T OF MALAYA AT KUALA LUMPUR

(COMMERCIAL DIVISION)

ORIGINATING SUMMONS NO:- 26NCC-27-03/2013

In the matter of AXIS IP SDN. BHD.
And
In the matter of Section 181,
Companies Act 1965
And
In the matter of Order 88 of the
Rules of Court 2012

BETWEEN

JULIAN SURESH CANDIAH **...PLAINTIFF**

AND

1. AXIS IP SDN. BHD.

2. AXIS REAL ESTATE ADVISORY PTE. LTD.

3. ABAS CARL GUNNAR BIN ABDULLAH

4. TEW PENG HWEE @ TEOH PENG HWEE

5. GEORGE STEWART LABROOY **...DEFENDANTS**

GROUNDS OF JUDGMENT

t falls for consideration in this originating
ession by the Plaintiff who therefore seeks a remedy under section 181 of the Companies Act 1965. There are however, two threshold issues that arise for adjudication at the behest of the Defendants, relating to the propriety of these proceedings being commenced under section 181.

2. The 5th Defendant, George Stewart Labrooy (õLabrooyõ) and the 2nd Defendant, Axis Real Estate Advisory Pte. Ltd., (õAxis Singaporeõ) seek to have these threshold issues determined in their favour under the provisions of Order 34 and/or Order 14A of the Rules of Court 2012.

(i) In Enclosure 24, D5 poses this question:-

> **<u>"Whether the Plaintiff is entitled to resort to Section 181 of the Companies Act 1965 to establish himself as a shareholder of the 1st Defendant when the Plaintiff has never subscribed for any shares in the 1st Defendant nor ever been placed on its Register of Members"</u>**

3. The 1st Defendant is hereafter referred to as õAXIS IPõ

(ii) In Enclosure 26, Axis Singapore poses this question:-

> **<u>"Whether the Plaintiff is entitled to resort to Section 181 of the Companies Act 1965 to thereby assert a cause and/or consequently seek relief on matters concerning the 2nd</u>**

e 2nd Defendant is not a company
e laws of Malaysia.

4. Vide Enclosures 24 and 26 the 5th Defendant and the 3rd Defendant seek to have this entire matter disposed of by a determination of the questions posed.

5. Each of these enclosures will be dealt with in turn. Prior to that however, the procedure sought to be adopted vide these applications and the law pertaining to the same is considered, followed by a narration of the salient facts. It has first to be determined whether these issues are amenable to adjudication under O.14 A or Order 34 of the Rules of Court 2012.

Is Order 14A (or Order 34) a suitable procedure to be adopted in this case?

6. The 5th Defendant, Labrooyôs application, has been taken out with reference to Order 34 and/or Order 14A of the Rules of Court 2012. The said Order 34 allows the Court of its own motion to give directions ñ*as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof*" (see Order 34 Rule 1(1)(b)); and also allows the Court in the course of pre-trial case management to address the ñ*settlement of all or any of the issues in the action or proceedings*ò so as to secure the just expeditious and economical disposal of the action. The 5th Defendant, Labrooy through this application seeks to have the preliminary issue above dealt with so

ious and economic disposal of the Plaintiffs
e a suitable procedure to deal with this threshold issue.

7. Alternatively Labrooy brings this application under Order 14A of the Rules of Court 2012. This Order enables the Court upon the application of a party or of its own motion determine any question of law arising in any cause or matter where it appears to the Court that such a question is suitable for determination without the full trial of the action and where such determination will finally determine the entire cause or matter or any claim of issue therein.

8. Learned counsel for D5, Mr. Logan Sabapathy, referred to **Petroleum Nasional Bhd. v Kerajaan Negeri Terengganu [2004] 1 MLJ 8** where Mohd Noor Ahmad JCA held inter alia as follows in relation to the function of a judge in applying this Order:-

"....With that factor in mind, what ought to have been done by the learned judge, not as a matter of choice but in the exercise of discretion, is, at the outset, to scrutinise the pleadings to discover what material facts are not obviously in dispute, what facts the parties may agree after discussion and submission with variation or otherwise and as the last resort to compel either party or both to accept the material facts, which the court thinks obviously should not be disputed. In our view the last recourse, though drastic is proper and permissible.....

.....

.....

.....However the learned judge did not do as what ought to have been done. He just accepted the fact that the plaintiff did not agree to the proposed statement of agreed facts (Appendix B) as distilled by the defendants from the pleadings and the applicable legislations. Having embarked on the exercise as he ought to have done, he should consider whether the undisputed or agreed facts are comprehensive and sufficient to determine and dispose of the core or primary issues.....

.....

.....By such exercise, there should be no risk of injustice to the plaintiff if proper determination on those questions is made because the applications are fought on the ground of the plaintiffs' choosing, since it may generally be assumed to plead its best case (by analogy, re-statement of Sir Thomas Bingham MR in E(a minor) v Dorset County Council, X & Ors. (Minors) v Bedfordshire County Council). We are fortified in our view by what was held in Federal Insurance Co. v Nakano Singapore (Pte) Ltd. [1992] 1 SLR 390 at pp 394-395 (CA):-

> *Thirdly we are in full agreement with counsel with respect to the powers of the court under O 33 r 2 of the RSC. That rule expressly provides that the court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law to be tried before at or after the trial of the cause or matter.* ***It would be contrary to the express terms of that rule for a court to hold that it has no power to state a preliminary point even if it involves having to determine some issues of fact in order to determine the point of law.*** *An action may involve many issues of fact in order to determine the point of law. An*

disputes on the facts as well as on the ***law, some*** *...ners. It may be that the determination of a* ***preliminary point in one way may make it unnecessary for other more complex issues of fact or law to be decided resulting in a saving of time and expense*** *of a protracted trial on those issues. (Emphasis added).*

And by what Jessel MR said in Pooley v Driver (1877) 5 Ch D 458 at p 460:

> *...the court will, at the trial of an action involving questions both of law and of fact,* ***decide the question of law first****, if it shall appear that the decision of such question may render it unnecessary to try the question of fact. (Emphasis added)...."*

9. And further on in the **Petronas case** ***(above)*** Mohd Noor Ahmad JCA held as follows in relation to the issue of agreement on the facts of the case in question:-

> *"Legally in O14A and O 33 r 2 of the RHC applications no party has any liberty to disagree just for the sake of disagreeing to any fact pleaded which is obviously undisputed because for the Court to give indulgence to such disagreement will not only erode efficacy but also will stultify the objective and purpose of those orders."*

10. Bearing these principles in mind, it is now necessary to consider whether the question posed in Enclosure 24 may be determined under Order 14A on the **undisputed facts** as evidenced by the contemporaneous documents before the Court. It appears to this Court that O.14A is the most appropriate procedural device to be adopted to

26. It therefore follows that it is necessary round facts pertaining to this dispute.

BRIEF FACTS

11. I have reproduced and summarised the salient facts largely, if not entirely, from the comprehensive and well-drafted submissions and affidavits filed by learned counsel for the Plaintiff and the Defendants.

12. The facts as borne out by the contemporaneous documents are not largely in dispute although areas of controversy exist. I have sought to set out the partiesô version of events such that it is clear where such wider areas of controversy arise. I have also sought to highlight from these slightly differing narrations, the material undisputed facts that emerge. It is only these latter undisputed facts that are relevant for the purposes of answering the questions in Enclosures 24 and 26.

The Plaintiff

13. The Plaintiff alleges in his affidavit in support of the originating summons claiming oppression that in or around February 2011, Labrooy on behalf of the Third Defendant, Gunnar (õGunnarö) and the 4th Defendant (õTewö) invited the Plaintiff to join the AXIS Group by reason of his experience in financial markets and investments in Malaysia and internationally. A considerable portion of the Plaintiffôs first affidavit sets out his varied work experience. The Plaintiff was appointed an

director of AXIS Global REIT Managers
l the first board meeting of that company on 14 February 2011.

14. Subsequently the Plaintiff was appointed and employed as the Head of Strategy and Capital Markets by AXIS REIT with a monthly salary of RM40,000-00 together with other benefits. He was therefore at all material times an employee of AXIS REIT.

15. The Plaintiff again outlines at some length in his affidavits his contributions to the AXIS Group whereby he claims to have created business opportunities for the group, by inter alia, leveraging off his personal relationships to generate income for the Group. The extent of the Plaintiffûs contributions is in dispute, but this is not directly relevant to the issue of the Plaintiffûs qualification to institute an oppression action, which is the subject matter of dispute vide this application. Neither is it relevant to AXIS Singaporeûs application which relates to the jurisdiction of this Court to adjudicate on the issue of oppression in relation to a Singapore incorporated company.

