

IN THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL

No. 25 of 1976

O N A P P E A L  
FROM THE FEDERAL COURT OF MALAYSIA (Appellate Jurisdiction)

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

and

IN THE MATTER OF THE COMPANIES ACT 1965

---

---

B E T W E E N:

KONG THAI SAWMILL (MIRI) SDN. BHD. (First Respondent)

LING BENG SIEW (Second Respondent)

LING BENG SIONG (Third Respondent)

APPELLANTS

and

LING BENG SUNG (Applicant)

RESPONDENT

And by Cross-Appeal

B E T W E E N:

LING BENG SUNG (Applicant) APPELLANT ON  
CROSS-APPEAL

and

KONG THAI SAWMILL (MIRI) SDN. BHD. (First Respondent)

LING BENG SIEW (Second Respondent) and

LING BENG SIONG (Third Respondent)

RESPONDENTS ON  
CROSS-APPEAL

---

R E C O R D O F P R O C E E D I N G S

---

V O L U M E III

Coward Chance,  
Royex House,  
Aldermanbury Square,  
LONDON EC2V 7LD

Stephenson Harwood & Tatham,  
Saddlers' Hall,  
Gutter Lane, Cheapside,  
LONDON EC2V 6BS.

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

Solicitors for the Respondent  
and the Appellant on the Cross-  
Appeal

WEDNESDAY, 22nd NOVEMBER, 1972

Resumption of hearing.

Parties as before.

Time 9.20 a.m.

In the High  
Court in  
Borneo

Mr. J.E. Vinelott

—  
No. 7

Produces Minutes of Partnership of Kong Thai (Ming Kee) marked KTS 70.

Notes of  
Evidence

Produces Minutes for year 1960 - KTS 72.

Produces Minutes for year 1961 - KTS 73.

10 Minutes of 3rd Annual General Meeting of United Singapore Lumber (Pte) Ltd. Produced and marked KTS 74.

Reserves further right to cross-examine witness.

—  
Respondent's  
Evidence

Subject to that have no further question to ask witness.

—  
Dato Ling  
Beng Siew

Mr. Starforth Hill

Plans to which Counsel for Applicant refers are available in Forest Office. This is a matter for him. Can sub-poena a witness to produce documents.

—  
Cross-examination  
(continued)

Mr. J.E. Vinelott:

Sub-poena has been taken out to serve Forest Department.

20 D.W.1 Dato Ling Beng Siew (on former oath)

Re-examination

REN.

Q. At last sitting of Court you were referred to disputes which arose after Dato Ling Beng Sung returned from Australia. You told us he was appointed Managing Director of Kong Thai (Ming Kee). Why was he appointed Managing Director.

30 A. As soon as he came back he claimed that he had studied economics in University. As the older brother I was very proud of it. He claimed that he passed Economics in the University. He asked that the post of Managing Director in Sawmill should be given to him.

Q. Did you at that time accept those representations.

A. At that time I told him he should learn practical work from me. Although he had been in a University he still had to learn. When he had acquired experience I would consider his request.

He refused to accept my advice. He said I have been Managing Director since the sawmill was in operation it was his turn to hold the post.

In the High  
Court in  
Borneo

—  
No. 7

Notes of  
Evidence

—  
Respondent's  
Evidence

—  
Dato Ling  
Beng Siew

—  
Re-examination

- Q. Did you believe that he passed economics.
- A. I believed him. I saw his photograph in academic robes. (R.1 and R.2 in affidavit of Ling Beng Siew dated 14.3.72).
- Q. After his appointment as Managing Director where did he live.
- A. He lived in a house about 100 - 200 ft. away from sawmill. It is a family house.
- Q. Did you visit the house at that time.
- A. I have been to the house on business matters. 10
- Q. What was your reception.
- A. It is regretted that on my visits I found the refrigerator was locked. The toilet was also locked. When it was necessary I had to go to another toilet 70-80 ft near the pond.
- Q. What about travelling facilities to sawmill.
- A. The factory had a motor-launch and speed boat.
- Q. Did you use them.
- A. He instructed the staff-in-charge of these not to allow me to use them. I had to charter a motor-launch to get back to Sibiu. 20
- Q. What is the general relationship between you and your brother.
- A. At that time we (Dato Ling Beng Sung and myself) were in bad terms. He did not treat me as his elder brother or as Chairman of the Board.
- Q. You were referred in April to a piece of paper which had certain words written on it. (Page 48\* in Volume I Exhibits). Were there any quarrels between you and your brother. 30
- A. Yes. We had quarrels.
- Q. Did the applicant ever call you names.

\* See page 1439, Vol.V

A. At the time of quarrel we exchanged insulting words. My brother called me "Bastard".

In the High Court in Borneo

(Mr. J.E. Vinelott: This was not cross-examined by me.

Mr. Starforth Hill: The whole relationship between them was in the affidavit. Ling Beng Sung's Counsel preferred not to deal with it and I can.).

No. 7  
Notes of Evidence

(Refers to KTS 71, and Volume I of Exhibits p.50).\*

KTS 71:

Respondent's Evidence

"TRANSLATION

10 Ling Beng Sung gave up his studies and stays back at home on account of the necessity in managing our family affairs and sawmill business for the benefit of all brothers concerned. This is to clarify any unfounded misunderstanding, because outsiders may misunderstand that he is fighting for power and personal gain, which is entirely contrary to fact.

Dato Ling Beng Siew

Dated this 5th day of January, 1960.

(Published on 7/1/1960 in See Hua Daily News).

Re-examination

20 Signed by:  
Ling Beng Siew,  
Ling Beng Thuang  
Ling Beng Siong,  
Ling Beng Hui, &  
Ling Beng King."

Page 50 Volume I of Exhibits:

"TRANSLATION

DATE: 5th January, 1960.

30 I, Beng Siew, from now on will be willing to treat my family and brothers in a peaceful and harmonious manner, and will not utter any unreasonable words and acts based on unfounded grounds.

(Signed Ling Beng Siew.)"

Q. Is there a date on these two documents.

A. KTS 71 is dated 5th January, 1960. Page 50 of Volume I Exhibits is also dated 5th January, 1960.

\* See page 1441, Vol. V

In the High  
Court in  
Borneo

—  
No. 7

Notes of  
Evidence

—  
Respondent's  
Evidence

—  
Dato Ling  
Beng Siew

—  
Re-examination

Q. You were asked yesterday of profits of Kong Thai (Ming Kee). After the settlement of certain Court proceedings did the business of Kong Thai (Ming Kee) continue.

A. The business was changed into Kong Thai (1963). The business continued as before.

Q. Under whose control.

A. I was the Managing Director.

Q. Did the applicant Dato Ling Beng Sung had anything to do with that business.

A. No.

Q. Have you examined profit figures of succeeding years.

A. Yes. I had prepared a list.

I produced this. Produced and marked R.11.

(Mr. J.E. Vinelott: I have not asked about this. Counsel is not entitled to ask the question.

Mr. Starforth Hill: Witness was asked yesterday questions designed to show when managed by Ling Beng Sung the Company had shown profits.

Mr. J.E. Vinelott: Asked Court to disallow the question as this was not asked.

Mr. Starforth Hill: It is relevant. My friend elected to bring up Kong Thai (Ming Kee) which is not directly connected with this case. The business is the same although Counsel for applicant says it is not. The change is it is incorporated.)

D.W.1

By Court:

The business is the same nature.

(COURT: Proceed.)

Q. During the time your brother was Managing Director of Kong Thai (Ming Kee) what office did you hold.

A. I was the chairman.

10

20

30

- |  |   |
|--|---|
| <p>Q. What are your duties.</p>  | <p>In the High Court in Borneo</p> <hr/> <p>No. 7</p> |
| <p>A. Dealing with policy matters, dealing with other people, forest authorities for forest concession, and promoting sales in timber marketing.</p>   | <p>Notes of Evidence</p> <hr/>                        |
| <p>Q. Whose responsibility was marketing.</p>  | <p>Respondent's Evidence</p> <hr/>                    |
| <p>A. All the timber produced by Kong Thai (Ming Kee) was sold to Sarawak United Sawmill.</p>  | <p>Dato Ling Beng Siew</p> <hr/>                      |
| <p>Q. Who is in charge of Sarawak United Sawmill.</p>  | <p>Re-examination</p>                                 |
| <p>A. I was the Managing Director.</p>   |   |
| <p>10 (Refers to Partnership Minutes of Meeting Kong Thai Sawmill. KTS 72 para 25).</p> <p style="padding-left: 40px;">"85% of the Ramin timber shall be sold to Sarawak United Sawmills Ltd."</p>   |   |
| <p><u>(BY COURT:</u></p> <p style="padding-left: 40px;">Kong Thai Sawmill refers to Kong Thai (Ming Kee) which includes Ban Hin Sawmill. Ban Hin is now Mukah Sawmill.)</p>  |   |
| <p>Q. Last April (Page 207 of Notes of Evidence) you were referred to accounts of Kong Thai Sawmills.</p>  |   |
| <p><u>(Mr. Starforth Hill:</u> This refers to Kong Thai (Ming Kee)).</p>   |   |
| <p>20 <u>(Mr. Starforth Hill:</u> Round about this time it was the Government policy requirement that unincorporated partnership in the timber industry should incorporate themselves this being a tax reason amongst others).</p>   |   |
| <p>Q. You filed an affidavit that you followed practice of your father in destroying accounts. Refers to Para 7 of Affidavit. Produced and marked R.12.</p>  |   |
| <p>30 "7. This practice of my late father of destroying past account books was explained to Ling Beng Sung and at the time the account books for the years 1956, 1957 and 1958 were handed over to him, he was informed that the account book for the year 1955 had been destroyed sometime in 1958 but that the statement of accounts for that year had been prepared and he was furnished with a copy of the statement of accounts not only for the year 1955 but also for the years 1956, 1957 and 1958."</p> |   |
| <p>Q. What is the practice to your personal knowledge.</p>   |   |

In the High Court in Borneo

A. I hope this will not be published. I will write the answer in a piece of paper.

(Mr. Starforth Hill: May the witness do this after the adjournment to save time.

COURT: Yes.)

No. 7  
Notes of Evidence

Q. You have said the books were destroyed.

Respondent's Evidence

A. Yes.

Q. Did any one in these proceedings produced evidence to the contrary.

Dato Ling Beng Siew

A. As far as I know none.

10

Re-examination

Q. You were also asked about accounts of Lee Seng Tai's Company. Produced and marked Ex. 13.

(Mr. Starforth Hill: Original is with Court).

The date of the application is 16th February, 1963.

Refers to Page 40 of Sarawak Hydrological Year Book For the Water Year 1962-3. Produced and marked R.14.

"1.1 Many parts of Sarawak experienced the most disastrous floods in recorded history during January and February of 1963. ....

2.1 ..... After eight continuous rainfall days flooding began in the Sibu area on January 4th and reached its peak there on the 12th....."

20

Q. In these proceedings was there any evidence to suggest that the books had not been destroyed in that manner.

A. No. That was what actually happened.

Q. In cross-examination there was evidence of Borneo Company and Inchape (Shows booklet). Is this a rough outline of what Inchape group is.

(Mr. J.E. Vinelott: This is wholly irrelevant on the ground to any issue raised in cross-examination.

30

Mr. Starforth Hill: Throughout cross-examination had sought to establish irregularities of these joint ventures. It is relevant to show who the other parties are.

COURT: Proceed).

Mr. Starforth Hill:

Now produced as R.15.

Q. We heard a lot of Mr. Gould. What office does he hold.

Q. Chairman of Inchape Group including Malaysia, Singapore, Brunei and Indonesia.

Q. Does he hold any educational qualification.

(Mr. Starforth Hill: Mr. Vinelott has no objection to my saying so. He is Advocate and Solicitor. Singapore Advocate and of English Bar. Former Senior Partner of my firm.)

D.W.1

He is also Chairman of International Chamber of Commerce.

Time 10.30 a.m.  
Adjourned for 15 minutes  
Sgd: B.T.H. Lee, J.

Time 11.25 a.m.

D.W.1 Dato Ling Beng Siew (on former oath)

Q. You were asked about United Singapore Lumber and Kalimantan Sari. You told Court they were joint ventures between Kong Thai Sawmill and Borneo Company. You were also asked about your remunerations. You referred to preliminary work before Company was incorporated. At what stage did you agree with Borneo Company to the joint venture.

A. In 1968. That is prior to the incorporation of United Singapore Lumber.

Q. When you agreed with Borneo Company in the joint ventures, were there any others.

A. The Senior staff concerned in Kalimantan Sari and United Singapore Lumber.

Q. When you agreed with Borneo Company in joint venture, what was the share of Kong Thai Sawmill.

A. It was agreed that Kong Thai Sawmill shares will be

In the High Court in Borneo

-----  
No. 7

Notes of Evidence

-----  
Respondent's Evidence

-----  
Dato Ling Beng Siew

-----  
Re-examination

10

20

30



In the High  
Court in  
Borneo

—  
No. 7

Notes of  
Evidence

—  
Respondent's  
Evidence

—  
Dato Ling  
Beng Siew

—  
Re-examination

the same as Kalimantan Sari.

Q. What is the percentage figure.

A. 48%. That was prior to incorporation of United Singapore Lumber.

Q. And when United Singapore Lumber was incorporated you and Mr. Gould was registered as shareholders.

A. There was Regulation which required two shareholders. I am subscriber to the Memorandum of Articles.

Q. You did not claim any beneficial interest in that share.

A. No.

Q. Shown KTS 74 -- United Singapore Lumber 3rd Annual General Meeting. Para 5 - Dividend.

"It was resolved that a dividend amounting to \$333,333.33 be and is hereby declared out of the profit of the Company for the year ended 31st December, 1971, and that the same be credited to the accounts of the following shareholders in the amount indicated:-

<u>Shareholder's Name</u>	<u>No. of Shares</u>	<u>Gross Div.</u>	<u>Less Tax</u>	<u>Nett Amount</u>
Dato Ling Beng Siew	8290	13,816.67	5,526.67	8,290.00
Mr. Kenneth Gould	1	1.67	0.67	1.00
The Borneo Co. (S) Sdn.Bhd.	74999	124,998.33	49,999.33	74,999.00
Kong Thai Sawmill (Miri) Sdn. Bhd.	96000	160,000.00	64,000.00	96,000.00
Mr. Ling Teng Sing	8284	13,806.67	5,522.67	8,284.00
Mr. Ting Ing Yee	4142	6,903.33	2,761.33	4,142.00
Mr. Ong Kek Haw	4142	6,903.33	2,761.33	4,142.00
Mr. Wong Siong King	4142	6,903.33	2,761.33	4,142.00
	<u>200000</u>	<u>333,333.33</u>	<u>133,333.33</u>	<u>200,000.00</u>

10

20

30

That list gave a total shares of 200,000.00.

In the High Court in Borneo

Q. Prior to that and during the time when there were 2 subscriber shares, were any dividends declared by United Singapore Lumber.

\_\_\_\_\_

No. 7

A. Not before that.

Notes of Evidence

Q. Is the shareholding by Kong Thai Sawmill in United Singapore Lumber the same as Kalimantan Sari.

\_\_\_\_\_

A. As far as I remember, yes.

Respondent's Evidence

Q. Is Ramin divided into grades or categories.

\_\_\_\_\_

Dato Ling Beng Siew

10 A. Is this in Sarawak or Indonesia.

Q. Sarawak.

Re-examination

A. There are a number of categories. No. 1 Peller logs. No. 2 F.A.Q. (Fair average Quality). No. 3 - Milling Logs. No. 4 "U" logs.

Q. Do the same categories apply in Indonesia.

A. No. They are classified differently.

Q. Is there any standard classification in Indonesia.

A. They change from time to time.

20 Q. Are there any fixed prices for Ramin timber in Indonesia. Will you be quoted different prices in Indonesia.

A. Prices differ in different places in Indonesia. In some areas the port is accessible to large ships, in some they are not. The freight charges will also affect the F.O.B. price.

Q. Without knowing the seller and without seeing the logs would you yourself buy Indonesian Ramin logs Class IV.

A. No. I would not buy.

S.C.A. payments

30 Refers to SCA donations. KTS 43.

Q. There are some signatures in Green.

A. I see them.

In the High Court in Borneo

Q. Whose initials are they.

A. I was told .....

(Mr. J.E. Vinelott: Objects to hearsay evidence.

No. 7  
Notes of Evidence

Mr. Starforth Hill: Counsel has asked question which is hearsay in cross-examination. I have not objected.

Respondent's Evidence

Mr. J.E. Vinelott: If I ask a question and if witness gives an answer which is hearsay, answer is in Evidence. My friend is not entitled in REN. to elicit hearsay evidence.

Dato Ling Beng Siew

COURT: Allows question on authority of Subramaniam v. Public Prosecutor (1955) M.L.J. 200 A.C.)

10

Re-examination

Q. Do you know whose initials they are.

A. Andrew Peattie's

Q. Your accounts are audited.

A. Every year.

Q. Formal S.C.A. receipts were issued as the auditor so advised.

A. Yes.

Q. Auditor had advised informal receipts in KTS 43 were insufficient.

A. Yes.

20

Q. Would there be any truth in any suggestion that money presented by those receipts have been used by you for your own personal purposes.

(Mr. J.E. Vinelott: Objects to leading question.

Mr. J.E. Vinelott: It was suggested in opening it was used by Respondent.

COURT: Allows it under S.142 Evidence Ordinance of Sarawak).

A. There is no truth at all.

(Mr. Starforth Hill: Is reluctant to question relating to account which have a political bearing. I hope my friend will not take that point.

30

Mr. J.E. Vinelott: The explanation has been given by this witness on which he has been cross-examined.

In the High Court in Borneo

COURT

Had already indicated that no questions ought to be asked when the provision of S.3(1)(f) of the Sedition Act, 1948 as amended by the Emergency (Essential Powers) Ordinance No. 45 of 1970, may be violated).

-----  
No. 7

Notes of Evidence

Q. You have been asked about burglary in Sibuh.

A. Yes.

-----  
Respondent's Evidence

10 Q. Apart from documents is there any monetary value in the documents.

A. Nothing of value was stolen.

-----  
Dato Ling Beng Siew

Q. You asked for a police report to be made.

A. I did.

-----  
Re-examination

Q. Did you expect to see the documents again which were stolen.

A. The possibility is dim.

Q. You are registered holder of 149,000 shares in Kong Thai Lumber Sdn. Bhd.

20 A. Yes.

Q. You have also produced KTS 53. Trust Deeds. Have you at any time been beneficial owners of these shares

A. No.

Q. You are registered holder of 100,500 shares in Sabah Agency Sdn. Bhd.

A. Yes.

Q. You have produced Trust documents in respect of them.

A. Yes.

Q. Have you been beneficial owner of the shares.

30 A. No.

In the High  
Court in  
Borneo

Q. You were shown Trust Deed by you and Wong Siong King page 47.

A. Yes.

No. 7

Q. Would you look at signature and say where it was signed.

Notes of  
Evidence

A. It was signed by Mr. Wong Siong King (not by me) at Jakarta, Indonesia.

Respondent's  
Evidence

Q. Where did you sign.

A. I signed it in the office of L.T. Wong in Singapore.

Dato Ling  
Beng Siew

Q. Did you sign the document before or after Mr. Wong Siong King signed it.

10

A. I signed before Mr. Wong signed.

Re-examination

(Mr. J.E. Vinelott: Object to line of questioning. I did not ask questions on documents in cross-examination. Not objecting to my friend re-examining on contents of documents but I am entitled to cross-examine further on those documents.)

Mr. Starforth Hill: Will not reply now - but will not accept that. Will deal with it when the time comes.)

Q. Put to you that in making a loan to Dato Harun it was an offence under the Corruption Act.

20

A. No. The loan was officially made openly.

Q. They were produced to Dato Ariffin some receipts.

(Mr. J.E. Vinelott: These documents were not produced in cross-examination before this witness. It was cross-examination of Dato Harun only. Not entitled to re-examination of this witness.)

Mr. Starforth Hill: Witness was asked questions on these payments to and by Dato Harun Ariffin and letters were produced. He was particularly referred to Harun in this matter. Entitled to ask him what the documents are. It is interesting to note conducted by Counsel in the cross-examination in a fishing expedition. They were not marked as Exhibits.

30

Mr. C. Darvall: I produced them but they were not marked. Produced and marked as R.16.

Mr. J.E. Vinelott: Marked for identification only.

In the High  
Court in  
Borneo

Mr. Starforth Hill: These matters were raised, the documents were produced and I am entitled to ask this witness.)

Now wishes to put to this witness.

-----  
No. 7

Refers to Page 291 and 292, 293 of Notes of Evidence.

Notes of  
Evidence

(Mr. J.E. Vinelott: He referred to Statement of Accounts and said they were the evidence of repayments. He cannot therefore having failed to produce other documents be asked in Re-examination to identify the receipts.

-----  
Respondent's  
Evidence

10 Mr. Starforth Hill: Asks court to take down objection by my friend as to production of Company's record - will not pursue the matter).

-----  
Dato Ling  
Beng Siew

Time 12.30 p.m.  
Adjourned to 2.15 p.m.  
Sgd: B.T.H. Lee, J.  
22.11.72

-----  
Re-examination

Time 2.20 p.m.

Mr. J.E. Vinelott

20 Witness has agreed to write out the practice of his late father in keeping accounts and he has not supplied the note yet, which he promised in the morning.

D.W.1 Dato Ling Beng Siew (on former oath)

I have the written note ready. It is written in Chinese characters.

(Mr. J.E. Vinelott: Asks for a translation of this. Has no objection if Respondent Junior Counsel could translate that and confirmed by Certificated Interpreter).

30 Q. About the \$3,000/-, Harun said he did not receive this advance. Put to you Kong Thai Sawmill records showed monthly payments before these proceedings began. Mr. Vinelott went on to say repayments were not paid and the entries in Company's books are therefore false. Did the Company receive the monthly repayments or not.

A. This can be seen from the books. Repayments were made and Company issued receipts for the payments.

In the High  
Court in  
Borneo

—  
No. 7

Notes of  
Evidence

—  
Respondent's  
Evidence

—  
Dato Ling  
Beng Siew

—  
Re-examination

Q. In that financial year was there any cash shortage in the Company.

A. No.

Q. Witness shown Ex. KTS 47. Is this the \$3,000/-.

A. This receipt confirms payment by Company to Harun Ariffin. He also signed at the bottom of receipt.

Q. You heard Dato Harun's evidence in this Court.

A. Yes.

Q. Before you heard what Mr. Vinelott said in this court have you any reason to disbelieve what the document purports to be.

10

A. I never disbelieve it. It is a true receipt.

Q. Has the Company lost any money on this transaction.

A. No loss.

Q. You were examined half a day on your knowledge of English language.

A. Yes.

Q. What language is mostly used at your Director's meeting.

A. Mostly in Foochow dialect.

Q. If you sent a letter in English what procedure do you follow.

20

A. I will speak to my Secretary in my office who will write the letter in English. I speak Foochow to my Secretary.

Q. You were asked about Aurora Hotel and whether you took an independent professional advice. Have any structural defects in building come to light since purchase.

A. No. All are in sound condition.

Q. What is the present financial condition of the Aurora Hotel.

A. Now the financial position is improving every year. Can make a profit of more than \$100,000/-.

30

In the High  
Court in  
Borneo

—  
No. 7

Notes of  
Evidence

—  
Respondent's  
Evidence

—  
Dato Ling  
Beng Siew

—  
Re-examination

Q. Reference was made to unpaid bills at the Aurora.  
Are they still unpaid.

A. After I made enquiries all the unpaid bills have been  
settled.

Q. You were asked about facilities you enjoyed in Aurora  
Hotel. When you go abroad do you stay in Hotels.

A. Mostly I stay in hotels.

Q. Do you find difficulties in getting what you want for  
yourself and your guests.

10 A. I am usually entertained and well treated by them.  
I do not own shares in those hotels.

Q. You were asked whether you sought advice before you  
brought Malaysia Daily News. What is the state of  
financial position of that project.

A. At present the newspaper can make possibly over \$40,000/-.

Q. Is it potential possibility or actual profit.

A. According to balance sheet up to September 1972 it  
shows a profit of about \$40,000/-.

20 Q. You were asked on two occasions remuneration you  
received from Kalimantan Sari and United Singapore  
Lumber. Were you ever paid by the Companies in  
respect of the same period.

A. No.

Q. You were asked whether Kong Thai Sawmill had borrowed  
\$2,000,000 from Bangkok Bank.

A. Yes.

Q. Was that secured or unsecured loan.

A. It was secured loan on my own personal guarantee.

30 Q. You were asked about Balance Sheet of Singapore  
Mouldings. You were referred to certain stock figures.  
It was suggested to you that if stocks were inaccurately  
valued, that it would affect financial position of  
the Company.

A. If it is true it would affect the Company. But in fact  
our Company's stocks were properly valued.



In the High  
Court in  
Borneo

—  
No. 7

Notes of  
Evidence

—  
Respondent's  
Evidence

—  
Dato Ling  
Beng Siew

—  
Re-examination

Q. You were referred to Auditor's Statement. They were not able to verify the stocks. Who is Mr. C. Holmes-Smith.

A. He was General Manager before.

Now he has been promoted to Deputy Managing Director.

Refers to P.138 and 139 of KTS 49.

It bears my signature and Mr. Holmes-Smith. The same appears to page 138.

(Mr. Starforth Hill: Those are Directors Reports and required by the Companies Act).

10

Q. You were referred to Chalfont and Kong Thai Lumber, and Glendale and Sabah Agency, KTS 62 and 63. They were signed by you and Mr. Gould.

A. Yes.

Q. On those documents there were some initials.

A. Yes. There were my initials and Mr. Gould's

Q. You were asked about a loan made by a Hong Kong Bank to Chalfont.

A. Yes.

Q. Was that secured or unsecured loan.

20

A. That was a guaranteed loan by Borneo Company. I think it was Inchape Group and myself.

Q. Did Kong Thai Sawmill make any investments in Chalfont or Glendale.

A. No.

Q. You were asked about a claim for non-delivery made against Singapore Moulding.

A. Yes.

Q. The figure was 1 $\frac{1}{4}$  million dollars.

A. That is not true.

30

- Q. You said there was some kind of claim pending.
- A. There is a claim against us in respect of a small amount. We are claiming for a large sum against the buyer for non acceptance of the goods ordered.
- Q. Do you know the amount of claim against Company.
- A. As far as I can remember it is only ~~£~~40,000 - ~~£~~50,000.

In the High Court in Borneo

-----  
No. 7

Notes of Evidence

Bumiputra shareholders

-----  
Respondent's Evidence

- Q. Do you have any personal knowledge of financial position of any of them.
- 10 A. I know something. It is difficult to know the position in detail.

-----  
Dato Ling Beng Siew

(COURT: Has indicated to Counsel in Chambers that as this touches on the special privileges of Bumiputras this ought not to be discussed. It is provided in the Article 153 of the Federal Constitution).

-----  
Re-examination

- Q. You were asked about shipment of logs in Kong Thai concession on October 1965. At what date logs from that concessior. first became available.
- A. Sometime around October 1965.
- 20 Q. You were asked to produce production figures for the past 18 months or thereabouts.
- A. Yes. I have the list.

Produced and marked R.70.

(Mr. Starforth Hill: Informs Court the average figure is 5011 tons, leaving aside the decimal points).

- Q. Have you ever received any complaints in the manner the joint ventures have been conducted.
- A. No. They were very satisfied with these joint ventures.
- 30 (Mr. J.E. Vinelott: There is one matter which I am entitled to cross-examine. I refer to R.11).

In the High  
Court in  
Borneo

XX<sup>n</sup>.

Refers to R.11 - Kong Thai (1963) Sdn. Bhd.

Notes of  
Evidence

Q. Is it not the case the Borneo Company at time of profit had introduced substantial capital and had substantial shareholding in that Company.

Respondent's  
Evidence

A. After the dispute among our brothers in 1963 the Borneo Company then owned 50% of the capital. 50% represents  $2\frac{1}{4}$  million dollars. That is the amount paid to my three younger brothers.

Dato Ling  
Beng Siew

Others remain the same, such as forest concession, machinery. The business continued as before until 1964. In 1964 we made a profit of over one million dollars.

10

Further cross-  
examination

Q. The Company was financed  $\frac{1}{2}$  by you, Beng Tuang, and Beng Siong and  $\frac{1}{2}$  by Borneo Company.

A. Yes.

Q. The profits of this Company is yet another joint venture with Borneo Company.

A. The profits depend on management. The business was still the same. The change of shareholders does not affect the profit.

20

Q. You had financial backing of Borneo Company.

A. I bought my younger brothers share for  $2\frac{1}{4}$  million and I sold to Borneo Company at the same figure.

Q. Is it true also Borneo Company put money into Company to enable you to buy a Band Mill in the sum of  $1\frac{1}{2}$  million.

A. It is not a fact.

(Mr. J.E. Vinelott: Informs Court that Mr. Starforth Hill cannot produce the map and monthly returns at short notice.

Mr. Starforth Hill: Not the map. The map may be in the logging station.

30

Mr. J.E. Vinelott: Mr. Starforth Hill informs me quite rightly these documents are available from Forest Department. I have sub-poenaed an officer to produce it. They should be available tomorrow. They will throw a lot of light on situations of the concession.

Reserves right to cross-examine witness further. On impounding of documents, refers to Section 3 of Sarawak Stamp Ordinance Cap. 32.

In the High Court in Borneo

COURT: Both Counsel agreed this Agreement KTS 62 and 63 do not come within the ambit of Section 3 as these are documents made between Singapore and Hong Kong Companies and relate to matters done in Indonesia. They do not require stamp duty.)

