

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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ON APPEAL  
FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT  
KUCHING SARAWAK

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(APPELLATE JURISDICTION)

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IN THE MATTER of KONG THAI SAWMILL (MIRI) SDN. BHD.  
AND  
IN THE MATTER of the COMPANIES ACT 1965

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B E T W E E N :

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

Appellants

- and -

LING BENG SUNG

Respondent

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CASE FOR THE RESPONDENT  
AND CROSS APPEAL

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1. These are consolidated appeals and a cross-appeal from a judgment and Order of the Federal Court of Malaysia holden at Kuching Sarawak dated 4th August 1975 whereby the said Federal Court (Gill Chief Justice of the High Court Malaya, Wan Suleiman Justice of the Federal Court Malaysia and Tan Chiaw Thong Justice of the High Court Borneo) allowed an appeal by Ling Beng Sung (the Respondent in this appeal) against an Order of the High Court of Borneo (B. T. H. Lee Justice of the High Court Borneo) who dismissed an application

RECORD

by the said Ling Beng Sung (hereinafter referred to as "the Applicant") whereby the Applicant sought relief under Section 181 of the Companies Act 1965 against Kong Thai Sawmill (Miri) Sdn. Bhd., Ling Beng Siew and Ling Beng Siong (hereinafter called "the Company", "Beng Siew" and "Beng Siong" respectively) who are the Appellants in this appeal.

2. By its Order the Federal Court directed (a) that Beng Siew pay back to the Company all sums paid out of the Company's funds for the purchase, reconstruction and maintenance of a luxury yacht known as Berjaya Malaysia with interest at 6 per cent. from 1st September 1971 until payment and that upon such payment being made the Company transfer the yacht to him, (b) that Beng Siew pay back to the Company the sum of \$1,154,800.69 paid out of the Company's funds as donations to the Sarawak Chinese Association (hereinafter referred to as "S.C.A.") and Sarawak National Party (hereinafter referred to as "SNAP") during the Company's accounting year 1968/69 with interest at 6 per cent. from 1st September 1971 until payment, (c) that one of them the Applicant, Ling Beng Hui and Ling Beng King (hereinafter referred to as "Beng Hui" and "Beng King" respectively) be appointed a 'watchdog' director of the Company in rotation (the first to be the Applicant, the second Beng Hui and the third Beng King) to protect their interests as shareholders in the Company, (d) that no further donations be made by the Company except in its name and with the prior approval of its Board of Directors, (e) that no bank account of the Company be operated without the signatures of two directors one of whom should be a person other than Beng Siew, Beng Siong or Ling Beng Tuang (hereinafter referred to as "Beng Tuang"), (f) that no moneys be withdrawn from the Company by the Managing Director or any of the other directors without the prior approval of the Board of Directors, (g) that 3 clear days notice in writing be given to every Director of the Company of any meeting of the Board of Directors, (h) that the power delegated to Beng Siew to make investments on behalf of the Company be cancelled, (i) that bonus in future be 2 per cent. of the net profits of which 1 per cent. should be paid to the Managing Director and the other 1 per cent. to the other directors of the Company, and (j) that no bonus be paid until after the passing of the Company's account at each Annual General Meeting.

3. The main issues in this appeal are whether the Applicant had made out a case for relief under Section 181 and if

so whether the Federal Court had power to make or alternatively ought in its discretion to have made orders in these terms. The secondary issue raised by the Applicant's cross-appeal is whether the Federal Court ought not to have ordered that the Company be wound up instead of making the Orders for the future regulation of the affairs of the Company set out in sub-paragraphs (c) - (j) (both inclusive) of paragraph 2 above in addition to the Orders for repayment set out in sub-paragraphs (a) and (b) of the said paragraph 2.

10 4. The historical background which have rise to the dispute which led to the proceedings instituted by the Applicant is set out in the first six pages of the judgment of Gill C. J. (who gave the judgment of the Federal Court). The salient facts are as follows :-

(a) Beng Siew, Beng Siong, Beng Tuang (who are hereinafter together referred to as "the elder brothers") the Applicant, Beng Hui and Beng King (who are hereinafter together referred to as "the younger brothers") are the sons of the late Ling Chui Ming who died in 1955. During his lifetime the father made each of his sons a partner in two family partnerships known as Kong Thai (M. K. ) Sawmill Sibul and Ban Hin Sawmill Mukah.

Vol. I p. 74

20 (b) In 1958 or thereabouts the younger brothers asked Beng Siew (who, with Beng Siong, was administrator of the father's estate and who, together with Beng Siong, managed the partnership business) for accounts of the father's estate. They were told that all accounts had been destroyed in accordance with the father's business practice. In 1962 or thereabouts the younger brothers asked Beng Siew and Beng Siong for accounts of the partnerships and were told that the accounts had been destroyed in a flood.

Vol. II p. 255-6-7  
Vol. VII p. 1335-6-7  
Ex. R. 12  
Vol. III p. 391-2

30 (c) As a result of the failure of Beng Siew and Beng Siong to provide accounts on those two occasions disputes arose between the elder brothers and the younger brothers which resulted in the commencement of proceedings by the elder brothers against the younger brothers, asking for dissolution of the partnerships. This action was settled on terms that (amongst other things) the three elder brothers bought the interests of the three younger brothers in Kong Thai (M. K. ) Sawmill

Vol. II p. 256-7  
Vol. IV p. 703  
Ex. KTS33

40 Vol. I p. 68

RECORD

Sibu and the younger brothers bought the interests of the three elder brothers in Ban Hin Sawmill Mukah. This partnership business was later (in December 1962) transferred by the younger brothers to a Company, Mukah Sawmills (1962) Sdn. Bhd. all the shares of which were held by them.

- (d) The Company (sometimes referred to in the documents in the record as "Kong Thai" or "K. T. S. ") was formed by the three elder brothers, each of whom was appointed a director. It was incorporated in Sarawak on 29th October 1964 with an authorised capital of \$3m. divided into 30,000 shares of \$100/- each. At all material times 13,600 of these 30,000 shares were issued and fully paid up, of which 7,582 were issued to Beng Siew, 1,060 to Beng Siong and 1,060 to Beng Tuang. 10
- (e) On 1st April 1965 a licence was granted to the Company for the extraction of timber. In its early days the Company was short of working capital and borrowed money from Kong Ming Bank Sdn., a Company owned and controlled by the younger brothers, on the security of bills of sale over its working equipment. Later (in 1966) these moneys were repaid in part out of moneys raised by the issue at par of 1,000 shares to Mukah Sawmills (1962) Sdn. Bhd. These shares were later transferred by Mukah Sawmills (1962) Sdn. Bhd. as to 340 to Beng King and as to 330 to each of the Applicant and Beng Hui. 20
- (f) Beng Siew has at all material times been Chairman and Managing Director of the Company, having been appointed to those offices on 20th January 1965 with effect from 1st January 1965. Beng Tuang and Beng Siong have also at all material times been Directors of the Company. Mukah Sawmills (1962) Sdn. Bhd. was purportedly appointed a director of the Company when shares were first issued to it but on 2nd February 1967 the Applicant was appointed a Director in its place. 30
- (g) Under powers conferred by Article 76 of the Articles of Association of the Company the Directors of the Company on 27th December 1967 authorised the Managing Director "to purchase tractors, logging 40

trucks, machines and any other equipment necessary for the operation of the Company" and to make such investments as he thought fit on behalf of the Board of Directors and for that purpose to make use of the Company's Seal.