16. The control of AXIS Reit Managers Berhad is associated with Tew and Gunnar and one Lao who is not a named party here.

AXIS Singapore

17. In or around June 2012, Labrooy alleges that he and

e incorporation of AXIS Real Estate in AXIS Groupôs relationship with one of their primary clients, the Employment Provident Fund, as their advisors on international industrial asset acquisitions and also to provide a platform to develop other advisory opportunities. To this end Axis Singapore, the 2nd Defendant was incorporated.

18. Labrooy alleges that he offered the Plaintiff an equity in the proposed fund manager of any wholesale fund that the Plaintiff might create. It was envisaged that the equity in any such proposed fund manager would consist of the founders of the AXIS Group, namely Gunnar and Tew, one Tharmalingam, the Plaintiff and Labrooy. The AXIS founders and Labrooy were to be entitled to 15% each in the fund manager whilst Tharmalingam and the Plaintiff would be entitled to 20% each in the fund manager. The latter two were accorded a prospectively higher shareholding as an incentive, because it was envisaged that they would be doing the work to establish the fund manager and the wholesale fund.

19. The Plaintiff, on the other hand, asserts a different basis or reason for the incorporation of AXIS Singapore. He maintains that in recognition of his contributions towards, inter alia, the resurrection and transaction management of the sale of the failed AXIS Globalôs assets to EPF, it was agreed between Gunnar, Tew, Labrooy and the Plaintiff that the Plaintiff would receive a portion of the fees paid by EPF in the form of a 20% shareholding in AXIS Singapore. The Plaintiff further alleges that to this end he entered into a ópartnershipôbased on mutual confidence and good faith with Gunnar, Tew, Labrooy and Tharmalingam to set up AXIS

Plaintiff further maintains that he is a 20% re.

20. Although the precise basis for the incorporation of AXIS Singapore is disputed, as evident from the differing versions given by Labrooy and the Plaintiff, this again is not directly relevant as:-

(i) It is not in dispute that AXIS Singapore was in fact incorporated;

(ii) The Plaintiff, individual Defendants and two others were involved in negotiations relating to their individual shareholding in AXIS Singapore;

(iii) The application in Enclosure 24, which requires a consideration of some part of the salient facts, pertains directly to AXIS IP and not AXIS Singapore. Enclosure 26 which relates to AXIS Singapore, requires no such consideration of the facts because it is a purely legal issue.

21. In support of the contention that he is a 20% shareholder of AXIS Singapore the Plaintiff relies on emails issued between himself and Labrooy between June 2012 and September 2012. It is not in dispute that these emails were issued and received. The Plaintiff relies on the statements therein where the parties discuss the proposed equity in AXIS Singapore, more particularly:-

June 2012 where Labrooy confirms that the equity in AXIS Singapore is 20%;

(ii) A second email of the same date where Labrooy attached a report on AXIS Singapore to be presented at a shareholdersô meeting, requesting for the Plaintiffôs opinion. The Plaintiff responded to several references as a potential shareholder and highlighted several comments to be discussed amongst the prospective shareholders at the next shareholdersômeeting.

AXIS IP

22. At the same time, i.e. in June 2012 the Plaintiff also claims to have entered into a similar partnership with Gunnar, Tew, Labrooy and Tharmalingam to form the First Defendant, AXIS IP. In like manner the Plaintiff maintains that he has a twenty percent shareholding in AXIS IP.

23. This is particularly relevant because AXIS IP comprises the subject matter of this application. The issue before this Court relates to the qualification of the Plaintiff as a ómemberôunder section 181 to initiate an oppression action *vis a vis* AXIS IP.

24. In support of his contention that he is a 20% shareholder of AXIS IP, the Plaintiff points to an email dated 23 August 2012, issued by Labrooy to the AXIS Groupôs solicitor, Chan, where Labrooy states that the shareholders of AXIS IP would include the Plaintiff. This email was copied to Gunnar, Tew and Tharmalingam. Chan the solicitor was in the

lderôs Agreement for AXIS IP. (In point of Agreements were prepared.)

25. On 11 September 2012, Labrooy forwarded a draft Shareholderôs Agreement of AXIS IP where the Plaintiff was described as a shareholder.

26. Apart from these two documents, the Plaintiff also relies on a power point presentation in respect of a project for the ói Park 3ôproject, which was owned and managed by AXIS AME (now known as AXIS AME IP). AXIS IP held a fifty per cent shareholding in AXIS AME. This presentation was prepared to facilitate the procurement of financing for the project.

27. In this presentation prepared by Labrooy entitled óAn Introduction to i-Park@ Indahpura Iskandar Malaysiaòa few of the slides describe the Plaintiff as a shareholder of AXIS IP.

28. Premised on these three matters, namely the email of 23 August 2012, the draft Shareholderôs Agreement for AXIS IP and the slides in a presentation to procure financing, the Plaintiff maintains that he is a shareholder of AXIS IP. The Plaintiff further maintains that Gunnar, Tew, Labrooy and Tharmalingam treated him and dealt with him as a fellow shareholder and business owner.

29. In relation to the incorporation of AXIS IP, the Defendants, through the 5th Defendant, Labrooy, maintain that in June 2012, in one of his

unders, suggested that Tharmalingam and investors in the joint venture between AXIS IP and AME. It was felt that this would give both of them an added incentive to ensure that the Indahpura Iskandar project would be a success. Accordingly Labrooy maintains that the understanding was that the AXIS founders comprising Gunnar, Tew, and Lao together with Labrooy, Tharmalingam and the Plaintiff would have an equity participation in the proposed joint venture with AME.

30. It is therefore clear that it is not in dispute that it was the intention of the Plaintiff, together with the named Defendants and one or two others to invest and participate as shareholders in AXIS IP.

31. Labrooy further affirms that although the AXIS founders had previously never had any form of a shareholderôs agreement to regulate their relationship, they did so on this occasion at the behest of the Plaintiff, who insisted that he required a shareholderôs agreement to be drawn up to subscribe the proposed shares in AXIS IP and to regulate the relationship between the parties. To this end, Labrooy, like the Plaintiff, states that solicitors were engaged to draw up the draft ShareholdersôAgreement (as well as the draft joint-venture agreement with AME).

32. AXIS IP was incorporated on 3 September 2012 with Tew and Labrooy as the initial subscriber shareholders.

12, a draft Shareholdersô Agreement (á1st solicitors and circulated to, among others, the Plaintiff. It was expressly captioned ñSubject to Formal Contractò The 1st Draft SA provided for the inclusion of Lao as a shareholder thereby bringing the number of shareholders to six rather than the earlier number of five. This necessarily had the effect of reducing the proposed shareholding of each of the prospective shareholders from 20% to 16.6%.This is not in dispute.

34. On the same day, the Plaintiff sent his comments regarding the 1st Draft SA to the solicitors. On the following day, i.e. 12 September 2012, it is not disputed that both the Plaintiff and Tharmalingam commented on the draft Shareholdersô Agreement querying the amendment to the proposed shareholding structure which now included Lao.

35. A meeting was held on 13 September 2013 amongst the parties to, inter alia, discuss the issues arising including the 1st Draft SA. The content of the 1st Draft SA was discussed, more particularly the inclusion of Lao as a shareholder. The Plaintiff questioned the inclusion of Lao and upon being advised that his name was inadvertently omitted, all those in attendance at the meeting agreed that the shareholding structure would be equal between the six prospective shareholders.

36. It was further noted that comments on the draft agreement were to be given to the solicitors by a specific date and that participating parties had to procure their funds with a targeted date for execution. The Plaintiff duly provided his comments which included the proposal that

mpulsory purchase of the Plaintiffôs intended
vent of an early exit for a stipulated take-out price.

37. The fact of the meeting to discuss the 1st Draft SA is not disputed. The fact that the Plaintiff provided his feedback in writing including a provision for compulsory purchase of his intended subscription shares in the event of an early exit is also not disputed.

38. A Second Draft Agreement was prepared by the solicitors (ó2nd Draft SAô) on 17 September 2012. It was also expressly captioned ó*Subject to Formal Contract*ô The 2nd Draft SA expressly highlighted that any compulsory buy-out had to be regulated by a special agreement between the possible exiting shareholder and the remaining shareholders.

