DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANGKUASA RAYUAN)

RAYUAN SIVIL NO: 02-83-11/2012(M)

ANTARA

1. Koh Jui Hiong @ Koa Jui Heong
2. Kosian Holdings Sdn. Bhd.
3. Sim Sai Boy
4. Tan Kim Chua
5. Tonisons Jaya Holdings Sdn. Bhd.
6. Yam Wai Hong
7. Yeap Kai Lang
8. Goh Kian Heng
9. CIN Holdings Sdn. Bhd. … Appellants

DAN

Ki Tak Sang @ Kee Tak Sang … Respondent

Didengar Bersama

RAYUAN SIVIL NO: 02-84-11/2012(M)

ANTARA

Ki Tak Seng @ Kee Tak Sang … Appellant

DAN

1. Koh Jui Hiong @ Koa Jui Heong
2. Kosian Holdings Sdn. Bhd.
3. Sim Sai Boy
4. Tan Kim Chua
5. Tonisons Jaya Holdings Sdn. Bhd.
6. Yam Wai Hong
7. Yeap Kai Lang
8. Goh Kian Heng
9. CIN Holdings Sdn. Bhd. … Respondents

Coram: Richard Malanjum CJ (Sabah & Sarawak)
Hashim Yusoff FCJ
Ahmad Maarop FCJ
Hasan Lah FCJ
Jeffrey Tan FCJ

JUDGMENT OF THE COURT

These two related appeals arose from the section 181 (of the Companies Act) petition of petitioners 1 – 8 (hereinafter referred to as petitioners, as enumerated in the petition) who, collectively held, either directly or indirectly, a total of 867,500 shares or 21.6875% of the equity of CIN Holdings Sdn Bhd (9th petitioner), where the trial court entered judgment for the petitioners and granted the reliefs sought against the respondents (hereinafter referred to as respondents, as enumerated in the petition) who collectively held 74.5625% of the equity of CIN Holdings Sdn Bhd (CH).

In the course of arguments, both parties agreed to proceed with only Appeal 02-84-12, the result of which, both parties further agreed, would bind Appeal 02-83-12. We need therefore only to relate that leave was granted to the Appellant (1st respondent) in Appeal 02-84-12 to appeal against the order of the Court of Appeal in respect of the matter decided by the

trial court in the exercise of its original jurisdiction, on one question of law, namely:

> "Whether an award of damages can be made in a petition under section 181(1) of the Companies Act 1965."

The pertinent background facts are the following. CH, which was incorporated on 10.9.1983, was an investment company, held shares in public listed companies, including 1,346,100 shares (polymate shares) in the capital of Polymate Holdings Berhad, a company listed on the 2nd Board of the Kuala Lumpur Stock Exchange. At the time of presentation of the petition dated 13.9.2003, the Appellant, his wife (2nd respondent) and one Kivy Holdings Sdn Bhd (3rd respondent) which the Appellant controlled, collectively held 49.25% of the equity of CH. The rest of the respondents collectively held 25.3125% of the equity of CH. The balance 3.75% equity was held by a shareholder who was not a party in the proceeding. The Appellant, who was the managing director of CH from October 1983 to 2nd May 2002, was primarily responsible for the financial management of CH.

On 31.10.2001, the board of CH appointed an *ad hoc* committee to investigate its accounts. On or about 27.6.2002, the *ad hoc* committee reported, *inter alia*, that the Appellant had disposed of the property of CH, namely 446,100 polymate

shares, without the authority of the board or members of CH. The *ad hoc* committee also reported that the Appellant had committed irregular financial transactions during his tenure as the Managing Director. Petitioners 1, 3 and 4 reported those financial irregularities to the police. On 2.10.2002, the board of CH appointed external auditors to conduct a special audit of the accounts of CH for the years ended 31.12.1997 to 30.9.2001, and to review the report of the *ad hoc* committee. The external auditors upheld the report of the *ad hoc* committee and valued the net tangible asset of CH, as at 30.9.2002, as being of worth RM4.2353 per share, it being inclusive of the value of the 446,100 polymate shares.

The trial court found that the petitioners had proved the alleged irregular financial transactions (see page 89 of the Appeal Record) and that the purported removal of petitioners 1, 4 and 6 as directors was for an ulterior motive, namely to stifle the suit of CH against the Appellant. Essentially, on those two grounds, the trial court on 12.2.2009 granted orders/reliefs that (i) declared the purported removal of petitioners 1, 4 and 6 as directors and the appointment of a new secretary as null and void, (ii) restrained the respondents or their proxies to propose or vote on any resolution of CH to remove petitioners 1, 3, 4 and 6 as directors of CH, (iii) restrained the respondents to discontinue Malacca Civil Suit 22-77-2003 against the

Appellant, or to enforce any resolution passed on 13.8.2003 or 21.8.2003, (iv) ordered the Appellant to purchase the minority interest of the petitioners at RM4.2353 per share, and, (v) ordered damages to be assessed.

Damages were assessed by the same trial court who adjudged that the loss suffered by CH was the difference between the quoted value of the 1,346,100 polymate shares as at 30.9.2009 (RM3,029,851) and the quoted value of those same said shares as at 20.3.2009 (RM209,518.03). The trial court awarded the difference (RM2,820,332.97) as the quantum of damages, to CH.

At the Court of Appeal, the 1st – 8th Respondents and Appellant on 22.2.2012 entered into a consent order which set aside the buyout order (see 28 of Jilid 1). The sole issue before the Court of Appeal was the quantum of damages awarded to CH. The Court of Appeal held that CH was only entitled to damages for those 446,100 polymate shares disposed of by the Appellant without authority. The rest of the damages awarded by the trial court was set aside by the Court of Appeal who held that it was not proved that CH could not deal with those polymate shares without the concurrence of the Appellant. The Court of Appeal accordingly reduced the quantum of damages awarded to CH, to the aggregate of RM1.13 for each of those 446,100 polymate shares.

Ordinarily, facts must be settled before the law (see Arab Malaysian Finance Bhd v Meridien International Credit [1993] 3 MLJ 193, where Jemuri Serjan CJ Borneo, delivering the judgment of the Court, said " … facts have to be ascertained first before we can decide on the question of law arising from those facts … "; Gerald Mcdonald & Co v Nash & Co [1924] AC 625 where Lord Dunedin said " … there is a question of fact which must first be decided before we can consider the law … "; Jager the Cleaner Ltd v Li's Investments Co. [1979] B.C.J. No. 1006 where Taylor J. said " … the Courts refuse to lay down propositions of law in isolation, and insist rather that the facts of the particular case first be established before the consequences in law are decided … "; and Federal Insurance Co v Nakano Singapore (Pte) Ltd [1992] 1 SLR 390, where Chan Sek Keong J, as he then was, delivering the judgment of the Court of Appeal said "In the present case, there are substantial disputes of facts involved which must first be determined even before the issue of law arises").

The fact which we must first underscore and draw attention to before we get to the law, is that damages were awarded to CH *qua* petitioner in the same petition in which the affairs and or acts of CH were sought to be remedied. A company was a petitioner in a section 181 petition in which it was the object company and awarded damages. Given that

unusual fact, we need to address the standing of CH to present a section 181 petition before we proceed to answer whether damages could be obtained in a section 181 petition.

On the issue of the standing of CH and the award of damages, learned counsel for the Appellant orally submitted that "the 9th petitioner who was a nominal litigant was awarded damages", that the 9th petitioner had no standing to file a section 181 petition, and that damages could not be awarded [to CH] under section 181(2) of the Companies Act. Learned counsel for the 1st to 8th Respondents orally submitted that "a [separate] derivative action would only encourage duplicity of actions", and that in the instant case "it was in the alternative", meaning relief under section 181 or damages to CH. Incidentally, learned counsel for 1st – 8th Respondents informed that as CH had been wound up, the 1st – 8th Respondents would not enforce the buyout order but would only enforce the order of damages to be paid to CH. Only learned counsel for CH said that "it was a derivative action". Learned counsel for CH however submitted that the wrongdoer would be let off if the appeal were allowed. Given those divergent views of learned counsel, we need also to address whether the object company (CH) could be a nominal petitioner in a section 181 petition and whether the respondents and CH had brought a derivative action.

Section 181 of the Companies 1965 (section 181), the relevant parts, reads:

> "(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground—
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> (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 himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
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> (b) that some act of the company has been done or is threatened 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).
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> (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 cancel or vary any transaction or resolution;
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> (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

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

Under section 181(1), only a member of the company, a debenture holder of the company or, in the case of a declared company under Part IX, the Minister may petition for relief under the section (see Walter Woon on Company Law, Revised 3rd Edition at paragraph 5.54, on section 216(1) of the Singapore Companies Act Cap 50, which is in *pari materia* with section 181(1); see also Re H.R Harmer [1958] 3 ALL ER 689, where on section 210, Jenkins LJ said "It is to be observed … that the person permitted to apply to court under section 210 is 'any member of the company … This indicates that the oppression complained of must be complained of by a member of the company … "). A member of a company includes a member who holds his shares as a nominee (see Re McCarthy Surfacing Ltd Hecquet and ors v McCarthy and ors [2006] EWHC 832, where Sir Francis Ferris rejected the argument that the member who held its shares as a nominee could not complain of prejudice and therefore lacked standing), but the

beneficial owner of shares has no standing (Re: Quickdome Ltd (1988) BCLC 370).

