RECHTSPRECHUNG / CASE LAW

Japanese Corporate Law: Important Cases in 2011

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I. INTRODUCTION

In 2012, the Japanese economy seems to be continuing its slump from 2011.[1] It was reported that according to the Governor of the Bank of Japan,[2] the domestic economy would get out of its standstill later than expected, with recovery projected to begin in the first half of FY2012. With the Japanese GDP contracting by 0.4% in FY2011 and projected to grow only 2.0% in FY2012, Japan's prospects of economic recovery remain poor, and the factor with the greatest impact on Japan's economic prospects would be the EU debt crisis. According to the *Nikkei* newspaper, in 2011 Japan entered into a trade deficit for the first time in 31 years.[3] The primary factors responsible were identified as the supply chain cuts caused by the Great Disaster in East Japan (*higashi nihon dai-shinsai*), stagnation of exports due to the deepening EU debt crisis, the movement of manufacturing overseas due to the yen's high value, and the increase in fuel imports for thermal power generation due to the shutdown of nuclear power plants after the Great Disaster in East Japan.[4] Little progress has been made on the rebuilding of areas stricken

* The authors express their appreciation to Mr *Alan K. Koh* of the National University of Singapore for kindly editing this paper.

1 Nihon Keizai Shinbun, 25 January 2012, at 5, 1.

2 Nihon Keizai Shinbun, 25 January 2012, at 5, Nihon Keizai Shinbun, 16 January 2012, at 1 (evening issue).

3 Nihon Keizai Shinbun, 25 January 2012, at 1 (evening issue), Nihon Keizai Shinbun 26 January 2012, at 3.

4 Nihon Keizai Shinbun, 25 January 2012, at 1.

by the Great Disaster,[5] and support to those areas is still necessary. As noted above, Japan in 2012 is confronted with the challenges of economic recovery and rebuilding after the Great Disaster in East Japan.

Even in these circumstances where economic prospects are poor, there have been important cases concerning corporate activities. This paper introduces four important cases. The first and second cases relate to the issue of when (i.e. the fixed time with reference to which) the 'fair value' of shares should be calculated in cases where shareholders opposing an absorption-type split or share exchange demand the redemption of their shares. Although the lower courts took different positions in those two cases, the Supreme Court in both cases took a clear position on the fixed time problem. The third case concerns an issue as to whether a person who is not a director would be liable to a third party as a de facto director. In the fourth case, a corporation suffering from management difficulties executed an incorporation-type split without transferring its debt liabilities to the newly-incorporated corporation, but the creditor of the former corporation pursued its claims against the latter corporation on the grounds of lifting the corporate veil.

II. THE SHARE REDEMPTION DEMAND BY SHAREHOLDERS OF A SPLITTING CORPORATION, AND THE FIXED TIME FOR THE CALCULATION OF 'FAIR VALUE' [6]

1. *Facts*

X corporation was a stock corporation primarily engaged in marketing, retailing and consulting, and held 37,770,700 shares (about 19.86%) in Y corporation. Y was a stock corporation primarily engaged in controlling, managing and assisting the business of broadcasting corporations operating under the Broadcast Act by holding shares of such corporations. Y's shares were listed in the first section of the Tokyo Stock Exchange. Y corporation held a shareholder meeting (hereinafter the 'Shareholder Meeting') where it sought a shareholder resolution approving an absorption-type split (hereinafter the 'Split') contract. By this Split contract, Y would allow A, a wholly owned subsidiary of Y, to succeed to the rights and duties which Y had in relation to the television broadcasting, visual design and cultural businesses. At the Shareholder Meeting X corporation opposed the bill as a shareholder of Y corporation, and made a demand for the redemption of its shares on the last day of the period during which the redemption right could be exercised. The parties did not reach an agreement on the purchase price within the period stipulated by law, and both X and Y sought a judicial determination as to the purchase price pursuant to Article 786 Paragraph 2 of the Company Code.[7]

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5 Nihon Keizai Shinbun, 11 January 2012, at 2, Nihon Keizai Shinbun, 4 January 2012, at 14. Also see Nihon Keizai Shinbun, 30 December 2011, at 16.

6 Supreme Court 19 April 2011, Hanrei Jihô 2119, 18.

7 *Kaisha-hô*, Law No. 86/2005.

X corporation had previously attempted to form a business alliance with Y corporation. As part of this move, from around August 2005 until 30 November 2005, X's subsidiary and others acquired 19.08% of Y corporation shares. In addition, X corporation made written proposals for management consolidation and a business alliance with Y corporation dated 13 October 2005. In response to X corporation's proposals, Y corporation set up a committee on 30 November 2005 with X corporation to discuss the business alliance, with the discussion period to last till the end of March 2006. Due to Y corporation's cautious approach to the business alliance, the discussion did not yield progress.

On 21 December 2007, the Broadcast Act was amended, and the broadcasting holding company licensing system was introduced. A shareholder is not in principle allowed to hold over 33% of the shares of a licensed broadcasting holding company, and any shares held over the limit will not carry voting rights in principle (Article 52-35 of the Broadcast Act and Article 17-28-24 of the Broadcast Act Enforcement Rules). Y corporation held the Shareholder Meeting on 16 December 2008, and at the Shareholder Meeting, the shareholders approved the Split contract in order for Y to become a licensed broadcasting holding company. Under this Split, A would provide Y, its wholly-owning parent company, no consideration at all. The Split became effective on 1 April 2009.

X corporation, with a person who was its agent and who also held 100 Y corporation shares, exercised its redemption rights in writing dated 31 March 2009. Y corporation on 1 May 2009, and X corporation on 14 May 2009 applied to the Tokyo District Court for a determination on the purchase price of the shares.

The Tokyo District Court[8] held that the Company Code empowered the courts to exercise rational discretion in determining the share purchase price, having regard to various factors. It held that as the date on which the demand for redemption becomes definitely effective is the date on which the absorption-type split takes effect (see Article 785 Paragraph 7, Company Code), by its discretion the effective date of the absorption-type split would be the fixed date at which 'fair value' is calculated. It further held that the 'fair value' should be, in general, the Volume Weighted Average Price of the closing price of the shares during the one month before the effective date of the absorption-type split, and that applying the calculation method to Y corporation would yield a 'fair value' of 1,255 yen per share. However, in the present case, since Y corporation offered 1,294 yen as the purchase price, it would be appropriate to fix the purchase price of the shares at 1,294 yen per share.

The Tokyo High Court[9] on appeal held that the law left the determination of the purchase price to the rational discretion of the courts, with the courts taking into account

8 Tokyo District Court 5 March 2010, Kinyû Shôji Hanrei 1339, 44.

9 Tokyo High Court 7 July 2012, Kinyû Shôji Hanrei, 1346, 14. For an introduction to this case and a brief comment in English, see E. TAKAHASHI / T. SAKAMOTO, 'Japanese Corporate Law: Important Cases in 2010', Zeitschrift für Japanisches Recht/Journal of Japanese Law, No. 31 (2011) at 264 et seq.

the purpose of the redemption system for dissenting shareholders. It further held that from the perspective of equality for all dissenting shareholders, the fixed time with reference to which the 'fair value' is determined should be the same for all dissenting shareholders. In a case concerning a redemption demand by the shareholders of the splitting corporation such as the present one, the fixed time at which 'fair value' is determined should be the time at which the redemption period (i.e. the period during which the right to redemption could be exercised) expires, and that the fixed time in the present case should be 31 March 2009, which was when the redemption period expired. Therefore, the 'fair value' should be 1,294 yen, which was the closing price of Y corporation shares listed on the Tokyo Stock Exchange on that day, 31 March 2009. X corporation appealed.