-----  
No. 7  
Notes of Evidence  
-----

Mr. Starforth Hill.

10 There are portions of accounts of Kong Thai Sawmill for 1965 and 1966 which are part of volumes.

-----  
Respondent's Evidence  
-----

Do not intend to read any other affidavits. I will close my case with this reservation.

-----  
Dato Ling Beng Siew  
-----

Received telegram from Singapore to say that Handwriting expert - Grant - will arrive in Kuching tomorrow at 3.00 p.m.

-----  
Further Cross-examination

Mr. J.E. Vinelott:

We have prepared an affidavit in reply by Dato Ling Beng Sung.

20 In our submission if that affidavit is read my friend's cross-examination must be limited to new matters contained in the affidavit in reply.

Not entitled to travel outside that.

If my friend accepts that proposition and will undertake to see that his cross-examination will be limited in that way then I will read the affidavit.

If my friend is not prepared to give such assurance or disputes such proposition will not read any more evidence. I am not willing that my client is exposed for the second time to any general cross-examination.

30 Mr. C. Darvall:

We give no such assurance and we do not agree with the proposition that there is a limitation in cross-examination of any witness given in reply.

Mr. J.E. Vinelott:

Will therefore not read any more evidence except two outstanding matters already mentioned.

Time 4.00 p.m. Adjourned to Thursady 23rd November 1972 at 2.15 p.m.

Sgd: B.T.H. Lee, J. 22.11.72

In the High  
Court in  
Borneo

---

Thursday, 23rd November, 1972

Resumption of hearing.

Parties as before.

Time 2.30 p.m.

No. 7

Mr. Starforth Hill

Notes of  
Evidence

---

Hands in the official translation of the  
explanation by Dato Ling Beng Siew.

Respondent's  
Evidence

---

Mr. J.E. Vinelott

This witness having given an answer this is evidence.  
Produced and marked R.18.

10

Dato Ling  
Beng Siew

---

Further whether this evidence should be given in open  
court.

Further Cross-  
examination

Refers Mallal's Rules of Supreme Court page 462  
0.37 r.1.

There are exceptions to this Rule - allow it to be  
heard in Camera - danger to life - infants.

Jurisdiction to hear in camera.

Consent of both parties - to allow. To embarrass a  
witness.

We say answer does not come within the exception.  
The principle in law which would allow this evidence in this  
way.

20

Judge should be able to assess the demeanour of witness.  
We feel unable to have the evidence received in this way for  
this reason. That an answer relating to practice of  
deceased person in particular his father.

Ought to be given in open Court.

Because if given in secret the secrecy is bound to  
create a suspicion however unfounded it may be.  
Something about deceased person to cover up.

30

Follows if witness is allowed to close this method  
to create that type of suspicions which might affect  
reputation of deceased person.

Submit witness should read this in open Court.

Mr. Starforth Hill

Provision is contained in Judicature Act.

O.37 refers to trials commenced by summons. This is not the case. That will not have any bearing. This is for Court's discretion.

Court has heard the witness's wishes in the matter. He felt distress and emotions.

Content to leave matter in Court's discretion.

Accept Court has discretion to hear evidence in camera.

10 Discretion must be sparingly exercised.

COURT

Orders to read in open Court.

D.W.1 DATO LING BENG SIEW (on former oath)

REN.

Witness prefers to read R.18 in Chinese. Witness reads Chinese script.

Translation read out by Court Interpreter.

20 "Prior to the Second World War, my father due to the failure in his business, owed a great deal of debts. He could not repay the said debts; so he was even sued in the Courts of Law. His pockets had always kept the Writs of Summons. Everyday he used to beg the Creditors to allow him time to make the repayment.

He was even forced by one creditor to let him to take away the only big 'Safe' left to settle the debt. The 'price of the said 'Safe' was fixed at a discount in that instance.

30 During the Second World War, all the Creditors stopped pressing my father for the repayment of the debts because they knew of the conditions existing at that time. Not until after the second World War, when my business in the sawmill made profits I began to make gradual repayment for and on behalf of my father's debts due to others prior to the Second World War.

In the High Court in Borneo

—  
No. 7

Notes of Evidence

—  
Respondent's Evidence

—  
Dato Ling Beng Siew

—  
Further Re-Examination

In the High  
Court in  
Borneo

---

No. 7

Notes of  
Evidence

---

Respondent's  
Evidence

---

Dato Ling  
Beng Siew

---

Further Re-  
examination

As far as I can remember on the last occasion when all the debts being cleared and repaid, he was extremely happy and he changed a new set of the Account-Books.

He himself transferred all the necessary accounts into the new Account Books. As regards the debts due to him by other people, those of which he felt were over due for a long time or those debtors whom he felt were unable to repay, he did not write or copy or transfer the same into the new Account Books. In other words, he cancelled all the debts that being overdue to him, the debts of debtors who were unable to repay.

10

After that being done he put the old account books underneath a big tree in front of the House and burnt them. At the same time, he felt very happy and said to the members of our family. "When I owed other people monies, I had been forced until I had no way out. I had already tasted that bitterness which was beyond description. Today I have owed no other debts I feel the whole of my body very light." At the same time, he told me that I must not press the poor debtors for the repayment. For those debts owing over the period of two years after careful investigation if I found that the debtors were really not in the position to make any repayment I must not press for the same and not need to transfer same into the new Account Books. All the old Account Books could be put together and burnt them".

20

This is my beloved father's instruction.

He said, "Because at that time one Mr. Hie Kui who bought over other people's Account Books during an Auction. In those Account Books my father was shown as one of Debtors. Mr. Hie Kui pressed my father for the repayment and took away one big 'Safe' in the family.

30

My father said, "That old Account Books had done serious harm to me".

Certified true translation from Document marked 'A'

Sgd: Sia Mee Tiong,  
Sr. Interpreter/Translator.  
High Court, Sibul.

40

Mr. J.E. Vinelott

Court has discretion to receive evidence in rebuttal -

where interest of justice so requires.

Refers to Phipson 11th Edition Page 665, Para 1559.

Evidence in Rebuttal - Civil Proceedings

10 "Evidence in reply, whether oral or by affidavit must, as a general rule, be strictly confined to rebutting the defendant's case, and must not merely confirm that of the plaintiff. Thus, where the latter had closed his case without calling a defendant who did not appear, the plaintiff was not allowed to call him in reply. So, in an action on a bill, where indorsement to the plaintiff was in issue, his case resting on mere proof of the indorser's handwriting, and the defendant, denying knowledge of the transaction, or authority to sign, had tendered evidence that the plaintiff was too poor to give value, proof by the plaintiff to rebut this was excluded as being merely confirmatory. Moreover, where the issues on the claim and counterclaim are identical, evidence in rebuttal cannot be called, as it must necessarily be confirmatory. With the Judge's leave, rebutting evidence may be called by the plaintiff in answer to evidence of the defendant in support of an issue, the proof of which lay upon him. The discretion may still be exercised in the plaintiff's favour where the nature of the defence became apparent during cross-examination of his own witnesses. The judge, however, has a discretion to admit further evidence either for his own satisfaction or where the interests of justice require it, and confirmatory evidence in rebuttal will generally be allowed when the party tendering it has been misled or taken by surprise."

20

30

We open the case that concession would expire in 1975. It would be unnecessary for us to call evidence which in any event would be worked out.

FRIDAY, 24th November, 1972  
 Resumption of hearing  
 Parties as before  
 Time 8.15 a.m.

Mr. Starforth Hill

40 Reads affidavits of Julius Grant dated 24.11.72.

Mr. Grant is here and I tender him for cross-examination.

In the High Court in Borneo

—  
 No. 7

Notes of Evidence

—  
 Respondent's Evidence

—  
 Dato Ling Beng Siew

—  
 Further Re-examination

Respondent's Evidence

—  
 Dr. Julius Grant

—  
 Cross-examination



In the High Court in Borneo

No. 7

Notes of Evidence

Respondent's Evidence

Dr. Julius Grant

Cross-examination

D.W.4 Dr. JULIUS GRANT: Affirmed states in English.

I have been a Handwriting expert for many years. Speaking very generally my duties involves the comparison of letters and strokes connecting them.

I examined KTS 47 with R.9 (3 signatures). My conclusions are based on other five authentic signatures.

(Witness asked to look at R.9).

Q. What alphabets are contained in the signatures.

A. I cannot tell from the signatures what the letters are supposed to be. I am not familiar with Jawi.

10

Q. Have you in your experience compared Arabic scripts.

A. I have on occasions been asked to make comparisons between Arabic scripts but I do not understand Arabic script.

Q. When you answered my question as handwriting expertise you said you were an expert in Roman letters.

A. I was speaking of Roman scripts not exclusively.

I do not think that expertise in handwriting comparison necessarily depends on the language in which the script is written. In a sense handwriting is a pictorial representation and that is what one compares. The appearance rather than the sense.

20

Q. Is it true that one of the most important aspects of handwriting is picking out the peculiarities, mannerisms or eccentricities of the writing of the persons concerned.

A. Yes.

Q. How then if you do not know the script which you are looking at can you pick out what is a peculiarity, mannerism or eccentricity as opposed to what is part of a copy of representation.

30

A. The two are completely unrelated. Mannerism and peculiarities show themselves quite independently of the language in which the script is written. Take an extreme case a person writing in English might and often does sign his name quite unintelligently. From

handwriting comparison point of view this could easily be a foreign language, but nevertheless one looks for and finds peculiarities.

In the High Court in Borneo

Q. Would you point out the peculiarities.

—  
No. 7

A. My comparison is based on five other documents as well as this and I rely on them for the peculiarities. A person never signs his name in exactly the same way every time and one has to look at a number of signatures to find peculiarities which are reproduced in the questioned signature.

Notes of Evidence

—  
Respondent's Evidence

The more signatures I have the better for my purpose especially if they are made at about the same time as the questioned signature.

—  
Cross-examination

Because at various times according to a person emotional stage etc. his signature may vary.

It is desirable to have a number of signatures at the same time and preferably with the same type of pen.

Ideally one would like to have as many signatures as possible.

20 Possibly you want the minimum number.

It is very seldom that one can say with absolute certainty that two signatures were or were not made by the same person because handwriting comparison is not an exact science.

It is not empirical. It is based on a scientific examination of the signatures and the interpretation depends very considerably on experience. One can almost say that every new signature one examines contributes something further to one's experience.

30 Q. I take it you had additional signatures of Harun Ariffin you had been able to express a definite conclusion.

A. I don't think I would. I had six authentic signatures and the opinion I had expressed is based on three and I do not think that any honest document examiner could express a stronger opinion as to the identity of these signatures than I have done in my affidavit.

Q. You said you cannot possibly exclude possibility of a clever forger.

In the High  
Court in  
Borneo

—  
No. 7

Notes of  
Evidence

—  
Respondent's  
Evidence

—  
Dr. Julius Grant

—  
Cross-examination

A. I said if someone is a clever forger and I said I find no significant evidence of this and that I think it is very unlikely that as far as I or anybody else know in certifying the identity of two sets of signatures.

Q. You had not studied the evidence of the signatures of Harun Ariffin.

A. I know very little of the background of the case. I have studied the signatures in isolation.

Q. You are restricting yourself to signatures alone.

A. I am not referring to the evidence and the signatures are such as to exclude forgery. I have said so but it is very remote. 10

Q. Given a very clever forger the forgery is not remote.

A. I would agree.

Q. You do not know if there exists a clever forger in Sibul or Kuching or in Sarawak.

A. If a person who signs the questioned document is in fact a forger I would say that he is a professional forger and that in all likelihood this is not his first and only attempt. 20

Professional forgers do exist. As far as I am concerned they may exist in Malaysia or Singapore.

In my experience they are very rare. I have had very little experience in Malaysia. I have in Singapore. As far as I can recall never one involves professional forgers. 99% of the forgeries one deals with are the work of amateurs and this can usually be easily detected in the work they produce.

That may attribute to the skill of the professional forger. The 1% are very skilful. 30

Q. What are the eccentricities.

A. (Witness shown R.9). This is a very unusual signature and forging it will be rather difficult.

First the underlining. Each and a double line. In both cases the double portion of the line is above the continuous line.

Second. There is the very unusual downstrokes with four loops.

You have a "V" shape stroke with the rather curly finish.

A very important characteristic is the downstroke of the second group. Viewed under the microscope the top part of the line does not commence on the top. There is a hidden loop. This is something that a forger (unless he is a clever one) omits. It occurs in KTS 49. It cannot be seen with a naked eye.

10 Thirdly. There is the finishing stroke which does vary among the authentic signatures. You find it more like this in the authentic signatures made in 1969, which is that of KTS 47, and is less frequent in the latter signatures in these exhibits e.g. R.9 - the signatures made in 1972.

Further points of importance are the punctuation periods - stop. They are less important.

One cannot find many eccentricities in stops.

Q. One may find eccentricities or peculiarities in the position or existence of dots.

20 A. Yes. In my explanation I was referring to the position rather than the existence because in some cases they do not exist - see 2nd signature. They do not occur e.g. in the 3rd signature.

Q. I have considered that the existence of dots may constitute a peculiarity.

A. I was referring to position and I was speaking in general terms.

I do not consider the existence of these dots as a peculiarity in this case because they do not always occur.

30 Q. In general terms a peculiarity is a departure from the norm.

A. Not the norm but a norm speaking of Roman script.

Q. Speaking of Roman script one can say whether certain parts of script to be normal in sense they are required.

A. Yes. It would be an abnormality if it was absent

In the High  
Court in  
Borneo

—  
No. 7

Notes of  
Evidence

—  
Respondent's  
Evidence

—  
Dr. Julius Grant

—  
Cross-examination

In the High  
Court in  
Borneo

e.g. cross bar on the "T".

No. 7  
Notes of  
Evidence

I do not know Jawi. I cannot say if it is Roman script or Jawi.

Respondent's  
Evidence

Q. Therefore you cannot say what is normal in Jawi and what is abnormal.

A. That is so.

Dr. Julius Grant

Q. Therefore if the signature is in Jawi you are unable to say what constitutes abnormalities.

A. Yes, if using R.9 alone.

Cross-examination

Q. Using abnormalities as a departure from a norm as opposed to indicating differences between different specimens you would not be able to say that the signature in question demonstrates any abnormalities or peculiarities. 10

A. The question has no relevance. As far as abnormalities is concerned the answer is "Yes". As far as peculiarities are concerned the answer is "No".

Q. Are you now drawing a distinction between abnormalities and peculiarities.

A. Yes. 20

Q. You will agree you have not shown that difference.

A. Yes. Now you are asking a different question.

Q. What are the differences.

A. A peculiarity can and often is an abnormality but an abnormality is not necessarily a peculiarity. As an instance of this - the peculiar loop at the top of downstrokes. That is a peculiarity. It is not an abnormality.

Q. Why not.

A. Because this stroke is sometimes made by the writer without the loop and it has a peculiarity that it sometimes makes it with and sometimes without the little loop at the top. 30

Q. You can say that you are in no position to say so with other writers of Jawi exhibit the same peculiarity.

A. One can eliminate the possibility.

I have dealt with Arabic quite frequently. I cannot say what is the difference between Arabic and Jawi.

In the High Court in Borneo

Q. It follows that you are in no position to say what are common character among writers of Jawi and what are uncommon characters.

No. 7

Notes of Evidence

A. That is so.

Q. You are not prepared to say the signatures on KTS 47 absolutely is signature of Harun Ariffin.

Respondent's Evidence

10 A. I believe it is. I cannot exclude possibility of a clever forgery.

Dr. Julius Grant

Q. Looking at authentic signatures at R.9 and using all your experience and disputed signature KTS 47. You are able to go this distance. The signature in KTS 47 looks as though it is signed by the same person.

Cross-examination

A. Yes.

REN.

Re-examination

20

Q. Using abnormalities as a departure from a norm as opposed to indicating differences between different specimens you would not be able to say that the signatures in question demonstrates any abnormalities or peculiarities. Why no relevance.

A. To me handwriting are pictures. I look among the authentic signatures for what I regard diagnostic characters (I am not using the terms peculiarities or abnormalities). They can be abnormalities, they can be peculiarities and they usually are peculiarities.

30

Having done this with the authentic signatures, I see whether I can find them in the questioned signature. That is why I said the point raised in cross-examination is not really relevant.

I adopt that procedure in the present case.

(Witness released)

In the High Court in Borneo

Mr. Starforth Hill

Say Mr. Vinelott is satisfied with the Forest Licence. Exhibit KTS 54.

No. 7

Mr. J.E. Vinelott

Notes of Evidence

Do not think the tapes can be destroyed.

Respondent's Evidence

COURT

The tapes to be destroyed by the Registrar.

Dr. Julius Grant

Mr. J.E. Vinelott

Re-examination

From instructions would like Court to record that Dato Ling Beng Siong is in Court now and apart from his absence yesterday has and possibly one other day has been in Court throughout the hearing.

10

Mr. Starforth Hill

If it is on instruction he has no right to make it because he is seeking to add evidence.

Time 9.30 a.m.  
Court adjourned.  
Sgd: B.T.H. Lee, J.  
24.11.72

No. 8

No. 8

20

Affidavit of Stephen Kalong Ningkan

AFFIDAVIT OF STEPHEN KALONG NINGKAN  
DATED 16th APRIL, 1972

16th April 1972

I, Stephen Kalong Ningkan, of 115 Green Road, Kuching, solemnly affirm and say as follows:-

1. It has been reported in the Press reports of the proceedings in this matter that Kong Thai Sawmill (Miri) Sdn. Bhd. through its Managing Director Dato Ling Beng Siew gave to Sarawak National Party during 1969 sums amounting to total to \$145,000.00. I was very surprised to read this report. I am authorized as Chairman of the Sarawak National Party to say that no moneys were ever received during 1969 by or on behalf of Sarawak National Party from Dato Ling Beng Siew or from Kong Thai Sawmill

30

(Miri) Sdn. Bhd. whether through Dato Ling Beng Siew or otherwise.

2. There are now produced and shown to me and exhibited hereto marked "SNAPM" \* the original Minutes of the Committee Meeting of the Party called to consider the report.

AFFIRMED at Kuching this )  
16th day of April, 1972 } Sgd: S.K. Ningkan  
at 10 p.m.

Before me,

10 Sgd: illegible

Magistrate of the 1st class

This Affidavit was filed by Messrs. Tang & Co., No. 5 Wong Nai Siong Road, Sibü, Advocates for the Applicant abovenamed.

No. 9

CORRECTIVE AFFIDAVIT OF LING BENG SIEW DATED 19th APRIL, 1972

I, LING BENG SIEW of full age of Upper Lanang Road, Sibü, Company Director make oath and say as follows:-

20 1. I refer to my Affidavit sworn on the 14th day of March, 1972 and filed herein on the 15th day of March, 1972 and in particular to exhibits R 28 and R 29 referred to therein respectively at paragraphs 62 and 63 of my said Affidavit.

2. Since the date of the said exhibits R 28 and R 29 amendments to the said agreements have been made between the parties thereto and there are now produced and shown to me marked R 30\*\* and R 31\*\* the current contracts which are now operative in place of exhibits R 28 and R 29.

30 3. In paragraph 10 on page 32 of the said Affidavit, I stated "I invited Beng Sung to have a lunch in Cuscaden House Hotel but nevertheless we had lunch together in Peking Restaurant in Singapore to resolve the family animosity."

\* "SNAPM" = see page 1347, Vol.IV

\*\* R 30 = see page 2012 (KTS.62), VOL.VII  
R 31 = see page 2016 (KTS.63), VOL.VII

In the High Court in Borneo

No. 8

Affidavit of Stephen Kalong Ningkan

16th April 1972

No. 9

Corrective Affidavit of Ling Beng Siew

19th April 1972



In the High Court in Borneo

No. 9

Corrective Affidavit of Ling Beng Siew

19th April 1972

4. In paragraph 10 on page 32 of the said Affidavit I stated "He paid the bill and walked off, leaving me puzzled." Instead, it should read as follows: "He wanted to pay the bill, but in fact I paid it. He just walked off. Nevertheless I still managed to catch up with him and send him back to the hotel with the car bearing the number SV 2144."

SWORN TO at Sibuan this 19th day of April, 1972 at 8.50 a.m. Sgd: Ling Beng Siew Declarant.

10

Before me,

Sgd: Sia Mee Tiong, Commissioner for Oaths. High Court in Borneo, at Sibuan

This affidavit is filed for and on behalf of the abovenamed Respondents by Messrs. Yong & Wong whose address for service is No. 2, Kampong Nyabor Road, Sibuan, Sarawak.

No. 10

Affidavit of Lee Swee Hock

16th June 1972

No. 10

AFFIDAVIT OF LEE SWEE HOCK DATED 16th JUNE, 1972

20

I, LEE SWEE HOCK (K.227427) of No. 50, Rubber Road West, Kuching, do hereby solemnly and sincerely affirm and state as follows:-

1. I have been and am still the Honorary Treasurer of the Sarawak Chinese Association (hereinafter referred to as "the Association") a Political Party registered in accordance with the Societies Ordinance.

2. I have now been shown the photostat copies of the Statements of Receipts and payments relating to the Association for the years ending 31st December, 1968 and 31st December, 1969 (hereinafter referred to as the said Statements of Receipts and payments) and the same are exhibited hereto and marked as LSH 1\* and LSH 2\*. They bear my signature.

30

3. I am responsible for the Accounts of the Headquarters of the Association (First Division), Sarawak, only.

\* LSH.1 = see page 1350, Vol.IV LSH.2 = " " 1352, Vol.IV

4. I submit annually the Statement of Accounts of the Association to the Registrar of Societies as being prepared by the Executive Secretary of the Association; and though the same does not include the other Divisions' Accounts, the Registrar of the Societies nevertheless accepts it without requiring further addition or alteration. I have made clear to the Registrar of Societies before my submission of the annual account that it only relates to the Headquarters of the First Division.

In the High Court in Borneo

No. 10

Affidavit of Lee Swee Hock

16th June 1972

10 5. I know from my own knowledge that the said Statements of Receipts and payments exhibited hereto are related only to the affairs of the Headquarters of the Association, First Division, Sarawak, and do not include the account of the Association for the 3rd Division.

6. During the pendency of these proceedings, a circular was issued by the Registrar of Societies addressed to the Secretary Generals of all Political Parties requiring them to submit annual returns which must include the Branches of the Parties concerned.

20 Affirmed by the said LEE SWEE HOCK in Kuching on the 16th day of June, 1972 at 10.30 o'clock a.m. ) Sgd: Lee Swee Hock Declarant.

Before me,

Sgd: illegible

Stipendiary Magistrate, Kuching.

30 This Affidavit is filed by Messrs. Yong & Wong, No. 2, Kampong Nyabor Road, (First Floor), Sibn, Advocates for the abovenamed Respondents.

In the High  
Court in  
Borneo

No. 11

AFFIDAVIT OF DATUK HARUN BIN  
ARIFFIN DATED 16th NOVEMBER, 1972

No. 11

Affidavit of  
Datuk Harun  
Bin Ariffin

16th November  
1972

I, Datuk Harun bin Ariffin, of full age and a Federal Citizen, residing at No. 4, Jalan 16/2, Petaling Jaya, Selangor, Malaysia, hereby make oath and say as follows:-

1. I am the Secretary General of the Ministry of National and Rural Development, Malaysia.

2. I am informed and verily believe that certain allegations affecting me have been made in the course of the hearing of the application herein, namely:-

10

(1) that on the 3rd day of March, 1969 there was lent to me by the First Respondent company herein a sum of \$10,000/-;

(2) that on the 7th day of October, 1969, there was lent to me by the said company a further sum of \$3,000/-; and

(3) that instalment payments have been made by me to the said company towards repayment of the aforesaid sums alleged to have been lent as aforesaid.

20

3. As regards the allegation that the sum of \$10,000/- was lent to me, an agreement regulating the conditions subject to which the loan was made was executed by me with the First Respondent company herein on the 1st day of March, 1969.

A copy of the said agreement is annexed hereto and marked "HA 1".\*

4. The sum of \$10,000/- mentioned in the agreement was received by me on the 3rd day of March, 1969, as evidenced by a receipt signed by me dated 3rd March, 1969, and annexed hereto and marked "HA 2".\*

30

5. As regards the loan of \$10,000/- aforesaid, the application therefore was initially made by me not to the First Respondent company herein but to one Hock Thai Finance Corporation Bhd which on the 30th of January, 1969, approved my application subject to my furnishing a guarantee by an acceptable guarantor; but as I was then holding the post of the Head of the Civil Service in Sarawak, I found it an embarrassment

\*"HA.1" = see page 1354, Vol.IV

"HA.2" = " " 1690, marked KTS.48

to ask any person to be my guarantor and informed the said finance company accordingly.

A copy of the letter of Hock Thai Finance Corporation Bhd. dated 30th January, 1969, and approving my application for the loan of \$10,000/-, together with the annexure referred to therein, are herewith annexed and marked "HA 3".\*

In the High  
Court in  
Borneo

—  
No. 11

Affidavit of  
Datuk Harun  
Bin Ariffin

—  
16th November  
1972

10 6. Consequent thereupon the aforesaid agreement was entered into, not with the said finance company, but with the First Respondent company herein, it being known to me that the said finance company and the First Respondent company herein were managed by members of the same family with whom I was and still am on friendly terms.

20 7. Though the loan of \$10,000/- was repayable by instalments as provided under the agreement aforementioned and in the receipt marked "HA2" aforesaid, no payment was made by me until the 1st day of May, 1972, when I paid the First Respondent company a sum of \$12,925/-, being full and final settlement of the loan and the interests accruing thereon, as stated in my letter annexed hereto and marked "HA 3A".\*

8. I was given time to repay the aforesaid loan of \$10,000/- and the interests thereon, to enable me to sell a piece of land registered in my name (to the extent of one-sixth share), being Lot No. 325 (5), Mukum 15, Butterworth, North District, Province Wellesley.

30 9. With regard to the allegation that a further sum of \$3,000/- was lent to me on the 7th day of October, 1969, I did upon becoming aware that an allegation was made that the said sum was lent to me, write to the First Respondent company for clarification.

A copy of my letter dated 15th May, 1972, is annexed hereto and marked "HA 4".\*

10. I have subsequently seen a receipt purported to have been issued by me and as annexed hereto and marked "HA 5".\*

40 11. I have no recollection of the circumstances in which the said receipt was issued but deny that I ever received any further loan of \$3,000/- either on the 3rd day of October, 1969, being the date of the purported receipt, or on the 7th day of October, 1969, as stated in a statement of account of the First Respondent company as shown to me

- \* "HA.3" = see page 1355, Vol. IV  
 "HA 3A" = " " 1357, Vol. IV  
 "HA 4" = " " 1358, Vol. IV  
 "HA 5" = " " 1589, marked KTS.47

In the High Court in Borneo

and as annexed hereto and marked "HA 6",\* or at all.

Dated this 16th day of November, 1972.

No. 11  
Affidavit of Datuk Harun Bin Ariffin

SWORN by the said Datuk Harun Bin Ariffin at Kuala Lumpur this 16th day of November, 1972 at 4.30 p.m. ) Sgd: Harun bin Ariffin

Before me,

16th November 1972

Sgd: Abdul Majid Khan  
Commissioner for Oaths,  
Pesuruhjaya Sumpah  
Kuala Lumpur.

10

This Affidavit is filed by Messrs. Tang and Co., on behalf of the abovenamed Applicant Ling Beng Sung, whose address for service is 5 Wong Nai Siong Road, (1st Floor), Sibu, Sarawak.

No. 12

No. 12

Supplementary Affidavit of Datuk Harun Ariffin

SUPPLEMENTARY AFFIDAVIT OF DATUK HARUN ARIFFIN DATED 20th NOVEMBER, 1972

20th November 1972

I, Datuk Harun Ariffin, of full age and a Federal Citizen, residing at No. 4, Jalan 16/2, Petaling Jaya, Selangor, Malaysia, hereby make oath and say as follows:-

20

1. I refer to my previous affidavit sworn on the 16th of November, 1972.
2. I refer to paragraph 10 of my previous affidavit, a copy of the receipts mentioned therein was sent to me under cover of the letter dated 18th May, 1972, a copy of which is now produced and exhibited "HA7".
3. The copy of the voucher referred to in the letter exhibited "HA 7"\* is now produced and exhibited "HA 8".\*
4. The payment by me referred to in paragraph 7 of my affidavit was acknowledged in the letter from the 1st Respondent dated 12th May, 1972, the copy of which is annexed hereto and exhibited "HA 9".\*

30

\* "HA 6" = see page 1359, Vol. IV  
 "HA 7" = " " 1360, Vol. IV  
 "HA 8" = " " 1361, Vol. IV  
 "HA 9" = " " 1362, Vol. IV

Enclosed with the said letter was a receipt for \$12,925/- dated 11th May, 1972 which is now produced and marked "HA 10"\*.

In the High Court in Borneo

5. I have not cashed the cheque for \$1,734.58 enclosed in the said letter. The cheque is now produced, marked and exhibited as "HA 11"\*.

No. 12

6. The money of \$10,000/- previously paid to me by a Hock Hua Bank cheque was paid into my account in Hongkong and Shanghai Bank, Kuching. A copy of the credit slip is now produced and exhibited "HA 12"\*.

Supplementary Affidavit of Datuk Harun Ariffin

7. Finally I left Sarawak on 19th July, 1970 and was ever since been posted back to West Malaysia to take up my present appointment.

20th November 1972

Dated this 20th day of November, 1972.