39. A perusal of the 1st and 2nd Draft SA discloses that it was envisaged that upon execution of the agreement there would be an initial capitalisation exercise of RM600,000-00 where all of the intended parties were to subscribe for shares in accordance with the portions as specified in the drafts. The 1st and 2nd Draft SAs are not disputed.

40. It is not in dispute that neither the 1st Draft SA nor the 2nd Draft SA were ever finalised nor executed by the parties, particularly the Plaintiff.

The Plaintiff's complaint

41. The crux of the Plaintiffôs complaint is that his óshareholdingô in both AXIS Singapore and AXIS IP was diluted. To this end he states that in July 2012, one of the AXIS founders, Alex Lee Lao (óLaoô) was invited to be a prospective shareholder in AXIS Singapore and AXIS IP. He maintains that he was surprised by Labrooyôs email of 23 August 2012 advising him of the inclusion of Lao as a shareholder, as he had not been mentioned previously. When a revised draft of the prospective Shareholdersô Agreement of AXIS IP dated 11 September 2012 was circulated to all shareholders, the Plaintiff complains that he realised that the inclusion of Lao would mean that his share would be reduced or diluted from 1/5th to 1/6th. This, he maintains was not agreed beforehand.

42. Secondly, the Plaintiff complains of the cessation of his employment. On 7 October 2012, some three days after the Plaintiff had attended an AXIS AME meeting in Johor, the Plaintiff was informed by Labrooy that the AXIS Group had decided to sever all links with him. To this end, Labrooy handed him a letter dated 1 October 2012 terminating his services. According to the Plaintiff he was informed that his 20% shareholding in AXIS Singapore would be redeemed at SGD140,000 but his 1/6th shareholding in AXIS IP would be taken up by Gunnar, Tew and Lao for zero value.

43. On 20 October 2012 at a subsequent meeting with Labrooy, the Plaintiff was handed a letter entitled óCessation of Employmentôdate 15 October 2012 which enclosed a Maybank cheque for RM101,518-85 (his salary and three monthsônotice). He was also given a cheque in the sum

areholding in AXIS Singapore. He was not
IS IP as Labrooy stated that it had been a
ôprojectôand no shareholdersôagreement had been signed.

44. On 27 November 2012 the Plaintiff rejected the payments made to him contending a wider entitlement and thereafter commenced the present proceedings. The Plaintiff in this originating summons now specifically seeks the monetary value of his shareholding in AXIS Singapore and AXIS IP (alternatively winding up) under the provisions of section 181.

45. The Defendantsôthrough Labrooy on the other hand, maintain that a level of mistrust had developed between the Plaintiff and the other shareholders by reason of:-

(i) The Plaintiffôs repeated and various concerns about the draft ShareholdersôAgreement which was never executed;

(ii) The Plaintiffôs concern that AXIS IP did not possess the funding to pay for the acquisition of land for the purposes of the AXIS AME joint venture project, more particularly that the other prospective shareholders would not contribute their respective portions;

(iii) The Plaintiffôs inability to contribute to the project by procuring financing for the joint venture project, which he had been tasked to do;

ty to confirm the terms of the proposed draft ment despite several amendments made at the Plaintiffôs behest to accommodate his concerns; and

(v) The fact that the Plaintiff caused discord between the shareholders.

46. Given the deteriorating relationship between the Plaintiff and the AXIS Group, both in relation to his employment as well as a prospective shareholder of AXIS IP and AXIS Singapore, Labrooy maintains that a decision was taken to terminate his employment. The Plaintiff was further advised that his proposed participation in AXIS IP was untenable.

47. It is evident from the foregoing that the **reasons** for the cessation of negotiations and completion of the shareholdersô agreement, as well as the cessation of the Plaintiffôs employment, are matters in dispute. However the fact of such cessation of negotiations and employment is not in dispute. In any event, the current application deals with the threshold issue of the locus of the Plaintiff as a ómemberô to initiate an oppression action. The matters pertaining to why the proposed venture failed etc. are matters which come into play after, and if, the threshold qualification is met.

48. In any event, it is not in issue that at no time were any shares in either AXIS Singapore or AXIS IP ever subscribed, registered or issued in the name of the Plaintiff.

n comprises the salient background facts as arties. It is evident from my recitation of the facts that there are some matters which remain in dispute , but these issues as I have stated earlier, do not directly impinge upon the determination of the preliminary or threshold issues that are raised in Enclosures 24 and 26, filed by the 5th and 2nd Defendants respectively. I am therefore satisfied that these two Enclosures may properly be dealt with under either Order 14A or Order 34. In this case, the more appropriate procedure of the two is Order 14A as the threshold issues raised are primarily issues of law. The first issue, namely the qualification of the Plaintiff to initiate these oppression proceedings, requires as I have said earlier, some consideration of the facts. It appears to this Court that there is sufficient accord or concurrence in respect of the material facts to enable such a determination to be made under Order 14A.

Enclosure 24:- "Whether the Plaintiff is entitled to resort to Section 181 of the Companies Act 1965 to establish himself as a shareholder of the 1st Defendant (i.e. AXIS IP) when the Plaintiff has never subscribed for any shares in the 1st Defendant nor ever been placed on its Register of Members"

50. This issue requires a consideration of the scope and ambit of section 181 of the Companies Act 1965, more particularly in relation to the construction to be accorded to the term ómemberô as it appears there.

ection 181 of the Companies Act 1965

51. Section 181 provides a remedy to members whose rights or interests have been affected by oppressive, discriminatory or prejudicial acts of the company or its directors.

"(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 ---***

(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***

(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 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).* (emphasis mine).

52. Section 181(2) then goes on to provide that if such oppressive or discriminatory or prejudicial conduct *vis a vis* a member is established, then the Court may, with a view to remedying the matters complained of,

nt options, including the regulation of the company in future, order a purchase of the shares of the member or company by other members or by the company itself or provide for the winding up of the company.

53. It is however apparent from a perusal of the section that in order to invoke the provisions of section 181, a prospective plaintiff must demonstrate his standing under section 181. It is equally plain upon a reading of section 181 that only a ómemberô has the *locus standi* to initiate an action for oppression under this section. In the instant case, the question of membership is disputed, as the Defendants in this action maintain that it cannot be said that the Plaintiff is a member. It is therefore incumbent upon the Plaintiff to establish that he does indeed fall within the definition of a ómemberô

The Plaintiff's statutory interpretation of the qualifications required to invoke the remedy provided in s.181 for oppression

54. Learned counsel for the Plaintiff, Mr. Tommy Thomas submits that section 181 is a statutory remedy accorded by Parliament to be used against all companies provided certain conditions are fulfilled. He points to the fact that given the diversity of corporate and commercial life, businessmen arrange their affairs in different ways in their corporate structure such that size and scale vary. No two companies are managed the same way. Notwithstanding this the remedy for oppression, he points out, is the same, namely as provided for in section 181.

55. As such, it is submitted for the Plaintiff that the section must be widely and broadly interpreted to cover the dynamics of businessmen who use companies in myriad ways. The statutory protection ought, therefore it is contended, to be generously construed such that every person who has a genuine grievance may raise it under this provision. It is further proposed that technical arguments ought to be avoided in the exercise of statutory interpretation.

56. It is further submitted for the Plaintiff that he falls within the first category of section 181, namely a ómemberô(as opposed to a debenture holder or the Minister in the case of a declared company). Reference is made to section 181(1)(a), more particularly the fact that this sub-section incorporates the word óshareholdersô when it stipulates ñ...*in disregard of his or their interests as* ***members, shareholders*** *or holders of debentures of the company....*"

57. The Plaintiff points to the fact that the word ómembersô is distinguished from óshareholdersôin Section 181(1)(a).

58. Section 16(4) of the Companies Act 1965 defines a member as a person whose name is on the Register of Members, and such entries are conclusive evidence of membership. Section 16(6) provides two ways in which a person can become a member of a company. In essence they are as follows:-

(a) the subscribers to the memorandum who are the original subscribers 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 the company register;

(b) any other person (being persons who subsequently subscribe) who agrees to become a member and whose name is then entered in the company register shall be a member of the company.

59. The Plaintiff therefore submits that the term ósharholderô is not identical with ómemberôunder section 181(1) as if it were so, there would have been no reason to use ósharholderô when ómemberô is already used. óShareholderô therefore must have a different meaning from ómemberô as Parliament deliberately distinguished the two terms in section 181(1)(a).