2. *Held*

Where an absorption-type merger, absorption-type split or share exchange (hereinafter 'absorption-type merger, etc.') is carried out, the shareholders stipulated in Article 785, Paragraph 2 of the Company Code (hereinafter 'dissenting shareholders') can demand the redemption of their shares at 'fair value' to the stock corporation absorbed in an absorption-type merger, splitting stock corporation in absorption-type split or wholly owned subsidiary corporation in share exchange (hereinafter 'absorbed stock corporation, etc.') (Article 785, Paragraph 1). The intent underlying the dissenting shareholders' right to redeem at 'fair value' is that while absorption-type mergers, etc., acts which change the fundamental character of the corporate organization, are facilitated by majority decision at shareholder meetings, dissenting shareholders are given an opportunity to exit on terms that place them in an economic position as favourable as they would have been in without the absorption-type merger, etc. In addition, where synergy or other enhancement of corporate value arises from the absorption-type merger, etc., the above-mentioned shareholders can share in such gains so that their interests are protected to a certain extent. It follows from the above that the courts' determination of the purchase price is not a confirmation of the share price as objectively measured at a certain point in the past, but rather a formulation of the 'fair value' by the courts in accordance with the aforesaid intent. Also, since the Company Code has no provisions setting out standards for price determination, such a determination will come within the rational discretion of the courts (see Supreme Court, 1 March 1973, First Petty Bench, Minshû 27 161).

In light of the intent mentioned above, where synergy or other enhancement of corporate value does not arise from an absorption-type merger, etc., there is no room for considering the appropriate distribution of enhanced corporate value. Therefore, the 'fair value' should be based on a calculation of what the share price would have been if the resolution at a shareholder meeting to approve a contract for an absorption-type merger, etc. had not been passed (hereinafter the '*nakariseba* price'). If dissenting shareholders of the absorbed stock corporation, etc. demand a redemption, then by action of law a legal relationship akin to that in a contract for sale and purchase will arise between them without any need for consent of the absorbed stock corporation, etc. The obligation to purchase the shares at the 'fair value' will accrue to the absorbed stock corporation, etc. (see the aforementioned Supreme Court, 1 March 1973, First Petty Bench), but the dissenting shareholders will not be allowed to withdraw the redemption demand without the consent of the absorbed stock corporation, etc. (Article 785 Paragraph 6, Company Code). Therefore, by virtue of a relationship akin to that of buyer and seller in a sale and purchase contract, it would be reasonable to determine the 'fair value' by adopting as the fixed date the day on which the redemption is demanded, which is also the time at which the dissenting shareholders express their intention to exit from the corporation. If the 'fair value' is determined with reference to a date after the day on which the dissenting shareholders demand the redemption, the dissenting shareholders would, while being unable to withdraw the redemption demand at will, be exposed to the risk of share price changes caused by ordinary market factors apart from the absorption-type merger, etc. occurring after they make their demand. This is inappropriate. Also, if the 'fair value' is determined with reference to the date on which the relevant resolution is passed at the shareholder meeting, since the dissenting shareholders must make their demand for redemption during the twenty-day period leading up to the day before the effective date of the absorption-type merger, etc. (Article 785, Paragraph 5, Company Code), there can be a considerable period between the date of the relevant resolution and the time at which the redemption is demanded. In this case, the dissenting shareholders would bear none of the risk from factors other than the absorption-type merger, etc. affecting share price. This is also inappropriate.

Thus, where synergy or other enhancement of corporate value does not arise from an absorption-type merger, etc. under Article 782, Paragraph 1 of the Company Code, the 'fair value' in a redemption demand by dissenting shareholders of the absorbed stock corporation, etc. under that paragraph should be in principle the *nakariseba* price on the day on which the redemption concerned is demanded.

Therefore, the 'fair value' in this case is the closing price (1,294 yen per share) of Y corporation shares listed on the Tokyo Stock Exchange on 31 March 2009, which is the date on which the redemption demand was made. The decision at first instance is affirmed.

3. *Comment*

With the holdings above, the Supreme Court dismissed X's appeal.

The enactment of the Company Code in 2005 has greatly changed the dissenting shareholder redemption regime.[10] When shareholders exercise their right to redemption,

10 For a commentary on this case, see E. TAKAHASHI, *Kyûshû bunkatsu kaisha no kabunushi ni yoru kabushiki kaitori seikyû to 'kôsei na kakaku' no kijunbi* [The Redemption Claim by Dissenting Shareholders and the Fixed Time for the 'Fair Value'], Kinyû Shôji Hanrei (forthcom-

the purchase price to be paid by the corporation is changed to the 'fair value' (Article 785 Paragraph 1, Company Code) from the 'fair value' that would have eventuated if not for the relevant resolutions' (Article 408-3 Paragraph 1, Commercial Code Before the 2005 Amendment[11] (hereinafter 'Pre-Amendment Commercial Code')). The explanation was that that this amendment was intended to make it possible to distribute the synergy that arises from corporate reorganizations, if it arises.[12] However, under the Company Code the wording is changed to 'fair value', so the view that the fixed time should be the time of the relevant resolution has lost its textual basis. Also, the new issue (in the case of listed corporations) of the point in time for which the market price should be applied in the calculation of 'fair value' has arisen.

The decision of the Supreme Court in this case, although limited to cases where the absorption-type merger, etc. creates no synergy or other enhancement of corporate value, is significant as it is the first Supreme Court decision on the aforementioned issue.

The lower courts had taken differing positions on the issue of 'fair value'. Four approaches may be identified. First, with respect to 'the "fair value" that would have eventuated if not for the relevant resolutions' under Article 408-3 Paragraph 1 of the Pre-Amendment Commercial Code, the dominant view before the 2005 Amendment was that the fixed time should be the time of the relevant resolutions at shareholder meetings.[13] However, since the Amendment, no lower court decisions have been based on this view. Second, there are decisions in which the court, like the Supreme Court in this case, has taken the view that the fixed time for calculating 'fair value' under the Company Code should be the time at which the redemption right is exercised.[14] In the Kobe District Court 16 March 2009 decision,[15] it was held that with respect to the calculation of the 'fair value' based on the market price, when dissenting shareholders express their intention to exercise their redemption rights to the corporation and the communication of such intention is received by the corporation, a legal relationship akin to that in a contract for the sale and purchase of shares would be formed, even though the proprietary rights in the shares are transferred only at time of payment. Therefore, the market price at the time when the legal relationship arises should be the 'fair value'. Third, there is the view that the date on which the option to demand share redemption lapses should be the reference fixed time, which is the view taken by the Tokyo High Court in the present case.[16] Fourth, there is a case that applied the time at which the cor-

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11 *Shôhô*, Law No.48/1899.

12 K. EGASHIRA, *Kaisha-hôsei no gendai-ka ni kansuru yôkô-an no kaisetsu* [Commentaries on the Outline Bill of the Modernization of the Corporation Law], Shôji Hômu 1725 (2005) 9.

13 Tokyo District Court 11 October 1983, Kakyû Saiban-sho Minji Saibanrei-shû 34(9-12) 968, Tokyo District Court 21 November 1985, Kinyû Shôji Hanrei 752, 26.

14 For example, Tokyo High Court 17 July 2009, Kinyû Shôji Hanrei 1341, 31.

15 Kobe District Court 16 March 2009, Kinyû Shôji Hanrei 1320, 59.

16 Tokyo High Court 7 July 2010, Kinyû Shôji Hanrei 1346, 14.

porate reorganization takes effect as the fixed time.[17] The Tokyo High Court 29 March 2010 decision,[18] which took this position, held that the 'fair value' in a share redemption demand by shareholders of the wholly owned subsidiary in a share exchange, by the discretion of the court, should be based on the effective date of the share exchange, which is the date on which the redemption demand becomes definitely effective.

Synthesizing the above, since the Company Code was enacted in 2005, the point of divergence in the views taken by the lower courts appears to be the point in time at which a contract for the sale and purchase of shares can be said to have arisen from shareholders' exercise of their right to redeem (with the exception of the Tokyo High Court decision in the present case, which was based on shareholder equality). The question really is, should the time be the point in time at which the shareholders' demand for share redemption reaches the corporation, or should it be the point at which the relevant corporate reorganization becomes effective, which is also when the redemption demand becomes definitely effective?