SWORN by the said )  
Datuk Harun bin Ariffin )  
at SibU this 20th day of ) Sgd: Harun bin Ariffin  
November, 1972 at 8.15 a.m. )

Before me,

Sgd: Chang Foo Lieng  
Assistant Registrar,  
High Court in Borneo,  
Sibu, Sarawak

This Supplementary Affidavit is filed by Messrs. Tang and Co., on behalf of the abovenamed Applicant Ling Beng Sung, whose address for service is 5 Wong Nai Siong Road, (1st Floor), SibU, Sarawak.

\* HA 10" = see page 1363, Vol.IV  
HA 11" = " " 1364, Vol.IV  
HA 12" = " " 1365, Vol.IV

In the High  
Court in  
Borneo

No. 13

AFFIDAVIT OF LAU BUONG TUNG  
DATED 23rd NOVEMBER, 1972

No. 13

Affidavit of  
Lau Buong Tung

23rd November  
1972

I, LAU BUONG TUNG, of full age and a Section Forest Officer, of the Forest Department, Miri, hereby make oath and say as follows :-

1. The Niah area forest concession of Kong Thai Sawmill (Miri) Ltd. (the First Respondent) is within my jurisdiction and under my control.

2. The total concession area as measured from the map in the licence is 92,225 acres. Of this, 66,090 acres have been exploited and declared closed by my Department according to the licence conditions. This area of 66,090 acres was exploited as follows:- 10

1965-6	. .	5,316 acres	
1967	. .	2,648 acres	
1968	. .	12,603 acres	
1969	. .	18,422 acres	
1970	. .	15,712 acres	
1971	. .	8,045 acres	20
1972	. .	3,344 acres	

3. The area presently under working is 5,835 acres; this includes the area actually in progress and the area not yet felled but inside the coupe.

4. Deducting from the total concession area the area already exploited and the area presently under working, there is left for future working, 20,300 which includes temuda area of roughly 8,000 acres and a kerangas area of 4,200 acres. The temuda area is under shifting cultivation and contains no merchantable timber. The temuda area could increase annually by about 1,000 acres. The Kerangas area contains very poor forest which may contain small trees: these are not normally economical to exploit. 30

5. Leaving out of account the future increase in the temuda area, the area still available for exploitation is roughly 8,000 acres which is still under survey and therefore I cannot be definite about figures. It could be less than 8,000. It could be more but it could not be more than 10,000.

6. Looking at production figures for the past two years, 40

the concession is likely to be finished in two to three years.

In the High Court in Borneo

7. There is now shown to me and annexed hereto marked "LBT 1"\* a copy of a progress map which shows the concession area outlined in red. The parts of the map which are not hatched in red are the parts of the concession area which have not been exploited and declared closed. In other words, the parts not hatched in red are (1) the area presently under working; (2) the present temuda area; (3) the kerangas area; (4) the remaining area of workable forest.

No. 13

Affidavit of Lau Buong Tung

10 8. The First Respondent should have a similar map. They are supplied with a copy each year and it is their duty to keep this up to date.

23rd November 1972

9. The First Respondent has a sawmill which commenced operations about September 1971. Its present out-turn is about ten tons per day based on a working month of twenty days. At present market prices, this is about break-even point, that is to say, they will just about cover costs.

20 SWORN by the said Lau Buong Tung at Sibu this 23rd day of November, 1972 at 2.16 p.m. ) Sgd: Lau Buong Tung

Before me,

Sgd: Chang Foo Lieng, Assistant Registrar, High Court in Borneo, Sibu, Sarawak.

30 This Affidavit is filed by Messrs. Tang and Co., on behalf of the abovenamed Applicant Ling Beng Sung, whose address for service is 5 Wong Nai Siong Road, (1st Floor), Sibu, Sarawak.

\* "LBT 1" = see page 1366, Vol.IV



In the High  
Court in  
Borneo

No. 14

AFFIDAVIT OF JULIUS GRANT  
DATED 24th NOVEMBER, 1972

No. 14

Affidavit of  
Julius Grant

24th November  
1972

I, Julius Grant, of full age, of 1 Bolney Gate,  
London, S.W.7, temporarily of the Sarawak Hotel, Sibu, do  
hereby make oath and say as follows:

1. I am a Master of Science of London University, a Doctor  
of Philosophy, also of London University, and a Fellow of the  
Royal Institute of Chemistry. I have been concerned with  
handwriting comparisons since the year 1932 or thereabout.  
I have frequently given evidence in my capacity as an expert  
in handwriting comparison in the Courts in the United Kingdom  
and in the Courts of other countries and I have been accepted  
as an expert in this field in those Courts.

10

2. On the 23rd November 1972 I visited the Court House,  
Sibu, Sarawak, and was handed the following documents relevant  
to the case between Ling Beng Sung on the one hand and Kong  
Thai Sawmill (Miri) Sendirian Behad, Ling Beng Siew and Ling  
Beng Siong on the other:

- Exhibit KTs. 47 - Receipt dated 3rd October 1969;
- Exhibit KTS. 48 - Voucher dated 3rd March 1969;
- Exhibit R.9 - Sheet of paper with three signature dated  
20th November 1972;
- Exhibit R.10 - Cheque dated 3rd March 1969;
- Exhibit R.24 - Agreement dated 1st March 1969;
- Affidavit of Harun bin Ariffin dated 16th November 1972;
- Supplementary Affidavit of Harun bin Ariffin dated  
20th November 1972.

20

3. All of the above were originals with the exception of  
Exhibit R.24 which was a photocopy.

30

4. I was asked to compare the signatures said to be  
that of Datuk Harun bin Ariffin, on Exhibit KTS. 47, which  
I was told is questioned, with the similar signatures on  
the other six documents listed above, which are said to be  
authentic.

5. Having made this comparison my conclusions are as  
follows:

- (i) I think it highly probable that the questioned  
signature on Exhibit KTS.47 was made by the person  
who made the six similar signatures on the

40

authentic documents listed above;

(ii) I cannot exclude the possibility of a very clever forgery, but I find no significant evidence of this and I think it very unlikely;

(iii) There is evidence that the piece of paper Exhibit KTS. 47 was folded almost in half just after the signature on it was made. Examination of the area where the resulting fold intersects the typescript shows that the typescript was made before the fold.

In the High Court in Borneo

No. 14

Affidavit of Julius Grant

24th November 1972

10

Sworn by me, Julius Grant )  
this 24th day of November ) Sgd: Julius Grant  
1972.

Before me,

Sgd: xx

This affidavit is filed by Messrs. Yong & Wong, Advocates for the Respondents whose address for service is No. 2, Kampong Nyabor Road, Sibul, Sarawak.

No. 15

JUDGMENT

No. 15

Judgment

20

BEFORE THE HONOURABLE MR. JUSTICE B.T.H. LEE

12th July 1974

IN OPEN COURT

J U D G M E N T

INTRODUCTION

This is an application made by way of Originating Motion under Section 181 of the Companies Act, 1965.

The applicant is represented by Mr. J.E. Vinelott, Q.C., assisted by Mr. Peter Mooney and Mr. Joseph Tang and later by Mr. D. Dawson, Q.C., while Mr. G. Starforth Hill assisted by Mr. C. Darvall and Mr. C.T. Wong appeared for the respondents.

30

In the High  
Court in  
Borneo

—  
No. 15

Judgment

—  
12th July 1974

The parties to these proceedings are the sons of the late Ling Chui Ming.

The case has proved to be a long and complicated one. The evidence and lengthy arguments lasted 29 days, the record occupying some 399 pages of closely printed matter, in which the voluminous evidence both documentary and oral were produced from both sides. The question to which an answer has to be found is of obvious importance but it lies nevertheless within a very small compass.

The company is a private company which was incorporated in Sarawak in 1964 with a capital of £3 million divided into 30,000 shares of £100 each of which 13,600 shares represented a paid up capital of £1,360,000 have been issued, and certain holdings of the Bumiputras are fully paid up.

10

The shareholdings of the brothers at the relevant time were as follows:

Beng Siew	-	7,582 shares	
Beng Tuang	-	1,060 "	
Beng Siong	-	1,060 "	
Beng Sung	-	330 "	
Beng Hui	-	330 "	
Beng King	-	340 "	

20

On 29th September, 1970, the applicant Beng Sung who was then a Director of the company applied to court for an order pursuant to Section 167(5) of the Companies Act 1965, that the accounting and other records of the company be open to inspection by an approved company auditor acting on his behalf.

That application was not opposed by the respondents and on the 18th November, 1970, an order was made appointing Mr. Andrew Peattie (for convenience I will call him "Peattie"), a Chartered Accountant and an approved company auditor to inspect the accounting and other records of the Company on behalf of the applicant.

30

At the next general meeting of the company following upon the making of that order namely on the 16th February, 1971, the applicant retired as a Director and was not re-elected. He has not been a Director of the company since that date.

In reliance upon this order Peattie thereupon examined the records of the company. On the 2nd and 5th June, 1971, he made a report (Ex. K.T.S. 34, 39 and 40) and on the basis thereof applicant filed an affidavit in support of this application.

40

This affidavit was affirmed by Peattie on 10th August, 1971. In September, 1971, Peattie conducted a further investigation into the books and records of the company and on the 27th November, 1971, he reaffirmed the affidavit in the form in which it was finally tendered to the Court by Counsel for the applicant. It is upon the affidavit of the applicant, that this application is primarily based.

It is on the basis of the details of the affidavits that the prayers in the Originating Motion were formulated.

10 The prayers in the Originating Motion can be conveniently divided into the following main categories:

1. Donations made for political purposes  
(Prayers 7, 13, 24, 35 and 52);
2. Sums admittedly paid by the company but disallowed by the Revenue authorities for tax purposes  
(Prayers 8, 9, 25, 26, 27, 36, 39 and 56);
- 20 3. Payments made to or on behalf of or otherwise alleged to have been enjoyed by Beng Siew and Beng Siong  
(Prayers 10, 11, 12, 20, 21, 22, 23, 29, 30, 31, 37, 38, 43, 46, 47, 53 and 54);
4. Motor cars and other vehicles purchased by the Company  
(Prayers 14, 15, 16, 32, 48, 49 and 60);
5. The Purchase and outfitting of the motor yacht Berjaya  
(Prayer 19);
- 30 6. Alleged mis-investment in the Aurora Hotel, a Hovercraft and the Malaysia Daily News  
(Prayers 17, 18 and 33);
7. Miscellaneous advances and salaries made to third parties  
(Prayers 41, 44 and 45);
8. Advances to Harun Ariffin  
(Prayer 28);
9. Advances to joint ventures  
(Prayer 40).

In the High  
Court in  
Borneo

—  
No. 15

Judgment  
—

12th July 1974

In the High  
Court in  
Borneo

—  
No. 15

Judgment  
—

12th July 1974

Grounds upon which application is opposed

The application is opposed on the following grounds:

- (i) the proceedings are brought with an ulterior, or collateral, motive;
- (ii) the relief sought in paragraphs 3, 4, 5, 7 to 60 inclusive of the originating motion is outside the scope of section 181;
- (iii) section 181 is not a substitute for a minority shareholder's action;
- (iv) the facts relied upon by the applicant, even if found to be true, do not constitute "oppression" within the meaning of section 181; 10
- (v) complaints made, even if established, which may constitute breaches of the Act have their own remedies prescribed by the Act for which section 181 may not be used as a substitute;
- (vi) the complaints which are made do not affect the applicant in his capacity as a shareholder though, if established, they might have in his capacity as a director. 20
- (vii) insofar as the acts complained of were specifically or generally authorised or approved by the Directors, it is all the Directors, including the applicant, who would be liable if the applicant were successful, yet the other Directors have not been made parties to the proceedings.

LAW

I proceed now to consider what is the law which should guide a court in such a matter.

The Companies Act, 1965, Section 181 upon which the present action arises, provides as follows: 30

- "(1) Any member (I am omitting the irrelevant words) of a company ..... 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 interest as members shareholders or bodies of debentures of the company; or
  - (b) that some act of the company has been done
- 40

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

In the High  
Court in  
Borneo

—  
No. 15

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

Judgment

—  
12th July 1974

- 10
- (a) direct or prohibit any act or cancel or vary any transaction or resolution;
  - (b) regulate the conduct of the affairs of the company in future;
  - (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
  - 20 (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."

I find it necessary to observe that section 181 of the Companies Act of Malaysia corresponds to, but is wider in terms than section 210 of the English Companies Act, 1948.

Section 210 of the English Companies Act is in these terms:

30 "(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or, in a case falling within subsection (3) of section one hundred and sixty-nine of this Act, the Board of Trade, may make an application to the court by petition for an order under this section.

(2) If on any such petition the court is of opinion -

- 40 (a) that the company's affairs are being conducted as aforesaid; and
- (b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up;

the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the

In the High  
Court in  
Borneo

—  
No. 15

Judgment  
—

12th July 1974

company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."

The language of Section 181 is reasonably plain, and it is manifest that to being a case within Section 181 an applicant must show:

- (1) that the affairs of the company are being conducted oppressively to one or more members including the applicant or in disregard of his interest; or
- (2) that the powers of the directors are being exercised in a similar manner; or
- (3) that some act of the company has been done which unfairly discriminates against or is prejudicial to one or more of the members including the applicant.

10

It would seem that all three of the above heads have the common denominator that the act of which complaint is made is one which singles out some part of the shareholders including the applicant for discriminatory or prejudicial treatment.

20

The section does not cover a situation where what it alleged is that the acts of the company or of the directors are against the interest of the company generally.

To attract the provisions of this section the acts must be in some manner selective. See Scottish Co-Operative Wholesale Society, Ltd. v. Meyer and Another (1958) 3 All E.R. 66.

That was a case of discrimination against a minority.

30

The distinction appears to be between conduct whose effects are the same on all the members of the company, and conduct whose effects are not the same on all the members of the company.

Conduct of the first kind cannot therefore form the basis of the allegation of oppression. The authority for this proposition is to be found in Re Five Minute Car Wash Service Ltd. (1966) 1 All E.R. 242.

Now, under the English Act, it seems clear that Section 210 is not intended to be used as a substitute for a minority shareholder's action to enable a disgruntled shareholder to bring an action in cases where he could

40

otherwise not do so by reason of the rule in Foss v. Harbottle (1843) 2 Hare, 461 E.R. Vol. 67 Page 189.

In the High  
Court in  
Borneo

In the present case the vast majority of the allegations made constitute claims for damages for misfeasance or breach of trust against the second and third respondents. There are claims which, if valid, are properly claims to be made by the company and not by a single shareholder.

—  
No. 15

Judgment

—  
12th July 1974

10 The applicant is not alleging any fraud and the general rule is that proceedings for such relief ought to be in the name of the company. The reason being that the majority of the shareholders are entitled, in a case not involving fraud to sue or refrain from suing the directors as they think fit. (See Buckley on the Companies Act, 13th Edition, Pages 169-171).

Where a minority shareholder's action is permissible the action must be brought as such i.e. by the plaintiff suing on behalf of himself and all the other shareholders in the company except the defendants.

20 Under the English Section 210, the English and Scottish cases are unanimous that what is involved is "at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder".

See Elder & Others v. Elder & Watson, Ltd. (1952) S.C. 49, the headnote of which reads as follows:

30 "Held (1) that sec. 210 was intended to meet the case of oppression of members of a company in their character as such;  
(2) that the matters complained of by the petitioners affected them solely in the character of director or employee of the company, and there were thus no relevant averments of oppression for the purposes of the section; and  
(3) that there were no facts averred which would justify a winding-up order on 'just and equitable' grounds;

and the petition dismissed as irrelevant."

and at page 60:

40 "It is not lack of confidence between shareholders per se that brings section 210 into play, but lack of confidence springing from oppression of a minority by a majority in the management of the



In the High  
Court in  
Borneo

company's affairs, and oppression involves, I think, at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder."

No. 15

and at page 61:

Judgment

"There is nothing to suggest that the company is not being conducted efficiently by the existing board in the interests of the members as a whole. The gravamen of the petitioners' complaint is summarised in statement 10 of the petition as follows:-

12th July 1974

"The said Walter Elder deliberately caused the affairs of the company to be conducted in an oppressive manner and with a view to depriving the first and second-named petitioners of their positions as directors of the company and to obtaining control of the company by himself or his nominees."

10

This in my opinion is not a relevant averment of oppression of members in the conduct of the affairs of the company, and there is no specification in the rest of the petition to give it any such colour. Equally I find no relevant ground for holding that this would be a case for a winding-up under the 'just and equitable' clause."

20

In the earlier case of Scottish Co-operative Wholesale Society, Ltd. v. Meyer and Another (1958) 3 All E.R. 66, Lord Russell reading the judgment of the court expressed a similar view.

Much the same thing was said by Plowman J. in the case of Re Bellador Silk, Ltd. (1965) 1 All E.R. 667 at pages 671 and 672.

30

See also Re H.R. Harmer, Ltd. (1958) 3 All E.R. 689, and Re Lundie Brothers, Ltd. (1965) 2 All E.R. 692.

In so far as Lundie Brothers Ltd. decided on the basis that the company in question was analogous to a partnership and that one partner had unjustifiably excluded the other from the partnership affairs, the case was over-ruled by Re Five Minute Car Wash Service Ltd. (1966) 1 All E.R. 242.

Re Five Minute Car Wash Service Ltd. also established that mere inefficiency, careless or unwise conduct are, in the absence of fraud, not sufficient for the purposes of

40

the English section.

Similar views were expressed in Re Jermyn Street Turkish Baths (1971) 3 All E.R. 184 at page 199.

See also Halsbury's Laws of England, 3rd Edition, Vol. 6 para 1044.

On the question as to what may be oppressive conduct it has been established that neither a winding-up order nor relief under the oppressive provision will be available to a petitioner whose complaint is merely of being out-voted by the majority.

Romer L.J. in Harmer's case (1959) 1 W.L.R. 62 at page 87 said:

"..... the mere use of voting power at board meetings or at a general meeting to secure the passing of resolutions, which the other members of the board or shareholders oppose, would not in general constitute oppression....."

Similarly in Elder v. Elder and Watson (1952) S.C. 49, Lord Keith stated that the word "oppressive" does not include:

".... mere domestic disputes between directors or members or lack of confidence between one section of members and another section in matters of policy or administration. Much less does it cover mere private animosities between members or directors."

It has been suggested by applicant that the authorities under what is now section 222(f) of the English Companies Act, 1948, provides that a company may be wound up if the Court is of opinion that it is just and equitable that it should be wound up.

It seems that under this heading the courts will order a winding-up whenever there are special circumstances of such a character as to render such an order just and equitable e.g. if a winding-up will put an end to a fraudulent concern or get rid of a complete deadlock.

See Buckley on the Companies Act - 13th Edition page 454 - para 1 which reads:

"In the earlier cases it was held that para (f), although thus worded in order to include all cases not before mentioned, must be interpreted in reference to matters

In the High  
Court in  
Borneo

—  
No. 15

Judgment

—  
12th July 1974

10

20

30

40

In the High  
Court in  
Borneo

—  
No. 15

Judgment

—  
12th July 1974

ejusdem generis as those in the previous clauses. Exactly what was intended by this is perhaps not very clear. Lord Cottenham, who first applied this rule of construction to the clause, explained its application by stating 'that there must be something in the management and conduct of the company which shows the Court that it should no longer be allowed to continue and that the concern ought to be wound up' but this appears to be little more than a paraphrase of the words used in the clause 'if the Court is of opinion that it is just and equitable that the company should be wound up.' And the tendency of the Court is now to give the words their natural meaning and make a winding up order whenever special circumstances appear to render the making of an order just and equitable, e.g. if a winding up will be the means of putting an end to a fraudulent concern or getting rid of a complete deadlock."

10

I turn now to the cases on which Counsel for the applicant relies. The first of these is Lock & Anor. v. John Blackwood Ltd. (1924) A.C. 783 and as it is placed in the forefront of the argument it is worth examining in some detail.

20

The basis of the decision is that the majority were fraudulently attempting to acquire the shares of the minor (see also Lord Cross in Re Westbourne Galleries (1972) 2 W.L.R. 1289 at page 1301F).

The grounds of the application were basically fraudulent with a view to a cheap acquisition. Rectification of the acts complained of would not affect the original motive with which they had been done which was the ground for the winding-up order. I can find nothing in the evidence which introduces any such consideration as a basis for the applicant's application.

30

In Thomson v. Drysdale (1925) S.C. 311 there were only two shareholders and the company was closely akin to a partnership. See also Buckley On the Companies Act, 13th Edn., page 456 last paragraph:

"On the other hand, even before the introduction of the provisions of s.225(2), it was held that a small private company might be analogous to a partnership and that, if the circumstances were such as would warrant the dissolution of a partnership, it would be 'just and equitable' to wind the company up even though one of the shareholders by virtue of his casting vote might have had a controlling vote in the company. In

40

such a case the Court might now have recourse to s.210, ante, instead of winding the company up."

What may be oppressive in a small proprietary company in the nature of a partnership may not be so in a larger company where disputes can be resolved by the principle of majority rule.

This is further illustrated by the decision cited by counsel for the applicant in Re Westbourne Galleries Ltd. (1972) 2 W.L.R. 1289 in which Lord Wilberforce at page 1292 F refers to the previous existence of a partnership:

"The company is a private company which carries on business as dealers in Persian and other carpets. It was formed in 1958 to take over a business founded by the second respondent (Mr. Nazar). It is in fact of cardinal importance that since about 1945 the business had been carried on by the appellant and Mr. Nazar as partners, equally, sharing the management and the profits."

It was held in that case that the facts complained of did not constitute oppressive conduct under section 210 but did warrant a winding-up order under the just and equitable provision in section 222(f).

The grounds for this is found at the headnote Para 3 which reads:

"(3) Elements which give rise to the super-imposition of equitable considerations may include one, or probably more, of the following: (i) an association formed or continued on the basis of a personal relationship involving mutual confidence; (ii) an agreement, or understanding, that all, or some, of the shareholders, shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company. The fact that the company is a small one, or a private company, is not enough (post pp. 1297H - 1298B)".

None of these elements are present in the case before me. The applicant has never attempted to participate in the affairs of this company at all.

I have had cited to me a series of authorities which seems to me to establish that where the issue concerns the conduct of directors the Court will not substitute its discretion for that of the directors. (See In Re Smith and

In the High  
Court in  
Borneo

—  
No. 15

Judgment

—  
12th July 1974

In the High  
Court in  
Borneo

—  
No. 15

Judgment  
—

12th July 1974

Fawcett, Ltd. (1942) 1 Ch. 304 per Lord Greene M.R. at pages 306 - 309, affirmed in Charles Forte Investments Ltd. v. Amanda (1964) 1 Ch. 240 per Willmer L.J. at page 254).

It seems clear that in all the cases relied on by the applicant there has been an element of open warfare between the parties before the proceedings commenced. In the present case the first intimation of dissatisfaction with the affairs of the company from the applicant was the issue of the motion.

"Oppression is something done against a person's will and in his despite. It is not something done with his acquiescence or consent, and still less something done with his co-operation. He chose voluntarily to risk the position in which he finds himself. Accordingly petitioner fails to establish any 'oppression' and cannot invoke sec. 111 bis."

10

per Reynold J. in Irvin and Johnson Ltd. v. Oelofse Fisheries Ltd. (1954) E.D.L.D. 231 at page 243.

It is plain that the oppression or discrimination suffered must be suffered in the character of a member (See Elder v. Elder and Watson (1952) S.C. 49 in which removal from office as a director was for this reason held to be relevant).

20

(See also Re H.R. Harmer Ltd. (1958) 3 All E.R. 689 at page 701).

An Australian appraisal of the equivalent New South Wales section is illustrated in Re Broadcasting Station 2 GB Pty Ltd. (1964-5) (N.S.W.R. 1648) per Jacobs, J. (now a member of the Court of Appeal of New South Wales) at pages 1661 - 1662.

30

I quote the passages at length because they are not easily available in the State of Sarawak and is worth reading in full.

"It is convenient at this stage to consider the matters which the petitioner has to prove in order to succeed in a petition under S.186. First, and I think most importantly, it is necessary for him to prove that the affairs of the company are being conducted in a manner oppressive to a member or members. The meaning of the word 'oppressive' has been considered in a number of cases and I have been most carefully referred to them by counsel in the course of addresses. My conclusion from these cases

40

is that it is my duty to look at the whole course of events in the company in the period complained of and see whether as a result of a 'visible departure from the standards of fair dealing' (Elder v. Elder & Watson (1952) S.C. 49) or of conduct which is 'burdensome, harsh and wrongful' (Scottish Co-operative Wholesale Ltd. v. Meyer (1958) 3 All E.R. 66; (1959) A.C. 324) or which suggests a lack of probity (Elder v. Elder & Watson, supra) some member or members have suffered in a pecuniary sense in their capacity of members (Scottish Co-operative Wholesale Society Ltd. v. Meyer supra) that is to say, that their rights as members have been affected. However, in applying these tests, the further question arises of determining what conduct falls within the ambit of the word or words used, whether it be the word 'oppressive' as used in the section itself or the words used in the synonyms suggested in the cases to which I have referred. What is the 'fair dealing' which the member is entitled to expect? When is the conduct 'wrongful' or lacking in probity? Clearly the section does not refer to all conduct in the affairs of a company which merits these descriptions. It refers only to such conduct when it is oppressive to a member and the question still remains - when is such conduct oppressive?

In the High Court in Borneo

No. 15

Judgment

12th July 1974

10

20

30

40

50

It seems to me that it is necessary, in the circumstances of the present case, to have recourse to the principles which have been developed in the cases dealing with the duties of a director in his conduct of the affairs of a company, and the duties of a majority shareholder towards the minority. Each of them in his own way must govern his acts by his appreciation of the interests of the company as a whole. Ordinarily the interests of the company can be identified with the interests of the majority of its shareholders. In a company the majority rule, unless the articles of association are so drawn as to provide otherwise. The system of election of directors is intended to achieve this result of majority rule. However, all directors must act in the interests of the company as a whole, as also must the majority shareholders who appoint them. The difficulty lies in reconciling this duty in all the shareholders with their right, generally speaking, to vote in their own interests. The reconciliation is to be found in the necessity that the shareholder should have a genuine belief that the proposed action, however much it may benefit him, is in the interests of the company as a whole, including the minority shareholders....."

In the High  
Court in  
Borneo

—  
No. 15

Judgment  
—

12th July 1974

See also Re Tivoli Freeholds Ltd (1972) V.R. 445 at pages 452 - 454.

For a recent application of this principle see Re Five Minute Car Wash Service Ltd. (1966) 1 All E.R. 242 at pages 246 - 247.

Powers of Directors

Generally directors occupy a fiduciary position and all powers entrusted to them are only exercisable in this fiduciary capacity.

While they are to some extent trustees or in the position of trustees, their position differs considerably from that of ordinary trustees and the strict rules applicable to such trustees do not apply in all respects to directors - Palmer's Company Law, 23rd Edn., pages 524-526. 10

This means that a director must act bona fide in what he believes - not what a Court may consider to be in the "interests of the company" - Smith & Fawcett Ltd. (1942) 1 Ch. 304 at page 306.

The duty of directors to act in the interests of the company has been interpreted to mean the duty to act in the interests of the shareholders as a whole. 20

As a result, although directors owe no fiduciary duty to shareholders, they must act in their interests. Percival v. Wright (1902) 2 Ch. 421.

It has, I think long been settled law that a director should not place himself in a position where there is a conflict between his fiduciary duty to the company (not the shareholders) and his personal interests. It therefore follows that unless the articles confer on a director express powers of contracting with the company, a director's power of so contracting are very limited. 30

If a director does enter into such a contract in breach of his duty or in breach of the articles, the company is entitled to have the contract set aside or sue the director for breach of duty - Palmer's Company Law, 23rd Edn., page 564.

Article 78 of Kong Thai's Articles permits a director to make a contract or be interested in a contract but requires that the precise nature of the interests of the director in such contract shall be declared to the board at 40

the time when it is entered into. The terms of the Article are important in the light of what follows. Article 78 reads:

In the High  
Court in  
Borneo

"A Director may contract with and be interested in any contract made with the Company, and shall not be liable to account for any profit made by him by reason of any such contract, provided that the precise nature of the interest of the Director in such contract be declared to the Board at the time to same is entered into; but no Director shall vote in respect of any contract or arrangement in which he shall be interested."

—  
No. 15

Judgment  
—

12th July 1974

In addition Section 131 of the Companies Act provides irrespective of anything in the articles, that disclosure shall be made but does not provide for the invalidation of any contract made contrary to that section.

Counsel for applicant contended that contract entered into in breach of Article 78 cannot be ratified by the Board after it has been entered into because Article 78 requires that the disclosure be made to the Board before the contract is entered into.

This, counsel for Respondent's say with which I agree does not go far enough because shareholders may waive the right since, even in the absence of a provision in the article such as Article 78, they can by resolution of a general meeting confirm a contract in which the directors or some of them are interested.

Northwest Transportation Company Ltd. v. Beatty (1887)  
12 A.C. 589, a Privy Council case, and Grant v. United Kingdom Switchback Railways Company (1888) 40 Ch. D.135, where Cotton, L.J. in the course of his speech said at page 138:

"It was urged for the Appellant that the directors could not, being interested, make a contract which would bind their company, and that a general meeting could not, by a mere ordinary resolution, affirm that contract, for that this would be an alteration of the articles, which could only be effected by a special resolution. This is a mistake. The ratifying a particular contract which had been entered into by the directors without authority, and so making it an act of the company, is quite a different thing from altering the articles. To give the directors power to do things in future which the articles did not authorize them to do, would be an alteration of the articles, but it is no alteration of the articles to ratify a



In the High  
Court in  
Borneo

—  
No. 15

Judgment  
—

12th July 1974

a contract which has been made without authority."  
and in a latter passage Lindley, L.J. said at page 139:

"The Appellant contends that the company could not ratify this contract except by special resolution. In my opinion that contention is unfounded. There is a broad distinction between altering the articles and merely saying "this act was not authorized by the articles, but we will ratify it." "

Further, a director interested in a contract with his company is entitled to vote for its ratification in general meeting even if he holds a majority of the voting shares and this is only, impeachable by proof of fraud. (See Northwest Transportation Company Ltd. v. Beatty, supra, and Bushell v. Faith (1970) 1 All E.R. 53, H.L.)