10 (h) The Applicant took no active part in the affairs of the Company and was content to leave its management in the hands of Beng Siew until 1970 when he saw draft accounts of the Company which showed that very large sums amounting to over \$1,000,000 had been paid by the Company as donations to political parties during the Company's year ending on 30th September 1969. He wrote letters on 22nd April 1970 and 14th May 1970 to the Secretary of the Company, asking for details of these donations and other matters, but received no reply to either letter.

Vol. I p. 46  
Vol. IV p. 620, 622

20 (i) On 29th September 1970 the Applicant applied to the Court under Section 167(5) of the Companies Act 1965 for an order that the accounting and other records of the Company be made available for inspection by an approved Company auditor acting on his behalf and an order was duly made on 18th November 1970 by the High Court of Borneo appointing one Andrew Peattie (hereinafter referred to as "Peattie"), a Chartered Accountant, pursuant to Section 167(5). At the general meeting of the Company held on 16th February 1971 the Applicant retired as a Director of the Company by rotation and was not re-elected.

[See in folder]

Vol. I p. 76

30 5. Reports made by Peattie to the Applicant disclosed a serious state of affairs and on 1st September 1971 the Applicant took out an originating motion in the High Court at Sibuan for relief under Section 181 of the Companies Act 1965. Section 181 (so far as material to this application) provides as follows :-

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

40 (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members ... including himself or in

disregard of his or their interests as members of the company;

(2) If on such application the Court is of the opinion that either of such 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;

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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.

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(3) When an order that the company be wound up is made pursuant to paragraph (e) of sub-section (2) of this Section the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company. "

Vol. I p. 2

6. In his originating motion the Applicant asked first (under 60 numbered paragraphs) for orders for the removal of Beng Siew as Chairman and Managing Director and of Beng Siong as Director of the Company, the appointment of a receiver and manager to conduct the business of the Company and to investigate and report to the Court on the misuse by Beng Siew of his powers as Managing Director, for the surrender by Beng Siew and Beng Siong of their shares in the Company at a valuation fixed by the Court, for restitution to the Company of money and property improperly taken from the Company by Beng Siew and Beng Siong with interest

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10 thereon, and for ancillary relief. The Applicant also asked in the alternative for an order for the compulsory winding-up of the Company. Many of the claims for restitution of money and property to the Company with interest were not pursued at the hearing either because restitution had already been made or because the amounts at stake were comparatively unimportant. At the hearing before B. T. H. Lee J. and in the Federal Court the charges of misconduct made by the Applicant against Beng Siew and Beng Siong in respect of which relief was sought fall under nine main heads, as follows :-

- (i) loan to Encik Harun Ariffin;
- (ii) remuneration (salary, fees and bonus) paid to Beng Siew;
- (iii) travelling and entertainment expenses;
- (iv) advances to and investment in joint ventures;
- (v) investment in the Malaysia Daily News Sdn. Bhd.;
- (vi) purchase of the Aurora Hotel;
- 20 (vii) purchase and outfitting of the motor yacht Berjaya Malaysia;
- (viii) donations to political parties;
- (ix) drawings by Beng Siew and Beng Siong from the Company's funds.

30 7. The main evidence in support of the application was given by Peattie. He affirmed an Affidavit on 10th August 1971. The Originating Motion was issued on 1st September 1971. Under the Rules of Court in Malaysia an Affidavit in support of an application under Section 181 is required to be affirmed after the originating motion has been issued. Accordingly Peattie re-affirmed his Affidavit on 27th November 1971. Between 10th August 1971 and 27th November 1971 Peattie obtained information and explanations from the Company on matters on which he had said in his Affidavit that the Company had failed to provide any information or explanation. At the date when he re-affirmed his Affidavit these statements were factually

RECORD

untrue. In their written submissions to B. T. H. Lee J. Counsel for the Company, Beng Siew and Beng Siong relied upon these misstatements of fact to launch an attack upon the credibility of Peattie. B. T. H. Lee J. (whose judgment in large measure consists of verbatim extracts from the written submissions of Counsel for Beng Siew and Beng Siong) accepted these criticisms and concluded that "a moment's consideration would have shown that the course adopted by Peattie was unjustified in point of law and in fact as it is assuredly repellant to the sense of professional decency. This in my judgment is a reprehensible attempt at making statements of fact which he knew to be untrue". These criticisms were wholly misconceived. As Gill F. J. pointed out, "On all matters of substance, to which I shall come later in my judgment, the evidence of Peattie remained unchallenged because it consisted of the Company's own records". Gill F. J., after a full discussion of the criticisms of Peattie made by B. T. H. Lee J. concluded that "a submission by Counsel for the respondents that Peattie had made a deliberate misrepresentation of fact in order to deceive the Court was, to my mind, with all deference to Counsel, nothing short of a red herring."

Vol. III p. 1173

Vol. III p. 556

Vol. III p. 556

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8. Apart from the evidence of Peattie the Applicant relied upon :-

Vol. I p. 46

(a) an Affidavit of the Applicant affirmed on 12th February 1972

Vol. II p. 416

(b) an Affidavit of Datuk Stephen Kalong Ningkan affirmed on 16th April 1972

Vol. III p. 420

Vol. III p. 422

(c) Affidavits of Encik Harun bin Ariffin (who later became Datuk Harun bin Ariffin and is hereinafter referred to as "Datuk Harun") affirmed on 16th November 1972 and 20th November 1972

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Vol. III p. 424

(d) an Affidavit of Lau Buong Tung affirmed on 23rd November 1974.

The Company, Beng Siew and Beng Siong relied upon :-

Vol. I p. 11

Vol. I p. 68

Vol. III p. 417

Vol. III p. 426

(a) Affidavits of Beng Siew affirmed on 30th September 1971, 14th March 1972 and 19th April 1972

(b) an Affidavit of Dr. Julius Grant affirmed on 24th



November 1972

- (c) the oral evidence of Ying Ten Ping Vol. II p. 282  
(d) the Affidavit and the oral evidence of Lee Swee Hock. Vol. III p. 418  
Vol. II p. 324

9. All the deponents to Affidavits filed on behalf of the Applicant and on behalf of the Company, Beng Siew and Beng Siong except Lau Buong Tung were cross-examined. In addition there was very considerable documentary evidence before the Court. The hearing before the Federal Court was a rehearing on fact and law and the whole of the  
10 Affidavit evidence, the Judge's note of evidence and the documentary evidence was reconsidered by the Federal Court. The salient facts accepted as established by the Federal Court may be summarised as follows (for convenience references to the evidence relevant to each of the main issues are set out in square brackets after each heading) :-

(1) Loan to Datuk Harun.

DATUK HARUN.