In the legal academy, an early view[19] supported the old position under Article 408-3 Paragraph 1 of the Pre-Amendment Commercial Code, i.e. that the time of the relevant resolution should be adopted in cases where synergy did not arise from the reorganization. The premise is that the wording under the old law – '"fair value"' that would have eventuated if not for relevant resolution' – still had meaning.

Later, Professor Tomotaka Fujita argued that the issue of the fixed time for the calculation of 'fair value' should be considered with respect to the question of whether shareholders would be given improper opportunities to speculate (and consequently whether shareholders would be overly incentivized to oppose resolutions).[20] He argued that where the fixed time is set at the time of the shareholder resolution approving the relevant reorganization, shareholders would only benefit from any increase in share price without bearing any risk of decreases, with the result that shareholders would be given an improper speculative opportunity and therefore strongly incentivized to oppose reorganizations.[21] However, he also maintained that the 'fair value' to be decided by the courts upon application by the parties should be the price the shares would have commanded had it not been for the reorganization, and therefore the fixed time should be the time of the resolution.[22] Proponents of this view point out that taking the resolution time

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17 Tokyo District Court, Kinyû Shôji Hanrei 1344, 36.

18 Tokyo District Court, Kinyû Shôji Hanrei 1354, 28.

19 See the literature canvassed in: E. TAKAHASHI, *Doitsu to nihon ni okeru kabushiki kaisha-hô no kaikaku* [Reform of the Law of Stock Corporations in Germany and Japan] (2007) 40 footnote 136.

20 T. FUJITA, *Shin-kaisha-hô ni okeru kabushiki kaitori seikyû-ken seido* [The Right of Redemption under the New Company Code], in: Kuronuma/Fujita (eds.), *Egashira Kenjirô sensei kanreki kinen igkyô-hô no riron (jô)* [In Celebration of Professor Kenjirô Egashira's 60th Birthday: Theories of Corporate Law (1)] (2007) 294.

21 T. FUJITA, supra note 20, at 294.

22 T. FUJITA, supra note 20, at 296 et seq.

as the fixed time means that as long as shareholders oppose reorganizations, they would be given for free the right to have their shares purchased at the price the shares command at the time of resolution – in other words, a put option. This would create an incentive for shareholders to oppose resolutions if only to get the benefit of the put option, and would in turn make corporate reorganizations, which in general have positive effects on the national economy, more difficult to achieve. It was after this view was presented that the cases began diverging on the issue of when the fixed time, which should be sometime after the time of resolution, should be precisely.

Professor Hideki Kanda argued that the redemption framework was also intended to include the functions of distributing gains from synergy and of maintaining the security of the '*nakariseba*' price. The purpose of the latter is to compensate dissenting shareholders for their losses caused by the majority shareholders' breach of the duty of loyalty.[23] It follows that except for cases where shareholders are forced to exit from the corporation in exchange for monetary consideration under a corporate reorganization, the fixed time should be the time of the demand for redemption. However, this could create the situation where the purchase price for each shareholder claiming redemption could be different as they might not claim redemption at the same time, and this would be inappropriate. Therefore, to solve the problem, where shareholders demanded redemption at different times the fixed time should be the point at which the redemption period (i.e. the period during which the right of redemption could be exercised) expires.[24] Professor Kanda's view largely supports the Supreme Court's decision in this case, but his point that the problematic situation of each shareholder receiving a different price for his shares would arise where each shareholder exercises his redemption right at a different time greatly influenced the Tokyo High Court in this case, which adopted as the fixed time the end of the redemption period.

Professor Masao Yanaga maintained that the courts should determine the purchase price taking into consideration when the shareholder acquired his shares, and that in certain circumstances, the fixed time could be the time when the internal decision (on reorganization) was made or when the reorganization plan was announced. It follows from this that the share purchase price could be different for each shareholder, but in any case since under the Company Code the regulation that consolidates hearings and trials on the question of price has been abolished, it is possible that the purchase price as determined by the courts could be different for each shareholder.[25] Neither the point that the court should consider the time at which the shareholders acquired the shares when determining the share purchase price, nor the idea that the fixed time should be the time

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23 H. KANDA, *Kabushiki kaitori seikyû-ken seido no kôzô* [The Structure of the Shareholder's Right of Redemption], Shôji Hômu 1879 (2009) 5.

24 H. KANDA, supra note 23, at 11.

25 M. YANAGA, *Hantai kabunushi no kabushiki kaitori seikyû-ken o meguru jakkan no mondai* [Some Issues Concerning the Dissenting Shareholder's Right of Redemption], Shôji Hômu 1867 (2009) 10.

of the decision of the board of directors or the time of announcement of the reorganization plan was adopted in decisions under the Company Code. Nonetheless, this view provides the theoretical basis for the Supreme Court decision in this case, which made it clear that differences in purchase price for each shareholder would not be against the intent of the Company Code.

Professor Kyôichi Toriyama criticized the Tokyo High Court decision in this case which opted for the time at which the redemption period expires on the basis that the fixed time should be the same for all dissenting shareholders from the perspective of equality for all dissenting shareholders. Professor Toriyama argued that 'equality' is an idea based on the premise that a presupposition (here the date of exercise of the redemption right) would be the same. He argued that since shareholders who maintained their status as shareholders after the reorganization had their shares purchased individually through the exercise of their redemption rights, it would conform better to the principle of equality that the purchase prices should be accordingly different when redemption is demanded at different times, and supported the position that the time of exercise of the redemption right should be the fixed time.[26] Professor Toriyama maintained that since the redemption framework was one under which shareholders had their shares purchased individually by exercising their redemption rights under the framework, the idea that each shareholder would have his shares purchased by the corporation at the shares' market price at the time when the shareholder demanded the redemption would conform to the notion of equality, and this offered the theoretical basis for the change in position taken by the Supreme Court from that taken in the Tokyo High Court decision.

The Supreme Court in this case adopted the time of the exercise of the redemption right as the fixed time in the calculation of 'fair value'. Its decision is appropriate, considering the intent of the 'fair value' provision that the 'fair value' is to be decided by the courts (Article 786, Paragraph 2, Company Code) and the interest in preventing shareholders from receiving a put option. Professor Masashi Kitamura maintained that the position on the fixed time should be decided by comprehensively taking into consideration matters such as consistency with the intent of the redemption framework, whether dissenting shareholders are improperly given speculative opportunities, and the balancing of the interests of the relevant stakeholders (dissenting shareholders, the corporation, shareholders other than dissenting shareholders and the corporation's creditors, etc.), and supported the time of exercise of the redemption right position which the Supreme Court in this case adopted.[27] Professor Mathias Habersack of the Ludwig Maximilian

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26 K. TORIYAMA, *Kabushiki kaitori seikyû ni okeru 'kôsei na kakaku' no kijun-bi rakuten tai TBS kabushiki kaitori kakaku kettei môshitate jiken* [Tokyo Kôsai Heisei 22.7.7 kettei] [The Fixed Date for the 'Fair Value' in a Redemption Claim, The Rakuten v. TBS Share Purchase Price Settlement Case [Tokyo High Court 7 July 2010 Decision], Kinyû Shôji Hanrei 1358 (2011) 17.