Sub-section 216(7) of the Singapore Companies Act, which is not in section 181, also gives standing "to a person who is not a member of a company but to whom shares in the company have been transmitted by operation of law as it applies to members of a company; and references to a member or members shall be construed accordingly". In Malaysia, standing was widened by the Federal Court. In Owen Sim Liang Khui v Piasau Jaya Sdn Bhd, & anor [1996] 1 MLJ 113, the Federal Court per Sri Ram JCA, as he then was, delivering the judgment of the Court, held that the standing under section 181 "is the general rule, and not a universal rule … and there may be cases where an application of the general rule would be unfair or unjust".

> "Section 181 opens with the words: 'Any member'. There then follows a recital of the other persons who are declared to be entitled to move the court under the section. The expression 'member' is not defined in s 4 of the Act. However, the meaning of that term is to be found in s 16(6) of the Act which provides as follows:
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> > The subscribers to the memorandum shall be deemed to have agreed to become members of the company and on the incorporation of the company shall be entered as members in its register of members, and every other person who agrees to become a member of a company and whose name

is entered in its register of members shall be a member of the company.

A reading of s181 reveals that in the latter part of para (a) of sub-s (1) to that section, the legislature has used the expression 'members, shareholders … of the company'. However, it does not require much intellectual exercise to realize that the sub-section, read as a whole, when using the term 'member' and 'shareholder' refers to the same category of persons within the company. The result, therefore, is that, as a general rule, only one who comes within the terms of s 16(6) of the Act may present a petition under s 181. Put another way, in general, a petitioner who applies under the section must be able to demonstrate that his name appears on a company's register of members at the date of presentation of the petition: if he is unable to do so, then he has no standing to invoke the jurisdiction conferred upon the court by the section. In this respect, the section differs materially from s 459 of the Companies Act 1985 of the United Kingdom, for under the latter provision, past members have been expressly given locus standi to apply for relief under it.

We have, in stating the applicable rule as to standing under s181, taken great care in emphasizing that what has been expressed is the general rule, and not a universal rule. We have done so to bring home the point that there may be cases where an application of the general rule would be unfair or unjust.

Take, for instance, the case of a person who has agreed to become a member, but whose name has been omitted from the register of members. If it transpires that prior to the dispute leading to the presentation of the petition, a company or its board had always treated the complainant as a member, it would not be open to

> them to assert that the petitioner lacked locus standi. Examples may be multiplied without any principle emerging from them. Take the facts of this very case. Here, we have a fact pattern where the appellant's membership of the company had been terminated in circumstances which are being challenged by him on substantial grounds. The substantial ground he complains of is the deprivation of his membership in the company. He says that the circumstances attending this deprivation of membership falls within the framework of s181(1)(a) and (b). It is the company, acting through its board, that had deprived the appellant of the status of a member. Can the company be now heard to say that the appellant is no longer a member and is therefore disentitled from moving the court under s 181 of the Act and from questioning that very deprivation in proceedings brought under the section? We think not. For it does not lie in the mouth of the alleged wrongdoers to say that the appellant has no ground to stand on after having cut the very ground from under his feet.
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> The true principle which governs such cases as the present is housed in the doctrine of estoppel. The doctrine has reached a stage where it may be applied to prevent or preclude a litigant from raising the provisions of a statute in answer to a claim made against him in circumstances where it would be unjust or inequitable to permit him so to do."

In *Owen Sim*, the Federal Court pronounced that a person who claims membership, albeit disputed, has the requisite standing to apply to court under section 181. Even so, it was nonetheless affirmed in *Owen Sim* that a petitioner who cannot demonstrate that his name appears on a company's

register of members at the date of presentation of the petition has no standing to invoke section 181. The petition of a petitioner without standing would be struck out. Thus, in Verghese Mathai v Telok Plantations Sdn Bhd & ors [1988] 3 MLJ 216, where the petitioner was not a member of the 4th respondent company, Siti Norma Yaacob J, as she then was, struck out the 4th respondent company as a party in the petition presented under sections 181 and 218(1)(f) and (i). Her Ladyship said "As the petitioner's *locus standi* is regulated by statute, he must comply strictly with the mandatory provisions of s 181 and to that end there had been a misjoinder of parties when the fourth respondent was made a party to this petition". And in Ng Kok Pooi v Brunswood ID Sdn Bhd [2006] 7 MLJ 365, where the petitioner failed to make out the requisite standing, Ramly Ali J, as he then was, dismissed the petition without consideration of the merits of the complaint.

Locus standi is but one part to it. To obtain relief, the petitioner must prove "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 himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or that some act of the company has been done or is threatened 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)". For relief to be granted, first there must be a finding of oppression or unfair discrimination as aforesaid. That was emphasised in Re Kong Thai Sawmill (Miri) Sdn Bhd [1978] 2 MLJ 227, where Lord Wilberforce, delivering the advice of the Privy Council, said that section 181 must be applied according to its terms and its purpose. Lord Wilberforce also pronounced that "if a case of 'oppression' or 'disregard' is made out, the section [181] applies and it is no answer to say that relief might also have been obtained in a minority shareholders' action".

> "This section can trace its descent from s 210 of the United Kingdom Companies Act 1948 which was introduced in that year in order to strengthen the position of minority shareholders in limited companies. It also resembles the rather wider s 186 of the Australian Companies Act 1961. But s 181 is in important respects different from both its predecessors and is notably wider in scope than the United Kingdom section. In sub-s (1)(a) it adds disregard of the interests of members, etc to oppression as a ground for relief in this respect making explicit what was already inherent in the section (see Re HR Harmer Ltd[1959] 1 WLR 62 at p 75). It introduces a new ground in sub-s (1)(b) and, most importantly, in sub-s 2, which sets out the kinds of relief which may be granted, it provides for 'remedying the matters complained of' and states as a

specific type of relief that of winding up of the company.

Section 210 is differently constructed. Under it, the court is required to find that the facts would justify the making of a winding-up order under the 'just and equitable' provision in the Act, but also that to wind up the company would unfairly prejudice the 'oppressed' minority. The Malaysian section, on the other hand, requires (under sub-s 1(a)) a finding of 'oppression' or 'disregard', and then leaves to the court a wide discretion as to the relief which it may grant, including among the options that of winding the company up. That option ranks equally with the others, so that it is incorrect to say that the primary remedy is winding up. That may have been so before 1948 and even after the enactment of s 210, but is not the case under s 181.
Their Lordships consider it important that courts applying s 181 should do so according to its terms and its purpose and should not regard themselves as necessarily bound by United Kingdom decisions, which are based upon a different section, and in some cases restrictive. The same applies, though with less force, to reliance upon Australian decisions upon s 186.

There are three particular points of direct relevance in the present appeal. First, it is claimed by the appellants that the section is not a substitute for a minority shareholders' action and, specifically, that many if not most of the matters complained of would properly form the subject of such an action. Their Lordships agree with this in part. Relief cannot be sought under s 181 merely because facts are established which would found a minority shareholders' action: the section requires (relevantly) 'oppression' or 'disregard' to be shown, and these are not necessary elements in the action referred

to. But if a case of 'oppression' or 'disregard' is made out, the section applies and it is no answer to say that relief might also have been obtained in a minority shareholders' action. To the extent that the appellants so contend their Lordships do not accept their argument. (Emphasis added)

Secondly, for the case to be brought within s 181(l)(a) at all, the complaint must identify and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be evoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (Elder v Elder & Watson Ltd [1952] SC 49: their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in Thompson v Drysdale [1925] SC 311 315). Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.

> Thirdly, in a number of United Kingdom decisions it has been held that for s 210 to apply the complainant must show oppression continuing up to the date of proceedings (eg Re Jermyn Street Turkish Baths Ltd [1971] 1 WLR 1042); where there has been oppression in the past, the section does not bite. Their Lordships agree that the wording of the section (and the same is true of s 181(l)(a)) relates to a present state of affairs: 'are being conducted', powers 'are being exercised' are grammatically clear: the language may be contrasted with that of s 181(l)(b) which refers to an act of the company which has been done or threatened. But this argument must not be taken too far. What is attacked by sub-s (1)(a) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be 'oppressive' or 'in disregard' even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that, as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section. This point is well brought out in Re Bright Pine Mills Pty Ltd (1969) VR 1002 at p 1011-2."

