

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No.25 of 1976

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O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE  
JURISDICTION)

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IN THE MATTER OF KONG THAI SAWMILL (MIRI) SDN.BHD.

- AND -

IN THE MATTER OF THE COMPANIES ACT 1965

B E T W E E N :

10 KONG THAI SAWMILL (MIRI) SDN.BHD. (First Respondnt)  
LING BENG SIEW (Second Respondent) and LING BENG  
SIONG (Third Respondent) Appellants

- AND -

LING BENG SUNG (Applicant) Respondent

AND BY CROSS-APPEAL

B E T W E E N :

LING BENG SUNG (Applicant) Appellant on Cross-  
Appeal

- AND -

20 KONG THAI SAWMILL (MIRI) SDN.BHD. (First  
Respondent)  
LING BENG SIEW (Second Respondent) and  
LING BENG SIONG (Third Respondent) Respondents to  
Cross-Appeal

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CASE FOR: (1) KONG THAI SAWMILL (MIRI) SDN.BHD.  
(2) LING BENG SIEW  
(3) LING BENG SIONG

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on (A) their appeal from the judgment of the Federal  
Court of Malaysia (Appellate Jurisdiction) dated  
4th August 1975

30 and on  
(B) the cross-appeal of Ling Beng Sung from the said  
judgment of the Federal Court of Malaysia (Appellate  
Jurisdiction)

PART 1. - INTRODUCTION AND SUMMARY OF EVENTS RELEVANT TO BOTH THE APPEAL AND THE CROSS-APPEAL

1. In this case the parties to the Appeal and Cross-Appeal will be referred to as follows:

- (1) Kong Thai Sawmill (Miri) Sdn.Bhd. will be referred to as "the Company"
- (2) Ling Beng Siew will be referred to as "Beng Siew"
- (3) Ling Beng Siong will be referred to as "Beng Siong"
- (4) The Company, Beng Siew and Beng Siong will together be referred to as "the Appellants" 10
- (5) Ling Beng Sung will be referred to as "Beng Sung".

Record

Vol III 2. This is an appeal by the Appellants and a cross-  
pp.550-593 appeal by Beng Sung from a judgment dated 4th August 1975  
of the Federal Court of Malaysia (Appellate Jurisdiction)  
(Gill C.J., Wan Suleiman F.J. and Tan Chiaw Thong J.)  
Vol III allowing in part Beng Sung's appeal from a judgment of  
pp.427-479 B.T.H. Lee J. dated 12th July 1974 wherein Beng Sung's  
Vol I application by way of Originating Motion under Section 181  
pp.2-11 of the Malaysian Companies Act, 1965 was dismissed with  
costs. The Appeal is made pursuant to an order of the  
Vol III said Federal Court of Malaysia dated 10th May 1976 granting  
pp.596-597 Final Leave to the Appellants to appeal to His Majesty,  
the Yang di-Pertuan Agong. The Cross-Appeal is made  
pursuant to an order of the said Federal Court of Malaysia  
Vol III dated 10th May 1976 granting Final Leave to Beng Sung to  
pp.598-599 appeal to His said Majesty, the Yang di-Pertuan Agong.

3. Beng Siew, Beng Siong and Beng Sung are sons of the late Ling Chiu Ming who died in 1955 leaving six sons who in order of seniority are Beng Siew, Beng Tuang, Beng Siong, Beng Sung, Beng Hui and Beng King. Beng Siew, Beng Siong and Beng Sung are businessmen of Chinese race and origin who live in Sarawak, and conduct their business affairs in that country and other parts of Malaysia. 30

4. The Company is a private company limited by shares which was formed by the three elder brothers (Beng Siew, Beng Tuang and Beng Siong) and incorporated on 29th June 1964 under the Sarawak Companies Ordinance Cap.65. The Company was formed for the purpose of extracting timber from the Sarawak forests under concessions of licences granted by the Sarawak Government, and although in recent years the Company has diversified its interests, its 40

10 principal business remains that of timber operators, contractors and merchants. The Company depended for its continued existence and profitability on such concessions or licences (and their renewal) and it was thus of material importance to the Company that the Government of the day should be formed by a political party which was sympathetic to the Company's activities and participators.

5. The Company has an authorised capital of 3 million Malaysian Dollars (hereinafter referred to as "g") divided into 30,000 shares of \$100 each of which as at the date of the issue of the Originating Motion herein 13,600 were issued and paid up, representing an issued capital of \$1,460,000. The history of the Company's capital structure is as follows: at the first general meeting of the Company held on 16th January 1965 10,000 shares representing a capital of \$1 million were issued and Beng Siew, Beng Tuang and Beng Siong were allotted 7,150, 1,000 and 500 shares respectively; on 3rd September 1965 the issued capital of the Company was increased to \$1,120,000 and on 4th April 1966 the issued capital of the Company was further increased to \$1,360,000. In 1966 the three younger brothers acquired (in circumstances which are in dispute but not relevant to the Appeal) 1,000 issued shares in the capital of the Company. On 4th April 1966 the said 1,000 shares were issued to Mukah Sawmill (1962) Sdn. Bhd, a company in which the three younger brothers were the sole shareholders; on 31st January 1967 the shares in the Company were transferred from Mukah Sawmill (1962) Sdn. Bhd. to the three younger brothers so that Beng Sung and Beng Hui took 330 shares each and Beng King 340.

Vol V.pp.936/7

Vol.V.pp.945

Vol V.p.951

Vol V.p.951

40 The numbers of shares respectively held by the six brothers and by other members of the Company as at the date of the issue of the Originating Motion herein and at all material times were as follows:

<u>Name</u>	<u>Number of Shares</u>	<u>Approximate Percentage of total number of shares</u>
Beng Siew	7,582	55.75%
Beng Tuang	1,060	7.79%
Beng Siong	1,060	7.79%
Beng Sung	330	2.43%
Beng Hui	330	2.43%
Beng King	340	2.5%
Others	2,898	21.31%
	<u>13,600</u>	<u>100%</u>

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6. It is common ground that:-

Vol V.p.938

(1) Beng Siew was on 20th January 1965 elected as Chairman and Managing Director of the Company with effect from 1st January 1965 and has since the said date occupied those offices;

(2) Beng Siew is and has always been the driving force behind the Company and his business acumen and skill have been largely responsible for the Company's commercial success;

(3) Beng Tuang and Beng Siong are and have at all material times been directors of the Company;

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Vol V.pp.953/  
4

(4) On 15th April 1966 Mukah Sawmill (1962) Sdn. Bhd. was appointed a director of the Company at the Second Annual General Meeting thereof; on 2nd February 1967 Beng Sung was appointed director in its place; but he took no active part in the affairs of the Company until the institution of proceedings by him in 1970 (as set out in a subsequent paragraph of this Case); he attended no directors' meetings and only one general meeting of the Company, namely the said second Annual General Meeting thereof which was held on 15th April 1966, which he attended in his capacity as director of Mukah Sawmill (1962) Sdn. Bhd;

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Vol V.pp.953/  
4

Vol V.pp.998/  
9

(5) On 16th February 1971 Beng Sung retired as director of the Company in accordance with the Articles of Association thereof and was not re-elected;

(6) Since the date of the Company's incorporation and at all material times the Company has had a number of directors other than the sons of the late Ling Chiu Ming; the number of such directors has been as follows:

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1964/1965

The directors were Beng Siew, Beng Tuang, Beng Siong and 3 other persons.

1966/1967

The directors were Beng Siew, Beng Tuang, Beng Siong and 6 other persons.

1967/1968

The directors were Beng Siew, Beng Tuang, Beng Siong, Beng Sung and 6 other persons.

1968/1969

The directors were Beng Siew, Beng Siong Beng Tuang, Beng Sung and 6 other persons.

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1969/1970

The directors were Beng Siew, Beng Siong, Beng Tuang, Beng Sung and 7 other persons

1970/1971                      The directors were Beng Siew,  
Beng Siong, Beng Tuang, Beng  
Sung and 7 other persons

1971/1972                      The directors were Beng Siew,  
Beng Siong, Beng Tuang and 7  
other persons;

10                      (7) Prior to the present proceedings there  
has been a series of family disputes and court  
proceedings relating to the various business  
interests and activities of the said brothers and  
to other matters.

20                      7. On 29th September 1970 Beng Sung (who was  
still at that time a director of the Company)  
applied to the High Court in Borneo (Sibu Registry)  
for an order pursuant to Section 167(5) of the  
Malaysian Companies Act 1965 (hereinafter called  
"the Act") that the accounting and other records  
of the Company be open to inspection by an approved  
company auditor acting on his behalf. The said  
application was not opposed by the Company, Beng  
Siew or Beng Siong, and accordingly on 18th  
November 1970 the High Court by consent appointed  
one Andrew Peattie (hereinafter called "Mr Peattie"),  
a Chartered Accountant and an approved company  
auditor under the Act, to inspect the said records  
of the Company on Beng Sung's behalf. Pursuant  
to his said appointment Mr Peattie conducted an  
investigation into the books and records of the  
Company in June 1971 and incorporated his  
findings in a report. In November 1971 Mr  
Peattie conducted a further investigation into  
the books and records of the Company.

Vol 1V.pp.708-  
722  
Vol 1V pp.763-  
779

30                      8. By Section 181 of the Act, it is provided  
(in so far as is here material) that

"(1) Any member.....of a company.....may  
apply to the Court for an order under this  
section on the ground -

40                      (a) that the affairs of the Company are  
being conducted or the powers of the  
directors are being exercised in a manner  
oppressive to one or more of the members  
or holders of debentures including him-  
self or in disregard of his or their  
interests as members, shareholders or  
holders of debentures of the company; or

(b) that some act of the company has  
been done or is threatendd or that some  
resolution of the members, holders of

debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may

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(a) direct or prohibit any act or cause, or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

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(e) provide that the company be wound up."

9. In reliance upon Mr Peattie's said report of his investigations carried out in June 1971, Beng Sung issued the Originating Motion herein on 21st September 1971 under section 181 of the Act. In the Originating Motion Beng Sung claimed:

Vol 1 pp.2 to 11

firstly sixty orders granting extensive relief the substance whereof being that Beng Siew and Beng Siong be removed from their respective offices of Managing Director and Director of the Company, that a receiver and manager be appointed to conduct the business and investigate the affairs of the Company, and that Beng Siew and Beng Siong do pay to the Company various sums of money which they had allegedly taken or paid out of the Company's funds wrongfully, without proper authorisation or for unauthorised purposes;

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and secondly in the alternative, an order that the Company be wound up.

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Vol 1 p.11

10. On 24th September 1971 Beng Sung issued an interlocutory Notice of Motion against the Company, Beng Siew and Beng Siong whereby he sought an order permitting him to advertise the Originating Motion in four newspapers circulating in different parts of Malaysia. The

interlocutory Motion came on for hearing on 10th March 1972 before B.T.H. Lee J. and was dismissed with costs; and accordingly Beng Sung did not obtain permission to advertise the Originating Motion.

11. In summary form the complaints made by Beng Sung against the Company, Beng Siew and Beng Siong related to the following matters:

- 10 (1) Donations made by the Company for political purposes
- (2) The purchase and outfitting of the motor yacht Berjaya Malaysia
- (3) Advances to and drawings by Beng Siew and Beng Siong or payments otherwise alleged to have been enjoyed by them
- (4) Advances made by the Company to joint ventures in which the Company, Beng Siew or Beng Siong were interested
- 20 (5) Motor cars and other vehicles purchased by the Company
- (6) Sums paid by the Company but disallowed by the Revenue Authorities as expenses for tax purposes
- (7) The investment by the Company in the Aurora Hotel, a Hovercraft, and the Malaysia Daily News
- (8) Miscellaneous advances and salaries made or paid by the Company to third parties
- (9) Advances to Harun bin Ariffin.