27 M. KITAMURA, *Rakuten tai TBS kabushiki kaitori kakaku kettei jiken, saikôsai-kettei to kôsei na kakaku no santei jiki* [The Supreme Court Decision in the Rakuten v. TBS Share Purchase

University of Munich Faculty of Law in Germany pointed out that the view (that the fixed time should be the time of exercise of the redemption) adopted by the Supreme Court creates two problems. First, the corporation would be placed in an unstable financial position as it could not know how much funds it should prepare for the purpose of responding to redemption demands by shareholders until the shareholders actually exercise their right. Second, the corporation would have to bear the increase where its share price rises after the relevant shareholder resolution, while the shareholders exercising the right to redeem would benefit from receiving a 'windfall profit'. Nonetheless, Professor Habersack supported the position under Japanese law that the purchase price in the case of a redemption demand would be determined by setting a fixed time and using the market price at that fixed time.[28]

III THE 'FAIR VALUE' IN THE REDEMPTION DEMAND OF THE DISSENTING SHAREHOLDER WHERE SYNERGY OR OTHER ENHANCEMENT IN CORPORATE VALUE DOES NOT ARISE FROM THE ABSORPTION-TYPE MERGER, ETC. [29]

1. Facts

Y was a stock corporation with its shares listed on the JASDAQ Stock Exchange. Y held a shareholder meeting on 28 August 2008 where the shareholders passed a resolution (hereinafter the 'Resolution') approving a contract including *inter alia* a share exchange. By this contract, the share exchange (hereinafter the 'Share Exchange') would turn U into the wholly owning parent corporation and Y into the wholly owned subsidiary. X, a shareholder of Y, gave Y notice of intent to oppose the Share Exchange before the abovementioned shareholder meeting. X also demanded redemption of its Y shares at fair value sometime during the twenty-day period leading up to the day before the date on which the Share Exchange became effective (hereinafter the 'effective date').

The market price (closing price) of Y shares on 1 July 2008, just before the Share Exchange plan was announced, was 79,500 yen, but it fell continuously after that. The price on 22 September 2008, the day Y was delisted, was 43,250 yen. The main reason for the fall in market price was the Share Exchange, which damaged the corporate or shareholder value of Y.

X and Y failed to reach an agreement on the purchase price of the shares held by X, so they respectively applied to the court for a determination of the purchase price under Article 786, Paragraph 2 of the Company Code.

Price Settlement Case, and the Time of Calculation of the Fair Value], Shôji Hômu 1941 (2011) 9 et seq.

28 An answer given on 17 January 2012 by Professor Mathias Habersack (Ludwig Maximilian University of Munich) to an inquiry by E. Takahashi via e-mail.

29 Supreme Court 26 April 2011, Hanrei Jihô 2120, 126.

2. *Held*

The intent underlying the dissenting shareholders' right to redeem at 'fair value' is that while absorption-type mergers, etc., acts which change the fundamental character of the corporate organization, are facilitated by majority decision at shareholder meetings, dissenting shareholders are given an opportunity to exit on terms that place them in an economic position as favourable as they would have been in without the absorption-type merger, etc. In addition, where synergy or other enhancement of corporate value arises from the absorption-type merger, etc., the abovementioned shareholders can share in such gains so that their interests are protected to a certain extent. In line with the intent of the provision, where synergy or other enhancement of corporate value does not arise from an absorption-type merger, etc. under Article 782, Paragraph 1 of the Company Code, it would be, in principle, appropriate to interpret the 'fair value' in a redemption demand by dissenting shareholders of the absorbed stock corporation, etc. under that Paragraph as the *nakariseba* price (i.e. what the share price would have been if the resolution at a shareholder meeting to approve a contract for an absorption type merger, etc. under Article 782 had not been passed) on the day on which the redemption concerned is demanded.

3. *Comment*

In this case, the Supreme Court quashed the interpretation of the Tokyo High Court,[30] which had held that the 'fair value' should be calculated as the *nakariseba* price based on the effective date, where absorption-type merger, etc. did not create synergy or otherwise enhance corporate value. The Supreme Court held that the calculation for the *nakariseba* price should be based on the date on which the dissenting shareholders demanded the redemption, and remanded the case to the Tokyo High Court.

The significance of this case lies in the Supreme Court following the aforementioned Supreme Court 19 April 2011 decision (the case above at II), holding that the 'fair value' should be, in principle, the price which the shares would have commanded had it not been for the resolution approving the contract for an absorption-type merger, etc. on the day on which the redemption was demanded. As seen above, although the lower courts had taken different positions on the fixed time with reference to which the 'fair value' is calculated, the Supreme Court in the present case, in following the aforementioned Supreme Court decision (case II above) issued just seven days prior, has indicated unequivocally that the position on the fixed time it would take for similar cases in the future would be that of the date of the redemption demand.

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30 Tokyo High Court 19 October 2010, Kinyû Shôji Hanrei 1354, 14.

IV. THE LIABILITY OF DE FACTO DIRECTORS FOR DAMAGES [31]

1. Facts

X concluded a building construction contract (hereinafter 'the Contract') with Z corporation.

Z corporation was a stock corporation with 200 outstanding shares and capital of 10,000,000 (10 million) yen. Y was one of the incorporators of Z corporation. Z's directors at the time of incorporation were OI (Y's son), OU and H. Later, H resigned as director, OI resigned as representative director but continued as director, and TT became a representative director. As to Z corporation's outstanding shares, at the time of incorporation Y held 50 shares, OI 100 shares, and OU 50 shares. At Y's direction, the entire capital of 10,000,000 yen contributed at the time of incorporation was withdrawn from Z's bank account. B corporation was a stock corporation with 200 outstanding shares, a capital of 10 million yen, with Y as representative director, and OI and OU as directors. K corporation was a limited liability corporation with a capital of 3,000,000 yen. OU was its sole director, but later resigned and was replaced by TN as sole director. Y was the head of C institute. Z corporation, B corporation and K corporation (hereinafter 'the three corporations') operated their businesses in the same room in a building. Y was in a room partitioned out for the institute head. TT, OI and OU worked in the same room as the other employees. OK was an employee of either Z corporation or B corporation.

Y had his own research certified as part of the national Millennium Project. It was after C institute began receiving research funding from the state that the three corporations were incorporated. Since Y's research received much funding from the state, it was necessary to document the contents of the research and accounts in state-prescribed forms, and to report this information to the authorities. OK performed this task under Y's direction.

At the workplace Y's position was absolute, and both OU and OI, who were directors, were akin to Y's subordinates. TT called himself a 'hired company president', and the employees also recognized that the real boss was Y. TT was not addressed as 'president', and Y was addressed as '*shochô*', meaning 'head of institute'.

Z corporation outsourced its research to the three corporations, and remitted outsourcing fees to the three corporations. When money was remitted, in relation to the portions received by B corporation, Z corporation and K corporation, Y directed OK, OI and OU respectively to withdraw the respective portions of the money. OK, OI and OU delivered the money they withdrew to Y. As to the bank account of Z corporation, on several occasions all the money remitted by C institute was repaid on the same day or a few days later.

X requested Y to construct a residence for himself (X), a request which Z corporation accepted. Y then hired TT as the representative director of Z corporation. Y proposed

31 Nagoya District Court 14 May 2010, Hanrei Jihô 2112, 66.

that the roof should be light and round. Y insisted to TT that such a roof shape would cause no problems, upon which TT acquiesced to Y's proposed design. Eventually, the shape of the roof resulted in rain leakage.

After Z corporation constructed the house and transferred it to X, the subcontractors involved in the construction remained unpaid and began demanding payment from Z corporation. Y gave OI and others directions to transfer to B corporation and others property held in the name of Z corporation in order to prevent seizure of Z's deposit on the building or its photocopying machines, etc. The registered address of Z corporation was also changed to that of TT's personal residence under Y's directions.

X argued that a defect was found in the house that Z corporation constructed and transferred to X under the Contract, and that X suffered losses amounting to about 9,220,000 yen, and thereby obtained the right to claim from Z corporation damages of that amount. Further, X argued that Y was a de facto director of Z corporation who had, through misappropriation of Z corporation property and other breaches of his duty of loyalty and other neglect of duties owed to Z corporation, rendered Z corporation practically insolvent. As a result of Z corporation's insolvency, which was caused by Y, X became unable to satisfy its right to cure of the defect or its right to damages against Z corporation. On this basis, X claimed that Y had caused it loss and sought damages from Y under an analogical application of Article 429, Paragraph 1 of the Company Code.

2. *Held*

[As to the bank account of Z corporation] (added by the authors), Y forced OI to withdraw 19,064,087 yen, and received that money from OI. Also, considering the fact that the entire capital of 10,000,000 yen contributed at the time of Z's incorporation was withdrawn from the bank account of Z corporation under Y's directions, it can be said that Y was not only involved in the management of Z corporation, but also in essence controlled the property of Z corporation as its real manager.

