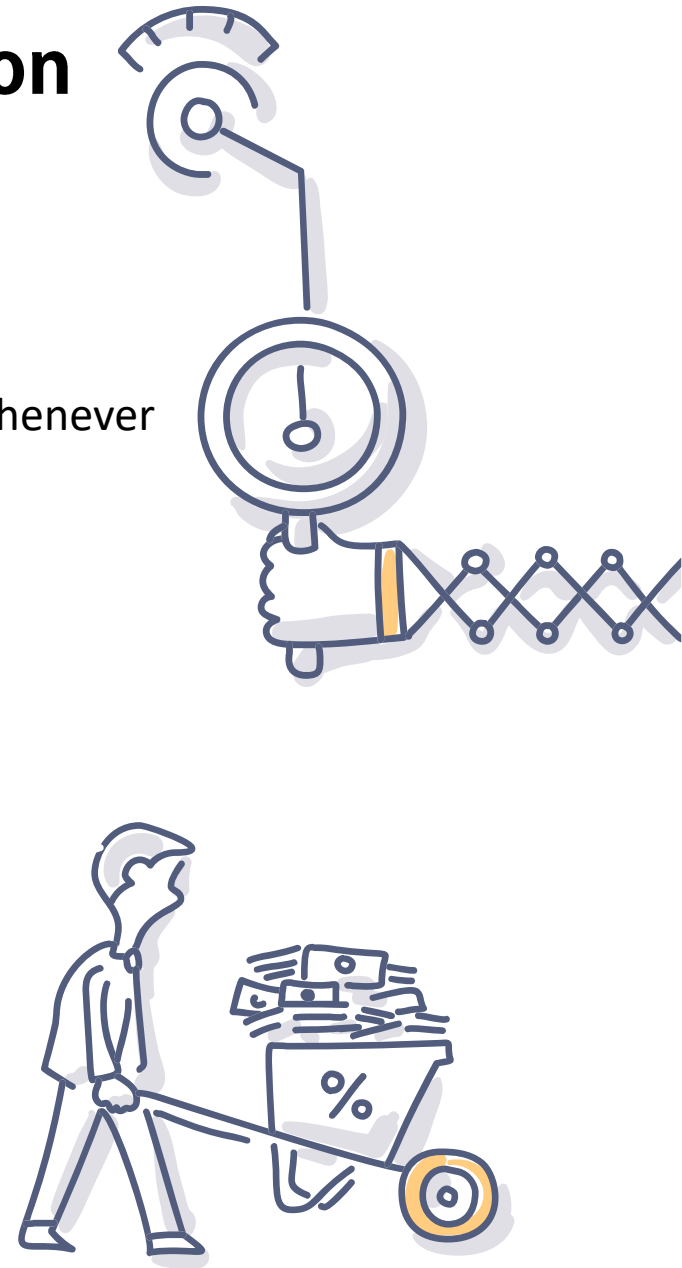


(SSM media release: 16.4.2019)

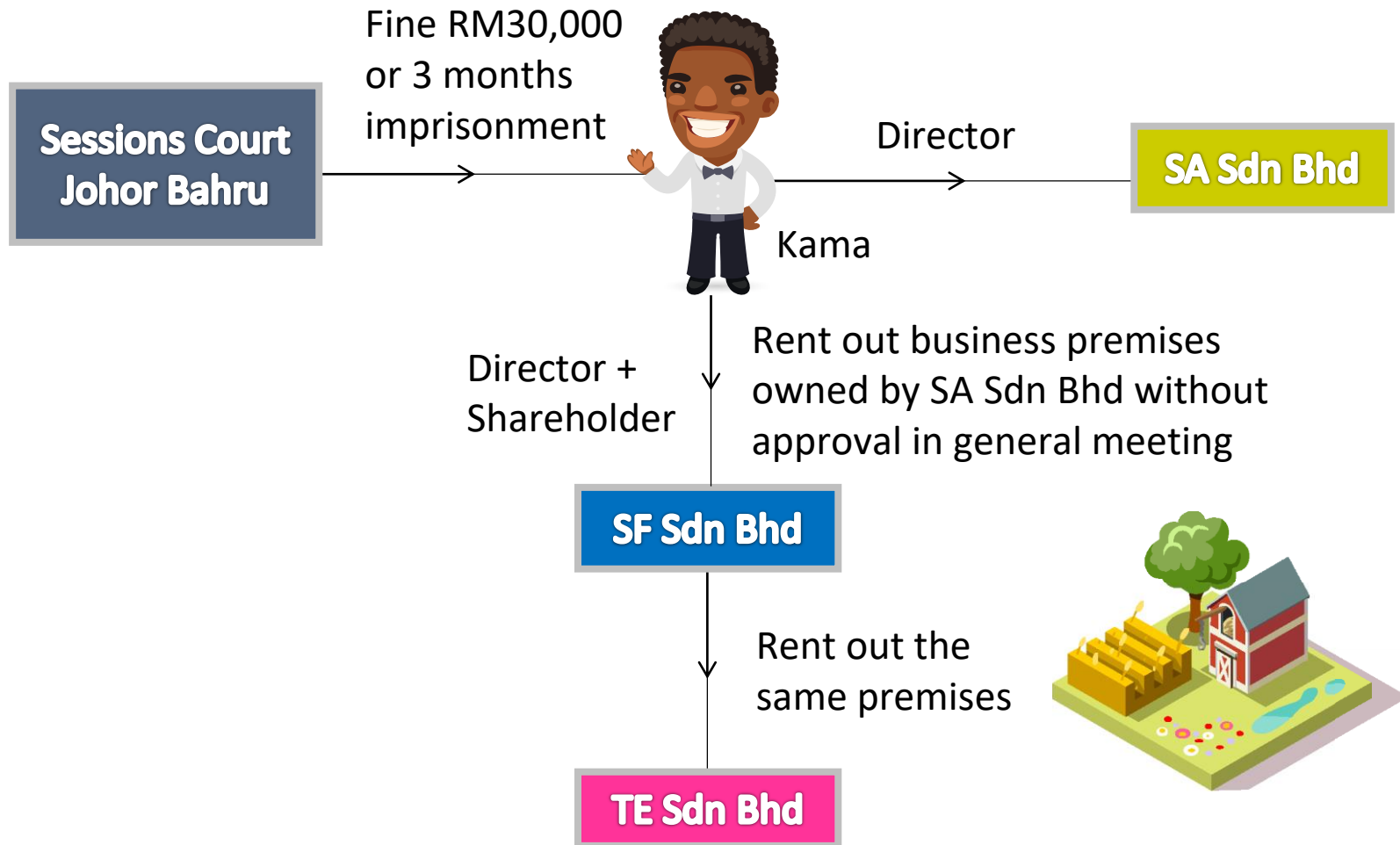
Steps in making business decision

Step

- 1 Reasonable care
 - Assemble of the facts
 - Reliance on expert advice/opinion whenever necessary
- 2 Components of directors
 - Knowledge
 - Experience
 - Skill
- 3 Diligence
 - In discharge duties
 - With honesty
- 4 Avoid making personal profit
 - Setting up new co
 - Implicate damages to the company
 - Detriment to the company



Practical illustration 6



Using his position as director to gain benefit for himself

[SSM media release: 16.7.2018]

Practical illustration 7

Sessions
Court Ipoh



MKC

Director

Pleaded guilty



(a) Using his position as
director to gain benefit
for himself

Fine RM20,000 for each charge

CA 1965

Pari materia
CA 2016

ss 132(2)(a), (c)

ss 218(1)(a), (c)

(b) Making false statement to SSM

- Failing state actual revenue
made by the company in year
2013 and 2015 in company's
profit and loss account



Fine RM3,000 for each charge



s 364(2)

s 591(2)

[SSM media release: 10.4.2019]

COMPANY LAW 2021

Appointment of directors

MANAGE YOUR **NEW** SHAREHOLDERS' RIGHTS &
DIRECTORS' RISKS TO AVOID BEING CHARGED



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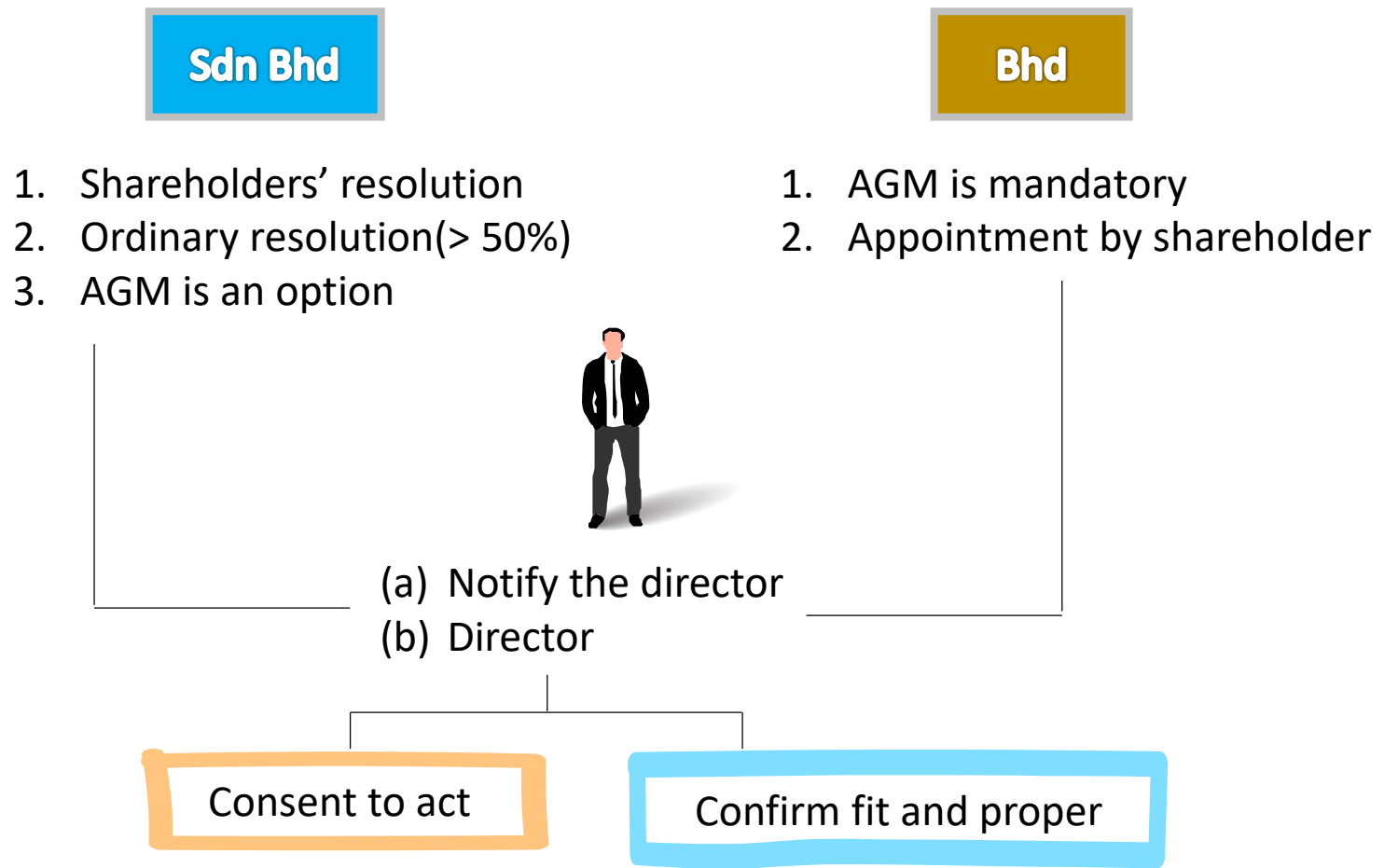
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Appointment of director

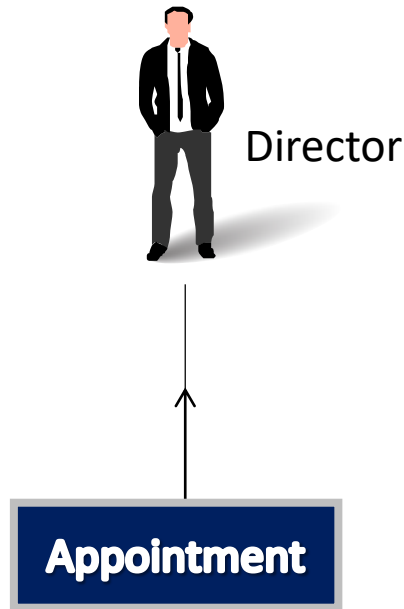




Director's criteria

- Age \geq 18 years
- No retirement age
- Shall ordinarily reside in Malaysia
- Can be foreigner or Malaysian

Fit and proper person



- Fit and proper person
- Cannot take part in the management of company if he is an undischarged bankrupt (RM100,000 in debts – gazette 23.10.2020*)

[s 198(1)(a)]

- Consent in writing to act as a director
- Declare that he is not disqualified from
 - being appointed
 - holding officeas director

Form s 201: Declaration by Person before Appointment as Director

- Retained in secretarial office

Practical illustration 8



Provide false information in
Form 48A* on 18.3.2013



Yayasan Kanser Malaysia



Ex-director

- Undischarged bankrupt at the time of declaration

prosecute

s 364(2), CA 1965
[s 591(2), CA 2016]

**Sessions Court
(Criminal Division)
Kuala Lumpur**

- Fine RM4,000; or
- Imprisonment 4 months

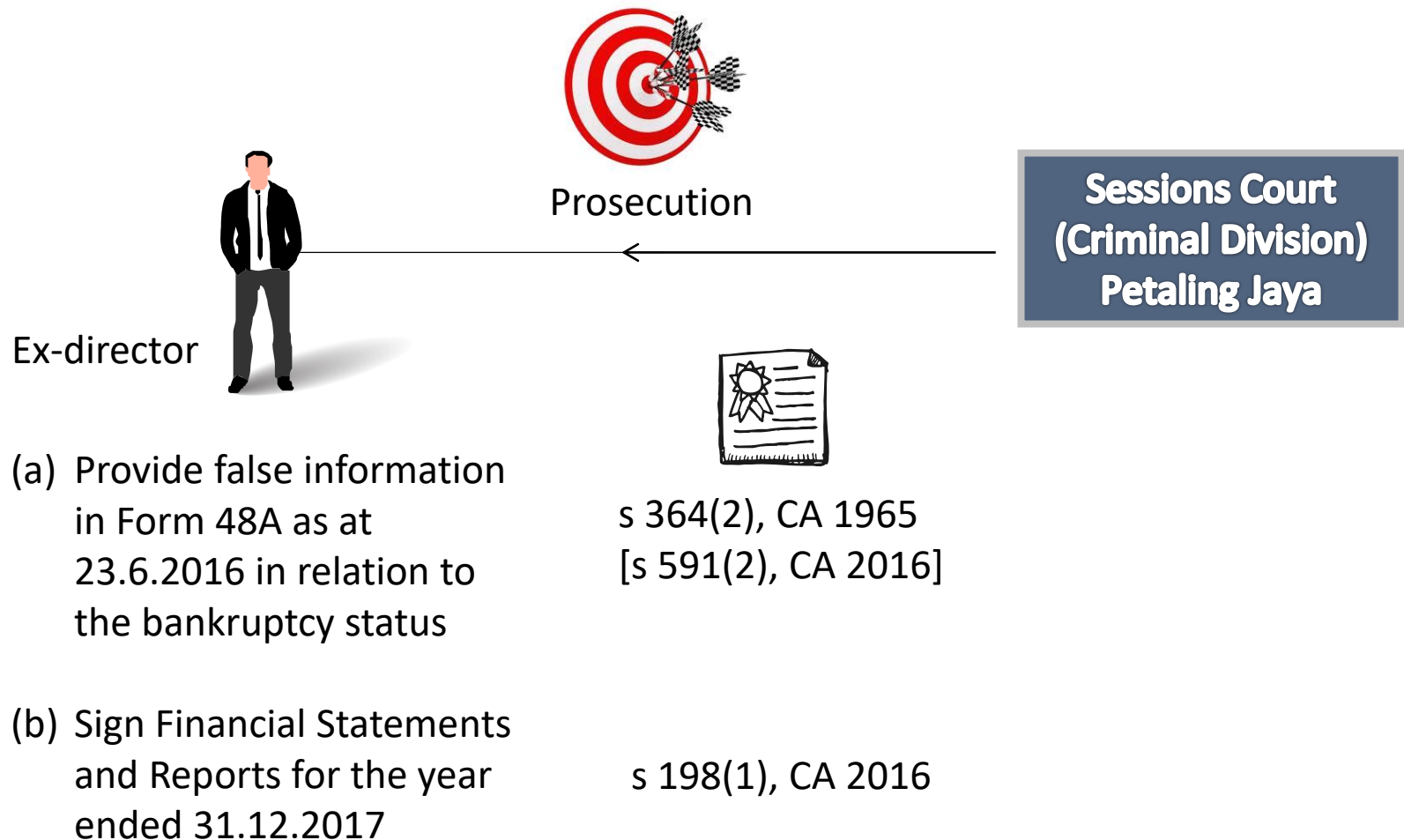
* CA 2016

Form s 201: Declaration by Person
before Appointment as Director

- Kept at registered office
- Lodged upon directed

[SSM media release: 1.9.2020]

Practical illustration 9



[SSM media release: 3.10.2019]

Appointment of director

Legislation

290(1)

Members' resolution

- (a) written resolution via circulation; or
- (b) meeting of members

202(2)

Manner:
Ordinary resolution



291(2)



Simple majority
> 50%

Mode



Email



Those members
entitled to vote

Notification of change in the Register of Directors, Managers and Secretaries

Form s 58



- Appointment
- Resignation



- Update Register of directors, managers and secretaries within 14 days from the change s 57(4)
- Notify SSM within 14 days from date of the change s 58(1)

Practical illustration 10

Form

49 CA 1965
s 58 CA 2016

False information

on

s 591(2), CA 2016
s 364(2), CA 1965



SSM media release

1.



Appointment
of director
2.3.2016

Magistrate Court
Ampang

24.9.2019

2.



Appointment
of director
15.4.2013

Session Court
(Criminal Division)
Johor Bahru

5.4.2019

Nature of appointment



	RM
A. Salary	4,000
EPF @ 19%	760
Meal allowance	900

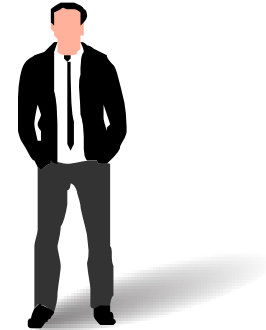
B. Director fees (annual)	24,000
Performance incentive	*
Meeting allowance	1,000



C. Consultant
[item (g), Group G, First Sch,
Service Tax Regulations 2018]

Annual threshold > RM500,000

Business income
- Issue invoice



Employment income

Employment income



Resolving conflicts



Shareholding > 50%

< 50%

100%

Dispute

C unilaterally appoint new director A

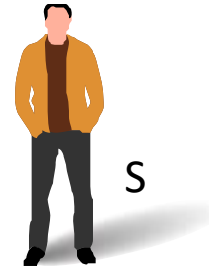


Appointment of A valid
?

Practical illustration 11



40%



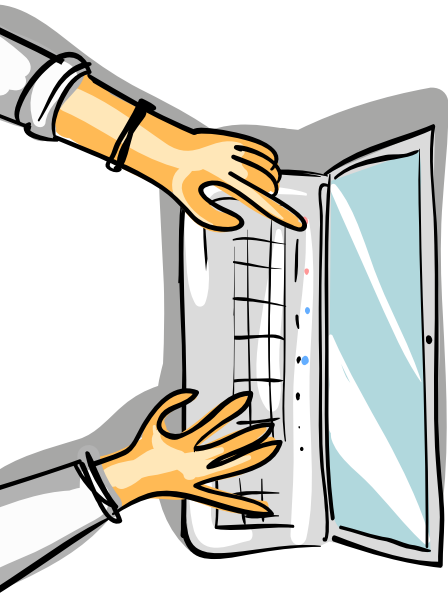
60%

O Sdn Bhd

- S Members' resolution
- Appoint JJ as director

Issue:

- (a) Whether effective and valid appointment of JJ?
- (b) Whether members' resolution signed by only one person (i.e. S) is valid?



Sdn Bhd

Resolution passed by

- Written resolution
- Members' meeting

s 290(1)



Ordinary resolution

- > 50%
- Vote
 - In meeting
 - On written resolution

s 291(1)

(a)

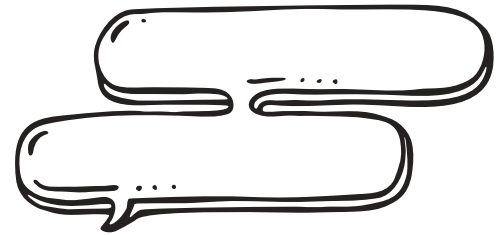
(b)



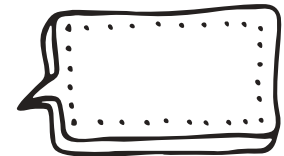
Meaning of
'simple majority of more than half
...'



- More than half of the number of shareholding of the members
- Not more than half of the shareholders



1. I am of the view that the second defendant, having 60% of the shareholding of the fifth defendant, can validly sign a written resolution of the members appointing the first defendant as the director of the fifth defendant. Such resolution was a valid ordinary resolution.
2. With the resolution in writing now, the plaintiff cannot stop the second defendant from passing members' resolution because a written resolution signed only by the second defendant will be a valid ordinary resolution.



- Wong Chee Lin JC

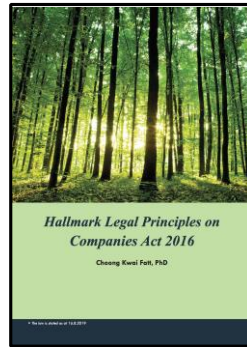
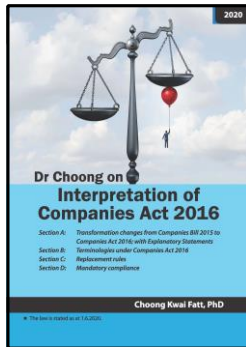
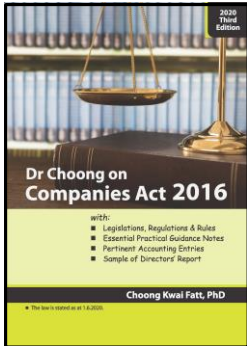


*Mohamed Zahid Yon B Mohamed Fuad v Jason
Jonathan & Lo & 4 Ors [2019](HC)*

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EXCLUSIVE FOR ZOOM PARTICIPANT ON 7 JAN 2021

Limit to one set for each participant



[market price: RM800(WM); RM830(EM)]

65%
Discount

3 in 1 Company Law Publication

Gift Premium price @ RM280 per set

☐ WM/EM: RM310

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GIFT**

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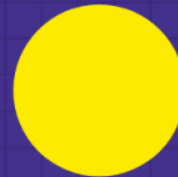
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COMPANY LAW 2021

Director's resignation

MANAGE YOUR NEW SHAREHOLDERS' RIGHTS &
DIRECTORS' RISKS TO AVOID BEING CHARGED

ACCOUNTANT



CO-SEC

SHAREHOLDER



Book 3

DIRECTOR



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7 January 2021

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Resignation

Mandatory

- No longer fit and proper person
- Disqualified s 198

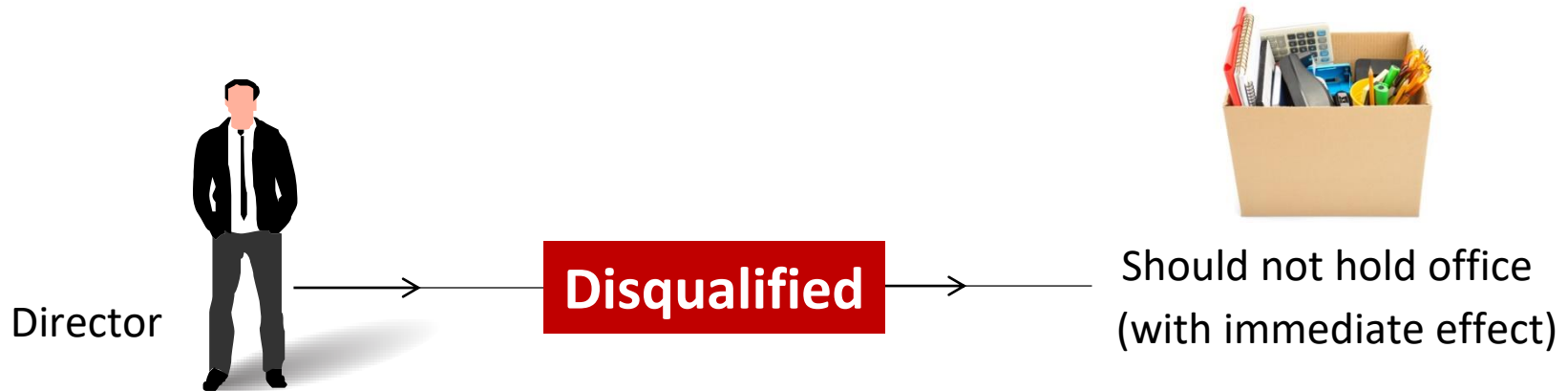
Non compliance

- Contract invalid
- Prosecution by SSM

Voluntary

Disqualified being a director

[s 198]



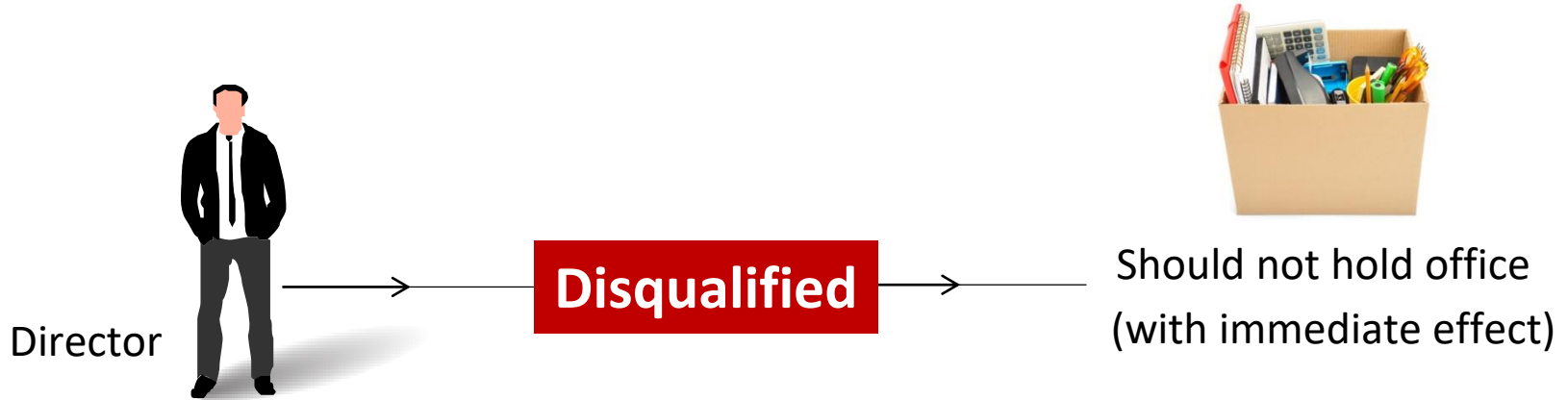
In Malaysia / outside Malaysia

- (a) Undischarged bankrupt
- (b) Convicted offence in relation to promotion, formation or management of company
- (c) Convicted offence involved in bribery, fraud, dishonesty



Disqualified being a director

[s 198]



(d) Convicted offence under (in Malaysia / outside Malaysia):

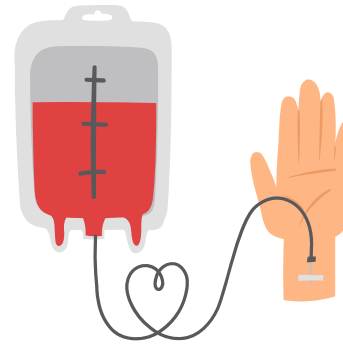
- Duties and responsibilities (s 213)
- Act in the best interest of the company (s 217)
- Improper use of property, position (s 218)
- Transactions with connected person (s 228)
- Proper accounts not kept (s 539)



Disqualified being a director

[s 198]