Lord Wilberforce observed that section 181 is wider in scope than section 210 of the UK Companies Act 1948, due in part to the approach adopted by the courts that for the grant of relief under section 210, the court is required to find that the facts would justify the making of a winding-up order under the 'just and equitable' provision in the Act, but also that to wind up the company would unfairly prejudice the 'oppressed' minority

(see Alan Dignam & John Lowry on Company Law 4th Edition at paragraph 11.17). As a consequence of that approach, section 210 failed to fulfil an effective role in protecting the minority (Sourcebook of Company 2nd Edition by Harry Rajak at page 571). But under sections 459 - 461 of the UK Companies Act 1985, the court could grant relief if the petitioner could establish 'unfairly prejudicial conduct'. "Under sections 459 – 461 the court is not, therefore, faced with a death sentence decision dependant on establishing just and equitable grounds" (Re: a Company (No 00314 of 1989) ex p Estate Acquisition and Development Ltd (1991) BCLC 154).

Two other observations in *Re Kong Thai Sawmill* are also particularly pertinent. First, courts applying section 181 are not necessarily bound by decisions based on section 210 or, it would follow, by the succeeding provisions (section 459 of the UK Companies Act 1985 or section 996 of the UK Companies Act 2006) or by decisions of other jurisdictions based on differently worded provisions. And secondly, a section 181 petition could be maintained even if relief might also have been obtained in a minority shareholders' action (see also Re: A Company [1986] BCLC 68, where it was held by Hoffman J, as he then was, that the fact that the petitioners could also have brought a derivative action with respect to the conduct which was alleged to have contributed to the unfairly prejudicial

behaviour did not preclude them from seeking relief under section 459). But where the loss suffered by the minority shareholder is merely reflective of the loss suffered by the company, "the general rule is that the reflective loss is not recoverable by the minority, as the company is the proper plaintiff to bring an action against the wrongdoing controllers. Where no injury apart from injury to the company is shown, it is arguable that the minority shareholder ought to commence a common law derivative action or apply to court under section 216A [of the Singapore Companies Act] for leave to bring an action on behalf of the company instead of proceeding under section 216A to obtain corporate rather than personal relief" (Walter Woon on Company Law Revised 3rd Edition paragraph 5.81 at page 183). In Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corporation (M) Bhd & anor [2010] 6 CLJ 721, where the allegation was centred on breach of fiduciary duties owed by one shareholder to the only other shareholder, it was held by the Federal Court per Richard Malanjum CJ (Sabah & Sarawak), delivering the judgment of the Court, that breach of fiduciary duties by one shareholder to the other does not automatically equate to conduct proscribed under section 181(1). Still, "there have been a number of successful petitions where the allegation has centred on directors acting in breach of their financial duties … The law reveals that section 459 may be used to obtain a personal remedy despite the rule in *Foss v*

Harbottle … (see Alan Dignam & John Lowry on Company Law 4th Edition at paragraph 11.42).

The rule in Foss v Harbottle (1843) 67 ER 189 is that in any action in which the wrong is alleged to have been done to a company, the proper plaintiff is the company itself. Of the exceptions that have been developed, the one important exception to the proper plaintiff rule is the 'derivative action', which allows a minority shareholder to bring a claim on behalf of the company, in situations where the wrongdoer is in control of the company and will not "permit action to be brought in its name" (Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417, per Gopal Sri Ram JCA, as he then was, delivering the judgment of the Court of Appeal).

Leave to commence a derivative action is not part of the procedure under the general law (see Oates and Consolidated Capital Servies Pty Ltd and ors (2009) 257 ALR 558, where it was held by the New South Wales Court of Appeal per Campbell JA (Spigelman CJ and Allsop P concurring) that Wallersteiner v Moir (No 2) [1975] QB 373 is not authority for leave to commence a derivative action ever having been part of the procedure under the general law, and Roberts v Gill & Co and others [2010] 4 All ER 367, where the Supreme Court of England agreed with Campbell JA that "there is no requirement

under the general law relating to derivative actions for leave to be obtained before a plaintiff commences such an action").

There is however a requirement for leave to bring a statutory derivative action. Section 181A(1) provides that "A complainant may, with the leave of Court, bring, intervene in or defend an action on behalf of the company". Concurrently, section 181A(3) provides that "the right of any person to bring a derivative action to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is not abrogated". The right to bring a statutory derivative action therefore stands alongside the right to bring a common law derivative action. But there are differences between the two (see South Johnstone Mill Ltd & ors v Dennis and Scales (2007) 244 ALR 730, where Middleton J expounded on the effect of the equivalent provisions (sections 236 and 237) under the Australian Companies Act 2001, and imparted that "the statutory derivative action was introduced to remedy certain difficulties … in bringing a derivative action at general law under the exceptions to the rule in *Foss v Harbottle* … ". Companies Act of Malaysia, An Annotation, by Walter Woon & Andrew Hicks at 181A.3 observed that "the statutory derivative action … gives greater certainty to members contemplating the bringing of an action on behalf of the company"). Under section 181A(2), "proceedings brought under this section shall be brought in the

company's name". In common law derivative actions, the proceeding is not brought in the company's name. Companies Act of Malaysia, An Annotation, by Walter Woon & Andrew Hicks at 181.38 – 181.40 collated the following as the persons who could initiate action for the company:

> "It is all very well to say that the company must sue to enforce duties owed to it. But a company has no physical existence. The question is, which person or body of persons is the company for the purpose of initiating litigation? The question may be answered by reference to the articles of association. If the articles specify that a certain person or body may commence litigation for the company, that person may authorise the commencement of proceedings on behalf of the company … [where not specifically stated] the right to commence a corporate belongs to the person or body in whom the function of management is vested [usually board of directors] … if the board of directors refuses to commence litigation, the members in general meeting may do so … where a company is in liquidation, corporate actions may be commenced by the liquidator in the name of the company or in his own name … the directors no longer have the authority to instruct counsel to commence litigation once the company is in liquidation … when the company is undergoing judicial management, the power to sue belongs to the judicial manager … a director might commence a corporate action against his co-director as agent of necessity … if the company is threatening to do an act or enter into a transaction that is ultra vires, a member may sue to restrain it… If the board and general meeting do not wish to commence action or if they neglect to do so, a minority who feels that a wrong has been committed against the company will have no choice but to

> commence an action himself against the defendants. Such an action is known as a derivative action. This is because the member is not suing to enforce his own rights, but the company's. Any right that he has 'derives' from that of the company."

A common law derivative action is brought by a person or body on behalf of the company against defendants with the company as a nominal defendant. That was upheld in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & ors* [supra] where the Court of Appeal per Gopal Sri Ram JCA, as he then was, delivering the judgment of the Court, emphasised the basic principle that governs a common law derivative action:

> "We emphasize that it is not permissible for a plaintiff in a derivative action to sue in his own name, without indicating that he is bringing the action in a representative capacity and for the benefit of the company of which he is a shareholder. The correct position in law is that stated by Jordan CJ (NSW) in Australian Coal and Shale Employees Federation v Smith (1937) 38 SR (NSW) 48 at p 54:
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> > 'Thus, if the wrongdoers control the company and successfully resist all attempts to cause the company to sue, an individual shareholder suing on behalf of himself and all other shareholders except the defendants may sue to remedy the wrong, joining the company as defendant: Burland v Earle.'

> See also, Davis v Commercial Publishing Co of Sydney Ltd (1901) 1 SR (NSW) Eq 37; New South Wales Wood Process Ltd v Gorton (1915) 15 SR (NSW) 454; and Atherton v Plane Creek Central Mill Co Ltd [1914] QSR 73."

Under common law, in a dispute between shareholders, the company is a nominal respondent (see Re Crossmore Electrical and Civil Engineering Ltd [1989] BCLC 137). The rationale for that was explained in Re a company (No 004502 of 1988), ex parte Johnson [1992] BCLC 701, where Harman J explained:

> "However, Crossmore seems to have brought it to the profession's attention that on s 459 petitions, in particular, where a company is a necessary respondent, the company may be affected by the petition in two particular ways: it may have to give discovery of documents on what is sometimes called a pure s 459 petition, that is a petition simply seeking a buy-out by one section of the members of the other section of the members or some of them; further, it may be that the company itself might be ordered to buy back the shares which are in issue. Such an order plainly involves the company's interest and requires its representations for two reasons: firstly, the interest of creditors may be affected and, secondly, the interests of members, as a whole, may be affected in that the company should have sufficient moneys to carry on its business in a proper way after it has spent moneys on buying in shares. Apart from those interests, the company has no business whatever to be involved in the s 459 petition on the principle that, as was said in Pickering v

> Stephenson, the company's moneys should not be expended on disputes between shareholders"
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> (see also Re: C. G. & L. Investment Ltd and Wyatt Estates Ltd [1993] HKCU 0538)

"The company is made a respondent as a matter of course. All members of the company whose interest would have been affected by the misconduct alleged or would be affected by an order made by the court under its wide powers to grant relief should be made respondents … or served with it … even if the members are not alleged to have been concerned in the alleged [unfairly prejudicial conduct] and are members against whom no relief is directly sought" (Halsbury's Laws of England 4th Edition 2004 Reissue Volume 7(1) at paragraph 930; by contrast, in Re Little Olympian Each-Ways Ltd [1994] 2 BCLC 420, Lindsay J held that the court could strike out a petition against a respondent, if no remedy was sought against that respondent). "There is no hard and fast rule about who should be Respondent to a s 459 petition. Anyone against whom there is an arguable claim for relief from unfair prejudice can be included (see the judgment in Atlasview Ltd at para 56) … The court can also join as Respondent anyone with an interest in the outcome of the proceedings and whom it is desired to bind by the judgment given after trial" (Hawkes v Cuddy and ors [2007] EWHC 1789 (Ch) per Havelock-Allan QC).