Moreover, the main business of Z corporation comprised the research (preparation of reports, etc.) outsourced from C institute and the Contract. As to the former … Y received much of the consideration remitted from C institute (even if it were the case, as Y testified, that Y let OI control the funds, this would merely indicate that Y was substantially in control of the management of Z corporation). As to the latter, it was originally an arrangement reached between Y and X (although it was TT, who became the representative director of Z corporation, who formally concluded the Contract). From that fact, and the fact that Y replaced OI, who was Y's son, with TT as representative director, it would be appropriate to recognize that Z corporation's main business activities were themselves substantially managed according to Y's will. As the employment interviews of OK, who became an employee of Z corporation, and HW, who worked part-time, were performed by Y and the decision to employ them made by Y, it should be said that Y also actually performed the task of managing Z corporation.

Also, at Z corporation, all the officers and employees, including the representative director (initially OI, later replaced by TT) were akin to Y's subordinates, and the employees considered Y to be the real manager and boss.

From the facts above, Y is found to be a de facto (representative) director.

……

Y testified that he handed over the money, which he let OI withdraw, to OI after he checked it, and that OI controlled the money and most probably used it for payments made by Z corporation. However, no objective evidence such as receipts was submitted to show what the purposes for which OI used that money were. If OI had indeed expended that money for Z corporation, he would naturally have the relevant receipts, etc. Despite the improbability that OI, as Y's son, would not support Y's story with the relevant evidence, Y's explanation remained unproven. Therefore, the proper inference to be drawn ought to be that the money was not expended on behalf of Z corporation, but rather was either pocketed or dissipated by Y. F, who prepared Z corporation's financial statement and final tax return for the first fiscal year, testified that the question of whether Y embezzled from Z corporation aside, he was of the opinion that Z corporation's monies were being misappropriated within the corporate group, even though he was not sure by whom, and admitted that there were suspicious points about the flow of funds in and out of Z corporation. It can also be inferred from F's testimony that Y pocketed Z corporation's monies (although it is unclear from only F's testimony as to who misappropriated that money, in conjunction with the fact that the cash withdrawn from Z corporation's account was delivered to Y as mentioned above, it should be inferred that Y either pocketed or diverted those monies). Regardless of whether Y had pocketed the monies personally or diverted them for the expenses of the corporations in the B group, Y caused Z corporation losses of the amount that Y pocketed or diverted. Consequently, this amounts to a neglect of duties owed by Y as a de facto director of Z corporation.

Had it not been for Y's personal misappropriation or diversion of the monies, Z corporation would not have gone bankrupt, and could have compensated X for its losses easily. Therefore, it can be said that X suffered losses due to Y's neglect of his duties as de facto (representative) director.

Therefore … by an analogical application of Article 429, Paragraph 1 of the Company Code, Y is liable to compensate X for its aforementioned losses.

3. Comment

In this case, X argued that it has suffered loss due to the defects in the house that Z corporation transferred to X under the Contract, and consequently obtained a claim for damages against Z corporation. X then argued that Y was a de facto director of Z corporation who caused Z corporation to become insolvent by breaching his duty of loyalty and neglecting his duties in misappropriating Z corporation assets, etc. In so doing, Y caused X loss as X could not realize his claim to cure of the defect or to damages. Thus, X claimed damages from Y in his capacity as a de facto director under an analogical application of Article 429, Paragraph 1 of the Company Code. The court found that Y, as the real manager and boss of Z corporation, controlled Z corporation's property, that Z's business matters were essentially managed according to Y's will, and that Y actually performed the task of managing the business of Z. Based on the above, the additional fact that all the officers and employees including the representative directors were in reality subordinate to Y, and that the employees considered Y to be the real manager of the business, the court found Y to be a de facto (representative) director of Z corporation. The court further held that had it not been for Y's personal misappropriation or diversion of the monies, Z corporation would not have gone bankrupt, and could have compensated X for its losses easily, and therefore it can be said that X's losses were caused by Y's neglect of his duties as de facto (representative) director. On this basis and through an analogical application of Article 429, Paragraph 1 of the Company Code, the court held that Y was liable to compensate X. Thus, this case was one in which director's liability was imposed on a person who was not a director on the grounds that that person was a de facto director.

Looking at precedents, there are cases[32] in which a person who was not a director was found liable as a de facto director. They are (1) the Tokyo District Court 3 September 1990 decision,[33] (2) the Osaka District Court 27 January 1992 decision,[34] and (3) the Kyoto District Court 5 February 1992 decision.[35] In the Tokyo District Court case (1) above, the person at issue contributed the entire capital of a corporation that he incorporated, and while he did not become a director, he had the corporation manage a clinic. That person raised the necessary funds for managing the clinic, and also decided other important matters pertaining to the clinic. The court held that that person was a de facto representative director with the power to decide important matters both internal and external and thus owed the duties of a representative director, and that he had breached those duties. In the Osaka District Court case (2) above, the person at issue incorporated a corporation but did not become a director. This person, as the substantial owner, called himself the 'owner', and the employees addressed him as president. He provided operating capital for the corporation's business, personally decided issues of employment and dismissal, and managed the business affairs of the corporation. No one else could intervene in the management and conduct of the business of the corporation. Based on the facts above, the court held that he was a de facto representative director, who in managing and conducting the business of the corporation breached his duty of loyalty to the corporation, and was therefore liable under Article 266-3 of the Pre-

32 Tokyo District Court 3 March 1990, Hanrei Jihô 1376, 110.
33 Osaka District Court 27 January 1992, Rôdô Hanrei 611, 82.
34 Kyoto District Court 5 February 1992, Hanrei Jihô 1436, 115.
35 K. EGASHIRA, *Kabushiki kaisha-hô* (dai 4 han) [The Law of Stock Corporations (4th edition)] (2011) 473.

Amendment Commercial Code. In the Kyoto District Court case (3) above, the court found that the person concerned, a representative director of the wholly owning parent corporation, was closely connected to the management of the wholly owned subsidiary corporation as a close correlation can be found between her words and actions, and the ups and downs of the state of administration in the subsidiary. The court also found that she, as a representative director of the parent corporation and the substantial owner of the subsidiary, essentially conducted the business affairs of the subsidiary continuously and was in control of the subsidiary. The court held that she was a de facto director of the subsidiary and had in that capacity breached her duty to monitor any neglect of the duties of the subsidiary's representative director, and held her liable under Article 266-3, Paragraph 1 of the Pre-Amendment Commercial Code. In these three cases, liability to third parties was imposed on a person who was not a director as a de facto director, where the person owned the corporation, had considerable control over the management of the corporation, and managed the business affairs of the corporation.[36] In these three cases, all the persons concerned were natural persons.

Amongst academic opinion,[37] an influential view is that it is necessary to find on the facts that a person actively conducted business affairs as the president of the corporation as a necessary requirement for imposing liability on that person as a de facto director.[38] Another view is that the person must both outwardly appear to be a director and conduct business affairs as a director in order for liability to be imposed.[39] Yet another view is that the requirement should not be the actual conduct of business affairs, but rather the fact that the person as the substantial owner of the corporation controls the corporation through the exercise of that person's influence.[40]

In this case, of Z corporation's 200 outstanding shares, Y held only 50, but Y had OI and OU, persons who followed his instructions, hold 100 and 50 shares respectively.

36 For these three cases, see T. Sakamoto, *Kage no torishimari-yaku no kisoteki kôsatsu* [Fundamental Inquiries on the Shadow Director] (2009) 309 et seq.

37 For academic views, see T. SAKAMOTO, supra note 36, at 313.

38 K. EGASHIRA, supra note 35, at 474 note 8; K. EGASHIRA, *Ketsugô kigyô-hô no rippô to kaishaku* [Legislation and Interpretation of the Law of Corporate Groups] (1995) 197 note 1; K. YOSHIMOTO, *Kaisha-hô* [Corporation Law] (2010) 203; K. UEYANAGI ET AL., representative editors, *Shiban chûshaku kaisha-hô (6)* [New Edition Commentaries on Corporation Law (6)], (M. Tatsuta) 266 jô no 3 chûshaku, [(M. Tatsuta) Article 266-3 Commentaries] (1987) 340.