- [Affidavit of Peattie S. 63, 93 & 120 (Vol. I pp. 56 & 66)  
Affidavit of Applicant S. 32 & 49 (Vol. I pp. 98 & 104)  
20 Affidavit of Beng Siew S. 41 (Vol. I p. 183)  
Exhibit R24 (Vol. IV p. 1329)  
Affidavits of Datuk Harun (Vol. I pp. 678, 682)  
Exhibits HA1, 2, 3, 3A, 4, 5, 6, 7, 8, 9, 10, 11, 12  
(Vol. IV pp. 1354-1365)  
Exhibits KTS R16 47 & 48 (Vol. V pp. 1689 & 1690)  
Henderson's Report p. 51(d) (Vol. IX 2308)  
Beng Siew's evidence (Vol. II pp. 489-503, 514)  
Exhibit KTS 51 (same as HA4)  
Datuk Harun (Vol. I pp. 566-577)  
30 Affidavit of Julius Grant (Vol. I pp. 687-8)  
Julius Grant (pp. 655-664, Vol. 4)  
Statement of Counsel (Vol. I p. 664) ]

(i) Datuk Harun is a senior civil servant who was in a position of influence in Sarawak. He was lent \$10,000 by the Company on 3rd March 1969. The Company's books record that he was lent an additional \$3,000 on 7th October 1969 which he is alleged to have repaid by instalments of \$500. The evidence showed that the \$3,000 was paid to Beng Siong. There was no evidence to show that the money

RECORD

was paid to Datuk Harun other than entries in the Company's books and a receipt allegedly signed by Datuk Harun. Datuk Harun gave evidence that he did not think that the receipt was signed by him and denied receiving the \$3,000. Beng Siong, although in Court throughout, did not give evidence. A handwriting expert, Dr. Julius Grant, gave evidence on behalf of Beng Siew and Beng Siong. He said that there was a high probability that the signature was that of Datuk Harun but that he could not exclude the possibility of a clever forgery. There was no direct evidence that the signature was that of Datuk Harun. There was no witness to say that the \$3,000 was paid to Datuk Harun, and no evidence of any kind to prove the alleged ten instalment repayments of \$500. A loan of \$10,000 to Datuk Harun was retrospectively approved at a meeting of the Directors of the Company on 10th June 1970. This was a Board Meeting convened after the Applicant had begun his inquiries, attended by Beng Siew, Beng Siong and only two other directors (out of eleven). There was no agenda. At it, over twenty resolutions were passed approving retrospectively various actions of Beng Siew and Beng Siong. Although the loan of \$10,000 was retrospectively approved, there was no mention at that meeting of the supplementary loan of \$3,000 purportedly made on 7th October 1969 and still outstanding.

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Vol. I p. 37-8-9  
Peattie's Affidavit  
S. 120, 121

(ii) The Judge held that he was entitled to determine himself whether the signature was Datuk Harun's and decided that it was. He further held that the \$3,000 was paid to Datuk Harun and said that Datuk Harun had admitted that it was repaid.

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Vol. III p. 560

(iii) Gill C. J. pointed out that there was no admission by Datuk Harun of any repayment in respect of a loan of \$3,000 and no evidence to support the Judge's finding that this money was paid to Datuk Harun. There was evidence that \$3,000 was paid to Beng Siong to be paid to Datuk Harun but no evidence that it was in fact paid by Beng Siong to Datuk Harun. The only person who could prove payment was Beng Siong, who was present in Court but who did not give evidence. He concluded that "if Harun's story about his never having received the additional loan of \$3,000 is true, and, as I have already said, there was no evidence to contradict it, then it is not possible to resist the conclusion that Harun's account with the Company was not quite correct".

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10 (iv) The Applicant will submit that the state of affairs revealed by investigation of the transactions between the Company and Datuk Harun recorded in the books of the Company are of the utmost gravity. The investigation showed that \$3,000 was paid to Beng Siong and recorded in the books of the Company as a loan to Datuk Harun, who knew nothing of the alleged loan. After the investigation started the discrepancy was covered up by entries in the books of the Company purporting to show repayment of the loan of \$3,000 with interest by Datuk Harun although he had neither received the money nor repaid it.

(2) Remuneration (salary and bonus) paid to Beng Siew.

[Peattie's affidavit S. 6, 7, 8, 10, 11, 12, 13, 17, 24, 37, 41, 49, 50, 72, 109, 128, 136, 139.  
Beng Siew's affidavit S. 16, 17, 18, 20, 21, 22, 26, 33, 46, 50, 56, 77.]

20 (i) During the period 30th September 1966 to 30th September 1970 Beng Siew received from the Company by way of salary, fees and bonus, a sum of \$1,135,326/-. In addition he drew substantial remuneration from subsidiary companies and companies associated with and financed by the Company none of which was authorised by the Company or disclosed to its Board of Directors. Gill C. J. held that "his fees and bonus were huge when compared to the net amount paid to the shareholders during the same period". He said "It is open to the Court when the amount so fixed is excessive and out of proportion to a director's shareholding to say that that amounts to oppression of other shareholders". He concluded as follows:

Vol. III p. 564

30 "I do not think it is possible for this Court to say that Beng Siew should be called upon to pay back to the Company a part of the enormous sums which he received, but I have very little hesitation in saying that the amounts paid to him were so large that they were paid in complete disregard of the interests of the other shareholders".

(3) Travelling & Entertainment Expenses.

[Peattie's Affidavit SS. 7, 12, 49, 53, 54, 75, 79, 112, 115, 129, 134, 136.  
Applicant's Affidavit SS. 8, 25, 27, 28, 41, 62, 65.  
Beng Siew's Affidavit SS. 17, 21, 56, 58, 59.]

RECORD

During the period from 30th September 1966 to 30th September 1970 \$840,396 was spent on entertainment and travelling primarily for Beng Siew and Beng Siong. The expenses included a daily allowance of \$60 over and above his actual expenses which were fully reimbursed.

The learned Judge held that expenditure on entertainment was within the discretion of directors and had no criticism to make under this heading. The Federal Court reviewed the matter of travelling and entertainment expenses and said that it was not surprising that a substantial portion of the entertainment and travelling expenses were disallowed by the Income Tax Authorities but made no specific order.

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(4) Advances to and investments in joint ventures.

(i) P. T. Kalimantan Sari & United Singapore Lumber P. T. Ltd.

[Peattie's Affidavit SS. 43, 59, 88, 89, 94, 104, 120, 131, 133, 142.

Beng Sung's Affidavit SS. 31, 57, 69.

Beng Siew's Affidavit SS. 5(8), 5(9), 62.

Henderson's Report pp. 24-28.

Peattie's evidence Vol. II pp. 296-7, 312.

Beng Sung's evidence Vol. II p. 390.

Beng Siew's evidence pp. 454, 495, 496-500, 503-528, 546-7, 587-90, 594-5, 626-9.

Exhibit KTS 49 (Vol. VI pp. 1751-1772; 1851-1874).

Exhibit KTS 53 (Vol. VI pp. 1875-1932).

Exhibit KTS 74 (Vol. VII pp. 2139-2140) ]

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P. T. Kalimantan Sari was a timber concessionaire in Indonesia. 48% of the shares were held by the Company and 7% by Beng Siew. Substantially all its timber was sold to United Singapore Lumber P. T. Ltd. (hereinafter referred to as "U.S. Lumber") which resold it. Between its incorporation in 1968 and 1971, P. T. Kalimantan Sari incurred trading losses of the equivalent of 25% to 30% of its subscribed capital. P. T. Kalimantan Sari was financed by the Company to the extent of \$1,212,762.49 up to 1970 but the advance was not approved and no shares were issued to the Company until the directors' meeting of 10th June 1970 when a retrospective approval was given to advances to date and it was agreed that shares should be taken to offset this. U.S. Lumber was also financed by the Company.