- (e) By Court order (s 199)
- (f) Unsound mind
- (g) Death



Non compliance

upon conviction

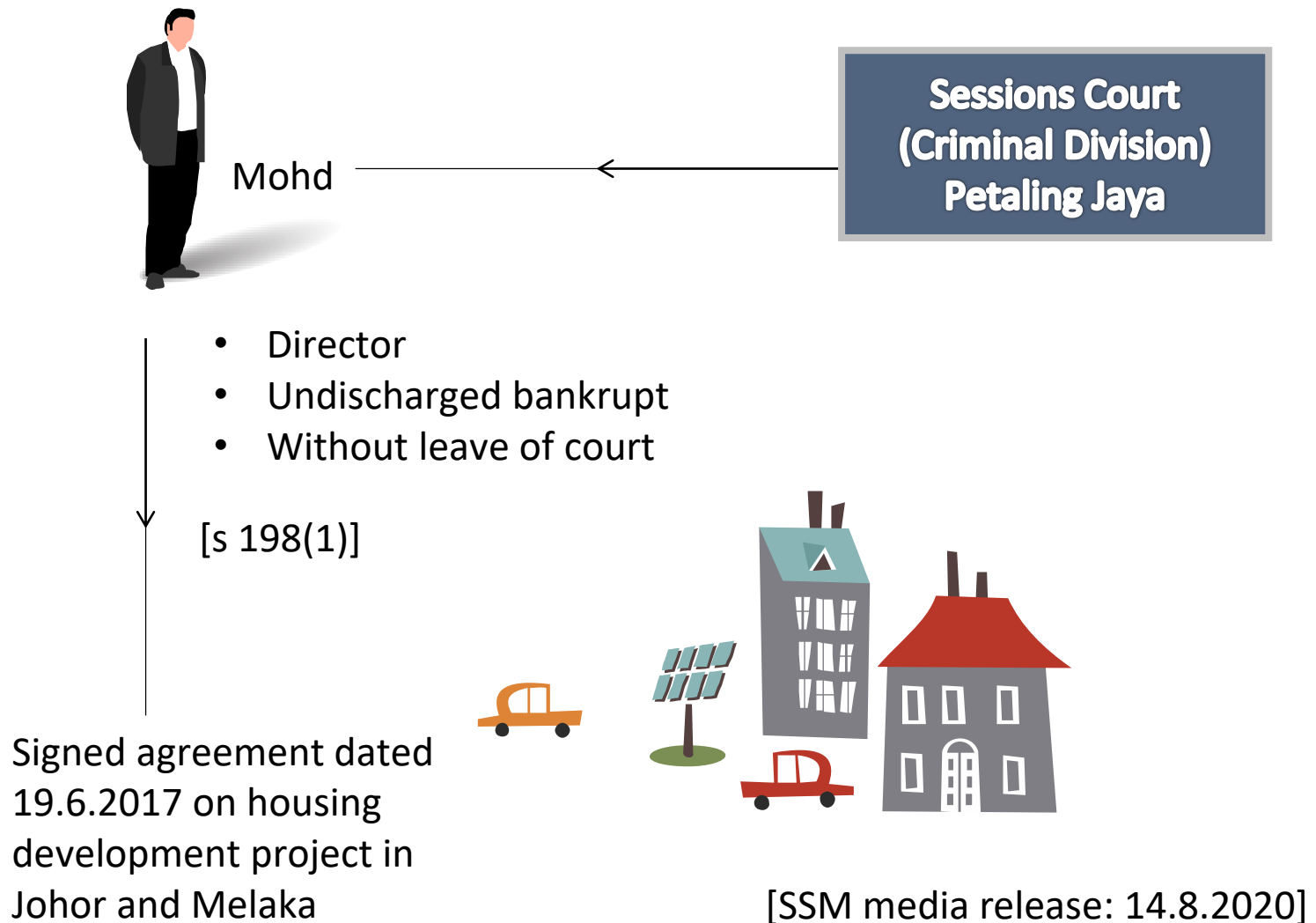
[s 198(7)]

(i) Imprisonment \leq 5 years

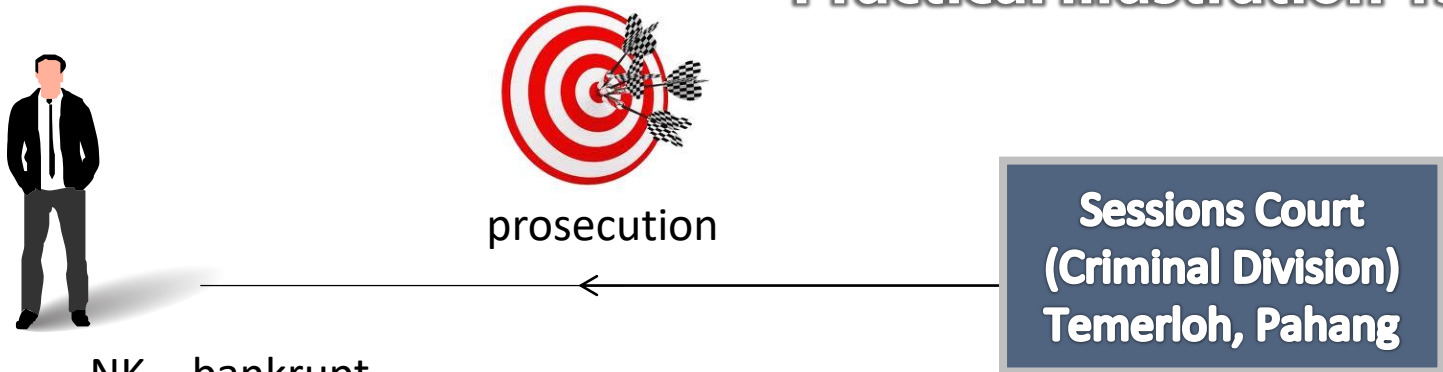
(ii) Fine \leq RM1 million

(iii) Both

Practical illustration 12



Practical illustration 13



Manager (take part in the management)

(a) Falsify bankruptcy status in Form 48A as at 13.7.2015

ss 125(1), 364(2) of CA 1965
[ss 198(1)(a), 591(2) of CA 2016]

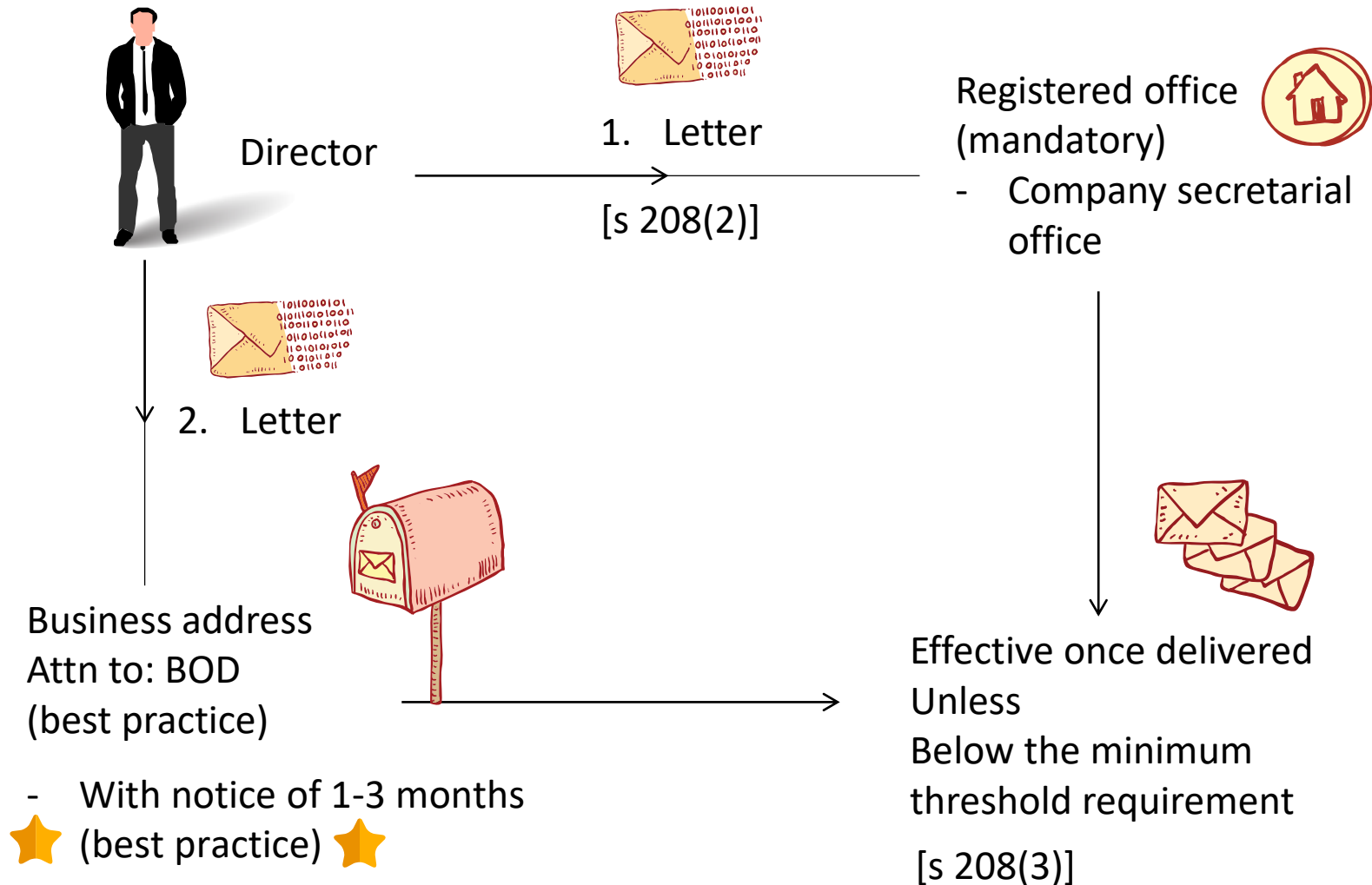
(b) Act as manager of the company for years 2014-2017

(c) Sign in the statutory declaration as person primarily responsible for the financial management of the company



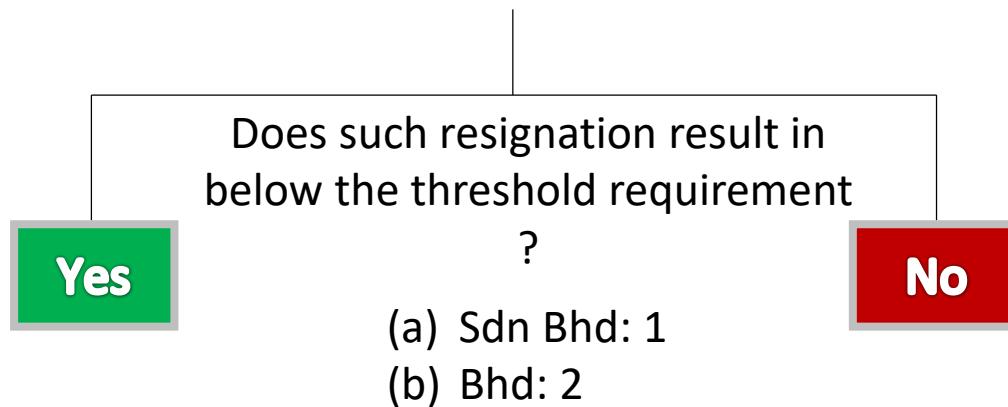
[SSM media release: 1.8.2019]

Resignation – pragmatic approach





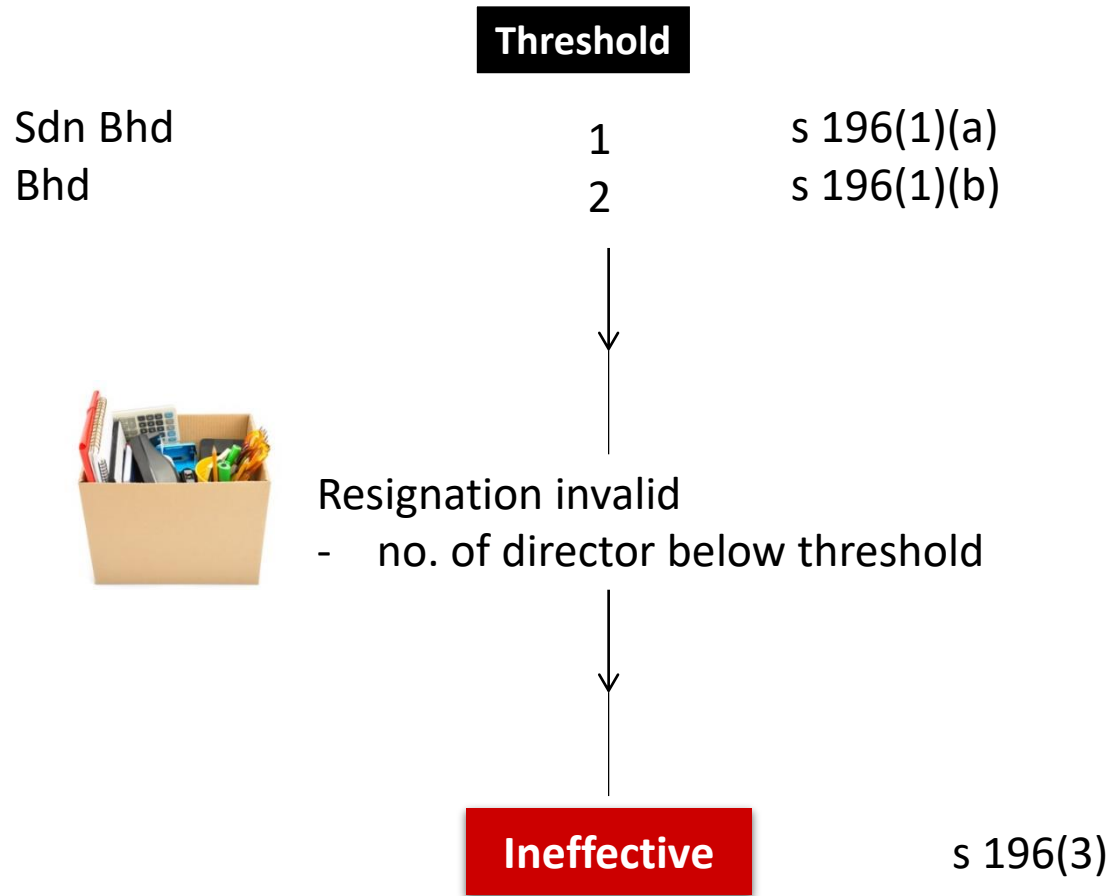
Resignation of directors



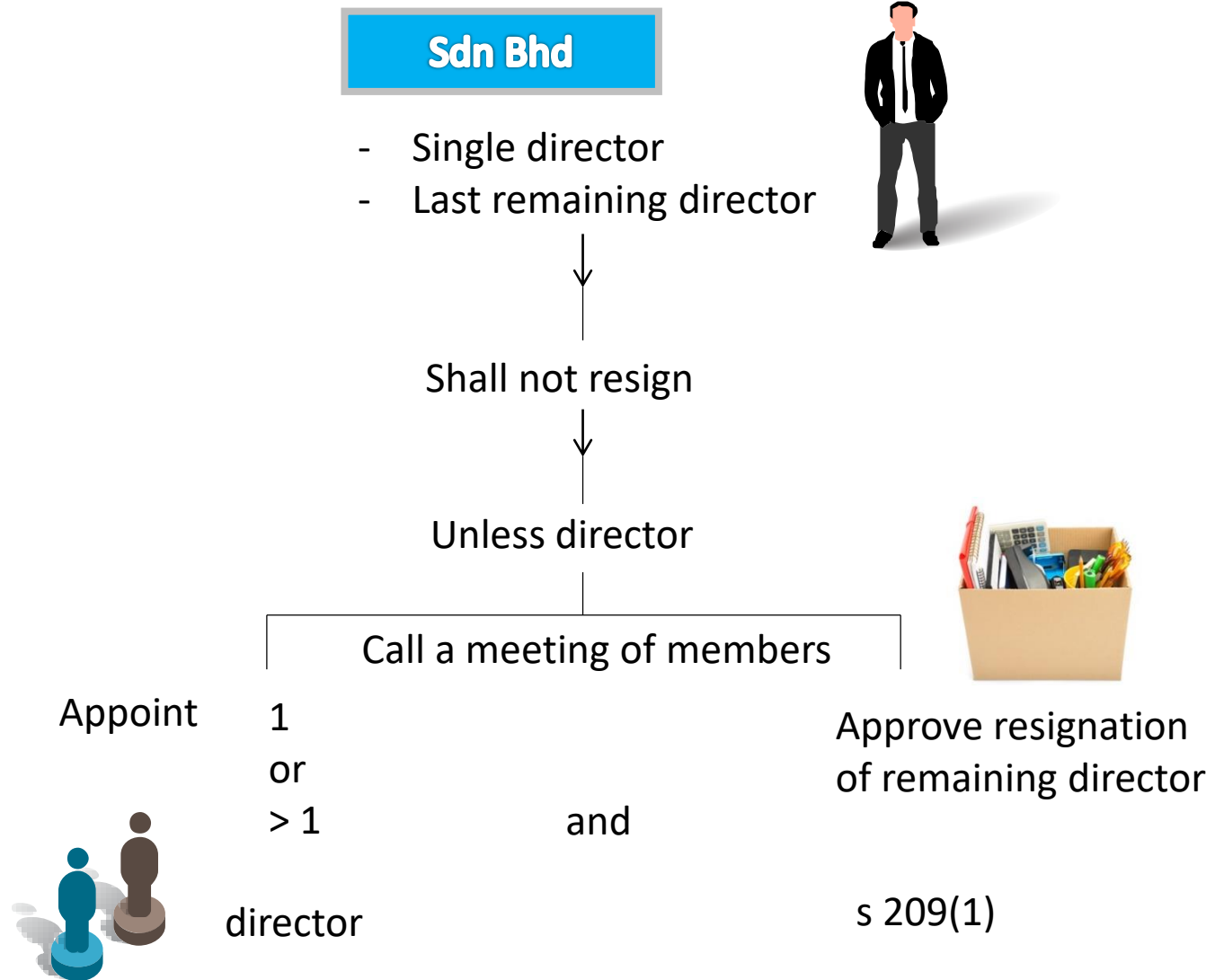
- The purported resignation is not effective and not valid [s 196(3)]

- Resignation is effective and valid

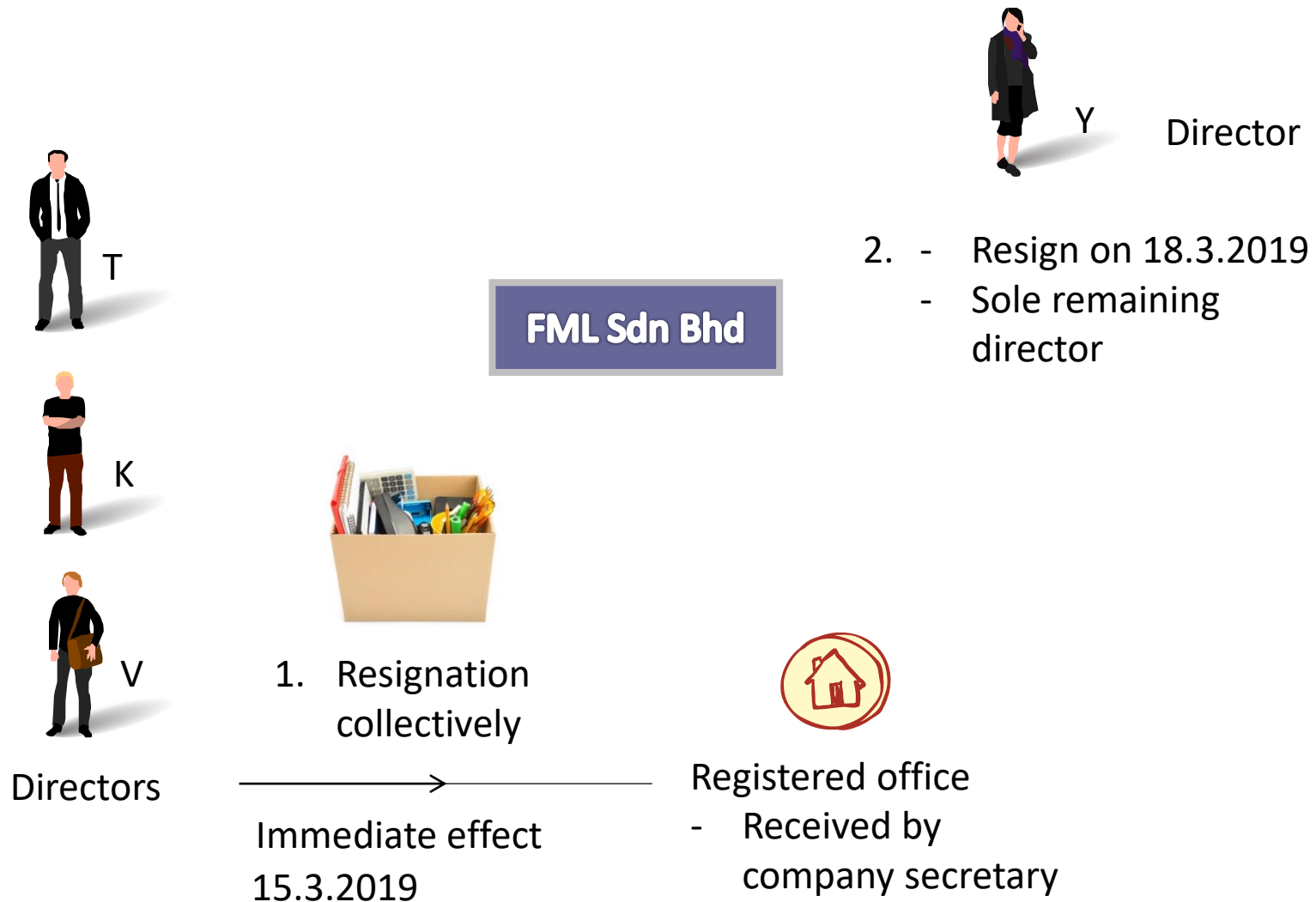
Minimum number of director



You are alone





Practical illustration 14



A. Resignation of a director – valid



- Must be by way of written notice 
- Take effect on the date stated in the notice
- Upon being delivered to the company's registered office (received by the company's secretary) 
- No requirement for acknowledgement of receipt of such notice
- No requirement to serve on the remaining director
- No requirement being accepted by the BOD



B. The resignation of the second defendant as the sole remaining director

- Ineffective
- Contravene s 196(3) read with s 196(1)



Amarjeet Singh Serjit Singh JC

Tan Kei Vin & 2 Ors v Feed Me Love Sdn Bhd
(2019)(HC)

Notification of change in the Register of Directors, Managers and Secretaries

Form s 58



- Appointment
- Resignation



Note

- | | | |
|------------------------------------------------------------------------------------------------------|---------|---|
| • Update Register of directors, managers and secretaries (“register”) within 14 days from the change | s 57(4) | 1 |
| • Notify SSM within 14 days from date of the change | s 58(1) | 2 |

Notes:

1. Non compliance [s 57(6)]

Company and every officer
On Conviction,

- (i) Fine \leq RM10,000; and
- (ii) in continuing offence, a further fine \leq RM500 each day during which the offence continues after conviction

2. Non compliance [s 58(4)]

Company and every officer
On Conviction,

- (i) Fine \leq RM50,000; and
- (ii) in continuing offence, a further fine \leq RM500 each day during which the offence continues after conviction



Practical illustration 15

Form

49 CA 1965

s 58 CA 2016

Notification of change in the Register of Directors, Managers and Secretaries

False information

s 591(2), CA 2016

s 364(2), CA 1965

on

SSM media release

1.



P

Resignation
of director
30.3.2015

Sessions Court
(Criminal Division)
Kuala Lumpur

26.9.2019

2.



M

False resignation of L
• without knowledge
• without authorisation
12.2.2015

Session Court
(Criminal Division)
Kuala Lumpur

1.6.2018



SSM media release

False information

s 591(2), CA 2016
s 364(2), CA 1965

3.



E

False resignation of Z
15.4.2015

Session Court
(Criminal Division)
Kuala Lumpur

26.7.2017

Stepwise guide

Procedures compliance

Legislation

Companies Act 2016

1. Director
- resignation



- (i) Written notice (letter of resignation)
- (ii) Delivered to
- (iii) Registered address

s 208(2)

2. Board of directors



- (i) Pass resolution on director's resignation
- (ii) Instruct company secretary to effect changes in register of directors, managers and secretaries

Stepwise guide

Procedures compliance

3. Company secretary



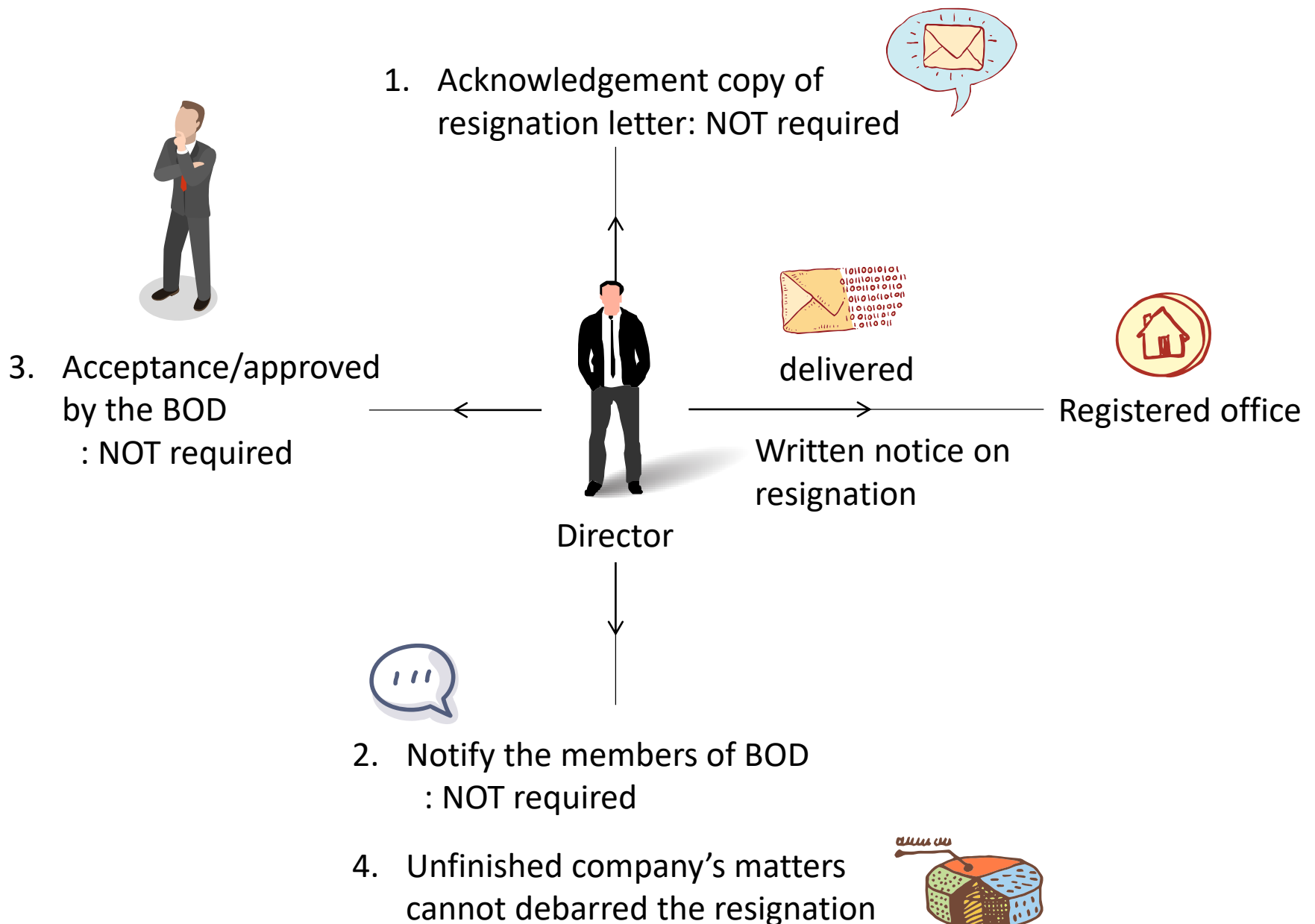
- (i) Make changes in the register
- (ii) Notify SSM using Form “Notification of change in the Register of Directors, Managers and Secretaries” – Section C within 14 days from the date of resignation

Legislation

Companies Act 2016

s 57(4)

s 58(1)



Practical illustration 16



Director

- Resigned

P Sdn Bhd



Directors

P Sdn Bhd

- Refuse to accept the resignation
- Refuse to hold a board meeting to approve the resolution for resignation
- No update of register
- No lodgement with SSM



Reason:

W cooperation to clarify matters in audited accounts

- A. • Companies Act 2016 does not require the consent of the company for the director to tender resignation
- B. • Companies Act 2016 merely require the director giving written notice to the company at the registered office [s 208(2)]
- C. • It is mandatory for the company to reflect the changes in the register and notify SSM within 14 days of the change [s 57(4) read with s 58(1)]
- D. • Outstanding management issues between the parties is not valid ground or justification to bar or prevent the director from resignation.