10

This subject is also dealt with in Gore-Browne on Companies, pages 722 to 723.

The Court in Boschoek Proprietary Co. Ltd. v. Fuke (1906) 1 Ch. 148 at page 159, et seq. held that ratification of an act by the directors which was ultra vires the articles was not possible. This is not such a case in the present instance.

20

The learned author, Alfred Read in "The Company Director", 4th Edn. (1971) has this to say at page 48 under the heading "Acts of Individual Directors":

"When the lack of authority arises on an individual director or a number of directors acting without being empowered to do so by the board as a whole, the transaction can be ratified by the board, if thought fit. Legal proceedings which have been initiated without authority by a managing director before the commencement of the winding up of the company can be ratified by the liquidator - Danish Mercantile Co. Ltd. and Others v. Beaumont and Another (1951) Ch. 680; 1 All E.R. 925."

30

I must now turn to the cases on which Counsel for the applicant has cited. The first of these is the American case of Guth v. Loft Inc. 5 Atlantic Reporter (2nd Series) Del p.5 to which Counsel for Appellant has strongly relied upon as it is placed in the forefront of the argument in order to decide the validity or otherwise of these contentions. It seems desirable to state such principles of law as have been established by the decisions of the Courts or by

40

reasonable inference from those decisions.

The rule of the English law, as contended by Counsel for Respondent, with which I entirely agree, is that any opportunity which belongs to company X must be afforded to Company X, and that any opportunity which belongs to Company Y must be afforded to Company Y. But that if a person who happens to be a director of Company X and Company Y is brought an opportunity which is given to him as an individual, and not as an officer of either Company, he is entitled to exploit such opportunity as he thinks best. He is not however bound to give it to either Company. He may if he so chooses exploit the offer himself.

In the High  
Court in  
Borneo

—  
No. 15

Judgment  
—

12th July 1974

Head note one and two and the first part of three as it seems to me expresses propositions of the English law, but not the second part of three.

The proposition that a director must "refrain from.... depriving (the corporation) of profit or advantage from his skill and ability might properly bring to it" would mean that a director must work full time furthering the interests of the company. If he was the director of numerous companies, this would be quite impossible.

It is now too well settled to be any longer in dispute in a court of law that a person can be a director of more than one company, even of more than one company in the same line of business. (See Wilson v. L.M.S. (1940) Ch 176 and 399, and Bell v. Lever Brothers Ltd. (1932) A.C. 161 at pages 195 - 196).

And according to Bell v. Lever Brothers it would seem that a director is impliedly free to compete with his own company.

Moreover English law recognises that the Board is under no duty to ensure that their Company exploits every opportunity which is offered to it. (See Regal (Hastings) Ltd. v. Gulliver (1967) 2 A.C. 134 per Lord Macmillan at page 153).

"The point was not whether the Directors had a duty to acquire the shares in question for the company and failed in that duty. They had no such duty."

Counsel for the Respondents contended (correctly if I may say so) that the fourth proposition in the head note of Guth v. Loft appears unexceptional, nor in my judgment is there any point in discussing the fifth.

In the High  
Court in  
Borneo

The six proposition expresses the English law which is founded upon general principles applicable to all cases of fiduciary relationship (See Boardman v. Phipps (1967) 2 A.C. 47 and the cases therein cited).

No. 15

It is the seventh proposition which is fundamentally unapplicable.

Judgment

12th July 1974

The implication is that if the opportunities is essential to the corporation the director is bound, even though the opportunity was offered to him as an individual, to turn it over to the company. This cannot be correct. One has to instance the case of a person who is the director of two corporations offered an opportunity which is essential to both. What then is his duty on the seventh proposition? (See London and Mashonal and Exploration Co. Ltd. v. New Mashonaland Exploration Co. Ltd. (1891) W.N. 165).

10

The proposition as stated in this case appears to have derived from a large number of cases in none of which was the positive, as distinct from the negative proposition involved.

Onus

Prima facie, the directors are assumed to act in the best interest of the company.

20

If anybody alleges the contrary the onus is on him to prove it, and if in fact he adduces no evidence at the trial which justifies a conclusion that there has been a mala exercise of the discretion, then the mere fact that the directors have decided to go in with a certain project, admits of no suspicion or in any sense shifts the onus of proof so as to put them the burden of justifying that which they have done.

It is for the applicant to satisfy the court that at the date of the presentation of this application the affairs of the company were being conducted in a manner oppressive to him as a member of the company.

30

I have dealt with the law at, I am afraid, some length because they are important and because of the considerable argument addressed to the Court on at least some aspect of them.

The second of the cases quoted is a Malaysian case Re Coliseum Stand Car Service Ltd. (1972) 1 M.L.J. 109. The case is not very helpful as an authority because in that case the Court delivered no reasoned judgment and in my opinion throws no light upon the questions which

40

arise in the present case.

Credibility of a Witness

In the High  
Court in  
Borneo

—  
No. 15

Judgment  
—

12th July 1974

On the question of credibility of a witness I find that the matter is very largely concluded by authority so long ago as 1894 that a witness may be cross-examined as to his credibility, but he should have his attention drawn to any facts with respect to which it is intended to impeach his credit so as to give him an opportunity of explanation, unless the evidence he gives is so incredible or romancing that it is reasonable to let him leave the box without such questions being put. (See Browne v. Dunn (1894) 6 The Reports 67 H.L.)

10

HENDERSON'S REPORT

I now pass to a consideration of Henderson's Report. Counsel for applicant in the course of the proceedings sought to exclude Henderson's Report because as I recall Counsel had no desire that the report go in as a whole unless Mr. Henderson was called as a witness. The Court having so excluded it, Counsel now complains that it ought to be part of the documentary exhibits (see pages 188 - 190 of Record).

20

The Court cannot now regard as a denial of justice the procedure which Counsel himself requested and of which Counsel for respondents did not strongly oppose.

But that is by no means the end of the matter. It must be observed that the report was marked K.T.S. 50 for identification only and it has not so far as the Court is able to discover been produced as evidence (See page 253 of the Record).

30 AFFIDAVIT

Having said so much I pass over very shortly to the consideration of hearsay nature of Affidavits.

It is quite clear upon the authorities that hearsay evidence cannot and does not constitute evidence.

See Re Williams (1968) 13 F.L.R. 10 at page 22 - 23:

"However, although the evidence in support of a sequestration order may be given by affidavit, that does not mean that the ordinary rules of admissibility are relaxed or that affidavits

In the High Court in Borneo

No. 15

Judgment

12th July 1974

containing hearsay statements may be used. The petition must be strictly proved, by admissible evidence, and the affidavits in support of the petition must be the affidavits of persons who can swear to the statements contained therein of their own knowledge.

In Parsons v. Bunge (1940 - 1941) 64 C.L.R. 421 the Court in a passage at page 430 said:

"It is a rule of prudence rather than any want of jurisdiction in the court to receive and act upon the affidavit. But it is, if I may say so, a wise rule, for affidavits verifying petitions are often in very general language and seldom state facts according to the mode of proof required by law. In this case the affidavit verifying the petition was irregular in its mode of proof and, standing alone, should not be acted upon."

10

The same principle is to be found in Re Cohen (1950) 2 All E.R. 36 at page 37:

"As regards the form of affidavit in support of the petition, it appears that steps have now been taken which will avoid the use in inappropriate cases of the present form, which I think is enshrined as a statutory form annexed and appended to the Bankruptcy Rules, 1915. Counsel for the petitioning creditors has not contended that the way in which the evidence was presented when the matter originally came before the court for adjudication, that is, by the recital of hearsay statements, was justifiable. There is no special rule which entitles a petitioning creditor to depart, in seeking to establish his case, in any way from the ordinary rules of evidence. One can see that there is a temptation, to save trouble or voluminous documentation, to use a form which the rules of evidence do not justify, but I think it is desirable that the court should state quite plainly that the rules of evidence must be properly observed. To depart from them may result in a serious injustice being done to some individual who might suffer adjudication, or the making of a receiving order, on material which turns out afterwards to be quite incorrect, and which should never have been accepted in the first instance. I venture to add this. It is suggested that insistence on oral evidence is, in fact, sometimes a troublesome matter which adds to the burden of costs in litigation, and that there should be much greater facilities for proving the facts in a case by affidavit evidence - the

20

30

40

existing rules permit it to a degree which is not, I think, always appreciated - but, unless the rules of evidence are properly adhered to, the whole justification for the use of affidavit evidence, instead of oral evidence is destroyed at a blow. Affidavit evidence can only be entitled to the same weight as oral evidence if those who swear the affidavits realise that the obligation of the oath is as serious when making an affidavit as it is when making statements in the witness box."

In the High  
Court in  
Borneo

—  
No. 15

Judgment  
—

12th July 1974

10 and more recently the Headnote of Re Koscot Inter-planetary (UK) Ltd. (1972) 3 All E.R. 829 sets out as follows:

"Held - Neither document was admissible in evidence for the following reasons -

(i) there was no general rule that hearsay evidence was admissible on a petition for the winding-up of a company; although the authorities established that there were two special categories of evidence or material which, even though hearsay, were admissible in such proceedings, i.e. affidavits verifying a petition under r 30 of the Companies (Winding-Up) Rules 1949 and inspectors' reports made under the Companies Act 1948 under the procedure obtaining before the Companies Act 1967, it did not follow that there was any open licence to admit hearsay evidence generally (see p 833 d to g, post); Re ABC Coupler & Engineering Co Ltd (No. 2) (1962) 3 All E.R. 68 and dictum of Buckley J in Re Allied Produce Co. Ltd (1967) 3 All E.R. at 400 applied; Re Travel & Holiday Clubs Ltd. (1967) 2 All E.R. 606 explained;

(ii) the letter from C was not admissible by virtue of s 2(1) of the Civil Evidence Act 1968 since it had not been established, nor did it appear, that C had first-hand knowledge of the facts stated in the letter (see p 834 a, post);

(iii) the summary was not admissible by virtue of s 4(1) of the 1968 Act since, even if the summary was a 'record' within s 4(1), it was incumbent on the petitioner to establish in some way that the requirements of s 4(1) had been satisfied, in particular that the summary was, or formed part of, 'a record compiled by a person acting under a duty', and there was no evidence who that person was or that he was subject to such a duty (see p 834 d g and h, post).

40 Semble. Where it is sought to adduce hearsay evidence contained in a document exhibited to an affidavit, noticed must be given in accordance with the Civil Evidence Act 1968, s 8, and RSC Ord 38, r 21(1).

In the High Court in Borneo

No. 15 Judgment

12th July 1974

Although for certain purposes, e.g. inspection and copying, an exhibit may be deemed to be part of the affidavit, it does not follow that statements contained in an exhibit are deemed to be included in the affidavit for all purposes. Accordingly the exemption from giving notice conferred by RSC Ord 38, r 21(4), in relation to 'evidence ..... to be given by affidavit' does not extend to documents exhibited to an affidavit (see p 835 c to e, post)."

Affidavit of Ling Beng Sung

10

Having now stated the principles to be applied I must refer to the affidavit of Beng Sung.

The applicant affirmed an affidavit on 12th February, 1971, a portion of which was read to the court, the balance were as conceded on behalf of the applicant being inadmissible, as parts of them are founded on hearsay and therefore cannot constitute evidence.

Reading through the portions of the affidavit which was read it is manifestly clear that they contained hidden hearsay and cannot therefore upon the authorities, to which reference has been made at the outset of this judgment, constitute evidence.

20

It is a matter of some surprise to the court that applicant's attempted adverse criticisms of various Company matters are based either upon what he has been told, or gathered from newspapers reports, or partly of conjectures or opinions which have been cast in terms of personal knowledge in his affidavit.

Prominent amongst these are and I will now set out:

"The applicant stated categorically that 'these donations were never authorised by Kong Thai or reported to Kong Thai.' "

30

Upon cross-examination he said:

"Q. And until Peattie told you, have you no knowledge whether the donations were incurred with or without Board's authority.

A. That is correct." (Page 138E of Record)

It is clear therefore and indeed it was not contended otherwise that this is hearsay and in my judgment applicant was not speaking of his own knowledge in respect of matters

40

which occurred prior to his becoming a shareholder and which could not by any conceivable stretch of imagination be oppressive to him. This information has to which reference must later be made shown to be incorrect.

In the High  
Court in  
Borneo

The applicant stated "Kong Thai has no place of business and conducts no business in Kuching. It has no place of business and conducts no business in Singapore."

—  
No. 15  
Judgment  
—

10 In cross-examination the applicant confirmed that he considered it correct that Kong Thai has no business in Kuching and stated that he did not wish to correct himself.

12th July 1974

He then stated in cross-examination:

"Q. Did you hear what Peattie said in his cross-examination.

A. I have heard, but I don't agree with him that Aurora Hotel is a business. It is, but not a timber business. Kong Thai has no timber business in Kuching." (Page 138G of Record).

20 The applicant, as it seems to me persisted in right up to the end of the evidence that he disagreed with Peattie, his own appointed Chartered Accountant.

There is no doubt whatever and I do not see how the applicant can avoid persisting in the line of conduct and avoid going against his own case without flying in the face of obvious facts.

#### ARTICLES

30 The terms of the Articles of Kong Thai are important in the light of what has been discussed. We must in these proceedings therefore for the purpose of ascertaining the nature and extent of the powers of the Directors refer to them, and that I now turn.

K.T.S. 35, Article 85 provides:

"The Directors or any Committee of Directors may meet together for the dispatch of business, adjourn and otherwise regulate their meeting as they think fit, and determine the quorum necessary for the transaction of business. Until otherwise determined, two shall be a quorum."

There is nothing in the documentary evidence as contended



In the High  
Court in  
Borneo

—  
No. 15

Judgment  
—

12th July 1974

by Counsel for the applicant which suggests that the quorum has been altered.

Provision is also made for delegation in Article 76 which reads as follows:

"The Directors may delegate any of their powers, other than the powers to borrow and make calls, to the Managing Director or to committees consisting of such members of their body as they think fit. The Managing Director or any committee so formed shall in the exercise of the power so delegated conform to any regulations that may be imposed upon them by the Directors."

10

The delegated powers given to Beng Siew as Managing Director of Kong Thai, were conferred at the Directors' Meeting held on the 27th December, 1967 (see Exhibit K.T.S. 46 - Folio 26).

The relevant resolution reads thus:

"It was resolved to authorise the Managing Director Dato Ling Beng Siew to purchase tractors, logging trucks, machineries and any other equipments necessary for the operation of the Company. It was also resolved to delegate the power to the Managing Director Dato Ling Beng Siew to make such investments, which he thinks fit and proper, on behalf of the Board of Directors. By this resolution, the use of Co's seal is allowed on any investments decided by Managing Director."

20

It is perhaps appropriate to deal with certain matters pertaining to this article.

Apart from the advance of \$50,000 to P.T. Kalimantan Sari, all the following investments were made in the year 1968 after the date of the resolution granting delegated powers:

30

1. P.T. Kalimantan Sari;
2. United Singapore Lumber;
3. Sabah Agency Sdn. Bhd.;
4. Commercial Bank Brunei;
5. Singapore Mouldings (Pte) Ltd.;
6. Kong Thai Lumber Sdn. Bhd.;
7. Development Bank, Brunei;
8. P.T. Indomark;
9. Kong Thai Glass (Pte) Ltd.;
10. Kong Thai Plywood (Pte) Ltd. (see Peattie's Affidavit Pages 14-15);
11. Malaysia Daily News Sdn. Bhd.;

40

12. Aurora Hotel - a direct investment by Kong Thai but is not a subsidiary.

In the High Court in Borneo

Peattie in the course of his evidence stated (Page 35D - F of Record):

—  
No. 15

"I discovered in course of my investigation that the Company was advancing monies with Borneo Co. on exploratory ventures. I discovered two ventures abortive and unprofitable. The amount advanced would be written off. So far as the successful ventures were concerned the money advanced was charged into shares capitals which Companies were formed.

Judgment

—  
12th July 1974

This happened in number of occasions. This was apparent to me from my examination that majority of investments had great hope of success."

The law in respect of notice of meeting is discussed on Page 717 in Gore-Browne on Companies.

Verbal notice is sufficient (Browne v. La Trinidad (1888) 37 Ch.D. 1 at page 9).

It is not necessary that the notice should state specifically what business is to be transacted (La Compagnie de Mayville v. Whitley, (1896) 1 Ch. 788) unless the articles require that certain business shall only be transacted at a meeting specially convened for that purpose, in which case the notice must sufficiently indicate the business to be considered (see Young v. Ladies Imperial Club (1920) 2 K.B. 523 C.A.)

I do not find anything however in the Memorandum and Articles of Association any such provisions relating to Directors' Meetings.

30 PEATTIE

In considering Peattie's evidence I do not propose to travel into detail all the items contained in Peattie's affidavit which appeared in evidence except to point out certain parts which showed that his affidavit contained statements which were false.

The affidavit of Peattie was affirmed on 10th August, 1971. In September 1971 he conducted further investigation into the books and records of Kong Thai and on 24th November, 1971, reaffirmed the affidavit in the form which was  
40 tendered to the Court by Counsel for the applicant.

In the High  
Court in  
Borneo

—  
No. 15

Judgment

—  
12th July 1974

On Peattie's own admission in cross-examination a number of statement of facts affirmed in his affidavit were false, some were misleading and others were incorrect and which were also made without any or any sufficient inquiry (Page 59B of Record).

He added that some of the matters in his former affidavit sworn in September which appeared to be contentious were no longer contentious.

I do not wish to use hard words, but I should have thought 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. 10

This in my judgment is a reprehensible attempt at making statements of fact which he knew to be untrue, details of which I shall presently allude to.

To begin with Peattie agreed that a statement made in paragraph 16 of his affidavit

"I was unable, despite requests, to obtain from Kong Thai any sight of its returns and correspondence with the Inland Revenue for this year and any other year". 20

was not true.

Further, Peattie agreed that observations contained at page 37 of his affidavit being part of paragraph 142 re P.T. Kalimantan and Sabah Agency Sdn. Bhd. that "no accounts have ever been produced to Kong Thai" were not correct and that on 24th November, 1971, when he reaffirmed his affidavit, he apparently knew that the statements were not correct and were false to his knowledge. (Page 59 of Record). 30

It is right to put on record that after the accountant's investigation had been made for the applicant in his capacity as a director of the company, no request was made by him to the company for further explanations or for rectification of matters which were raised for the first time after the present application was made to the Court.

In so far as Peattie was concerned he has throughout applied his opinion as a Chartered Accountant but agreed that it would be no part of the function of an auditor to criticise decisions made by the Board of Directors though he said he would probably make some remark in his report to 40

shareholders. He however stated categorically that the shareholders were informed (Page 79C of Record).

Peattie after his later examination in September 1971 reported verbally to the applicant, Beng Sung and he agreed in cross-examination that he made it clear that some of the matters in his former affidavit which appeared to be contentious were no longer contentious (Page 80F - I of Record).

In the High  
Court in  
Borneo

—  
No. 15

Judgment  
—

12th July 1974

10 He added that he did not report the matters discovered to the legal adviser that Beng Sung had discussions with the legal adviser after he had reported the matters which he found on his later visit. He agreed that he had not been asked to make any supplementary affidavit so that the matters which appeared contentious and had ceased to be so could be rectified and he agreed that there was no rectification until after the start of his cross-examination (Page 81A of Record).

20 These considerations do not appear to have received the attention they deserved at the hands of the legal advisers. But I have rarely seen a case in which fulness and candour of statements in the affidavit were more imperatively required than in the present and I have met with no other case in which both were so unreasonably and studiously with-held. These matters which were made known to the applicant would not have come to light but for the cross-examination which as events have proved is so vital in arriving at the truth.

30 It is perhaps appropriate at this stage to note that the accounts were passed by shareholders at the annual general meeting held each year without any dissenting voice though Beng Sung, even though the applicant was a shareholder of the company (Page 101 of Record).

MISLED

Let me say at once that for my part and I am quite satisfied that the information on Kong Thai's affairs upon which Peattie's report was based was supplied to the Applicant and although the applicant believed the report to be all right, he was obviously misled on the facts.

40 The allegations against the respondents were of the gravest order and were not supported in any particular by counsel for the applicant in their argument during the 22 days in which the trial lasted.

The court has arrived at the conclusion that the

In the High  
Court in  
Borneo

—  
No. 15

Judgment  
—

12th July 1974

affidavits in support of the applicant was not candid and did not fairly state the facts but stated in such a way as to mislead the court as to the true state of affairs, the court ought to in its entire agreement with counsel for the Respondents prevent an abuse of its process and to have refused to proceed any further with the examination of the merits.

But out of deference to the arguments which was addressed to the Court I propose to express my views briefly on a number of points which has been canvassed.

10

I mention these matters at the outset, for they have to be borne in mind in determining the reasonableness or otherwise of the applicant's conduct after the true state of affairs were discovered by Peattie.

#### MALICE

A fact which calls for mention is that the applicant accused the second respondent Beng Siew of having misappropriated funds of Kong Thai to make donations in his own name or for the furtherance of his own personal or political ambitions and those of the third respondent.

20

This considered in the light of Peattie's evidence is not true for Peattie in his cross-examination said "as far as I know there is not a jot of evidence to suggest anything improper." "Agreed that donations were made and approved." (Page 75I and 76A of Record).

In paragraph 77 of his affidavit applicant again accused the second respondent of misappropriating and converting moneys to his own use without the knowledge or authority of the directors or shareholders.

This seems to be an expression of opinion which is upon the evidence unfounded and unsupported and I hold that this was motivated by malice.

30

Further allegations were made by applicant that Beng Siong with the authority and connivance of Beng Siew and without the knowledge or authority of the other directors or shareholders misappropriated and converted to his own private and personal use certain funds of the company.

Applicant agreed that the information was given to him by Peattie and further agreed that the Board of Directors of

the company later authorised the payments (Page 170H of Record).

In so far as "the income tax papers" were not shown to the auditor appointed by Order of Court the applicant agreed in cross-examination that the papers were seen by Peattie and he knew it before his affidavit was sworn.

On 12th February, 1972, when the statement was affirmed it was false to the knowledge of the applicant.

I refer to the cross-examination at page 172 G and H:

"Q. As of 12th February was the statement incorrect.

A. No. It is correct.

(Mr. G. Starforth Hill asks for the 3rd time)

Q. Do you maintain that as on 12th February this year statement is correct.

A. Yes."

In the present motion, there is no evidence to support any allegation of misappropriation by either the second or third respondent (see Page 170 of Record).

The Prayers asked by the application sought relief as an oppressed minority shareholder upon the ground that the affairs of the Company are being conducted or the powers are being exercised in a manner oppressive to him (Section 181(1)(a)). They do not show any honest belief that he is being oppressed. In my view therefore there is abundant evidence on which the court could properly conclude that the allegations are actuated by malice and I so find.

From these statements, it seems to the Court that the applicant's complaints appear to me to be so ill-founded as to be consistent with a firmly fixed and unalterable determination of the applicant to wreck the company without regard to whether such a course is justified.

BUMIPUTRAS & NATIVES

The question of the issue of shares to Bumiputras and Natives was raised which can I think be disposed of quite briefly.

I do not think anyone could have complained of the issue of shares being made to Bumiputras and Natives of Borneo.

Their special position is enshrined in the Federal Constitution and safe-guarded by the Sedition Act, 1948.

In the High  
Court in  
Borneo

\_\_\_\_\_

No. 15

Judgment

\_\_\_\_\_

12th July 1974

10

20

30

In the High  
Court in  
Borneo

The question does not in my judgment come into this controversy and I need say no more about that.

DATUK HARUN ARIFFIN (Prayer 28)

No. 15  
Judgment

The next question that I will concern myself is that of the sum of ~~₹~~3,000/- the debt owed by Datuk Harun Ariffin (hereinafter referred to as "Harun"). He denied that he ever received the sum of ~~₹~~3,000.

12th July 1974

The respondent had before the Court the evidence of a handwriting expert, Dr. Julius Grant (D.W.4), who had frequently had in the course of his duties to compare handwritings and signatures. He expressed the opinion that the signature (Exhibit KTS 47) having compared the specimen signatures of Harun and the purported signature of Harun on the receipt was that of Harun.

10

Harun's evidence is that he genuinely and honestly believed that he borrowed ~~₹~~10,000 and not ~~₹~~13,000.

He was cross-examined and I quote (See page 313 of Record):

"Q. You received a letter dated 18th May, 1972, HA 7 which indicates that there was a crossing of letters earlier and refers you to payment voucher and your acknowledgment receipt of ~~₹~~3,000. You did not reply to that letter.

20

A. No.

Q. So you did not reply to either letters. In addition you had received a detailed account and explanation of those account. (Ex. HA 6).

A. Yes.

I did not bank the cheque nor did I reply to either of the letters.

30

Q. You made no suggestion having received those letters that there was any mistake or misunderstanding.

A. I did not reply as I do not wish to cause any embarrassment at all.

Q. You realised there was a mistake or misunderstanding you believed the officers of the Kong Thai Sawmill.

A. I notice there are mistakes.

Q. You did not see fit to write to Kong Thai Sawmill so that the difference could be explained.

A. No. I did not."

40

In my opinion, if it is shewn that there is a mistake, the Court expects to find steps immediately taken by Harun in order that the position may be clarified.

Harun has it in his power to inform Kong Thai what the figure should be and has at his disposal every means to do so. I apprehend that the Court does require a person to be prompt in rectifying financial errors in a case of this description.

In the High  
Court in  
Borneo

—  
No. 15

Speaking for myself I would have arrived at the same conclusion apart from the evidence of Dr. Julius Grant.

Judgment

—  
12th July 1974

10 Section 45 of the Evidence Act only makes evidence of a handwriting expert a relevant fact, but it is for the court to determine whether a particular writing is to be assigned to a particular person.

There is nothing in principle or authority which bars the Judge of facts from using his own eyes and looking at the admitted signature along with the disputed signature in deciding whether the evidence given as regards the genuineness of the document should be believed or not. Fazaladdin v. Panchanan AIR (1957) Cal. 92.

20 The question has been dealt with in a case where the correct law appears to have been laid down holding that there is no legal bar to the Judge using his own eyes to compare disputed signatures with admitted signatures given without the aid of experts. Bisseswar v. Nahabwip AIR (1961) Cal. 300. Mukharji J. observed:

"As I read the case-law and the sections I am unable to subscribe to the view of judicial blindness that a court is prevented by law to use its own eyes either in addition to handwriting expert's opinion on the point or even in the absence of such expert evidence on the point."

30 In another case the Privy Council compared the disputed signature with admittedly genuine signature and was "strongly impressed by such comparison". Mamindra v. Mahaluxmi Bank Ltd. AIR (1945) P.C. 105, 107. (See Sakar on Evidence, 11th Edition, Page 685).

Harun, in my opinion, was under the mistaken but honest belief that he borrowed ~~₹~~10,000 and not ~~₹~~13,000.

It is to be observed that the second loan of ~~₹~~3,000 was authorised in a resolution of a board meeting.

40 The amount which he paid cannot relate to interest of  $6\frac{1}{2}\%$  on ~~₹~~10,000 for 38 months even if it is compounded.



In the High  
Court in  
Borneo

A calculation made upon a loan of \$13,000 with 10 repayments of \$500 each gives an answer at 6½% which does not coincide with the amount paid by Harun but is closer than the former calculation.

No. 15  
Judgment

12th July 1974

Having examined the receipt (Ex. DTS.47) myself, I find as a fact that on the evidence the signature of Harun on the receipt for \$3,000 is genuine, that the payment was in fact made to him, that it has since been repaid on his own admission and has been overpaid and that the company has not lost any money in the process. There is therefore nothing further to be done in this matter.

10

### PRAYERS

I will now deal with the various prayers raised at the hearing before me and I will take them as conveniently formulated in the respondent's form though in somewhat different order.

#### Donations (1965-1970) - Prayers Nos. 7, 13, 24, 35 & 52

Peattie in his cross-examination agreed that the company had power in its memorandum to make donations and also that the Companies Act incorporated in the powers of every company the power to make donations for charitable and national purposes.

20

So far as Peattie was concerned he had seen and was satisfied with the evidence of the receipt of moneys by the recipient. Peattie in cross-examination said in relation to donations "As far as I know there is no jot of evidence to suggest anything improper."

The allegation that some of these moneys might have found their way into the pocket of Beng Siew for his personal benefit has at the end of the proceedings remained unsubstantiated.

30

I am satisfied that there is nothing unusual still less improper in Directors approving donations.

Upon the evidence and as agreed or conceded by Peattie before the Court I find as a fact:

(a) that donations were in fact made by Kong Thai (not by Beng Siew) in the amounts and to the recipients disclosed in the evidence from 1965 to 1970;

(b) that the company has power in its memorandum to make donations;

40

(c) that all the donations were reported at board meetings and approved by the directors and that the amounts were audited (see Ex. KTS 46 page 47);

(d) that the accounts containing reference to the donations were presented at the annual general meetings of the shareholders of the company and approved by the members without dissent;

10 (e) that the allegations made by Beng Sung in his affidavit (paragraph 77(c)) that the political donations were made for personal political advancement of Beng Siew have not been proved.