30 12. The Originating Motion came on for hearing before B.T.H. Lee J. on 10th April 1972 and occupied 29 days. The evidence adduced in support of the Originating Motion was Vol 1 pp.2 to 11

(a) Contained in the following affirmations made on behalf of Beng Sung

<u>Name of Deponent</u>	<u>Date of Affirmation</u>	
(i) Mr Peattie	24th November 1971	Vol 1 pp.15 to 46
(ii) Beng Sung	12th February 1972	Vol 1 pp.46 to 67
(iii) Stephen Kalong Ningkan	16th April 1972	Vol III pp.416/417
(iv) Harun bin Ariffin	16th November 1972	Vol III pp.420/422
(v) Harun bin Ariffin	20th November 1972	Vol III pp.422/423

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and (b) given orally by the following witnesses

Vol II pp.116 to 190  
Vol II pp.356 and 357  
Vol II pp.190 to 241  
Vol II pp.225 to 230  
Vol II pp.347 to 356

- (i) Mr Peattie
- (ii) Beng Sung
- (iii) Stephen Kalong Ningkan
- (iv) Harun Bin Ariffin

The evidence adduced by the Appellants in reply to the Originating Motion was

(a) contained in the following affirmations made on behalf of the Appellants

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<u>Name of Deponent</u>	<u>Date of Affirmation</u>
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Vol I pp.68 to 114  
Vol III pp.417/418  
Vol III pp.418/419  
Vol III pp.426/427

- |                      |                    |
|----------------------|--------------------|
| (i) Beng Siew        | 14th March 1972    |
| (ii) Beng Siew       | 19th April 1972    |
| (iii) Lee Swee Hock  | 16th June 1972     |
| (iv) Dr Julius Grant | 24th November 1972 |

and (b) given orally by the following witnesses

Vol II pp.241 to 386  
Vol III pp.387 to 409  
Vol II pp.282/283  
Vol II pp.324-327  
Vol III pp.410 to 415

- (i) Beng Siew
- (ii) Ying Ten Ping
- (iii) Lee Swee Hock
- (iv) Dr Julius Grant

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In so far as is material the Appellants will refer to the said affirmations and the record of the evidence of the said witnesses.

13. The submissions made to B.T.H. Lee J. at the hearing of the Originating Motion by Counsel for Beng Sung were, shortly stated, as follows:

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- (1) that on the evidence the matters complained of (set out in paragraph 11 above) amounted to breaches of those fiduciary duties which Beng Siew and Beng Siong as directors owed the Company;
- (2) that such breaches of duty had always been regarded by the law as a ground for winding up a company if such breaches led to a loss of confidence in the probity of a director who was in a position by virtue of his voting control to maintain his position in the company; and that Beng Sung had a lack of confidence in Beng Siew and Beng Siong who were in fact in control of the Company;
- (3) that the principle set out at (2) above had been enshrined in Section 218(1)(f) of the Act which specified as a ground for winding up that "the directors have acted in the affairs of the Company

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in their own rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to the other members;"

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- (4) that such breaches of duty on the part of directors in control may amount to oppression and thus also justify relief under section 181 of the Act;
- (5) that section 181 recognised as an independent ground for relief (other than the ground of oppression) that the affairs of the company were being conducted in disregard of the interests of some of the members; and that the matters complained of established that the affairs of the Company were not being conducted in the interests of its members other than Beng Siew and Beng Siong;
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- (6) that it was irrelevant that Beng Siew and Beng Siong had recitified the matters complained of or had attempted so to do;
- (7) that it was irrelevant that the investment by the minority in the shares of the Company had been profitable; that the question was whether it would have been more profitable if the affairs of the Company had been properly conducted;
- (8) that it was irrelevant that Beng Siew and Beng Siong had offered to buy Beng Sung's shares for more than he had paid for them; and
- 30
- (9) that under section 181 the Court had a wide discretion as to what relief it would grant, and that in the present case the appropriate relief would be a winding up order since a full investigation into the Company's affairs was necessary, and this could be most effectively carried out by a liquidator.

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Counsel for Beng Sung made it clear that the application was being made under section 181(1)(a) of the Act alone, and not under section 181(1)(b) thereof.

14. The submissions made to B.T.H. Lee J. by Counsel for Beng Siew, Beng Siong and the Company in opposition to the Originating Motion were, shortly stated, as follows:-

- (1) that the proceedings had been brought by Beng

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Sung with an ulterior or collateral motive, namely malice;

Vol I pp.2,3  
to 10

(2) that the relief sought in paragraphs 3, 4, 5, 7 to 60 inclusive of the Originating Motion was outside the scope of section 181;

(3) that section 181 was not a substitute for a minority shareholder's action;

(4) that the facts relied upon by Beng Sung, even if found to be true, did not constitute "oppression" within the meaning of Section 181;

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(5) that the complaints made, even if established, which might constitute breaches of the Act had their own remedies prescribed by the Act for which section 181 might not be used as a substitute;

(6) that the complaints which were made did not affect Beng Sung in his capacity as a shareholder though, if established, they might have affected him in his capacity as a director;

(7) that insofar as the acts complained of were specifically or generally authorised or approved by the Directors it was all the Directors, including Beng Sung, who would be liable if he were successful, yet the other Directors had not been made parties to the proceedings.

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It was also submitted in general terms by Counsel for Beng Siew, Beng Siong and the Company that the evidence did not disclose any breaches of fiduciary duty on the part of Beng Siew and Beng Siong or alternatively did not disclose any serious breach such as would justify the exercise of the Court's powers under section 181.

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Vol III pp.  
427 to 479

15. B.T.H. Lee J. gave judgment on 12th July 1974 in which he dismissed Beng Sung's application with costs. Those parts of his judgment which are particularly relevant to the Appeal and the Cross-Appeal respectively will be considered in greater detail (if thought fit) on the hearing of the same. Shortly stated the learned Judge held

Vol III p.455  
11.18 to 25

(1) that the proceedings had been brought by Beng Sung with an ulterior motive, namely malice

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Vol III p.474  
1.30

(2) that the relief sought in the Originating Motion was outside the scope of section 181

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(3) that on the evidence Beng Sung had not established any grounds which would justify the intervention of the Court under section 181. Vol III p.479 ll. 1 to 7

10 16. By Notice of Appeal dated 12th July 1974 Beng Sung appealed to the Federal Court of Malaysia (Appellate Jurisdiction). The appeal came on before Gill C.J., Wan Suleiman F.J. and Tan Chiaw Thong J. on 10th March 1975 at Kuching and occupied 8 days. At the hearing of the Appeal Counsel for Beng Sung relied in addition upon the following affidavit evidence which (by consent) he was given liberty to read:- Vol III pp.483/484

Name of Deponent                      Date of Affirmation

(i)	Beng Sung	9th March 1972	Vol III pp.492/493
(ii)	Charles Henderson	8th March 1972	Vol III pp.494/550
(iii)	Lau Buong Tung	23rd November 1972	Vol III pp.424/425

20 17. On 4th August 1975 Gill C.J. delivered a reserved judgment with which Wan Suleiman F.J. and Tan Chiaw Thong J. agreed. In his judgment the learned Chief Justice first stated the nature of the case and summarised the previous history of the parties and the course of the proceedings. Secondly he criticised the learned Judge's finding that much of Mr Peattie's affidavit was mis-leading or incorrect. Having recited section 181 of the Act, and referred briefly to certain authorities explaining the meaning of the word "oppression" the learned Chief Justice went on to consider the evidence relating to the various complaints made by Beng Sung against Beng Siew and Beng Siong. His conclusions in respect of such evidence which are particularly relevant to the Appeal are considered in greater detail in subsequent paragraphs of this Case. Shortly stated he held that, save for four matters, none of the matters complained of by Beng Sung in the Originating Motion or raised in the evidence justified the exercise of the Court's jurisdiction under section 181. The four matters about which the learned Chief Justice concluded that Beng Sung was entitled to complain and in respect whereof he was entitled to relief were the following:- Vol III pp.550 to 593  
Vol III pp.550 to 555  
Vol III p.555 l.42 to p.557 l.11  
Vol III pp.557 to 580

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50	(i)	salaries and bonuses paid to Beng Siew	Vol III p.563 to 565
	(ii)	advances to or drawings by Beng Siew and Beng Siong	Vol III pp.579 to 580

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Vol III pp.572 to (iii) the purchase and renovation of the yacht  
574 Berjaya Malaysia

Vol III pp.574/578 (iv) political donations.

Vol III p.580 17. The judgment of the learned Chief Justice went on to consider the grounds upon which the Appellants had opposed the application at the hearing of the appeal. In summary form the submissions put forward by Counsel for the Appellants and the conclusions reached in respect thereof by the learned Chief Justice were as follows:-

Submission: (1) that the proceedings were brought with an ulterior motive, namely malice; and for the sole purpose of destroying the Company;

Vol III pp.583/584 Conclusion: The learned Chief Justice held that there was no evidence whatsoever to support the allegation that the proceedings were founded in malice; nor was there any evidence to suggest that the whole object of Beng Sung in bringing the proceedings was to bring about the destruction of the Company;

Submission: (2) that in so far as the acts complained of were specifically or generally authorised by the directors it was all the directors including the applicant who would be liable if the applicant was successful;

Vol III pp.584 to 586 Conclusion: The learned Chief Justice held that a director is not liable for acts of co-directors in which he has taken no part, and that non-attendance at board meetings does not impose liability on directors for acts of the board; that every director is entitled to reasonable notice of a meeting; and that there was no evidence that Beng Sung had had reasonable notice of any meeting; that even if Beng Sung had attended board meetings he would only have known what was going on after the act in question had occurred;

Submission: (3) that the complaints made by Beng Sung did not affect him in his capacity as a shareholder, though if established, they might have affected him in his capacity as a director;

Conclusion: The learned Chief Justice held that once oppression had been established it was irrelevant that Beng Sung was also a director; Vol III p.586

10 Submission: (4) that the relief sought was outside section 181 and that the facts relied upon by Beng Sung did not constitute oppression; that the complaints made, if established, have their own remedies prescribed by the Act, for which Section 181 might not be used as a substitute;

20 Conclusion: The learned Chief Justice held that the salaries and bonuses paid to Beng Siew were excessive and as such amounted to oppression to the other shareholders and were in complete disregard of such shareholder's interests; he held that "the evidence with regard to drawings by Beng Siew and Beng Siong by itself constituted oppression" and that such drawings were in disregard of Beng Sung's interests as shareholder and the interests of other minority shareholders. He also held that the purchase of the yacht Berjaya Malaysia and the payment of more than one million dollars by way of political donations without the prior approval of the Board were in complete disregard of the interests of the shareholders; Vol III p.587 l.44

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40 Submission: (5) that section 181 was not a substitute for a minority shareholders' action; that since there was no allegation of fraud, any action against the Directors should be taken by the Company and not by a single shareholder;

50 Conclusion: The learned Chief Justice was of the opinion that there were the clearest allegations of fraud, and that, in any event the Rule in Foss v. Harbottle (1843) 2 Hare 461 was no bar to an individual shareholder making an application Vol III p.587 l.45

<u>Record</u>	to the Court under <u>Section 181</u> .	
Vol III p.590 1.40	18. The learned Chief Justice then went on to say that it was not necessary for him to consider the point as to whether it would be an appropriate remedy to order that the majority shareholders should purchase Beng Sung's minority holding in the Company. The reason he gave for it not being necessary for him to do so was that B.T.H. Lee J. had not thought it fit to make such an order. However the learned Chief Justice nonetheless remarked that in his judgment "it would be wrong and unjust to order the minority shares of an aggrieved applicant to be sold without his consent". The learned Chief Justice then concluded that a winding-up order would not be appropriate, and, allowing the appeal, made ten orders which provided <u>inter alia</u>	10
Vol III p.590 1.46		
Vol III p.591 1.6		
Vol III p.592 1.11	(i) that Beng Siew should take over and pay for the yacht Berjaya Malaysia	
Vol III p.592 1.19	(ii) that he should pay the Company the sum of \$1,154,800.69 with interest in respect of political donations made by the Company	20
Vol III p.592 1.25	(iii) that one of the three younger brothers should be appointed as a "watchdog" director of the Company	
Vol III p.593 1.4	(iv) that the bonus payable in future to the Managing Director should be only two percentum of the net profits of the Company and the bonus payable to the other directors should be one per centum of such profits, and	
	(v) that the future conduct of the Company's affairs should be regulated in certain specified ways.	30
Vol III p.593 1.10	The learned Chief Justice ordered that Beng Siew and Beng Siong should pay Beng Sung's costs in the Court of Appeal and in the Court below and that they should also pay the separate costs of the Company (if any) in the Court of Appeal and in the Court below.	
Vol III pp.596 to 599	19. Beng Siew, Beng Siong, the Company and Beng Sung applied for, and obtained, leave to appeal to His Majesty the Yang di-Pertuan Agong from the decision of the Federal Court. The details of the proceedings subsequent to the judgment of the Federal Court in which ( <u>inter alia</u> ) such leave was obtained are not relevant for the purposes of this Case. It suffices to say that on 4th August 1975 on the applications of Beng Siew and Beng Siong the Federal Court ordered that pending their appeal to His Majesty the Yang di-Pertuan Agong the orders (i) that Beng Siew	40

should take over and pay for the yacht Berjaya Malaysia with interest and (ii) that he should pay the Company the sum of \$1,154,800.69 with interest in respect of political donations made by the Company, should be stayed. Stay of execution in respect of the other orders of the Federal Court was not granted, either on the application of Beng Siew and Beng Siong or on the application of the Company.