- Gunalan Muniandy J

Wong Kok Meng v Preserver Bina Sdn Bhd (2019)(HC)

COMPANY LAW 2021

- Derivative action
- Personal guarantee - recovery procedures
- Removal of director

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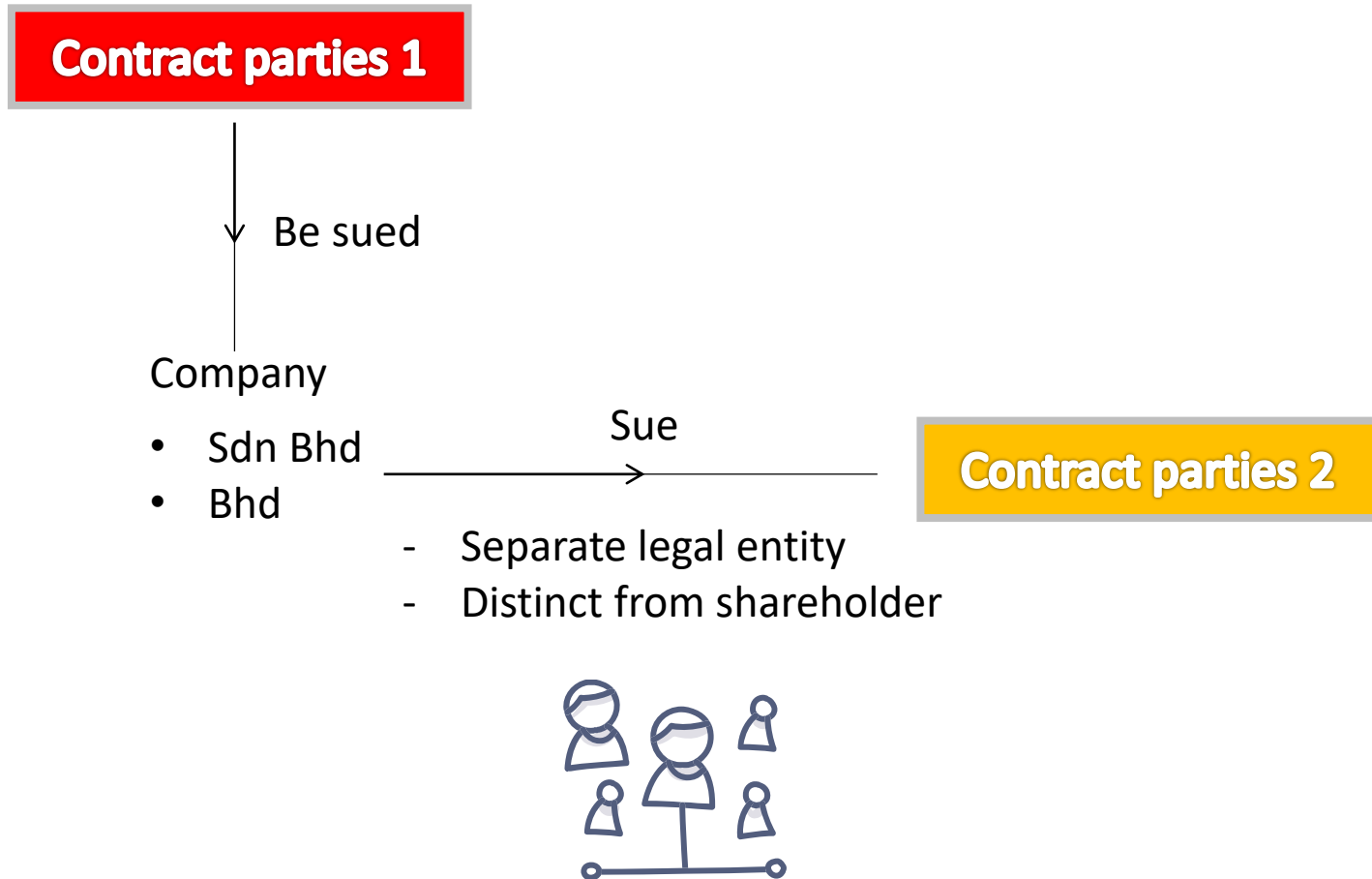
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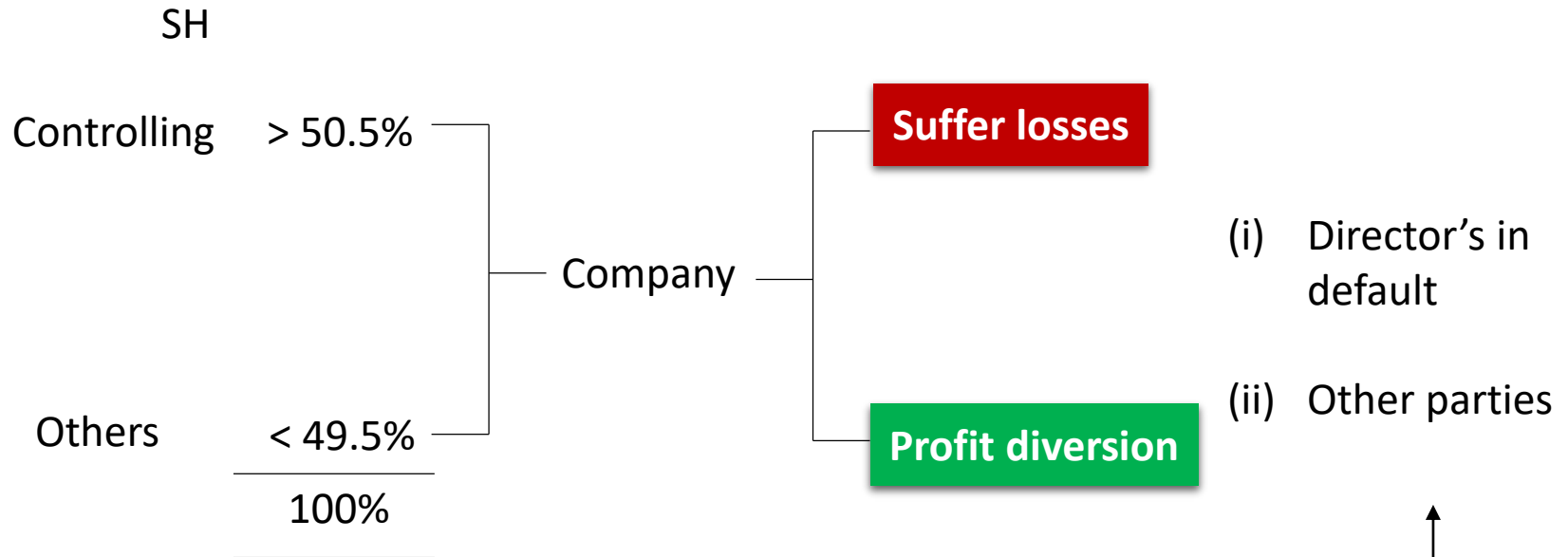
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Separate legal entity



Derivative action [s 347]

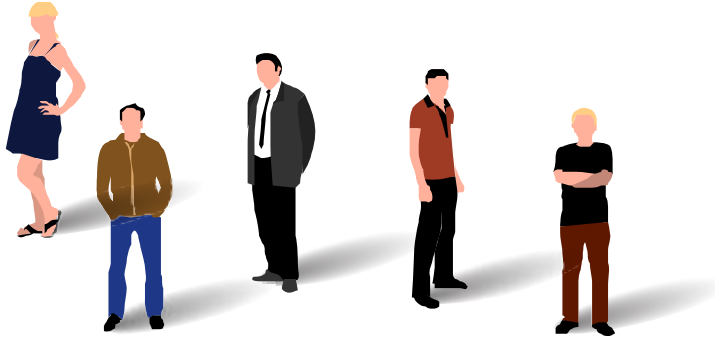


Shareholders' intervention

- Shareholder's act on behalf of company
- Proceedings brought in the company's name [s 347(2)]

Pre-requisite

Stage 1



Complainant means [s 345]

- (a) a member of a company, or a person who is entitled to be registered as a member of a company;
- (b) a former member of a company if the application relates to the circumstances in which the member ceased to be a member;
- (c) any director of a company; or
- (d) the Registrar, in the case of a company declared by the Minister for investigation under s 590.

Pre-requisite to initiate the derivative proceedings

Stage 2

Step

- 1 30 days notice in writing
 - to
 - company's secretary office
 - board of directors of company
 - intention to apply for leave of court
 - to initiate a proceeding
 - on behalf of the company

s 348(2)
- 2 The complainant is acting in good faith. [s 348(4)(a)]



Step



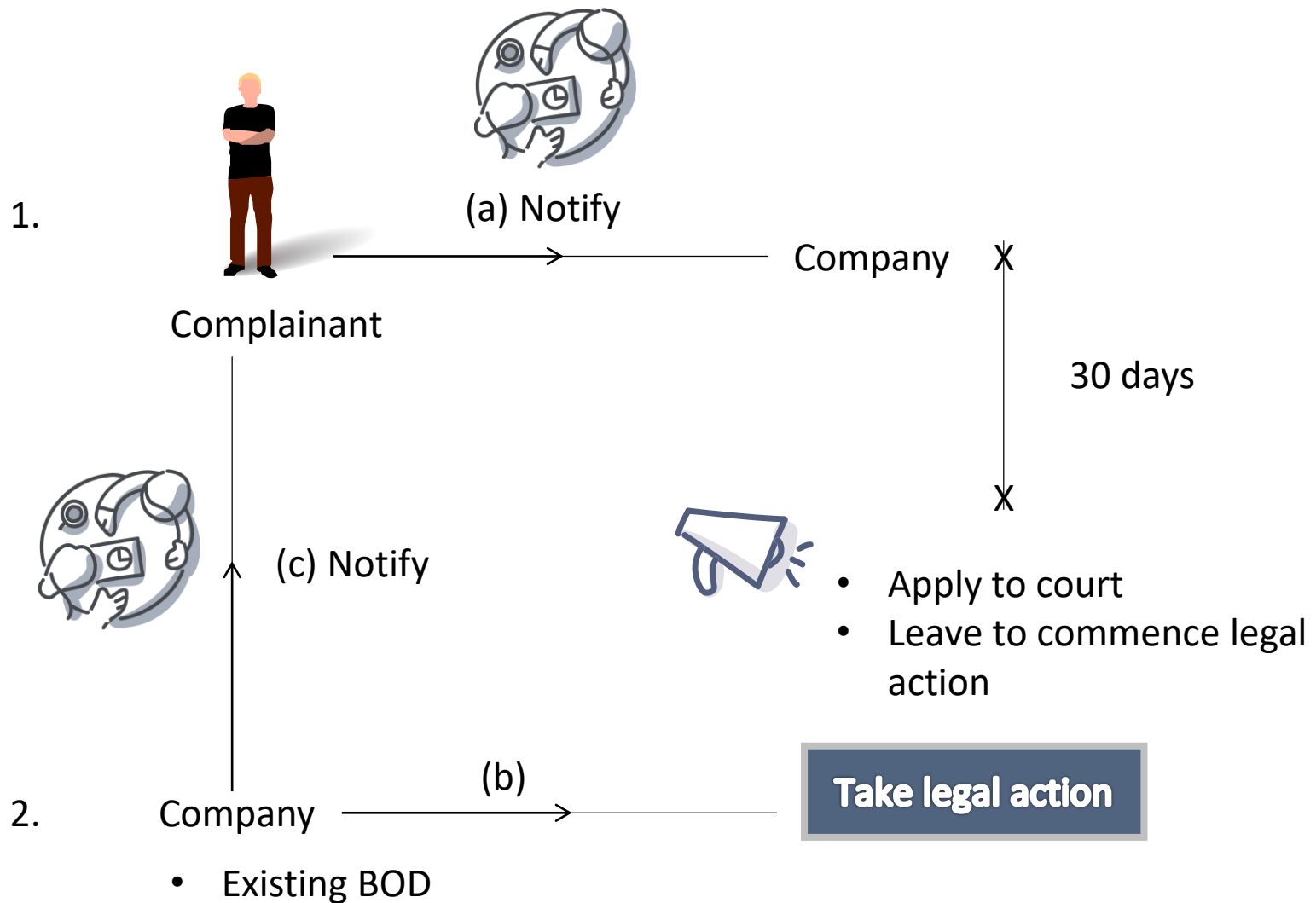
3 The proceedings must be in the best interest of the company. [s 348(4)(b)]

4 BOD shall call a meeting to

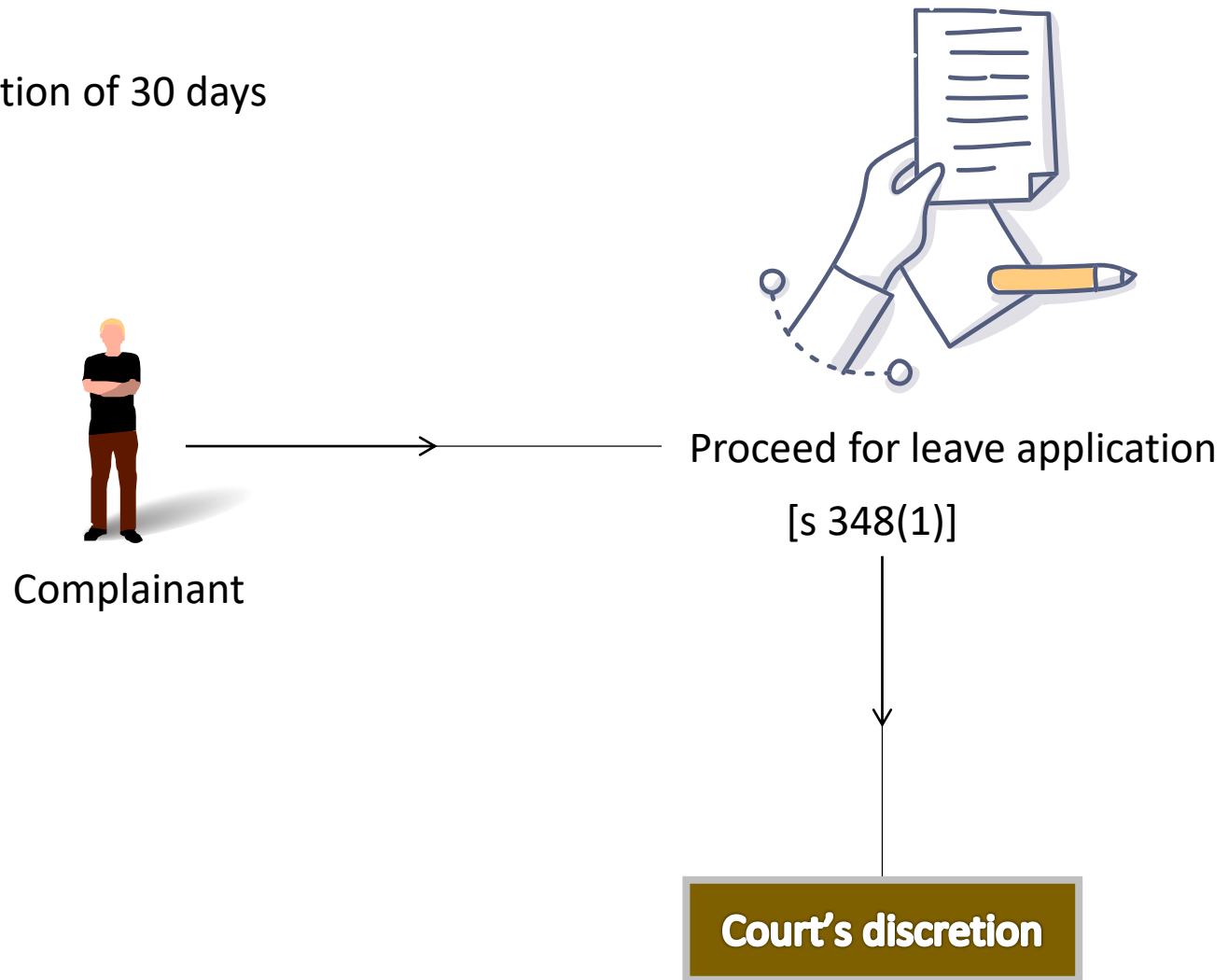
- consider
- respond
- agree

request by the complainant to commence legal action on behalf of the company





3. Expiration of 30 days



Court's action and discretion – leave stage

A. Court would exercise discretion to evaluate

- Factual matrix
- Complainant is acting in good faith
- Acting in the best interest of the company

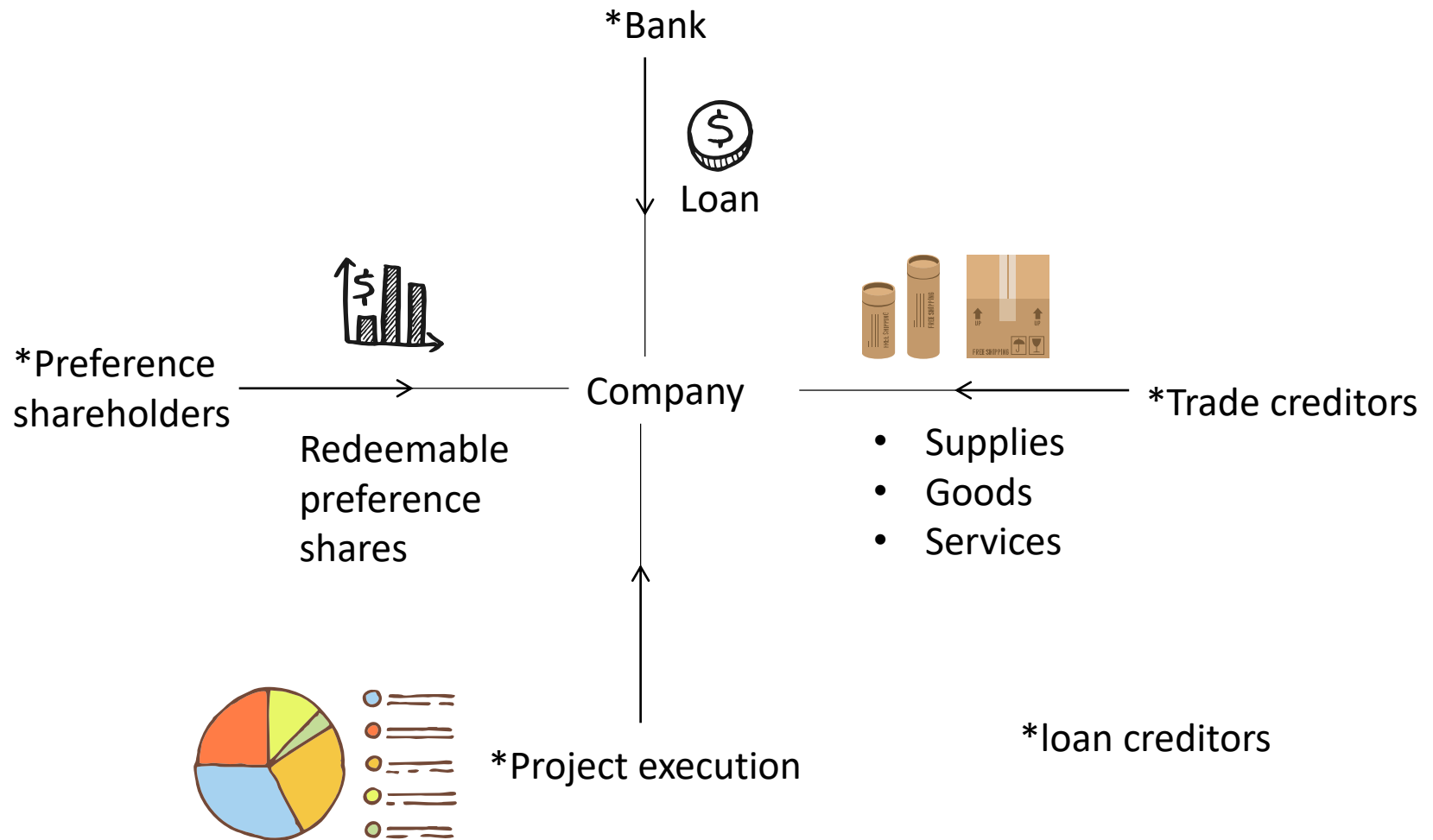
B. Good faith required

- Honest belief the action is essential
- In the best interest of the company
- Not brought up for a collateral purposes

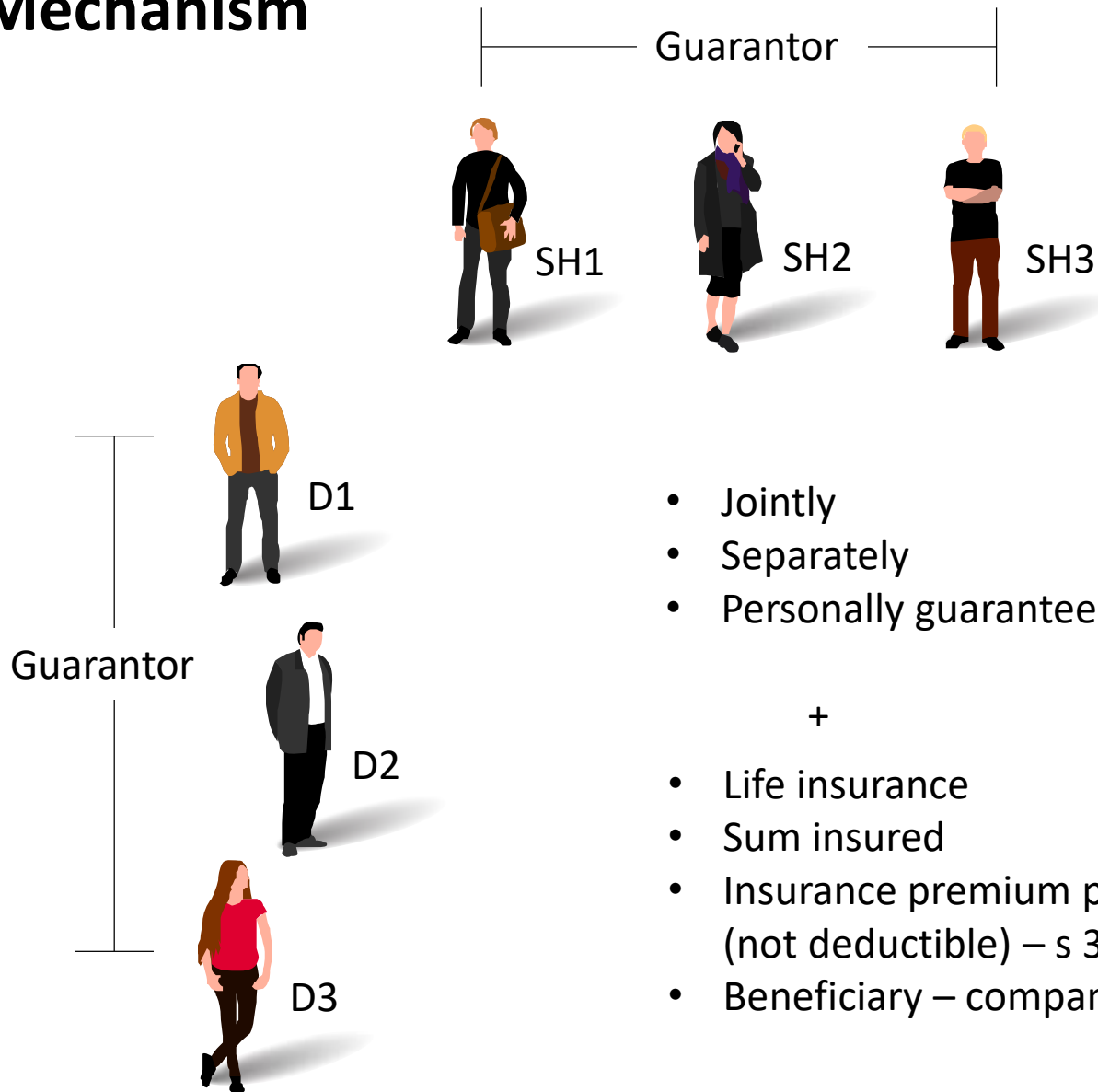
C. Best interest

- Legal action would bring commercial benefit
- The company stands 'to gain substantially in money or in money worth'
- Merits of the case is secondary

Personal guarantee



Mechanism



- Jointly
- Separately
- Personally guarantee on loan

+

- Life insurance
- Sum insured
- Insurance premium paid by company (not deductible) – s 39(1)(b)
- Beneficiary – company

Procedures for recovery

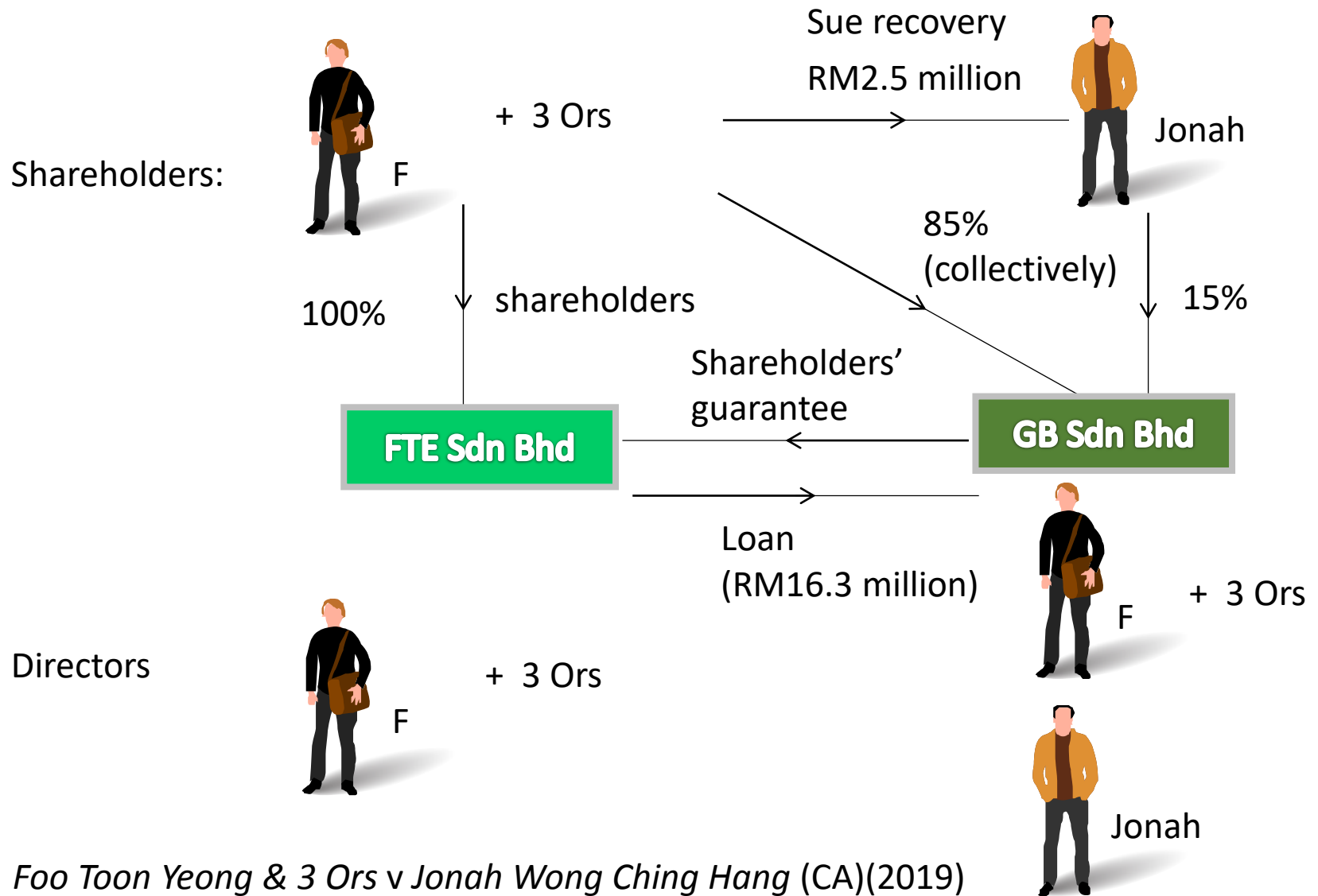


Step

- 1 The loan creditors* must first recover from the company
- 2 Legal action on the company
- 3 Judgment sum against the company
- 4 Default payment
 - Recovery on personal guarantee
- 5 Notice to guarantors
- 6 Legal action on guarantors

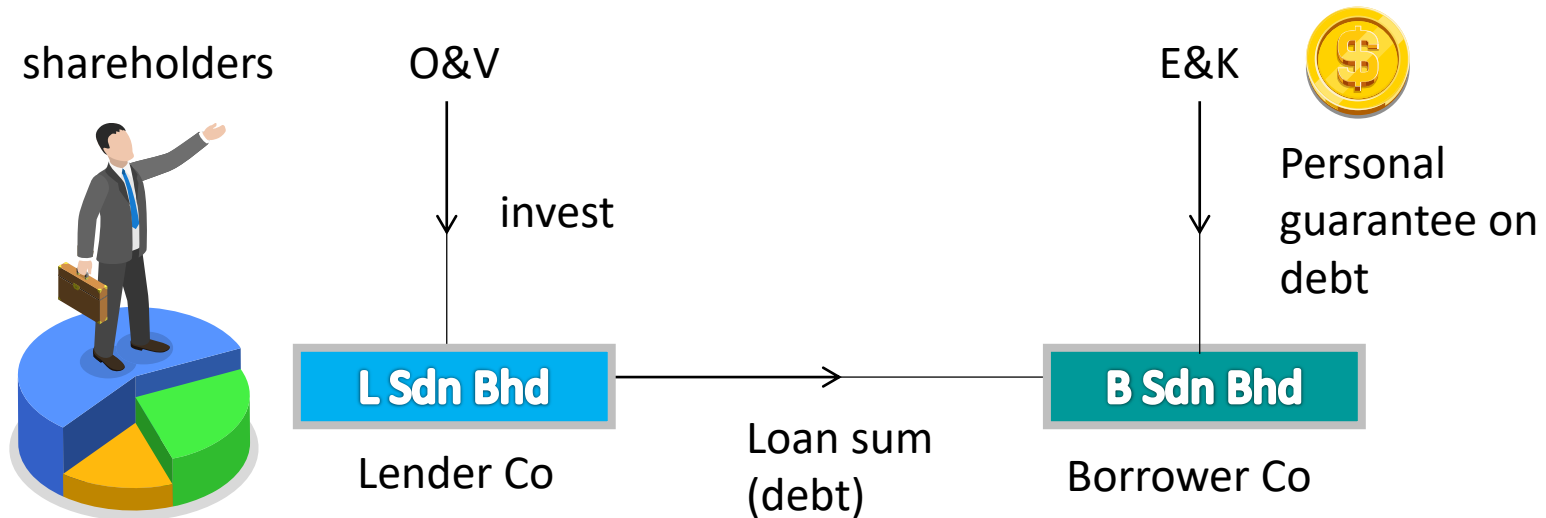


Practical illustration 17



Foo Toon Yeong & 3 Ors v Jonah Wong Ching Hang (CA)(2019)

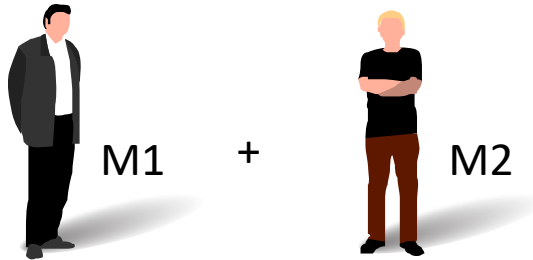
Company's debts – shareholders' action



- (a) L Sdn Bhd has legal capacity to sue B Sdn Bhd on debt sum owed.
- (b) Shareholders O&V have no legal capacity to sue on:
 - (i) B Sdn Bhd;
 - (ii) shareholders of E&K.
- (c) L Sdn Bhd has legal capacity only to sue shareholders E&K based on the personal guarantee in the event B Sdn Bhd defaulted on the repayment after taking action in (a).