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RECORD

It began with a loan of over \$600,000 but it only had two shareholders, one of whom was Beng Siew, until after these proceedings began. Then on 21st February 1972 additional shares were issued. The Company received 96,000. 28,999 were given to Beng Siew. During the hearing on 16th November 1972 (some seven months after the case for the Applicant had been opened) Beng Siew produced a series of written declarations, newly executed, declaring that he held the shares in trust for senior staff. He stated that he had been a trustee since the formation of U.S. Lumber. Earlier, in evidence on 15th November, he said that he did not know what "trustee" meant. The trust deeds relating to U.S. Lumber were dated 11th and 13th November 1972 and are part of a series of twenty-seven trust deeds all executed between the beginning and middle of November 1972 during the cross-examination of Beng Siew.

Vol. VII p. 1966-7-8  
Ex. KTS57

Vol. II p. 315

Vol. II p. 302  
Ex. KTS53  
Vol. VII p. 1199

The learned Judge held that there was no evidence to support the Applicant's allegation that prices had been 'rigged' so as to ensure that profits that ought to have been made by Kalimantan Sari enured for the benefit of U.S. Lumber and also said that in any event it was irrelevant since the Company's shareholding in both companies was identical. In regard to the allegation that Beng Siew had a personal interest in the two companies, the Judge said that Beng Siew had given evidence on this and in support produced the relevant trust deeds where following a consistent practice a proportion of the shares in these companies was held on behalf of members of the senior staff. He found no ground for criticism.

Vol. III p. 467

Gill C. J. referred to the fact that notwithstanding the advance of large sums to P. T. Kalimantan Sari, the Company had no shareholding in it till after the Board Meeting of 10th June 1970 (which was after the Applicant began his inquiries) and said that the same was true of U.S. Lumber. He referred also to the transfer of shares taking place during the proceedings. He referred to the change in trading arrangements after the Applicant initiated his inquiries. He said that it "would be idle to speculate on what would have happened if the Applicant had not started inquiries and subsequently brought these proceedings. But it would be wrong to say that the Applicant's allegations" (that U.S. Lumber was intended to make a profit at the expense of P. T. Kalimantan Sari and that the Company only got shares because of the

Vol. III p. 567, 568

RECORD

inquiries and proceedings) "were unfounded and activated by malice. In my judgment there cannot be the slightest doubt, in the light of all the evidence produced, that it was as a result of the initiation of these proceedings that the matters were eventually put right".

- (ii) Kong Thai Lumber Sdn. Bhd. and Chalfont Investments Ltd.  
Sabah Agency Bhd. and Glendale Investments Ltd.

[Evidence :

Peattie's Affidavit S. 43, 49, 86, 88, 104, 120, 135, 142. 10

Henderson's Report p. 20 et seq.

Beng Sung's Affidavit paragraphs 52, 57, 58.

Beng Siew's Affidavit paragraphs 57, 62, 63.

Beng Sung's evidence: Judge's Notes p. 160.

Beng Siew's evidence: Judge's Notes pp. 216, 283-4, 288-307.

Exhibit R28 (KTS 64)(Vol. VII p. 2020).

Exhibit R29 (KTS 65)(Vol. VII p. 2023).

Exhibit KTS 49 (Vol. VI, pp. 1691-1750).

Exhibit KTS 53 (Vol. VI, 1875 et seq. ). 20

Exhibit KTS 58 (Vol. VII, 1978).

Exhibit KTS 62 (Vol. VII, 2012).

Exhibit KTS 63 (Vol. VII, 2016).

Exhibit KTS 64 (Vol. VII, 2020).

Exhibit KTS 65 (Vol. VII, 2023).

Peattie's evidence, Vol. II p. 294.

Beng Sung's evidence, pp. 389, 390.

Beng Siew's evidence, Vol. II, 455, 533-5, 539, 542-562, 578-581, 600-602, 607-609, 638]

Glendale Investments Ltd. and Chalfont Investments Ltd. (hereinafter referred to as "Glendale" and "Chalfont" 30

respectively) were Hong Kong companies which had the right to exploit timber in Indonesia. This was their only business. Beng Siew and Beng Siong owned 35% of the share capital of Glendale and 37½% of the share capital of Chalfont. Glendale and Chalfont did not do the work of exploitation themselves. Glendale employed a company called Sabah Agency Sdn. Bhd. (hereinafter referred to as "Sabah Agency") and Chalfont employed a company called Kong Thai Lumber Sdn. Bhd. (hereinafter referred to as "Kong Thai Lumber"). Sabah Agency and Kong Thai Lumber did the actual work of felling and extracting the timber. They did this by virtue of written agreements 40

Vol. III p. 510  
p. 511

with Glendale and Chalfont. Sabah Agency and Kong Thai Lumber had no other business. Sabah Agency issued only their subscriber shares in 1968. Beng Siew was a subscriber. But on 15th April 1970, 8,997 shares were issued: 1,349 to Beng Siew and 2,700 to the Company. Later Beng Siew transferred 345 shares to the Company. Kong Thai Lumber issued two subscriber shares in 1968. Beng Siew was a subscriber. On 15th June 1970, 8,998 shares were issued in Kong Thai Lumber: 2,248 to Beng Siew and 3,375 to the Company. The Company provided substantially all the finance for Sabah Agency and Kong Thai Lumber. Between 1968 and 1970 the Company lent Sabah Agency \$1,674,738.10 and lent Kong Thai Lumber \$678,936.91.

Vol. III p. 511

From March to December 1969 Glendale made a gross profit of HK \$365,121.44 and a net profit (after deducting what were said to be administrative expenses of HK \$164,252.33 and financial expenses of HK \$247,459.99) of HK \$53,409.12. Sabah Agency for the period ended 31st December 1969 incurred a net loss of M \$252,933.60. For the year ended 31st December 1970, Glendale made a gross profit on trading of HK \$2,572,865.73 and a net profit of HK \$2,051,059.51. For the same period Sabah Agency incurred a loss of M \$21,078.10.

From March to December 1969 Chalfont made a gross profit on trading of HK \$43,819.30 but a net loss of HK \$317,601.33 (the net loss arising out of the borrowing by Chalfont of money to lend to Glendale). Kong Thai Lumber incurred a loss in the year ending 31st December 1969 of M \$83,554/-. For the year ended 31st December 1970, Chalfont made a gross profit on trading of HK \$1,386,789.74 and a net profit after deducting what were said to be administrative expenses of HK \$135,316.25 and financial expenses of HK \$976,717.82, of HK \$300,187.84. For the same period, Kong Thai Lumber made a profit of M \$45,130/-.