While there is some latitude in the range of respondents who could be properly joined, there is however no such latitude in the joinder of petitioners. "There is in my view no room for nominal petitioners … " (Atlasview Ltd and ors v Brightview Ltd and ors [2004] 2 BCLC 191 at paragraph 31 per Jonathan Crow, sitting as a deputy judge of the High Court). "The interests of a member of a company that the court has jurisdiction to protect under section 459 are only his interest as a member. While those interest are not necessarily limited to his strict legal rights under the constitution of the company, they do not extend to interest of his in some other capacity" (Re: J E Cade & Son Ltd [1992] BCLC 213 per Warner J).

As seen from the foregoing, CH had no standing under section 181. CH could have been but was not joined as a nominal respondent. CH could not be a nominal petitioner. Yet, CH was the 9th petitioner, to pursue what could only have been a derivative action. The hallmarks of a derivative action were everywhere. First, the action was brought by the minority in the name of CH against the majority. Secondly, the complaint concerned alleged wrongdoings by the majority against CH. And thirdly, the damages awarded was to compensate CH for loss caused by the misconduct of the Appellant against CH. "In my judgment the distinction between misconduct and … [mismanagement] does not lie in the

particular acts or omissions of which the complaint is made, but in the nature of the complaint and the nature of the remedy necessary to meet it … If the whole gist of the complaint lies in the unlawfulness of the acts or omissions complained of, so that it may be adequately redressed by the remedy provided by law for the wrong, the conduct is one of misconduct *simpliciter*" (Re: Charnley Davis Ltd (No. 2) [1990] BCLC 760, per Millett J). Damages were not awarded to CH for mismanagement. The damages awarded by the trial court, albeit reduced by the Court of Appeal, were to compensate CH for loss caused by the Appellant's fraudulent disposal of its 446,000 polymate shares. Damages were awarded to CH for misconduct towards it, which was actionable by CH itself, by a derivative action (see Re: Charnley Davis Ltd (No. 2) [1990] BCLC 760, where Millett J, as he then was, concluded that where the essence of the claim was not mismanagement but consisted of breaches of duty or other misconduct actionable by the company itself, the proper vehicle for relief was a derivative action; and A R Evans Capital Partners Limited v Gen2 Partners Inc [2012] HKCU 1284, where Barma J held that where the claims concern misconduct, they belong to a derivative action). Damages were not awarded to CH under sub-sections 181(1)(a). That clearly evinced that the respondents had pursued a derivative action (see Clark v Cutland [2004] 1 WLR 783, where the derivative action was later consolidated with the petition under section 459).

Damages were nonetheless awarded to CH, which begs the [leave] question "whether an award of damages can be made in a petition under section 181(1) of the Companies Act 1965?", or rather in the light of the instant facts, "whether an award of damages can be made [to the object company as a co-petitioner] in a petition under section 181(1) of the Companies Act 1965?".

Damages to members is not amongst the reliefs mentioned in section 181(2) which provides that "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 (a) direct or prohibit any act or cancel 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 (e) provide that the company be wound up. That is not however to say that the court could not award any other relief. Section 181(2) is a non-exhaustive list that does not limit other types of relief that the court could fashion,

with the view to bringing to an end or remedying the matters complained of (see Company Law in Context, Text and Materials, by David Kershaw at page 635). As said by Lord Wilberforce in Re: *Kong Thai Sawmill*, section 181 "leaves to the court a wide discretion as to the relief which it may grant, including among the options that of winding the company up". That discretion is evidently wide enough to order reliefs not mentioned in section 182(2), as could be seen from the following cases, albeit based on section 210, which read:

> "210 Alternative remedy to winding up in cases of oppression
>
> Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or, in a case falling within subsection (3) of section one hundred and sixty-nine of this Act, the Board of Trade, may make an application to the court by petition for an order under this section.
>
> (1) If on any such petition the court is of opinion—
>
> (a) that the company's affairs are being conducted as aforesaid; and
> (b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up;

> the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."

In Scottish Co-operative Wholesale Society Ltd v Meyer & anor (1958) 3 WLR 404, the facts were as follows. The co-operative formed a subsidiary company to participate in the manufacture and sale of rayon materials and to get licences to manufacture rayon cloth. The company traded for several years and earned substantial profits. In 1951, the society sought to purchase the shares of the respondents at less than their true value but the suggestion was rejected. The society dropped the attempt but adopted a policy of transferring the company's business to a new department within its own organization, thereby forcing down the value of the company's shares. The respondents were not informed of that plan. In consequence, the company's business came virtually to a standstill and the value of its shares was greatly reduced. It was common ground that at the date of the petition it was just and equitable that the company should be wound up. The society was ordered to purchase the respondents' shares. On appeal, some criticism was made of the relief given by the court, which was to purchase the respondents' shares at the fair

value "had there been no oppression". The appeal was unanimously dismissed. Both Viscount Simonds and Lord Denning espoused that the court could order compensation for injury inflicted by oppressors.

> Viscount Simmonds - "It was said that only that relief could be given which had its object and presumably its effect the 'bringing to an end of the matters complained of" and that an order upon the society to purchase the respondents' shares in the company did not satisfy that condition. This argument is without substance. The matter complained of was the oppression of the minority shareholders by the society. They will no longer be oppressed and will cease to complain if the society purchase their shares. Finally, it was said that the court had not properly exercised its discretion in fixing a price of £3 15s 0d per share. I see no ground for interfering with this decision. Necessarily a price cannot be scientifically assessed, but I heard no argument, nor had any evidence called to my attention, which suggested that their Lordships had acted upon any wrong principle or adopted a measure too generous to the respondents."

> Lord Denning – "So I would hold that the affairs of the textile company were being conducted in a manner oppressive to Dr. Meyer and Mr. Lucas. The crucial date is, I think, the date on which the petition was lodged - July 14, 1953. If Dr. Meyer and Mr. Lucas had at that time lodged a petition to wind up the company compulsorily, the petition would undoubtedly have been granted. The facts would plainly justify such an order on the ground that it was "just and equitable" that the company should be wound up: see *In re Yenidje Tobacco Co. Ltd.* [1916] 2 Ch. 426; 32 T.L.R. 709. But

such an order would unfairly prejudice Dr. Meyer and Mr. Lucas because they would only recover the break-up value of their shares. So instead of petitioning for a winding-up order, they seek to invoke the new remedy given by section 210 of the Companies Act, 1948. But what is the appropriate remedy? It was said that section 210 only applies as an alternative to winding up and that an order can only be made under section 210 if the company is fit to be kept alive: whereas in this case the business of the company was virtually at an end when the petition was lodged, and there was no point in keeping it alive. If the co-operative society were ordered, in these circumstances, to buy the shares of Dr. Meyer and Mr. Lucas, this would amount, it was said, to an award of damages for past misconduct - which is not the remedy envisaged by section 210.

"Now, I quite agree that the words of the section do suggest that the legislature had in mind some remedy whereby the company, instead of being wound up, might continue to operate. But it would be wrong to infer therefrom that the remedy under section 210 is limited to cases where the company is still in active business. The object of the remedy is to bring "to an end the matters complained of," that is, the oppression, and this can be done even though the business of the company has been brought to a standstill. If a remedy is available when the oppression is so moderate that it only inflicts wounds on the company, whilst leaving it active, so also it should be available when the oppression is so great as to put the company out of action altogether. Even though the oppressor by his oppression brings down the whole edifice - destroying the value of his own shares with those of everyone else - the injured shareholders have, I think, a remedy under section 210.