Shareholders' conflict

SH

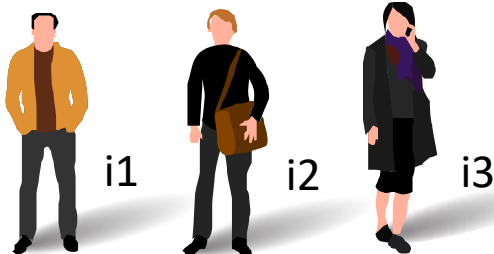


> 50.5%

↓
Act as directors

Kita Sdn Bhd

SH



< 49.5%

- Must accept majority rule
- The right of the majority to decide how the company's affair should be conducted
- Supremacy of majority rule

*Soh Jiun Jen v Advance Colour
Laboratory Sdn Bhd
[2010] 5 MLJ 342*

BOD's function



The BOD has all powers necessary for

- managing
- directing
- supervising

the management of the — business affairs of company

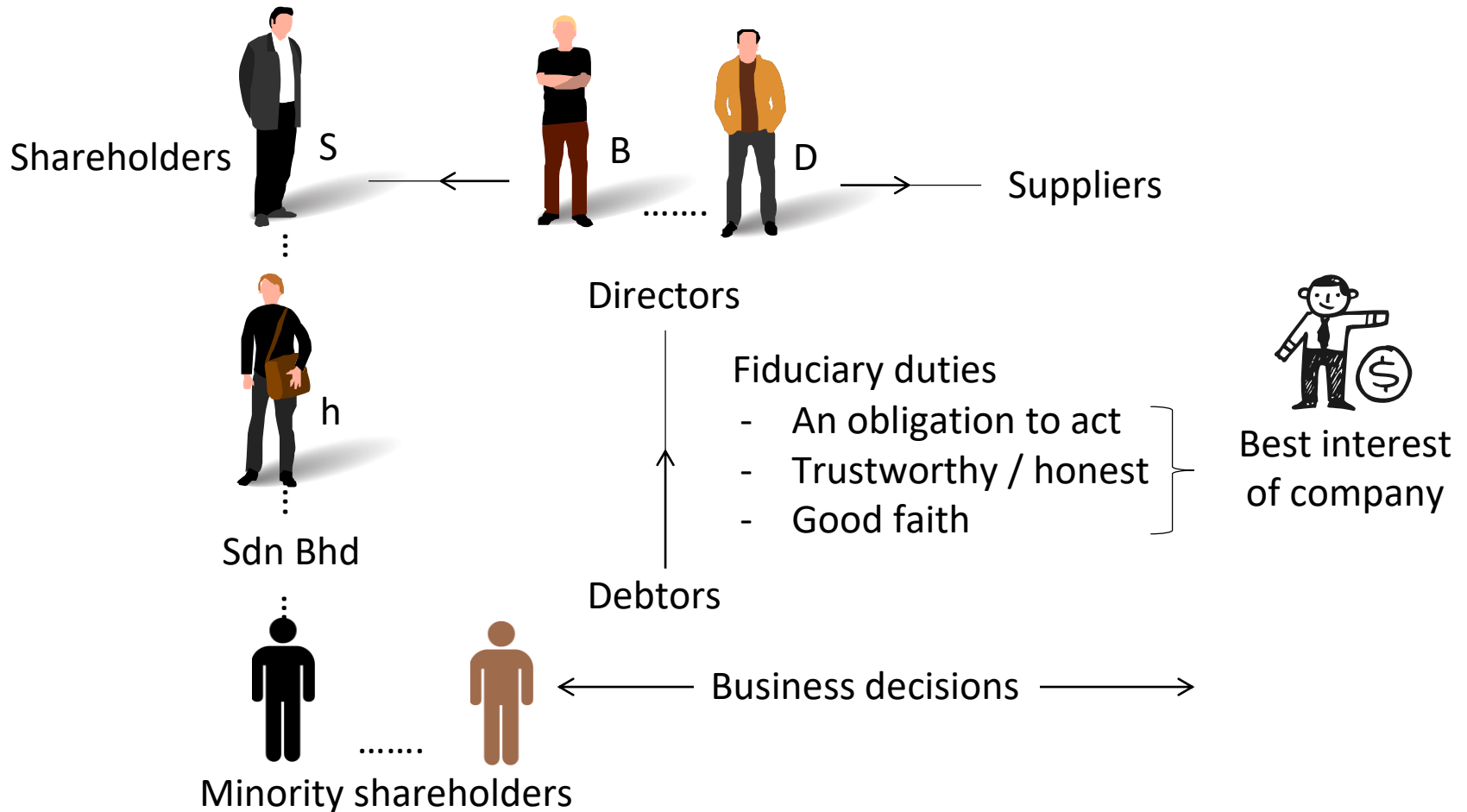
[s 211]



Shareholders in general meeting cannot

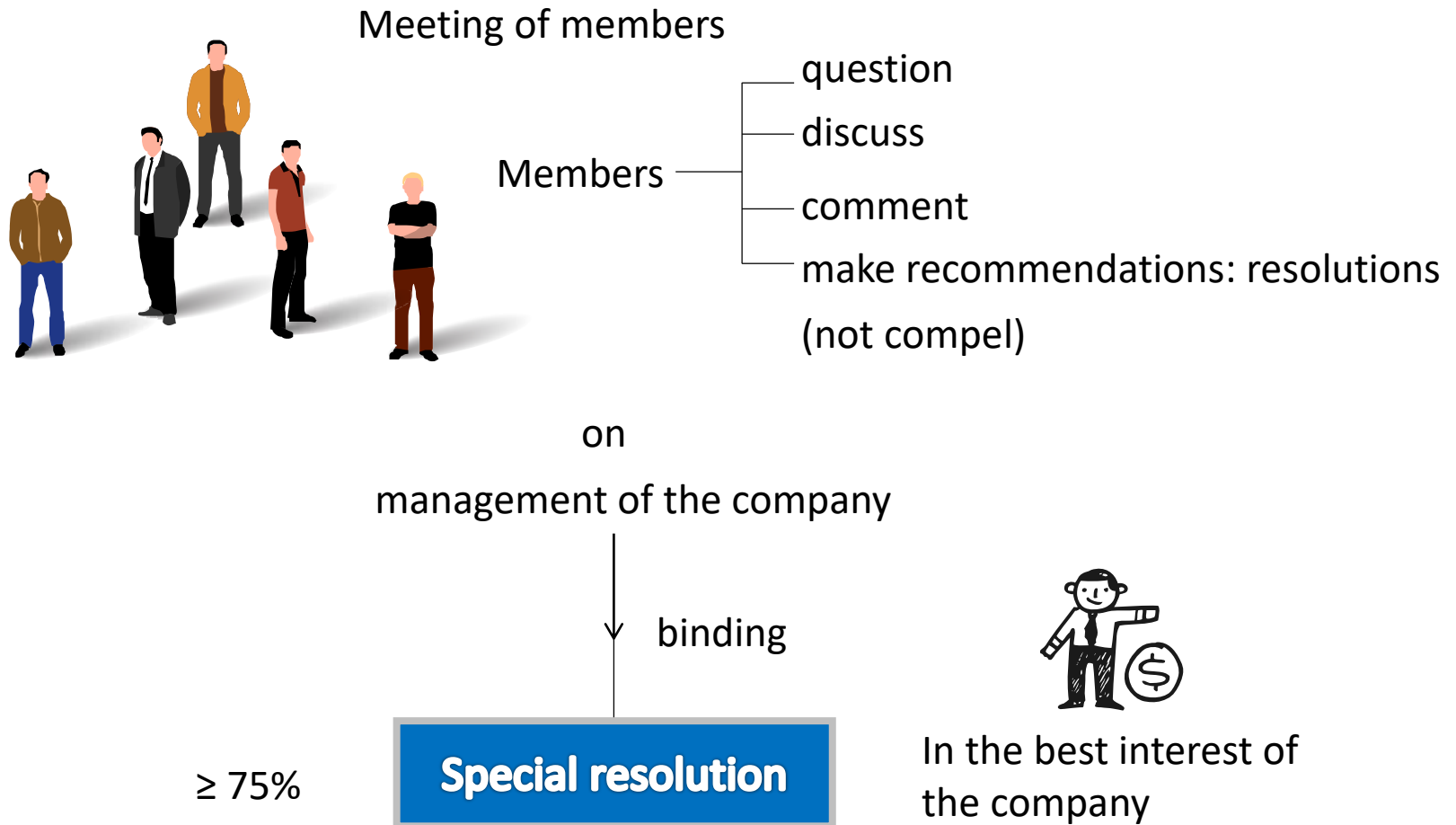
- usurp
- interfere

Shareholders v directors' conflict



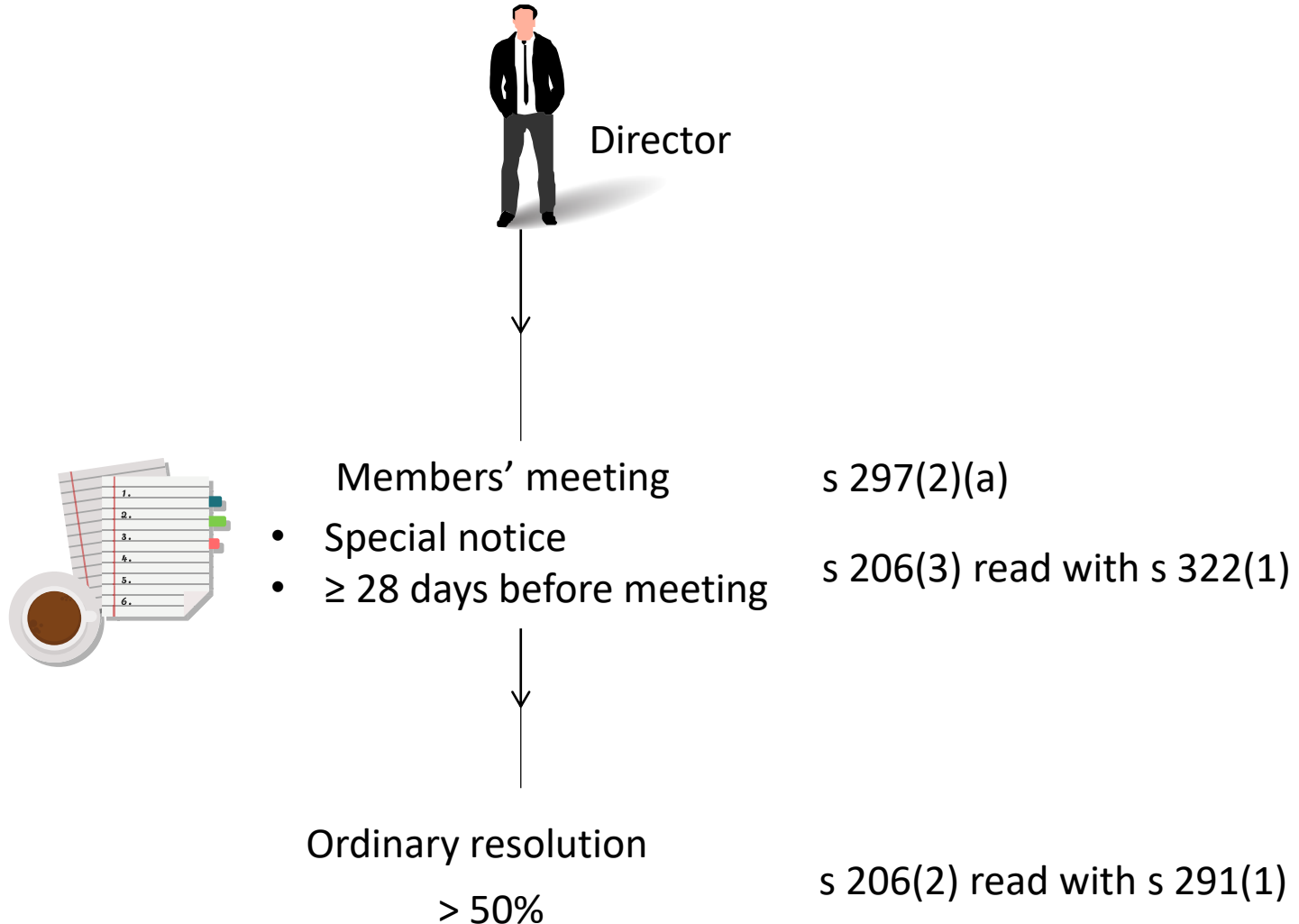
Shareholders' intervention

[s 195]



Removal of director

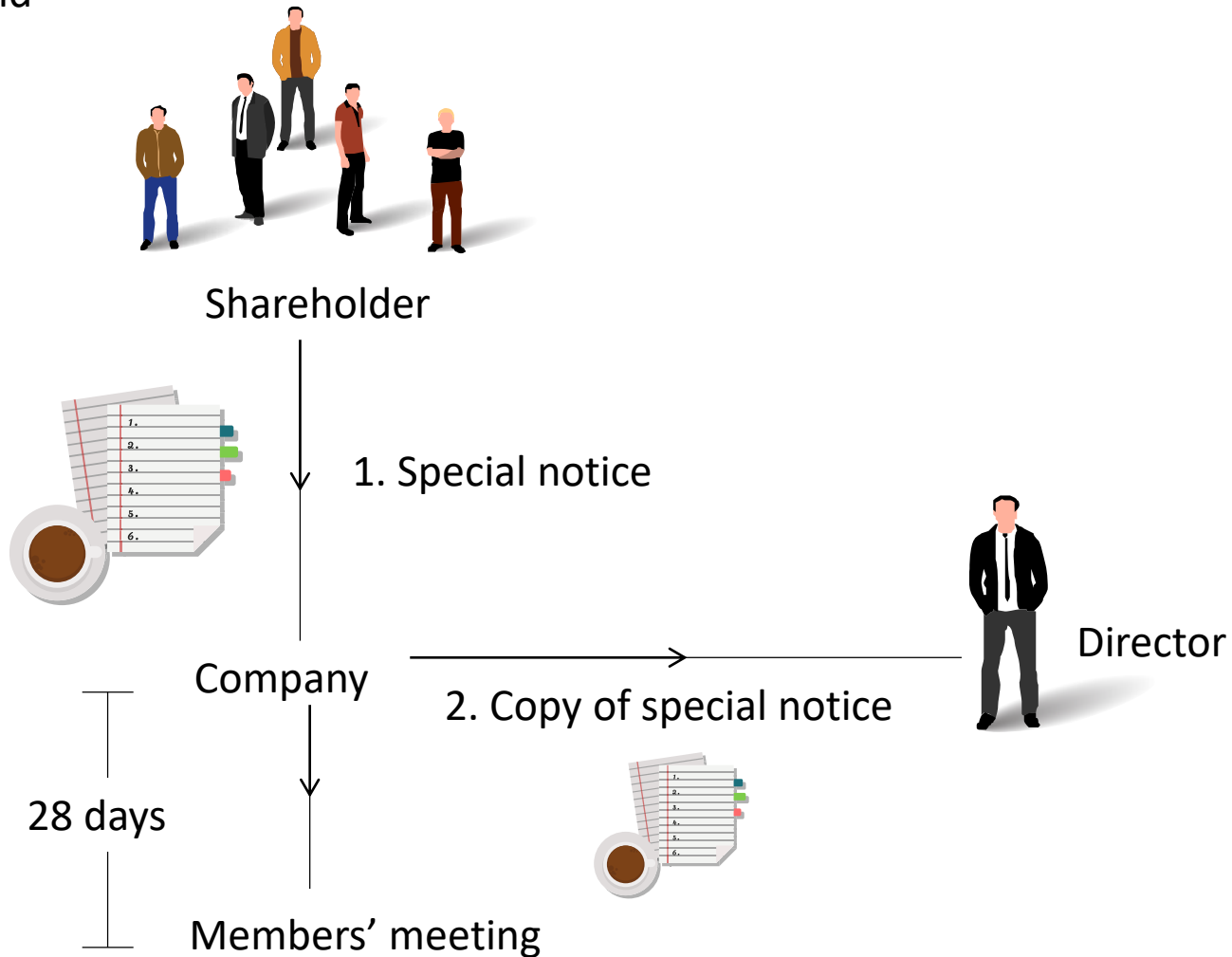
- Sdn Bhd



Removal of director

- Bhd

A.



B.



Director

- Right to make representation
 - Oral
 - Written

s 207(2)



C. Company



- State the facts of the representation
- Send a copy of the representation to every member
- Read out the representation at the meeting (upon request of the director)
- Apply to the court for non compliance

s 207(3)

D. Members' meeting

Ordinary resolution > 50%

s 206(2) read with s 291(1)

COMPANY LAW 2021

- Shares regime applications
- Preference shares – issuance and redemption
- Tax incentives on company/LLP

MANAGE YOUR **NEW** SHAREHOLDERS' RIGHTS &
DIRECTORS' RISKS TO AVOID BEING CHARGED



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CA(Aust. & NZ), FCPA(Aust.).

7 January 2021

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Shares regime

A. Not in application

- Authorised capital
- Par value – minimum price
- Nominal value
- Share premium
- Share discount



B. No par value regime

(a) Incorporation



- Shares can be issued at price decided by BOD

Example:

20,000 ordinary shares @ RM1 per share

(b) Subsequently



- Based on net tangible asset (NTA)
- Varies depends on issuance date

Basis of valuation

w.e.f. 1.3.2020



	Category	Value of shares transferred to compute stamp duty
a.	Sales of shares requires approval from SC	Price/Value approved by SC
b.	Company incurred losses	Whichever is <i>higher</i> : i. Net Tangible Asset (NTA); or ii. Share consideration
c.	Company made profits	

Stamp duty = Value of shares transferred x No. of shares transferred x 0.3%

Basis of valuation

w.e.f. 1.3.2020



	Category	Value of shares transferred to compute stamp duty
d.	Newly incorporated company	Share consideration
e.	Non-active company <ul style="list-style-type: none">• dormant• zero-revenue• threshold-qualified	

Guidelines on stamp duty on instrument of transfer of shares not listed in Bursa Malaysia Bhd (Guidelines 2020 dated 23.6.2020)

Company



A. Ordinary shares

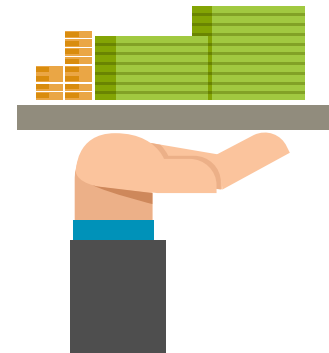
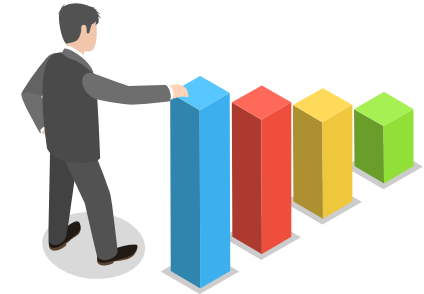
Voting rights mandatory

B. Preference shares

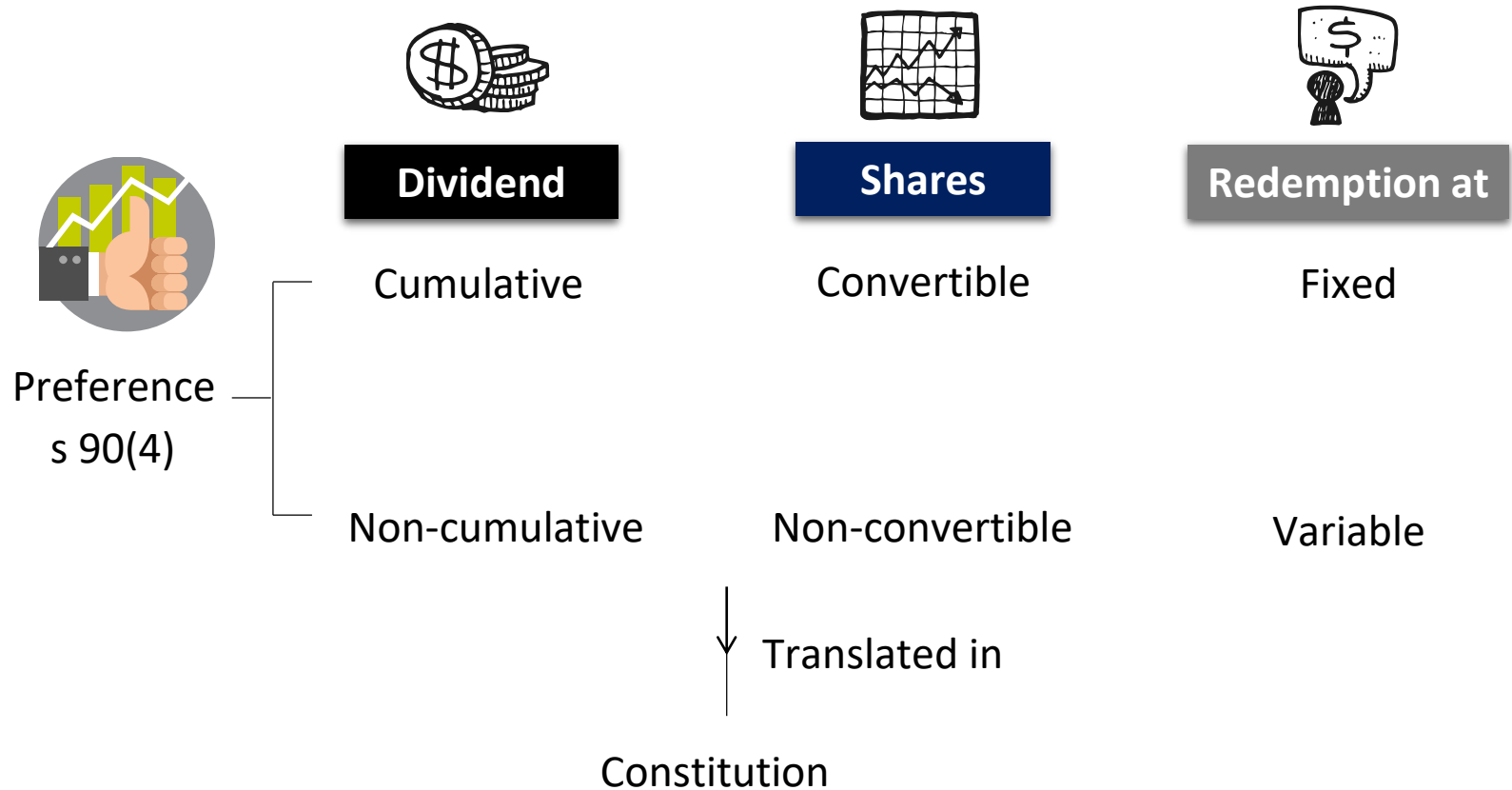
- No voting right
- Preference on dividend
- Preference on distribution of asset upon liquidation
- Guaranteed by (option)
 - ordinary shareholders
 - directors

C. Issuance of preference shares

- Allowed by constitution [s 72(1)]
- Approved by shareholders
- Executed by directors



Features



Practical illustration 18

Redeemable preference shares



- Non transferrable
- Redeemed at RM xx on the anniversary of 3rd year / 5th year
- Dividend rate 4.5% (suggestion)
- Cumulative
- Issued at RM200 per share
- Participative



Example

Company with increased in annual profit of at least 20% compared with immediate previous year would pay additional 3% as participative preference dividend.