In the High  
Court in  
Borneo

—  
No. 15  
Judgment

—  
12th July 1974

It is desirable to point out that the applicant did not become a shareholder until 1st January, 1967.

Drawings and other payments (Prayers 10, 12, 20, 21 & 30)

20 In regard to drawings and other payments, the evidence shows that interest has now been credited. I am satisfied that the failure to charge interest prior to the commencement of these proceedings was not deliberate and accordingly further consideration of items falling under this category is not now necessary.

As regards sums disallowed for tax, it is sufficient to say that upon the evidence a company may incur expenditure perfectly in the course of its business all or part of which may subsequently be disallowed for tax purposes.

In the state of things it seems to me that nothing appears to turn on that, and I accordingly disregard them.

Tax - sums disallowed by Inland Revenue

30 (a) in respect of Entertainment expenses (Prayers 8, 9, 25, 26, 27, 36 and 53).

(b) in respect of travelling expenses (Prayers 39 & 56).

The evidence in support of the applicant's case rests on Peattie's affidavit and his cross-examination and the only other evidence is hearsay evidence of Beng Sung.

I find that upon the evidence that the moneys were in fact expended by the Company in the amounts claimed and for the purposes indicated.

Peattie agreed in cross-examination the fact of

In the High  
Court in  
Borneo

—  
No. 15

Judgment

—  
12th July 1974

disallowance by the Inland Revenue Department does not mean that the company should not have made the expenditure and that entertainment is an item which cannot be assessed as against profits earned and that there are different views as to the amount of expenditure which should be made for the purpose of entertainment.

I hold upon the evidence

- (a) that the travelling expenses incurred were properly incurred on behalf of the company;
- (b) that the legal expenses were in fact properly incurred by the company.

10

It is to be observed that Prayer 8 relates to a time prior to the date the applicant became a shareholder and covers the sum of \$7,081 disallowed by way of entertainment expenses.

I find that there is no ground for an order to be made under any of the prayers asked for.

Ling Beng Siew Sdn. Bhd.

Peattie agreed that this was an ordinary trading account and not an advance account and that it has been recklessly called an advance account.

20

It follows that there is no basis upon which interest can be claimed.

Preliminary Expenses (Prayer 23)

Peattie in cross-examination agreed that the payment was approved by the board of directors and debited to preliminary expenses to be written off over a ten year period.

This being an authorised payment, the ground argued is without any substance.

Advance of Bonus to 2nd Respondent (Prayer 31)

30

The bonus was payable to Beng Siew as at and from 30th September in each case and it is as at that date that credit has been given.

The fact that other directors may have received payment of their bonus at a later date does not in any way take away from the entitlement of Beng Siew to a bonus at the closing date of each year.

Sums drawn by Ling Beng Siew & Co. during the year 1969/70  
(Prayer 47)

In the High  
Court in  
Borneo

In cross-examination Peattie agreed that the account had been in credit until 31st March in the sum of \$797,000.00 and at the end of June of \$29,254.00 but that the account was squared at the end of the financial year and further agreed that there would be interest payable by the Company to Ling Beng Siew & Co. in the sum of \$25,000 to \$30,000 and that this was not a case of cash withdrawn from Kong Thai.

-----  
No. 15

Judgment

-----  
12th July 1974

10 On the face of it, it is difficult to see what ground there is on which Court can grant the order sought for under this head.

Telephone Bills (Prayers 37 and 38)

There is no evidence but merely a suggestion that a portion (Peattie does not say what portion) of the amount is personal.

20 Counsel for respondents contended, with which I agree, that it can hardly be alleged that the payment of bills which may or may not contain a personal element of expenditure constitutes an oppression of a shareholder.

Sums drawn by 3rd Respondent without authority during year 1969/70 (Prayer No. 46)

Peattie agreed that this was a current account and there is no evidence that any payment was made on that current account without authority.

(Prayer 29 - in respect of third respondent)

Peattie agreed that repayments had been made and that it was a current account.

30 In cross-examination he agreed that interest has been charged in accordance with the resolution of directors at the rate of 7% and in the case of the account of Ling Beng Siew & Co. interest had been credited to it.

The contention must therefore fail and there is accordingly no basis upon which any order can be made.

Entertainment expenses (Prayers 53 & 54)

The question of entertainment are matters in the discretion of directors.

Peattie in his evidence agreed that this was a

In the High  
Court in  
Borneo

—  
No. 15

Judgment

—  
12th July 1974

contentious matter.

That is I think sufficient to dispose of this argument and I cannot find any cause for any orders to be made under these prayers.

Salaries amounting to £42,000 paid by 2nd Respondent or with his authority 1969-1970 (Prayer No. 57)

It seems this figure is arrived at by multiplication out and addition of the totals of the sums set out in paragraph 118 of the affidavit of Andrew Peattie.

In cross-examination Peattie agreed that the paragraph was merely informative and relates to employees of the Company. There can be no basis for asking the second respondent to repay these moneys.

10

Sums drawn from Kong Thai in year 1966-67 (Prayer 11)

Peattie admitted that there was no account in respect of Beng Siew in the year 1966-1967 and that his affidavit is wrong.

That seems to me a complete answer to the prayer.

Prayer No. 6

"That the second and third respondents do transfer or surrender to Kong Thai their entire shareholding in Kong Thai, etc."

20

This has been dealt with elsewhere.

Yacht (Prayers 19)

Cars (Prayers 14, 15, 16, 32, 48, 49 & 60).

Peattie under cross-examination said that he had received a full explanation for the moneys spent on the Yacht and was satisfied that the expenditure was in accordance with the authority of the Board of Directors (See K.T.S. 46 Folio 36), of which at the relevant time the applicant was a member though he did not choose to attend the meetings. He also conceded that the vessel appeared to be used in connection with investments companies. Peattie agreed that it was a decision properly within the domain and discretion of the Directors.

30

It is sufficient to say that the complaint about cars was founded on a misapprehension by Peattie of the nature of the purchase of the interest in Aurora Hotel.

Peattie himself admitted that the question of cars was a matter of minor importance.

In my view I consider this item petty and hardly merits examination by the Court.

Accordingly, I find as a fact:

(a) that the yacht was purchased and refitted and that the expenditure was authorised by the Board;

(b) that all the cars in question were purchased by the company in the course of its business or were acquired by the company as part of the assets of another business or businesses acquired by the company.

In the result there is no ground for an order to be made under section 181 of the Companies Act that the yacht or the vehicles should be purchased by either of the respondents.

Repair to car (Prayer 43)

In cross-examination Peattie agreed that there was no expert in Sibu to repair the motor vehicle which has been flooded.

This is an ordinary company expense and I find that there is no basis for making any claim against the 3rd respondent.

Investments:

- Aurora Hotel (Prayer 17)
- Hovercraft (Prayer 18)
- Malaysia Daily News (Prayers 19 & 33)

Aurora Hotel and Malaysia Daily News

There is no dispute that the company acquired as part of its investments, the Aurora Hotel and the Malaysia Daily News Sdn. Bhd.

The minute book of the Company shows that the investment was confirmed by the Board of Directors (See K.T.S. 46 Folio 33).

The applicant's complaint in respect of these is two fold.

First, it is suggested that they are bad investments and that the company's surplus funds could have been put to

In the High  
Court in  
Borneo

—  
No. 15

Judgment  
—

12th July 1974

In the High  
Court in  
Borneo

—  
No. 15

Judgment  
—

12th July 1974

better use in other ways.

It was contended on behalf of the Respondents with which I agree that the quality of the investments is an irrelevant consideration this being a matter properly within the province of the discretion of the Board of Directors.

There is no evidence before the Court to justify holding that they are bad investments although Peattie himself was at one stage confused as to the nature of the assets which was acquired in the Aurora acquisition, and accordingly this ground of objection must fail. 10

Assuming for a moment that I am wrong and that the investment were bad investments, that of itself would not justify interference by the Court in what is essentially a matter for the exercise of the directors' discretion.

The alternative ground of objection is that they were purchased for personal ulterior reasons benefitting only Beng Siew.

In the case of the Malaysia Daily News, it is contended that the newspaper was purchased in order to give Beng Siew and Beng Siong a public organ through which either could advance his political career and in the case of the Aurora Hotel that Beng Siew was purchasing the hotel in Kuching for personal glorification and to enable him to indulge in lavish entertaining of his friends and political acquaintances. 20

The evidence so far adduced in support of these allegations is in my opinion the personal view of the applicant or by way of secondhand evidence in the nature of hearsay, neither of which constitutes evidence and I accordingly find that in neither of these investments is the second ground of complaint substantiated. 30

#### Hovercraft

Similar allegations were made in regard to the acquisition of the hovercraft which was in fact never delivered. I find that these allegations without merit and that the loss on this item was a loss in the ordinary course of the company's business.

Peattie agreed that the company from whom the hovercraft was being purchased has gone into liquidation and that a dividend had been paid. That being so he agreed no blame attaches to the Directors as such. 40

Investment - Chalfont (Prayer 47)

"That the 2nd Respondent do pay to Kong Thai interest at 8% for the appropriate period on all sums drawn by Chalfont Investments Ltd. Hongkong during period 1969/70."

Peattie agreed that the entry of \$150,000.00 in so far as the moneys referred to Chalfont are concerned it was a wrong entry in the ledger and that no question of interest arose because Ling Beng Siew's account was in credit.

In the High  
Court in  
Borneo

—  
No. 15

Judgment  
—

12th July 1974

10 There is therefore no basis whatsoever for this claim, an allegation as unfounded as it is unsupported.

I pause to observe that this is one of the many illustration of the fact of recklessness and carelessness on the part of Peattie which as it seems to me to be deliberately misleading had not Counsel for Respondent been vigilant enough to detect it.

20 This merely adds to the length of the trial and so the parties are put to expense and trouble of a long trial when it could all have been avoided by the exercise of reasonable skill and care.

Repayments of Loans and interest incurred

Sums advanced to :

(a) Chen Ko Ming (Prayer 44)

In cross-examination Peattie admitted that the debt has been paid in full.

(b) Yii Suk Moi (Prayer 44)

There is no evidence that the debt owing by Yii Suk Moi of \$250 was in any way illegal.

(c) Pau Tien Ha (Prayer 45)

30 Peattie agreed that there were regular repayments of loan being made at the rate of \$1,000 per month. Nothing improper is suggested in this transaction.

(d) Ling Lee Soon (Prayer 22)

Peattie agreed that the advance to Ling Lee Soon was repaid in full with interest.



In the High  
Court in  
Borneo

(e) Pan Sarawak Sdn. Bhd. (Prayer 34)

During his cross-examination, Peattie was shown the Register of Directors which disclosed the interest.

No. 15

There is therefore no ground upon which any of the above claims may be made.

Judgment

Bonus and Salaries amounting to \$32,209.50 to

12th July 1974

Kong Sieng Ong  
Kong Kuek Miew  
Penghulu Poh  
Pengaruh Chundi  
Wong Yew Ming  
Chew Kwan Loke and  
Chen Ko Ming.

10

(Prayer 41).

There is no evidence upon which a finding can be made that these persons were not employed by or carrying out work on behalf of Kong Thai.

Nor is there any suggestion that the payments are in any way wrongful.

International Executive Corporation (Prayer No. 55)

20

In cross-examination Peattie stated that since the date of his report he had learned that this sum of \$3,167.25 represented mining exploration expenses incurred by the company.

Being a legitimate company expenditure there can therefore be no claim against the 2nd respondent in this regard.

Borrowings from Hock Thai Finance Bhd. and Bangkok Bank Ltd.  
(Prayer No. 51)

Peattie agreed that both these borrowings were the subject of ordinary commercial decisions by the company, and in the case of Bangkok Bank, Peattie confirmed that by the time he gave evidence he knew that the loan was personally guaranteed by Beng Siew.

30

There is accordingly no cause for any order to be made under this prayer.

United Singapore Lumber and P.T. Kalimantan SariIn the High  
Court in  
Borneo

No. 15

Judgment

12th July 1974

It was the applicant's case that when United Singapore Lumber was formed Beng Siew being one of the two only shareholders, held 50% of the issued capital, the other 50% being held by Mr. Gould on behalf of the Inchape Group. The share held by Beng Siew was held on trust for Kong Thai and at some later stage Kong Thai's shareholding was reduced to a figure of 48% of the issued share capital.

10 The evidence of Beng Siew stands uncontradicted and shows that United Singapore Lumber and P.T. Kalimantan Sari were joint ventures entered into between Kong Thai and the Inchape Group.

To give effect to this joint venture, United Singapore Lumber was incorporated, one share each was allotted to Beng Siew and Mr. Gould.

The accounts showed the company was financed initially with loaned capital. Profits of the Company were accumulated. No dividends being declared during the time when the issued share capital remained at the figure of \$2.

20 There were changes in the identities of the other parties to the joint Venture, but Kong Thai's percentage of the capital remained throughout at 48%. This was finally given effect to at the meeting of the Board of Directors dated 21st July, 1972. Shortly afterwards a declaration of the first dividend was made at the general meeting dated 27th June, 1972.

30 It was suggested that there was some sort of price rigging arrangement between the two companies, whereby the profit of the venture would in the process benefit the Singapore company.

There does not seem to be any evidence to support the allegation. Nor in my judgment is it relevant to the arguments having regard to the fact that the share of Kong Thai Sawmill in the two companies is identical.

On the subject of timber prices with particular reference to milling logs described by counsel for the applicant as "Indonesian Ramin Timber Class 4", the evidence of Beng Siew was that there is no such category as a "Class 4 Ramin Milling Log".

40 The only categories of Ramin known to him in Sarawak are Class I Peelers, Class 2 FAQ (fair average quality), Class 3 Milling, and Class 4 "U".

In the High  
Court in  
Borneo

No further evidence was called in regard to the prices of timber or to the timber alleged to have been referred to in the invoices produced and there the matter rested.

No. 15

It was also alleged that Beng Siew had a personal interest in these two companies.

Judgment

12th July 1974

Beng Siew had given evidence and in support of it 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.

10

It is also alleged that Beng Siew participated in the voting of remuneration paid by P.T. Kalimantan Sari and United Singapore Lumber to him as a director.

He denied that at one stage he was drawing remuneration from both companies for the same period.

His evidence was that the initial remuneration of \$28,500 represents remuneration covering not only the period of the accounts in question but the period which together with that period makes up a total of 19 months at \$1,500 per month.

20

There is evidence in the accounts of the method of payment and the transfer made in the books of Kong Thai.

Prayer 42

"That the Second Respondent do transfer to Kong Thai all shares held by him in Kong Thai Lumber Sdn. Bhd., Sabah Agency, Bhd. and any other companies in which the second respondent has not disclosed his interest, etc."

Prayer 5

30

"That the second respondent provide all information and documents required by the said receiver and Manager and in particular that he produce all accounts of all companies and ventures in which Kong Thai's funds have been invested and that he produce all accounts of Chalfont Investments, and Glendale Investments Ltd. Hong Kong."

The accounts of all companies and ventures in which Kong Thai's funds have been invested and of Chalfont and Glendale have been produced in the course of the proceedings.

40

These prayers therefore do not arise.

In the High  
Court in  
Borneo

Prayer 50

"Accounts of Chalfont Investments, Ltd. Hong Kong and Glendale Investments Ltd."

—  
No. 15

It is sufficient to say that all the accounts have been made available to the applicant.

Judgment  
—

12th July 1974

These two companies, namely Chalfont Investments and Glendale Investments are joint ventures, between Beng Siew personally and the Inchcape Group.

10 Apart from speculative allegations on the part of the applicant, there is no evidence that the funds of Kong Thai were used for the purposes of financing these two companies.

They were financed by a bank in Hongkong which granted a loan of HK\$4<sup>1</sup>/<sub>2</sub> million to Chalfont. This loan was secured by the personal guarantee of Ling Beng Siew and the Inchcape Group.

20 These two companies were under contract with either the concessionaire direct or contracted concessionaire to provide all heavy equipment and the labour to exploit the concessions.

There is no evidence that they were concessionaires themselves. They in turn sub-contracted the labour notwithstanding they were under no obligation to do so in the case of Chalfont to Kong Thai and in the case of Glendale to Sabah Agencies (Ex. K.T.S. 62 and 63).

The risk in regard to the capital investment in the equipment rested entirely with Chalfont and Glendale but Kong Thai received the benefits in the sub-contracts.

Prayer 40

30 "Investment by Kong Thai in other ventures or advanced to them as 'sundry debtors'."

The evidence is that moneys were advanced upon new ventures and classified as sundry debtors until it was proved that the ventures had a reasonable chance of success at which time the advances were converted into share capital held by Kong Thai and the Borneo Company.

These advances were all authorised by the directors

In the High  
Court in  
Borneo

—  
No. 15

Judgment  
—

12th July 1974

and shown in the accounts of the Company.

There is no suggestion that these investments were in any way unlawful or involved acts of misfeasance on the part of the managing director.

There is no evidence to substantiate this prayer.

SHAREHOLDERS & DIRECTORS

In order to appreciate the shareholdings and the Directors of the Company it is necessary to set out in chronological order their history since its inception.

On 20th January, 1965, all shareholders were Directors of the Company. 10

On 15th April, 1966 all the shareholders were Directors of the company including Mukah Sawmill (1962) Ltd.

On 16th July, 1966, certain Bumiputra shares were allotted.

At the Third Annual General Meeting of the Company all the previous directors were re-elected with the following exceptions:

- (a) Ling Beng Sung became a director in place of Mukah Sawmills; 20
- (b) Ting Lik Hung became a director in place of Ting Sik Toh; and
- (c) Jonathan Bangan ak. Reneng, a Bumiputra shareholder joined the Board.

It was this Board which on 27th December, 1967, vested the very wide powers in Beng Siew.

At the Fourth Annual General Meeting on 5th March, 1968, the same ten directors were re-appointed.

At the Fifth Annual General Meeting on 14th February 1969, an additional director, Cheng Yew Kiew, was appointed. 30

At a directors' Meeting on 14th February, 1969, the purchase of the Aurora Hotel and the Malaysia Daily News Sdn. Bhd. were approved.

On 20th June, 1969, the purchase and reconstruction of Berjaya Malaysia was approved by the Directors.

The directors of the Company then personally held all shares, except for what appear to be inter-family transfers of very small parcels approved at a meeting on 14th February, 1969.

In the High  
Court in  
Borneo

On 10th June, 1970, the directors' approval was given (inter alia) to the donations, investments in P.T. Kalimantan Sari, Sabah Agency Sdn. Bhd., Kong Thai Lumber Sdn. and United Singapore Lumber (Pte) Ltd.

—————  
No. 15  
Judgment  
—————

10 The applicant did not cease to be a director of the Company until 16th February, 1971.

12th July 1974

It necessarily follows that he was a member of the Board that approved actions of which he now complains.

It is worthy of note that at the General Meeting held on 20th January, 1965, the following resolution was passed:

"It was decided that the Directors' fee would be \$500 per person annually. This was increased to \$600 at the Second Annual General Meeting held on 15 April, 1966.

20 It was decided that the Directors' Bonus would be 5%, 4% for Managing Director, 1% for the other Directors." (See K.T.S. 46)

It is I would have thought plain enough that the fees and bonuses to which criticisms were levelled against the respondents were in fact paid in accordance with this resolution.

The prayers set out various allegations of facts extending down the numeral as far as "61" with winding-up as an alternative.

30 They set out various matters which the applicant wish to advance and which when under cross-examination prove ultimately in all of them to be either irrelevant, false or misleading.

Despite the powerful arguments advanced by Counsel for the applicant in respect of the large donations and expenditure involved in the yacht Berjaya Malaysia, the question to which an answer is to be found is that it is the Board of Directors who makes the decision.

40 It is, I say it again, not material what the Court's opinion is in the matter - the only matter of any materiality being whether the Board of Directors have adopted the decisions.

In the High  
Court in  
Borneo

No. 15  
Judgment

12th July 1974

It is plain from Exhibit K.T.S. 46 Folio 36 to which reference has been made that the Board had ratified the resolutions and gave formal expression of their opinion which the minutes bore ample evidence.

That being the facts, and that being the position to my mind it is no longer open to the applicant to object on the ground that the proceedings thus ratified and adopted were in the first instance brought without proper authority.

In my judgment the facts and circumstances alleged in all the 62 prayers are insufficient to amount to oppressive conduct on the part of the Respondents, and the motion accordingly fails.

10

#### WINDING-UP

That leads me to the next and important point of the case, namely winding-up and the other 61 prayers.

The answers in cross-examination of the applicant which I now quote appear to me to be highly relevant:

"Q. Which of these are you really asking then, 62 61 orders or winding up?

A. This is for the Court.

Q. Which of the two alternatives you wish to see the Court grant you?

A. Either No. 1 - 2nd Respondent be removed and receiver being approved or alternatively a winding-up." (Page 129E of Record).

20

"Q Then what is your choice?

A. It is for Court to decide.

Q. You are the applicant.

A. I ask for 61 orders. In alternative, I ask for winding up. Winding up is my second choice." (Page 130B of Record).

30

"The Applicant was then asked if he had considered what would happen if Kong Thai were wound up.

A. All the assets of the Company will be disposed of, debts paid by the disposal of fixed assets. If there is anything left it goes to shareholders proportionately.

Q. What would you get?

A. I have not worked it out.

Q. Have your advisers worked out?

A. No. We do not know the value of fixed assets and investments." (Page 131A of Record).

40

"I derive income from Kong Thai. I received director's fees - may be \$600. As a director I receive my share of bonus. Amount varies from year to year. As shareholder, I receive regular dividends. Amount of dividends was given by Mr. Peattie."

(Page 133A of Record)

"Q. The figures from 1967 to 1970 inclusive added up to 265% of your capital.

A. I accept what he said.

10 In addition to that, I receive an offer to purchase my shares at six times their par value - Par value \$100 at \$600.

I was told of this offer a few days before the hearing. I did not reply to that offer. I did not consult my advisers on that offer. I did not make any counter offer.

If they were winding up, I would be entitled to proceeds of the various assets.

20 Q. You enquired what you will get on winding-up. More or less of the offer made?

A. I did not enquire since the offer came a few days before the hearing and I had no opportunity to enquire.

Q. Have you since then sought to consult?

A. No."

(Page 133E of Record).

30 The applicant has not to my mind given sufficient and serious thought to the orders which he sought and the benefits which would flow to him by way of relief from his claimed oppression.

40 The applicant holds 330 shares of 13,600 shares which have been issued and is the only shareholder who has come before the court claiming that he is oppressed. No other shareholder has entered the dispute or claimed that the directors of the company (of which at all material times the applicant was one) have acted other than in the best interest of the Company. The shareholding of the applicant means that his interest is something like 2.42647 in the subject matter. This would also represent the percentage loss which he would suffer if the company were to be wound up and his gain if all the orders were made including interest. As against this, he has been offered \$600 per share which would mean a payment to him of \$198,000 or a capital gain of \$165,000 upon an investment of \$33,000.

That there exists at all material times and there continues to exist a deadly quarrel between the applicant and the respondent is I think quite clear.

In the High  
Court in  
Borneo

—  
No. 15

Judgment

—  
12th July 1974



In the High  
Court in  
Borneo

\_\_\_\_\_

No. 15

Judgment

\_\_\_\_\_

12th July 1974

Indeed, the applicant has not sought to deny or contradict the evidence of Beng Siew as to the continuing family dispute which was admitted by his counsel at the preliminary hearing.

I will here quote what was said by Buckley, J. in Re A.B.C. Coupler and Engineering Co. Ltd. (No. 2) (1962) 3 All E.R. 68 at page 73 (which incidentally was the authority Counsel for Respondent had in mind):

"After all, the winding-up of a company is a drastic remedy which may have far-reaching consequences financial and commercial and also consequences affecting not only the company but persons who have been concerned with the conduct of its affairs, and the court should act with caution in exercising its discretionary jurisdiction."

10

Upon the evidence, I am not satisfied that it is in fact just and equitable in the circumstances of the case that the company should be wound up.

Receiver & Manager (Prayers No. 58 & 59)

"To furnish to Receiver and Manager with all correspondence and other documents relating to advance of \$1,954,143.43 from Bangkok Bank Ltd. K.L. to Kong Thai. That the Receiver and Manager do conduct a check of all stocks, stores physical assets of Kong Thai and furnish a report thereon to the Court."

20

In view of the court's conclusion in this application these prayers do not arise at all.

Relief Sought

I shall now examine the decided cases on this point.

It seems to me that certain specific items of relief sought in the Originating Motion are outside the scope of Section 181. These are:-

30

(1) The request for the appointment of a receiver to investigate the affairs of the company. Article 71 to which reference has been made provides for the affairs of the company to be managed by the Board of Directors, provided that the Board is properly constituted it should not be deprived of its powers.

(2) The request for the supply of information under para 5 namely:

40

"That the Second Respondent provide all information and documents required by the said Receiver and Manager and, in particular that he produce all accounts of all companies and ventures in which Kong Thai's funds have been invested and that he produce all accounts of Chalfont Investments Ltd. and Glendale Investments Ltd., Hong Kong."

In the High Court in Borneo

—  
No. 15

Judgment

10

is irrelevant to the matters complained of. It is a "fishing" expedition which the Court will discourage. See Hennessey v. Wright (No. 2) (1890) 24 Q.B.D. 445 per Lord Esher at page 448:

12th July 1974

".... the plaintiff wishes to maintain his questions, and to insist upon answers to them, in order that he may find out something of which he knows nothing now, which might enable him to make a case of which he has no knowledge at present .....

20

The moment it appears that questions are asked and answers insisted upon in order to enable the party to see if he can find a case, either of complaint or defence, of which at present he knows nothing, and which will be a different case from that which he now makes, the rule against 'fishing' interrogatories applies."

(3) The relief sought in paragraph 7 to 60 (inclusive) of the Originating Motion are not to the benefit of the applicant in his capacity as a member and do not constitute a form of from:

30

(a) a present state of oppression as against past acts.

See Lundie Brothers Ltd. (1965) 1 W.L.R. 1051 at page 1057:

"But that does not mean that he is entitled to succeed in so far as his claim rests on section 210 of the Companies Act, 1948. He has to go further and satisfy me that at the date of the presentation of this petition the affairs of the company were being conducted in a manner oppressive to him as a member of the company."

40

and Re Five Minute Car Wash Service Ltd. (1966) 1 All E.R. 242 at 243:

"The petition alleges that, before Dec. 16, 1964, Mr. Evison, who then controlled the company, conducted its business in a manner oppressive of the minority, in that it is said that he conducted its affairs with complete disregard of the interests of any shareholders other than his wife and himself. A number of alleged instances of such conduct are particularised in

In the High  
Court in  
Borneo

\_\_\_\_\_  
No. 15

Judgment

\_\_\_\_\_  
12th July 1974

para 9 of the petition, but I do not pause to consider these because they are now past history. Since Dec. 16, 1964, Mr. Evison has not controlled the company and has not been in a position alone to act in a manner oppressive to any other member of the company. These allegations accordingly are irrelevant to the relief sought by the petitioner, which must be justified by conditions existing in November, 1964, when this petition was presented."

(b) an infringement of the applicant's personal rights as a shareholder.

10

It seems to be settled law that in England and Australia relief will be denied if the complaint of conduct has ceased by the time the petition is taken out.

See In re Hannetta, Limited (unreported, 2nd November, 1953) Roxborough J. held:

"That the language of the section pointed to a continuing state of affairs as at the date of the petition."

20

The Law Times, December, 18, 1953  
Volume 216 - 639

This construction is no doubt based on the use of the present tense of the section:

".....the affairs of the company are being conducted in a manner oppressive ...."

It is to be observed that Section 181 of the Malaysian Act to which reference has been made is wider in this respect in that some trust actions may give rise to a petition under the section.

30

Section 1(b) provides that relief will be granted if ".... some act of the company has been done ....." (Counsel for applicant not having relied on this paragraph).

But in view of the provisions of Section 181 sub-section (2) which in terms empowers the court to act ".... with the view to bring to an end or remedying the matters complained of ....." it seems clear that the same principles ought to apply, i.e. where the act complained of has already been remedied in which event Section 181(2) is not applicable and it follows that such an act will as hitherto elsewhere not give jurisdiction for an order.

40

Even assuming for a moment that oppression is made out the relief, according to the authority of Scottish Co-operative Wholesale Society Ltd. v. Meyer & Anor (1959) A.C. 342 at page 343 is by way of an order that the majority, or controlling shareholder or shareholders buy the shares of the complainant.

In the High Court in Borneo

—  
No. 15

Oppression as a ground for winding-up requires considerably more than failure to observe the articles or even a minor act of fraud. Menard & Anor v. Horwood and Company Limited (1922) 31 C.L.R. 20, the heading of which reads:

Judgment

—  
12th July 1974

"The governing director of a company, who with his wife held the majority of the shares in the company, had, in respect of a contract by the Company to buy goods on commission for a principal, fraudulently charged, on behalf of the company, a higher price than in fact been paid and commission on that higher price, but in circumstances which did not justify an inference that systematic or recurring dishonesty on his part in the future was to be anticipated.

..... On a petition by shareholders who held a minority of the shares for the winding-up of the company,

Held, that in the circumstances it was not 'just and equitable' that the company should be wound up, within the meaning of sec.84(e) of the Companies Act 1899 (N.S.W.), and therefore that an order should not be made under that section for the winding up of the company by the Court."

The learned author of McPherson's Law of Company Liquidation 1968 at page 113 has this to say:

"But, despite the availability of some alternative remedy, winding up remains the appropriate form of procedure in cases where fraud or breaches of duty have been serious and persistent and appear likely to recur in the future. It is essential, however, that the misconduct complained of should have reached virtually incurable proportions, for an order will not be made on account of a single insignificant breach of duty ....."