> One of the most useful orders mentioned in the section - which will enable the court to do justice to the injured shareholders - is to order the oppressor to buy their shares at a fair price: and a fair price would be, I think, the value which the shares would have had at the date of the petition, if there had been no oppression. Once the oppressor has bought the shares, the company can survive. It can continue to operate. That is a matter for him. It is, no doubt, true that an order of this kind gives to the oppressed shareholders what is in effect money compensation for the injury done to them: but I see no objection to this. The section gives a large discretion to the court and it is well exercised in making an oppressor make compensation to those who have suffered at his hands.
>
> True it is that in this, as in other respects, your Lordships are giving a liberal interpretation to section 210. But it is a new section designed to suppress an acknowledged mischief. When it comes before this House for the first time it is, I believe, in accordance with long precedent - and particularly with the resolution of all the judges in *Heydon's case* (1584) 3 Co. Rep. - that your Lordships should give such construction as shall advance the remedy and that is what your Lordships do today."

In Re Jermyn Street Turkish Baths Ltd [1970] 3 All ER 57, Pennycuick J said "Section 210 gives the court an unlimited judicial discretion to make such order as it thinks fit with a view to bringing to an end the matters complained of, including an order for buying out one faction by the other ... in prescribing the basis on which the price on such a sale is to be calculated, the court can in effect provide compensation for whatever

injury has been inflicted by the oppressors". On appeal (Re Jermyn Street Turkish Baths Ltd [1971] 3 All ER 184), the Court of Appeal per Buckley LJ restated that "s 210 confers a very wide discretion on the court as to the form of relief to be granted under the section".

Both *Scottish Co-operative Wholesale Society Ltd v Meyer* and *Re Jermyn Street Turkish Baths Ltd [1970]* were referred to the Court of Appeal in Re Bird Precision Bellows Ltd [1985] 3 All ER 523, where Oliver LJ voiced his understanding of those 2 cases.

> "We have been referred to a number of authorities, first of all to a decision of Pennycuick J in Re Jermyn Street Turkish Baths Ltd [1970] 3 All ER 57 at 67, [1970] 1 WLR 1194 at 1208, and I read an extract from his judgment. He said:
>
> > 'Section 210 gives the court an unlimited judicial discretion to make such order as it thinks fit with a view to bringing to an end the matters complained of, including an order for buying out one faction by the other. It is not disputed on behalf of the respondents that, in prescribing the basis on which the price of such a sale is to be calculated, the court can in effect provide compensation for whatever injury has been inflicted by the oppressors.'
>
> In Scottish Co-op Wholesale Society Ltd v Meyer [1958] 3 All ER 66 at 89, [1959] AC 324 at 369 Lord Denning said:

> 'One of the most useful orders mentioned in the section—which will enable the court to do justice to the injured shareholders—is to order the oppressor to buy their shares at a fair price; and a fair price would be, I think, the value which the shares would have had at the date of the petition, if there had been no oppression. Once the oppressor has bought the shares, the company can survive. It can continue to operate. That is a matter for him. It is, no doubt, true that an order of this kind gives to the oppressed shareholders what is, in effect, money compensation for the injury done to them; but I see no objection to this. The section gives a large discretion to the court, and it is well exercised in making an oppressor make compensation to those who have suffered at his hands.'

What I think is being suggested here is that these citations in some way support the respondents' arguments because it is said that what in effect the judge was seeking to do was to compensate the oppressed shareholders, and that that was not within the terms of the order. I do not read what the judge did as doing that at all. Speaking for myself, I have been quite unable to see why these two authorities should be supposed to support the arguments which the respondents have advanced. They seem to me to be entirely against them because, as it seems to me, they indicate as clearly as can be the wide discretion which the court has in directing the basis on which shares should be valued for the purpose of a purchase ordered under this section. <u>It may be true that it can be compensatory, but what the court is required to do, in the exercise of its very wide discretion, is to do what is just and equitable between the parties</u>." (Emphasis added)

In Re A Company ex parte Shooter [1990] BCLC 384, 394, Harman J stated that the words "make such order as it thinks fit" in section 210 "plainly gave wide jurisdiction" to the court to make orders unlike anything mentioned in section 210.

> "Those words, ["to make such order as it thinks fit"] plainly, gave very wide jurisdiction, as is demonstrated by the decision of Mr Justice Roxburgh, affirmed by the Court of Appeal in In Re HR HARMER LTD, reported in [1959] 1 WLR 62. There Mr Justice Roxburgh had granted, and the Court of Appeal affirmed, an order that the respondent, of whose conduct complaint was made, should be restrained from interfering in the affairs of the company, that he should be appointed president of the company for life without any rights or powers or duties, and that he should be paid a salary. Those remedies were entirely unlike anything mentioned in Section 210(2) and, plainly, could only be granted if the Court had very wide powers to make any orders it thought fit which were useful in controlling the conduct of the company's affairs for the future. In my judgement, the words of Section 461 are extremely wide and are not cut down by any of the authorities shown to me. (Emphasis added)
>
> In my view, there is power here to make such orders as I consider will enable the company, for the future, to be properly run, and for its affairs to be under the conduct of somebody in whom shareholders generally can have confidence that the company will be properly conducted."

The principle, that the buyout price should put the party injured to the same position as he would have been if not for

the wrong by an order of a compensatory nature, was recently applied in Re Annacott Holdings Ltd; Attwood v Maidment & ors [2012] EWHC 1662, where Hodgson QC (sitting as judge of the High Court) said:

> "The most appropriate way of addressing Mr Maidment's conduct was to take a valuation of Annacott on the basis of the state of affairs that had pertained immediately before Mr Maidment began the transfer of the properties to himself. If I were to do that, it seemed to me only fair that Mr Attwood should also be awarded the equivalent of interest on the amount applicable to the value of his shares as at 1 October 2005. At para 18, I said that the appropriate way to redress the unfair prejudice suffered by Mr Attwood as a result of Mr Maidment's conduct was to order a buy-out on the basis of values as of October 2005, together with quasi-interest. I said that I had had regard to the overriding principle applicable to the assessment of damages generally: that a sum of money should be awarded which would put the party – in this case Mr Attwood – who had been injured in the same position as he would have been in if he had not sustained the unfair prejudice for which he was now receiving his compensation or reparation." (Emphasis added)

But where the relief had satisfied the complaint, John Randall QC, sitting as judge of the High Court in Allmark v Burnham & anor [2005] EWHC 2717, refused to award general damages to compensate the unfair prejudice suffered.

The United Kingdom is far from being the only jurisdiction to grant relief of a compensatory nature.

Locally, in Automobiles Peugeot SA v Asia Automobile Industries Sdn Bhd & ors [1988]3 MLJ 209, the amendment sought by the petitioner to make the 2nd respondent personally liable to pay damages to the company was resisted by the 2nd respondent who argued that the petitioner as a minority shareholder could not question acts done by him with the support of the majority, and that the petitioner had to file another writ by way of a derivative action. Siti Norma J, as she then was, however held that there is now statutory sanction for a shareholder with a minority interest to institute proceedings against directors from conducting the affairs of the company in a manner prejudicial to the company, and accordingly allowed the amendment. In Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd, [1994] 2 MLJ 789, Anuar J, as he then was, ordered the oppressor to purchase the shares of the oppressed members and to pay compensation for the loss sustained by them. And in Eric Lau Man Hing v Eramara Jaya Sdn Bhd [1998] 7 MLJ 528, Selventhiranathan J, as he then was, held that the financial irregularities, when viewed in total, amounted to oppressive conduct. His Lordship ordered the oppressor to buy the shares or pay damages.

In Singapore, in Kumagai Gumi Co Ltd v Zenecon Pte Ltd [1995] 2 SLR 297, the trial court ordered winding up, buyout, and reimbursement of the loss suffered by the company. On appeal, it was submitted that the jurisdiction of the court to grant relief under section 216(2) was limited by its express terms, the limitation being that the relief granted must be 'with a view to bringing to an end or remedying the matters complained of', and that the 'matter complained of' meant a matter within section 216. On that basis, it was submitted that the learned judge had no power to make the following orders: that Low pay to KPM the sum of $2,982,517.17; that Low purchase or procure the purchase of KPM's shares in KZ Investments, and that Zenecon pay to KZ the rental for the use of certain items of equipment. Both sides referred to various Australian and English authorities to show the extent of the orders which the courts in those jurisdictions had made under the corresponding statutory provisions. However, it was held by the Singapore Court of Appeal per LP Thean JA, delivering the judgment of the court, that the corresponding Australian and UK provisions (section 320 of the Australian Companies Code and section 461(1) of the UK Companies Act 1985) were much wider than section 216. Instead, the Singapore Court of Appeal found Malaysian cases to be of greater assistance:

> "However, there are a couple of Malaysian cases which are of some assistance. In Kumagai Gumi v Zenecon-

Kumagai [1994] 2 MLJ 789 at p 829, Anuar J, in dismissing the petition and allowing the cross-petition made, inter alia, in respect of the cross-petition under s 181 of the Malaysian Act, an order requiring the petitioner to pay compensation to the second, third and fourth respondents for the loss sustained by those respondents, and the amount of such compensation to be determined at an inquiry to be conducted before him. The third respondent there was none other than Low himself. With the exception that para (c) of s 216(2) of our Act is not present in s 181 of the Malaysian Act, s 181 is in pari materia to our s 216(2) of our Act.