60. It is further submitted that by reason of the foregoing, a member must mean the registered and legal owner of shares as evidenced by his being on the Register, while a shareholder, on the other hand evinces the wider concept of both legal and beneficial ownership of shares. **It is further submitted that this extends to even one who claims such a status, for example any person who is held out by the company, its directors or its members as a shareholder or is treated by them as one.** (emphasis mine).

that the general rule in respect of section complainant or plaintiff *".... must be able to demonstrate that his name appears on a company's register of members at the date of presentation of the petition"* per Justice Gopal Sri Ram (as he then was) in **Owen Sim Liang Khui v Piasau Jaya Sdn. Bhd. [1996] 1 MLJ 113** where it was held as follows:-

> *"...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 realise 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 section 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 section....."***

62. Two propositions emerge, one that the term ómemberô and óshareholderô are used interchangeably; and secondly that in order to invoke any of the remedies provided under section 181 a plaintiff

must be a member as defined under section

63. Having thus stated the general rule the Federal Court went on to set out exceptions to the general rule that might arise in the following circumstances:-

> ñ.....*We have, in stating the applicable rule as to standing under section 181, 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.....*

64. The facts relating to that particular case are as follows:-

had at all material times been a member of the company with a shareholding of some 1,500 shares. The complainant had his shareholding forfeited by the company on the grounds that he owed the company monies and that such shareholding was being forfeitedô and the proceeds thereof utilised to repay the loan due and owing from him. The complainant then presented a petition under section 181, claiming inter alia, that the sale and transfer of the said shares was effected in a manner oppressive to his interests as a shareholder of the company. He sought an order that the sale was null and void.ò

65. The principle to be gleaned from this case which sets out the exceptions to the general rule was stated thus:-

> *"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 to do so....."*

66. And further on:-

ite safely stated that if facts emerge from which that it is unjust or inequitable to permit a respondent to a petition under s.181 to asset or to contend that a petitioner has no locus standi to move the court, then, he will be estopped from so asserting. Stated in another fashion, a respondent who is guilty of unconscionable or inequitable conduct will not be permitted to raise or rely upon the requirement of membership in order to defeat a petitioner's standing as this would amount to his using statute as an engine of fraud. It does not matter how the proposition is formulated so long it has the effect adverted to."

67. Based on the foregoing learned counsel for the Plaintiff contends that a plaintiff initiating a section 181 action can come within 5 exceptions:-

(i) unjust;
(ii) unfair;
(iii) estoppel;
(iv) inequitable conduct; or
(v) unconscionable

68. In short it is contended that when a fact pattern emerges which exhibits one of the foregoing exceptions, then an action based on section 181 may be brought by the aggrieved person, whether he is a member or otherwise. And the issue of whether any particular fact pattern falls within these five exceptions, it is submitted, is a mixed question of fact and law.

egoing submission is to extend the scope and ambit of section 181 so as to encompass and provide relief to any aggrieved person whose circumstances or fact pattern feature any one of these five criteria, whether or not he is a member or shareholder of the company.

70. Proceeding then to apply this construction of the law to the present factual matrix, it is submitted for the Plaintiff that the totality of the circumstances here as borne out by the contemporaneous documents, particularly from Labrooy, disclose that the Plaintiff was at all material times treated and held out as a shareholder by D3 ï D5. Accordingly it is contended that the Defendants here are consequently estopped from denying the Plaintiffôs status as a óshareholderô

71. The Plaintiff also relies on **Jet-Tech Materials Sdn. Bhd. v Yushir Chemical Industry Co. Ltd. [2013] 2 MLJ 297[FC]** for the proposition that the principles developed in dealing with the ójust and equitableô ground for winding up are equally applicable to disputes under section 181. Consideration was then given to **Ebrahimi v Westbourne Galleries Ltd. [1972] 2 ALL ER 492.** Learned counsel submitted that this Court is entitled to take into account as a relevant consideration, the case put forward by the Plaintiff that he was a at all times a ópartnerôof D3 to D5 and that therefore the quasi-partnership principles laid down in Ebrahimi enable him to establish that as he was always held out as a shareholder and partner, he falls within the exception to the general rule as set out in **Owen Sim's** case (above).

72. It must be borne in mind however that the issue of whether or not the Plaintiff was a ópartnerôof D3 to D5 is neither an admitted or settled fact. More significantly however, it appears to this Court that this last issue relating to the applicability of the ójust and equitableôprinciple in the determination of this oppression petition is more relevant to the substantive issue of oppression and prejudicial conduct, rather than to the preliminary or threshold issue of whether or not a person is qualified to bring an action under section 181 as an aggrieved and oppressed member or shareholder of a company. In other words, the primary issue for consideration here is the qualification of the Plaintiff to bring this action premised on oppression, rather than whether he is entitled to rely on the principles in **Ebrahimi v Westbourne Galleries** ***(above)*** in establishing his case under section 181, which would arise only after he has established such qualification.

73. If I may summarise therefore, it is the Plaintiffôs contention that the general rule stipulates that only a person falling within the ambit of a member as defined in section 16(4) of the Companies Act 1965 may qualify and therefore apply for relief under section 181 for oppression. However there are exceptions to this general or universal rule as borne out by case-law, namely **Owen Sim's case**. The Plaintiffôs reading of this case is that it is authority for the proposition that any person who is able to establish a fact pattern from which the following features emerge, namely:- unjustness, unfairness, estoppel, inequitable conduct or unconscionable conduct possesses the locus standi to bring an action under section 181.

74. It is also contended that in determining locus standi, a mixed question of fact and law, the Court is entitled to take into account and apply the principles applicable in a ójust and equitableô winding up scenario as set out in Ebrahami v Westbourne Galleries (above), namely the quasi-partnership principle. This last contention, as I have explained above appears to me to become relevant only at a later stage, to establish the substantive issue of oppression or prejudicial conduct rather than qualification which is a preliminary or threshold point.

75. It is therefore evident that the Plaintiffôs interpretation of ómemberô in section 181, premised on **Owen Sim's case** affords a broad and generous construction to the term, allowing for a broad range of persons to seek relief under section 181 where they claim to have suffered from inequitable treatment.

76. Based on the foregoing submissions, the Plaintiff submits that the answer to the question in Enclosure 24 ought to be answered in the affirmative, namely that the Plaintiff has the requisite *locus standi* to file this action. Alternatively it is the submission of the Plaintiff that the issue of whether or not the Plaintiff has the *locus standi* is one of fact and law which the Court ought not to determine summarily but adjudicate upon after hearing evidence in full on the factual matrix, given the disputes of fact arising.

retation of statutory interpretation of the invoke the remedy provided in s.181 for oppression

77. Learned counsel for the 5th Defendant, Mr. Logan Sabapathy contends otherwise. He submits that the mere assertion that a person owns shares in a particular company does not make him a member of that company within the statutory framework of the Act. Reference is made to **sections 16(4) and 16(6) of the Act** to submit that the Plaintiff clearly does not fall within definition of a member. (It is not in dispute that the Plaintiff does not fall within the definition of section 16(4) or (6) of the Act).

78. In support of this contention, learned counsel refers to the case of **Raja Khairulzaman Shah bin Raja Aziddin & Ors. v Zaman Indah Sdn. Bhd. [1979] 2 MLJ 181** as authority for the established principle that a mere allotment of shares does not create the status of membership.

79. In that case, Abdoolcader J (as he then was) stated as follows at page 183, D-E:-

> *".....**the legal effect of an allotment**, **which is an appropriation to a person of a certain number of shares but not necessarily of any specific shares, depends on the circumstances,** for it may be an*

llottee or an acceptance of an application for ***otment of itself does not necessarily create the status of membership, even when the contract to take the shares is complete.*** *(Spitzel v Chinese Corporation Limited [1899] 80 L.T. 347). A resolution to allot shares is not necessarily the issue of them, as the term 'issue' would appear to mean allotment followed by registration or possibly by some other act, distinct from allotment, whereby the title of the allottee becomes complete (Clarke's case (1878) 8 Ch D 635."*

80. In the instant case there has been no allotment of shares effected. Neither was the draft shareholdersô agreement, which may well have eventually resulted in the allotment of shares, ever executed. In other words even an agreement to allot was not effected. However the Plaintiff in essence seeks to establish that by reason of the Defendantsôconduct, they are estopped from denying that the draft shareholdersôagreement was effectively or as good as executed, by reason of their holding out of the Plaintiff as a shareholder, and their treatment of him as an equally participating partner in their proposed joint venture vide AXIS IP.