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10 PART II - MATTERS MATERIAL TO AND ISSUED ARISING  
ON THE APPEAL

20 20. It is relevant for the purposes of the Appeal to set out briefly the nature of the four matters in respect of which the Federal Court concluded that Beng Sung was entitled to complain and in respect of which (inter alia) it granted relief. The four matters (hereinafter collectively referred to as "the specified matters"), the complaints made in respect thereof, and the relief granted as a result thereof by the Federal Court were, shortly stated, as follows:

(1) Salaries and bonuses paid to Beng Siew.

Complaint: Beng Sung did not, in the Originating Motion, expressly seek any form of relief in respect of the amount or extent of salary and bonus paid or payable to Beng Siew or to the other directors. In paragraph 37 of his affidavit dated 12th February 1972 Beng Sung drew attention to the alleged smallness of the dividend compared with the net profits of the Company and with remuneration and bonuses paid to Beng Siew and Beng Siong but made no express complaint about the amount or extent thereof. In his oral evidence Beng Sung likewise made no such complaint about bonus and remuneration. In his submissions to the Federal Court Counsel for Beng Sung stated that Beng Sung had "accepted the remuneration".

Vol I p.54 1.24

40 However the learned Chief Justice took the view that "the amounts paid to Beng Siew were so large that they were paid in complete disregard of the interests of the other shareholders", and accordingly the Federal Court ordered that in future Beng Siew (as Managing Director) should be entitled to only 2 per centum of the net profits of the Company by way of bonus and that the other directors should receive 1 per centum of such profits between them.

Vol III p.565 1.6

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Facts:

The facts relating to the amount of salary and bonus received by Beng Siew (and the other directors) are not in dispute and, shortly stated, are as follows:

Vol IV p.748

- (a) Article 68 of the Company's Articles of Association provides as follows:

"The remuneration of Directors other than the Managing Director shall be such sums as may from time to time be decided in General Meeting. All such sums shall be divided among the Directors as they shall determine";

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Vol IV p.750

Article 74 of the said Articles provides as follows:

"The Directors may from time to time appoint one or more of their body to be the Managing Director or Managing Directors, for such period and upon such terms as they think fit, and may from time to time remove him or them from office, and appoint another or others in his or their place or places. The remuneration of a Managing Director may be by way of salary or commission or participation in profits or by any all [sic] those modes";

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Vol V p.938

- (b) At the general meeting of the Company held on 20th January 1965 it was resolved that the directors' fee would be \$500 per person annually and in accordance with this resolution Beng Siew received such sum by way of directors fees' in the year 1964/1965, as did the other directors of the Company;

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Vol V p.953

- (c) At the Second Annual General Meeting of the Company it was resolved pursuant to the earlier resolution to pay \$500 to each director holding office in 1965 and that the directors' fees for 1966 would be \$600 per annum for each director holding office in 1966; in accordance with these resolutions Beng Siew received \$500 by way of directors' fees in 1965/1966 and \$600 in 1966/1967 as did the other directors of the Company;

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Vol VI p.998

- (d) No mention was made of directors' fees in the minutes of subsequent general meetings until the seventh Annual General Meeting held on 16th February 1971 when it was resolved to pay annually the sum of \$600 by way of directors' fees to each director; however in accordance with the earlier resolution Beng Siew and the other directors each received \$600 per annum of way of directors' fees in the years 1967/1968, 1968/1969, 1969/1970;



(e) At the said general meeting of the Company held on 20th January 1965 it was resolved that Beng Siew should be paid \$1,500 per month by way of salary for his job as Managing Director of the Company; in accordance with this resolution Beng Siew has at all material times from 1965 been paid the sum of \$1,500 per month by way of salary;

Vol V p.938

(f) At the said general meeting of the Company held on 20th January 1965 it was resolved "that the Directors' Bonus would be 5%, 4% for Managing Director and 1% for the other directors", but no mention was made of what such bonus was to be a percentage; it is not clear whether the bonus was calculated on the Company's profits after or before taking into account preliminary expenses, taxation, adjustment of depreciation on disposals and profits and losses on fixed assets; in 1967/1968 the loss on a certain fixed asset was deducted from the profits before calculation of the bonus but in the year 1969/1970 losses on 2 investments were not deducted before calculating such bonus; in the years 1965/1966, and 1966/1967 Beng Siew took 4 per centum of the profits available for the bonus and the remaining directors 1 per centum between them; in the year 1967/1968, 1968/1969 and 1969/1970 Beng Siew not only took 4 per centum of the profits, but also took a share in the 1 per centum along with the remaining directors, which was probably not in accordance with the wording of the said resolution;

Vol V p.938

(g) The bonus received by Beng Siew was accordingly as follows:

1965/1966	\$ 22,656
1966/1967	\$123,680
1967/1968	\$378,004
1968/1969	\$316,874
1969/1970	<u>\$154,677</u>
<u>Total</u>	<u>\$995,891</u>

(h) At the Second, Third, Fourth, Fifth, Sixth and Seventh Annual General Meetings of the Company held respectively on 15th April 1966,

Vol V p.953

Vol V.p.957

Vol V. p.962

Record

Vol V p.966  
Vol VI 972  
Vol VI 998

2nd February 1967, 5th March 1968, 14th February 1969, 9th March 1970 and 16th February 1971 the audited accounts of the Company for each preceding financial year were approved; the accounts for each such financial year disclosed the amount of salary and bonus paid to Being Siew and the other directors in such year;

(2) Advances to and drawings by Beng Siew and Bend Siong.

Complaint:

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In the Originating Motion Beng Sung sought the following relief in respect of advances to and drawings by Beng Siew and Beng Siong:-

Vol I p.3  
1.40

(i) an order that Beng Siew should pay to the Company interest at the rate of 8 per centum "for the appropriate period on the sum of \$16,562/- drawn by Ling Beng Siew Sdn.Bhd. in the year 1966/1967"

Vol I p.4 1.1

(ii) an order that Beng Siew should pay to the Company interest at the rate of 8 per centum "for the appropriate period on all sums drawn by him from [the Company] in the year 1966/1967"

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Vol I p.4 1.5

(iii) an order that Beng Siew should pay to the Company interest at the rate of 8 per centum "for the appropriate period on all sums drawn by Ling Beng Siew & Co. from [the Company] in the year 1966/1967"

Vol I p.5 1.8

(iv) an order that Beng Siew should pay to the Company interest at the rate of 8 per centum "on all sums drawn by Ling Beng Siew Sdn.Bhd from [the Company] during the year 1967/1968 for the appropriate period"

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Vol I p.5 1.12

(v) an order that Beng Siew should pay to the Company interest at the rate of 8 per centum "on all sums drawn from [the Company] by Ling Beng Siew & Co. during the year 1967/1968 for the appropriate period"

Vol I p.6 1.14

(vi) an order that Beng Siong should pay to the Company interest at 8 per centum "on all sums drawn by him from [the Company] during the year 1968/1969 for the period of the advances"

Vol I p.6 1.18

(vii) an order that Beng Siew should pay to the Company interest at 8 per centum "on all sums drawn by Ling Beng Siew & Co. from [the Company] funds during the year 1968/1969 for the period of the advances"

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Vol I p.6 1.22

(viii) an order that Beng Siew should pay to the Company

interest at 8 per centum "on the advance of bonus of \$301,210.11 taken by him in respect of the year 1968/1969, the interest to run from the date on which he took the said advance to the date on which the other directors were paid bonus"

10 (ix) an order that Beng Siong should pay to the Company interest at 8 per centum "for the appropriate period on all sums drawn by him without authority during the year 1969/1970" Vol I p.8 1.31

(x) an order that Beng Siew should pay to the Company interest at 8 per centum "for the appropriate period on all sums drawn by Ling Beng Siew & Co. during the year 1969/1970 and all sums drawn by or on behalf of Chalfont Investment Ltd. Hong Kong during that year". Vol I p.8 1.35

20 Facts:

The facts relating to the advances and drawings are not in dispute and shortly stated are as follows:

30 (a) Section 133 of the Act provides that a company (other than an exempt private company) shall not make a loan to any of its directors or to any directors of any of its related companies save in certain circumstances not material for the purposes of this Appeal.

(b) From the date of its incorporation until April 1966 the Company was an exempt private company; thereafter the Company was a non-exempt private Company.

40 (c) During the year 1965/1966 Beng Siew maintained an account in his own name with the company; for almost half the year the said account was in credit. As at the end of August 1966 Beng Siew owed the Company \$228,057.58 on the said account, and in September 1966 it was paid off in full. No specific mention of the said account was made in the Company's accounts for the year 1965/1966, and at the time, no interest was charged on the said account. Vol IV p.688

(d) As at 30th September 1967 Ling Beng Siew Sdn. Bhd. appeared in the Company's list of sundry

Record

debtors as owing the Company \$16,562. Ling Beng Siew Sdn.Bhd. is and was at all material times a company owned by Beng Siew and his family. The said sum of \$16,562 did not represent an advance made by the Company to Ling Beng Siew Sdn. Bhd. but was the amount outstanding on an ordinary trading account maintained between the two companies. The Company supplied equipment etc. for Ling Beng Siew Sdn. Bhd. The said sum outstanding on the account was paid by Ling Beng Siew Sdn. Bhd. in October and November 1967. At the time no interest was charged on the said account.

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Vol IV p.689 (e) During the year 1966/1967 Ling Beng Siew & Co. maintained an account with the Company. Ling Beng Siew & Co. is and was at all material times a trading partnership of which Beng Siew is and was a partner. During the year payments were made by the Company to Ling Beng Siew & Co. on behalf of Beng Siew by way of advance of bonus. The total drawings on the account for the year were \$351,967.88, and although small repayments were made during the year by Ling Beng Siew & Co. almost the entire sum was in fact repaid in September 1967. No specific mention of the said account was made in the Company's accounts for the year 1966/1967 and at the time no interest was charged thereon.

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Vol IV p.757 (f) During the year 1967/1968 Ling Beng Siew Sdn. Bhd. maintained an ordinary trading account with the Company in the same manner as that outlined in subparagraph (d) above. The account was settled regularly so that at times Ling Beng Siew Sdn. Bhd. was a creditor of the Company. As at 30th September 1968 the sum of \$43,703.80 was owing on the said account to the Company. At the time no interest was charged on the said account.