Issuance of redeemable preference shares (RPS)

Stepwise guide

Step

- 1 Members' meeting —

{

Constitution

RPS

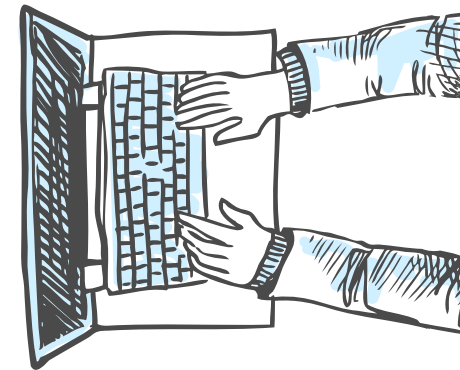
Issuance
- 2 Constitution clause
- 2 Board resolutions – allotment —

{

50,000 shares

@

RM200
- 3
 - Subscription agreement to investors
 - Features
- 4 Board resolutions
- Acceptance
- 5 Issuance
Register of members





Redemption of preference shares

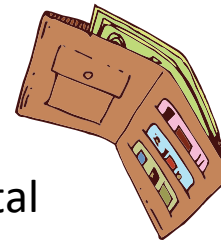
A. Redemption out of profit [s 72(4)(a), 74(5)]

- Transferred to share capital a/c
- Value of shares redeemed



Dr Retained earnings
Cr Share capital

Dr Preference shares capital
Cr Bank





Redemption of preference shares

B. Redemption out of fresh issue of shares [s 72(4)(b)]

Dr Preference shares capital
Cr Share capital

C. Redemption out of capital of the company [s 72(4)(c)]

Dr Preference shares capital
Cr Assets

Tax rebate RM20,000

A. SME

- Incorporated under CA 2016

B. LLP

- Registered with SSM



- Operating expenditure + Capital expenditure
- Commence operation 1.7.2020-31.12.2021



- 3 YAs
- Tax rebate of RM20,000 per YA



Tax rate

- SME
- LLP

- (a) • Paid up capital on ordinary shares
• Capital contribution (cash/in kind)
 \leq RM2.5 million



Chargeable income
First RM600,000
Exceeding

Tax rate (%)
17
24

(b) Others




Chargeable income @ 24%



- SME
- LLP

**w.e.f. YA 2020
(3 YAs)**

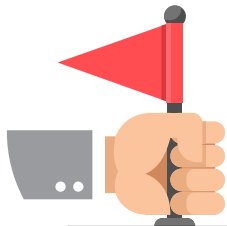
RM




Chargeable income	118,000
Tax payable @ 17%	20,060
Less: tax rebate	(20,000)
Net income tax payable	60

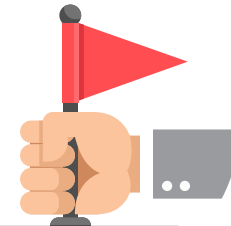
- Rebate cannot be c/f
- No refund

Qualifying conditions



A. SME

1. Paid up capital on ordinary shares at the beginning of basis period \leq RMM2.5 million
2. Gross business income \leq RM50 million
3. Resident 
4. Form e-C



B. LLP

Capital contributed (cash/in kind) at the beginning of basis period \leq RMM2.5 million

Gross business income \leq RM50 million

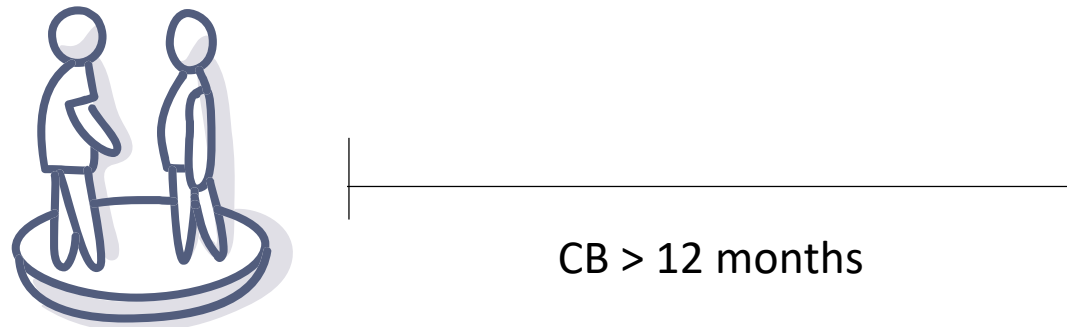


Resident



Form e-PT
(mandatory w.e.f YA 2021)

Maximise the YA for 3 YAs



YA 2

12 months



YA 3

12 months



Commencement date

Industry

1. Trading

2. Services

3. Manufacturing

4. Mobile Apps



Commencement date

Open the door to the public for sales



- Key employees being employed
- Readiness to provide services

Raw materials being first processed



App ready for public use

SME company

Preferential over LLP



Legislation

(i) No monthly installment for first 2 YAs

s 107C(4A)

- No estimate of tax
- No need to pay CP204 installment
- No revision of tax estimate

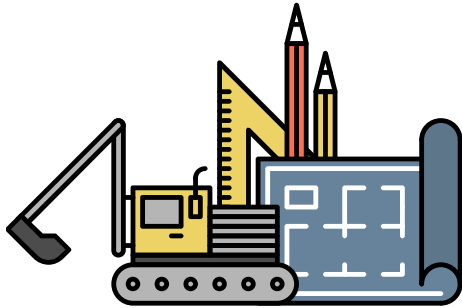


(ii) 100% on QPE (each asset \leq RM2,000)
: Accelerated capital allowances

Para 19A, Sch 3



- No restriction of quantum



Renovation and refurbishment

- Specific deduction up to RM300,000
- Business premises
 - Office building
 - Shoplots
 - Rented premises
 - Home office

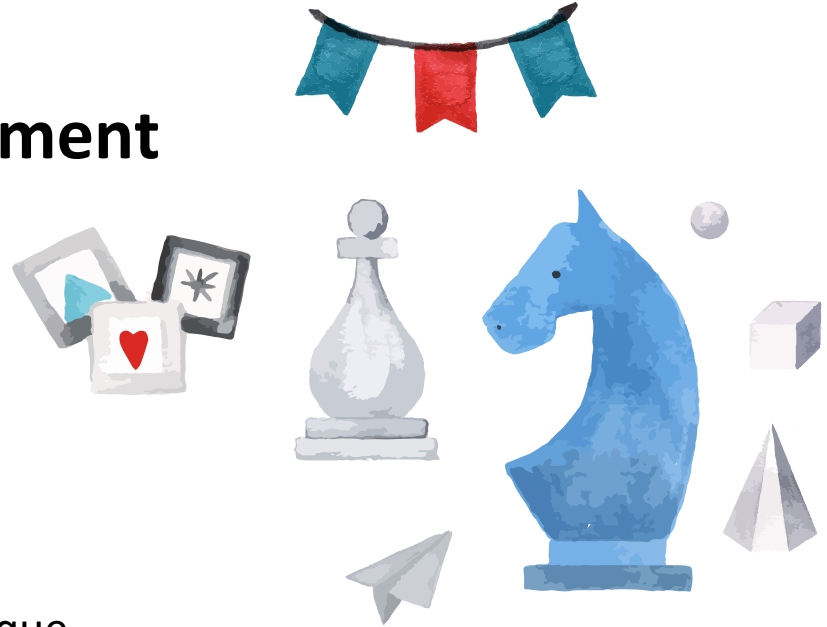
Scope

- (a) general electrical installation
- (b) lighting
- (c) gas system
- (d) water system
- (e) kitchen fittings
- (f) sanitary fittings
- (g) door, gate, window, grill and roller shutter
- (h) fixed partitions
- (i) flooring (including carpets)
- (k) wall covering (including paint work)
- (l) false ceiling and cornices
- (m) ornamental features or decorations excluding fine art
- (n) canopy or awning
- (o) fitting room or changing room
- (p) recreational room for employee
- (q) air-conditioning system
- (r) children play area
- (s) reception area
- (t) surau

Renovation and refurbishment

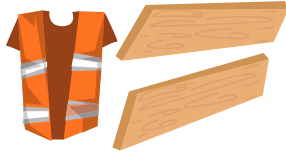
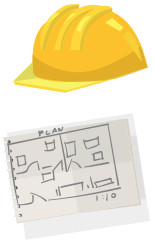
Exclusion

- (i) designer fee
- (ii) professional fee
- (iii) purchase of antique
 - purchase of an object or work or art
 - represents a previous era in human society,
 - collectable item due to
 - age
 - rarity
 - craftsmanship
 - other unique features
 - appreciates in value over time

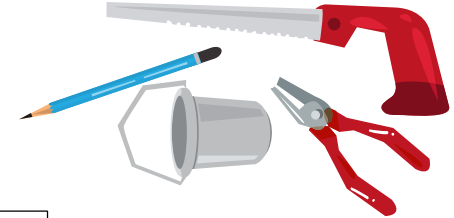


[Income Tax (Costs of Renovation and Refurbishment of Business Premise) Rules 2020, PU(A) 381/2020]

Renovation and refurbishment expense



- On business premises
- Restricted to RM300,000
- Renovation activity



**Commences
1.3.2020**

**Ends
31.12.2021**



Audit certificate in every YA

Allowable as specific deduction
in arriving at adjusted income
for business



COMPANY LAW 2021

Post COVID 19 remedies

- Striking off
- Voluntary winding up
- Will applications on shareholder

MANAGE YOUR **NEW** SHAREHOLDERS' RIGHTS &
DIRECTORS' RISKS TO AVOID BEING CHARGED



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7 January 2021

drchoong.seminar@gmail.com

Strike off the company [s 549]

Step

- 1 Resolution of shareholders
 - initiation of the application to strike off
 - the name of the company from the register

- 2 (a) Status of company
 - not in operation or
 - not carrying on business

(b) No assets

(c) No liabilities due to

- IRB
- RMC
- SSM

(d) Updated information in SSM records

(e) No legal proceedings outstanding

- 3 Application to SSM



Disposal of asset

Settling the liabilities



Company

- Dormant



(a) Management account need to be prepared

(b) No requirement of statutory audit



- Form C submission
- Form E submission is mandatory

Until Form CP 7 accepted by IRB

Tax clearance application



Submit Form s 550 to SSM

Application to strike off company



Approved by SSM



Submit Form CP 7 to IRB



Practical illustration 19



Director

- Apply for striking off for OHL (M) Sdn Bhd on 2.8.2010
- Statutory declare that the company is not carrying on business since its incorporation on 10.3.2009

Investigation

- Company having
 - (i) business transaction records
 - (ii) inflow and outflow of cash from the company's account



Fine RM15,000 or
imprisonment of 5 months

Sessions Court

(SSM media release: 25.6.2018)

Practical illustration 20



Managing director
(59 years old)

- Apply for striking off for 2 companies on 23.3.2011
- Attached with statutory declaration that both companies does not have asset and liabilities



Investigation

- There is debt owing to creditor at the time of application



Sessions Court

Fine RM40,000
(RM20,000 for each company)

(SSM media release: 8.9.2017)

Step

Legislation (s)

1 Members' voluntary winding up

2(1)

2 Declaration of solvency
- Made at director's meeting
- Lodged to SSM
by majority of directors (> 50%)

443(1)



3 Contents of declarations

443(1)(b), 4(a)

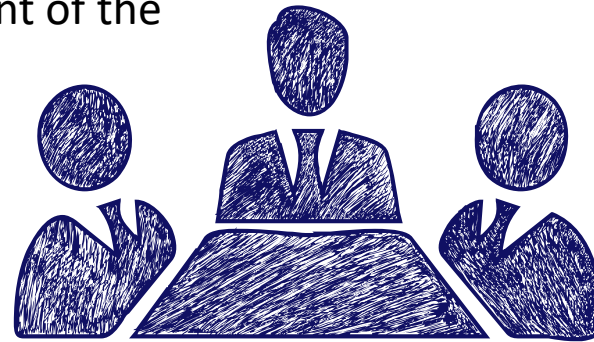
A. Inquiry into the affairs of the company

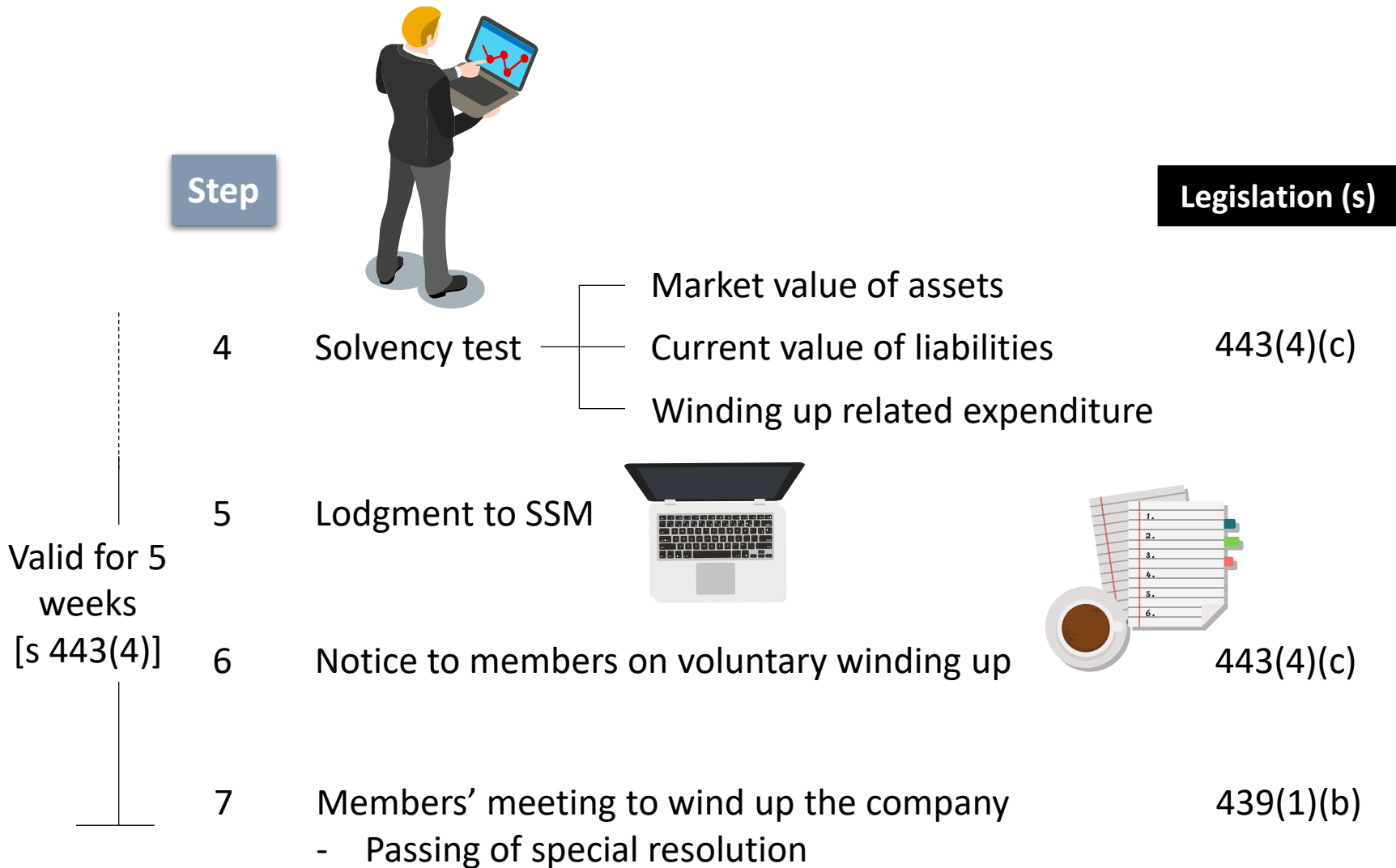
B. BOD's meeting

- Form an opinion that the company will be able to pay its debts in full within a period ≤ 12 months after the commencement of the winding up

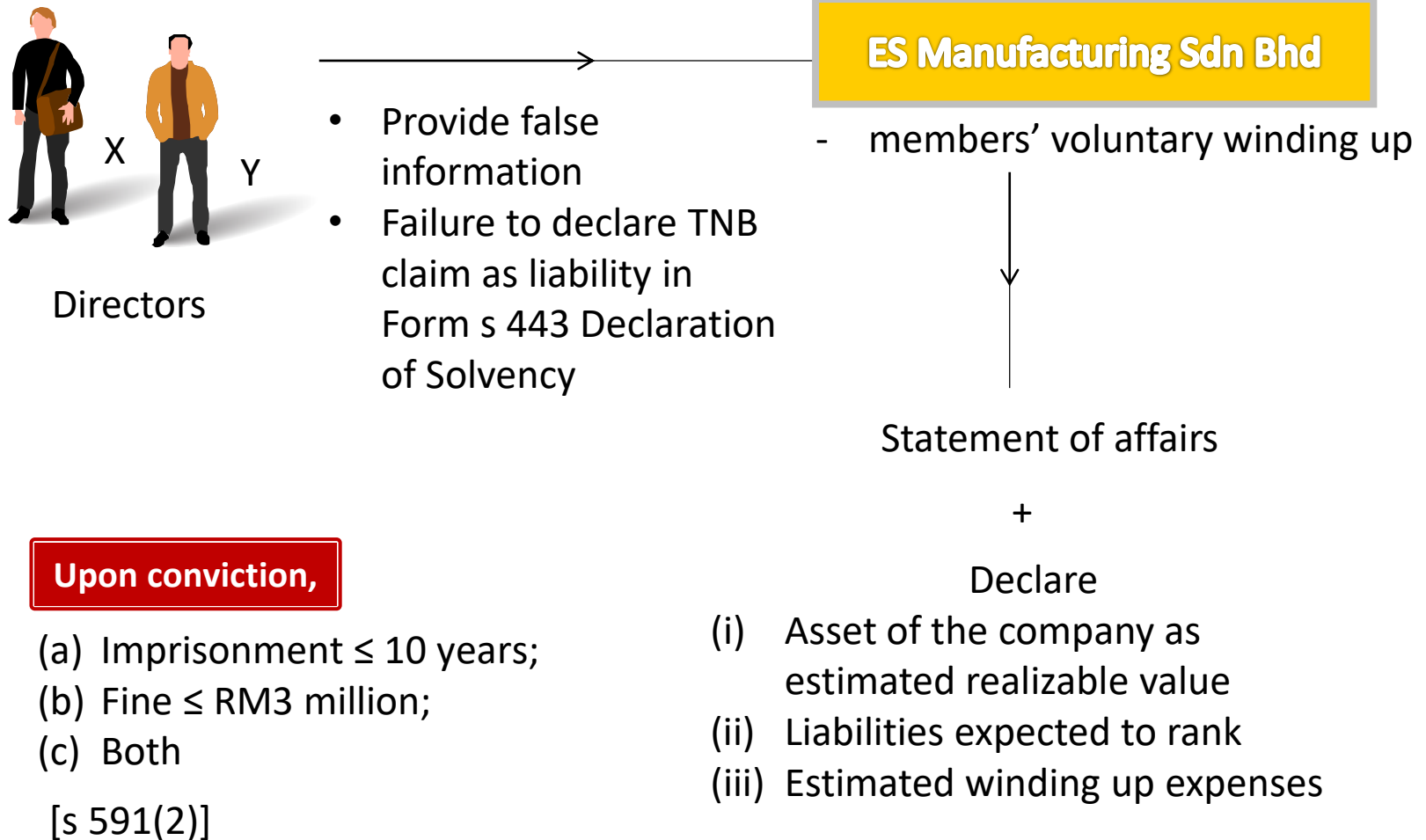
- Not by directors' written resolution

Valid for 5
weeks
[s 443(4)]





False material information



[SSM medial release: 26.9.2020]

Step



Legislation (s)

7 days

- 8
- (a) Lodgment to SSM
- Resolution
 - (b) Notice of resolution

439(2)(a)

10 days

- 9
- Advertise the
 - (a) Bahasa Malaysia
 - (b) English
 - Newspaper in Malaysia

439(2)(b)



Sdn Bhd

Legislation

Members' voluntary winding up

s 439(2)(a), CA 2016



Members' meeting
- Final

Form s 439(2)(a)
Notice of Resolution
(Members' voluntary
winding up)

Appointment of 2 directors to remain responsible of

- Accounting records
- Company law records
 - ☐ Statutory minutes
 - ☐ Various registers

Shareholders

Directors



Store for 7 years

Expiration

Destroyed

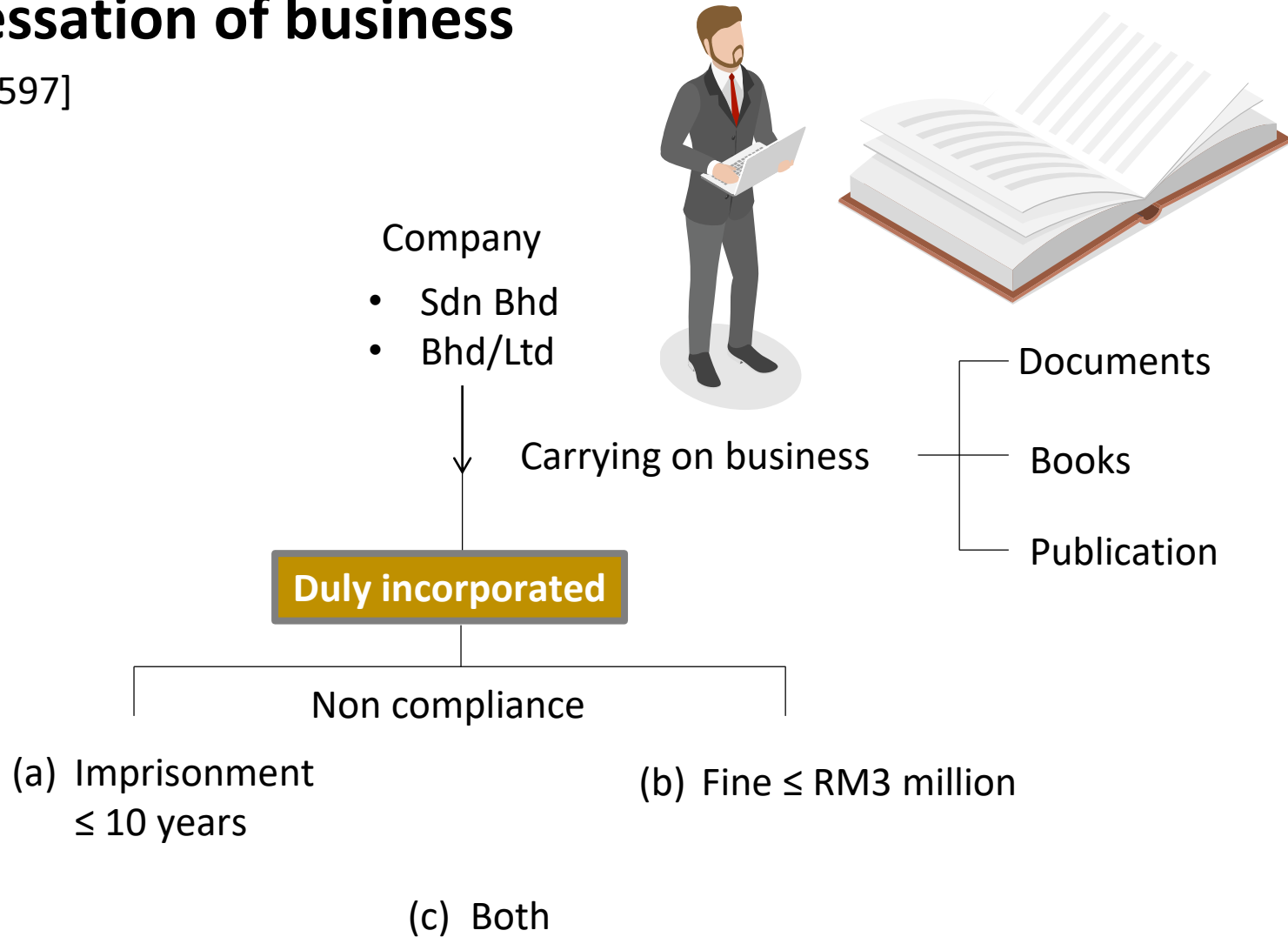
s 341(2), CA 2016

s 245(3), CA 2016

s 82(1)(a), Income Tax Act 1967

Cessation of business

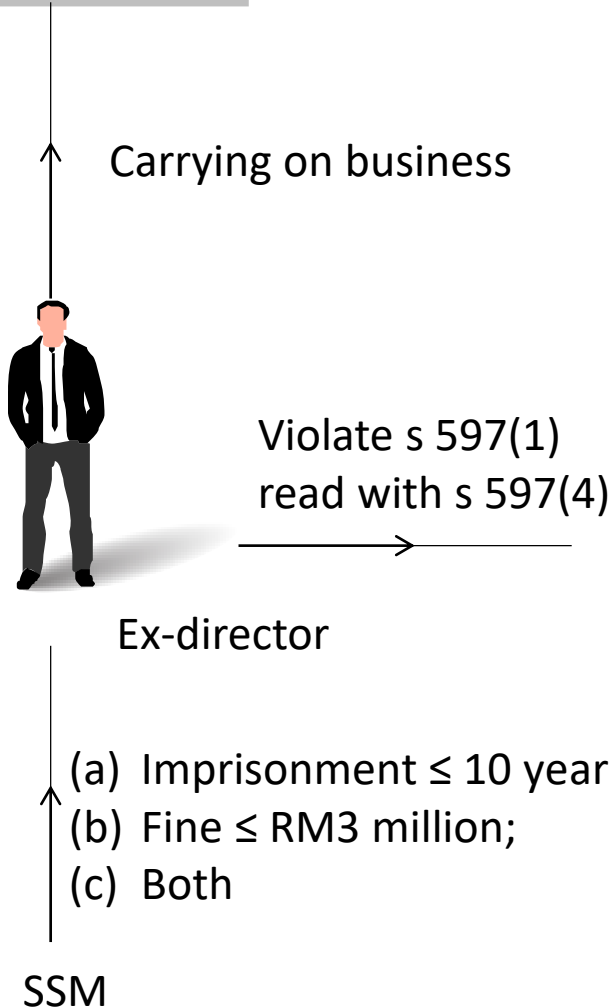
[s 597]



Practical illustration 21

MZI Sdn Bhd

Wound up since 2011



s 597(1)



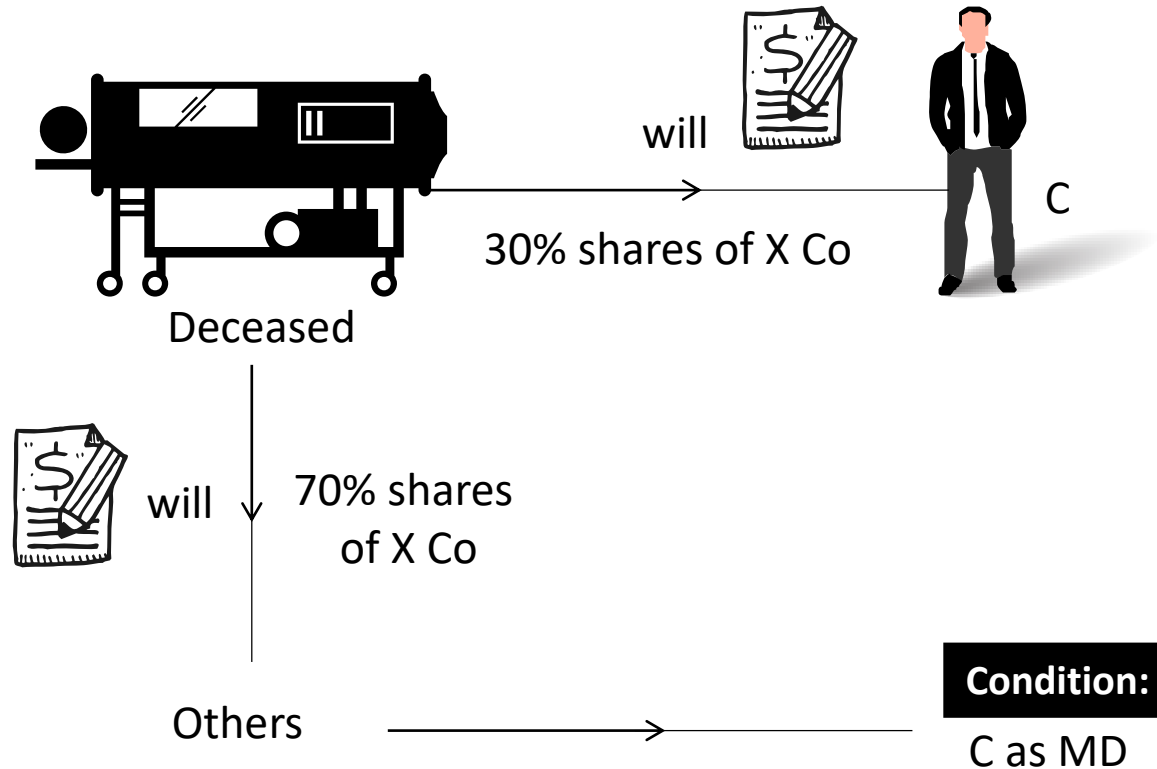
“Any person carrying on business under any name or title of which “Berhad” or “Bhd.” or “Limited” or “Ltd.” is the final word or abbreviation, the person, unless duly incorporated with limited liability ...”

s 597(4)

“Carrying on business” includes use of any name or title of which
(i) Bhd (ii) Ltd (iii) Sdn
is part of the name or title in any documents, books or publication

(SSM media release: 27.10.2020)

Company law prevails over will



Wong Poo Teck v Chui Chung Fong (f) & Anor (sued as the joint executors of the estate of Wong Yik Ka (deceased) (HC)(2019)



- Majority shareholders of the company cannot overwrite the Companies Act 2016.
- The appointment of MD is purview of the BOD.
- It cannot be dictated by will.

Wong Poo Teck v Chui Chung Fong (f) & Anor (sued as the joint executors of the estate of Wong Yik Ka (deceased) (HC)(2019)

COMPANY LAW 2021

- Execution of documents
- Records keeping requirement
- Auditor matters all
- Company secretary – do an don't

MANAGE YOUR **NEW** SHAREHOLDERS' RIGHTS &
DIRECTORS' RISKS TO AVOID BEING CHARGED



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CA(Aust. & NZ), FCPA(Aust.).