39 T. ISHIYAMA, *Jijitsujô no torishimari-yaku gainen no ta-gisei* [Various Conceptions of the De Facto Director]; T. Ishiyama/T. Uemura edited, *Kôkai kaisha to heisa gaisha no hôri* [Legal Principles of Public Corporations and Closed Corporations] (1992) 55; T. ISHIYAMA, *Jijitsujô no torishimari-yaku riron to sono tenkai* [The Theory of De Facto Directors and its Development] (1984) 163 et seq. In this respect, see E. TAKAHASHI / T. SAKAMOTO, *Kage no torishimari-yaku seido* [The Framework of Shadow Directors], Kigyô Kaikei 62(5) (2010) 755.

40 T. FUJITA, *Iwayuru tôkibo jô no torishimari-yaku no dai sansha sekinin nitsuite* [So-called Registered Directors and their Liability to Third Parties], in: YONEDA MINORU KOKI KINEN RONBUNSHÛ KANKÔ IINKAI (eds.), *Gendai kinyû torihiki-hô no sho-mondai* [Issues in Contemporary Finance and Trade Law] (1996) 44, 46.

Therefore, Y can be considered the real owner. The court in this case held that Y, as the real manager of Z corporation, controlled the corporation's property and also essentially controlled the management of Z corporation. In addition, the court found that the main business of Z corporation was managed substantially according to Y's will and that Y also did in reality perform the task of managing Z, and on that basis found Y to be a de facto director of Z corporation. From these facts, it can be inferred from the court's findings that Y substantially controlled the management of Z corporation and also personally managed the business affairs of the corporation. Thus, it can be said that this case is of similar character to the aforementioned three cases.

In relation to this case, one academic view, referencing the shadow director framework in the UK, argues that Y should be considered a shadow director.[41] Under the UK Companies Act 2006, ''shadow director' means a person in accordance with whose directions or instructions the directors of the company are accustomed to act' (Section 251(1)).[42] Under this shadow director framework, even if a person is not officially appointed as a director, such a person will be subject to the statutory duties of directors where the official directors are accustomed to act in accordance with directions or instructions of the person (sections 170(5) and 251(1)). Under this framework, a shadow director is a person who actually and continuously influences management decisions of the corporation to a certain degree,[43] and it is not necessary that such influence must be exercised over the entire range of the corporation's activities.[44] Thus, the intent underlying the shadow director framework can be said to be the control and supervision of persons who control decisions of the board of directors by continuously exercising their influence on such decisions by giving directions or instructions. As to the relation between the shadow director and the director's statutory duties, under section 170(5) of the Companies Act 2006, '[t]he general duties apply to shadow directors where, and to the extent that, the corresponding common law rules or equitable principles so apply'.

41 N. NAKAMURA, *Kaisha-hô 429jô 1kô no ruisui tekiyô niyoru 'jijitsujô no torishimariyaku' no songai baishô sekinin* [Liability in Damages of 'De Facto Directors' Under the Analogical Application of Article 429 Paragraph 1 of the Company Code], Kinyû Shôji Hanrei 1379 (2011) 5.

42 For literature on shadow directors in Japanese, see T. Sakamoto, supra note 36; E. TAKAHASHI / T. SAKAMOTO, supra note 39; N. NAKAMURA, *Igirisu 2006 nen Kaisha-hô ni okeru kage no torishimariyaku kisei no shinten to Nihon-hô he no shisa* [Development of Shadow Director Regulations in UK Companies Act 2006, and Its Implications for Japanese Law], Hikaku Hôgaku 42(1) (2008) 211.

43 Re Unisoft Group Ltd (No 3) [1994] 1 BCLC 609; Re Hydrodam (Corby) Ltd [1994] 2 BCLC 180; Secretary of State for Trade and Industry v Deverell [2001] Ch 340; Re Kaytech International plc, Secretary of State for Trade and Industry v Kaczer [1999] 2 BCLC 351; Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch). For Japanese literature discussing UK shadow director cases, see T. Sakamoto, supra note 36, at 148 et seq.

44 Secretary of State for Trade and Industry v Deverell [2001] Ch 340. Paul L. Davies, Gower and Davies' Principles of Modern Company Law (Sweet & Maxwell, 8th edition, 2008) at 219.

Therefore, issues as to whether shadow directors owe directors' statutory duties at all, and if so to what extent, must be resolved with reference to the case law.

Considering this case within the abovementioned shadow director framework, the court found that Y substantially controlled the management of Z corporation, that Y had absolute power at the workplace, that the directors of Z corporation were subordinate to Y, and that Y gave special directions to the director of Z corporation to withdraw moneys belonging to Z corporation, and that the director followed Y's directions. Therefore, Y should be deemed a shadow director. As to the issue of whether Y should be held liable for breach of director's duties, because Y retained control of the money belonging to Z corporation that was withdrawn and handed to Y on Y's instructions, Y either misappropriated for personal gain or for other corporations in the group a sum that Y should have dealt with properly as money belonging to Z corporation. Therefore, Y should be held liable as a director in respect of that sum.

V. ABUSE OF THE CORPORATION SPLIT AND LIFTING THE CORPORATE VEIL [45]

1. Facts

X corporation was a stock corporation mainly engaged in debt collection and corporate rehabilitation. K corporation was a stock corporation primarily engaged in the management of *pachinko* (Japanese pinball) stores, and managed five stores including T, O, and H. K corporation is a family concern whose shares were held by B, C (a son of B) as the current representative, and members of their family (hereinafter the 'Family Group'.). K corporation was insolvent with a net loss of 700,005,389 yen as of 31 December 2002. K corporation had incurred massive debts from its large-scale investments in plant and equipment and poor management of its individual stores arising from the intensification of competition in the *pachinko* industry from around 2003. C and the other shareholders, thinking that K corporation would go into bankruptcy shortly, consulted Q, a lawyer, and ceased payments to financial institutions except those for necessary business debts by October 2003. Q decided on corporate rehabilitation by way of corporation split and incorporation, after discussion with C and other senior officers of K corporation's corporate group on or about 4 November 2003. Essentially, the plan comprised the transfer of the profitable parts of the business to a newly incorporated corporation, the settlement of debts through negotiations with creditors, and the appointment of A, who was C's wife and someone who was never a shareholder or guarantor of K corporation's debts, as the newly incorporated corporations' representative. On 30 November 2003 K corporation incorporated N corporation, Y1 corporation, Y2 corporation, P corporation and others through corporation splits, and transferred the stores T, O and H to the newly incorporated corporations. From around 18 December 2003, K corporation prepared proposals

45 Fukuoka District Court 17 February 2011, Hanrei Taimuzu 1349, 177.

in relation to the corporation splits for its primary creditors. On 2 December 2003 C and Q approached X corporation, explained their plan to rehabilitate K corporation through the corporation split, and sought X corporation's co-operation. However, as X corporation was neither supplied with any materials nor any explanation of specific details during the discussion, X corporation ended the discussion with a request that K corporation supply supporting documents and a clear repayment plan. After that meeting, K corporation commenced procedures including the transfer of its business license, and on 7 January 2004 executed the incorporation-type split by which N corporation, Y1 corporation, Y2 corporation and P corporation were incorporated (hereinafter the 'Corporation Split'). Subsequently, on 1 April 2007, K corporation transferred the shares of N, Y1, Y2, and P corporations to A for a total of 2,000,000 yen (or 500,000 yen per corporation). Although A had previously worked at K corporation for a long time prior to the relevant events, for many years she had been a housewife and had no experience in the management of corporations. She was involved in the management of the corporations only to the extent that she arranged faxes addressed to C and sent to their residence and handed them to C. She agreed to be a representative of the new corporations and to receive the transfer of the capital only because she was asked to by C and the family and because she thought it would be for their benefit. P corporation was absorbed into Y2 corporation on 31 October 2007.