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Vol IV p.691 (g) During the year 1967/1968 Ling Beng Siew & Co. maintained an account with the Company. No specific mention of the said account was made in the accounts of the Company for the year nor in the minutes of Board Meetings. By 30th September 1968 no monies were outstanding thereon. During the year Ling Beng Siew & Co. drew sums on the said account which totalled \$1,262,975.47; but repayments were made to the Company throughout the year. As at 31st December 1967 the debit balance was \$943,552. On 5th January 1968 the balance was reduced to \$482.052. The debit balance then increased so as to amount to \$686,475.47 as at 26th September 1968. This sum was paid off before 30th September 1968 by Ling Beng Siew & Co. by a cheque in the sum of \$386,475.47 and by the sum of \$300,000 credited to the

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account in respect of an advance of bonus to Beng Siew. At the time no interest was charged on the said account.

10 (h) During the year 1968/1969 Beng Siong maintained a "No.1" account with the Company. No specific mention of the said account was made in the accounts of the Company for the year, nor in the minutes of Board Meetings. By 30th September 1969 no monies were outstanding thereon. During the year Beng Siong drew \$15,000 a month for 10 months (i.e. a total of \$150,000) from the said account. Part of the said sum was paid off by crediting a dividend; the remainder was paid off on 30th September 1969 by a cheque in the sum of \$97,530. At the time no interest was charged on the said account.

20 (i) During the year 1968/1969 Beng Siong maintained a "No.2" account with the Company. No specific mention of the said account was made in the accounts of the Company for the year nor in the minutes of Board Meetings. There were 2 entries in the said account; the first dated 24th December showed Beng Siong drawing the sum of \$440,706.05; the second dated 6th January 1969 shows him repaying the said sum to the Company. At the time no interest was charged on the said account.

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(j) During the year 1968/1969 Ling Beng Siew & Co. maintained an account with the Company. No specific mention of the said account was made in the accounts of the Company for the year nor in the minutes of Board Meetings. By 30th September 1969 no monies were outstanding thereon. Total drawings by Ling Beng Siew & Co. in the year amounted to \$2,558,066.75 but repayments of amounts outstanding took place throughout the year so that the debit balance at the end of any one month never exceeded \$846,973.55. On 10th September 1969 the sum of \$350,000 was credited to the account in respect of donations paid by Beng Siew on behalf of the Company and on 30th September 1969 the sum of \$301,201.11 was credited to the account in respect of an advance of bonus payable to Beng Siew. At the time no interest was charged on balances outstanding on the said account.

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Vol IV p.693

Record

(k) During the year 1969/1970 Beng Siong maintained an account with the Company. On 2nd October 1969 Beng Siong drew the sum of ~~£~~107,530 from the said account and thereafter drew the sum of ~~£~~10,000 each month throughout the year, so that his total drawings amounted to ~~£~~217,530. In April 1970 he paid off the sum of ~~£~~31,800 by crediting his dividend to the said account. The balance thereof was paid off before 30th September 1970 by a cheque in the sum of ~~£~~185,730. At the time no interest was charged on the said account. 10

Vol IV p.686

(l) During the year 1969/1970 Ling Beng Siew & Co. maintained an account with the Company. The said account was substantially in credit from 1st October 1969 to June 1970; as at 31st March 1970 the sum of ~~£~~729,927 was owing to Ling Beng Siew & Co. on the said account. Thereafter the credit balance was reduced gradually, until the account was in debit. The account was cleared by 30th September 1970. At the time no interest was charged on the account either in respect of the credit balance in Beng Siew's favour or that in the Company's favour. 20

(m) During 1970 Beng Siew guaranteed the Company's overdraft facility with the Bangkok Bank.

Vol VI p.980

(n) At a directors' meeting held on 10th June 1970 it was resolved that any director or shareholder receiving any advance from the Company should be charged with interest at a rate of 7 per cent per annum and that such resolution should have retrospective effect to any advances made in the past. 30

(o) In accordance with the said resolution interest was charged on and debited to all the accounts maintained by Beng Siew, Ling Beng Siew & Co, Ling Beng Siew Sdn. Bhd. and Beng Siong for the material years. In addition, where appropriate, such accounts were credited with interest in respect of periods during which such accounts had been in credit. The charging of interest was effected before the closing of the Company's accounts for the year ended 30th September 1971. 40

Relief:

Vol III p.586  
1.45

Despite the fact that interest had been charged on the said accounts the Federal Court held that the drawings by and advances to Beng Siew and Beng Siong constituted oppression within the meaning of section 181 of the Act, and that the same were in disregard of the interests of

Beng Sung and the other minority shareholders in the Company. The Federal Court granted the following relief to Beng Sung which was specifically referable to his complaints about such advances and drawings

- 10 (a) an order that no bank account of the Company should be operated without the signatures of 2 directors 1 of whom should be a person other than Beng Siew, Beng Siong or Beng Tuang Vol III p.592 1.33
- (b) an order that no monies should be withdrawn from the Company by the Managing Director or by any of the other directors "as in the past" without the prior approval of the Board Vol.III p.592 1.37
- (c) an order that no bonus should be paid until after the passing of the Company's accounts at the Annual General Meeting. Vol III p.593 1.8
- 20 (3) The purchase reconstruction and maintenance of the yacht, "Berjaya Malaysia" (hereinafter called "the yacht")

Complaint:

30 The relief sought by Beng Sung in the Originating Motion was that Beng Siew should pay to the Company all sums expended in the "purchase reconstruction and operating" of the yacht, together with interest thereon at the rate of 8 per centum per annum from the date of expenditure to the date of payment and that the Company should transfer the yacht to Beng Siew.

Vol I p.5 1.1

Facts:

The principal facts relating to the yacht are for the most part not in dispute; those not in dispute are as follows:

- (a) By virtue of a resolution passed at a directors' meeting of the Company held on 27th December 1967 Beng Siew Vol V p.960
- (i) was authorised "to purchase tractors, logging trucks, machineries and other equipments necessary for the operation of the Company" and Vol V p.961
- (ii) had delegated to him the power to make such investments as he thought fit on behalf of the board of directors. Vol V p.961
- 40

Record

(b) In January 1968 the hull of a vessel was purchased by the Company for \$48,000. During that year and the following year the vessel was reconstructed and converted into a yacht at a cost to the Company of approximately \$505,698.

Vol VI p.971

(c) By a resolution passed at a directors' meeting held on 20th June 1969 the directors "resolved to approve the purchase of a second hand boat and to reconstruct it at a cost of approximately half a million dollars".

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(d) On purchase the yacht was registered in the name of Beng Siew but during the year ended 30th September, 1970 the yacht was transferred into the name of the Company, and \$5,000 was expended by way of stamp duty and registration fees in respect of such transfer. This expenditure was capitalised.

(e) The running expenses of the yacht in the year 1968/1969 were approximately \$189,028 and in the year 1969/1970 approximately \$95,910.

(f) In each year after its purchase, the yacht was shown as one of the assets of the Company in the Company's accounts, all expenditure upon it was disclosed in such accounts, and such accounts were presented to and approved by the Company in general meeting.

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The following are facts relating to the yacht which are, or may be, in dispute:

(g) The yacht (according to the uncontradicted evidence of Beng Siew) was initially registered in Beng Siew's name rather than that of the Company because the safety regulations in respect of boats registered in the names of private persons were less stringent than those in respect of boats registered in the names of companies.

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(h) The yacht was purchased with the intention that it should be used on the Company's business in travelling to and from Indonesia. The yacht was used in Singapore, Kuching, Penang, Sibuluan, and Tawau to entertain customers, potential customers and business associates of the Company. It was also, on occasions, used for private purposes by Beng Siew and Beng Siong.

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Relief:

Vol II p.154  
1.22

The evidence of Mr Peattie was that he had received a full explanation for the moneys spent on the yacht and was satisfied that it was in accordance with the said



Record

10 resolution of the directors. In addition he  
conceded that the yacht appeared to be used in  
connection with companies in which the Company had  
invested. The Federal Court held that the yacht  
was not necessary for the business of the Company,  
that it was used as "personal yacht" principally  
by Beng Siew and Beng Siong and that as such its  
purchase, reconstruction and maintenance were in  
complete disregard of the interests of the share-  
holders of the Company. The Federal Court  
accordingly ordered that Beng Siew should pay to  
the Company all sums which had been paid out of the  
Company's funds for the purchase, reconstruction  
and maintenance of the yacht with interest at the  
rate of 6 per centum per annum from 1st September  
1971 to the date of payment on such sums as had  
been paid for the purchase and reconstruction of  
the yacht, and that upon payment as aforesaid the  
yacht should be transferred to Beng Siew.

Vol II p.157  
1.34 p.158 1.1

Vol III p.572  
1.39

Vol III p.592  
1.11

20 (4) Political donations made by the Company

Complaint:

In the Originating Motion Beng Sung sought  
the following relief in respect of political  
donations made by the Company

30 (i) an order that Beng Siew should pay to the  
Company "the sum of \$18,246.10 being donations  
made by him or with his authority in the year  
1965/1966 together with interest thereon at  
the rate of 8% to the date of payment"

Vol I p.3 1.17

(ii) an order that Beng Siew should pay to the  
Company "the sum of \$44,962.40 together with  
interest thereon at 8% from the date of the  
original payment to the date of repayment being  
donations made by him or with his authority in  
the year 1966/1967"

Vol I p.4 1.9

40 (iii) an order that Beng Siew should pay to the  
Company "the sum of \$138,614.80 being donations  
made by him or with his authority during the  
year 1967/1968 together with interest thereon  
at 8% from the date of the donations to the  
date of payment"

Vol I p.5 1.25

(iv) an order that Beng Siew should pay to the  
Company "the sum of \$1,304,743.49 being the  
donations made by him or with his authority  
from [the Company's] funds in the year 1968/  
1969 together with interest at 8% from the

Vol I p.7 1.5

Record

date of the donations to the date of payment"

Vol I p.9 1.18 (v) an order that Beng Siew should pay to the Company "507,562.83 being donations made by him or with his authority in the year 1967/1968 together with interest at 8% from the date of the donations to the date of payment"

Facts:

Vol II p.592  
1.11 The Federal Court granted the relief sought by Beng Sung only in respect of certain political  
Vol I p.17 1.24 donations made in the year 1968/1969 which amounted 10  
Vol I p.23 in total to the sum of \$1,154,800.69. The facts  
1.24 relating to the donations made in other years are  
Vol I p.28 set out in Mr Peattie's affidavit and are not  
1.25 disputed. The facts relating to the relevant  
Vol I p.35 political donations made in the year 1968/1969  
1.36 are with certain exceptions not in dispute and,  
shortly stated, are as follows:

Vol IV p.734 (a) The Memorandum of Association of the Company contains a general power at Clause 3(qq) thereof for the Company to make donations. 20

(b) Section 19 of the Act and the Third Schedule thereto also confer power on the Company to make donations for (inter alia) patriotic, public and charitable purposes.

(c) During the year 1968/1969 certain political donations totalling \$1,154,800.69 were made by the Company and appeared in the Company's books as having been made to the following:

Vol I p.28 Sarawak Chinese Association 30  
1.26 ("S.C.A.") \$1,009,800.69

Sarawak National Party  
("S.N.A.P.") \$ 145,000.00

(d) These political donations (together with other donations made by the Company in the year 1968/1969) were not specifically authorised by the Board of directors before they were made. However they appeared in the Company's audited accounts for the year ended 30th September 1969 with a note in the Auditor's Report that donations "were mostly through the Managing Director". The Accounts for the said year together with the Directors' and Auditor's report were presented to and approved by the Company at its annual general meeting on 9th March 1970. In addition these political donations (together with the other 1968/1969 donations) were retrospectively approved at a 40

Vol VI p.972

meeting of the Board of directors held on  
10th June 1970.

Vol VI p.977

(e) Donations shown in the books of the Company  
as made to S.C.A.

(i) Beng Siew was at the material time  
President of S.C.A. but was not seeking  
electoral office of any kind

Vol II p.243 12

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(ii) a large proportion of the donations  
shown in the Company's books as having  
been made to S.C.A. were made by Beng  
Siew personally and he was subsequently  
re-imbursed by the Company

Vol II p.244  
1.20

(iii) a proportion of the donations shown in  
the Company's books as having been made  
to S.C.A. were in fact made to other  
political parties through S.C.A.