That the court is not concerned with obvious omissions which have since been corrected or remedied having belatedly been brought to the notice of the company e.g. the crediting of interest is clear from the case in Re Five Minute Car Wash Service Ltd. (1966) 1 All E.R. 242.

In the High  
Court in  
Borneo

—  
No. 15

Judgment

—  
12th July 1974

The other matters raised by Counsel for the applicant is in my view without any merit or substance.

In the result the applicant in my judgment has failed to make out a case for relief under Section 181 of the Companies Act.

I would only add a brief reference to three matters.

The first, the applicant accused the respondents of misappropriating and converting moneys to his own use without the knowledge or authority of the directors or shareholders.

In cross-examination he stated that the words "converted" and "misappropriated" were advised by his legal counsel. 10

Allegations however strong may be the words in which they are stated are upon the evidence before me insufficient to amount to an averment of "misappropriation or conversion" of which any court ought to take notice.

It is impossible in my opinion to say they have discharged the onus upon them of proving the allegations which they make against the respondents under this head.

It is unfortunate that such serious charges were made and extravagant terms employed because it turned out there was no ground whatever for them. 20

The second is that it is a matter for deep regret that a matter mentioned in Chambers regarding the disposal of some donations should have been brought up in the submission in open Court.

The identities of some of the recipients of the funds were made available to and inspected by Mr. Joseph Tang, Junior Counsel for the applicant.

Finally I desire to place on record one further observation which arises in this case. I refer to certain confidential information which apparently came into the possession of the applicant. 30

I should have thought that a moment's consideration would have shown the course adopted was unjustified in point of law. It shows a lack of proper fairness in the presentation of a case and a conscious attempt to bolster up the applicant's case.

Having considered the matter carefully from every point of view and giving the rival arguments the best consideration I can I have arrived at the conclusion in the light of the authorities that the applicant has not established any grounds which would justify the intervention of the Court under section 181 of the Companies Act, 1965 and accordingly this application is dismissed with costs.

In the High  
Court in  
Borneo

—  
No. 15  
Judgment

Application dismissed.

—  
12th July 1974

Dated this 12th day of July, 1974

10

Mr. Justice B.T.H. Lee

Original signed by Judge

High Court in Borneo

(B. T. H. LEE)  
JUDGE.

FOR APPLICANT: Mr. J.E. Vinelott.  
Mr. C. Dawson.  
Mr. P. Mooney.  
Mr. J. Tang of Messrs. Tang & Co., Sibü.

20

FOR RESPONDENTS: Mr. G. Starforth-Hill  
Mr. C. Darvall.  
Mr. C.T. Wong of Messrs. Yong, Wong & Co.,  
Sibü

Certified true copy:-

Signed

P.A. to the Judge

In the High  
Court in  
Borneo

No. 16

ORDER

No. 16

BEFORE THE HONOURABLE MR. JUSTICE B.T.H. LEE

Order

IN OPEN COURT

O R D E R

12th July 1974

UPON READING the Applicant's Originating Motion herein dated 1st day of September, 1971, AND UPON HEARING Mr. J.E. Vinelott, Q.C., Mr. D. Dawson, Q.C., Mr. Peter Mooney and Mr. Joseph Tang of Counsel for the Applicant, and Mr. G. Starforth Hill, Mr. Cholmondeley Darvall and Mr. C.T. Wong of Counsel for the Respondents AND UPON READING the Affidavits of Andrew Peattie dated 24th day of November, 1971, filed herein on the 12th day of February, 1972; Ling Beng Sung dated 12th day of February, 1972, filed herein on the 12th day of February, 1972; Dato Stephen Kalong Ningkan dated 16th day of April, 1972, filed herein on the 17th day of April, 1972; Ling Beng Siew dated 14th day of March, 1972, and his corrective Affidavit dated 19th day of April, 1972, both filed herein on the 15th day of March, 1972, and 19th day of April, 1972, respectively, Datuk Harun bin Ariffin dated 16th day of November, 1972, and his Supplementary Affidavit dated 20th day of November, 1972, both filed herein on the 20th day of November 1972, Lee Swee Hock dated 16th day of June, 1972, and filed on the 13th day of November, 1972 and Dr. Julius Grant dated 24th day of November 1972, and filed on the 24th day of November, 1972, IT WAS ORDERED that the Application do stand adjourned for judgment and the same coming on for judgment in Open Court on the 12th day of July 1974 in the presence of Mr. Peter Mooney and Mr. Joseph Tang of Counsel for the Applicant and Mr. G. Starforth Hill and Mr. C.T. Wong of Counsel for the Respondents IT IS ADJUDGED that the Application made herein be and it is hereby dismissed AND IT IS FURTHER ORDERED that the costs of and occasioned by this Application be taxed on the higher scale and paid by the Applicant to the Respondents and this Court doth order that costs be allowed for two Counsel.

GIVEN under my hand and the Seal of the Court this 12th day of July, 1974.

(L.S.)

Sgd:  
Assistant Registrar,  
High Court, Sibuan.

10

20

30

40

No. 17

PROCEEDINGS IN CHAMBERS  
ON 23RD JULY, 1974

TUESDAY, 23RD JULY, 1974

FOR APPLICANT: Mr. Alexandra Yu Lung Lee of Messrs.  
Skrine & Co., with Mr. J. Tang

FOR RESPONDENTS: Mr. C.T. Wong

In the High  
Court in  
Borneo

No. 17

Proceedings in  
Chambers

23rd July 1974

Court

10 I have noticed in my judgment that I have ordered  
that the majority buy the interests of the applicant at a  
fair price. As I still retain seisin of this case and  
having arrived at a finding of fact that there is no  
"oppression" made out by applicant, I have no jurisdiction  
to order an enquiry to be made with a view to purchase by  
the Respondents of applicant's shares.

Since the order has not been perfected I have omitted  
that part of it from my judgment.

20 The authority for the course adopted by me is  
Re Harrison's Settlements (1955) 1 All E.R. 185, a Court of  
Appeal decision and Mallal's Supreme Court Practice Vol. I  
page 352, and Halsbury's Laws of England Vol. 22 3rd Edn.  
page 784 para 1664.

Mr. Alexandra Lee

Will wish to record objection that once the judgment  
has been delivered in open Court the Court is functus  
officio. The Court has no jurisdiction to amend or alter  
any part of the judgment. Asks for adjournment to argue  
this in open Court.

Mr. C.T. Wong

30 The Court has absolute jurisdiction to order, vary or  
set aside Court's judgment before it is perfected.

Refers to Millensted v. Governors House Ltd. (1937)  
1 All E.R. 736. Headnote and page 739 on point of functus  
officio. The Court is still seised with the case. The  
order has not been drawn up.



In the High  
Court in  
Borneo

Mr. Alexandra Lee

Judgment has been delivered. Even if there is an irregularity this is a matter for appeal.

No. 17

My learned friend seems to have come prepared with his arguments.

Proceedings in  
Chambers

Mr. C.T. Wong

23rd July, 1974

My learned friend Mr. Joseph Tang told me over the telephone a few days ago that Court may alter the judgment.

Mr. Joseph Tang

I was merely speculating.

10

Court

In view of the authorities I do not consider further arguments on this point is necessary.

Sgd: B.T.H. Lee, J.  
23.7.74

Certified true copy  
Sgd: illegible  
P.A. to the Judge  
25/7/1974

No. 18

NOTICE OF APPEAL

IN THE FEDERAL COURT OF MALAYSIA  
(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 101 OF 1974

In the matter of Kong Thai Sawmill  
(Miri) Sdn. Bhd.

And

In the matter of the Companies  
Act, 1965

In the Federal  
Court of  
Malaysia

No. 18

Notice of  
Appeal

12th July 1974

10

BETWEEN

Ling Beng Sung

Appellant

And

Kong Thai Sawmill (Miri) Sdn. Bhd.  
Ling Beng Siew  
Ling Beng Siong

1st Respondent  
2nd Respondent  
3rd Respondent

(In the matter of Originating Motion No. 1 of 1971  
in the High Court in Borneo at Sibiu)

Between

20

Ling Beng Sung

Applicant

And

Kong Thai Sawmill (Miri) Sdn. Bhd.  
Ling Beng Siew  
Ling Beng Siong

1st Respondent  
2nd Respondent  
3rd Respondent)

NOTICE OF APPEAL

TAKE NOTICE that Ling Beng Sung, the Appellant above-named, being dissatisfied with the decision of the Honourable Mr. Justice B.T.H. Lee given at Kuching on the 12th day of July, 1974, appeals to the Federal Court

In the Federal  
Court in  
Malaysia

against the whole of the said decision.

Dated this 12th day of July, 1974.

—  
No. 18

Sgd: Tang & Co.  
Advocates for the Appellant

Notice of  
Appeal

To -

12th July 1974

The Registrar,  
The Federal Court,  
Kuala Lumpur.

and to -

The Registrar,  
High Court,  
Kuching.

10

and to -

The Assistant Registrar,  
High Court,  
Sibu.

and to -

Messrs. Yong & Wong,  
No. 2, Kampong Nyabor Road,  
(First Floor),  
Sibu,

20

Solicitors for the Respondents abovenamed.

The address for service of the Appellant is Messrs.  
Tang & Co., Advocates, No. 5, Wong Nai Siong Road  
(1st Floor), Sibu, Sarawak.

Filed this 12 July 1974

Sgd: illegible  
Assistant Registrar,  
High Court, Sibu, Sarawak.

No. 19

MEMORANDUM OF APPEALIn the Federal  
Court in  
Malaysia

No. 19

Memorandum of  
Appeal

19th October 1974

Ling Beng Sung, the Appellant abovenamed appeals to the Federal Court against the whole of the decision of the Honourable Mr. Justice B.T.H. Lee given at Kuching on the 12th and 23rd days of July, 1974, on the following grounds:-

1. The learned Judge erred in law in holding that to bring a case with Section 181 of the Companies Act 1965 the act of which complaint is made must be one "which singles out some part of the shareholders including the Applicant for discriminatory or prejudicial treatment" (p. 6 D-F) and in holding that a distinction must be drawn between "conduct whose effects are the same on all the members of the Company, and conduct whose effects are not the same on all members of the Company" (p. 6 H). The Court has jurisdiction to make an Order under Section 181 if it is satisfied that objectively considered (amongst other things) the affairs of the Company or the powers of the directors are being exercised in a manner "oppressive to one or more of the members... in disregard of his or their interests as members" and these words are capable of applying even if the conduct complained of affects the interests of all the members as members.
2. The learned Judge similarly erred in law in holding that the Court has no jurisdiction to make an Order under Section 181 if the acts complained of would, if substantiated, found a claim by the Company against a member or director being a claim which by reason of the rule in Foss v. Harbottle (1843) 2 Hare 461) the applicant could not himself make direct against that member or director. There is jurisdiction under Section 181 to make an Order if the affairs of a Company are being conducted in such a way as to secure the personal advantage of a member or members who alone or with his associates controls the Company and is able to use his control to stifle opposition by members adversely affected, and it is no answer to an application under Section 181 that the acts complained of might also found a claim by the Company for misfeasance or breach of trust.
3. In so holding the learned Judge attached undue weight to decisions of the English Courts concerning Section 210 of the U.K. Companies Act 1948 and failed to take account of the substantial difference between Section 210 and

In the Federal  
Court in  
Malaysia

—  
No. 19

Memorandum of  
Appeal

—  
19th October 1974

Section 181, of which the more important are (a) that Section 181 confers jurisdiction if the affairs of the Company are being conducted or the powers of the Directors are being exercised in disregard of the interests of one or more of the members (and not, as under Section 210, only if the affairs of the Company are being conducted "in a manner oppressive to some part of the members") and (b) that Section 181 expressly authorises the making of an Order for the winding-up of the Company (whereas Section 210 provides remedies which are strictly alternative to a winding-up).

10

4. As a result of the misapprehension by the learned Judge of the true scope of the jurisdiction conferred by Section 181 he failed to consider whether the Respondent had met the main complaints made by the Applicant which are first that the de facto control of the Respondent Company (hereinafter referred to as "K.T.S.") which has at all material times been vested in the Second and Third Respondents (hereinafter referred to as "Beng Siew" and "Beng Siong" respectively) has been exercised to secure their personal advantage at the expense of the other shareholders, secondly that the resources and facilities of K.T.S. have been used by Beng Siew and Beng Siong as if they had responsibility to no-one but themselves, and thirdly that they have acted in their own interests rather than in the interests of the members of K.T.S. as a whole. The learned Judge therefore failed properly to consider and evaluate the evidence directed to establishing these complaints and if he had properly considered the evidence would have been bound to find that these complaints had been fully substantiated.

20

5. The learned Judge dismissed the decision of Datuk Abdul Hamid J. in Re Coliseum Stand Car Service Ltd. [1972] 1 M.L.J. 109) upon the ground that this case "is not very helpful as an authority because in that case the Court delivered no reasoned judgment and in my opinion throws no light upon the questions which arise in the present case". The decision in Re Coliseum Stand Car Service Ltd. is the only reported authority in Malaysia upon the true construction of Section 181 and the judgment of Datuk Abdul Hamid J. strongly supports the construction contended for by the Applicant. Further, the decision of Datuk Abdul Hamid J. in that case is direct authority for the proposition relied on by the Applicant that a majority shareholder and director who uses the funds of the Company to make loans to himself and his family for his own benefit and not for the benefit of the Company is guilty of acts upon which an application under Section 181 may be founded.

30

40

6. The learned Judge erred in law in refusing to allow a

Supplementary Affidavit sworn by the Applicant on 9th March 1972 to be read on the ground that the matters contained therein were irrelevant or hearsay. The newspaper cuttings exhibited to paragraphs 2 and 3 of the said Supplementary Affidavit were relevant and admissible as showing that donations made at the expense of K.T.S. were allowed to be reported without contradiction by Beng Siew as made by him personally and the documents exhibited to paragraph 5 thereof were relevant and admissible as showing the contents of the accounts of Sarawak Chinese Association filed with the Registrar of Societies.

In the Federal  
Court of  
Malaysia

—  
No. 19

Memorandum of  
Appeal

—  
19th October 1974

7. The learned Judge attached undue importance to the fact that the Affidavit of Applicant's expert witness Peattie having been affirmed on 10th August 1971 before these proceedings were commenced (and which could not therefore be used in evidence in these proceedings without being re-affirmed) was re-affirmed on 24th November 1971 without alteration notwithstanding that certain information which on 10th August 1971 was correctly stated not to have been available to him had before 24th November 1971 become available. He wrongly rejected Peattie's evidence as unreliable and lacking in fairness and candour upon this ground although the evidence of Peattie was substantially uncontradicted and was in fact independently established by the documentary evidence.

8. The learned Judge wrongly refused to treat as part of the documentary evidence a Report by one Henderson which was exhibited to an Affidavit sworn by him and which was also exhibited to the Affidavit of Beng Siew sworn on the 14th March, 1972. Henderson was not called as a witness to be cross-examined on behalf of the Applicant and his Affidavit could not, therefore, be relied on as evidence by the Respondents. But the Affidavit having been sworn by Henderson and filed on behalf of the Respondents and the Report having been exhibited to the said Affidavit of Beng Siew the Affidavit and the Report constituted part of the documentary evidence upon which the Applicant is entitled to rely so far as containing admissions by the Respondent. Further the Report was referred to in the evidence given by Beng Siew on several occasions and Beng Siew stated in evidence that he agreed generally with it.

9. The learned Judge failed to appreciate or give due weight to the evidence relating to a loan made by K.T.S. to Datuk Harun Ariffin (hereinafter referred to as "Datuk Harun"). The books of the Company purported to show that two loans, one of \$10,000 and one of \$3,000, had been made to Datuk Harun and that both had been repaid. Datuk Harun admitted the loan of \$10,000 but denied that he had received

In the Federal  
Court in  
Malaysia

—  
No. 19

Memorandum of  
Appeal

—  
19th October 1974

the loan of \$3,000. No evidence supporting the claim that this second loan had been made was produced by the Respondents except a purported receipt which Datuk Harun stated he did not sign. No motive was suggested why Datuk Harun should have given false evidence on this point or why he should falsely have denied that he made repayment of this loan, which also appeared in the books of the Company as having been made by him. Further, the records of the Company showed that the sum of \$3,000 was paid to Beng Siong and no evidence was called to show that the money was paid by Beng Siong to Datuk Harun. The learned Judge's finding that Datuk Harun was paid this sum of \$3,000 and had repaid it was, therefore, against the weight of the evidence and if the evidence had been properly appreciated by the learned Judge he would have been bound to hold that the facts showed a serious mis-application of the Company's moneys by Beng Siong and that the documents produced in evidence by the Respondents on the issue of the second loan were false and were produced for the purpose of deceiving the Court.

10

10. The learned Judge failed to appreciate or give due weight to the evidence concerning donations by K.T.S. to political parties. The evidence showed that very large sums (amounting to over \$1.3 million) shown in the books of K.T.S. as made to the S.C.A. were in large measure paid to Beng Siew and Beng Siong allegedly in repayment of political donations made by them. No adequate evidence was produced to show that all the payments charged in the books of K.T.S. as donations to S.C.A. were actually made to and used for the purposes of S.C.A., that such payments were properly authorised on behalf of K.T.S., or that they were made bona fide for the benefit of K.T.S. The finding of the learned Judge that all the donations were made by K.T.S. and not by Beng Siew, that they were all reported at board meetings and approved by the directors (if it is to be inferred from this finding that these donations were so reported and approved when they were respectively made) was unsupported by the evidence. Further, the learned Judge failed to appreciate that the burden was on Beng Siew and Beng Siong to show that payments made to them allegedly for the purposes of S.C.A. or in reimbursement of moneys used for those purposes were used for those purposes and that the payments made were bona fide for the benefit of K.T.S. The true and only conclusion from the evidence was that Beng Siew and Beng Siong had not discharged this onus.

20

30

40

11. The learned Judge was wrong in his appreciation of the law relating to the position of directors in relation to the company which they direct and on a correct appreciation of the law and the evidence was bound to hold that it had been established that the conduct of Beng Siew and Beng Siong fell

far short of the standard required by law.

In the Federal  
Court in  
Malaysia

12. The learned Judge failed to appreciate or give due weight to the evidence of the large and repeated private drawings on K.T.S. funds by Beng Siew and Beng Siong which were never disclosed in the Annual Reports or Accounts and which were not authorised by the Board. The learned Judge ought to have held that these large and undisclosed private "borrowings" and the other extravagant personal benefits taken by Beng Siew and Beng Siong from K.T.S. in themselves demonstrated their unfitness to be directors and constituted ground for the application.

—  
No. 19

Memorandum of  
Appeal

—  
19th October 1974

13. The learned Judge failed to appreciate or give proper weight to the evidence of the alleged donations to Sarawak National Party and ought to have held that the evidence showed that the payments were not in fact made to that party and were improper.

14. The learned Judge failed to appreciate and give proper weight to the evidence regarding P.T. Kalimantan Sari and its relationship with U.S. Lumber and on the evidence ought to have held that the arrangements regarding these two companies were intended to confer personal advantages to Beng Siew at the expense of K.T.S. and that the "trust" documents produced by Beng Siew in the middle of the trial were part of a belated attempt to cover up or rectify a wholly improper situation.

15. There was no evidence to support the finding by the learned Judge that "following a consistent practice" a proportion of the shares of U.S. Lumber was held by Beng Siew on behalf of senior members of the staff of K.T.S. No evidence of any such practice was given and it was not until after the commencement of the hearing that Beng Siew executed declaration of trust of shares of U.S. Lumber in favour of members of the staff of K.T.S., the true and only conclusion from the facts is that these steps were taken because Beng Siew realised at a late stage that his previous conduct was indefensible.

16. The learned Judge failed to appreciate or attach due weight to the evidence relating to two groups of companies Glendale/Sabah and Chalfont/Kong Thai Lumber. In both cases timber concessions or subconcessions which ought to have been offered to K.T.S. (alone or jointly with the Borneo Company) were taken up by Glendale and Chalfont (being companies in which Beng Siew, Beng Siong and their respective families were shareholders) and contracts unfavourable to Sabah and Kong Thai Lumber were entered into between these companies and Glendale and Chalfont



In the Federal  
Court in  
Malaysia

—  
No. 19

Memorandum of  
Appeal

—  
19th October 1974

respectively. The cost of financing the operations of Sabah and Kong Thai Lumber was borne by K.T.S. The true and only conclusion from the evidence was that Beng Siew and Beng Siong designed and intended by the use of assets and moneys of K.T.S. to make profits for Chalfont and Glendale being companies in which they and their families (but not K.T.S.) were interested.

17. In the cross-examination of Beng Siew the learned Judge wrongly refused to allow a question as to the price received by him and Beng Siong for the sale of their shares in Chalfont and Glendale although that question was clearly relevant as showing the extent of the profits made by them at the expense of K.T.S. 10

18. The learned Judge ought to have held that the evidence regarding Kong Thai Plywood Pte Ltd., Singapore Mouldings Pte Ltd., Malaysia Daily News Sdn. Bhd. and Aurora Hotel was evidence which in the context of the case showed oppression and improper conduct on the part of Beng Siew and Beng Siong and that the "investments" in the last two, in particular, were made for their private purposes. 20

19. Similarly the learned Judge ought to have held that the purchase and reconstruction of the yacht Berjaya Malaysia, which was used only by Beng Siew and Beng Siong, at a cost of over half a million dollars, was an extravagant and unauthorised use of K.T.S. funds for their personal benefit.

20. The learned Judge erred in law in refusing to give the Applicant leave to read the affidavit of the Section Forestry Officer, Lau Buong Tung, concerning the amount of timber in the concession owned by K.T.S. What remained to be exploited and the period required for the proper exploitation of the timber. In cross-examination Beng Siew refused to produce the control map and other data in the possession of K.T.S. (from which the information could have been obtained) upon the ground that the Applicant could obtain this information from the Forest Department. The Applicant obtained the information in the form of an Affidavit by Lau Buong Tung the Section Forestry Officer having control of the area covered by K.T.S. concession and in the circumstances the evidence ought to have been allowed. 30

21. The learned Judge was wrong in issuing a written judgment on 23rd July 1974 (which was not read out) in terms which differed from the written judgment orally read out by him in Open Court on 12th July 1974. 40

22. The learned Judge erred in holding that the prayers

did not show an honest belief that the affairs of K.T.S. were being conducted in an oppressive manner and that the allegations were actuated by malice. If the evidence showed that the conduct of Beng Siew and Beng Siong in their management of K.T.S.'s affairs was such as to justify the application, the fact that there was ill-will between the Applicant and Beng Siew was irrelevant.

In the Federal  
Court in  
Malaysia

—  
No. 19

10 23. The learned Judge ought to have held that Beng Siew and Beng Siong had in numerous respects acted in substantial breach of their duty to the company and the interests of its members and had used its funds and facilities for their own private purposes without proper or adequate disclosure or authority and that the circumstances proved amply justified the application and made a winding-up order the appropriate remedy.

Memorandum of  
Appeal

—  
19th October 1974

Dated this 19th day of October, 1974.

(Sgd) Tang & Co.  
Advocates for the Appellant

20 To The Registrar,  
Federal Court,  
Kuala Lumpur.

and to

Messrs Yong & Wong,  
No. 2 Kampong Nyabor Road,  
(First Floor)  
Sibu.  
Advocates for the Respondents  
abovenamed

30 The address for service for the Appellant is  
Messrs. Tang & Co., Advocates, No. 5, Wong Nai Siong Road  
(1st Floor), Sibu, Sarawak.

In the Federal  
Court in  
Malaysia

No. 20

Supplementary Affidavit of Dato Ling Beng Sung  
filed 14th February 1975

No. 20

Supplementary  
Affidavit of  
Dato Ling  
Beng Sung  
filed 14th  
February 1975

M A L A Y S I A

IN THE HIGH COURT IN BORNEO

(SIBU REGISTRY)

ORIGINATING MOTION NO. 1 OF 1971

In the matter of Kong Thai Sawmill (Miri) Sdn. Bhd.

And

10

In the matter of the Companies Act, 1965

BETWEEN

LJNG BENG SUNG ... APPLICANT

AND

KONG THAI SAWMILL (MIRI)SDN. BHD. ... 1ST RESPONDENT;  
LING BENG SIEW ... 2ND RESPONDENT;  
LING BENG SIONG ... 3RD RESPONDENT.

SUPPLEMENTARY AFFIDAVIT

I, DATO LING BENG SUNG of Kong Ming Bank, Sibn solemnly  
and sincerely affirm as follows:-

20

1. I refer to Paragraph 20 of my Affidavit of 12th February, 1972 in which I said that the purchase of the hovercraft was publicised by the Second Respondent as his own private investment. There is now produced and shown to me and exhibited hereto as "LBS1", a cutting from the Sarawak Tribune Newspaper dated 5th March 1968. Kong Thai Sawmill (Miri) Sendirian Berhad has no sawmill or logging areas on the Rejang River. The attention of this Honourable Court is also invited to the last three paragraphs of the article in which the Second Respondent is represented to have given details of the purchase of a "luxurious yacht" with seven air-conditioned cabins, long baths, a bar and a dining room with a table seating eighteen. I refer to Paragraph 21 of my said Affidavit.

30

In the Federal  
Court in  
Malaysia

—  
No. 20

Supplementary  
Affidavit of  
Dato Ling  
Beng Sung  
filed 14th  
February 1975

2. I refer to Paragraph 74 of the Affidavit of Mr. Andrew Peattie dated 24th November, 1971. Amongst the donation shown in the accounts of Kong Thai Sawmill (Miri) Sendirian Berhad for the year 1968/69 is \$4,000/- for Kiong Hin School. There is now produced and shown to me and exhibited hereto as "LBS2", a cutting from the Sarawak Tribune Newspaper of 21st February 1969 which states that the Second Respondent "personally donated \$4,000/-" for the construction of this school.

10 3. I refer to Paragraph 26 of my said Affidavit. There is now produced and shown to me and exhibited hereto marked "LBS3" and "LBS4", a cutting from See Hua Daily News together with an English translation thereof in which it is stated that the Second Respondent donated \$5,000/- to Teku Road Committee.

4. To the best of my knowledge and belief, none of the matters reported in the said cuttings were ever contradicted by the Second Respondent.

20 5. I refer to Paragraph 39 of my said Affidavit relating to the donation of \$1,009,800.69 paid to Sarawak Chinese Association in the year ending 30th September, 1969. There is now produced and shown to me and exhibited hereto marked "LBS5A", "LBS5B", "BLBS6A" and "LBS6B" copies certified as true by the Registrar of Societies of the Statement of Receipts and payments of Sarawak Chinese Association for the year 1968 and 1969 and their balance sheets as at 31st December 1968 and as at 31st December 1969. It will be seen that in 1968 total donation were \$1,600/- and in 1969 \$1,736/-. Total donation to the  
30 Association in this two years were \$3,336/- according to the Association's accounts.

AFFIRMED by the said DATO LING )  
BENG SUNG this 9th day of )  
March, 1972, )  
Before me, ) (Sgd) LING BENG SUNG

(Sgd) SIA MEE TIONG,  
Commissioner for Oaths,  
High Court in Borneo,  
at Sibü.

40 This Supplementary Affidavit is filed by Messrs. Tang and Company, 5 Wong Nai Siong Road, (1st Floor), Sibü, advocates for the abovenamed Applicant.

Filed 15th March 1972.

In the Federal  
Court in  
Malaysia

No. 21

Affidavit of Charles Henderson  
filed 14th February 1975

No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

M A L A Y S I A

IN THE HIGH COURT IN BORNEO

(SIBU REGISTRY)

ORIGINATING MOTION No. 1 OF 1971

In the matter of Kong Thai Sawmill  
(Miri) Sdn. Bhd.

AND

10

In the matter of the Companies Act, 1965.

Between

Ling Beng Sung ... Applicant

And

Kong Thai Sawmill (Miri) Sdn. Bhd. ... 1st Respondent  
Ling Beng Siew ... 2nd Respondent  
Ling Beng Siong ... 3rd Respondent

A F F I D A V I T

I, Charles Henderson, of full age of 296 Dikas Bay  
Road, Kota Kinabalu, Sabah, Malaysia, make oath and say  
as follows :-

20

1. I am a chartered accountant, an approved company  
auditor under the Companies Act 1965 and a partner in the  
firm of Turquand, Youngs & Company practising as certified  
public accountants in Kota Kinabalu, Sabah and elsewhere in  
Malaysia.

2. I have been furnished with copies of the Originating  
Motion filed herein dated the 1st September, 1971 of the  
affidavit of Andrew Peattie affirmed on the 10th August, 1971  
and filed herein and the exhibits thereto and of the  
affidavit of Dato Ling Beng Sung affirmed on the 16th August,  
1971 and filed herein and the exhibits thereto.

30

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

3. In September 1971 I was instructed by the solicitors for the Respondents to examine the books and records of Kong Thai Sawmill (Miri) Sendirian Berhad, the abovenamed first Respondent (in this affidavit referred to as "Kong Thai", and of any other companies or firms mentioned in the said affidavits which I might think it necessary to examine to the extent that those companies and firms might be under the control of one or other of the Respondents and to report upon the allegations made in the said affidavits. In particular insofar as those  
10 allegations consist of statements of fact I was asked to report whether in my opinion the facts alleged are correct and, where the said allegations in the said affidavits consist of speculation or conclusions drawn by the deponent, to examine any further evidence that might be available and to report whether in my opinion the conclusions or speculation were justified.