The agreements between Chalfont and Glendale on the one hand and Kong Thai Lumber and Sabah Agency on the other, imposed on the contractor the task of felling and extracting all the timber and required them to be responsible for all wages, salaries and other expenses in connection with the employment of workers, the provision of all quarters, offices, stores, roads, bridges and ramps and

Vol. VII p. 1310  
Ex. KTS64 & 65

RECORD

the provision of all tools and utensils, tugboats, electrical appliances, etc. The contractors were also responsible for the payment for fuel repairs and maintenance for the heavy equipment supplied by the employers. In return for this, the contractors were paid a fixed sum of \$45 (Kong Thai Lumber) and \$50 (Sabah Agency) per ton. There was no provision in the Chalfont/Kong Thai Lumber agreement for termination. The Glendale/Sabah Agency agreement contained no provision for termination other than the fixed date of 17th December 1987. The agreements were exhibited as R. 28 and R. 29 to Beng Siew's affidavit of 14th March 1972. Towards the end of the first session of the Court hearing Beng Siew filed a "Corrective Affidavit" dated 19th April 1972 in which he stated that the agreements had been amended, and he exhibited "the current contracts" R. 30 and R. 31. The Chalfont/Kong Thai Lumber agreement was the same agreement except that there was an interlineation making the payment to the contractor \$50 "or such other sum as may from time to time be agreed". The Glendale/Sabah Agency agreement was also the same except for a similar interlineation and another alteration which gave a right of termination on three months notice to both parties. The Company not only financed Kong Thai Lumber and Sabah Agency but it also financed Chalfont and Glendale directly and through its associated companies. Chalfont's borrowings in 1968/9 from the Company and associated companies totalled \$1,224,692.81. Glendale in the same year borrowed over \$3,000,000 from Chalfont. Beng Siew sold his shares in Chalfont and Glendale in 1971. Beng Siew declined to answer questions on this transaction on the ground that according to Chinese custom it was not good to be owing money: Judge's Notes 303. Beng Siew agreed in cross-examination to check the date of sale, purchaser and the sale price of the shares. At the resumed hearing, all questions on this were objected to and disallowed by the Judge: Judge's Notes p. 321.

Ex. KTS 64 & 65 10

Ex. KTS 62 - 63  
Vol. VII p. 1302 20

Vol. II p. 332 30

Vol. II p. 340  
Vol. II p. 333

Vol. II p. 359

Vol. III p. 569 40

The Judge found nothing to criticise in these arrangements. Gill C. J. said that it was common ground that Beng Siew entered into these contracts without approval of the Company's Board and did not disclose his interest in the contracts by reason of his holding in the Hong Kong companies. The Federal Court said that it was reasonable to assume that the contracts would not have been amended but for these proceedings. The Federal Court accepted that Beng Siew was liable to account for the profits which



10 Beng Siew made out of Chalfont and Glendale but held that however reprehensible his conduct may have been, the liability to account was to Sabah Agency and Kong Thai Lumber and not to the Company. The Applicant will submit that the Federal Court was wrong in its view that Beng Siew was only liable to account to Sabah Agency and Kong Thai Lumber and not to the Company but will submit that the claim by the Company could most effectively and conveniently be made by a liquidator of the Company after a winding-up order has been made.

(5) Malaysian Daily News Sdn. Bhd.

Peattie's Affidavit SS. 68, 100.

Henderson 44.

Beng Siew's Affidavit SS. 45, 60.

Peattie's evidence Vol. II 288, 299, 329, 330.

Beng Siew Vol. II pp. 597-9, 636.

20 The funds of the Company were also invested in and loaned to a newspaper. The newspaper afforded publicity to Beng Siew and Beng Siong personally but financially there were no figures to justify the investment. No-one in the Company had any experience in running a newspaper.

The Judge held that there was no evidence that this investment was a bad one and that in any event this was a matter for the directors' discretion. He held further that there was no substance in the Applicant's contention that it was purchased to give Beng Siew and Beng Siong a public organ to advance their political careers.

30 The Federal Court held that the purchase of the newspaper was not in line with the Company's business. There was no evidence that the newspaper had proved to be a profitable venture or ever would be. The Federal Court said that although there was no doubt as to the interest which Beng Siew and Beng Siong took in Sarawak politics and that a newspaper could be a very valuable instrument for a politician there was no evidence, apart from speculation, that the newspaper was used to further their political ends, and that as Beng Siew had authority to make investments on behalf of the Company there was  
40 no ground on which the Court could make any order.

(6) Aurora Hotel.

[ Peattie's Affidavit SS. 36, 37, 66, 67, 99.  
Beng Sung's Affidavit SS. 19, 35, 54.  
Beng Siew's Affidavit SS. 28, 44, 59.  
Henderson 38A.  
Peattie Vol. II p. 259 et seq.  
Beng Siew Vol. II pp. 595-7, 635-6 ]

This was purchased by Beng Siew by an investment of over \$2,000,000 of the Company's funds. No valuation or other report was obtained before the purchase nor was the hotel surveyed. The purchase was made at a time when the Company was in debt. The hotel facilities were extensively used by Beng Siew and Beng Siong for private entertainment. It was an unprofitable investment.

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The learned Judge held that there was no evidence that this was a bad investment, that the contention that the purchase of the hotel was to enable Beng Siew and Beng Siong to indulge in lavish entertainment of political acquaintances was unfounded and that the investment was a matter for the directors.

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Vol. III p. 571, 572

The Federal Court held that the value of immovable property in the nature of things continues to rise and that now it was perhaps the most valuable asset of the Company and that there was therefore no ground for complaint.

(7) Berjaya Malaysia.

Evidence :

[ Peattie's Affidavit SS. 39, 42, 69, 81, 101, 116.  
Beng Sung's Affidavit SS. 21, 66.  
Beng Siew's Affidavit S. 30.  
Henderson 56.  
Peattie's evidence 331.  
Beng Sung Vol. II 369-375, 411-2.  
Beng Siew 563-565, 581-584, 592.  
Exhibit KTS 60 (Vol. VII 1984) ]

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(i) In 1967/68 Beng Siew used \$48,000 of the Company's funds to buy a secondhand motor-vessel. This was renovated at a cost of over \$500,000. Running expenses in 1968/69 cost \$189,027.80. In 1969/70 running expenses cost \$95,910.94. The total spent on Berjaya Malaysia up

to the time of Peattie's inspection was \$797,031.91. The vessel was not a working boat. It was an extremely luxurious yacht and was used as such by Beng Siew and Beng Siong. The boat was registered in Beng Siew's name until 10/4/70 when it was transferred to the Company. No authority was given for its purchase or reconstruction until the Board meeting of 10th June 1970 when the retrospective resolutions were passed. Beng Siew stated in his affidavit that any director of the Company could have used it if he had wished to do so but none did. There is no evidence that any director knew that the boat belonged to the Company before 10th June 1970. Beng Siew in his affidavit said that he was only too willing to buy the yacht from the Company at cost but he felt that this would be unfair to shareholders since he would gain and they would lose substantially. In cross-examination he stated that he would not take it over.

Vol. I p. 50  
Vol. I p. 98-9

Vol. I p. 99-100

Vol. II p. 361

The Judge held that the yacht was purchased and refitted and the expenditure was authorised by the Board. The Federal Court held that the yacht was unnecessary for the Company's business and that the general authority given to Beng Siew to purchase equipment necessary for the operation of the Company did not authorise the purchase and renovation of a luxury yacht. The Federal Court accordingly ordered that the yacht be purchased by Beng Siew at a price equal to all moneys spent on its purchase, renovation and maintenance with interest.

Vol. III p. 571-4

(8) Donations.

Evidence :

- 30 [ Peattie's Affidavit SS. 15, 26, 52, 74, 110, 111, 120, 143.  
Beng Sung's Affidavit SS. 16, 26, 39, 61, 69.  
Beng Siew's Affidavit SS. 19, 25, 35, 48, 66, 74.  
Peattie's evidence Vol. II 283, 290, 302, 319-20.  
Beng Sung's evidence Vol. II 377, 391-2.  
Beng Siew's evidence: Vol. II 428-449, 457-488, 629-631.  
Ying Teng Ping Vol. II 480-1, 493.  
Lee Swee Hock Vol. II 535-9.  
Henderson 48-49.  
40 Exhibits R12, R13A, R13B, R13C, R13D, R23, R25a, R25b,  
SNAPM; SLH 1A, 1B, 2A, 2B; R2, R3, R4, R5,  
R6, R7, KTS 30, KTS 41, KTS 42, KTS 43, R8,  
KTS 44, KTS 45, KTS 55, KTS 61.