81. Reliance is also placed by learned counsel for Labrooy on **Re Quickdome ltd. [1988] BCLC 370** where Mervyn Davies J. had to consider whether the petitioner who presented a petition for winding up or for relief under section 459 of the Companies Act 1985 (the latter being the oppression provision under that Act), had the requisite locus standi to do so. The facts of that case are that the initial shareholders of Q Ltd. were the two subscribers to the memorandum. These original subscribers subsequently executed a transfer of their shares. The

s not disclosed on the forms. The petitioner, t the company had been set up as joint venture between her husband and one Mr. P and it was intended that the two subscriber shares should be transferred to herself and Mrs. P as nominees respectively for their husbands. The petitioner further claimed that it had been intended that she and her husband would participate in the running of the company's business, but that they had been excluded from so doing by Mr. P and that she was therefore entitled to relief under the oppression provisions of the then UK Companies Act 1985. Mr. and Mrs. P sought to have the petition struck out. The issue before the Court was whether Mrs. O had the standing, inter alia, to seek relief under section 459 of their Act.

82. The Court concluded in that case that no proper transfer had been effected. In doing so reliance was placed on the case of **Re a company (No 003160 of 1986) [1986] BCLC 391** at 393 where Hoffman J. stated:-

> *"...In my judgment the word "transferred" in s 459(2) requires at least that a proper instrument of transfer should have been executed and delivered to the transferee of the company in respect of the shares in question. It is not sufficient to say that there should be n agreement for transfer."*

83. The English High Court found that the transfer relied upon was not proper as it was blank in relation to the name of the transferee. In

the petitioner claimed to have, arising from arties, it was held, relying on the above that the same was insufficient to establish *locus standi* to petition for oppression. The learned judge relied in turn on the words of Brightman J. in **Re JN2 Ltd. [1977] 3 All ER 1104 at 1109, [1978] 1 WLR 184 at 188**:-

> *"**That dispute is not between the company and a person claiming against the company but between a shareholder and a person claiming to be a shareholder. Let that dispute be settled first before the company is brought on to the scene by the presentation of a petition**. By being brought on to the scene I mean of course as a substantial party. **By dismissing the petition the court is not driving a litigant from the judgment seat or doing any injustice to him. The court will be merely requiring him to establish his right to present a petition before he is permitted to take a step which has such an immediate and potentially damaging effect on the company."*** (emphasis mine).

84. It is evident from the foregoing that there is a clear distinction between a claim brought by a shareholder against the company for oppression and a claim brought by a person who claims to be a shareholder and whose status as such has not been clearly established.

85. Learned counsel for the 5th Defendant maintains that in order that a plaintiff may assert a right to a statutory remedy under section 181, such a plaintiff must fall squarely within the ambit of the section. Such

Ng Kok Pooi v Brunswood ID Sdn. Bhd. titioner there claimed to be the beneficial owner of a 40% equity in the first respondent company. He had taken no steps to register himself as a shareholder and had in fact refused to accept the transfer of the 40% to himself. In these circumstances Ramly Ali J (now FCJ) summarily struck out the petition and stated, inter alia:-

> *"The s.181 remedy is a creature of statute and basically unless the applicant comes squarely within the section, the court ought not to entertain the action. This position has been succinctly stated by Siti Norma Yaacob J. in Verghese Mathai v Telok Plantations Sdn. Bhd. & ors. [1988] 3 MLJ 216 as follows:-*
>
> *As the petitioner's locus standi is regulated by statute, he must comply strictly with the mandatory provisions of section 181"*

86. Reliance was placed on **Niord Pty Ltd. v Adelide Petroleum NL (1990) 8 ACLC 684** where it was held that an applicant must be registered as a member before he could complain of oppressive conduct, and that a mere equitable interest as an unregistered transferee was not sufficient.

87. Learned counsel also relied on and cited **Verghese Mathai v Telok Plantations Sdn. Bhd. & 3 ors [1988] 3 MLJ 126** where the petitioner sought to contend that he had a connection with the company against whom the oppression petition had been filed, by virtue of the fact that he was a shareholder of the holding companies who in turn were the

older respectively of the subject company. h Court and Siti Norma J. (as she then was) held that a petitonerôs *locus standi* was regulated by statute and strict compliance with the mandatory provisions of s.181 was necessary.

88. It is contended for the 5th Defendant that the Plaintiff here ought to establish his status as a shareholder before bringing this action for oppression. He relies inter alia on **Ng Kok Pooi *(above)*** where it was held at page 374 that:-

> *"..The law provides the means for which an aggrieved party can have the register of a company rectified if there is any issue of the company's register having omitted the party's name as a shareholder, i.e. under s 163 of the Companies Act 1965. Alternatively, if the dispute is such that it is unsuitable to be decided upon by the summary procedure provided for under s 162, the proper course is to file a suit against the company to resolve the issue."*
>
> (see also **Ming Yueh Holdings Sdn. Bhd. v Kong Ming Bank Bhd. & Anor. [1990] 1 MLJ 374** per Haidar J. (as he then was).

89. Learned counsel for the 5th Defendant goes on to submit that the Plaintiff here has adopted a ôshortcutô approach to the dispute at hand which is untenable. It is pointed out, inter alia, that the Plaintiff has proceeded as follows:-

re on an alleged right as a member of AXIS
een established legally or beneficially;

(b) Sought to unilaterally stipulate a monetary entitlement to RM7.25 million vis a vis AXIS IP;

(c) Alternatively to secure recourse of a personal nature for that same sum against D3- D5 on the basis that he is to be treated as a member with shares available to be sold to those individuals.

90. It is submitted that the Plaintiffôs óentitlementôis a matter which is outside the affairs of AXIS IP. Accordingly it does not fall within the statutory ambit of section 181.

91. **Owen Sim's case** and the Singapore case of **Kitnasamy s/o Marudapan v Ngatheran s/o Mangar & Anor [2000] SLR 598** where Owen Sim was followed are distinguished on the following grounds:-

(i) Unlike Owen Simôs case, the present Plaintiff has never ever been a registered shareholder of AXIS IP;

(ii) The facts as set out earlier in the judgment suggest a negotiation towards a shareholdersô agreement as borne out by the use of the words óSubject to Formal Contractô There was no executed shareholdersô agreement nor any performance on such agreement for subscription by the Plaintiff;

nor its board has treated the Plaintiff ós a

(iv) The only discussions between the parties related to meetings described as óshareholdersô meetingsô although the draft agreements had not been executed. There has been no formal meeting of AXIS IP or any corporate activity by this vehicle.

92. Reference was also to made the decision of the Singapore Court of Appeal in Kitnasamyôs **case a**nd distinguished on the following basis:-

(i) The complainant was made a director of the subject company upon an understanding that the existing controlling shareholder would make a transfer to him of a significant interest in the company in exchange for services to be provided towards the common commercial objectives to be pursued;

(ii) With regards to his formal status as a shareholder, the complainant was advised by the auditor that he had not updated their records to reflect him as a shareholder. However the auditor stated that the subject shares had been transferred to him but were being held by the transferor for ósafekeepingô;

(iii) The complainant continued providing valuable services towards the common commercial objective until December 1999 when he received a formal notice of an extraordinary general meeting seeking to remove him as a director of the company when he

pression petition and sought an interim

93. In these circumstances the Singapore Court of Appeal adopted the reasoning in **Owen Sim's case** and concluded that on the facts of the case although the petitioner was not a registered shareholder, the facts disclosed an instance where the appellant had agreed to become a shareholder of the company and had rendered invaluable services to it, and due to default of those responsible for the administration of the company the appellant's name as a shareholder was not entered in the register of the company. The belief of the petitioner that he was a member was reinforced by the fact that a notice of EGM with a proxy form had been despatched to him. As such documents were only despatched to members it was held that the respondents were estopped from asserting that he was not a member.

94. Having distinguished both **Owen Sim's case** and **Kitnasamy's case**, it is submitted for the 5th Defendant that the fact pattern of the instant case falls squarely within the general rule rather than the exception. It is further submitted that in the present case it is incumbent upon the Plaintiff here to first establish his 'entitlement' as a shareholder, and succeed in such an action prior to applying for remedies as a member or shareholder under section 181. It is maintained for the 5th Defendant that for this Court to entertain the Plaintiff's claim as it now stands would prejudice the Defendants who would be forced to lead evidence on matters not properly falling within the jurisdiction of the Court hearing a s.181 application.

hold issues for example the relationship of corporate structure and affairs of AXIS IP would have to be determined, including whether the unexecuted draft shareholdersô agreement is capable of according the Plaintiff the requisite status notwithstanding that there was never any performance in relation to it.