7 January 2021

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Execution of documents

[s 66(6)]

Documents to be executed

- Legislation (written law)
- Resolution
- Agreement
- Constitution

Manner

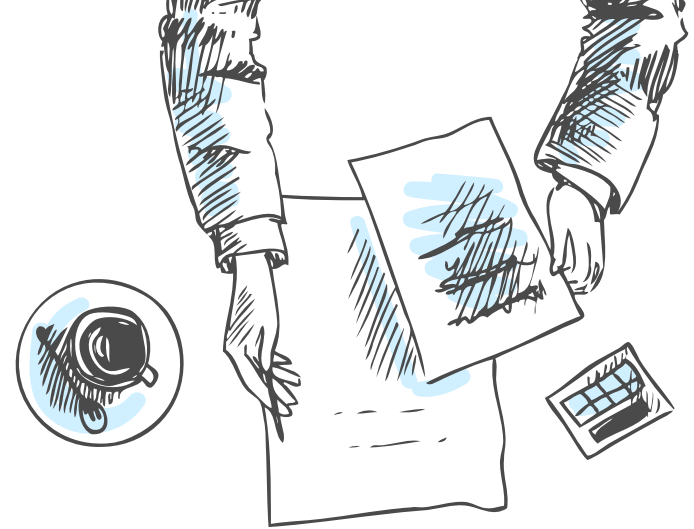
- Common seal

- Signature

Director

Authorised officer

- Director
- Company secretary
- Any other person approved by the board



[s 3, Companies (Amendment) Act 2019]



Records keeping

Accounts keeping
Recording business transaction
- 7 years retention [s 245(3)]



to explain

Transaction



of company

Financial position

Within 60 days
[s 245(2)]

Entry



Accounting books

- (a) A company
- (b) The directors
- (c) Managers of company

Upon conviction

Imprisonment \leq 3 years

Fine \leq RM500,000

Both

[s 245(9)]

Failure in retain accounting records for 7 years



- Director
- Failed to keep accounting records that
 - Sufficiently to explain the transactions
 - For year 2014-2015
 - s 167(2), CA 1965 [s 245(3), CA 2016]

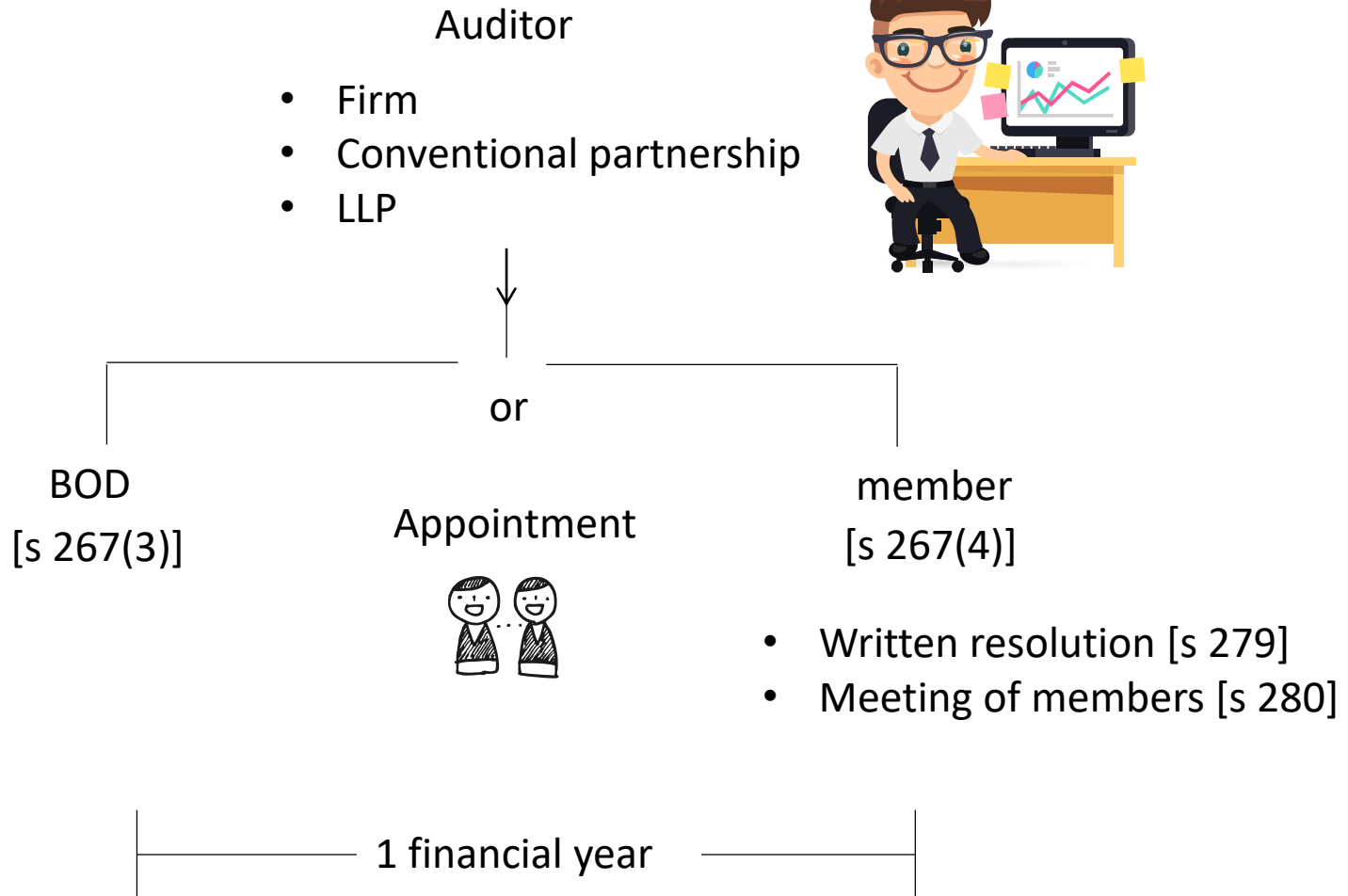
↑ Fine RM1,500; or
Imprisonment 2 months

**Sessions Court
(Criminal Division)
Kuala Lumpur**

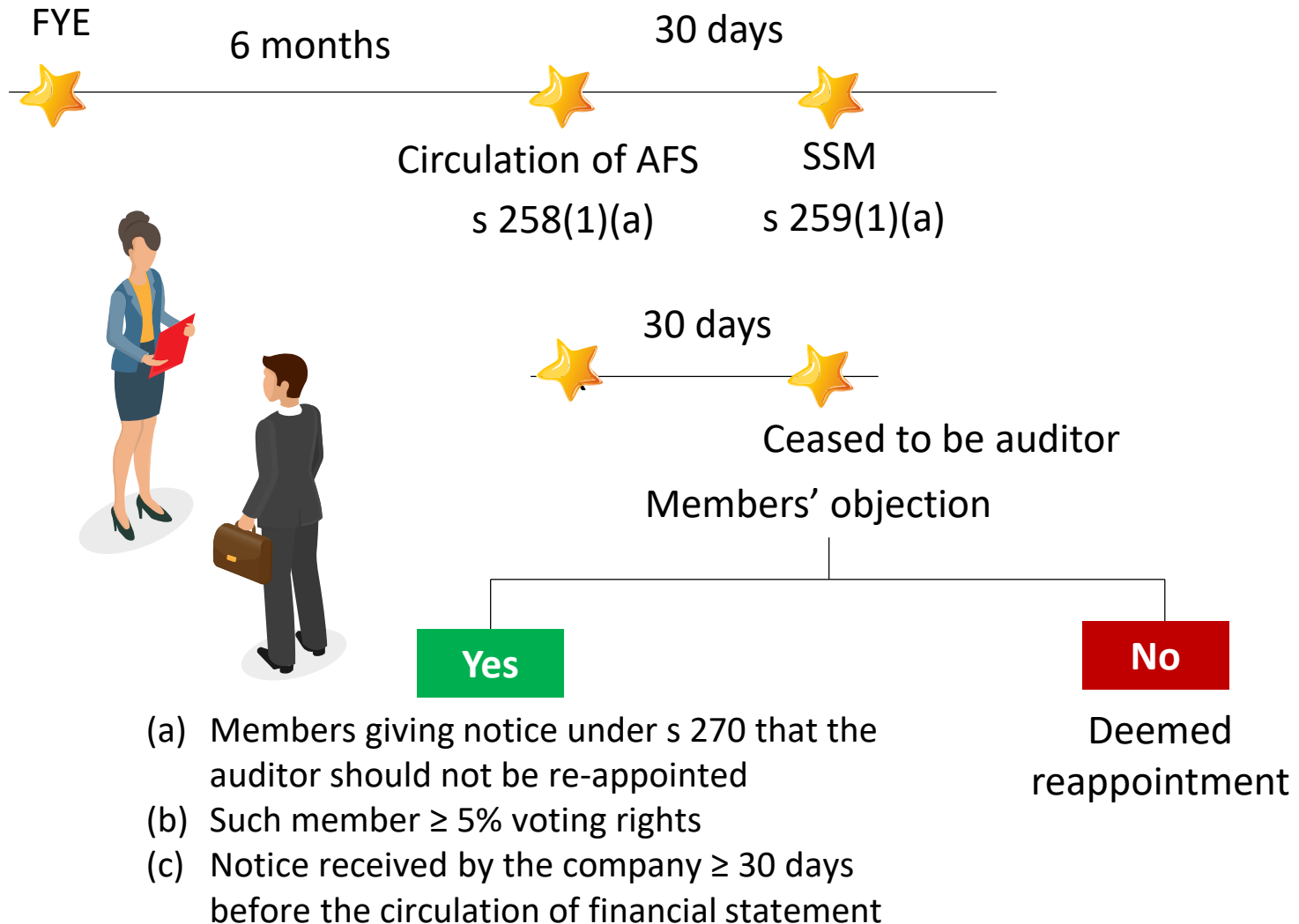
(SSM media release: 16.10.2020]

Auditor – appointment

Private company

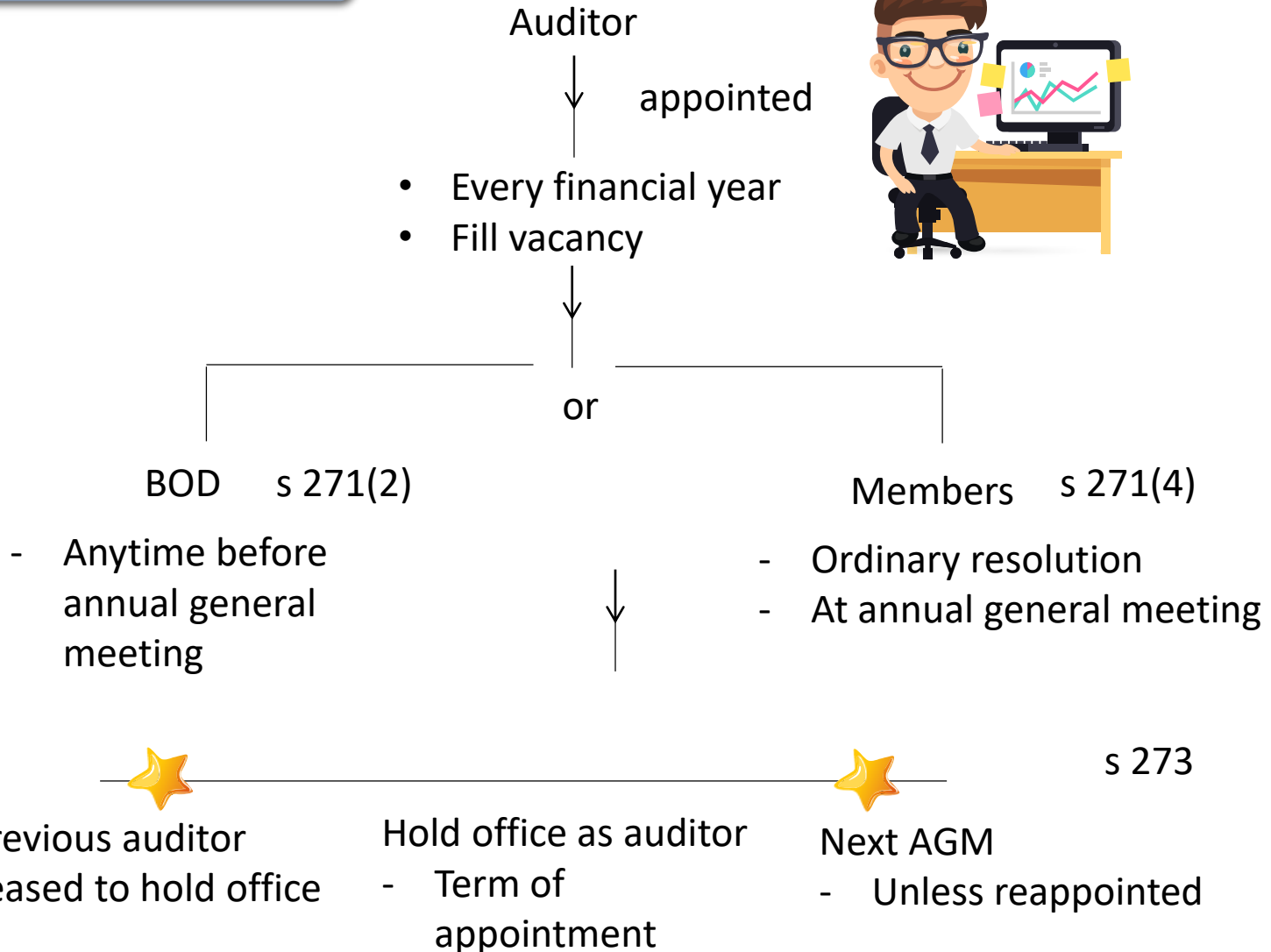


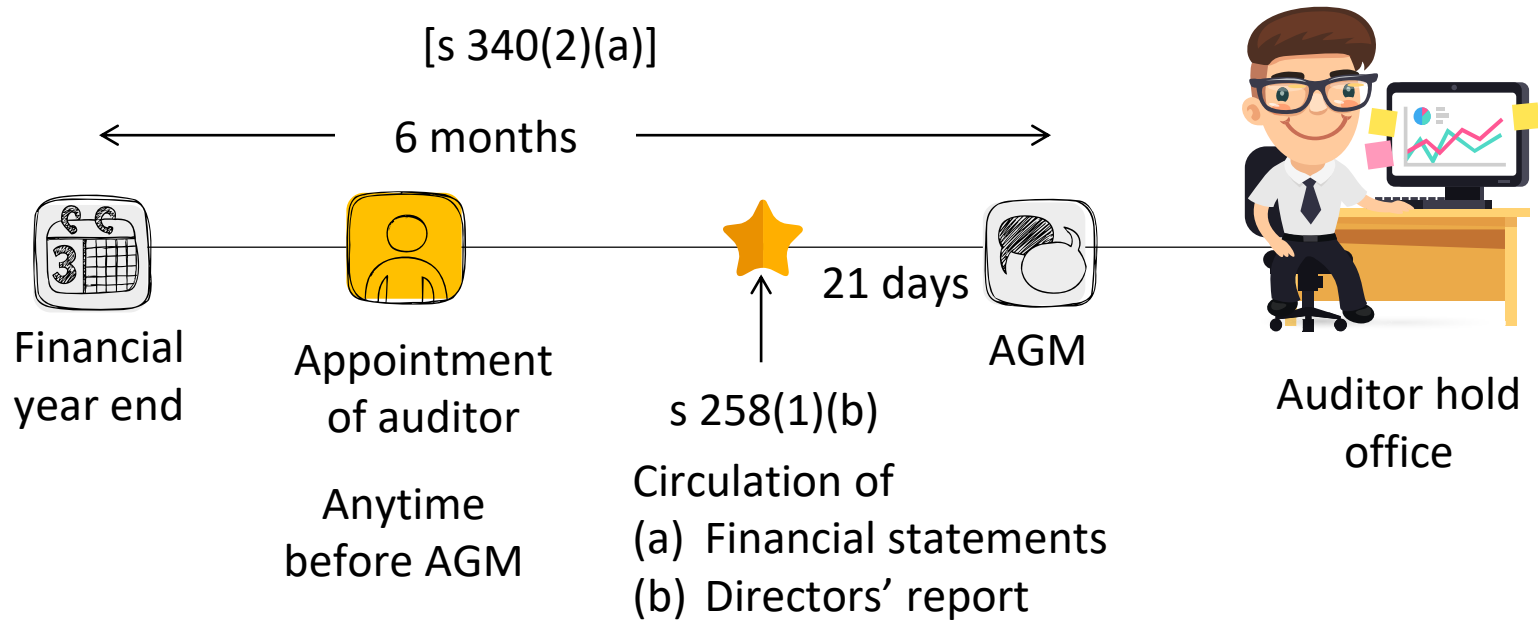
Private company



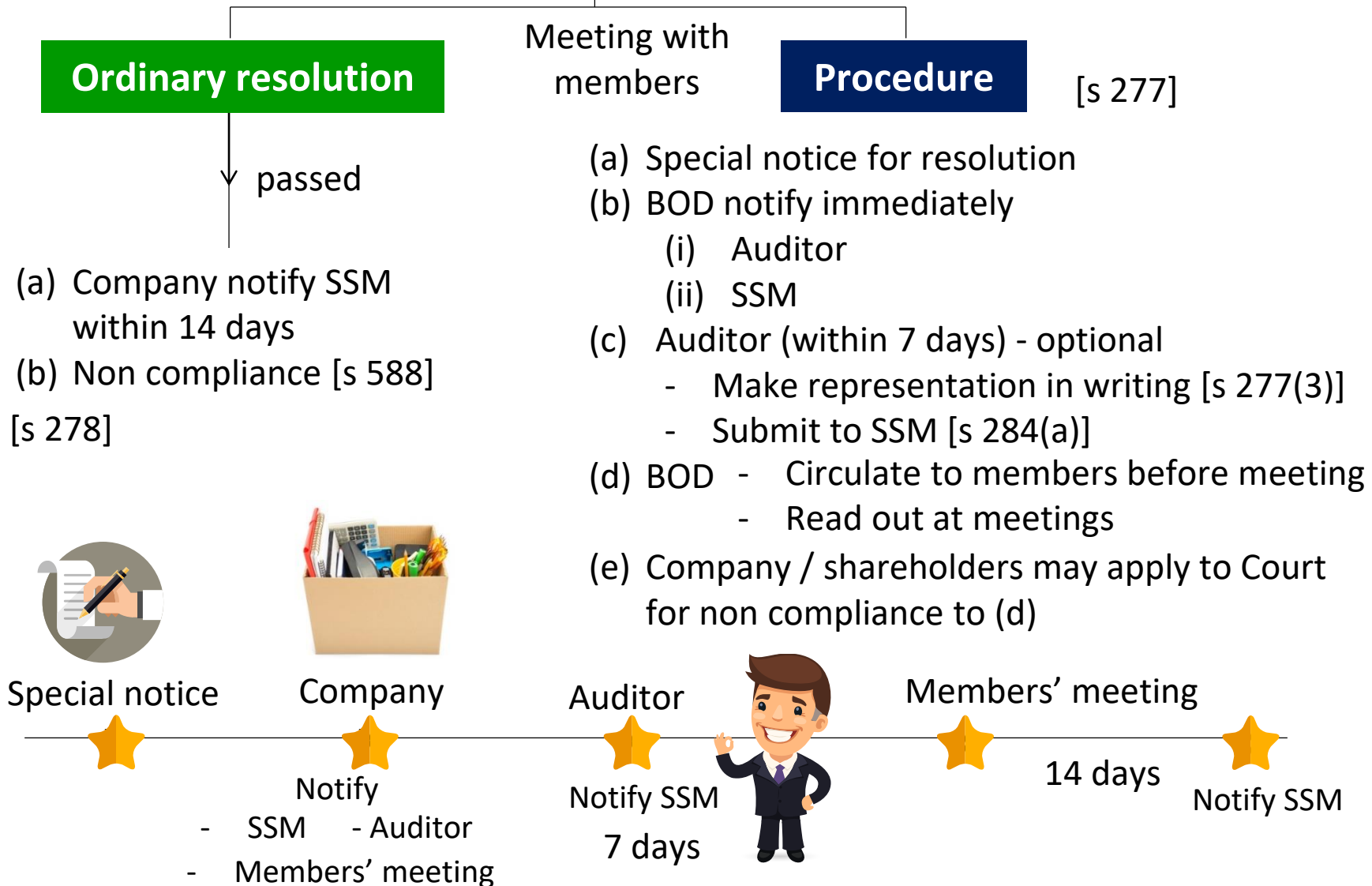
Auditor – appointment

Public company





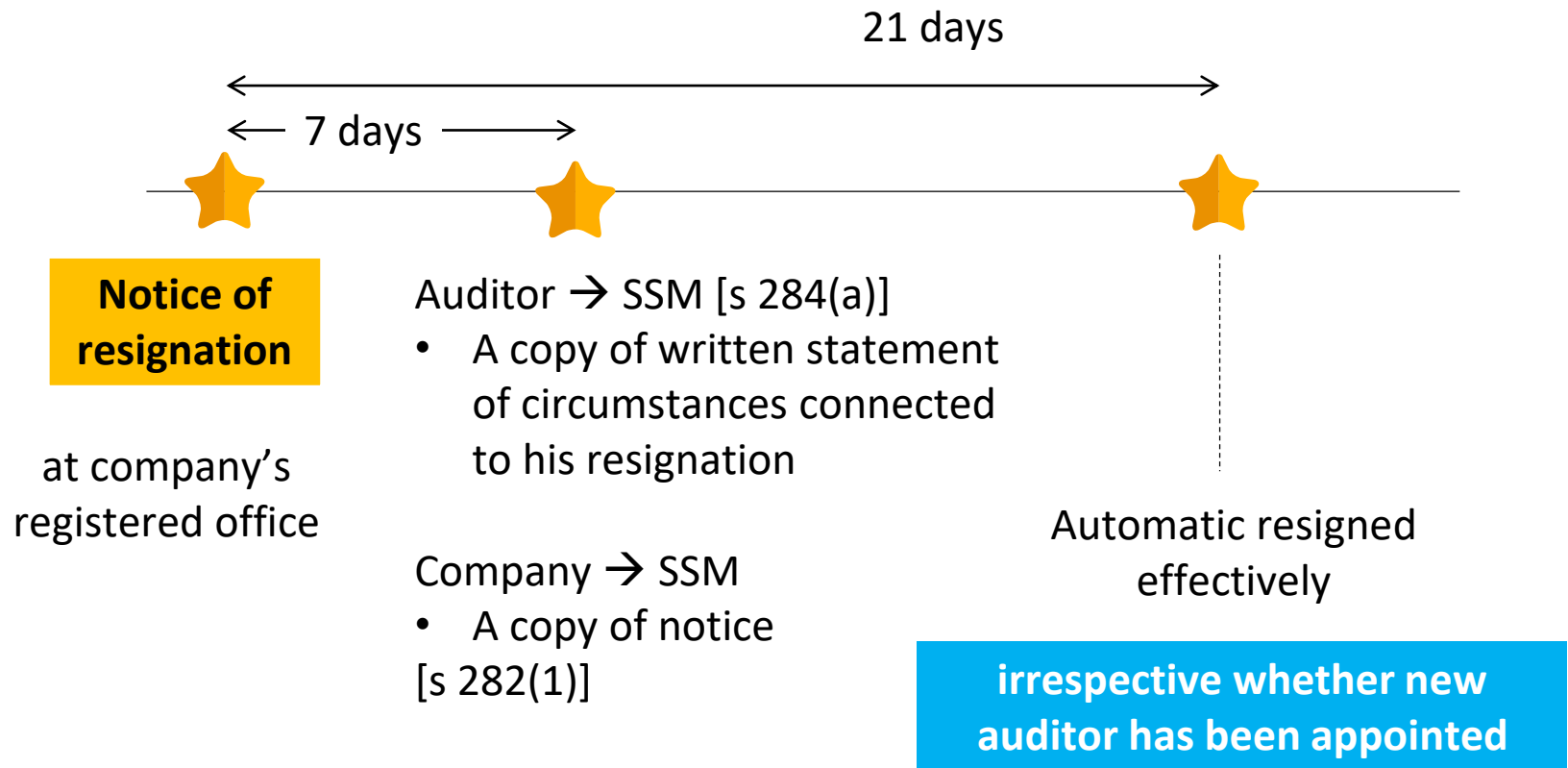
Removal of auditor at any time



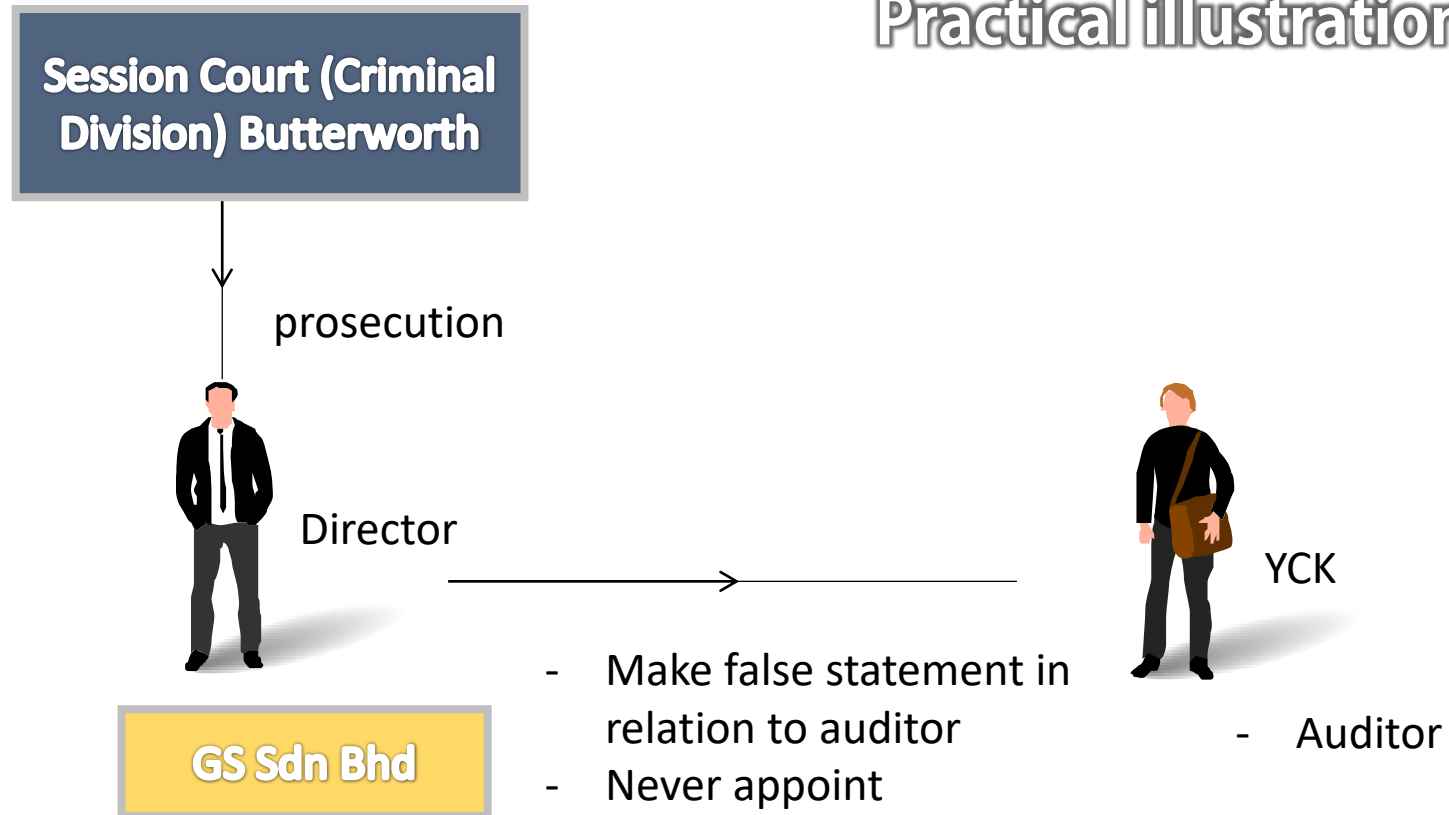


Resignation of auditors

[s 281]