RECORD

(i) Beng Siew and Beng Siong were actively engaged in politics and were members of S.C.A., a political party of which Beng Siew was Chairman or President and Beng Siong was also an office-bearer. In 1966/7, the accounts of the Company show that \$7,543/- was paid to S.C.A. In 1967/8, \$36,200 is shown as paid to S.C.A.; in 1968/9, \$1,009,800.69 is shown as paid to S.C.A.; in 1969/70, \$292,628.21 is shown as paid. These payments were made on the authority of Beng Siew or Beng Siong. Beng Siew originally said that the payments were made to and received by S.C.A. When asked to produce the accounts, he said that the accounts of S.C.A. had been stolen. He said in cross-examination that they had been audited and undertook to obtain the auditor's copy of the accounts. No accounts were produced and subsequently Beng Siew said there had been no audit. With regard to the burglary which he stated had taken place, evidence was given that it was not reported to the police until three weeks after the burglary was said to have taken place. The police were not asked to and did not investigate the allegation of burglary. Nothing was taken from the office of S.C.A. except documents. The report was made by a clerk solely with the intention of preventing any allegation being made that he was responsible.

(ii) As has been mentioned on two previous occasions the Applicant had sought to obtain accounts from Beng Siew in connection with the administration by Beng Siew of their late father's estate and the other being regarding the administration by Beng Siew of partnership property. In one case they were told that the accounts were destroyed by Beng Siew in accordance with their late father's practice. In the other case they were told that the relevant records had been destroyed by flood.

(iii) Subsequently Beng Siew said in evidence that the donations were not all made to S.C.A. but were made to other parties but posted to S.C.A. accounts. The receipts and bank statements of S.C.A. leave many of the payments unaccounted for.

(iv) Further, the S.C.A. receipts in respect of the alleged donations totalling \$1,009,800.69 in 1968/69, although they bear dates ranging from 1/10/68 to 29/9/69, bear consecutive receipt numbers (Peattie's Paragraph 74). In cross-examination Beng Siew stated that they were not issued until after the 1970 election, that is to say, until

Vol. VII p. 1264

after the Applicant had written to the Company asking for details of the donations.

(v) No evidence was called by the Respondents from any S.C.A. officer to explain the discrepancies or testify to receipt of the sums stated in the Company's accounts to have been paid to S.C.A.

10 (vi) The larger part of the donations alleged to have been made to S.C.A. were admitted not to have been paid directly to S.C.A. but were paid to Beng Siew and Beng Siong, who claimed them as reimbursement of moneys which it was said was paid by them on behalf of S.C.A.

No authority was given by the Board of Directors for these payments made by these two Respondents until the passing of the series of retrospective resolutions at the Board Meeting of 10th June 1970.

20 (vii) The Judge found nothing to criticize in the matter of the donations. The Federal Court held in relation to the donations to S.C.A. that the burden was on Beng Siew to show that the payments shown as donations to S.C.A. were actually made for the purposes of S.C.A., that they were properly authorised on behalf of the Company and were made bona fide for the benefit of the Company and that Beng Siew had failed to produce any evidence to substantiate any of these matters.

30 (viii) There were a number of other donations. In particular the accounts of the Company show a donation of \$145,000 to S.N.A.P. in the year 1968/9. S.N.A.P. was a political party opposed to S.C.A. On cross-examination of Beng Siew it emerged that the payments were not made to S.N.A.P. but to members of S.N.A.P. who were dissatisfied with the party, in particular one Charles Ingka. Three of the payments were made by Beng Siew personally and he subsequently reimbursed himself from the funds of the Company. This was not made known to the Board of Directors and there was no authority for donations to S.N.A.P. or these persons or for the reimbursement until 10th June 1970 when retrospective resolutions were passed.

40 (ix) There were other donations (including dona-

RECORD

tions to charities and public bodies) made by Beng Siew and Beng Siong personally and which they reimbursed themselves out of Company funds without authority. A number of these donations were given in circumstances of personal publicity to Beng Siew and Beng Siong.

Vol. III p. 458

(x) The Judge held that the Company had power to make donations, that all donations were reported at Board meetings and that the accounts comprising the donations were approved by members without dissent. He was satisfied that there was nothing unusual or improper in the Directors approving donations.

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Vol. III p. 574-578

(xi) The Federal Court held that the learned Judge had completely overlooked the very unsatisfactory nature of Beng Siew's evidence relating to the S. C. A. and S. N. A. P. donations in 1968/69. They held that he had no authority and neither the Board nor the Company in general meeting could give him authority to reimburse himself these moneys. The Federal Court ordered that Beng Siew repay to the Company the total sum of \$1,154,800.69 paid out allegedly as donations to S. C. A. and S. N. A. P. in the year 1968/69.

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(9) Drawings by Beng Siew & Beng Siong.

Evidence :

[Peattie's Affidavit SS 20, 21, 22, 28, 40, 41, 46, 64, 65, 96, 97, 120(6), 121, 136.

Beng Sung's Affidavit SS 12, 13, 22, 23, 24, 33, 34, 51, 52, 69.

Beng Siew's Affidavit SS 21, 22, 31, 32, 42, 43, 56, 74, Peattie's Evidence Vol. II 250, 252, 253, 278, 280, 282, 287, 298, 304, 317, 323-6.

Henderson 11-15, 16-17.

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Exhibits R16, P1, KTS 18, KTS 19, KTS 20, KTS 21, KTS 36 ]

(a) (i) Beng Siew and Beng Siong drew very frequently and very substantially on the Company's funds for their own personal benefit. No interest was paid and no security was given. There was no authority given to them to make these drawings and they were never revealed to shareholders or other directors. In most cases they contravened the provisions of Section 133 of the Companies Act 1965, being loans to directors of a public company. The regular borrowings did not appear in the annual accounts of the

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Company since they were repaid immediately before the close of the financial year and borrowed again immediately thereafter at the beginning of the next financial year.

10 (ii) For example, Beng Siong drew \$15,000 each month for ten months in 1967/68 without authority and paid it off on 30/9/68, the day the financial year ended. On 30th September 1969 his account was overdrawn in the sum of \$97,530 and he paid in that sum in order to clear the overdraft. Two days later, on 2nd October 1969 he drew \$107,530. He continued to draw \$30,000 a month during 1969/70. The balance outstanding in September 1970 was \$185,730/- which was paid off before the financial year closed.

(iii) On 29th December 1968 the Company paid \$101,250 for his account with another company and this was repaid on 8/1/69.

(iv) On 24/12/68 he drew \$440,706.05. This was repaid on 6/1/69.

20 (v) In 1967/68 Beng Siew drew sums totalling \$1,262,975.47, of which \$686,475.47 was outstanding towards the end of the financial year. This was paid off on 26th September 1968. On 6th October 1968, Beng Siew drew \$150,000.

(vi) On 29/12/68, Beng Siew drew \$240,000 and repaid it on 4th January 1969.

(vii) On 29/12/68 Beng Siew's own private company obtained \$461,500 from the Company. On 30/3/69 this debit against the private company was stated to be an error and it was converted to a debit against Beng Siew.