In fact, the very question before us was decided in another Malaysian case. In Automobiles Peugeot SA v Asia Automobile Industries [1988] 3 MLJ 209, the petitioner sought to amend the petition under s 181 of the Malaysian Act by adding a prayer seeking to make the alleged oppressor personally liable to pay damages to the company in which the oppression was said to have occurred. It was argued that the proper course was for the petitioner to file a writ by way of a derivative action. This was rejected by Siti Norma Yaakob J, who held at p 210:

> 'The injured party in this action is the first respondent and s 181(1) and (2) of the Companies Act 1965, under which this petition is presented and relief sought, was specially enacted to overcome the problem posed by [(1843) 2 Hare 461], and to strengthen the position of the minority shareholders in limited companies. Since there is now statutory sanction for a shareholder with a minority interest in a company to institute proceedings against directors from conducting the affairs of the company in a manner prejudicial to the company,

there is no longer any need for a derivative action to be filed by the petitioner in the manner suggested by the second respondent as that would amount to a duplicity of actions relating to the same subject matter.'

The learned judge in that case concluded further down as follows:

'Since a claim for a [sic] damages against the second respondent would be a natural consequence should the wrong acts complained of by the petitioner be established, I had concluded that the particular amendment objected to by the second respondent could not prejudice him in any way and that it is necessary in the circumstances to enable the court to determine the issues in dispute between the parties.'

In the landmark Malaysian case of Re Kong Thai Sawmill (Miri); Kong Thai Sawmill (Miri) v Ling Beng Sung [1978] 2 MLJ 227 … "

The Singapore Court of Appeal duly affirmed the trial judge's order that the company be compensated for the use of equipment belonging to the company, and would have affirmed the order that the errant director reimbursed the loss sustained by the company but for the lack of evidence (see Walter Woon on Company Law Revised 3rd Edition at paragraph 5.83).

In Yeo Hung Kiang v Dickson Investment (Singapore) Pte Ltd & ors and another appeal [1999] 2 SLR 129, it was held

by the Singapore Court of Appeal per Karthigesu JA, delivering the judgment of the court, that section 216(2) of the Singapore Act gave the court a very wide discretion not just to bring to an end the matters complained of but also to 'remedy' such matters, and that in an appropriate case the discretion was wide enough to include an element of compensation in the relief granted. And in Low Peng Boon v Low Janie [1999] 1 SLR 761, the Singapore Court of Appeal per LP Thean JA, delivering the judgment of the court, ordered the oppressor, as a consequent order to winding up, to make restitution to the company.

There is also jurisdiction in Hong Kong to grant corporate relief. In Re: Chime Corporation (2004) 7 HKCFAR 546, the Hong Kong Court of Appeal accepted that in the rare and exception case, the court might exercise its jurisdiction to order payment of compensation or damages to the company itself in a [Hong Kong] section 168A petition. That view was reiterated by the Hong Kong Court of Final Appeal in Re: Shun Tak Holdings [2009] 5 HKLRD 743 (see *A R Evans Capital Partners Limited v Gen2 Partners Inc supra* at paragraph 74).

We are mindful that the Hong Kong Ordinance is differently worded. The HK Ordinance provides that "the court may order payment by any person of such damages and interest on those damages as the court may think fit to any members (including the member who presented the petition) of

the specified corporation, whose interests have been unfairly prejudiced by the act or conduct" (section 168A(2)(b) of the Ordinance), although "the damages that may be ordered by the court under subsections (2)(b) … does not entitle a member, past member or then member of a specified corporation to recover by way of damages any loss that is solely reflective of the loss suffered by the specified corporation which only the specified corporation is entitled to recover under the common law" (section 168A(2C) of the Ordinance). While section 181 is silent, the HK Ordinance specifically provides that the court may order payment of damages to members. But that is not to say that in relation to the corresponding provision, the law in Hong Kong is different. Section 168A is a codification of the common law, which is, that (i) damages may be ordered to be paid to members affected and (ii) that only the company is entitled to recover the loss that is solely reflective of the loss suffered by the company. Nothing new has been introduced by section 168A of the HK Ordinance that is not already in the common law.

The authorities positively asserted that relief of a compensatory nature to an oppressed member is within the discretion of the court to award. In a suitable case, the court could even award corporate relief to the object company.

Need it be said, that the Respondents submitted, but of course, that section 181 is wide enough to allow the court to award damages should the facts so warrant. The Appellant however argued that "the compensatory element, if at all, applies to the determination of a fair price for the shares of the oppressed party which the oppressor is ordered to buyout" and that an award of damages would not satisfy the condition that the order 'be made with a view to bringing to an end the matter complained of'. Learned counsel for the Appellant cited Re Irish Press plc v Ingersoll Irish Publications [1995] 2 I.R. 175, where Balyney J, delivering the judgment of the Irish Supreme Court, pointedly disagreed with the submission that section 205 of the Irish Companies Act 1963 was so wide as would permit damages to be awarded, as authority that damages would not be awarded under section 181.

But we however find that what was actually held in Re *Irish Press plc* was that the award of damages could not be granted on the facts of the case, which were the following. Irish Press plc (PLC), the owner of the three well-known Irish newspapers - Irish Press, Evening Press and Sunday Press - was short of capital. In 1988, Mr Ralph Ingersoll, who had substantial interests in the newspaper business, invested £5 million in the 3 newspapers, in manner carried out by the incorporation of 2 new companies, namely Irish Press

Newspapers Limited (IPN) to run the three newspapers, and Irish Press Publications Ltd (IPP) to hold the right to the titles of the three newspapers. PLC duly assigned the business of the three newspapers to IPN. The right to the titles of the three newspapers was assigned to IPP. As agreed, PLC and Ingersoll Irish Publications Ltd (IIP) became equal shareholders in the two new companies (IPN and IPP), while the management of IPN was entrusted to Ingersoll Publications Ltd (IPL).

The relationship between PLC and IIP started well. But in 1991, due to a management buy-out, Mr Ingersoll lost control of IPL. It became necessary to assign the management agreement which IPL had with IPN. Mr Ingersoll turned his attention to IPN, and over the next twelve months he exercised powers to appoint the chief executive of IPN and IPP. For a variety of reasons, the good relationship which had existed before simply broke down. In 1993, PLC presented a petition against IIP under s 205 of the Irish Companies Act, 1963. The relief sought was an order providing for the termination of the management agreement and for an order restraining IIP from making any payment of fees or expenses under the management agreement. The petition also sought an order directing IIP to procure the repayment to IPN of monies paid under the management agreement. IIP alleged that PLC had been guilty of oppression. Amongst others, PLC claimed for

damages for breach of contract and/or breach of duty and/or breach of fiduciary duty. Barron J held that IIP had been guilty of oppression, by insisting on the management agreement still being operated when in fact it had come to an end, and by the *de facto* take-over of IPN and IPP by appointing nominees for the purposes of the interests of IIP and not in the interests of IPN.

Inter alia, Barron J made the following orders:-

> "1. The court doth declare that the affairs of Irish Press Newspapers Ltd and Irish Press Publications Ltd [2 new companies] are and were being conducted by the respondent and that the powers of the 'A' directors are and were being exercised in a manner oppressive to the petitioner and in disregard of its interest as a member.
>
> 2. It is ordered that the respondent do sell its shareholding in Irish Press Newspapers Ltd and Irish Press Publications Ltd [2 new companies] to the petitioner at a price to be determined by the court comprising a judge sitting alone - such shares to be held upon trust for the petitioner and purchaser until completion of the transfer but until then the exercise of the beneficial rights attaching to such shares shall be subject to such directions as the court may make from time to time."

Commenting on those orders of Barron J., the Irish Supreme Court held that "the formal order drawn up does not set out adequately the precise form of the monetary relief to

which the learned trial judge held that PLC was entitled". The Irish Supreme Court found it necessary to refer to the judgment itself to see what was ordered:

> "It is necessary to refer to the judgment itself to see what this was. At p 84 of his judgment the learned trial judge said:-
>
> > 'Having regard to the nature of the oppression and the consequential losses to the companies as a result, the nature of the relief must be designed not only to bring an end to the matters complained of, but also to compensate the petitioner and the companies for the losses sustained. This can best be done by directing a purchase of the respondent's shareholding'. (Emphasis added)
>
> The learned trial judge then went on to say:-
>
> > 'The price to be paid for such shares shall be the present value of the respondent's shareholding having regard to the terms of the subscription and shareholders' agreement but not to the terms of the management agreement on the basis that there shall have been made good in money terms all actual financial loss to the company by reason of the oppression. In addition, the petitioner shall be entitled to recover from the respondent the drop in value, if any, between the present value of its shareholding upon the same basis and the value of its shareholding on the 14th November, 1991, being a date contemporaneous with the commencement of the oppression but before it commenced having regard to the terms of both agreements.' (Emphasis added)

Pursuant to the direction contained in the order of the 20th December, 1993, the adjourned hearing for the purpose of valuing the shares in IPN and IPP and assessing the damages to which PLC had been held to be entitled, was heard over fourteen days in early 1994 and a reserved judgment was delivered by Barron J on the 13th May, 1994. The main provision of the order made on the 16th May, 1994, for the purpose of giving effect to the said judgment, were as follows:-

1. It was ordered that IIP should repay to IPN and IPP the sum of £6 million and to PLC the sum of £2,750,000.

2. The court assessed the value of IIP's shareholding at the sum of £2,250,000 and directed PLC to pay such sum to IIP on payment of the amounts referred to in the preceding paragraph and upon the execution of a transfer to PLC of IIP's shares in IPN and IPP.