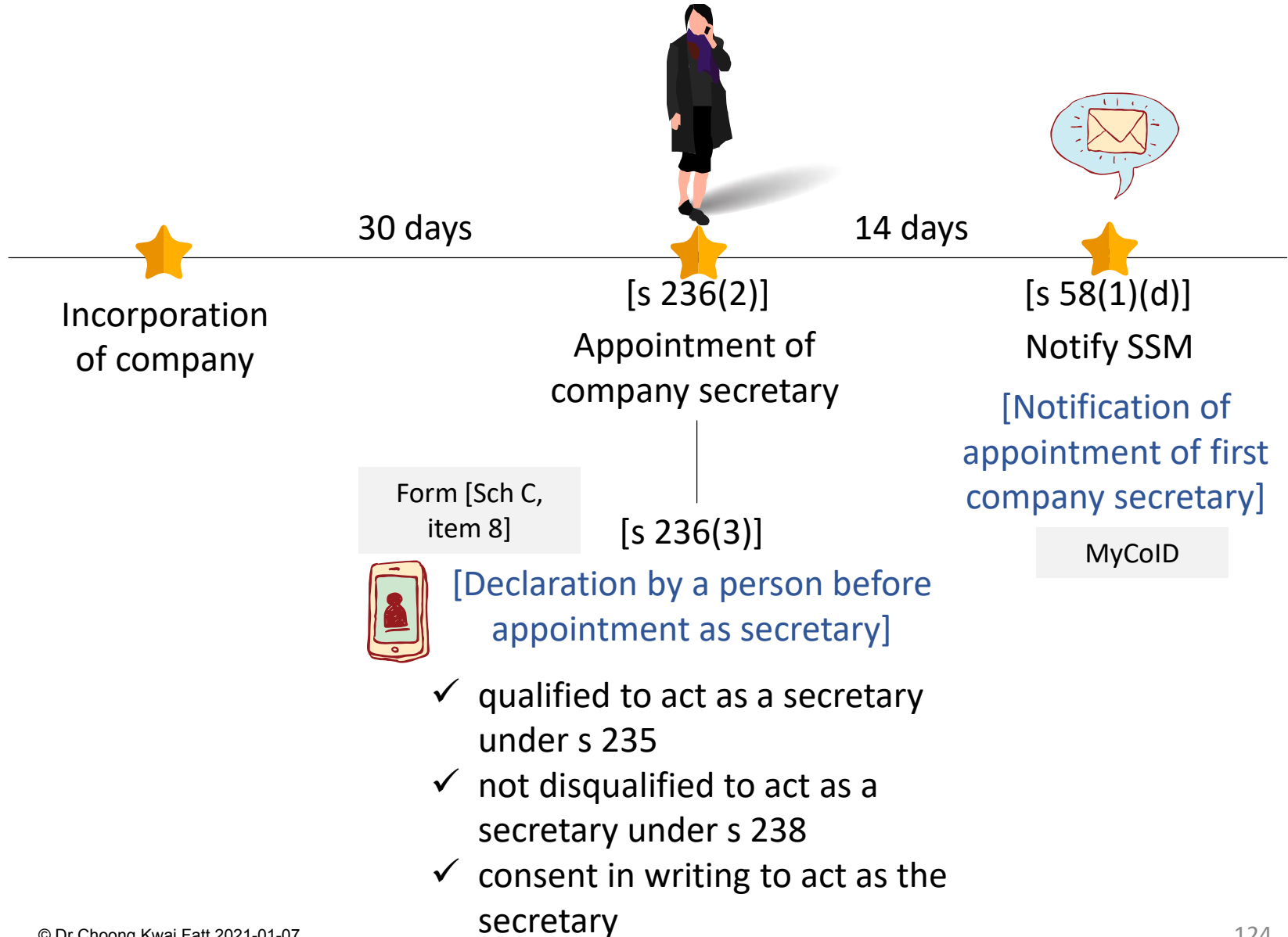
Practical illustration 22

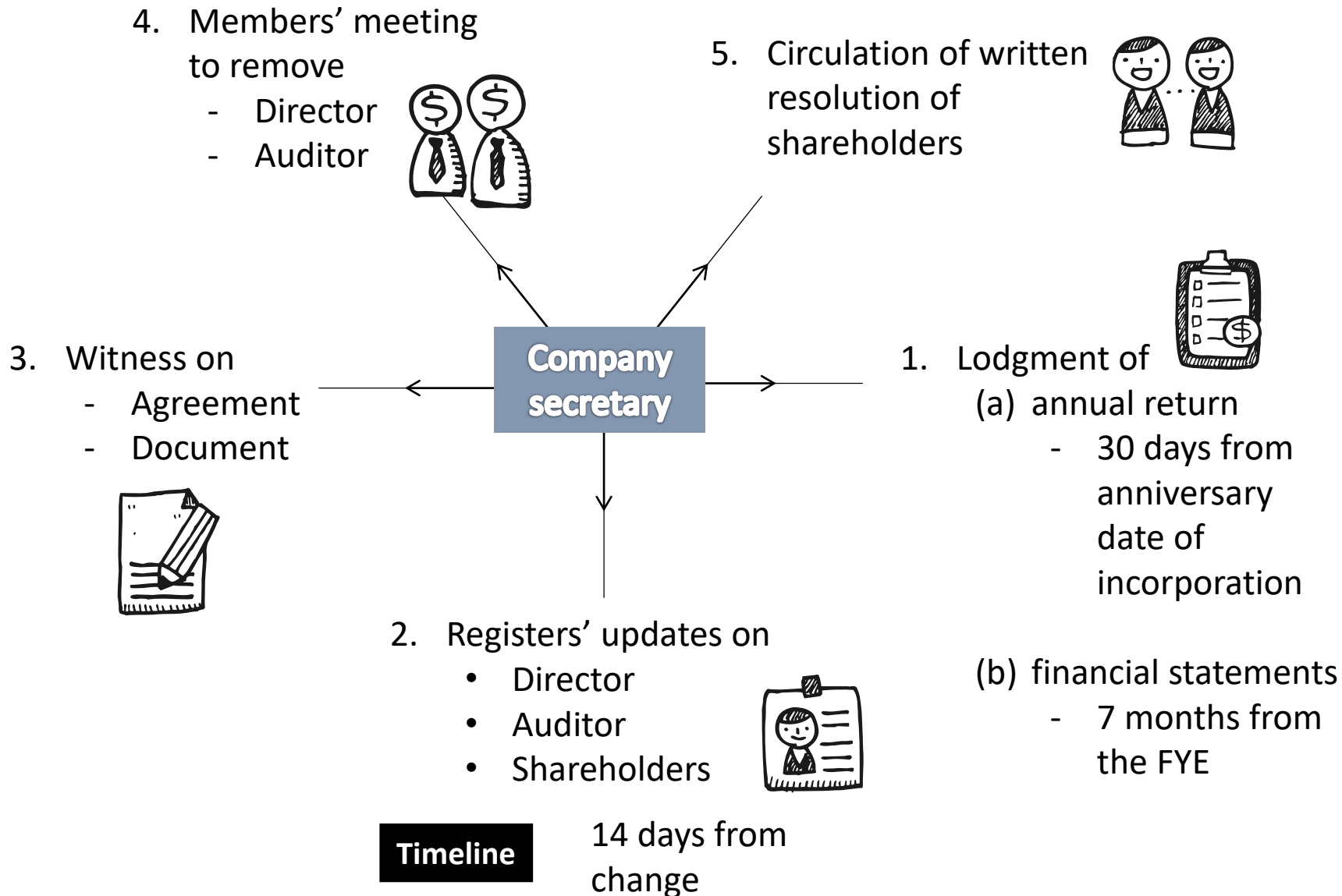


[s 364(2), CA 1965;
s 591(2), CA 2016]

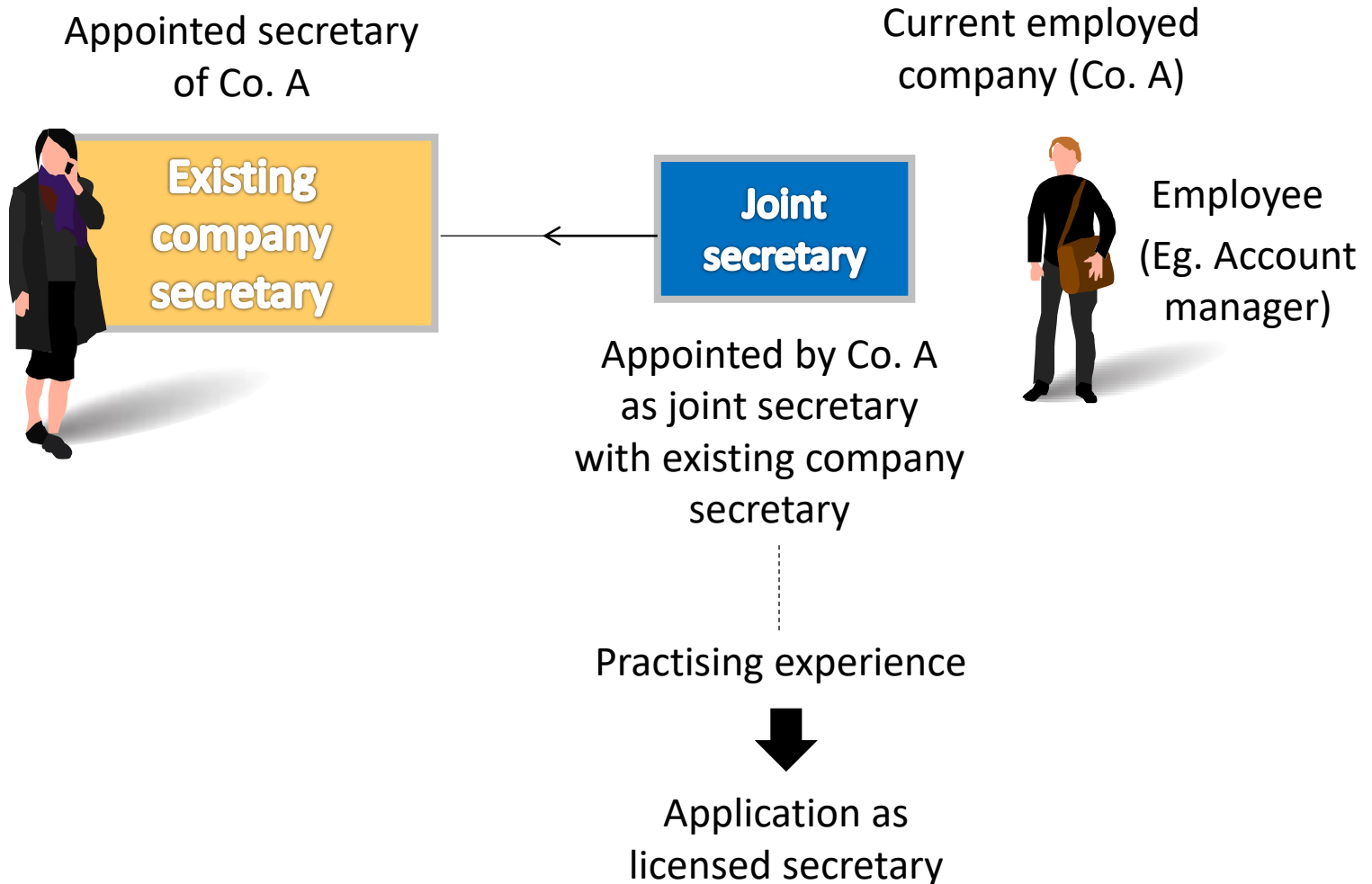
(SSM media release: 5.2.2018)

Appointment of company secretary





Joint secretary with existing company secretary



Resignation of company secretary

(i) Through BOD

- (a) 30 days from notice; or
- (b) period specified in constitution; or
- (c) period based on terms of appointment



[s 237(1)]
Notice of
resignation
to **BOD**



[s 237(3)(a)]
Company secretary
ceased office

If company secretary is of the
view that his resignation may
not be notified to the SSM,
he may lodge notice to SSM

[Declaration by secretary
to cease office]

Form [Appendix of Practice Note 4/2018]

14 days



[s 58(1)(e)]
Notify SSM

[Notification of
cessation as a secretary]

Form [Sch B, item 18]

If no notification, the
secretary's name will still
remain in the register
and be reflected in the
corporate profile of the
company

Resignation of company secretary

(ii) Through SSM

- None of the director can be communicated at last known residential address



30 days



[s 237(2)]



[Notice of intention
to vacate the office
of secretary]

+

Form [Sch B,
item 43]

Supporting evidence that none of the
directors can be communicated
(eg. proof of returned correspondences
addressed to the directors)

to



[s 237(3)(b)]

Company secretary
ceased office

Removal of company secretary

- (a) period specified in constitution; or
- (b) period based on terms of appointment

14 days



Removal of
company secretary
by **BOD**

[s 239]



Company secretary
ceased office



[s 58(1)(e)]

Notify SSM

[Notification of
cessation as a secretary]

Form [Sch B,
item 18]

Prohibition of dual capacity

[s 242]

Prohibition to act as
“director + secretary”

in a situation that
requires or authorizes
anything to be done by:

- (i) a director; and
- (ii) a secretary.

e.g. EPC certificate



Director



Company secretary

2 different persons

SSM prosecution on company secretary



General penalty

[s 588]

- (i) Fine \leq RM50,000; or
- (ii) Imprisonment \leq 3 years;
- (iii) Both

[s 236(4)] Non-compliance in the appointment of company secretary

[s 238(3)] Continue to act as the company secretary after being disqualified

[s 241(8)] Non registration with SSM to act as a secretary
(practising without practising certificate)

Disqualification to act as a secretary

[s 238, CA 2016]



- Undischarged bankrupt
- Convicted offence s 198 —
 - Malaysia
 - Overseas
 - (a) Offence relating to promotion, formation or management of company
 - (b) Bribery, fraud or dishonesty
- Cease to hold practising certificate by SSM under s 241

[First Sch, CCMA 2001]



- Have any pending legal action under
 - (a) Companies Act 2016 [Act 777]
 - (b) Trust Companies Act 1949 [Act 100]
 - (c) Kootu Funds (Prohibition) Act 1971 [Act 28]
 - (d) Registration of Businesses Act 1956 [Act 197]
 - (e) Limited Liability Partnerships Act 2012 [Act 743]
 - (f) Interest Schemes Act 2016 [Act 778]

Practising certificate



Practising
certificate



Mandatory

s 241

Company secretary (1-3 years)

(a) CPD hours (20 hours each year)

(b) Qualification:

- Licensed secretary of SSM; or
- Members of
 - MIA
 - MICPA
 - MACS
 - MAICSA
 - Bar council

**Failure to renew after 12 months
from the expiry date**



- Cancellation of practicing certificate
- New application is required
- The applicant will be treated as never applied for a PC

CPE hours

**Validity period of
practising certificate
(Year)**

**Minimum
CPE hours**

1

20

2

40

3

60



Types of course / training

% of CPE hours allowed

(a) Course relating to

- Company secretarial practice
- Company and corporate law
- Industry in which a company is operating

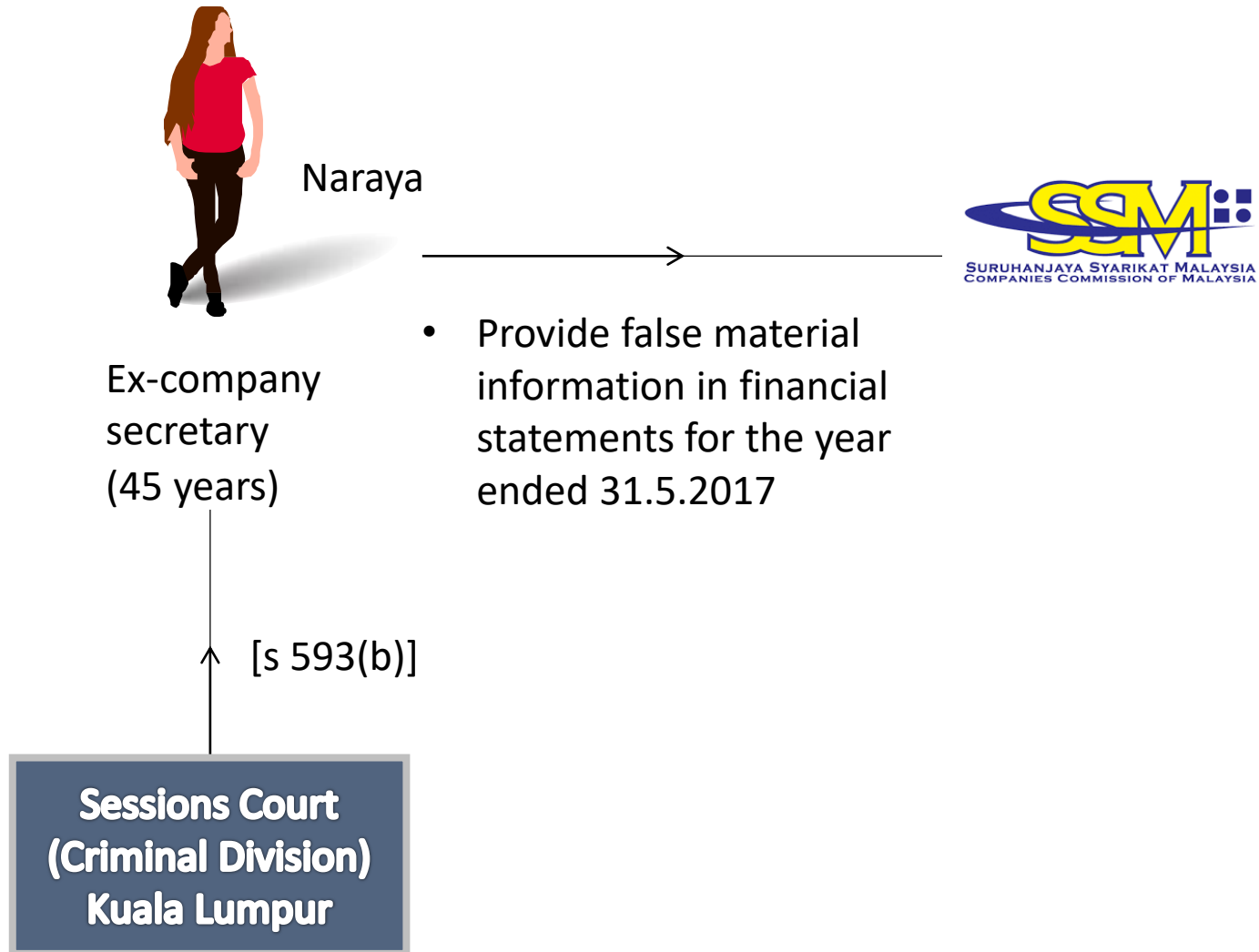
(b) Personal development

Minimum of 60%

Maximum of 25%

Maximum of 15%

Practical illustration 23



[SSM media release: 6.7.2020]

Practical illustration 24



Furnishing false statement



Owner of a
management
company
(43 years old)

Providing

- (a) false particulars of company secretary in M&A for company ST&T Sdn Bhd on 22.10.2009
- (b) false information in submitting Form 6 (declaration of compliance) by company secretary on 23.10.2009
- (c) false information in Form 49** on appointment of WYH as the company secretary on 6.11.2009

Investigation



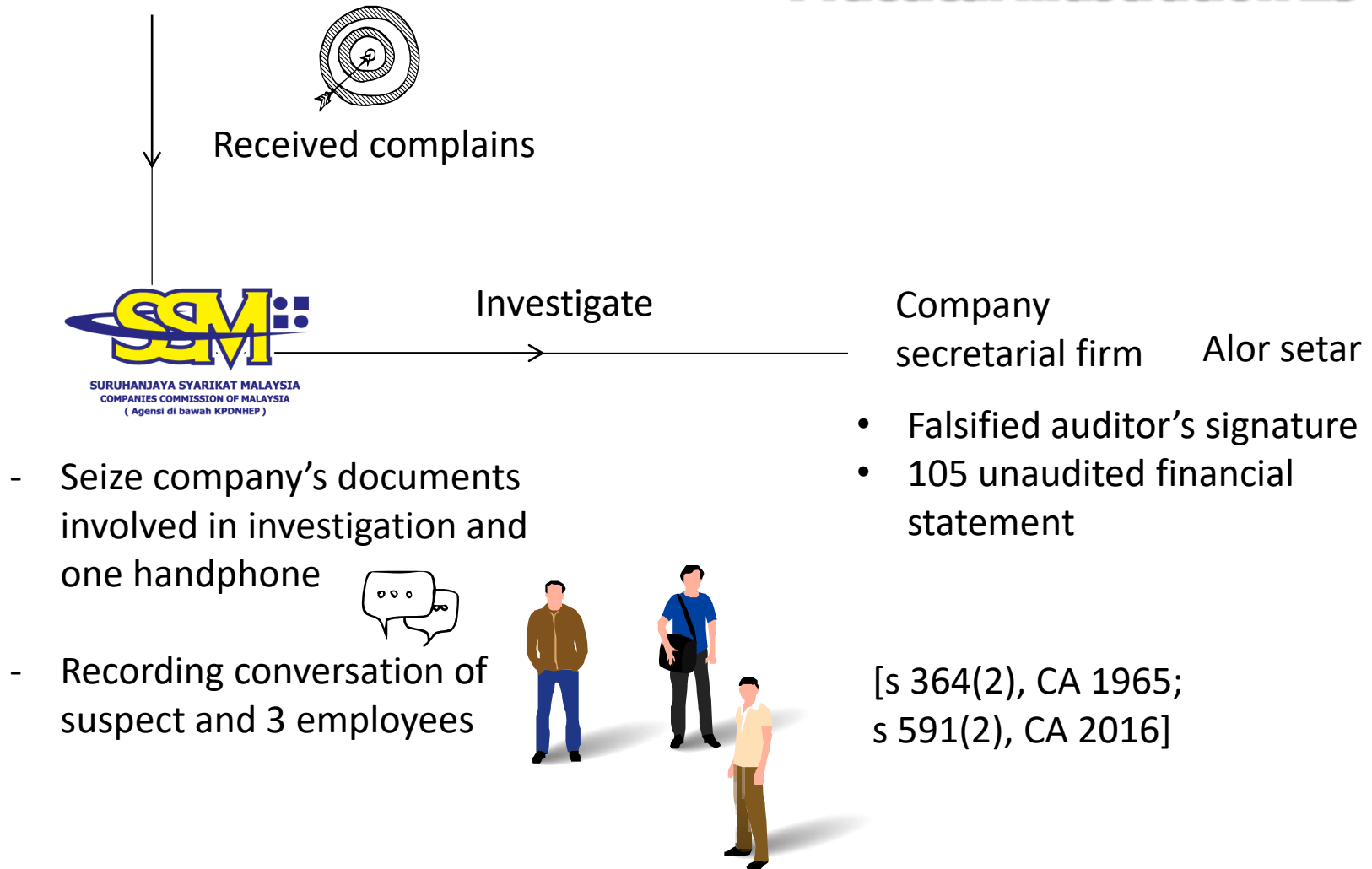
WYH is falsified as company secretary

** Form s 58:

Notification of change in the Register of
Directors, Managers and Secretaries

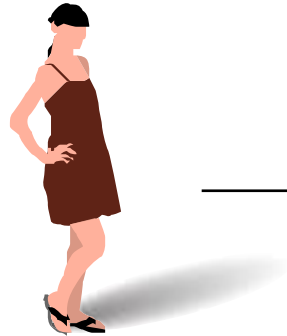
(SSM media release: 19.12.2018)

Practical illustration 25



(SSM media release: 2.7.2019)

Assistant company secretary being charged for false statements



Assistant
company secretary

RES & C (M) Sdn Bhd



False statement made on
shares transfer

lodgement to SSM
through MYCOID



[s 593(a), CA 2016]

Upon conviction

- (i) Fine \leq RM3 million; or
- (ii) Imprisonment \leq 10 years;
- (iii) Both.

(SSM media release: 13.5.2019)

COMPANY LAW 2021

- Dividend payment – in and out
- Solvency test – practical applications
- Solvency statement requirement
- Restructuring of employment in COVID climate

MANAGE YOUR **NEW** SHAREHOLDERS' RIGHTS &
DIRECTORS' RISKS TO AVOID BEING CHARGED



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7 January 2021

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Dividend payment

1. Retained earning +ve s 131



2. Fulfillment of solvency test s 132



3. Proposed of dividend



4. Payment of dividend



Dividend out of profit

Year ending 2020

Net profit

(-) income tax

Net profit after tax

RM

xx

(x)

xx



Retained earnings

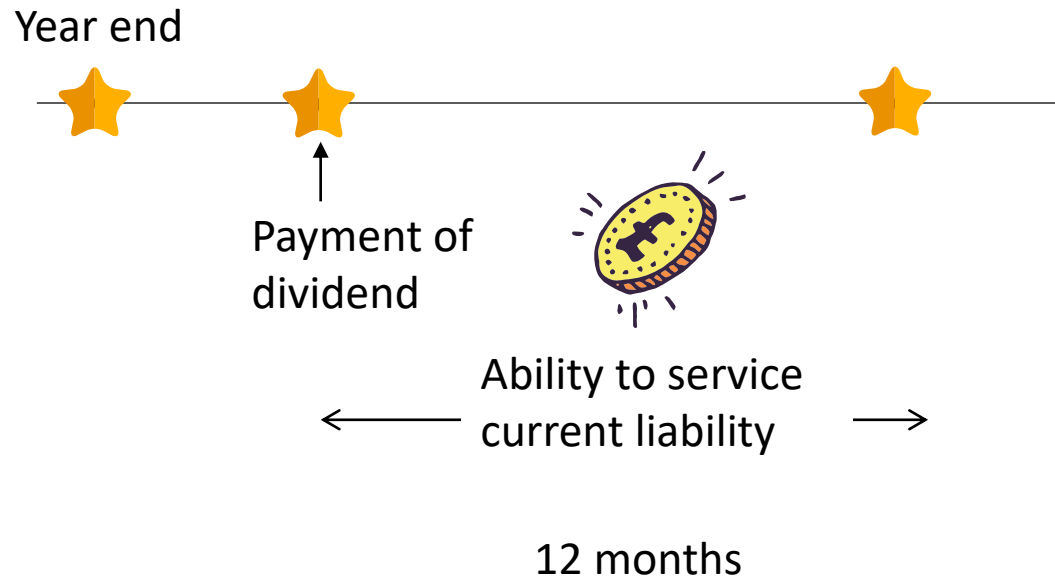


	1	2	3	4	5	6
Retained earnings b/f	+	+	+	-	-	-
Current year	+	-	-	+	+	-
Retained earning c/f	+	+	-	+	-	-



Solvency test [s 132(3)]

- Within 12 months upon payment
- Able to pay its debts as and when the debts become due





Solvency test mechanism

Cash flow

- Review and evaluation
- Now

Bank balance

+ Estimated payment from trad debtors

- Estimated payment to

- Trade creditors
- Annual operating expenses

RM

x

x

xx

(x)

z

>



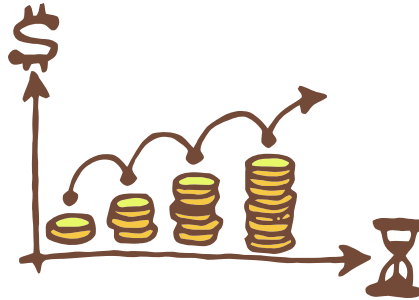
Proposed dividend
payment sum (D)

$$z - D = N$$

Cash flow projection

Revenue

- Sales of goods
- Provision of services



Balance b/f

N



Cash flow in

- Cash sales
- Payment from debtors

xx

xx

xx



Cash flow out

- Operating expenses
- Payment to creditors

x

x

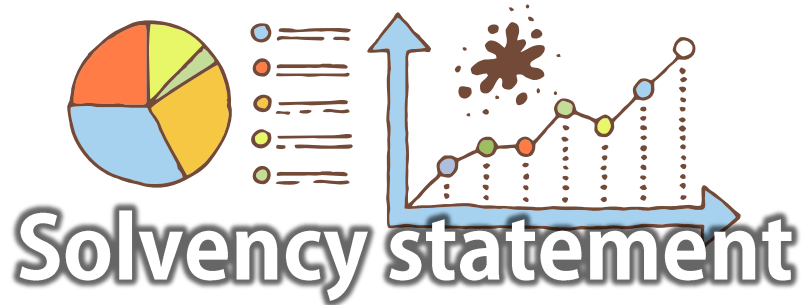
(x)

A



Projection 12 months

- Positive cash flow



Solvency statement

- A confirmation and affirmation
- By directors
- That:

A. at transaction date

- Net tangible asset +ve (Asset > Liability)

B. Immediately after transaction date

- Company in position to service debt
- Within 12 months
- Solvency test



C. Transaction

Solvency test – 12 months

- (a) Capital reduction
- (b) Redemption of preference shares

Director

100%

[s 113(2)(a)]

- (c) Financial assistance



Majority

[s 113(2)(b)]

Solvency test – 6 months

- (d) Share buyback

Majority

[s 113(2)(b)]



Employment restructuring

Employees

1.



< 55 years

- Voluntary separation scheme
- Compensation for loss of employment
 - RM20,000 per complete year of service (exemption)

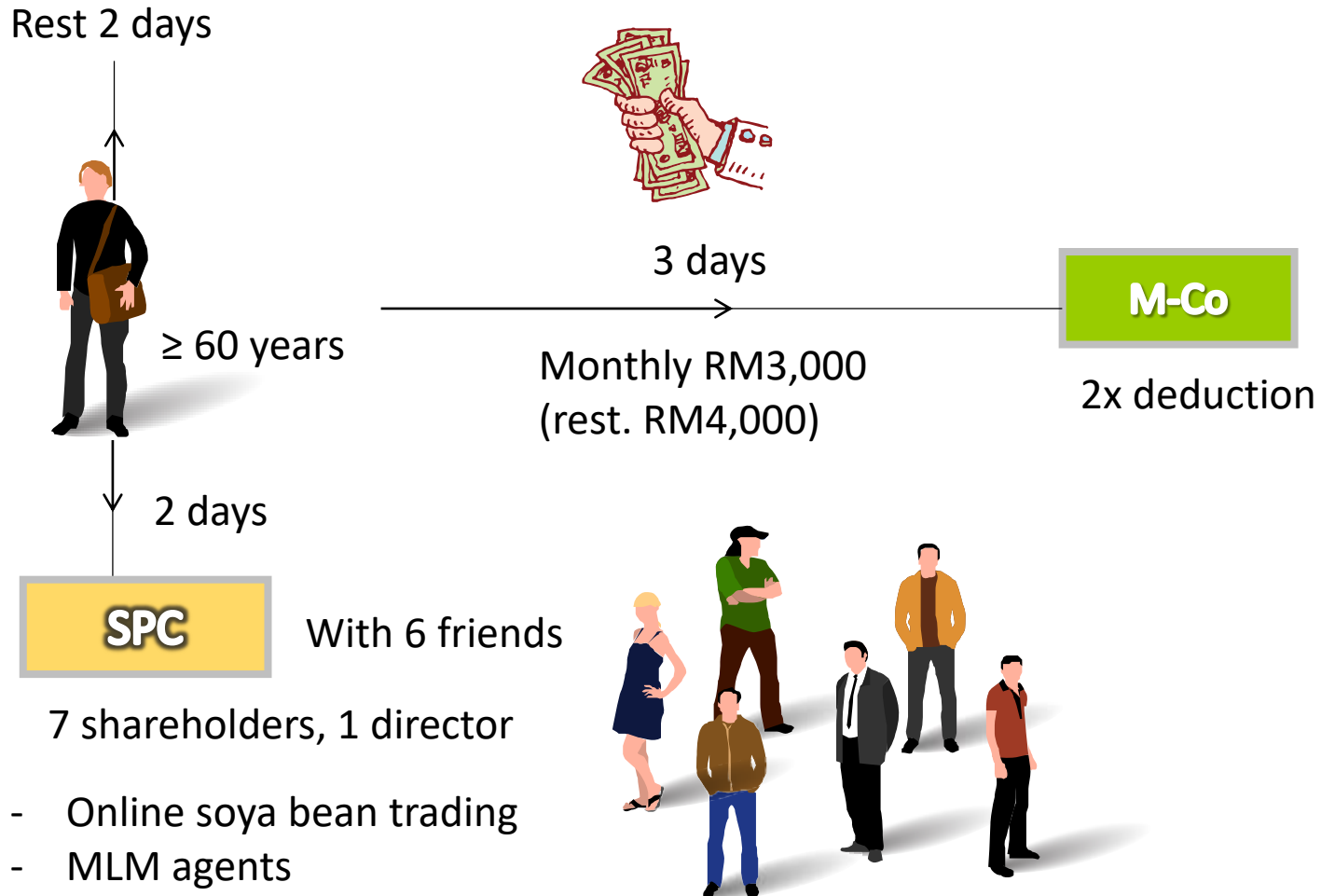
2.