30 (viii) The evidence on these matters is contained in the affidavit of Peattie and reference is made to his affidavit, paragraphs 22, 40, 41, 64, 65, 96 and 97. The accounts showing these transactions are KTS 19, KTS 20, KTS 21 and KTS 11.

(b) On 10th June 1970 a resolution of the Board of Directors was passed with retrospective effect to impose interest on any advance to "any director or shareholder". This resolution was passed after the Applicant had begun

RECORD

his inquiries into the accounts.

Vol. III p. 458-9

(c) The learned Judge in his judgment did not deal with the question of drawings except to say that interest had been credited. He said he was satisfied that failure to charge interest prior to the commencement of proceedings was not deliberate and accordingly he said it was not necessary to consider the drawings further. The Federal Court held that the drawings were a very serious matter. It was reasonable to assume, they thought, that but for these proceedings nothing would have been done about the drawings. They held that the behaviour of Beng Siew and Beng Siong was inexcusable and clearly showed lack of probity on their part and a justifiable lack of confidence in them on the part of the minority. Gill C.J. said that "the attitude of Beng Siew and Beng Siong clearly was that so long as they had control over the funds as directors they could do as they pleased". He quoted a passage from the judgment of Layton C.J. in Loft Inc. v. Guth (5 Atlantic Reporter 2nd Series 503 at 515) which he said applied directly to Beng Siew and Beng Siong, namely :-

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"Guth's abstractions of Loft's money and materials are complacently referred to as borrowings. Whether his acts are to be deemed properly cognizable in a civil court at all, we need not enquire, but certain it is that borrowing is not descriptive of them. A borrower presumes a lender acting freely. Guth took without limit or stint from a helpless corporation, in violation of a statute enacted for the protection of corporations against such abuse, and without the knowledge or authority of the corporation's Board of Directors. Cunning and craft supplanted sincerity. Frankness gave way to concealment".

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10. It is submitted by the Applicant that there was ample evidence to support the findings of the Federal Court summarised in the preceding paragraphs hereof and that those findings ought not to be disturbed. It is further submitted that in the light of those findings the Federal Court was right to hold that the Applicant had made out a case for relief under Section 181. The grounds for this submission are as follows :-

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(a) The evidence showed that Beng Siew and Beng Siong



had treated the moneys of the Company as if those moneys belonged to them personally and used such moneys for their own purposes without authority and without the knowledge of their co-Directors; the Applicant relies in particular on the findings of the Federal Court under the headings Berjaya Malaysia, Donations and Drawings by Beng Siew and Beng Siong.

- 10 (b) The fact that the Company's moneys were being used by Beng Siew and Beng Siong for their own purposes was deliberately concealed from the other Directors and from shareholders of the Company; in particular drawings by Beng Siew and Beng Siong were concealed by paying off their indebtedness shortly before the end of the Company's financial year and creating a similar indebtedness shortly after the beginning of the next financial year (so that the borrowing from the Company did not appear in its annual accounts)
- 20 and other payments made to Beng Siew and Beng Siong were shown in the books of the Company as "donations" by the Company;
- (c) After enquiries had been made by the Applicant concerning the draft accounts of the Company for the year ended 30th September 1969 (i) entries were made in the books of the Company to conceal a payment of \$3,000 to Beng Siong which payment was falsely shown as a loan to Datuk
- 30 Harun and entries were made purporting to show repayment thereof by Datuk Harun by instalments although such repayments were not in fact made by him, and (ii) receipts were obtained from S. C. A. bearing dates corresponding to the dates on which the moneys purportedly donated to S. C. A. were charged as donations in the books of the Company although all the receipts were in fact issued on the same day, being a date after the Applicant commenced his enquiries, and these receipts were intended to mislead and did in fact
- 40 mislead Peattie into believing that they were issued on the respective dates on which they purported to be issued.
- (d) Other transactions indicating the same absence of probity are :

RECORD

- (i) the registration of M. V. Berjaya Malaysia in the name of Beng Siew;
  - (ii) the alleged burglary which took nothing except some critical documents and which was never investigated or pursued by Beng Siew or any other S. C. A. office-bearer;
  - (iii) the decision to "invest" in P. T. Kalimantan Sari after the inquiries of the Applicant had begun and it was obvious that the massive advances would come to light; 10
  - (iv) the share issue by U. S. Lumber after the commencement of proceedings by the Applicant;
  - (v) the execution of trust deeds by Beng Siew in the middle of the trial;
  - (vi) the production in the middle of the trial of amended agreements with Chalfont and Glendale.
- (e) The Company's moneys were used to finance the acquisition of timber concessions and the business of timber extraction in such a way that the profits to be derived therefrom either enured for the benefit directly or indirectly of Beng Siew and Beng Siong or would have so enured if these proceedings had not been commenced (reference is made to the transactions relating to Chalfont/Kong Thai Lumber, Glendale/Sabah Agency and Kalimantan Sari/U. S. Lumber). 20
- (f) Remuneration and expenses were paid to Beng Siew and Beng Siong on a lavish scale and a yacht was bought and lavishly converted and equipped for their personal use at the expense of the Company in complete disregard of the interests of other shareholders. 30
- (g) In these circumstances the Court had jurisdiction to make an order under Section 181 first because the evidence showed that Beng Siew and Beng Siong as Chairman and Managing Director and as Director respectively were using the property of the Company for their own purposes and in disregard of the interests of the other members of the Company, secondly because the conduct of Beng Siew and Beng Siong

showed such want of probity on their part that their power as majority shareholders to secure their own continuance in office as directors amounted to a continuing state of oppression of the minority shareholders.

10 (h) Under Section 181(2)(c) the Court has power to "direct or prohibit any act or cancel or vary any transaction or resolution" and accordingly the Federal Court had power to direct Beng Siew to pay back to the Company all sums paid out of the Company's funds for the purchase reconstruction and maintenance of Berjaya Malaysia and to direct Beng Siew to pay back to the Company the sum of \$1,154,800.69 improperly charged in the Company's accounts as donations to S. C. A. and S. N. A. P. in 1968/69.

20 (i) Under Section 181(2)(c) the Court has power to make an order to "regulate the conduct of the affairs of the Company in future" and accordingly the Federal Court had power to make the orders regulating the future conduct of the affairs of the Company which are summarised in subparagraphs (c) to (j) (both inclusive) of paragraph 2 hereof.

11. The Applicant will submit that the Federal Court had power to make and should have made an order for the winding up of the Company in place of the orders for the future regulation of the affairs of the Company (but in addition to the orders for payment to the Company set out in subparagraphs (a) and (b) of paragraph 2 hereof).  
30 The conduct of Beng Siew and Beng Siong showed such want of probity and such disregard for the interests of other shareholders that the Applicant and other minority shareholders could and can no longer have any confidence that they will in the future manage the affairs of the Company properly and prefer the interests of the Company to their own private interests. Such justifiable lack of confidence has always been a ground justifying the making of a winding-up order and under Section 181 the Court, if satisfied that the powers of directors who have  
40 a controlling interest in a company are being exercised in disregard of the interests of the minority shareholders, have specific power to make an order for the winding-up of the company (Section 181(2)(d)). Further, during the

RECORD

course of the proceedings it became apparent that there were many aspects of the management of the Company's affairs by Beng Siew and Beng Siong which could not fully or adequately be dealt with by an order under Section 181 and that it was imperative that a thorough investigation of all the Company's affairs be made by an independent person acting under the supervision of the Court. Such an investigation could most conveniently be made in the course of a compulsory winding-up of the Company.