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(iv) at the time when donations were made  
vouchers were issued by the Company to  
support such payments and such vouchers  
were for the most part signed and  
authorised by Beng Siew or Beng Siong

Vol V p.842

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(v) informal receipts were issued at the time  
of payment in respect of certain  
donations; formal receipts were subse-  
quently issued by S.C.A. sometime in 1970  
in respect of all donations shown as  
having been made to or through it, but  
these receipts were dated to correspond  
with the respective dates of payments

(vi) there were no audited accounts of S.C.A.  
but the statement of Accounts of S.C.A.  
which had been lodged by S.C.A. with the  
Registrar of Societies did not reveal the  
full amount of the donations shown in the  
books of the Company as having been made  
to or through S.C.A.

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(vii) evidence was adduced on behalf of the  
Appellants (but these facts are in dispute)  
that the annual Statement of Accounts of  
S.C.A. lodged with the Registrar of  
Societies only related to the Headquarters  
of S.C.A. and not to receipts and payments  
of branches of S.C.A., and that a large  
proportion of the donations made by the  
Company were made to the 3rd Division Sib

Record

branch and accordingly details of the receipt and expenditure of such donations did not appear in the Statement of Accounts lodged with the Registrar of Societies. Evidence was in addition adduced on behalf of the Appellants (but these facts are likewise in dispute) that details of the receipt and expenditure of donations made to or through S.C.A. Sibiu branch appeared in the accounts of the Sibiu branch, but that such accounts had been stolen in a burglary which had occurred in or about February 1971.

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(viii) evidence was adduced on behalf of the Appellants (but this fact is in dispute) that the donations made to or through S.C.A. by the Company were made for the purpose of ensuring that a benevolent and stable government remained in office after the 1969 elections.

(f) Donations shown in the books of the Company as made to S.N.A.P.

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(i) Of these donations three totalling \$135,000.00 were made in the name of Beng Siew and one of \$10,000.00 was made in the name of the Company

(ii) four formal receipts were issued by S.N.A.P. in respect of such payments and signed by duly authorised officers of S.N.A.P.

(iii) the sums comprised in such donations were not applied for the formal purposes of S.N.A.P. as such, but were applied to assist dissentient or ex-members of S.N.A.P. to stand against official members of S.N.A.P. in the 1969 elections, so as to persuade S.N.A.P. to rejoin the "Appliance", a group of political parties.

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(iv) evidence was adduced on behalf of the Appellants (but this fact is in dispute) that the above donations made to persuade S.N.A.P. to rejoin the Alliance were made for the purpose of ensuring that a benevolent and stable government remained in office after the 1969 elections.

Relief:

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In cross-examination Mr Peattie stated that "there was not a jot of evidence to suggest anything improper" in respect of the donations made by the Company in 1968-1969. The Federal Court held that Beng Siew had no general authority to make donations, that he "should have made no donations to himself as President of S.C.A. without the express approval of the Board before the

Vol VII pp.  
1329 to 1331

Vol II p.155  
1.28

Vol III p.578  
11.22 to 28

10 donations were actually made" and that "neither the Board nor the Company in general meeting could give him authority, to reimburse himself moneys which he had spent for political purposes". The Federal Court, holding that the donations "without the prior approval of the Board were in complete disregard of the interests of the shareholders" and that accordingly a case had been made out for the exercise of the Court's jurisdiction under section 181, ordered that Beng Siew should pay back to the Company with interest at the rate of 6 per centum per annum the total sum of \$154,800.69 being moneys which, according to the Federal Court, were "paid out allegedly as donations to S.C.A. and S.N.A.P. in the year 1968/1969". The Federal Court also ordered that in future no donations should be made except in the name of the Company and with the prior approval of the Board of Directors.

Vol III p.587  
1.9

Vol III p.592  
1.19

Vol III p.592  
1.30

20 21. In addition to the relief granted by the Federal Court in relation to each of the specified matters in particular, the Federal Court granted the following general relief:

(i) it ordered that one of the three younger brothers be appointed a "watchdog" director to safeguard their interests

Vol III p.592  
1.25

(ii) it ordered that no bank account of the Company be operated without the signatures of two directors, one of whom was to be a person other than Beng Siew, Beng Siong or Beng Tuang

Vol III p.592  
1.33

(iii) it ordered that three clear days' notice in writing be given of any directors' meetings

Vol III p.592  
1.40

(iv) it ordered that the power delegated to Beng Siew to make investments be cancelled

Vol III p.593  
1.1

22. The Appellants submit that the circumstances set forth in the foregoing paragraphs raise the following issues:

40 ISSUE I (A) Whether the proceedings herein were brought by Beng Sung bona fide to obtain the relief claimed in the Originating Motion, or whether the same were brought with the object of achieving a collateral and malicious purpose, namely the discrediting of the commercial reputation of Beng Siew and the destruction of the Company;

(B) Whether, if it be the case that the proceedings were brought by Beng Sung for such collateral purpose, they should be stayed or dismissed

ISSUE II

Whether the evidence relating to any one or more of the specified matters establishes that as at the date of the hearing of the Originating Motion the affairs of the Company were being conducted or the powers of the directors were being exercised either in a manner oppressive to Beng Sung or to Beng Sung and other shareholders in the Company or in disregard of his or his and their interests as members within the meaning of section 181 (1) of the Act

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ISSUE III

Whether the Court has or had jurisdiction under section 181

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(A) in any, or in the present, proceedings brought under section 181 to order a third party (i.e. a person other than the applicant or the company) to pay damages and/or compensation to the company for breach of duty and/or trust or otherwise

(B) in the present proceedings to grant the relief under order (h) cancelling Beng Siew's power to make investments on behalf of the Company

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(C) in the present proceedings to grant the relief under order (i) reducing and fixing the bonus payable to the Managing Director and other directors of the Company

ISSUE IV

Whether, on the assumption that it was correct for the Federal Court to have granted some form of relief under section 181 of the Act and that the Federal Court had jurisdiction so to do, the relief actually granted by the Federal Court was in the light of the evidence and in all the circumstances the appropriate relief, or whether some other, and if so what, relief should have been granted.

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23. On Issue I(A) the Appellants contend that the proceedings herein were not brought by Beng Sung bona fide with the object of obtaining the relief claimed in the Originating Motion, but rather with the object of achieving a collateral and malicious purpose, namely the discrediting of Beng Siew and destruction of the Company. In support of this contention the Appellants submit:

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(1) that B.T.H. Lee J. was right in finding as a fact that the proceedings had been motivated by malice;

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(2) that the Federal Court should have been unwilling to reject and should not have rejected the learned judge's said finding of fact because it was a finding of a specific primary fact that must have been based on inter alia the credibility and demeanour of Beng Sung as a witness: in support of this submission the Appellants will rely on the speeches of Viscount Simmonds, Lord Reid, and Lord Somervell in the House of Lords in Benmax v. Austin Motor Co. Ltd. [1955] A.C.370

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(3) that (in the alternative to (2) above) the Federal Court was wrong in holding that there was no evidence to support the allegation that the proceedings had been motivated by malice because there were several facts from which the Federal Court could and should have inferred such an ulterior motive, namely the following:-

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(i) the fact that there had been a long history of family disputes between the parties culminating in the present proceedings; that no mention was made of this fact in Beng Sung's original affidavit in support of the Originating Motion dated 12th February 1972; that Beng Siew gave evidence both in his affidavit dated 14th March 1972 and in court in relation to the family disputes and stated why the three younger brothers had turned against him, but that Beng Sung did not file an affidavit in reply to deal with such matters nor did he give evidence in court in respect thereof;

Vol I p.46

Vol I p.68

Record

Vol IV pp.603  
and 604

Vol II p.194  
1.1

- (ii) the fact that after a long period of inactivity and non-participation in the affairs of the Company Beng Sung, having received Mr Peattie's report, immediately instituted legal proceedings without first either making any complaint or representation to the Company, Beng Siew or Beng Siong, or giving notice to them of his intention to institute proceedings, or giving them an opportunity to rectify or explain all or any of the matters complained of; 10
- (iii) the fact that Beng Sung took steps to ensure that maximum publicity adverse to Beng Siew was given in respect of his (Beng Sung's) application to inspect the Accounts of the Company; that the issue of the Originating Motion was publicized in two newspapers on 21st August 1971 even before the same had been served on any of the Appellants; that shortly after the issue of the Originating Motion Beng Sung applied by way of interlocutory motion to have the same advertised in four different newspapers circulating not only in Sarawak but also in Singapore and Kuala Lumpur; 20
- (iv) the fact that repeated submissions were made by Counsel on behalf of Beng Sung both to B.T.H. Lee J. and to the Federal Court that winding up the Company would be the most and indeed the only appropriate relief; that Beng Sung had given no proper thought to the consequences which would follow from a winding up order, notwithstanding that through his counsel he was seeking such relief; that a winding up order was considered wholly inappropriate in view of the profitability of the Company by both the learned Judge and the Federal Court (the inference to be drawn from the said fact being that Beng Sung had no reasonable justification for seeking to wind up the Company and therefore was motivated, by malice); 30 40
- (v) the fact that in cross-examination when asked which relief he wished to see the Court grant him, Beng Sung said "either No.1 Beng Siew be removed and receiver being approved or alternatively a winding-up";
- (vi) the fact that Beng Sung complained about matters which had occurred before he became a shareholder in the Company on 31st January 1967; 50



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(vii) the fact that Beng Sung, without any or any reasonable justification, challenged numerous acts done or decisions made by the Company, Beng Siew or Beng Siong in respect of which neither B.T.H. Lee J. nor the Federal Court found that there were any real grounds of complaint; that such acts or decisions of which complaint was unjustifiably made included inter alia:-

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- (a) entertainment expenses
- (b) motor cars
- (c) the purchase of the Aurora Hotel
- (d) the purchase of a hovercraft
- (e) travelling expenses
- (f) legal expenses
- (g) the loan to Harun bin Ariffin
- (h) the purchase of the Malaysia Daily News
- (i) telephone bills
- (j) salaries to third persons
- (k) advances to third persons
- (l) the payment to International Executive Corporation
- (m) borrowings from Hock Thai Finance Ltd. and Bangkok Bank Ltd.

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(viii) the fact that no other shareholder (not even the two other younger brothers) has claimed that the directors have acted other than in the best interests of the Company;

(ix) the fact at a meeting of the directors of the Company held on 31st March 1972 it was resolved that the Board (whose members included shareholders of the Company other than Beng Siew and Beng Siong) did not support Beng Sung's

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application and strongly opposed any attempt to wind up the Company as it would cause irreparable damage to the Company whose principal asset, namely the forest licence, was not transferable;

- (x) the fact that the number of shares held by Beng Sung in the capital of the Company amounts to only approximately 2.43 per centum of the total share capital thereof.

24. If Issue I(A) is decided in favour of the Appellants then they will contend that Issue I(B) should be decided in the affirmative. The Appellants will submit that proceedings which are instituted not with the genuine object of obtaining the relief claimed but with the object of achieving a collateral and malicious purpose, are an abuse of the process of the Court and as such should be stayed or dismissed. The Appellants will rely, in support of this submission, on:

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the judgment of Mr Justice Plowman in

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Re Bellador Silk, Ltd.  
[1965] 1 All E.R. 667

the judgment of Mr Justice Vaughan-Williams in

In Re a Company  
[1894] 2 Ch.349

In addition the Appellants will respectfully invite Your Lordships' Board not to follow the judgment of the Court of Appeal (Buckley and Stephenson L.JJ. and Sir John Pennycuick) in

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Bryanston Finance Ltd. v. de Vries (No.2)  
[1976] 1 Ch. 63

and in particular the dictum of Lord Justice Buckley at page 75.