As of November 2003, K corporation owed X corporation a principal sum of about 640,000,000 yen (not including interest), but the new corporations did not assume that debt obligation, with the result that it would be difficult for X corporation to collect the debt from K corporation.

X argued that K corporation had abused the corporation-split system by transferring the business of its *pachinko* stores to the new corporations Y1, Y2 and Y3 (Y3, with A as its representative, was newly incorporated through incorporation-type merger by K corporation on 1 June 2006) which K created by incorporation-type split, and thereby improperly evading its debt obligations to X. On that basis, X claimed for the repayment of the debt owed by K corporation against Y1, Y2 and Y3 corporations.

2. *Held*

X argued that the case falls into the so-called abuse of incorporation category under the principle of lifting the corporate veil. In order to make such a finding, it must be shown that [1] the legal personality of the corporation was used as an instrument by the controlling mind according to his will (the control requirement), and that [2] the controlling mind had an illegal or improper purpose (the purpose requirement).

It must be said that there is no substantial difference in the actual running and management of the business in K corporation before the Corporation Split and in the new corporations after the Corporation Split. Therefore, it should be said that the corporation's legal personality was controlled by C and his family, the controlling minds, and used as an instrument according to their will (the control requirement).

The main purpose of the rehabilitation scheme in this case that K corporation attempted to implement must have been to evade repayment of the debt owed to X corporation, a sum which amounted to almost half of K corporation's debt liabilities.

It has to be said that K corporation executed the rehabilitation scheme by formally using or abusing the corporation split system with the intent of arbitrarily evading its debt repayment obligations to X corporation alone amongst its creditors. Therefore, it should be said that K corporation had an illegal or wrongful purpose (the purpose requirement).

The principle of lifting the corporate veil differs from the right to demand the rescission of fraudulent acts in its requirements and effects. It cannot be said that the principle of lifting the corporate veil can apply only where the right to demand the rescission of fraudulent acts cannot be exercised.

The new corporations may not in good faith evade their debt obligations to X corporation on the ground that they are distinct legal persons from K corporation.

3. Comment

The court held that Y1, Y2 and Y3 corporations are jointly and severally liable to pay X corporation the amount owed to X by K corporation.[46]

Recently, there has been a rapid increase in cases of the so-called 'abuse of the corporation split', where an insolvent corporation uses the corporation split mechanism without involvement from its creditors to let successor corporations or others succeed to its prime assets and an arbitrarily chosen part of its debts.[47] The judgment in the present case was significant in that the creditor of a splitting corporation in an abuse of the corporation split was protected through the application of the principle of lifting of the corporate veil.

There have been cases where the courts rescinded corporation splits pursuant to the right of the creditors of splitting corporations to demand the rescission of fraudulent acts (Article 424, Civil Code)[48] on the ground that the corporation splits were fraudulent acts.[49] The decision in this case sparked a debate as to whether creditors of splitting corporations in cases where an abuse of the corporation split has occurred should be

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46 For a commentary on this case, see E. TAKAHASHI, *Ran'yô teki kaisha bunkatsu to hôjin-kaku hinin no hôri* [Abuse of the Corporation Split and the Principle of Lifting the Corporate Veil], Heisei 23 nendo Jûyô hanrei kaisetsu [Commentaries on Important Cases of 2011] (Jurisuto) (forthcoming).

47 See Zenkoku tôsan shori bengoshi nettowâku [National Bankruptcy Lawyers' Network], *Ran'yô teki kaisha bunkatsu ni tsuite no ikensho no teishutsu* [Submission of Opinion Papers Concerning Abuses of the Corporation Split], Kinyû Hômu Jijô 1914 (2011) 10.

48 *Minpô*, Law No. 89/1896.

49 Tokyo High Court 20 October 2010 Kinyû Shôji Hanrei 1355, 42.

protected exclusively through their right to demand the rescission of fraudulent acts under Article 424 of the Civil Code, or in addition to the aforementioned right protected through applying the principle of lifting the corporate veil where the necessary requirements are met. Academic opinion is divided on the issue. One view is that although the requirements of the principle of lifting the corporate veil are that of control and purpose, if a fraudulent purpose is established the creditors can be protected by their right to demand the rescission of fraudulent acts. Consequently, it is unnecessary to give creditors additional protection through the principle of lifting the corporate veil on top of the aforementioned right.[50] A contrary view is that since the intent underlying the principle of lifting the corporate veil is different from that underlying the right to demand the rescission of fraudulent acts, even where creditor protection through the latter (i.e. the right to demand rescission) is possible, as long as the requirements of the former (i.e. lifting the corporate veil) are satisfied, creditors of splitting corporations can directly claim payment of debts owed by the splitting corporations against the newly incorporated corporations through the lifting of the corporate veil.[51] The court in this case held that since the right to demand the rescission of fraudulent acts and the principle of lifting the corporate veil had different requirements and effects, it could not be said that the latter principle could be applied only where the former right could not be exercised. Therefore, even in circumstances where creditor protection is possible through the former right, if the requirements of the latter principle are met, then creditors of the splitting corporations can claim payment directly against the newly incorporated corporations through application of the principle.

At present, there has yet to be legislation for the protection of creditors in cases where the corporation split is abused. In these circumstances, the principle of lifting the corporate veil is a more direct remedy that is more effective in protecting the creditors of splitting corporations, as compared to the creditors' right to demand the rescission of fraudulent acts, as exercise of the rescission right necessitates the return of the lost assets to the splitting corporations. Considering the weakness of creditor protection where there is abuse of the corporation split and the differences in intent underlying the right to demand the rescission of fraudulent acts and the principle of lifting the corporate veil, even in cases where relief is possible through the former right, as long as the requirements of the latter principle are met, it should be possible to achieve creditor protection through application of the principle. It is not necessary to consider as absolute the position that the principle of lifting the corporate veil should be applied only where no relief

50 K. NANBA, *Kaisha bunkatsu no ranyô wo meguru sho mondai* [Issues Concerning the Abuse of the Corporation Split], Hanrei Taimuzu 1337 (2011) 37.

51 H. KANSAKU, *Shô-hô gakusha ga kangaeru ranyô teki kaisha bunkatsu mondai* [Thoughts of a Commercial Law Academic Scholar on Abusive Corporation Split Issues], Kinyû Hômu Jijô 1924 (2011) 52; K. KUROKI / T. KAWAGUCHI, *Ranyô teki kaisha bunkatsu o meguru sho mondai* [Various Issues Concerning the Abusive Corporation Split], Kinyû Hômu Jijô 1902 (2010) 74.

for creditors is possible under any other legal frameworks as a supplement.[52] Thus, it is submitted that the position taken by the court in this case, which is that creditors of a splitting corporation may seek satisfaction of their claims directly against the successor corporations of the splitting corporation even when the rescission right is exercisable, provided that the requirements for the principle of lifting the corporate veil are met, is appropriate.

In a leading case[53] concerning the principle of lifting the corporate veil, the Supreme Court suggested that the principle would be applicable in two types of situations, namely, where corporate personality has been abused, or where corporate personality was a mere shell. In an early Supreme Court decision,[54] it was held that to establish abuse of corporate personality, the control requirement is that of uniformity in substance. In other words, the court based its decision on whether the principle of lifting the corporate veil could be applied on the grounds of 'the uniformity in substance' of the new and old corporation, in situations where the business assets of the old corporation were diverted to the newly incorporated corporation, and the new corporation had the same trade name, representative directors, business purposes, employees, etc., as the old corporation.

The majority of academic opinions are of the view that in addition to the requirement that the corporate personality be used as an instrument by the controlling mind behind it according to the controlling mind's will (i.e. uniformity of substance as the control requirement), the subjective intent of the controller to abuse the corporate personality of the corporation must also be established in order to maintain certainty in the law.[55]

In a later Supreme Court decision on the issue of abuse of corporate personality,[56] it was held that to establish abuse of corporate personality, it is necessary to show that a person in a position of control who can use the corporation as an instrument of his or her will had the intent of abusing corporate personality for an illegal or wrongful purpose. In so holding, the Supreme Court in that decision established the requirements of control and purpose.