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12. The Federal Court declined to make a winding-up Order. The Chief Justice said that "such an order should not be made lightly, especially where alternative and more suitable remedies are available. Putting a liquidator in charge of the Company with a view to its being wound up will not, in my opinion, be beneficial to all the parties concerned. In many cases, however, it is not in the interests of the oppressed minority to have the Company wound up. Liquidation of the Company may result in the sale of its assets at break-up value, without regard to the value of goodwill or "know-how" of the Company and the minority shareholder who, urged by the majority shareholder's oppression, petitions for a winding-up order might, in effect, play his opponent's game (Palmer, p. 511). It will be a colossal task for any liquidator to take charge of the Company's affairs in view of the large investments it has in other companies. What is necessary is to make some orders to regulate the conduct of the affairs of the Company in future".

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13. The Applicant submits that the approach of the Federal Court to the question whether a winding-up order should be made was wrong. When the evidence shows that there has been gross abuse by controlling directors of their powers, that false and misleading entries have been made in the books and records of the Company to conceal those abuses, that other actions have been taken of a deceitful or dubious nature to cover up abuses and that there are grounds for suspecting that there are irregularities which will only come to light if the affairs of the Company are fully investigated by an independent person with full access to the Company's books and papers, the Court should make a compulsory winding-up order unless there are very strong reasons for taking some

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other course. In this case there was no sufficient reason for not making a winding-up order. The main business of the Company was the extraction of timber under a licence issued for a term of 10 years from March 1975 but renewable for a further period of 10 years. There was a conflict of evidence as to the reserves of timber left in the area covered by the concession at the date of the hearing before B. T. H. Lee J. Beng Siew claimed that there was sufficient timber to last for 10 7-8 years. But he admitted that the Company was re-working areas that had already been worked. He also admitted that Reports were made to the Forestry Department which kept a "control working map" showing the areas worked and the extent of unworked timber. In view of his evidence the Applicant obtained an Affidavit from an official of the Forestry Department having custody of the control working map and of the returns made by the Company and who was able to give independent evidence as to the extent of the reserves of 20 timber remaining unworked. Counsel for the Company Beng Siew and Beng Siong objected to this evidence being given and that objection was upheld by B. T. H. Lee J. In the circumstances the Applicant submits that there was no or no sufficient evidence to support the claim of Beng Siew (who had already demonstrated that he was a person of unreliable veracity) that there was sufficient workable timber to justify the renewal of the licence. Moreover, even if there had been sufficient timber to 30 justify the renewal of the licence there is no reason why a liquidator should not have continued to work the concession during the comparatively short period of 6/7 years from November 1972 which (on Beng Siew's own evidence) was all that would be required to exhaust the concession area. The only other asset of the Company of significant value is the Aurora Hotel, which on Beng Siew's own evidence was readily saleable (and which has in fact since been sold). Further, the financial position of the Company was precarious (the accounts as at 30th September 1971 show a deficit of working 40 capital of \$3,978,128.85 and liabilities of \$4,611,019) and it was imperative that the assets of the Company not required for its main business of timber extraction should be sold to repay its indebtedness and secure sufficient working capital to exploit the remainder of the concession.

RECORD

14. On 4th August 1975 the Federal Court made the Order allowing the appeal and setting aside the Order of B. T. H. Lee J. The terms of the said Order are fully set out in paragraph 2 hereof. The Federal Court also ordered that Beng Siew and Beng Siong pay the costs of the Applicant in the Federal Court and in the court below and that Beng Siew and Beng Siong also pay any separate costs incurred by the Company in the Federal Court and in the court below.

15. On 10th May 1976 the Federal Court granted Beng Siew, Beng Siong and the Company final leave to appeal to the Yang Di Pertuan Agong (the applications of Beng Siew, Beng Siong and the Company for leave to appeal having been consolidated by Order of the Federal Court dated 31st October 1975) and by Order dated 10th May 1976 the Federal Court granted the Applicant final leave to cross-appeal to H. M. the Yang di Pertuan Agong. 10

16. The Applicant respectfully submits that the consolidated Appeals should be dismissed and the Cross-Appeal allowed with costs for the following (amongst other)

R E A S O N S

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1. Because the Federal Court was entitled to review all the evidence before B. T. H. Lee J. and (making due allowance for the advantage denied to the Federal Court of seeing and hearing the witnesses) to substitute its own findings of fact for those of B. T. H. Lee J.

2. Because there is ample evidence to support the findings of the Federal Court.

3. Because the evidence showed that Beng Siew as Chairman and Managing Director and Beng Siong as Director of the Company had used their powers over the property of the Company to further their own interests and in disregard of the interests of other shareholders and that accordingly the Federal Court had jurisdiction to make an Order under Section 181. 30

4. Because the evidence showed that Beng Siew and Beng Siong had been guilty of serious misconduct in the management of the affairs of the Company on numerous occasions and that the continuance in office

of Directors of proven want of probity and who were able to maintain themselves in office by reason of their shareholdings amounted to a continuing state of oppression of the minority shareholders and that the Federal Court accordingly had jurisdiction to make an Order under Section 181.

10 5. Because the Federal Court had jurisdiction to direct and rightly exercised its jurisdiction by directing Beng Siew to pay back to the Company all sums paid out of the Company's funds for the purchase reconstruction and maintenance of Berjaya Malaysia and to pay back to the Company the sum of \$1,154,800.69 paid out of the Company's funds as donations to S.C.A. and S.N.A.P. during the Company's accounting year 1968/69.

6. Because the Federal Court instead of making further Orders for the regulation of the affairs of the Company ought to have made an order for the compulsory winding-up of the Company.

20 7. Because an order for the compulsory winding-up of the Company was the appropriate order having regard to the evidence that Beng Siew and Beng Siong had been guilty on numerous occasions of gross abuse of their powers as Managing Director and Director respectively of the Company and that the minority shareholders can no longer have any confidence in their probity and having regard to the evidence of irregularities on the part of Beng Siew and Beng Siong requiring further investigation by an  
30 independent person acting under the directions of the Court.

8. Because there was no sufficient reason for refusing to make an order for the compulsory winding-up of the Company.

9. Because if the Federal Court was right to refuse to make an Order for the compulsory winding-up of the Company the Federal Court had jurisdiction to make and rightly exercised its jurisdiction to make the Orders for the future regulation of the conduct of

RECORD

the affairs of the Company set out in subparagraphs  
(c) - (j) (both inclusive) of its Order of 4th August  
1975.

JOHN VINELOTT Q. C.

PETER MOONEY



IN THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL

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ON APPEAL  
FROM THE FEDERAL COURT OF MALAYSIA  
HOLDEN AT KUCHING SARAWAK

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(APPELLATE JURISDICTION)

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

AND

IN THE MATTER of the COMPANIES ACT 1965

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B E T W E E N :

KONG THAI SAWMILL (MIRI) SDN. BHD.

LING BENG SIEW

LING BENG SIONG

Appellants

- and -

LING BENG SUNG

Respondent

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CASE FOR THE RESPONDENT

AND CROSS APPEAL

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STEPHENSON HARWOOD & TATHAM,  
Saddlers' Hall,  
Gutter Lane,  
Cheapside,  
London, E. C. 2.