4. For the purposes of making the required investigations I visited Kong Thai's Sibü and Kuching offices between the 14th and the 24th September, 1971, and I have had searches  
20 made at the offices of the Registrars of Companies situated in Kuching, Kota Kinabalu, Kuala Lumpur, Hong Kong and Singapore. I have been given access to and have examined all the books and records of Kong Thai and the accounts of a number of companies in which Kong Thai has an interest for which I have asked and on matters where the records required clarification I have sought such clarification by direct inquiries from officers or employees of Kong Thai.

5. My conclusions are embodied in a written report, a copy of which is now produced and shown to me marked  
30 "C.H.-1". I confirm that this report to the best of my ability accurately sets out the results of my investigations into the affairs of Kong Thai and the other companies and firms which I have investigated.

SWORN TO at Singapore )  
this 8th day of March } (Sgd) C. HENDERSON  
1972

Before me,  
(Sgd)  
40 H.F. SHEPPARD,  
Notary Public,  
Singapore.

This affidavit is filed by Messrs. Yong & Wong, Advocates for the Respondents whose address for service is No. 2 Kampong Nyabor Road, (First Floor), Sibü, Sarawak.

In the Federal  
Court in  
Malaysia

M A L A Y S I A

IN THE HIGH COURT IN BORNEO

(SIBU REGISTRY)

No. 21

ORIGINATING MOTION NO. 1 OF 1971

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

In the matter of Kong Thai Sawmill  
(Miri) Sdn. Bhd.

AND

In the matter of the Companies Act, 1965.

Between

Ling Beng Sung ... Appellant

10

And

Kong Thai Sawmill (Miri) Sdn. Bhd. ... 1st Respondent  
Ling Beng Siew ... 2nd Respondent  
Ling Beng Siong ... 3rd Respondent

Report of an examination of the records of Kong Thai  
Sawmill (Miri) Sendirian Berhad and other investigations  
carried out for the purposes of the application made  
herein under section 181 of the Companies Act.

IN THE HIGH COURT IN BORNEO (Sibu Registry)  
O.M. No. 1 of 1971

20

This is the exhibit marked "C.H.-1"  
referred to in the affidavit of  
Charles Henderson sworn on the 8th day  
of March 1972.

Before me,

(Sgd) H.F. SHEPPARD  
Notary Public, Singapore.

<u>Page</u>	<u>INDEX</u>	In the Federal Court in Malaysia
2	General Observations: Introductory	<u>1</u>
7	Dato Ling Beng Siew and Ling Beng Siew & Co.: allegations of advances made to Dato Ling in contravention of The Companies Act and the Articles of Association.	No. 21  Affidavit of Charles Henderson filed 14th February 1975
10	16 Ling Beng Siew Sdn. Berhad: allegations of non- disclosure of interest.	
	18 Investments & Property: allegations of non- disclosure of interest.	
	38A Aurora Hotel	
	44 Malaysia Daily News Sdn. Berhad	
	46 Donations	
	49 Advances to Shareholders and Advances and Payments to Other Individuals	
	54 Vehicles & Motor Yacht	
20	58 Entertainment	
	60 Staff Travel & Transport	
	62 Miscellaneous	
	<u>Note</u> (a) under each heading are listed code references to the originating motion and the affidavit of Mr. Peattie filed in support thereof	
	(b) in this report the first respondent is referred to as "Kong Thai Sawmill (Miri) Sdn. Bhd" or as "Kong Thai" or as "KTS"	
30	<u>INTRODUCTORY</u>  <u>KONG THAI SAWMILL (MIRI) SENDIRIAN BERHAD</u>  <u>General Observations Re-Conduct of Affairs</u>	
	1. Kong Thai Sawmill (Miri) Sdn. Berhad was incorporated in Sarawak on 29th October, 1964 with an authorised capital of \$3,000,000, divided into 30,000 shares of \$100 each.	



In the Federal  
Court in  
Malaysia

No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

2. A license was issued to the Company on 1st April 1965, to extract timber from a forest area in the Miri district for a period of 10 years.
3. The first formal meeting of the Company was held on 16th January, 1965 at which the first 10,000 shares, representing a capital of \$1,000,000 were issued. On 4th April, 1966, a further 2,400 shares were issued and on 16th July, 1966, a further 1,200 shares were issued, making the total of 13,600 shares that is maintained today.

10

4(i) Particulars of the Directors are -

Ling Beng Siew	: Named in Articles and has continued to act.	
Ling Beng Tuang	: Named in Articles and has continued to act.	
Hii Yu Chong	: Appointed 20.1.65 and has continued to act.	
Ling Beng Siong	: Named in Articles and has continued to act.	
Lau Hui Kang	: Appointed 20.1.65 and has continued to act.	
Datu Tuanku Bujang	: Appointed 20.1.65 Retired 9.3.70	
Ting Ing Yee	: Appointed 15.4.66 and has continued to act.	
Ting Sik Toh	: Appointed 15.4.66 Retired 2.2.67	
Jonathan Bangau	: Appointed 2.2.67 and has continued to act.	20
Ting Lik Hung	: Appointed 2.2.67 and has continued to act.	
Ling Beng Sung	: Appointed 2.2.67 Retired 16.2.71	
Cheng Yew Kiew	: Appointed 14.2.69 and has continued to act.	
Wan Abdul Rahman	: Appointed 9.3.70 and has continued to act.	
Mukah Sawmill (1962) Ltd.	: Appointed 15.4.66 Retired 2.2.67.	

(ii) Particulars of the principal shareholders are -

	Allotment 16.1.65	Allotment 4.4.66	Allotment 16.7.66	Transfers	Balance	
Dato Ling Beng Siew	7,150		432		7,582	30
Dato Ling Beng Siong	500	500	60		1,060	
Ling Beng Tuang	1,000		60		1,060	
Hii Yu Chiong	1,000		60	(1,000)	60	
Lau Hui Kang	300		18		318	
Datu Tuanku Bujang	50		153		203	
Ling Sik Toh		800		(600)	200	
Ling Ing Yoo		100	6		106	
Ling Lik Hung			48		48	
Sakah Sawmill (1962) Ltd.		1,000	63	(1,000)	63	
Natives of Sarawak (4)			300		300	40
Ling Beng Sung				(1) 330	330	
Ling Beng Hui				(1) 330	330	
Ling Beng King				(1) 340	340	
Hii Kah Tung & Sons Sdn.Bhd.				(3) 1,000	1,000	
Ling Children (3)				(2) 600	600	
					<u>13,600</u>	

(1) At 31.1.67 (2) At 30.7.68 (3) At 5.10.68

5(a) General Meetings of shareholders have been held regularly and each year there has been an Annual General Meeting. The Articles of Association provide:-

"52. One half of the shareholders present in person or by proxy share (sic) form a quorum. No business shall be transacted at General Meeting unless a quorum is present when the meeting proceeds to business."

10 I would take it that the word "share" in the second line above should read "shall" and that what is intended is that a quorum shall be one half of the persons named in the register as shareholders, present in person or by proxy. If this interpretation is correct, a further question arises as to how the Article is affected by shareholders who had not paid for their shares and were thus, under Article 62, unable to attend or vote at a General Meeting.

20 3rd A.G.M. (2.2.67): There were 17 shareholders on the register of whom 4 had not paid for their shares in full. Seven persons attended, all of whom were entitled to vote.

4th A.G.M. (5.3.68): Situation as above but with six persons attending.

5th A.G.M. (14.2.69): There were 21 shareholders on the register of whom 4 had not paid for their shares in full. Seven persons attended.

6th A.G.M. (9.9.70): There were 21 shareholders of whom 3 had not paid for their shares in full. Six persons attended.

30 7th A.G.M. (16.2.71): There were 21 shareholders of whom 3 had not paid for their shares in full. Eleven persons attended including three by proxy.

The validity of the proceedings of the 4th, 5th and 6th A.G.Ms. is open to question. If the quorum provisions are interpreted as meaning that a quorum is one half of the persons named on the register and entitled to vote, the proceedings of the 3rd A.G.M. are valid.

40 (b) I have seen nothing to indicate that notices of meetings or agenda or copies of the accounts were sent to shareholders prior to general meetings.

(c) At all of the general meetings referred to above as being possibly invalid, the business conducted was purely

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

formal i.e. adoption of the accounts, approval of final dividend, appointment of Directors and Auditors. There is no specific reference in the Originating Motion or the Affidavits to the irregularities discussed in this paragraph but there are numerous references to acts being done without the knowledge of shareholders. Any such irregularities can be put right by subsequent rectification.

6. The question of remuneration of the Directors is one for shareholders to decide but this is discussed elsewhere in this report.

10

7(a) Directors Meetings were held from time to time but I have seen nothing to indicate that notices of meetings or agenda were distributed. Two Directors form a quorum and there were never less than that number present at any meeting. (The statement in Mr. A.D. Peattie's affidavit, para. 4, that at the first General and Directors Meeting held on 16th January 1965, only Dato Ling Beng Siew was present is not correct).

(b) At a meeting held on 27th December, 1967, the Directors resolved,

20

"to authorise the Managing Director, Dato Ling Beng Siew to purchase tractors, logging trucks, machineries and any other equipment necessary for the operation of the Company. It was also resolved to delegate the power to the Managing Director Dato Ling Beng Siew to make such investments which he thinks fit and proper on behalf of the Board of Directors. By this resolution, the use of the Company's seal is allowed on any investments decided by Managing Director."

By Article 76 of the Articles of Association, the Directors were empowered to make such delegation so that any acquisition of investments or equipment made by Dato Ling was quite within his powers whether or not any such acquisition was subsequently brought before the Board for ratification.

30

(c) I am informed that Ling Beng Sung attended one Annual General Meeting and that he never attended a meeting of the Directors. I have seen no records to indicate that this information is incorrect.

DATO LING BENG SIEW and LING BENG SIEW & COMPANY

(References: Originating Motion. Paras. 11, 12, 29, 30,  
31, 47  
A.D. Peattie's Affidavit, Paras. 4, 5, 6, 7,  
8, 10, 11, 12, 13, 17, 21, 22, 24, 28,  
41, 49, 50, 65, 72, 97, 109, 136 and 139)

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

10 In the main, the applicant asks that Dato Ling Beng Siew pay interest on all sums drawn by him personally and by Ling Beng Siew & Co. during 1966/67 and 1968/69. He also asks that interest he charged to Dato Ling Beng Siew on the sum taken by him in anticipation of the bonus for 1968/69 and on all sums drawn by him or on behalf of Chalfont Investment Limited, Hongkong during 1969/70. Generally, this section of the Originating Motion is answered in principle by the resolution of the Directors on 10th June, 1970 wherein "it was resolved that any Director or Shareholder receiving any advance from the Company should be charged with interest at a rate of seven percent per annum and that this resolution should have retrospective effect to any advances in the  
20 past". I have ascertained that the necessary adjustments to give effect to this resolution were made before closing the Accounts of the year ended 30th September, 1971.

Comments

## 1. Preliminary and Pre-Production Expenses -

Mr. A.D. Peattie Affidavit, Paras. 4 to 7, 10, 12 and 49

30 The first meeting took place on 16th January 1965 with five persons attending, representing all but \$5,000 of the share capital of \$1,000,000 then issued. It is not possible to vouch the details of the expenditure of \$50,000. An amount of \$9,700 was paid to Dato Ling Beng Siew in 1964/65 in reimbursement to him of expenses he had incurred. Details are not available but the expenditure was called Premium to Natives. It was carried forward in the Balance Sheet under the general heading "Advances" at 30th September 1965. In 1965/6, \$4,700 was charged to the Log Working Account and was added back for tax purposes. The remaining \$5,000 was added to Preliminary Expenses which includes all the expenditure other than capital expenditure in the period prior to  
40 incorporation until 30th September 1965. These Preliminary Expenses are being written off over a period of 10 years; none of it is claimed as a deduction for tax purposes. The \$5,000 referred to in Mr. A.D. Peattie's para. 10 is the remaining part of the Premium to Natives referred to above. It is not additional travelling expenses. Full details of the Pre-Production Expenses totalling \$139,943.56 are shown

In the Federal Court in Malaysia

No. 21

Affidavit of Charles Henderson filed 14th February 1975

in the Accounts of the period ending 30th September 1965. The amount of ~~£~~20,500 paid to the Managing Director is fully authorised viz:-

At the meeting described as a General and Directors Meeting held on 20th January 1965 and attended by persons holding ~~£~~995,000 of the issued share capital -

Allowance for services rendered during 1964	<del>£</del> 7,000	10
Salary at the rate of <del>£</del> 1,500 per month for 9 months	<u>13,500</u>	
	<u><del>£</del>20,500</u>	

It is true that Dato Ling Beng Siew was paid an allowance of ~~£~~60 a day travel allowance. I am informed that this was intended to cover the expenses he paid in cash e.g. for car hire and taxis over and above hotel bills etc. Other members of the staff are paid a travel allowance and there is in my opinion nothing extraordinary in this. At para. 49, Mr. A.D. Peattie refers to an amount of ~~£~~5,500 paid to Dato Ling Beng Siew in reimbursement of travel expenses. The payment is supported by bills from hotels which indicate that the expenditure was incurred in the period January to July, 1966. Clearly, the expenses should not have been charged to Preliminary Expenses but, as it was explained to me, the bills were produced for reimbursement in the year 1967/68 whereas the expenditure had been incurred in 1965/66 and it was thought that it would not be appropriate to include the expenditure as belonging to the current year. For want of another place to put it, the expenditure was charged to Preliminary Expenses. 20 30

2. Remuneration of Directors -

Mr. A.D. Peattie's Affidavit, Paras. 8, 13, 17, 24, 41, 50, 65, 72, 109, 136 and 139.

Article 68 of the Articles of Association provide that the remuneration of the Directors other than the Managing Director shall be such sums as may be decided in General Meeting. Article 74 provides that the Directors may appoint the Managing Director upon such terms as they think fit.

At the meeting held on 20th January 1965, it was resolved that the Directors Fee would be ~~£~~500 per person annually. At the Second Annual General Meeting it was 40

resolved pursuant to the earlier resolution to pay  $\text{£}500$  to every Director holding office in 1965 and that the Directors' Fee for 1966 would be  $\text{£}600$  per annum for each Director holding office in 1966. No mention is made of Directors' Fees in the minutes of the subsequent general meetings until the Seventh Annual General Meeting held on 16th February, 1971 when "it was resolved to pay annually Directors' Fees of  $\text{£}600$  per person and Directors' Bonus of 5% of which 4% to the Managing Director and 1% to other Directors".

In the Federal  
Court in  
Malaysia

No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

10

At the meeting held on 20th January, 1965, "it was resolved that the Directors bonus would be 5%-4% for Managing Director 1% for the other Directors'. This is substantially repeated in the resolution passed at the Seventh Annual General Meeting referred to in the last paragraph at the meeting held on 20th January 1965" the Managing Director's salary was set at  $\text{£}1,500$  per month. Dato Ling Beng Siew was appointed Chairman and Managing Director. In Mr. A.D. Peattie's Affidavit, there are regular references to the Directors' Fees of  $\text{£}600$  per annum and to the salary of  $\text{£}1,500$  per month paid to Dato Ling Beng Siew. Mr. Peattie's concern is with the Directors' Bonus and then only in connection with the fact that drawings were made in anticipation of bonus.

20

30

It will be noted that the resolutions regarding bonus to be paid to Directors merely mention 5%. 4% and 1% but do not say of what. One must assume that they refer to a percentage of the profit but profit for this purpose would require definition. In practice, the bonus has been calculated on the profit after deducting the bonus but before taking into account preliminary expenses, taxation, adjustment of depreciation on disposals and profits and losses on disposals of fixed assets. In 1967/68 the loss on Aurora Hotel is not deducted before calculating the bonus. In 1968/69 and 1969/70, the loss on Aurora Hotel is not deducted before calculating the bonus, nor is the loss on the Subsidiary company, Malaysia Daily News Sdn. Berhad. This is the only objection that can be made so far as the total amount of the bonus paid to Directors is concerned.

Up to the year ended 30th September, 1967, it was taken that the simple interpretation of the resolution regarding Directors' Bonuses was the correct one, Dato Ling Beng Siew took  $\frac{4}{5}$  of the bonus pool and the other Directors shared the remaining one fifth. In the year ended 30th September 1968 and in subsequent years Dato Ling Beng Siew successfully claimed a share of the remaining one fifth along with the other Directors. The figures of bonus quoted by Mr. A.D. Peattie in the following paragraph are not correct for this reason -

In the Federal	Para. 50 Bonus figure quoted	<del>₹</del> 368,784	Should be	<del>₹</del> 378,004
Court in	72 - do -	309,832		316,874
Malaysia	109 - do -	151,240		154,677

No. 21  
Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

The later interpretation of the resolution is, in my opinion, clearly wrong but the effect is not a matter that can give cause for complaint to a shareholder. By the time the Accounts were closed in each year, the profit subject to audit was established and an estimate could be made of the bonus that would be payable to the Directors. Dato Ling Beng Siew's account with the Company, kept in the name Ling Beng Siew & Co. was normally in debit and before the books were closed, a sum representing his share of the estimated bonus was credited to the account to help reduce the balance at the year end. The other Directors were generally paid their share of the bonus pool in February or March when the audited figures became available. Where bonuses are computed according to an agreed formula and the liability to pay them is a contractual obligation, it is not unusual to credit the amounts to the accounts of the persons concerned at the date of closing the books of account. It is not unusual for persons to be allowed to draw monies in anticipation of bonus, particularly in a case such as Dato Ling Beng Siew's where the bonus represents the principal part of the remuneration. That he drew monies in anticipation of bonus would not, in my opinion be grounds for complaint of oppression by shareholders. In September, 1968 Dato Ling Beng Siew was credited with ~~₹~~300,000 in anticipation of bonus, in September, 1969, ~~₹~~301,202. 10

### 3. Ling Beng Siew & Co. -

Mr. A.D. Peattie's Affidavit, Paras. 21, 22, 28, 41, 65 & 97. 30

In 1965/66, an account was kept in Dato Ling Beng Siew's own name but in later years, all transactions on his account passed into the account of Ling Beng Siew & Co. The remarks in Mr. A.D. Peattie's para. 21 in connection with the amount of ~~₹~~228,058 actually refer to 1965/66. A summary of the account shows:-

Opening balance 1.10.65		Credit	₹ 99,228.36	
Debits Oct/Feb. 1966	<del>₹</del> 232,805.60			
Credits - do -	<u>121,732.25</u>		<u>111,073.35</u>	
		Debit	₹ 11,844.99	40
Debits April/Aug, 1966	254,165.40			
Credits - do -	<u>37,952.80</u>		<u>216,212.60</u>	
		Debit	<del>₹</del> 228,057.59	
Credits and payments in September, 1966			<u><u>228,057.59</u></u>	

Thus, for almost half of the year, the account was in credit.

For 1966/67, the figures quoted by Mr. A.D. Peattie in his para. 22 are correct. The debits on the account, totalling ~~₹~~351,067.88 represent payments made on behalf of Dato Ling Beng Siew.

In the Federal  
Court in  
Malaysia

—  
No. 21

10 In para. 28 of the his affidavit, Mr. A.D. Peattie makes a remark to the effect that the loans to Ling Beng Siew, Ling Beng Siew Sdn. Bhd. and Ling Beng Siew & Co. are abnormal and must have affected the KTS results because of their size which deprived KTS of capital and also of the fact that no interest was charged. The section of his report containing this remark refers to 1966/67. In this year, there was no account for Ling Beng Siew. All the transactions on his account passed into the account of Ling Beng Siew & Co. which had a balance that accumulated to ~~₹~~351,067.88 by the end of the year. The account with Ling Beng Siew Sdn. Berhad is an ordinary trading account. The only account affecting the results of KTS is that of Ling Beng Siew & Co. and the only manner in which this might have  
20 affected the results is in relation to bank interest. The Company's bank interest charge for the year amounted to ~~₹~~16,590 against a profit before tax of ~~₹~~3,568,866. To have saved the whole of the bank interest would have affected the results of KTS but not materially.

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

30 In para. 41 of his affidavit, Mr. A.D. Peattie has taken the total debits on the account during 1967/68 in quoting the figure ~~₹~~1,262,975.47. At 31st December, 1967, after taking into account the item of ~~₹~~461,500 referred to in para. 40 of the affidavit, the debit balance on the account was ~~₹~~943,552. This was reduced on 5th January 1968 to ~~₹~~482,052. The balance then increased to ~~₹~~686,475 at the end of the financial year until it was cleared as Mr. Peattie reports.

40 Para. 65 of the affidavit relates to the year ended 30th September 1969. Again, the figure of ~~₹~~2,558,066.75 relates to the total debits on the account during the year. Repayment of the debits then accumulated began in March, 1969 with credit of the dividend due to Dato Ling Beng Siew. In September the account was credited with a number of payments made by Dato Ling Beng Siew for KTS account. Relating these back to the dates of payment, the month end balances on the Ling Beng Siew & Co. account are as follows:-



In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

31st October, 1968	₤ Nil
30th November	270,019.15
31st December	662,840.25
January	650,715.50
February	620,848.25
March	182,755.25
April	571,572.25
May	581,629.35
June	501,679.35
July	496,147.45
August	846,973.55
September	496,307.11

10

Para 97 of the affidavit relates to the year 1969/70 and again the figure quoted, ₤1,210,762.93 represents the total debits on the account for the year. The account started off the year in credit which by 31st March 1970 amounted to a figure of ₤729,927 which was then reduced gradually and cleared at 30th September 1970. On 26th October 1969, Dato Ling Beng Siew asked for an amount of ₤150,000 to be credited to his bank account in Sibü. On the Company's internal payments voucher was written "Being amount deposited with Pan Hutan Nusantara for the account of Chalfont Investments Ltd., Hongkong". A receipt for the amount was received from the Borneo Company Limited in Dato Ling's favour. It was subsequently learned that Dato Ling Beng Siew had himself drawn the money from The Borneo Company Ltd. To correct the account, Chalfont Investments Ltd. was credited and Ling Beng Siew & Co. debited with ₤150,000.

20

4. Sundry Matters - Mr. A.D. Peattie's Affidavit Para. 11  
The Personal Accident policy with American International Assurance Co. Ltd. insures Dato Ling Beng Siew against loss of life etc. and medical expenses. The beneficiary is Datin Ling. Although the premium appears to have been charged to the Company on this one occasion only and the fact that it was may be an oversight, the provision of a policy of this nature by a company for its executives or directors is not in my experience either uncommon or improper.

30

LING BENG SIEW SDN. BERHAD

(References: Originating Motion, Paras, 10 and 20  
A.D. Peattie's Affidavit, Paras. 20, 40)

40

The applicant asks that Dato Ling Beng Siew pay interest at the rate of 8% per annum on the amount of ₤16,562 drawn by Ling Beng Siew Sdn. Berhad in the year

1966/67 and interest on all sums drawn by the Company in 1967/1968.

In the Federal  
Court in  
Malaysia

Comments

No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1965

1. I am advised that Ling Beng Siew Sdn. Berhad is owned by Dato Ling Beng Siew and his family. One of its activities is as a timber extraction contractor to the licensee in an area near Miri adjacent to the area worked by Kong Thai Sawmill (Miri) Sdn. Bhd. There exists a working arrangement whereby KTS supplies logging materials such as wire rope and makes small cash advances to certain employees of Ling Beng Siew Sdn, Bhd. Ling Beng Siew Sdn. Bhd. is billed regularly for anything it gets and pays without undue delay.

2. At 30th September, 1967, the balance on the account was \$16,562 made up as follows:-

Advances to workers	\$	900
Supplies - 'S' books and wire rope		6,520
- do -		7,200
Fixed Assets - Johnson Outboard		1,292
- Longboat		<u>650</u>
	\$	<u>16,562</u>

This was settled by payments in October and November 1967.

3. In para. 40 of his affidavit, Mr. A.D. Peattie says that Ling Beng Siew Sdn. Bhd. obtained sums from Kong Thai totalling \$984,627.01 in 1967/68. This figure actually represents the total debits for the year on the account which were settled regularly. Ignoring the item of \$461,500, which is clearly an error, the balance on the account at the end of each month is :-

31st October	\$ 3,138.20	April	\$ 25,900.00
30th November	1,471.75	May	46,646.17
December	11,333.50	June	47,525.01
January	13,516.00	July	27,372.50
February	14,266.00	August	36,330.82
March	13,516.00	September	43,703.80

The greatest amount due at a month end is \$47,500 and the smallest, \$1,400. To say that Ling Beng Siew obtained sums totalling \$984,627.01 is misleading.

4. There is no formal contract between KTS and Ling Beng Siew Sdn. Bhd. and the terms of the arrangement between the two companies have never been raised before the KTS Board of Directors. There has been no formal disclosure to the

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

Board of Dato Ling Beng Siew's interest in Ling Beng Siew Sdn. Bhd. as required under Article 78 of the Articles of Association but in the Company's statutory register of Directors it is shown that he is a Director of Ling Beng Siew Sdn. Berhad.

5. I have ascertained that prior to the closing of the accounts of KTS at 30th September 1971 interest at 7% per annum has been taken up on the monthly balances due from Ling Beng Siew Sdn. Bhd. since the account was opened.

INVESTMENT & PROPERTY

10

(References: Originating Motion. Paras. 5, 40, 42, 47 & 50  
Mr. A.D. Peattie's Affidavit, Paras, 18, 34,  
35, 43, 57, 58, 59, 70, 73, 76, 82,  
84, 86, 88, 89, 94, 98, 103, 104, 113,  
120, 122, 128, 129, 130, 131, 132, 133,  
133A and 142.)

The applicant asks that Dato Ling Beng Siew be required to produce the Accounts of all companies in which Kong Thai Sawmill (Miri) Sdn. Berhad has taken an interest; that he be charged with interest on all sums invested by KTS, or lent by KTS, in respect of other ventures that he be required to sell to KTS, at cost to him any shares held by him personally in any companies with which KTS has contracted and in which he has not disclosed his interest.

20

The simple answer to the question as to why the Company took to investing in other businesses and property is that the opportunities and credit were available and there was a need for the Company to diversify.

Most of the investments in companies were acquired in the same way. During the formation and exploratory period expenses relating to a project were debited to an account with some suitable name and shown as Advances in the Accounts. Later, when it was decided to proceed with the project, shares were issued in consideration for the amounts advanced. Alternatively, if it was decided that the project was not viable, the amounts advanced were written off.

30

General powers to make such investments as he thought fit and proper were given to Dato Ling Beng Siew at a meeting of the Directors held on 27th December 1967. Subsequently, at the meeting of the Directors held on 10th June 1970, the investments which had then been made and the advances outstanding were specifically approved. Thus, it cannot be said that in making advances which were of the nature of

40

investments or in making investments in existing companies, Dato Ling Beng Siew acted beyond his powers.

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

The Companies Act in Section 131 and the Company's Articles of Association in Article 78 set out rules for the declaration of a Director's interest in contracts or arrangements made by the Company and the manner in which such interest is to be disclosed to the Directors. Whether, apart from contracts or arrangements entered into in the pursuit of trade or business, the expressions "contract or arrangement" extend to the formalities attending the taking up of shares of one company by another is a matter for the Court to decide. If they do, but not otherwise, Dato Ling Beng Siew ought to have declared the extent of his interest, (in the manner laid down, to the Directors of KTS) in all other companies in which KTS took up shares and in which he was interested as a shareholder and/or in which he was interested as a salaried Director. He should also have declared his interest in other companies with which KTS had a trade relationship, subject in each case to the exclusion from this requirement of any interest which consisted only of being a shareholder to an extent which may have been regarded as not material.

Certain of the Directors including Dato Ling Beng Siew and Dato Ling Beng Siong have provided to KTS for the purposes of the Register of Directors a list of companies in which they are Directors which I take as an indication that there was no attempt to conceal from KTS the fact that those Directors had such interest in such other companies. The Register does not contain particulars of other directorships held by the applicant. Apart from this there is no indication in the Minutes of meetings of the Directors that any of the Directors declared their interest in any other companies with which KTS entered into contracts or arrangements. Failure to disclose where there is a duty to do so under Section 131 of the Act may involve a liability on the part of the offending director to account to KTS, but not to individual shareholders, for any benefit or profit derived by them from such contracts or arrangements.

Dato Ling Beng Siew has received remuneration from certain of the companies in which both he and KTS are shareholders. It seems to me that such remuneration would have been paid to him in consideration for his personal exertions on behalf of those companies and that such remuneration would not be accountable to KTS as a benefit or profit derived from the fact that KTS had taken up shares in such companies.

In the Federal  
Court in  
Malaysia

No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

Article 78 provides that a Director shall not be liable to account to the Company for any profit made by him provided that his interest is disclosed; he would presumably be held liable to account for any profits arising from a contract wherein his interest is not disclosed.

In paras. 5, 42, 47 and 50 of the Originating Motion, specific mention is made of Chalfont Investments Ltd. and Glendale Investments Ltd. of Hongkong and of Kong Thai Lumber Sdn. Berhad and Sabah Agency Sdn. Berhad which are incorporated in Malaysia. KTS has an interest in the Malaysian companies and this is discussed in detail below. Particulars of the Hongkong companies are as follows:-

10

CHALFONT INVESTMENTS LTD.

Incorporated 5th November 1968 with an authorised share capital of HK\$1,000, increased on 7th March 1969 to HK\$1,500,000 being 150,000 Shares of HK\$10 each.