25. On Issue II the Appellants contend that the evidence relating to any one or more of the specified matters does not establish that as at the date of the hearing of the Originating Motion the affairs of the Company were being conducted or the powers of the directors were being exercised either in a manner oppressive to Beng Sung or to Beng Sung and other shareholders in the Company or in disregard of his or his and their interest as members within the meaning of section 181. In support of this contention

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(A) The Appellants make the following submissions on the law: Record

10 (1) that "oppressive" means conduct which is "burdensome, harsh and wrongful", or which involves "at the lowest a visible departure from the standard of fair dealing and a violation of the conditions of fair play upon which every shareholder who entrusts his money to a company is entitled to rely" or "at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as shareholder"; that the fact that a director draws remuneration in excess of that to which he is (or may be) legally entitled does not amount to conduct which is "oppressive;"

the Appellants will rely, in support of this submission, on:

20 the speech of Viscount Simmonds in the House of Lords in

Scottish Co-operative Wholesale Society v. Meyer [1959] A.C. 324 at p.342

the judgments of the Court of Appeal in

Re H.R. Harmer Ltd.  
[1958] 3 All E.R. 689 at pp. 701, 706 and 708

30 the speeches of the Lord President, Lord Cooper and Lord Keith in the Inner House in

Elder v. Elder & Watson Ltd.  
(1952) S.C. 49 at p.55 and at p.60

the judgment of the Court of Appeal delivered by Lord Justice Buckley in

Re Jermyn Street Turkish Baths Limited  
[1971] 3 All E.R. 184 at p.199

dicta in the judgment of Mr Justice Menhennitt in

40 Re Tivoli Freeholds Ltd.  
[1972] V.R. 445 at p.452

dicta in the judgment of Vieyra A.J. in

Marsh v. Odendaalsrus Cold Storage Ltd.  
[1963] (2) W.L.D. 263 at p.268;

- (2) that the words "oppressive" and "in disregard of his or their interests as members" when construed in the context of subsection (1)(a) and (1)(b) of section 181 mean that the conduct complained of must single out the applicant (or the applicant and some part of the shareholders) for discriminatory or prejudicial treatment, and that accordingly the section is not applicable to a situation where it is alleged that the conduct complained of is against the interests of the company generally;

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the Appellants will rely, in support of this submission, on:

the judgment of Mr Justice Buckley (as he then was) in

Re Five Minute Car Wash Service Ltd.  
/1966/ 1 All E.R. 242

the decision of the House of Lords in

Scottish Co-operative Wholesale  
Society Ltd. v. Meyer  
/1959/ A.C. 324;

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- (3) that it was not intended by section 181 to give jurisdiction to the Court to interfere with the internal management of a company by directors who have exercised their powers in a way which they consider to be bona fide in the interests of the company, albeit that the Court is of the opinion that the particular exercise of the power was not, in fact, in the company's interest; that accordingly the Court will not and should not substitute its discretion in place of the directors' when the decision in question has been honestly arrived at; that if a particular exercise of the directors' powers is bona fide it is not impeachable merely because in promoting the interests of the company they were also promoting their own;

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the Appellants will rely, in support of this submission, on:

the judgment of Lord Greene M.R. in the Court of Appeal in

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Re Smith & Fawcett Ltd.  
/1942/ Ch. 304 at p.306

dicta in the judgment of Mr Justice Pennycuik (as he then was) in

Charterbridge Corporation Ltd.  
v. Lloyds Bank Ltd.  
[1970] Ch.62 at p.74

the Advice of the Judicial Committee  
of the Privy Council delivered by  
Lord Wilberforce in

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Howard Smith Ltd. v. Ampol  
Petroleum Ltd.  
[1974] A.C. 821 at p.832

the Advice of the Judicial Committee  
of the Privy Council delivered by  
Lord Selbourne in

Hirsche v. Sims  
[1894] A.C. 654, at pp.660 to 661;

- (4) that, in the absence of a fraud in the  
minority, a member cannot apply for an order  
under subsection (1) of section 181 on the  
grounds that the affairs of the company are  
being conducted or the powers of the  
directors are being exercised in an  
"oppressive" manner or in disregard of his  
interests as a member in circumstances where  
the conduct and the exercise of powers  
complained of has been ratified by the  
company in general meeting;

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the Appellants will rely, in support  
of this submission inter alia on:

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the Advice of the Judicial Committee of  
the Privy Council delivered by Sir  
Barnes Peacock in

Irvine v. The Union Bank of  
Australia  
(1877) 2 App. Cas.366 at p.371

the judgments of Lord Justices Cotton,  
Lindley and Bowen in the Court of Appeal  
in

Grant v. United Kingdom Switchback  
Railways Company (1880) 40 Ch. p.135.

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the Advice of the Judicial Committee of  
the Privy Council delivered by Sir Richard  
Baggallay in

North-West Transportation Company  
Limited v. Beatty (1887) 12 App. Cas.589

dicta in the judgment of Mr. Justice  
Buckley (as he then was) in

Hogg v. Cramphorn Limited [1967]  
Ch.254 at pp. 269-272

the judgments of the Court of Appeal in

Bamford v. Bamford [1970] Ch.212 (Lord  
Justices Harman, Russell and Karminski)

dicta in the judgment of the Court of  
Appeal, delivered by Lord Justice Buckley  
in

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Re Jermyn Street Turkish Baths Limited  
[1971] 3 All E.R. 184.

- (5) that for the conduct complained of to be  
"oppressive" or "in disregard of his or their  
interests as members" within the meaning of  
subsection (1)(a) of section 181, the party  
claiming to be aggrieved must not have  
acquiesced in or consented to the conduct  
complained of:

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the Appellants will rely, in support of this  
submission, on

dicta in the judgment of Mr. Justice Byrne  
in

Drincobier v. Wood  
[1899] 1 Ch.393 at p.406

the judgment of Mr Justice Reynolds in

Irvin and Johnson Ltd. v. Oelofse  
Fisheries Ltd.  
[1954] 1 S.A.L.R. 231 at p.243

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the judgment of the Court of Appeal, delivered  
by Lord Justice Buckley in

Re Jermyn Street Turkish Baths Limited  
[1971] 3 All E.R. 184 in particular  
at p.200;

- (6) that, for the Court to exercise its jurisdiction  
under section 181 on the grounds set out in  
subsection (1)(a) thereof (as opposed to those  
set out in subsection (1)(b) thereof which, as

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conceded by Counsel for Beng Sung are not applicable to the present case), the conduct complained of must be a continuing state of affairs existing as at the date of the hearing of the Originating Motion; Record

The Appellants will rely, in support of this submission, on

dicta in the judgment of the Court of Session in

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Meyer v. Scottish Textile & Manufacturing Co  
/1954/ S.C. 381  
per the Lord President, Lord Cooper at p.388 per Lord Russell p.394

dicta in the judgment of Mr Justice Jacobs in

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Re Broadcasting Station 2 G B Pty. Ltd.  
/1964/ (5) N.S.W.R. 1648

dicta in the judgment of Mr Justice Roxburgh in

Re Hannetta Ltd.  
(1953) 216 L.T. Jo. 639

dicta in the judgment of Mr Justice Megarry (as he then was) in

Re Fildes Bros. Ltd.  
/1970/ 1 All E.R. 923 at p.927

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dicta in the judgment of the Court of Appeal delivered by Lord Justice Buckley in

Re Jermyn Street Turkish Baths Limited  
/1971/ 3 All E.R. 184 at p.198

dicta in the judgment of Mr Justice Menhennitt in

Re Tivoli Freeholds Ltd.  
/1972/ V.R. 445 at p.453

and

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(B) The Appellants make the following submissions

on the evidence and the findings of the  
Federal Court:

- (7) Salaries and bonuses paid to Beng Siew  
that the salaries and bonuses paid to  
Beng Siew were not oppressive or in  
disregard of Beng Sung's interests  
because
- (i) they were not "oppressive" within  
the definition set out in submission  
(1) above 10
  - (ii) Beng Siew's position as majority  
shareholder had never had any bearing  
on his remuneration as director
  - (iii) at all times the salaries and  
bonuses paid to Beng Siew were (with  
the possible exception relating to  
the excessive share in bonus in the  
years 1967 to 1970) paid in  
accordance with the resolutions passed 20  
at the Annual General Meetings of the  
Company held on 20th January 1965 and  
15th April 1966 respectively
  - (iv) the fact that Beng Siew may have taken  
a share in the 1 per centum of the  
profits due to the other directors  
did not constitute conduct which was  
oppressive to Beng Sung or in disregard  
of his interests in his capacity as  
a member of the Company 30
  - (v) as accepted by the Federal Court, it  
was Beng Siew's business acumen and  
genius that had contributed to the  
success of the Company and that  
accordingly he was entitled to  
receive substantial remuneration for  
his services to the Company
  - (vi) Beng Sung had voluntarily become a  
shareholder in the Company at a time  
when the formula governing the  
entitlement of Beng Siew and the other  
directors to bonus had already been 40  
fixed by the resolution dated 20th  
January 1965
  - (vii) the salaries and bonuses paid to  
Beng Siew had appeared in the annual

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953

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accounts of the Company for all the relevant years, which accounts had been presented to and passed by the Company in general meeting without dissent

Record

10 (viii) Beng Sung had acquiesced in or consented to the payment of such salaries and bonuses to Beng Siew, and had not sought any specific relief in the Originating Motion in respect of the amount or extent of such salaries and bonuses

20 and that accordingly the Federal Court was wrong in holding that the remuneration paid to Beng Siew was oppressive to Beng Sung and in disregard of his interests as a member, and that it had no jurisdiction, and was wrong to vary the amount of the said bonus. In support of this submission the Appellants will refer to the evidence relating to the salaries and bonuses;

(8) Advances to and drawings by Beng Siew and Beng Siang

- 30 (i) that the advances and drawings were not "oppressive" within the definition set out in submission (1) above
- (ii) that the advances and drawings were not "oppressive" or "in disregard" of Beng Sung's interest as a member in that they did not single out Beng Sung for any discriminatory or prejudicial treatment since there had been no loss to the Company as a result thereof
- (iii) that the advances and drawings were to a large extent made against future bonuses and dividends and as such were normal internal company practice
- 40 (iv) that the mere fact that such advances and drawings may have been in breach of section 183 of the Act did not necessarily make the same "oppressive" or in "disregard" of Beng Sung's interests within the meaning of section 181
- (v) that there was no evidence from which the Federal Court could properly draw the inference that the failure to charge interest on the part of Beng Siew and Beng

Siong had been deliberate, and that accordingly it should not have overruled the finding of B.T.H. Lee J. on the point

(vi) that in so far as any failure to charge interest had caused loss to the Company and had been "oppressive" or "in disregard" of Beng Sung's interests, since such failure had been remedied by the retrospective resolution passed on 10th June 1970 and the subsequent charging of interest to the relevant accounts prior to 30th September 1971, there was no conduct nor state of affairs in relation to the advances and drawings existing at the hearing of the Originating Motion in respect of which Beng Sung was entitled to complain 10

(vii) that there was no evidence from which the Federal Court could properly draw the inference that such advances and drawings were deliberately and cunningly concealed from the annual accounts; that, on the contrary, there was evidence to show that whether or not such directors' current accounts were shown in the Company's accounts was a matter for the discretion of the Company's auditors 20

(viii) that if Beng Sung had properly discharged his responsibilities as a director of the Company he would have known about or could have discussed the respective accounts of Beng Siew and Beng Siang and that accordingly he must be taken to have acquiesced in the same 30

(ix) that in the circumstances the Federal Court was wrong in holding that the advances and drawings were oppressive and in disregard of Beng Sung's interests as a shareholder

In support of these submissions the Appellants will refer to the evidence relating to the advances and drawings. 40

(9) The purchase, reconstruction and maintenance of the yacht

(a) that the expenditure on the yacht was not "oppressive" within the definition set out in submission (1) hereinabove

(b) that whether or not such expenditure was in the interests of, or necessary for, the

business of the Company was a commercial decision within the discretion of the directors with which the Federal Court should not have interfered in the absence of fraud