96. On this basis learned counsel for the 5th Defendant submits that the question posed in Enclosure 24 ought to be answered in the negative.

Determination of the preliminary issue of locus standi by the Court

97. Given the foregoing background facts, case-law, as well as the competing detailed and comprehensive submissions by learned counsel, it is necessary to consider the application of the principles gleaned from the law and the case-law to the present factual matrix.

98. The primary feature of section 181 is that it applies to a ómemberô The section stipulates quite specifically at the outset that the necessary qualification to invoke a remedy under this section is that the person applying has to be a ómemberô It does not state that a shareholder may do so. However is there a distinction between a shareholder and a member?

99. This was one of the matters considered by the Bombay High Court in **Killick Nixon Limited and Others v Bank of India and Others 1983 (2) Bom CR 631.** In that case the question that arose for determination was whether a member of a company who has transferred his shareholding to another person but whose name continues to be on the register of members of the company by reason of the company not deleting his name and entering the name of the transferee in his place, can maintain an oppression petition. The Bombay High Court determined that such a transferor who remained on the register of members had the requisite *locus* to initiate an oppression petition for and on behalf of the transferee. In so determining this issue, Court considered the definition of the word ómemberôin the Indian Companies Act (which is similar to ours), more particularly whether it was necessary to exclude from its ambit ó bareô members who had sold their shares. Reference was made to **Palmer's Company Law, volume 1, 22nd edition, page 527**:-

> *"In the case of a company limited by shares, a member is a person holding shares in the company; there can be no membership, i.e. proprietary relationship to a company, otherwise than through the medium of shareholding. Consequently the terms 'member' and 'shareholder' are synonymous, apart from the now exceptional case of the bearer of a share warrant who is a shareholder but is not a member because he is not registered in the register of members."*

de to the Company's Act, 9th Edition,

"In the case of a company limited by shares, a company limited by guarantee and having a share capital and an unlimited company whose capital is held in definite shares, the terms 'member' and 'shareholder' are synonymous and there can be no membership except through the medium of shareholding."

101. In the case of **Howrah Trading Co. Ltd. v Commissioner of Income Tax [1959] 36 ITR 215(SC)** the Indian Supreme Court observed that:

"The words 'holder of a share' are really equal to the word 'shareholder', and the expression 'holder of a share' denotes, in so far as the company is concerned only a person, who, as a shareholder, has his name entered on the register of members."

102. The Bombay High Court in **Killick Nixon's case *(above)*** concluded that there was no real distinction between a ómemberôand a óshareholderô This conclusion is similarly borne out by **Owen Sim's case** where Gopal Sri Ram JCA (as he then was) said:-

reveals that in the latter part of para (a) of
on, 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....."

103. It follows from the foregoing that ómemberôand óshareholderômay be utilised interchangeably.

104. As has been said many times in this judgment, it is not in dispute that the Plaintiff here is not a registered member. It therefore follows equally that the Plaintiff does not fall within the ógeneral ruleô as enunciated by Gopal Sri Ram JCA (as he then was) in **Owen's Sim's case**. That too is not disputed. Accordingly the primary issue for adjudication is whether the Plaintiff in the instant case, given the factual matrix I have described previously, falls within the purview of the exception/s as prescribed in **Owen Sim's case**.

105. I have considered the submissions of learned counsel for the Plaintiff as well as learned counsel for the 5th Defendant in relation to the case of **Owen Sim (above**). It appears to this Court that **Owen Sim's case** is not authority for the proposition that the term ómemberôis to be construed so widely and generously that if any of the five instances enumerated by counsel, namely óunjustness, unfairness, estoppel,

onscionabilityô are made out on any given rieved person is clothed with the requisite qualification to apply for relief as a ómemberôunder section 181. This is because each of those terms is generic and non-specific in definition, and the use of such a general test would allow a wide range of complainants who are neither shareholders nor members to fall within the purview of the section. It would amount to unequivocally expanding the carefully prescribed statutory ambit based on broad principles of justice. In other words it would give rise to considerable uncertainty in the law.

106. In so concluding it must be pointed out that I am in no way detracting from the principle established by **Owen Sim's case,** namely that if an estoppel is evident on a given set of facts which precludes a prospective respondent from challenging the locus standi of the aggrieved party, then the threshold issue would not be allowed to stand in the way of the substantive merits of the case relating to oppression.

107. However, it appears to me that the factual matrix of **Owen Sim's case** is entirely different from the present case. In **Owen Sim's case** the petitioner was at all material times a registered member of the company whose shares were forfeited by the majority in control of the company, on the basis that Owen Sim owed the company money. The value of the forfeited shares were utilised to set-off the loan. It was against this conduct that Owen Sim filed his petition based on oppression. There was no doubt that it was the act of the majority in control of the company who had deprived Owen Sim of his shareholding and affected his status

e was clearly between the company and a

108. The factual matrix or pattern in the instant case is entirely different. In determining whether the Plaintiff here falls within the exceptions to the general rule on the definition of ómemberôas established by **Owen Sim's case**, it is necessary first to consider the nature of the Plaintiffôs interest (if at all) in the shareholding of AXIS IP.

109. Can it be said on the present factual matrix that the Plaintiff enjoys a legal or beneficial interest in 20% of the shareholding of AXIS IP?

110. Or has any such shareholding devolved by operation of law to the Plaintiff?

111. Or, does any party hold such a 20% shareholding on trust for the Plaintiff?

112. The answer to the foregoing questions must be in the negative. The factual matrix in the instant case discloses that the Plaintiff is not the legal owner of a 20% shareholding or 16.6% shareholding in AXIS IP because he is not a member on the register of members. Neither is he a shareholder.

shareholding devolved or been transmitted f law, such that some other person or entity merely holds such shares as the registered owner, but is in law, merely holding such shares as a constructive trustee. The Plaintiff does not also enjoy any ócontingentô interest in the shares which merely await perfection so as to accord him title as a shareholder or member.

114. The Plaintiff is not and has not as yet been declared the beneficial owner of any shares or a 20% shareholding in AXIS IP because the beneficial or equitable ownership has not vested in him. The beneficial or equitable ownership has not vested in him because the draft shareholdersô agreement was never executed and was expressly stipulated to be ósubject to Contractô This is not in dispute. In **Ho Kam Phaw v Fam Sin Nin [1998] 3 CLJ 708** at 716, Mahadev Shankar JCA (as he then was) explained it thus:-

> *"In such circumstances the rule is that:*
>
> > *Even although the terms to be included in the documents have been agreed, there is no contract and each party has a locus poenitentiae until at least execution on both sides.*
>
> *These concepts are not new. Reference can be made to the standard text books as well as Carruthers v Whitaker [1975] 2 NZLR 667, and Concorde Enterprises Ltd. v Anthony Motors (HUH) Ltd. [1981] 2 NZLR 385, as well as Shell Oil v Wordcom Investments [1992] 1 NZLR 129."*

e Plaintiff, on the present factual matrix, shares in AXIS IP. In other words he has no interest in the shareholding of AXIS IP. It follows therefore that he enjoys no rights or entitlements as a shareholder of AXIS IP. How then can he seek a remedy that has been statutorily cast to meet the needs of an aggrieved shareholder who has been treated unfairly or prejudicially by the company?

116. On the contrary in the instant case, the Plaintiffôs complaints of prejudice, unfairness, unjustness etc. are properly levelled, if at all, at various individuals, namely the 3rd to 5th Defendants individually and others, not AXIS IP. These complaints are therefore properly ventilated in other civil proceedings, and not s.181.

117. If the parties had executed the shareholdersô agreement then certain rights would devolve to the Plaintiff by virtue of that agreement. He would then have become entitled beneficially to be allotted a 20% shareholding in AXIS IP (provided the conditions stipulated in relation to his acquisition of such shareholding in the shareholdersô agreement were fulfilled). If so, this might well have put him in the position of a beneficial or equitable owner or transferee of shares whose rights had then to be perfected by entry of his name on the register of members. In other words the Plaintiff could then seek to have his beneficial ownership in the shares effected by the allocation of shares to him, subscription to those shares, and in the final instance, registration as a member on the register of members, thereby perfecting his legal and beneficial interest as a member or shareholder.