3. It was ordered that the payments to be made by IIP were to be effected within two months from the date of the order.

4. It was ordered that any sums which might have to be paid to IIP in respect of loans made by IIP to IPN or IPP should not be payable until all of the monies payable by IIP under the order have been paid.

5. It was ordered that all of the shares in IPN and IPP then held by IIP be transferred to PLC two months after the date of the order

6. It was ordered that PLC do recover against IIP its costs of the assessment and of the order when taxed and ascertained."

With that clarification by the Irish Supreme Court, it should therefore be observed that Barron J not only ordered the respondent (IIP) to sell its shares in the 2 new companies but also to repay £6m to the 2 new companies and to pay £2.75m to the petitioner (PLC).

On appeal, the finding of oppression and the order that IPP sell its shares to PLC were not contested. IIP however contended that "the oppression found by the learned trial judge had not been the cause of any of the losses sustained by the [2 new] companies and that, even if this were not the case, the Court had no power to award damages in a petition brought under s 205 of the Companies Act, 1963". IIP also contested the valuation of £2,250,000 placed on their shares in the 2 new companies (IPN and IPP). Those were the issues before the Irish Supreme Court. It was against that background and in the context of those orders of Barron J that Blayney J, disagreed that section 205 was wide enough to permit damages to be awarded to the 2 new companies. The Irish Supreme Court did not say that damages could never be awarded under section 205. Rather, the Irish Supreme Court held that damages could not be awarded to the 2 new companies under section 205:

> "The first issue has two separate parts to it, the first being concerned with fact and the second with law. The factual issue is whether the learned trial judge was correct in finding that the loss sustained by the

companies was caused by the oppression of which he held IIP to have been guilty. The issue of law is whether s 205 gives the court power to make an award of damages and having regard to the view I have formed on this issue I propose to deal with it first.

The relevant provisions of s 205 are as follows:-

(1) Any member of a company who complains that the affairs of the company are being conducted or that the powers of the directors of the company are being exercised in a manner oppressive to him or any of the members (including himself), or in disregard of his or their interests as members, may apply to the court for an order under this section …

(3) If, on any application under sub-section 1 or sub-section 2, the court is of opinion that the company's affairs are being conducted or the directors' powers are being exercised as aforesaid, the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether directing or prohibiting any act or cancelling or varying any transaction or for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

In considering what power this section gives to the court, and how it should be applied in the circumstances of the present case, the first thing to be noted is that the order of the High Court that IIP transfer its shares to PLC, is no longer being contested. The position accordingly is that an order has been made in the case under s 205 that will bring to an end the oppression complained of since it will terminate IIP's

interest in IPN and IPP. The question to be considered, accordingly, is whether the High Court had, in addition, power to make the order directing £6 million to be paid by IIP to IPN and IPP and £2,750,000 to PLC. In my opinion s 205 did not give the High Court power to make such an order. (Emphasis added)

The relief which may be given under the section is that the court may make such order as it thinks fit "with a view to bringing to an end the matters complained of." The court is not at large as to what it may do. Whatever order it makes must have this object. It must be made with a view to bringing to an end whatever it was that was causing the oppression.

Could it be said that the order directing IIP to pay £6 million to IPN and IPP and £2,750,000 to PLC was made with a view to bringing to an end the oppression of which PLC had complained? In my opinion it could not. The object of the order was clearly something quite different. It was to compensate IPN and IPP for the loss suffered by those companies, and to compensate PLC for the reduction in the value of its shareholding. The object quite clearly was not to bring to an end the oppression which the learned trial judge had found to exist. The object was to compensate the three companies for the consequences of the oppression. Even if no other order had been made by the High Court, that would still have been the position, but the fact that IIP was directed to transfer its shares to PLC, and that this put an end to the oppression, as referred to earlier, puts it beyond doubt that the order for the payment of compensation could not also have been made with a view to bringing to an end the matters complained of. That object had already been achieved

by the direction to transfer the shares. (Emphasis added)"

On the submission that the transfer of the shares was an inadequate remedy and that the 2 new companies should be entitled to compensation for the losses suffered and the argument that compensation had been awarded in Re Greenore Trading Co Ltd [1980] ILRM 94 and in *Scottish Co-Operative Wholesale Society v Meyer*, the Irish Supreme Court answered:

> "In re Greenore Trading Co Ltd [1980] ILRM 94, Keane J found that there had been oppression and directed the oppressor to purchase the shares of the party who had been oppressed. In fixing the price to be paid he added to the par value of the shares so much of a sum wrongfully applied by the oppressor as was proportionate to the equity of the oppressed shareholder. Keane J said in his judgment at p 102:-
>
> > 'That, however, does not conclude the matter, since it is clear that in prescribing the basis on which the price is to be calculated, the court can, in effect, provide compensation for whatever injury has been inflicted by the oppressors. (See Scottish Co-Operative Whole- sale Society v Meyer [1959] AC 324).'
>
> In the Scottish Co-Operative case the oppressor was also directed to purchase the shares of the oppressed shareholder. Lord Denning said in his judgment at p 369:-
>
> > 'One of the most useful orders mentioned in the section - which will enable the court to do justice to

> the injured shareholders - is to order the oppressor to buy their shares at a fair price: and a fair price would be, I think, the value which the shares would have had at the date of the petition, if there had been no oppression. Once the oppressor has bought the shares, the company can survive. It can continue to operate. That is a matter for him. It is, no doubt, true that an order of this kind gives to the oppressed shareholders what is in effect money compensation for the injury done to them: but I see no objection to this. The section gives a large discretion to the court and it is well exercised in making the oppressor make compensation to those who have suffered at his hands.'

The provision in s 210 of the English Companies Act, 1948, dealing with the purchase of shares, to which Lord Denning was referring, is exactly similar to the provision in our section 205. It provides that one of the reliefs which the court may give is an order "for the purchase of the shares of any members of the company by other members of the company.

While compensation was included in the relief given in each of these two cases, it was given in an extremely limited context - where the oppressor had been directed to purchase the shares of the oppressed shareholder, and where the compensation resulted from the court's determination of what would be a fair price for the shares in the particular circumstances. The element of compensation was incidental to the main relief which was the purchase of the shares. <u>The cases are not authority for a general right to compensation for loss resulting from oppression</u>, which is what is being contended for, and in my opinion this submission is not well-founded." (Emphasis added)

The Irish Supreme Court clearly accepted that compensation could be included in the relief, where the oppressor had been directed to purchase the shares of the oppressed shareholder, and where the compensation resulted from the court's determination of what would be a fair price for the shares in the particular circumstances. The Irish Supreme Court held that in relation to the case before it, the element of compensation should be incidental to the main relief which was the purchase of the shares. What the Irish Supreme Court would not agree however was that there is a general right to compensation for loss resulting from oppression:

> "It was also submitted that the provisions of s 205, sub-s 3 were so wide that they would permit damages to be awarded. I am unable to agree. Firstly, an award of damages would not satisfy the condition that the order be made "with a view to bringing to an end the matter complained of'; secondly, an award of damages is a purely common law remedy for a tort, breach of statutory duty or breach of contract, and acts of oppression would not come within any of these categories; and finally, if the Oireachtas had intended to include the remedy of damages as one of the reliefs which could have been granted, there would have been no difficulty in doing so, and it is quite clear that this was not done.
>
> I would adopt as a correct statement of the law the following passage from Gower's Principles of Modern Company Law (4th edition) at p 630:-

> 'In talking about the duties of shareholders, whether they be to refrain from fraud on the minority or to refrain from oppression, the duties differ markedly from those of directors and officers - and not only because they fall short of those of a fiduciary. The duties of directors, as such, are owed only to the company; those of members may be owed either to the company or to their fellow shareholders. The remedies for a breach of the members' duties are much more restrictive. There is no duty in the sense of an obligation giving rise to damages or compensation in the event of breach; the duties can be enforced only by injunction, declaration, winding-up or a regulating order under section 210.' "

From our study of the case, we find that while it was said in *Re Irish Press plc* that "an award of damages is a purely common law remedy for a tort, breach of statutory duty or breach of contract, and acts of oppression would not come within any of these categories", it was however not said by the Irish Supreme Court, as a general statement of law, that damages could not be awarded under section 205. In the final analysis, the Irish Supreme Court merely held that the object of the order of damages to the 2 new companies was not with a view to bring an end the oppression of which PLC had complained – "Could it be said that the order directing IIP to pay £6 million to IPN and IPP and £2,750,000 to PLC was made with a view to bringing to an end the oppression of which PLC had complained? In my opinion it could not. The object of the

order was clearly something quite different". Otherwise, the Irish Supreme Court clearly agreed that the element of compensation as part of the share price was allowed by section 205. Incidentally, in *Yeo Hung Khiang v Dickson Investment* supra at paragraph 35, the Singapore Court of Appeal had the same opinion that "the Irish Supreme Court appeared to agree that, where the element of compensation was included as part of the share price, this would be allowed by s 205 of the Irish Companies Act".