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(c) that the Federal Court made no finding, or alternatively in the light of the evidence had no grounds for finding, that the expenditure on the yacht amounted to a fraudulent expropriation of the Company's funds; that their finding that the yacht was unnecessary to the Company's business and a "white elephant" was not a finding of fraud but merely a finding that the directors of the Company had made a wrong commercial decision

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(d) that, in any event, the Federal Court were wrong in finding as a fact that the yacht was unnecessary for the Company's business, in the light of evidence from Beng Siew and Mr Peattie to the contrary; that there was no evidence whatsoever to support the Federal Court's finding that the yacht was a "white elephant"

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(e) that even if (contrary to the Appellants' contention) the decision to purchase, reconstruct and maintain the yacht was commercially a wrong decision, and therefore not in the interests of the Company generally, such decision did not single out Beng Sung and the other minority shareholders for discriminatory or prejudicial treatment and thus was not conduct which came within subsection (1)(a) of section 181

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(f) that (contrary to the finding of the Federal Court) Beng Siew had a general authority to purchase equipment on behalf of the Company by virtue of the resolution of the board passed on 27th December 1967; that the expenditure on the yacht had been expressly approved by the board (whereof Beng Sung was a member) on 20th June 1969; that the expenditure had been shown in the Company's Accounts for the years ended 30th September 1968,

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1969 and 1970, which accounts had been passed and approved by the Company in general meeting without dissent; and that accordingly

(i) Beng Sung must be deemed to have acquiesced in the purchase, reconstruction and maintenance of the yacht and

(ii) if and to the extent that the expenditure on the yacht was an unauthorised act or breach of duty on the part of the directors or any one or more of them the same had been duly ratified by the Company in general meeting

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(g) that accordingly the Federal Court was wrong in holding that the purchase, reconstruction, and maintenance of the yacht was "oppressive" or "in disregard" of Beng Sung's interests as a member and wrong and had no jurisdiction to order the repayment by Beng Siew of the Company's expenditure on the yacht.

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In support of these submissions the Appellants will refer to the evidence relating to the yacht.

(10) Political donations made by the Company during the year 1968/1969

(a) that the Company had power to make donations and that whether or not donations were made and the amount thereof was a commercial decision for the directors with whose discretion the court should not interfere in the absence of fraud

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(b) that in the absence of fraud if the directors had made a wrong commercial decision with regard to the amounts or the recipients of the donations that decision, albeit not in the interests of the Company generally, would not amount to conduct which was "oppressive" or in "disregard of the interests" of Beng Sung and the other minority shareholders since it did not single them out for discriminatory or prejudicial treatment

40

(c) that on the evidence, the Federal Court had no grounds for holding that the donations were a misappropriation of the Company's property or fraudulent or conferred a benefit on Beng Siew or Beng Siong; in particular in arriving at its conclusion

(i) the Federal Court attached undue importance to the fact that a large number of donations were made in Beng Siew's own name

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(ii) the Federal Court wrongly rejected the finding of fact of B.T.H. Lee J. that there was no proof that the donations had been made for the personal or political advancement of Beng Siew

(iii) the Federal Court disregarded the evidence of Mr Peattie that there was "no jot of evidence to suggest anything improper" in relation to the donations

(iv) in relation to the donations to S.C.A. the Federal Court -

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(aa) gave undue weight to the fact that Beng Siew was the president of S.C.A.;

(bb) gave undue weight to the fact that he was unable to remember exactly how the donations had been spent;

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(cc) wrongly rejected the evidence of Beng Siew that the branch accounts of S.C.A. had been burgled, and in doing so wrongly admitted and relied upon evidence relating to 2 earlier occasions upon which Beng Siew had not supplied Beng Sung with accounts, notwithstanding that such evidence related to dissimilar circumstances and was not logically relevant to the issue in question:

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in support of the submission made in sub-paragraph (cc) above the Appellants will rely on dicta in the judgment of Lord Denning M.R. in the Court of Appeal in

Mood Music Publishing Co. Ltd.  
v. De Wolfe Ltd.  
[1976] 2 W.L.R. 451 at p.456

and on passages in their Lordships' speeches in the House of Lords in

(dd) gave undue weight to the fact that some of the donations shown in the Company's books as made to S.C.A. had been made through S.C.A. to other political parties

- (v) in relation to the donations shown in the Company's books as made to S.N.A.P. the Federal Court wrongly considered it relevant that the donations had been made inter alia to an ex-member of S.N.A.P. which had no bearing on the proprietary or impropriety of the donations in question 10
- (d) that, on the evidence, the donations had been made to protect and advance the legitimate business interests of the Company, and as such were unimpeachable
- (e) that the donations had been authorised by the Board (whereof Beng Sung was a member) and had been shown in the accounts for the year 1968/1969 which accounts had been presented to and passed by the Company in general meeting without dissent; and that accordingly (i) Beng Sung must be deemed to have acquiesced in the payment of such donations and (ii) if and to the extent that the payment of the donations was an unauthorised act or breach of duty on the part of the directors or any one or more of them the same had been duly ratified by the Company in general meeting 20 30
- (f) that accordingly the Federal Court was wrong and had no jurisdiction to order the repayment of the donations to the Company by Beng Siew.

In support of these submissions the Appellants will refer to the evidence relating to the donations.

(11) Generally 40

That in the circumstances the Federal Court was wrong and had no jurisdiction to grant the relief contained in the order of 4th August 1975.

26. Issue III arises for determination only if Issue II (or part thereof) is decided in the affirmative. The Appellants contend that Issue III should be decided in the negative.

10 The Appellants contend that the Court has no jurisdiction under section 181 either in the present or in any proceedings brought under section 181 to order a third party (i.e. a person other than the applicant or the company) to pay damages and/or compensation to the company in respect of breach of duty and/or trust or otherwise, and that accordingly in the present

20 (1) that an award of damages and/or compensation for past misconduct on the part of a director is not a remedy that is envisaged by section 181 or one that is available on a proper construction of that section

On the law

30 (2) that it was not the intention of the legislature to provide minority shareholders by means of section 181 with a substitute for a minority shareholders' action (hereinafter called a "derivative action") so as to enable them to circumvent the Rule in Foss v. Harbottle (1843) 2 Hare 461

(3) that the purpose of the section is to regulate the affairs of a company as between its various shareholders in their capacity as such and not as between a company on the one hand and third parties (for example shareholders in their capacity as directors) on the other

40 (4) that accordingly a minority shareholder may not use section 181 as a means of suing a director for a ratifiable breach of duty and/or trust in cases where the minority shareholder would not be able to bring a derivative action on behalf of the company against such director because of the Rule in Foss v. Harbottle

50 (5) that accordingly even in cases where a minority shareholder could, or might be

able, to bring a derivative action against the director on the grounds that the conduct complained of amounted to, or might amount to, a fraud on the minority the court cannot in the proceedings brought solely under section 181 award damages and/or compensation in respect of such misconduct because (in addition to the reasons set out in submissions (1) to (3) above) to do so would unfairly prejudice the third party in that he would be obliged to defend a claim of fraud in proceedings commenced by originating motion as opposed to in an action commenced by writ with the result that the allegations of fraud would not have to have been specifically and formally pleaded against him and he would not have had the procedural advantages of an action commenced by writ

10

- (6) that the correct procedure where it appears in section 181 proceedings that the company has a right of action as against a third party in respect of an unratifiable breach of trust and/or duty but will not proceed with the same, is for the Court to make an order in the exercise of its jurisdiction under section 181 that the company do institute proceedings against such third party

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In support of the above submissions the Appellants will rely on

dicta in the speech of Lord Denning in the House of Lords in

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Scottish Co-operative Wholesale Society Ltd. v. Meyer

[1959] A.C. 324 at pp 368-69

the judgment of the Court of Appeal delivered by Lord Justice Buckley in

Re Jermyn Street Turkish Baths Limited

[1971] 3 All E.R. 184

the judgment of Mr Justice Reynolds in

Irvin and Johnson Ltd. v. Oelofse Fisheries Ltd.

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[1954] 15 A.L.R. 231 at pp 243-244

The Report of the Company Law Committee (Chairman Lord Jenkins) dated 30th May 1962

Cmd. 1749 para. 206



the fact that, so far as the Appellants are aware, in none of the reported decisions on section 181 or on equivalent sections in other jurisdictions which have Companies Acts based on the British Companies Act 1948, has such an order for damages and/or compensation ever been made

Record

10 (7) that on the evidence the conduct of Beng Siew with regard to the purchase, reconstruction and maintenance of the yacht and/or the political donations did not, even if such conduct were oppressive and/or in disregard of Beng Sung's interests as a member of the Company, constitute a fraud on the minority and therefore was able to be ratified and was in fact ratified by the Company in general meeting; that in  
20 accordance with submission (4) above the Federal Court had no jurisdiction to make an order under section 181 for payment of damages and/or compensation by Beng Siew in respect of such ratifiable breach of duty

On the Evidence

30 (8) in the alternative to submission (7) above that if, contrary to the said submission, the said conduct of Beng Siew did amount to a fraud on the minority and as such was not capable of ratification by the Company in general meeting then in accordance with submission (5) above the Federal Court had no jurisdiction to make an order under section 181 for payment of damages and/or compensation by Beng Siew in respect of such unratifiable breach of duty.

On Issue III(B)

40 The Appellants contend that the Federal Court had no jurisdiction under section 181 to grant the relief under order (h) cancelling Beng Siew's power to make investments on behalf of the Company. In support of this contention they submit

50 (1) that the Court can only make an order under section 181(2) "with the view to bringing to an end or remedying the matters complained of" in circumstances where the complaint in respect of the particular matter is established

- (2) that, since the Federal Court held that none of the investments made by Beng Siew on behalf of the Company were oppressive to Beng Sung or in disregard of his interests as a member of the Company (since it held that the purchase of the yacht was not an "investment") no complaint was established in respect of Beng Siew's powers of investment
  
- (3) that accordingly the Federal Court had no jurisdiction to grant the relief under order (h) since the said relief would not bring to an end or remedy any matters in respect of which a complaint had been established. 10

On Issue III(C)

The Appellants contend that the Federal Court had no jurisdiction under section 181 to grant the relief under order (i) reducing and fixing the bonus payable to the Managing Director and other directors of the Company. In support of this contention they submit 20

- (1) that the Court can only make an order under section 181(2) "with the view to bringing to an end or remedying the matters complained of"
  
- (2) that no relief was sought nor complaint made in the Originating Motion or in the evidence in support thereof in respect of the amount of bonus payable to Beng Siew or to the other directors
  
- (3) that accordingly the Federal Court had no jurisdiction to grant the relief under order (i) since the said relief would not bring to an end or remedy any matters in respect of which a complaint had been made. 30
  
- (4) Further that on the evidence the conduct of Beng Siew, Beng Siong and the other directors with regard to the amount of salary and bonus paid to them did not, even if such conduct were (contrary to the Appellants' submissions on Issue II) oppressive and/or in disregard of Beng Sung's interests as a member of the Company, constitute a fraud on the minority and therefore was able to be ratified and was in fact ratified by the Company in general meeting; that in accordance with submission (4) in the Appellants' submissions on Issue III(a) above the Federal Court had no jurisdiction to make an order under Section 181 reducing and fixing the bonus payable to the Managing Director and other directors of the Company 40

27. On Issue IV the Appellants contend that the relief granted by the Federal Court was wholly inappropriate even on the assumption that the Court was entitled to exercise its jurisdiction under section 181 and that the complaints made against Beng Siew and Beng Siong by Beng Sung were justified. The Appellants contend that, on the aforesaid assumptions, the correct relief which the Federal Court should have granted to Beng Sung was an order that Beng Siew and/or Beng Siong or alternatively the Company should purchase his shares therein. In refusing to exercise its discretion in the said manner the Federal Court acted in disregard of principle and under a mistake of law and did not attach sufficient weight to certain relevant matters.