118. Even in such an instance, (i.e. if a shareholdersô agreement had been executed) it is debatable whether the holder of such an interest may present an oppression petition. On the one hand it may be argued that as there is a clear entitlement to have the shares registered in his name, he is effectively a shareholder, albeit in equity. However his name would not appear on the register as member. He would enjoy no legal ownership in the shares as legal title would still elude him. In such an instance the plaintiff as equitable owner may bring an action for rectification of the register under s.162 of the Companies Act to recognise and formalise his interest in the shareholding, prior to proceeding with an oppression petition.

119. On the other hand it might be argued with some basis that in such an event the aggrieved person falls within the ambit of **Owen Sim's test** (see also **Kitnasamy)** and may in fact present an oppression application.

120. To my mind however, even in such an instance, given the clear and unequivocal words of the statute, the aggrieved person should first seek rectification under the Companies Act 1965 prior to presentation of a petition, simply because that recourse or remedy is readily available.

121. Applying the well known principles of statutory interpretation as set out in Maxwellôs Interpretation of statutes, 12th edition at page 29:-

...Where the language is plain and admits of but one meaning the task of interpretation can hardly be said to arise.....Where by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced, however harsh or absurd or contrary to common sense the result may be. The interpretation of a statute is not to be collected from any notions which may be entertained by the court as to what is just and expedient; words are not to be construed contrary to their meaning, as embraced or excluding cases merely because no good reason appears why they should not be embraced or excluded. The duty of the court is to expound the law as it stands, and to leave the remedy (if one be resolved upon) to others."

122. To my mind there appears to be no ambiguity about the term ómemberô as utilised in section 181 which would require the court to depart from the normal rules of construction, namely that the intention of the legislature should be gathered primarily from the words used. (see **Killick Nixon's case** (above). See also **Ng Kok Pooi v Brunswood ID Sdn. Bhd**. (above).

123. Again, if for example, there is a transmission of such an equitable or beneficial interest in shares at law, such that the interest in those shares has in fact devolved upon the plaintiff, and the majority are wrongfully refusing to recognise his entitlement as a shareholder, the plain and ready recourse available to the transferee is to seek rectification under the Companies Act 1965 or initiate a civil suit seeking a declaration as to his rights. Such a beneficial or equitable owner may,

resent Plaintiff, seek to have his grievance on. However it is not apparent even in such a clear instance that the proper recourse is under this section, rather than rectification or a civil suit, procuring a clear declaration as to the beneficial ownerôs rights.

124. In this context, the position in Malaysia differs from that in England where a statutory amendment has long been in place so as to accord *locus stand*i under the statutory oppression provisions to á*a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law'*.

125. The law in Malaysia has not been so amended although the Corporate Law Reform Committee in its report entitled ñConsultative Document on Membersô Rights and Remedies (2007) made important recommendations to extend the scope of s.181. It was recommended that section 181 should be extended to give legal standing to two further categories of persons, namely (1) a person who was a former member but only if the oppression relates to the circumstances in which he ceased to be a member and (2) a transferee of shares or a person entitled to the shares by operation of law whose membership has not been perfected (i.e. a beneficial owner). It is to be noted that the first category seeks to give statutory form to **Owen Sim's case**.

126. This recommendation was made after a review of the statutory provisions in New Zealand, Australia and England, where these

cognised as persons who qualify to present se amendments were not included in the Companies (Amendment) Act 2007.

127. As such it would appear that as the law presently stands under section 181, even a person enjoying an undisputed equitable or beneficial interest in shares, whose ownership as a shareholder or member has not been made legal by registration and entry on the register of members, ought to seek rectification prior to bringing an action for oppression under the provisions of s.181.

128. This reinforces my conclusion that vis a vis the company however, under the law as it presently stands, only a person who is a member or shareholder is entitled to present an oppression petition. In other words, the rights that may exist between the company and its members or shareholders can be exercised only by its members.

129. The present factual matrix however, is several steps removed from even the foregoing situation. As stated earlier, the factual matrix presenting in this case discloses that no shareholdersô agreement was ever signed. On the contrary the documents, i.e. both the 1st and 2nd Draft Shareholdersô Agreements are strictly marked ó Subject to Formal Contractô They are clearly drafts. It follows from this therefore that no interest in the shares of AXIS IP (or AXIS Singapore) could have devolved to the Plaintiff either beneficially or legally. There is simply no nexus between the Plaintiff and the shares of AXIS IP because no

evolved to him pursuant to any concluded were allotted to him. There was never any subscription for the stated twenty percent shareholding in either AXIS Singapore or AXIS IP.

130. To my mind, the doctrine of estoppel does not afford the present Plaintiff recourse to section 181 unlike the situation in **Owen Sim's case**. This is because the Plaintiff has no interest, albeit legal or beneficial in the shares at present. In **Owen Sim's case** the petitioner had been a former member with full legal and beneficial entitlement to shares in the company. The petitioner there had a legal, beneficial and registered interest in the company which the majority wrongfully forfeited. It was the act of the company by its majority which caused the petitioner there the loss of his shares. The principle of estoppel was therefore invoked to preclude the company from depriving him of his rights as a member, by wrongfully forfeiting his shares. In other words, although the petitioner there was not a ómemberô at the time of the filing of the petition, he had at all material times been a ómemberô within section 16(4), whose rights were wrongfully removed by an act of the company through its majority.

131. Turning to the facts of the present case, it seems to this court that the doctrine of estoppel cannot be invoked to create or supplement an interest where there is none. In this context I have considered the various e-mails issued by Labrooy as well as the exchanges between him and the Plaintiff. The presentation to various banks to procure financing has also been considered. These matters do not, to my mind,

lf of the Plaintiff in the shares of AXIS IP. ded or accompanied the draft shareholdersô agreement, which was never executed. As such these órepresentationsô cannot form the basis for invoking the doctrine of estoppel to ócreateô an interest in the shares of AXIS IP for the Plaintiff, when no such interest or entitlement, legal or beneficial has ever vested or devolved or has been transmitted to him by operation of law. It may be the case that such an interest may be declared in a civil suit brought by the Plaintiff. But unless and until such an entitlement or interest is properly declared in favour of the Plaintiff, recognising his status as a shareholder or member, the present action fails on the threshold issue of qualification to bring an action under section 181.

132. Estoppel may well be sought to be invoked by the Plaintiff here in a civil suit against the individuals who proposed the venture into AXIS IP, premised on a different cause of action. But estoppel is not available against AXIS IP, i.e. the company itself on the present factual matrix, because the fact pattern does not disclose any act or omission on the part of the company itself, which can form the basis for a grievance under this section.

133. Equities may well exist between the Plaintiff and the other prospective shareholders, namely Tew, Gunnar, Labrooy, Tharmalingam and Lao which may entitle the Plaintiff to bring an action against them for specific performance of the 1st or 2nd Draft Shareholdersô Agreements, or damages in lieu of specific performance. There may be other causes

aintiff in respect of the failed proposed joint
o fruition. In other words the Plaintiff may

well hold an óequityôor a right to some form of redress for the failure of the relevant parties to proceed to execute the shareholdersô agreement.

134. However no such equity exists or subsists as between the Plaintiff and the company, AXIS IP. The factual matrix presenting itself in this case does not give rise to even an inchoate interest on the part of the Plaintiff in the shares of AXIS IP. As there was never any consensus achieved amongst the several individuals in relation to the shareholdersô agreement, it appears clear to me that the Plaintiff enjoys no legal or beneficial interest in the shares of AXIS IP as alleged.

135. Neither does the factual matrix of this case fall within the fact pattern of **Owen Sim's case**, as the petitioner there was in fact a member whose shares had been wrongfully forfeited. That cannot be said in the instant case where the possible ówrongdoingô, even if proved, would disclose a wrongful act by the collection of individuals who intended to become, or who at best, had agreed to become prospective shareholders of AXIS IP. The Plaintiff here therefore, if he is successful in proving wrongful or unfair acts or omissions on the part of these individuals, depriving him of the proposed shareholding in AXIS IP, can then initiate a cause of action against these persons. If he is successful in establishing an entitlement to a 20% shareholding as he alleges, it would then be open to him to initiate the present originating summons.