≥ 55 years

- Retirement gratuity
- Full exemption – with 10 years of services

Aged uncle tax planning



Practical illustration 26

Employer

- Business income



Employee \geq 60 years old



EPF contribution

- Employer: 4%



EPF contribution

- Employee: -

Monthly remuneration*

Max: RM4,000

Deduction of EPF [s 34(4)]

Max: 19%

Excess: not deductible

*

- | | |
|--------------------|--------------|
| - Wages | - Bonus |
| - Salary | - Incentives |
| - Overtime payment | - Fees |
| - Commission | - Perquisite |
| - Tips | - ESOS |
| - Allowance | - Tax borne |



Remuneration package – a new consideration

- A.
- Salary
 - Commission



B. Tax exempt



- Meal allowance RM400-600 per month

- Interest subsidy on loan of RM300,000

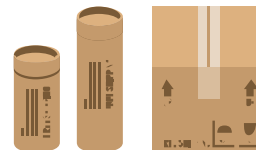
Education

Car

Housing

- Company's goods up to RM1,000

- Mobile phone with telephone bills



[Income Tax (Exemption) Order 2009, PU(A) 152/2009]



Remuneration package – a new consideration

C. Schedule 6, para 25C exemption

RM

- Service excellence
- Innovation
- Productivity

2,000

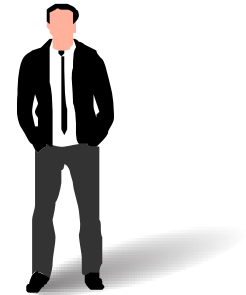
Per employee
Per year

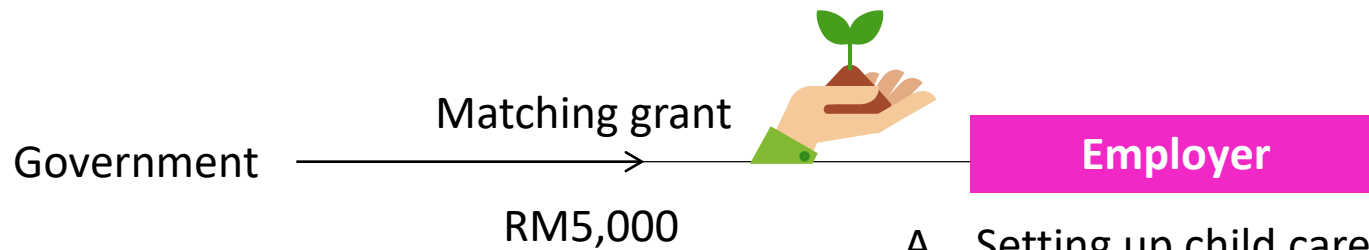


Award



D. Loan to employee on internal fund - Employee owned < 5% shares





A. Setting up child care centre

- Operating cost
- Salaries
- Foods and beverages

2x deduction

B. Child care allowance

- Child ≤ 12 years old
- Exempted



COMPANY LAW 2021

- Shadow director
- Beneficial ownership framework

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DIRECTORS' RISKS TO AVOID BEING CHARGED



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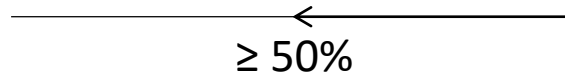
drchoong.seminar@gmail.com

Scope of directors to include 'shadow director'

[s 2]



Directors



Shadow director

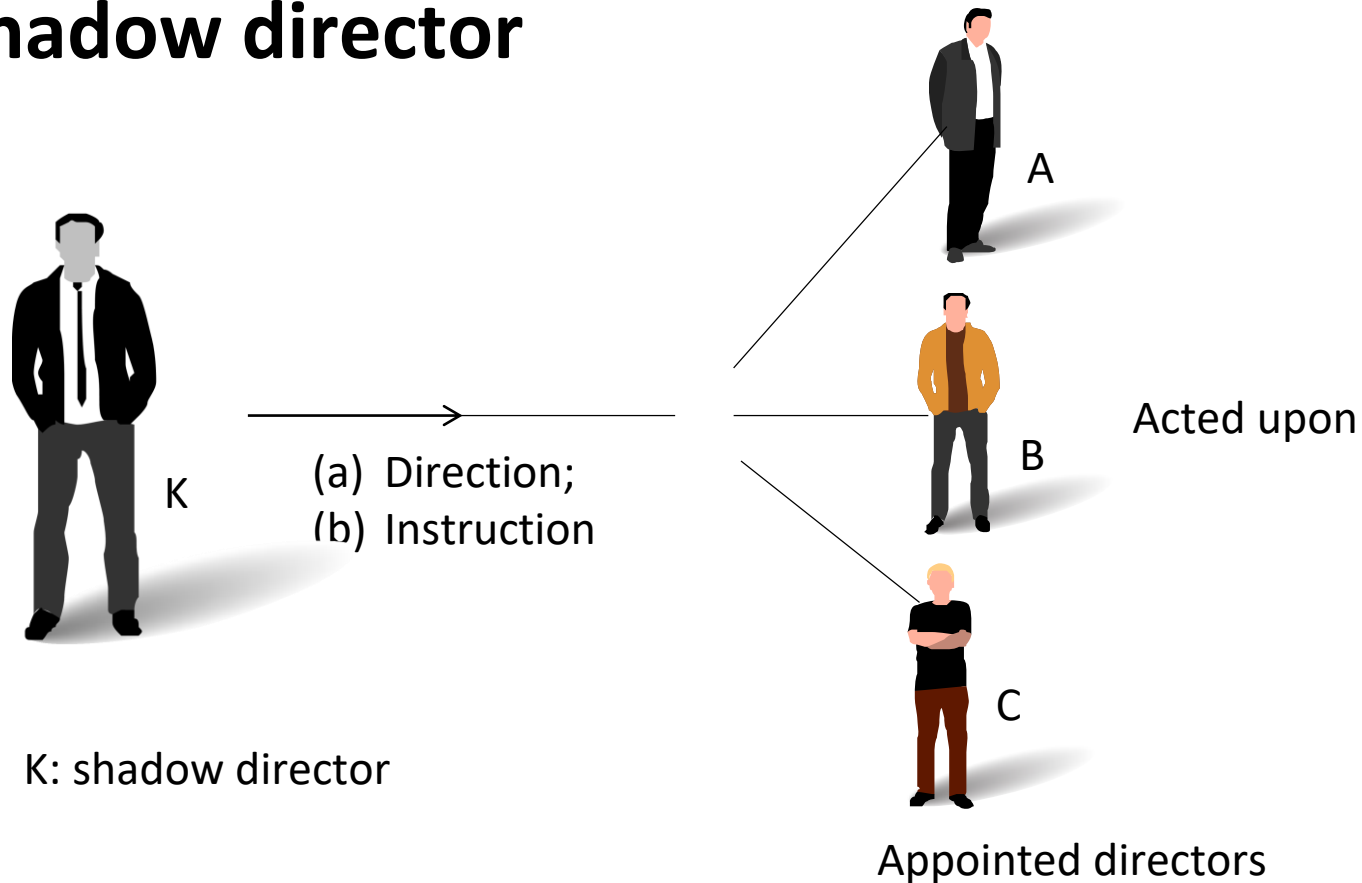
Components:

- (a) The majority of directors
- (b) Are accustomed to act
- (c) In accordance with the person's instruction and direction

Datuk Sahar bin Arpan v Public Prosecutor

[2007] 1 MLJ 697

Shadow director



Evidential burden : nexus
: influencing
: coordinating
: systematic

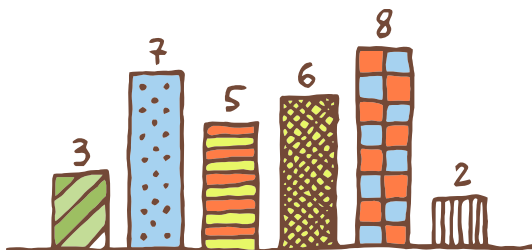


Beneficial ownership reporting framework



Introducing BO

Avoid business entities from carrying out illicit activities



Anti-money laundering

Counter terrorism financing measures

Mr. Y

Beneficial owner

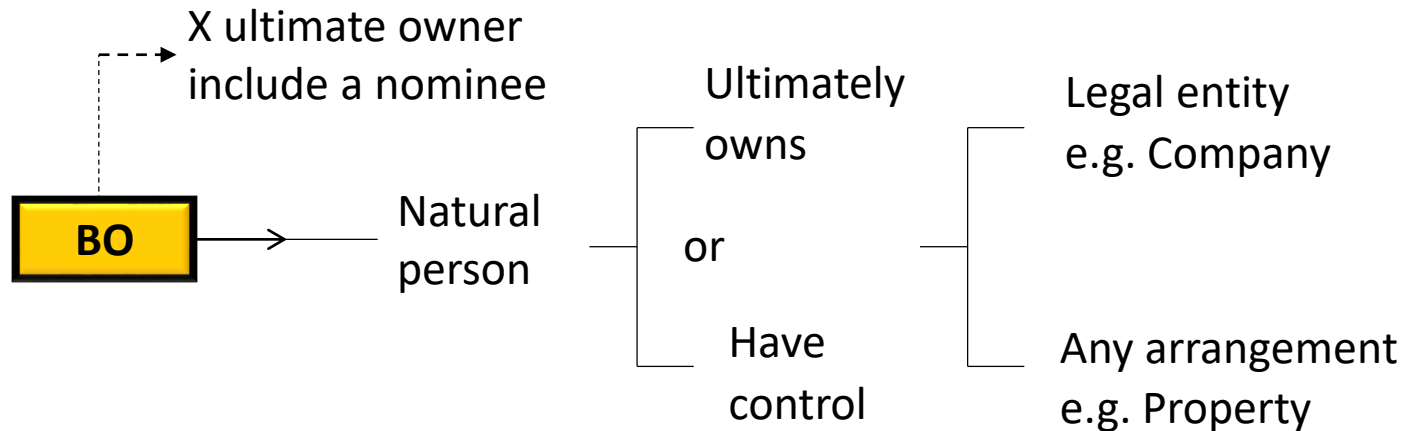
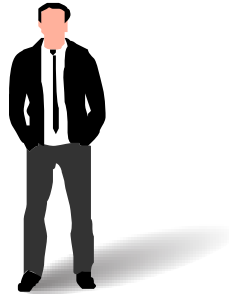
Mr. X

Legal owner

100%

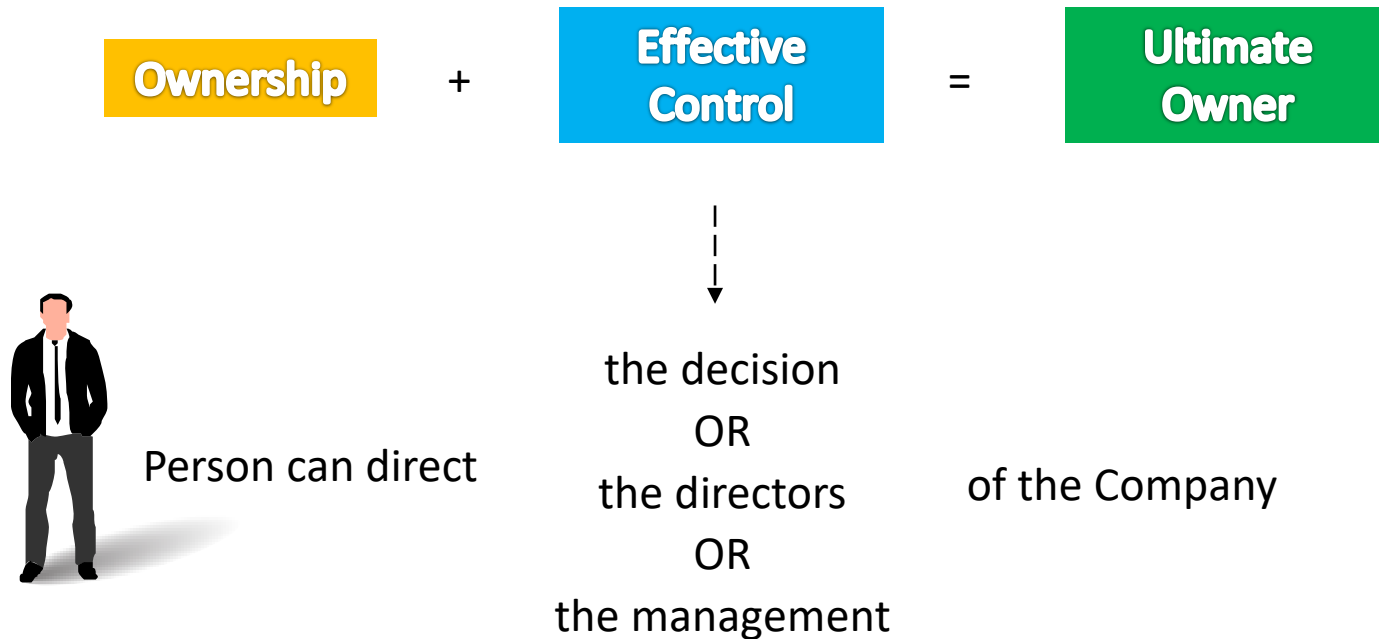
Company ABC

Definition of beneficial owner



Read together with s 8 of CA 2016 “Interests in shares”

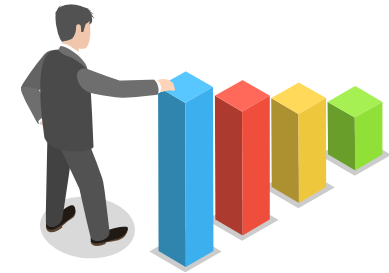
Definition of beneficial owner



Beneficial owner



exercise



Control
> 50% shares

Directly

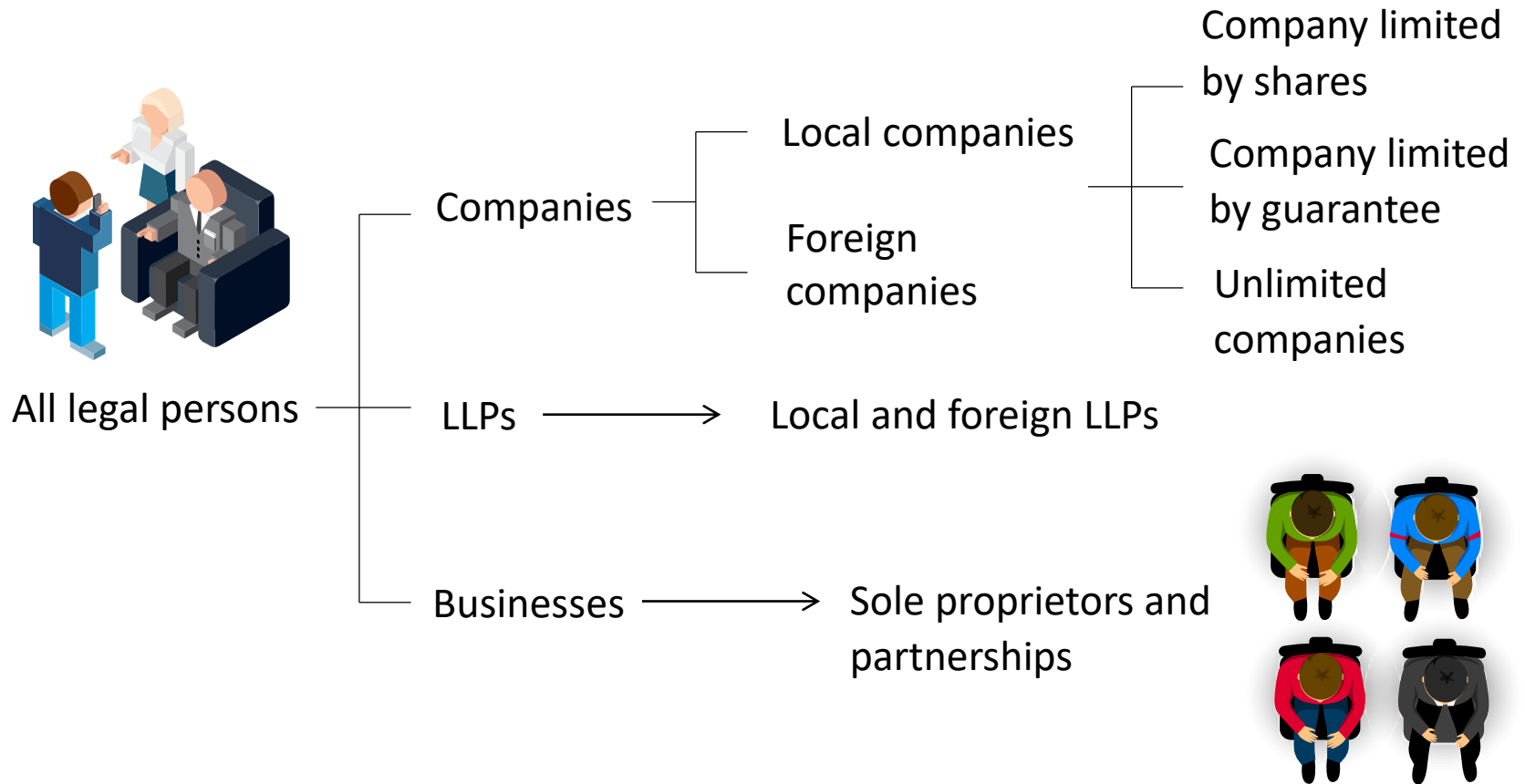
Indirectly

Hold $\geq 20\%$ shares
directly/indirectly with

- Influence of the BOD/top management
- Control over decision maker
- Right to appoint/remove director
- Agreement to control



BO - applications



The proposed Companies (Amendment) Bills 2020

– s 56 of the CA 2016



BO framework

To identify and obtain information of BO from the shareholders

Maintain the register of BO and register of members separately at the registered office

Keep the BO information together with the supporting documents and it can be accessed in a timely manners

Update BO information and notify the Registrar whenever there is a change to the particulars of BO

Who have the responsibilities on BO?



(a) Company director

- Make sure the s 56 of CA 2016 is in compliance

(b) Company secretary/agent



- Maintain the register of BO and relevant supporting document
- Notify the Registrar on the BO information
- Provide BO information in stipulated time to authorised person

Who have the responsibilities on BO?

(c) Shareholders/members

- To notify the company on BO information



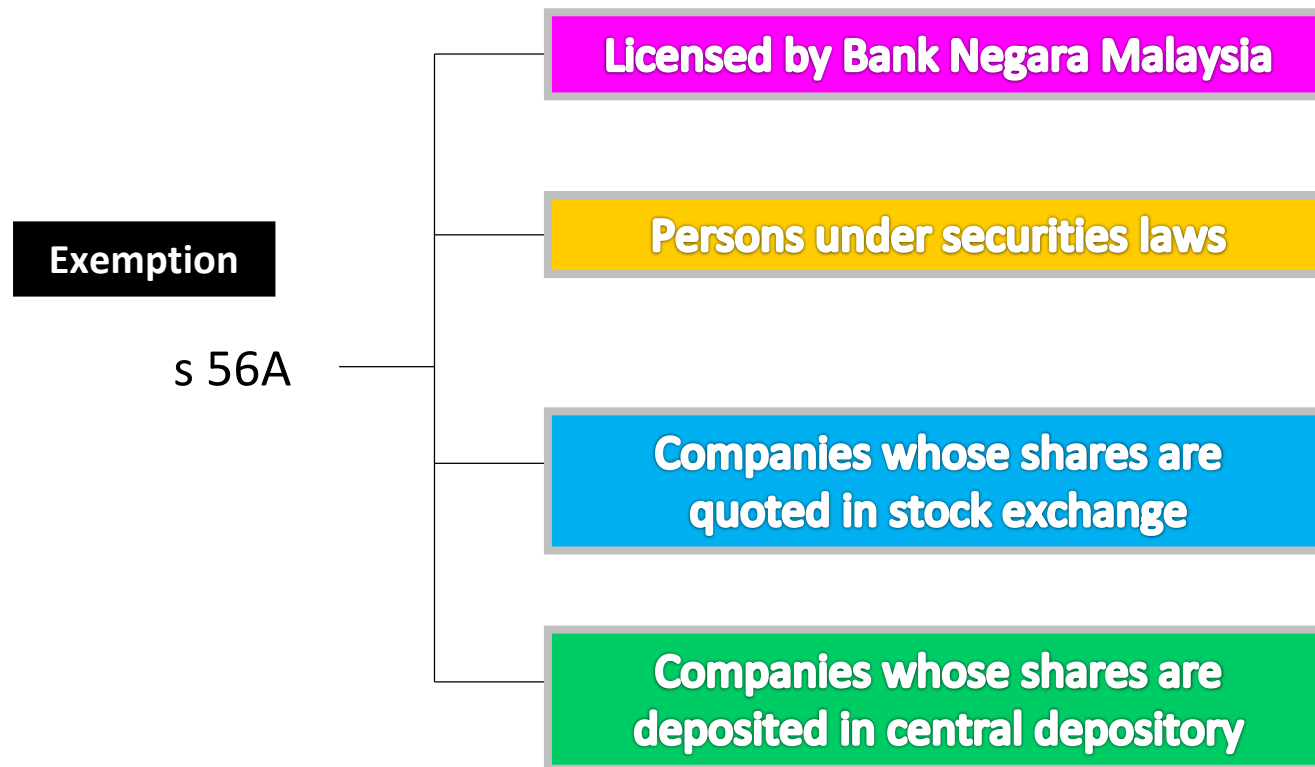
(d) Any person who received notice under ss 56(7)

- To notify the Company on BO information



The proposed Companies (Amendment) Bills 2020

– s 56A of the CA 2016

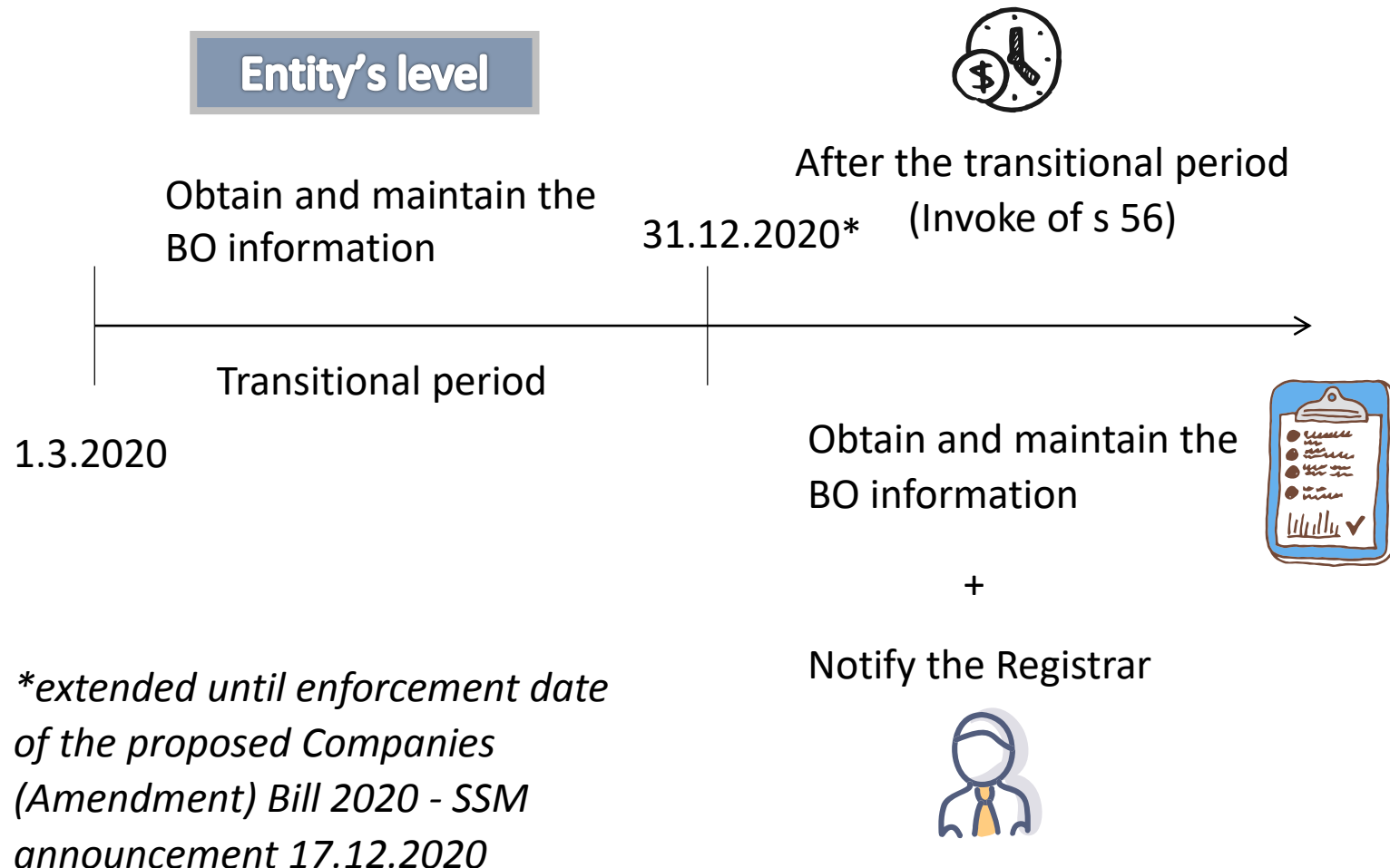


** Exemption status provided is to relief the compliance burden of these companies*



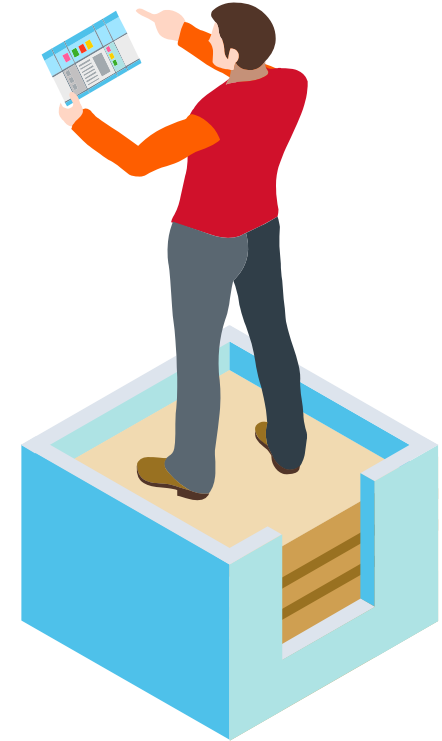
Transitional periods

– enforcement of s 56 of the CA 2016



s 56C(1) information of BO

- (a) Name of BO
- (b) IC/passport
- (c) Nationality
- (d) Date of birth
- (e) Residential address
- (f) Email address
- (g) Type of BO (direct / indirect)
- (h) Date of the person becoming to be a BO
- (i) Date of the person ceasing to be a BO
- (j) Other information as the Registrar may require



Non compliance

1. Company
2. Every officer

contravene to ss 56C(1) - commit an offence, and on conviction: -

- A fine \leq RM10,000; and
- In the case of continuing offence, a further fine \leq RM500 each day during which the offence continues after conviction.

Failure of BO to provide information to company

↓
Commits an offence

Upon conviction,



s 56E(4) read with s 588



- (a) Fine \leq RM50,000;
- (b) Imprisonment \leq 3 years;
- (c) Both

Individual

- (a) Fine \leq RM50,000

Others