Authorities do not support the argument that damages or compensation could not be awarded under section 181. As to whether the award of damages should have been granted to CH, learned counsel for the Appellant argued that 'the matters complained of' had been brought to an end by the buyout order, and that whatever wrong to the company should have been pursued by a derivative action. Learned counsel for the 1st – 8th Respondents responded that there would not be any double recovery as the buyout order had been set aside by consent, with the result that "The Appellant [would not be] condemned to … a buyout based on a valuation which [had taken] into account the assets dissipated and at the same time [be liable] to account to the company for the same assets". Learned counsel for CH stressed that the interest of the creditors of CH were paramount and so should be protected,

and contended that the present "facts … lend themselves perfectly to the mechanism used in Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd & ors [2001] 37 ACSR 672".

The pertinent facts in *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* were as follows. The appellant was a company under the control of Bob Bosnjak which, with other family members, was a shareholder in the first respondent. The first respondent was the holding company of a group of related companies that operated the Westbus Group, the largest private bus company in Australia. The appellant held 2/7 shares in Westbus. Other family members, notably Jim and Carol Bosnjak, held the balance of the shares. Together, Jim and Carol Bosnjak held 57% of the shareholding in the first respondent. The appellant was increasingly alienated from decision-making. Bob Bosnjak unsuccessfully made proposals that the assets of the business should be split between family members.

Young J, at first instance, held that the first respondent's affairs were conducted in manner oppressive to the appellant, and that Jim and Carol Bosnjak should account for breaches of their fiduciary duties. The court ordered that Fexuto could require Jim and Carol Bosnjak's companies to purchase Fexuto's minority shareholding, at a court-ordered valuation which would take into account the breaches of fiduciary duty.

Fexuto appealed the orders, seeking a split of the company's assets or that Fexuto be permitted to purchase the respondents' shares in the first respondent, together with an account of profits derived from ventures. The respondents cross-appealed against the substantive findings and the orders made. In allowing the appeal and dismissing the cross-appeal, the Court of Appeal (Spigelman CJ, Priestley and Fitzgerald JJA) made the following orders:

> "The trial judge ordered that, if Fexuto elected to sell its shares in Holdings, it was to be paid their fair value "ascertained without regard to [Fexuto's] shares being a minority interest in [Holdings] and on the basis that … the amounts found to be due to [Holdings]" for breach of fiduciary duty had been paid. That was the correct course.
>
> If Fexuto elects to purchase NBC's shares in Holdings at a fair price, the amounts found to be due to [Holdings] for breach of fiduciary duty should be disregarded but the price paid by NBC to Fexule and Feyama for their shares in Holdings and to Jim by NEG in respect of NBC's shares in Holdings should be available to be taken into account."

With the result reached at the appeal, Fexuto had the option to sell its minority interest or to purchase the majority interest. But in the instant case, there was no such option to the Respondents to buy or sell. The majority was ordered to purchase the minority interest, but the minority had no right to

purchase the majority interest. The fact that the Respondents subsequently agreed not to enforce the buyout order was a matter decided by the Respondents after the orders had been granted. That fact had no bearing whatsoever on whether the buyout order could stand alongside the order of damages at the point when they were granted. The valuation of the shares of the 1st – 8th Respondents had taken into account the value of the 446,100 polymate shares disposed of by the Appellant without authority. Thereafter, the derivative action could not be pursued further (see Minority Shareholders' Right and Remedies 2nd Edition by Margaret Chew at page 235, where the argument was advanced that " … where an order is made that the oppressor purchase the complainant's share at a price that takes into account the loss-causing conduct of the oppressor in the valuation of the shares, a derivative action under section 216(2)(c) ought not to be ordered, save where it is against a third party"). Since the buyout order had brought to an end all matters complained of, there was no longer any "matter complained of' to be further remedied by any order of damages, declaration or injunction. In any event, with the buyout order, the Respondents could not have any further interest in the affairs of CH which would belong, after the buyout order, to the majority. But all those circumstances were not considered in the exercise of discretion in granting the award of damages. On top of that, it was also overlooked (i) that non-members

who had no standing under section 181 were joined as petitioners 1 & 4, (ii) that CH who had no standing under section 181 was joined as a petitioner, (iii) that the Respondents had brought a common law derivative action, if that were the case, without naming CH as a nominal respondent, and, (iv) that the Respondents had brought a statutory derivative action, if that were the alternate case, without the requisite leave of court.

Walter Woon on Company Law supra at paragraph 5.82) asked whether issue had been raised to the "extent to which section 216 of the Singapore Companies Act may be used to outflank the rule in *Foss v Harbottle* and its statutory analogue section 216A". In point of fact, that was answered by the Singapore Court of Appeal in *Kumagai Gumi Co Ltd v Zenecon Pte Ltd [1995*]:

> "In our opinion, there is a limitation on the order which the court can make under s 216. The order to be made must be made 'with a view to bringing an end or remedying the matters complained of' and we agree that 'the matters complained of' mean matters rightly complained of. Nevertheless, subject to this limitation, the jurisdiction to make an order under that section is very wide. Much depends on the matters complained of and the circumstances prevailing at the time of hearing." (Emphasis added)

There is a limit to the extent to which section 181 could be used to outflank the rule in *Foss v Harbottle*. The order to be made must be made with a view to bringing an end or remedying the matters complained of' under section 181. The derivative action elements should be an incident of the matters complained of under section 181. It would be an abuse of section 181 where the nature of the complaint was misconduct rather than mismanagement (see Re *Chime Corporation* supra per Lord Scott). "To allow corporate claims to be pursued via the oppression remedy would effectively denude the statutory derivative action of much of its intended effect" (A Reconsideration of the Shareholder's Remedy for Oppression in Singapore by Pearlie M.C Koh, CLWR 42 1(61) 1 March 2013). But in the instant case, especially now with the setting aside, by consent, of the buyout order, what is left is the award of damages obtained in a defectively instituted derivative action brought under section 181. Given further that the order of damages should not have been granted in the first place, we find ourselves, with respect, at a loss to defend the order of damages.

For the aforesaid reasons, we answer the leave question in the affirmative and in the following terms. An order of a compensatory nature can be made in a petition under section 181(1) of the Companies Act 1965, if the order is with

the view to bring an end or to remedy the matters rightly complained of under section 181(1)(a) or (b). But on the facts and circumstances, we unanimously allow this appeal (02-84-2012(M)) and set aside the order of damages which was not made under section 181(1)(a) or (b), with costs to the Appellant, and dismiss the cross-appeal (02-83-2012(M)) with costs.

Dated this 29th day of October 2013.

Dato' Jeffrey Tan
Hakim
Mahkamah Persekutuan
Malaysia

C O U N S E L

02-83-11/2012(M)

For the 9th Appellant : Leong Kwong Wah and Norlidah A. Bakar

Solicitors:
Tetuan Leong Kwong Wah

For the 1st – 8th Appellants	:	Wong Rhen Yen, Faizul Nasir, Hanif Idris and Chow Yen Loong Solicitors: Tetuan Hanif Idris & Associates
For the Respondent	:	Gopal Sreenevasan, Conrad Young and Lawrence Tan Boon Twee Solicitors: Tetuan Lawrence Tan & Associates

<u>02-84-11/2012(M)</u>

For the Appellant	:	Gopal Sreenevasan, Conrad Young and Lawrence Tan Boon Twee Solicitors: Tetuan Lawrence Tan & Associates
For the 9th Respondent:		Leong Kwong Wah and Norlidah A. Bakar Solicitors: Tetuan Leong Kwong Wah
For the 1st – 8th Respondents	:	Wong Rhen Yen, Faizul Nasir, Hanif Idris and Chow Yen Loong Solicitors: Tetuan Hanif Idris & Associates