136. Under the statutory regime of section 181 the court is given greatlatitude in prescribing the appropriate relief to bring an end to, or remedy the matters complained of. To this end, **section 181(2)** accords the Court the right to ómake such order as it thinks fitô and without prejudice to such a right, sets out five specific remedies. The Plaintiff in the present proceedings has however, stipulated definitively, that he requires the payment of a monetary sum very much as if this were a writ action for a quantified sum. This appears to be an attempt to stifle or usurp the rightful exercise of the Courtôs statutory powers as stipulated in **section 181(2)**. It is not for a prospective plaintiff in an oppression petition to rigidly stipulate or dictate the remedy that is to be afforded to him by the Court.

137. The prayers sought in the present petition afford yet further reason for the conclusion that the Plaintiff ós complaint is not as a shareholder qua the company, but is instead a monetary claim, which is properly brought by way of a civil suit, seeking damages for any perceived ówrongôdone to the Plaintiff as a consequence of the proposed venture or participation as a shareholder and director of AXIS IP which never came to fruition.

138. I therefore conclude that on the present factual matrix that the Plaintiff is not entitled to resort to section 181 of the Companies Act 1965. This is because he fails to qualify or pass the threshold

mberô of the subject company. I am also tual matrix does not fall within the category of exceptions envisaged in Owen Simõs case.

139. It should also be stated that this is not a case where there are complex question of fact involved, which preclude the Court from determining whether the Plaintiff falls within the definition of a ómemberô by way of qualification to initiate an oppression action.

140. The factual matrix here is sufficiently clear (as I have detailed above in the background facts) to enable this Court to arrive at the conclusion that the Plaintiff here does not qualify as a ómemberôfor the purposes of section 181. I state this because it might be the case that if very complex facts are involved, the application under the oppression provisions may not warrant dismissal at the threshold stage, but may need to be heard on the merits to enable the prospective plaintiff to establish that he is a member. I am satisfied that this is not the case here.

141. For the foregoing reasons, the question in Enclosure 24 is answered in the negative, namely that the Plaintiff is not entitled to resort to **Section 181 of the Companies Act 1965** to establish himself as a shareholder of AXIS IP when the Plaintiff has never subscribed for any shares in AXIS IP nor ever been placed on its Register of Members.

142. The Second Defendant, AXIS Singapore vide Enclosure 26 seeks to challenge its inclusion as a party to these proceedings under **section 181 of the Companies Act 1965**. Accordingly it seeks under Order 14A and/or Order 34 Rule 1(1)(b) and 2(2) and/or Order 18 Rule 19 Rules of Court 2012 that these proceedings against AXIS Singapore be set aside and dismissed upon the determination of the following question:-

> **"Whether the Plaintiff is entitled to resort to Section 181 of the Companies Act 1965 and thereby assert a cause and/or consequently seek relief on matters concerning the 2nd Defendant when the 2nd Defendant is not a company incorporated under the laws of Malaysia."**

143. It is evident from the question that it is essentially a question of law which is eminently suitable to be disposed of under Order 14A Rule 1(1).

144. The Plaintiff vide this originating summons seeks as against AXIS Singapore, an order that it pay the Plaintiff the sum of RM1.25 million (or such other sum which the Honourable court deems fit) representing the Plaintiffûs 20% share in the capital of AXIS Singapore within 14 days of an order of court.

the Plaintiffôs cause of action against AXIS s.181 of the Companies Act 1965. AXIS Singapore is a company incorporated on 1 June 2012 under the laws of the Republic of Singapore.

146. Learned counsel for AXIS Singapore, Mr. Gopi Seshadari submits that the current proceedings brought by the Plaintiff against AXIS Singapore are simply not maintainable for the following reasons:-

(i) AXIS Singapore does not fall within the expression ócompanyô as set out in section 181 of the Companies Act 1965 as it is a company that was incorporated in Singapore;

(ii) The expression ócompanyô is defined in section 4 of the Companies Act 1965 as ñ..***a company incorporated pursuant to this Act or pursuant to any corresponding previous enactment";***

(iii) **Section 24(c) of the Courts of Judicature Act 1964** provides that with regard to companies the jurisdiction of the High Court shall be under any written law relating to companies, namely the Companies Act 1965;

(iv) Applying the definition of a ócompanyôin **section 4** of the Act and relating it to **section 217** of the Act it was held in

at Malaysia v Isles Internationale n Union) Limited (Companies (Winding Up) No: D-28NCC-90-2010) by Mohamad Ariff J. (now JCA) that the Court had no jurisdiction to wind up the foreign company which was the subject matter of the winding up action as it fell outside the scope of **sections 217 and 218** of the Act.

147. Applying the same reasoning in relation to the construction of ócompanyô in section 181 it would follow that this Court cannot grant relief under section 181 to a company that is not incorporated pursuant to the Companies Act 1965.

148. The Plaintiff in reply concedes that this Court cannot wind up a company incorporated under the laws of Singapore. However learned counsel points to the fact that the Plaintiff here seeks a remedy in monetary terms against the Singapore incorporated company, and not winding up. This has been specifically prayed for in the prayer against AXIS Singapore. To this end it is maintained that as it is monetary relief that is sought the 2nd Defendant ought to be treated like any other foreign Defendant against whom monetary relief.

149. I have considered the competing submissions of learned counsel for AXIS Singapore and the Plaintiff. It appears to me that as this is essentially an application for relief from oppression falling under the provisions of the Companies Act 1965, those provisions must be adhered to. It is clear that this Court is clothed with jurisdiction to provide

Companies Act 1965 only to companies as nition specifically refers to companies incorporated pursuant to this Act. It follows from this that section 181 which makes reference to a ócompanyô(as specifically defined in the Act) refers or is available specifically to companies incorporated under this Act and no other. It follows that a remedy under section 181 is not available to a company incorporated under the laws of Singapore.

150. The contention that the relief sought for is purely monetary does not afford an answer to this issue because the Courtôs powers under section 181, as I have alluded to earlier, are extensive. A plaintiff seeking relief for oppression under section 181 ought not to dictate to the Court nor seek to usurp the Courtôs powers by specifying the precise relief sought. It is for the Court to determine the appropriate relief.

151. Furthermore the fact that monetary relief is sought and not winding up, does not and cannot bring the Plaintiff within the purview of **section 181**. This is because the Courtôs jurisdiction is clearly circumscribed by **sections 4 and 181** read together. I am therefore satisfied that the answer to the question posed by AXIS Singapore vide Enclosure 26 is to be answered in the negative. In other words, the Plaintiff is not entitled to resort to **section 181 of the Companies Act 1965** to assert a cause and consequently seek relief against AXIS Singapore as AXIS Singapore is not a company incorporated under the laws of Malaysia.

efendant's application to strike out the

ating Summons

152. Vide Enclosure 41 the 5th Defendant seeks to have the Plaintiffs Amended Originating Summons dated 23 May 2013 struck out upon the undertaking of the 3rd, 4th and 5th Defendants to effect the voluntary winding-up of AXIS IP within a period no later than thirty (30) days of the order of this Court. It is contended for the 5th Defendant that such a voluntary winding up will not prejudice the Plaintiffs claim, if any, as it is specifically without prejudice to any alternative civil causes of action that may be available to the Plaintiff.

153. It is not necessary for me to determine this application as I have answered the questions posed in Enclosures 24 and 26 in the negative. The net result is that it has been concluded that the Plaintiff:-

(i) Lacks the locus standi to bring these oppression proceedings against AXIS IP, the 5th Defendant;

(ii) Cannot bring these oppression proceedings against AXIS Singapore, the 2nd Defendant because it is a company incorporated under the laws of Singapore and the remedy afforded under section 181 of the Companies Act 1965 is not available to a company so incorporated.

ons, Enclosures 24 and 26 are allowed with smissed. The net result therefore is that the Plaintiffôs claim in the Amended Originating Summons stands dismissed without prejudice to any alternative civil causes of action that may be available to the Plaintiff.

Y.A. NALLINI PATHMANATHAN
Judge
High Court (Commercial Division)
Kuala Lumpur

DATE: 7 NOVEMBER 2013

For the Plaintiff: *Tommy Thomas & Anita Natalia with him (T/n TommyThomas)*

For the Defendant: *Gobi Seshadari – 2nd Defendant (T/n Gobi Seshadari)*

Logan Sabapathy, Sanjeev Kumar & Suhana Salikin with him – 5th Defendant (T/n Sanjeev Kumar)

Saranjit Singh & Nur Faezah with him – 1st, 3rd & 4th Defendant (T/n Saranjit Singh)