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In support of this contention the Appellants submit:-

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(1) that where a minority shareholder, with a shareholding that represents a very small percentage of the total issued share capital, establishes grounds for the exercise of the Court's discretion under section 181, then as a matter of principle and of practice the appropriate order is one ordering the "oppressors" or the company to purchase such minority shareholder's shares at a fair price or alternatively giving the "oppressors" the opportunity of doing so, such price to take into account whatever injury has been inflicted on such minority shareholder by the "oppressors"

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In support of this submission the Appellants will rely on: the decision of the House of Lords in

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Scottish Co-operative Wholesale Society Ltd. v. Meyer

[1959] A.C. 324 and in particular dicta in the speech of Lord Denning at p.369

dicta in the judgment of Mr Justice Pennycuick (as he then was) in

Re Jermyn Street Turkish Baths Limited

[1970] 3 All E.R. 57 at p. 67 to 69

the decision of the Supreme Court of Victoria in

Re Bright Pine Mills Pty. Ltd.

[1969] V.R. 1002

the course adopted by Mr Justice Lowe in

Re Straw Products

[1942] V L.R. 139 at p. 143

- (2) that in exercising their discretion and refusing to make an order for the purchase of Beng Sung's shares the Federal Court wrongly failed to appreciate or to attach any or any sufficient weight to
- (a) the fact that Beng Sung held only a minute percentage of the total issued shares of the Company
  - (b) the fact that no other minority shareholder in the Company supported Beng Sung in the complaints made by him against Beng Siew and Beng Siong
  - (c) the fact that
    - (i) the salaries and bonuses paid to Beng Siew, Beng Siong and the other directors
    - (ii) the expenditure on the purchase, reconstruction and maintenance of the yacht; and
    - (iii) the payment of the political donations had all been ratified by the Company in general meeting
  - (d) the fact that there had been a long history of hostility and family disputes between the parties
  - (e) the fact that if Beng Sung were to remain a member of the Company and if he, Beng Hui, or Beng King were to be a director thereof there would inevitably be confrontation between Beng Siew and Beng Siong on the one hand and Beng Sung on the other which would seriously impede the successful conduct of the Company's business
  - (f) the fact that, as found by B.T.H. Lee J. the proceedings had been brought by Beng Sung with a malicious and collateral purpose, and the Appellants repeat the facts set out above in sub-paragraph (3) of paragraph 23 of this Case

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10 (3) that the Federal Court erred in law in holding that because B.T.H. Lee J. had not thought fit to make an order for the purchase of Beng Sung's shares, there was no necessity for it to consider the point; in so holding the Federal Court failed to appreciate that the reason why the learned judge made no such order was because he held that no grounds had been established under section 181(1) for the exercise of the court's powers under section 181(2) and that accordingly he had no jurisdiction to make any order whether for the purchase of Beng Sung's shares or otherwise

20 (4) that the Federal Court erred in law in holding that it would be wrong to order the shares of an aggrieved minority shareholder to be purchased without his consent; that the Federal Court misinterpreted a passage in Buckley on the Companies Act (13th edition) at p. 423 in coming to its conclusion that an order for the purchase of the shares of a minority shareholder could only be made with his consent; that on a proper construction of section 181(2) the court does have power to order the purchase of the shares of an aggrieved minority shareholder notwithstanding that he does not consent to such purchase.

30 In support of this submission the Appellants will rely on

dicta of Mr Justice Pennycuick (as he then was) in

Re Jermyn Street Turkish Baths Limited

[1970] 3 All E.R. 57 at p.67

40 (5) that the Federal Court failed to appreciate or give due weight to the fact that Beng Sung had no reasonable grounds for refusing to consent to such an order for the purchase of his shares, in view of the fact that, as the principal remedy sought by Beng Sung was the winding up of the Company, he clearly had no objection in principle to receiving the asset value of his shares in a liquidation or otherwise and that he had no bona fide wish or reason to remain a shareholder in the Company in the future.

(6) that even if (contrary to the Appellants' contention on Issue III(A)) the Federal Court had jurisdiction under section 181(2) to order Beng Siew to pay damages and/or compensation to the Company, as a matter of discretion the Federal Court was wrong in principle to make such an award of damages and/or compensation rather than an order for the purchase of Beng Sung's shares: in support of this submission the Appellants will rely on the submissions made in relation to Issue III(A) in subparagraphs (2) (3) and (5) of paragraph 26 of this Case. 10

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28. In the alternative to the contentions made in paragraph 27 above and on the assumption that the Federal Court was correct in refusing to make an order for the purchase of Beng Sung's shares, the Appellants contend on Issue IV that in granting certain of the relief contained in the order of 4th August 1975 the Federal Court wrongly exercised its discretion and acted without attaching any, or any sufficient, weight to certain relevant matters. 20

In support of this contention the Appellants submit

(1) Generally in respect of all the relief granted by the Federal Court

that the Federal Court failed to take into account or attach any or any sufficient weight to the fact set out at sub-paragraph (2)(c) of paragraph 27 above; and that in the light of such evidence the correct order that the Federal Court should have made was 30

- (i) to direct that a general meeting of the Company be held to consider
  - (a) what remuneration by way of bonus should be paid in future to Beng Siew and to the other directors and at what time in the financial year such bonus should be paid
  - (b) what formalities should govern the operation of the Company's bank account 40
  - (c) whether any steps should be taken to obtain the payment to the Company by Beng Siew of sums paid out of the Company's funds for the purchase, reconstruction and maintenance of the yacht

(d) whether any steps should be taken to obtain the payment to the Company by Beng Siew of the political donations totalling \$1,154,800.69 made by the Company in the year 1968/1969

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(e) whether, in rotation, one of Beng Sung, Beng Hui and Beng King should permanently be a director of the Company; and

(f) whether Beng Siew should have power delegated to him to make investments on behalf of the Company without prior authorisation of the Board of Directors;

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(ii) to direct that at the said meeting Beng Siew should not exercise the votes attached to any of the shares in the Company held by him; and

(iii) to stand over Beng Sung's Originating Motion pending the outcome of the said meeting

in support of this submission the Appellants will rely on the course adopted by Mr. Justice Buckley (as he then was) in

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Hogg v. Cramphorn Limited [1976]  
Ch.254 at p.272.

or in the alternative

(2) in respect of order (a)

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that the Federal Court failed to take into account the evidence of Beng Siew to the effect that the yacht was required for the purposes of the Company and was in fact used for such purposes; and that in the light of such evidence the correct order should have been that the Company should sell the yacht with liberty to Beng Siew to purchase the said yacht and not that Beng Siew should be obliged to purchase the same and to repay with interest all sums expended by the Company on its purchase, reconstruction and maintenance;

(3) in respect of order (b)

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that the Federal Court failed to take into

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account all the evidence relating to the political donations and in particular the evidence of Beng Siew to the effect that the political donations were required to maintain the Company's licences and concessions and the undisputed evidence that certain of the donations were made in the Company's name; and that, in the light of such evidence, the correct order should have been that Beng Siew should repay to the Company only those political donations which were not only not made in the Company's name but also were proved to have been not in the interests of the Company

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(4) in respect of order (c)

that the Federal Court failed to take into account the evidence relating to the history of family disputes, the fact that neither of the two younger brothers, Beng Hui and Beng King, were parties to the Originating Motions, the fact that such an appointment would inevitably lead to confrontation and disputes between directors to the detriment of the business of the Company, and the fact that such an appointment would, perhaps contrary to the wishes of the other directors of and shareholders in the Company, confer benefits on the "watchdog" director (namely directors' fees and directors' bonuses) which would not be benefits to which the said director was entitled in his capacity as member; that accordingly the Federal Court was wrong to appoint a "watchdog" director;

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(5) in respect of order (h)

that the Federal Court should not have deprived the Company of the advantage and benefit of having immediate decisions taken by Beng Siew in relation to investment matters in the light of the evidence accepted by the Federal Court (i) that Beng Siew's business acumen and genius were responsible for the Company's success (ii) that "except in the case of the Malaysian Daily News" he could not be accused of having made any bad investments and (iii) that he had been given full authority by the board of directors to make investments;

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(6) in respect of order (i)

that, in the absence of the consent of Beng Siew and of the other directors of the Company and in the absence of any evidence as to what was the proper or appropriate bonus remuneration for Beng Siew and the other directors, the Federal Court was wrong to impose on Beng Siew and the other directors an arbitrary reduction in their bonus remuneration of 50 per centum and was wrong to fix the bonus for the future at the rate prescribed in the said order since in the

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nature of things the proper or appropriate percentage rate might change from time to time; that in reducing the rate of Beng Siew's bonus the Federal Court failed to take into account the fact accepted by it that Beng Siew's business acumen and genius were responsible for the Company's success.

10 29. The Appellants accordingly humbly submit that the judgment of the Federal Court of  
and that Beng Sung's application under  
section 181 should be dismissed with costs;  
in the alternative the Appellants humbly  
submit that the relief granted by the  
Federal Court to Beng Sung was wrong and  
should be varied by the substitution of an  
order that Beng Siew and/or Beng Siong and/or  
the Company do purchase his shares in the  
latter at a fair price or such other order  
20 as in the premises may seem just. The  
Appellants make the above submissions for the  
following (among other)

R E A S O N S

(1) BECAUSE the proceedings were not brought by Beng Sung bona fide with the object of obtaining the relief claimed in the Originating Motion but with the object of achieving a collateral and malicious purpose

30 (2) BECAUSE on the evidence and as a matter of law no grounds were established under section 181(1) of the Act such as to enable the Federal Court to exercise its powers under section 181(2) of the Act

40 (3) BECAUSE the Federal Court had no jurisdiction under section 181 of the Act to order Beng Siew to pay damages and/or compensation to the Company, nor to cancel his power of investment on behalf of the Company, nor to reduce or fix the rate of bonus payable to the Managing Director and other directors thereof

(4) BECAUSE in refusing to order the purchase of Beng Sung's shares and in granting the relief ordered the Federal Court exercised its discretion under section 181(2) in disregard of principle, under a mistake of law, and without attaching sufficient weight to relevant matters.

50 PART III - THE APPELLANTS' CASE ON THE  
CROSS-APPEAL

30. So far as the Appellants are aware, the

only issue which arises on the Cross-Appeal is whether or not in the exercise of its jurisdiction under section 181 the Federal Court should have ordered the Company to be wound up. On this Issue the Appellants respectfully submit that the decision of the Federal Court not to wind up the Company was right for the reasons stated in the judgments of B.T.H. Lee J. and of Gill C.J.

31. The Appellants accordingly respectfully submit that the Cross-Appeal should be dismissed and the decision of the Federal Court on this point affirmed for the following (among other)

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R E A S O N S

(1) BECAUSE in the circumstances of the case, winding up the Company would not be an appropriate remedy

(2) BECAUSE the decisions of B.T.H. Lee J. and the Federal Court on this issue were right for the reasons given in their respective judgments.

P.J. MILLETT

GRAHAM HILL

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ELIZABETH GLOSTER

IN THE JUDICIAL COMMITTEE OF THE PRIVY  
COUNCIL

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O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA  
(APPELLATE JURISDICTION)

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IN THE MATTER OF KONG THAI SAWMILL  
(MIRI) SDN. BHD.

- and -

IN THE MATTER OF THE COMPANIES ACT 1948

B E T W E E N :

KONG THAI SAWMILL (MIRI) SDN. BHD.  
LING BENG SIEW  
LING BENG SIONG

- and -

LING BENG SUNG  
and by Cross-Appeal

B E T W E E N :

LING BENG SUNG

- and -

KONG THAI SAWMILL (MIRI) SDN. BHD.  
LING BENG SIEW  
LING BENG SIONG

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CASE FOR: (1) KONG THAI SAWMILL (MIRI)  
SDN. BHD.  
(2) LING BENG SIEW  
(3) LING BENG SIONG

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COWARD CHANCE  
Royex House  
Aldermanbury Square,  
London EC2V 7ED.

Solicitors for the Appellants and the  
Respondents on the Cross-Appeal