The decision of the Fukuoka District Court in this case was one that faithfully followed the position (taken by the Supreme Court in the abovementioned decision and by the majority of academic opinion) that requires both control and purpose to be established in order to find abuse of corporate personality.

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52 See S. MORIMOTO, *Kaisha bunkatsu seido to saikensha hogo* [The Corporation Split Framework and Creditor Protection], Kinyû Hômu Jijô 1923 (2011) 34.

53 Supreme Court 27 February 1969, Saikô Saiban-sho Minji Hanrei-shû 23(2) 511.

54 Supreme Court 26 October 1973, Saikô Saiban-sho Minji Hanrei-shû 27(9) 1240.

55 K. UEYANAGI ET AL., representative editors, *Shiban chûshaku kaisha-hô (1)* [New Edition Commentaries on Corporation Law (1)], (K. Egashira) (1985) 75.

56 Supreme Court 15 July 2005, Saikô Saiban-sho Minji Hanrei-shû 59(6) 1742.

VI. CONCLUSION

This paper looked at two Supreme Court decisions which held that in a demand for redemption of shares by dissenting shareholders, the fixed time with reference to which the 'fair value' for the repurchase of shares by the corporation is calculated should be the date on which the shareholders exercise their right to redemption. The first Supreme Court decision took a position for the first time on the issue of fixed time in response to the confusion in the lower courts. The position of the Supreme Court became clear with the second Supreme Court decision, which followed the first Supreme Court decision on the issue of the fixed time for the calculation of 'fair value'. These two cases were concerned with the fixed time for the calculation of the 'fair value' of the shares of listed corporations in cases where synergy does not arise from the corporate reorganization in question. An issue still remains as to whether these two Supreme Court decisions will be applied in other types of cases. The fourth case concerned corporation splits and the principle of lifting the corporate veil. In that case, a corporation suffering from management difficulties executed an incorporation-type split in which the newly incorporated corporations did not succeed to part of the debt obligations of the splitting corporation, but the business of the splitting corporation was continued by the newly incorporated corporations (or a corporation that absorbed the splitting corporation). Relying on the principle of lifting the corporate veil, the creditors of the splitting corporation succeeded in their claims against the new corporations for the payment of debts owed by the splitting corporation. On the issue of whether creditors of splitting corporations should be protected exclusively by the creditors' right to demand the rescission of fraudulent acts, or also protected by the principle of lifting the corporate veil in addition to the aforementioned right, the court in this case took the latter position and recognized both remedies. In the third case, a person who was not a director was found liable to a third party as a de facto director through an analogical application of Article 429 of the Company Code. This case can be said to have been decided on principles similar to those applied in other de facto director cases thus far in Japan.

As seen above, with the first and the second cases, the Supreme Court gave its response to the issue that arose from the change in wording from 'the fair value that would have eventuated if not for the relevant resolutions' under the Pre-Amendment Commercial Code to simply 'fair value' under the new Company Code. The fourth case concerned the abuse of the corporation split framework, something that has become a recent problem. In German law, the corporation split is provided for and regulated under a special law, the *Umwandlungsgesetz* (Reorganization Act). Since this legislation sets out special procedures for the protection of creditors in a corporation split (§ 133 Abs. 1, 3 *Umwandlungsgesetz*), the problem of abuse of the corporation split framework does not arise in German law as it does in Japanese law.[57] As can be seen, these three cases dealt

57 J. KUHLMANN / E. AHNIS, Konzern- und Umwandlungsrecht, 3. Aufl., Heidelberg 2010, S. 424 f.

with issues that have recently garnered attention in Japanese corporate law. From the third case examined in this paper, it can be seen that even in recent times the courts are prepared to impose directors' liability to third parties on de facto directors. Furthermore, even if a person is not an appointed director, it should be noted that where that person is actively involved in conducting the business affairs of a corporation, that person could still be imposed with duties and found liable for breaches of those duties.

ABSTRACT

This paper introduces four recent court decisions and highlights their importance to the development of Japanese corporate law under the new Company Code enacted in 2005.

In the first two cases, the Supreme Court addressed an issue concerning the 'fair value' at which shareholders opposing a corporate restructuring plan may have their shares purchased by the company through exercising their right to share redemption (Art. 786 Para. 2 of the Company Code). Previously, the question of what the 'fixed time' (with reference to which the 'fair value' is calculated) should be under the new dissenting shareholder regime (which was substantially reformed by the enactment of the Company Code in 2005) was not definitively answered in a string of inconsistent lower court decisions. The Supreme Court in two almost-contemporaneous decisions settled the question, holding that the fixed time is the point at which the dissenting shareholders make their demand for share redemption.

In the third case, the company was near-insolvent and unable to compensate the losses of a party who had contracted with the company, due to misappropriation of company assets by a company shareholder who, though not a director, was the controlling mind behind the company. The contracting party sued the shareholder for damages. On an analogical application of Art. 429 Para. 1 of the Company Code, the Nagoya District Court found the shareholder, although he was not a director, nevertheless liable to the plaintiff as a de facto representative director of the company. This decision is of similar character to earlier decisions holding non-directors liable as de facto directors under the Commercial Code prior to the commencement of the Company Code

The last case is an example of the increasingly-common abuse of the corporation-split mechanism by insolvent corporations to prevent their debt liabilities from being assumed by their successor corporations. The plaintiff (a debt collection company) sued the successor corporations of its debtor (the splitting corporation), which had succeeded to the assets and business of the splitting corporation without the endorsement of the plaintiff, for the satisfaction of its claims against the splitting corporation. In allowing the plaintiff's claim directly against the successor corporations by lifting the corporate veil, the Fukuoka District Court held that since the principle of lifting the corporate veil

is distinct from the right to demand rescission of fraudulent acts under Art. 424 of the Civil Code in its requirements and effects, a remedy through lifting the corporate veil is not precluded by the existence of the Civil Code remedy.

(Alan K. Koh)

ZUSAMMENFASSUNG

Der Beitrag stellt vier aktuelle Entscheidungen des Obersten Gerichtshofes vor, denen besondere Bedeutung für die Weiterentwicklung des Gesellschaftsrechts unter der Geltung des neuen Gesellschaftsgesetzes von 2005 zukommt.

In den ersten beiden Entscheidungen, die kurz nacheinander ergingen, hat der OGH geklärt, welches der angemessene Preis für einen Rückkauf von Aktien durch die Gesellschaft von Aktionären ist, die einer Restrukturierung derselben widersprochen haben (Art. 786 Abs. 2 GesG). Die Frage war in der instanzgerichtlichen Entscheidungspraxis mit Blick auf den für die Wertermittlung maßgeblichen Zeitpunkt umstritten. Der Gerichtshof hat klargestellt, dass es auf den Zeitpunkt ankomme, zu dem die Aktionäre ihren Anspruch auf einen Rückerwerb durch die Gesellschaft geltend machten.

In der dritten Entscheidung ging es um die Frage, ob ein Gläubiger einer Gesellschaft mit Liquiditätsproblemen seine Ansprüche direkt gegen einen Hauptaktionär geltend machen kann, der diese dominiert und Gesellschaftsvermögen beiseite geschafft hatte, obwohl er kein Mitglied des Verwaltungsrates war. Das Distriktgericht Nagoya hat dies in Analogie zu Art. 429 Abs. 1 GesG bejaht und den Aktionär als de facto vertretungsberechtigtes Verwaltungsratsmitglied angesehen.

Die letzte Entscheidung befasst sich mit dem Problem missbräuchlicher Gesellschaftsspaltungen, die dem Zweck dienen, die abgespaltene Gesellschaft schuldenfrei weiterführen zu können. Das Distriktgericht Fukuoka hat einem Gläubiger einen Durchgriff auf die abgespaltene Gesellschaft wegen einer Forderung gegen die Altgesellschaft zuerkannt.

(Übers. durch d. Red.)