The Directors at 29th June 1971, were -

K. Gould  
A.I. McCrostie  
Lau Ping  
Dato Ling Beng Siew (appointment assumed to date  
from 31st December 1969)

20

At 14th May 1971, the issued share capital was HK\$1,000,000, which, apart from the two subscribers shares, was allotted on 31st December, 1969 and held as follows:-

Inchcape (Hongkong) Ltd.	37,500 shares
Dato Ling Beng Siew	20,000 shares
Dato Ling Beng Siong	17,500 shares
Horseford Nominees	<u>25,000 shares</u>
	<u>100,000</u>

30

I have been informed that since 14th May 1971, Dato Ling Beng Siew has transferred 3,000 shares to Madam Ngu Choo Sieng who is the wife of Mr. Ling Beng Tuang and that Dato Ling Beng Siong has transferred 3,000 shares to Madam Ngu and the remaining 14,500 shares to Mr. Lau Ping.

GLENDALÉ INVESTMENTS LTD.

Incorporated 15th November 1968 with an authorised

share capital of HK\$1,000, increased on 7th March 1969 to HK\$1,000,000, being 100,000 shares of HK\$10 each. Particulars of Directors are the same as those for Chalfont Investments Ltd.

In the Federal  
Court in  
Malaysia

At 14th May 1971, the issued share capital was HK\$600,000 which, apart from the two subscribers shares, was allotted on 31st December 1969 and held as follows:-

No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

10	Inchcape (Hongkong) Ltd.	22,500 shares
	Dato Ling Beng Siew	13,500 shares
	Dato Ling Beng Siong	9,000 shares
	Horseford Nominees Ltd.	9,000 shares
	Peter Wong Hieng Tock	<u>6,000 shares</u>
		<u>60,000</u>

I have been informed that since 14th May 1971, the following transfers of shares have taken place:-

	From Dato Ling Beng Siew to Mr. Koh Yee	4,500 shares
20	From Dato Ling Beng Siong to Madam Ngu Choo Sieng	3,000 shares
	From Dato Ling Beng Siong to Mr. Lau Ping	6,000 shares
	From Inchcape (Hongkong) Ltd. to Mr. Joseph Wong Hieng Chang	4,500 shares

I have been informed that both Hongkong companies have concessions over forest land in Indonesia, that Sabah Agencies Sdn. Berhad is employed by Glendale as a timber extraction contractor and that Kong Thai Lumber Sdn. Berhad is employed by Chalfont as a timber extraction contractor. Kong Thai Sawmill (Miri) Sdn. Berhad has no interest in either Chalfont or Glendale. KTS has a substantial shareholding in Sabah Agencies and Kong Thai Lumber. In my opinion, there was no need for Dato Ling Beng Siew to disclose his interest in Chalfont and Glendale to the KTS Board as no contract exists between the parties. At the same time, I can see no reason why Dato Ling Beng Siew should produce the Accounts of those Companies. The Accounts of Kong Thai Lumber and Sabah Agency are in the possession of KTS and are on public record at the Registry of Companies.

In the Federal  
Court in  
Malaysia

A. Investments

Sabah Agency Sdn. Berhad

No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

Incorporated in Sabah on 31st December, 1968 with an authorised share capital of \$200,000 divided into shares of \$100 each. On 15th April, 1970, the authorised capital was increased to \$1,000,000. At 31st December 1970, the issued share capital was \$900,000, being 9,000 shares of \$100 each.

The Directors are -

Dato Ling Beng Siew	:	Named in the Articles	10
Koh Kee Kieng	:	- do -	
Peter Wong Hieng Tock	:	- do -	
Dato Ling Beng Siong	:	Appointed 30.1.69	
Ting Ing Yee	:	- do -	
Dato Ting Lik Hung	:	- do -	
Kenneth Gould	:	- do -	
Ling Lee Soon	:	Appointed 23.6.71	

The shareholdings are -

	Subscribers	Allotted	Transfer	Position per	
	Shares	15.4.70	1970	Annual Return	
				23.6.71	
Dato Ling Beng Siew	1	1,349	-345	1,005 (11.2%)	
Koh Yee Kieng	1	674		675 (7.5%)	
Peter Wong Hieng Tock	1	899		900 (10%)	
The Borneo Company (Singapore) Sdn. Bhd.		2,700		2,700 (30%)	
Kong Thai Sawmill (Miri) Sdn. Bhd.		2,700	+345	3,045 (33.8%)	
Joseph Wong Hieng Cheng		675		675 (7.5%)	
	3	8,997	-	9,000 Shares	30

It is true to say as Mr. A.D. Peattie does in para. 142 of his affidavit that large sums of money were paid out by KTS for the account of Sabah Agency Sdn. Berhad. This was necessary because the capital structure of Sabah Agency was not properly established until April 1970, although money was required for preliminary expenses and the purchase of capital equipment in 1967/68 and 1968/69. I have been informed that contributions to this pre-operation financing by other interested persons were made through Chalfont. At the various balance dates, the amounts outstanding on the account of Sabah Agency were -

At 30.9.60	₤ 134,722.75
30.9.69	495,809.84
30.9.70	285,998.66

In the Federal  
Court in  
Malaysia

At 31st March 1970, interest at 8% per annum was taken up on all the advances made to Sabah Agency Sdn. Berhad up to the 31st December 1969 and at 30th September 1971 on balance outstanding up to that date.

No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

10 I am satisfied that during 1969 and part of 1970 Dato Ling Beng Siew was paid a salary of ₤1,800 per month by Sabah Agency. Up to February, 1970, the amount was actually paid to Dato Ling Beng Siew by KTS and debited to Sabah Agency account.

20 Sabah Agency began its contracting work in 1969 and, in the period ended 31st December 1969 it made a loss of ₤252,934. During the year ended 31st December 1970 it made a profit of ₤636,671 before tax. After providing for taxation and writing off pre-production expenses and the loss brought forward, there was a balance of ₤49,299 from which a dividend of 7½% less tax amounting to ₤40,500, was paid leaving ₤8,799 to be carried forward.

Kong Thai Lumber Sdn. Berhad

Incorporated in Sabah on 28th December, 1968 with an authorised share capital of ₤300,000 divided into shares of ₤100 each. On 15th April 1970 the authorised capital was increased to ₤1,000,000. At 31st December 1970, the issued share capital was ₤900,000, being 9,000 shares of ₤100 each.

The Directors are -

30	Dato Ling Beng Siew	-	Named in the Articles
	Dato Ting Lik Hung	-	- do -
	Kenneth Gould	-	Appointed 23.6.71
	John Norman Hacking	-	- do -
	Ling Lee Soon	-	- do -

The shareholdings are -

	Subscribers shares	Allotment 15.6.70	Transfer 1970	Position per Annual Return 23.6.71
Dato Ling Beng Siew	1	2,248	-759	1,490 (16.6%)
Dato Ting Lik Hung	1			1
The Borne Co. (Singapore) Sdn. Bhd.		3,375		3,375 (37.5%)
40 Kong Thai Sawmill (Miri) Sdn. Bhd.		<u>3,375</u>	<u>+759</u>	<u>4,134</u> (45.9%)
	<u>2</u>	<u>8,998</u>	<u>-</u>	<u>9,000</u>



In the Federal  
Court in  
Malaysia

The remarks above regarding advances made to Sabah Agency apply equally well to the advances made for the account of Kong Thai Lumber. At the various balance dates the amounts outstanding were -

No. 21	30.9.69	£344,368.03
	30.9.70	£341,436.91

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

At 31st March 1970, interest at 8% per annum was taken up on all the advances made to Kong Thai Lumber Sdn. Bhd. up to the 31st December 1969 and at 30th September 1971 on balance outstanding up to that date.

10

I am satisfied that during 1969 and part of 1970 Dato Ling Beng Siew was paid a salary of £1,800 per month by Kong Thai Lumber. Only £3,600 is charged as Director's salary in the Accounts for the year ended 31st December 1970 so that the salary must have been paid in respect of January and February only. Up to February 1970, the amount was actually paid by Kong Thai Sawmill (Miri) Sdn. Berhad and debited to Kong Thai Lumber account.

Kong Thai Lumber began its contracting work in 1969 and, in the period ended 31st December 1969 made a loss of £86,666 after writing off preliminary expenses. During the year ended 31st December 1970, it made a profit before tax of £216,796. After providing for taxation and writing off the loss brought forward, there was a balance of £45,130 from which a dividend of 7½% less tax, amounting to £40,500, was paid leaving £4,630 to be carried forward.

20

With reference to Mr. A.D. Peattie's affidavit para.129, the position is that on 15th June 1970, Dato Ling Beng Siew had a credit balance with Kong Thai Lumber of £74,900. He was allotted 2,248 shares of £100 each and the cost was debited to his account leaving a debit balance of £149,900. In December 1970 he transferred 759 shares to KTS and Kong Thai Lumber took this up by debiting KTS and crediting Dato Ling Beng Siew with £75,900. The balance was also cleared by transfer to KTS account. In KTS books, the £75,900 was debited to Investments Account. The balance was debited to the accounts of several members of the staff as, I understand, the shares held by Dato Ling Beng Siew are not held entirely for his own account.

30

P.T. Kalimantanari

40

I have not carried out a search of Registry records concerning this Company. However, I have seen evidence sufficient to satisfy me that it is a company incorporated

in Indonesia having a timber concession in Pontianak under the Indonesian Foreign Investment Scheme. The authorised share capital as at 31st December 1970 according to the Accounts presented to me was 150 "A" Shares of US\$1,000 each and 850 "B" Shares of US\$1,000 each. At that date the issued capital was 105 "A" Shares and 595 "B" Shares, fully paid. I deduce from what I have been told and from other information available to me that these shares are held as follows:-

In the Federal  
Court in  
Malaysia

No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

10	By P.T. Hutansari, representing Indonesian interests, 105 "A" Shares	US \$ 105,000	15%
	Kong Thai Sawmill (Miri) Sdn. Bhd., 336 "B" Shares	336,000	48%
	The Borneo Company (Singapore) Sdn. Bhd. 210 "B" Shares	210,000	30%
	Dato Ling Beng Siew, 49 "B" Shares	<u>49,000</u>	7%
		US \$ <u>700,000</u>	

20 I have been informed that in consideration for entering into an arrangement under the Foreign Investment Scheme, foreigners are required to subscribe for the shares that are taken up by Indonesian interests. Kong Thai Sawmill (Miri) Sdn. Berhad paid \$157,500, which at exchange of US\$1 = M\$3 represents US\$52,500, being half the amount subscribed for the "A" Shares. I was informed that The Borneo Company paid the other half.

30 The first trading account of P.T. Kalimantanansari is for the two months ended 31st December 1968 from which I take it that extraction began in November 1968. At the date of the 1968 Balance Sheet, the cost of fixed assets is shown as Rp. 60 million. By 31st December 1969 and 1970, the cost of fixed assets were Rp. 144 million and Rp. 202 million respectively. It can be seen that this is another instance where, prior to the establishment of the capital to be subscribed, a great amount of money was already invested. This accounts for the advances made by KTS to P.T. Kalimantanansari. At the various balance dates of KTS such amounts outstanding were :-

40	At 30.9.67	\$ 50,000
	30.9.68	207,385
	30.9.69	758,037
	30.9.70	463,724

At 31st March 1970, KTS took up interest at 8% on the

In the Federal  
Court in  
Malaysia

advances that had been made on account of P.T. Kalimantanansari up to the 31st December 1969 and at 30th September 1971 on the balance outstanding up to that date.

No. 21

The results of P.T. Kalimantanansari, according to the Accounts produced to me, are as follows -

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

Two months ended			
31st December 1968	Loss RP.	8,327,948	
Year ended			
31st December 1969	Loss	51,895,557	
Year ended 31st			
December 1970 (Draft			
accounts)	Loss	<u>11,101,233</u>	
Total losses	RP	<u>71,324,738</u>	

10

It is difficult to say exactly what this means in real terms. The original capital of US\$700,000 is converted into rupiahs at a rate of US\$1 = Rp. 326, foreign currency transactions were converted at rates approximating those ruling at the year ends and payments and receipts during the year were converted at the rates prevailing at the date of the transactions. In 1969 and 1970, the Accounts show losses on exchange of Rp. 30,644,232 and Rp. 21,814,678 respectively. During 1970 and 1971 the exchange rate was approximately US\$1 = Rp. 378. In August 1971 the rate became US\$1 = 415 Rp. I have estimated that between 25% and 30% of the subscribed capital has been lost.

20

I have been informed that the bulk of the timber produced is sold to United Singapore Lumber (Pte.) Ltd.

Until February, 1970, Dato Ling Beng Siew was paid a salary of \$1,500 per month by P.T. Kalimantanansari. The amount was actually paid by KTS and debited to the account of P.T. Kalimantanansari.

30

#### United Singapore Lumber (Pte.) Limited

Incorporated in Singapore on 25th March 1969 with an authorised capital of S\$3,000,000 divided into 1,500,000 "A" Ordinary and 1,500,000 "B" Ordinary shares of S\$1 each. At 31st December 1970, the issued share capital was 2 "A" Ordinary shares of \$1 each, fully paid, held one each by Dato Ling Beng Siew and Kenneth Gould. The first Directors were Dato Ling Beng Siew and Kenneth Gould. The latter retired on 5th July 1971 and was replaced by John Norman Hacking. KTS resolved to take up 150,000 shares of the company (said to be a 50% interest) at the meeting of the Directors held on

40

10th June 1970 but, at the date of my inspection at the Singapore Registry of Companies, this has not been given effect to.

In the Federal  
Court in  
Malaysia

The Company buys and sells timber and has been in operation since March 1969. During the period ended 31st December 1969 and the year ended 31st December 1970, it made profits of \$1,675 and \$66,444 respectively after writing off preliminary expenses and making provision for taxation.

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

10 The records of Kong Thai Sawmill (Miri) Sdn. Berhad show the following balances representing advances on account of United Singapore Lumber -

At 30.9.69	\$ 606,000
30.9.70	30,026

20 During the period under review, KTS and The Borneo Company (Inchcape group) were jointly interested in a number of new projects and before those projects developed into properly formed companies with issued share capital, both KTS and The Borneo Company put up the necessary funds. In July 1969 KTS paid \$606,000 in two amounts to United Singapore Lumber (the internal payments voucher for one payment of \$576,000 shows that it is for the account of P.T. Kalimantanansari). I am informed that the payment was made to equalise the KTS contributions to various projects with the contributions made by The Borneo Company. It was subsequently found on reconciling inter-company balances that the credit for \$606,000 in favour of KTS had actually been taken up by P.T. Kalimantanansari and in June 1970, the amount was transferred to that company's account. This is the item referred to in Mr. A.D. Peattie's Affidavit para. 131.

30 I am unable to say whether Dato Ling Beng Siew is holding his one share as trustee of KTS. The Accounts of United Singapore Lumber show Director's Remuneration of \$29,500 in the period ended 31st December 1969 and \$18,000 in the year ended 31st December 1970. I am unable to say whether this was paid to Dato Ling Beng Siew.

Singapore Mouldings Pte. Limited

40 Incorporated in Singapore on 2nd August 1968 with an authorised share capital of \$5,000,000 divided into 2,500,000 "A" Ordinary and 2,500,000 "B" Ordinary shares of \$1 each. At 31st December 1970, the issued share capital was \$1,500,000 representing 750,000 "A" Ordinary and 750,000 "B" Ordinary shares of \$1 each, fully paid.

In the Federal  
Court in  
Malaysia

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

The Directors are -

Dato Ling Beng Siew : Named in the Articles  
Kenneth Gould : - do -  
Ling Tang Sing : Appointed alternate for Dato Ling  
Beng Siew on 2.11.70 and full  
Director 23.7.71  
John N. Hacking : Appointed 2.11.70  
C. Holmes-Smith : Appointed 23.7.71  
Ling Lee Soon : Appointed alternate for Dato Ling  
Beng Siew on 24.7.71  
Alan Smith : Appointed alternate for John N. Hacking  
on 24.7.71

10

The shareholdings are -

	Subscribers	Allotted shares	Allotted 27.8.69	Allotted 30.12.69	Allotted 26.12.70	Position per Annual Return 30.9.71
Kenneth Gould	A	1				1
.E.J.Shelley	A	1				1
The Borneo Co. (Singapore) Sdn. Bhd.	A		249,998	250,000	250,000	749,998 (50%)
Kong Thai Sawmill (Miri) Sdn. Bhd.	B		250,000	250,000		500,000 (33%)
Sarawak United Sawmill Sdn. Bhd.	B				250,000	250,000 (17%)
		2	299,998	500,000	500,000	1,500,000

20

From 1967/68 advances were made by KTS to what was then called Singapore Moulding Factory and then to Singapore Moulding Pte. Ltd. The amounts outstanding at the various balance dates were -

30

At 30th September 1968	₹	4,515
30th September 1969		250,000
30th September 1970		20,686

Approval of the investment of \$500,000 in Singapore Moulding was given at a meeting of the Directors of KTS on 9th March 1970. During 1969 and 1970, a factory for the manufacture of wood mouldings was built in Singapore. Production commenced on 1st November 1970 and the Accounts for the year ended 31st December 1970 show losses incurred of \$171,663. Directors emoluments of \$13,835 are charged in the 1970 Accounts but I am unable to say whether Dato Ling Beng Siew received any of this.

40

Hock Thai Finance Corporation BerhadIn the Federal  
Court in  
Malaysia—  
No. 21Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

This is a public company incorporated in Sarawak. It is a subsidiary of Hock Hua Bank Berhad, also a public company incorporated in Sarawak. KTS acquired at par 791,734 shares of \$1 each, fully paid, of Hock Thai Finance Corporation Bhd. during 1967/68, specifically approved at a meeting of the Directors of KTS on 14th February 1969. In 1968/69, 8,000 shares were sold in parcels of 2,000 each to three of the Directors and one other person and in 1969/70, 20,000 shares were sold to Hock Hua Bank Bhd. The shares were all disposed of at par and with the approval of a meeting of the KTS Directors held on 9th March 1970.

I have not carried out a search at the Registry of Companies. However, from the Accounts of Hock Thai Finance and its parent Company for the year ended 31st December 1970, the position is as follows -

The Finance Company has an authorised share capital of \$5,000,000 divided into Ordinary shares of \$1 each. 2,000,000 shares have been issued and these are held as follows -

Hock Hua Bank Berhad	1,020,000 shares
Kong Thai Sawmill (Miri) Sdn. Berhad	763,734 shares
Directors of Hock Thai Finance and others	216,266 shares
	<u>2,000,000</u>

Dato Ling Beng Siew is Chairman of Hock Thai Finance and holds 2,000 shares. The Company trades at a profit.

The applicant in his affidavit at para. 18 suggests that the purpose of the investment by KTS was to help to provide Dato Ling Beng Siew with virtually complete control of Hock Thai Finance. However, since he could exercise voting control through the parent company's holding, this hardly seems likely. It is more likely that Hock Thai Finance was considered to be a sound investment in view of the timber industry's increasing need to finance its capital expenditure. KTS itself in 1967/68 financed the purchase of \$1,707,912 worth of capital equipment through Hock Thai Finance.

The Commercial Bank, Brunei  
The Development Bank, Brunei

Dato Ling Beng Siew, on behalf of KTS and several

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

other parties decided to form a banking company in the State of Brunei. A Company, The Commercial Bank Limited, was incorporated on 19th June 1968. The subscribers to the Memorandum of Association were, Dato Ling Beng Siew, Dato Ling Beng Siong, Ling Beng Thuang, Dato Ting Lik Hung, Mr. Lim Beng Thai, Pehin Kapitan China Lim Teck Hoo and Mr. Lim Ming Siong who each took one share. The first Directors were all of the above apart from Mr. Lim Ming Siong. Notice of cessation of business was filed with the Brunei Registrar of Companies on 4th November, 1968 and duly registered by him on 30th November 1968. I have been informed that on the formation of the Company, an application was made to the State authorities for a licence to carry on a banking business. The application was rejected and notice of cessation of business was given to the Registrar of Companies who should then have taken steps to remove the company's name from the Register. He had not done so at the time of my inspection of the register. 10

A fresh application for a banking licence was lodged in the name of The Development Bank Limited. This Company was incorporated on 21st November 1968. The subscribers and first Directors were Dato Ling Beng Siew, Dato Ling Beng Siong, Dato Ting Lik Hung, Mr. Ting Ing Yee, Y.B. Awang Haji Abdu Rahman b. O.K. Shahabandor Awang Md. Taha and I.B.M. Jahfar. The six subscribers took one share each and according to the Registrar's records, no other shares from the authorised capital of 100,000 shares of B\$100 each have been allotted. 20

To 30th September 1970, expenditure by KTS in respect of this venture was -

Payments re- The Commercial Bank	B\$ 161,747.89	
The Development Bank	31,278.50	30

This does not include the deposit of B\$2,000,000 made in support of the application for a banking licence and since recovered. I was unable to ascertain what the position was at the time of my examination of the records but I was given to understand that the application for a banking licence was still under consideration by the State Authorities. Advances made up to 31st May 1970 were approved by the Board at their meeting on 10th June 1970. So far as I was able to ascertain, The Development Bank Limited has not produced any accounts nor has it filed any annual returns with the Registrar of Companies. 40

Glass Project and Plywood Project, Singapore

Little information is available in Sibul concerning these projects, I understand that the Glass Project related

to the proposed exploitation of silica deposits in Sarawak. The project was abandoned after expenditure of \$10,156.95 had been incurred and this amount was written off in the Accounts for the year ended 30th September 1970 in accordance with a resolution of the Directors at their meeting on 10th June 1970.

In the Federal  
Court in  
Malaysia

—  
No. 21

10 Kong Thai Plywood Pte. Limited was incorporated in Singapore on 15th November, 1968 with an authorised share capital of \$10 million divided into shares of \$1 each. The subscribers to the Memorandum of Association were Dato  
Ling Beng Siew and Mr. K. Gould who agreed to take one  
share each and became the first Directors. Other Directors  
appointed on 20th November 1968 are Dato Ling Beng Siong,  
Ling Beng Tuang, Ting Ing Yee and Ting Lik Hung. On 30th  
November 1968, 3,000,000 shares of \$1 each were allotted to  
Kong Thai Sawmill (Miri) Sdn. Berhad at par but no calls  
were made in respect of those shares. I have been informed  
that Kong Thai Plywood acquired a factory site with a view  
to building a veneer and plywood factory. However, it was  
20 found that the Company would not be given relief under the  
investment incentives provisions and the project was  
abandoned. At their meeting on 10th June 1970, the  
Directors of KTS resolved to write off the expenditure of  
\$196,649.25 incurred up to that date. Subsequently KTS  
made a further payment of \$40,000 for account of Kong Thai  
Plywood. I understand this was to be applied in paying off  
creditors, principally the Singapore Government for land  
rent. At 30th September 1970, the balance on the Kong  
Thai Plywood account was \$236,690. Contrary to the  
30 Directors' resolution referred to, the amount was not  
written off in that year's Accounts.

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

Pirima Utang Concession/P.T. Antang Kalimantan

40 Expenses of exploration of a forest area in BANJERMASIN, Indonesia consisting mainly of the wages of forest staff were charged to Pirima Utang Concession Account. At 30th September 1970 these expenses totalled \$20,841.25, which was carried forward under Sundry Debtors. In 1970/71 the expenditure increased to \$43,986.45 which was transferred to an account in the name of P.T. Antang Kalimantan and settled by payment in September 1971. I was unable to find out who the proprietors of P.T. Antang Kalimantan are.

Pahang Concession/Gold Hill Lumber Sdn. Berhad

In para 98 of his affidavit Mr. A.D. Peattie refers to amounts paid for the account of Pahang Concession, the debit subsequently being paid off by Gold Hill Lumber Sdn. Berhad. This is not correct.



In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

The Borneo Company obtained a licence to extract timber from an area of land in Pahang and KTS was brought in with a 50% interest. KTS provided staff to carry out exploration work. The payments to Wong Kwong Chong referred to by Mr. Peattie represent the salary of a number of the forest staff. The \$2,800 was transferred to Gold Hill Lumber account and further payments were charged until the total reached \$17,691.83. This amount was cleared when KTS took up half the allotment share capital of Gold Hill Lumber Sdn. Bhd. in the form of 500 shares of \$100 each, registered in the names of KTS - 498 shares, Dato Ling Beng Siew - 1 share and Dato Ling Beng Siang - 1 share. The balance of purchase price of the shares, \$32,308.17, was paid in December 1970. The other half of the share capital is held by The Borneo Company.

10

Gold Hill Lumber Sdn. Berhad was incorporated in Malaysia on 10th April 1970 with an authorised share capital of \$1 million divided into shares of \$100 each. The subscribers to the Memorandum of Association were Dato Ling Beng Siew, Dato Ling Beng Siang and Mr. K. Gould who agreed to take one share each and became the first Directors. On 27th May, 1970, there was an allotment of shares as follows -

20

The Borneo Company Limited	499 shares
Kong Thai Sawmill (Miri) Sdn. Berhad	<u>498</u> shares
	<u>997</u> shares

Mr. K. Gould was replaced on the Board of Directors by Mr. J. Hacking on 8th August 1971.

The Company began operations in 1970 and the audited accounts for the period from incorporation to 31st March 1970 show a loss of \$92,533. There is no charge in the Accounts for remuneration of Directors.

30

P.T. Indomark

I have been informed that KTS in association with The Borneo Company considered a project concerning timber extraction in Balikpapan, Indonesia. In the course of this KTS incurred expenditure of \$15,000 which was debited to the account of P.T. Indomark. I understand that the project was abandoned. In 1970/71, The Borneo Company paid \$7,500 to KTS representing its share of the abortive expenditure; the balance now standing in the KTS books will be written off.

40

Borneo Mining Sdn. Berhad

I have not carried out a search at the Registry of Companies. I was unable to obtain any information about this Company in the Sibu office. The amount advanced, \$5,425.60, remained outstanding at 30th September 1970; KTS is not a shareholder in this Company.

In the Federal  
Court in  
Malaysia

\_\_\_\_\_  
No. 21

Malaysia Timber Company Limited

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

10 This Company was incorporated in Hongkong on 4th November 1966 with an authorised share capital of HK\$150,000 divided into 15,000 shares of HK\$10 each. The subscribers to the Memorandum of Association were Wong Yuk Feng and Chan Sin Wai.

The shareholders are -

	Subscribers shares	Allotment 10.5.67	Allotment 17.8.67	Allotment 2.3.68	Trans- fer	Share- holdings 16.8.71
	1	39				40
	1				-1	-
		19			+1	20
20			2,000			2,000
			1,000			1,000
			1,200			1,200
			400			400
			800			800
			800			800
			800			800
			800			800
30			200			200
			400			400
				1,500		1,500
				20		20
				20		20
	2	58	8,400	1,540		10,000

The following are or have been Directors of the Company :-

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

Dato Ling Beng Siew	Appointed 18th November 1966	
Dato Ling Beng Siong	- do -	
Ling Beng Tuang	- do -	
Teng Chin Hua	- do -	
Ling Beng Sung	- do -	Resigned 29.4.67
Ling Beng Hui	- do -	- do -
Wong Yuk Feng	- do -	
Lau Haw Ming	Appointed 29th April 1967	
Chen Siong Seng	- do -	

Malaysia Timber Company buys and sells timber. It began its operation in August 1967. During the first two years of operations it made losses but the Accounts of the year ended 31st March 1971 show a credit balance of \$20,124 on the Profit and Loss Account after making provision for taxation and after writing off preliminary expenses and the losses in prior years. There is no change in the accounts for the remuneration of directors.

10

Malaysia Air Charter Company Sdn. Bhd.

This Company is incorporated in Malaysia. During the relevant period, the authorised share capital was \$1,600,000 divided into 150 Ordinary shares of \$10 each and 10,000 Employees shares of \$10 each. In late 1968, Dato Ling Beng Siew was allotted 16,000 Ordinary shares at par and acquired, by purchase, a further 3,500 Ordinary shares. All of these shares were transferred to Kong Thai's name in 1970. During 1969 and 1970 the issued share capital was \$495,579, held as follows -

20

F.J. Bussel:	300 Employees shares of \$10 each	\$ 3,000	
	10,203 Ordinary shares of \$10 each	102,030	
E.A. Bussel:	1 Ordinary share of \$10	10	
V.F. Decruz:	75 Employees shares of \$10 each	750	
The Borneo Company (Malaysia) Sdn.Bhd.:			
	19,500 Ordinary shares of \$10 each	195,000	
Kong Thai Sawmill (Miri) Sdn. Berhad:			
	19,500 Ordinary shares of \$10 each	195,000	
			\$ <u>495,790</u>

30

Dato Ling Beng Siew and Mr. K. Gould (of The Borneo Company) were first appointed as Directors on 30th January 1969 and, at the date of the Annual Return made up to 28th December 1970 the Directors were -

40

Mr. F.J. Bussel  
Dato Ling Beng Siew (and his alternate Mr. Ling Tang Sing)  
Mr. K. Gould (and his alternate Mr. A. Nelson)  
Inche Semu b. Abdul Rahman

The amount paid for Kong Thai's 19,500 Ordinary shares, including charges, was \$195,400.50 and it is shown in the Balance Sheet as at 30th September 1969 as an "Advance for purchase of MAC shares." This is the item referred to in Mr. A.D. Peattie's affidavit para. 58. In the 1970 Balance Sheet it is included under Investments.

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

10 Malaysia Air Charter is well known as the principal supplier of local air charter services in Malaysia. The Accounts for the year ended 30th April 1970 show accumulated losses of \$728,794. During 1970/71 a revaluation of spare parts and of certain of the aircraft was carried out and most of the surplus arising was taken to Profit and Loss Account. With other minor adjustments this reduced the accumulated losses brought forward to \$290,234. The draft Accounts for the year ended 30th April 1971 show that there was a net profit for the year of \$130,816, leaving a balance of losses to be carried forward to 1971/72 of \$159,418.

B. Property

20 Land and Shophouses

(1) SARIKEI Shophouse is referred to in Mr. A.D. Peattie's affidavit in para. 57. The land and building was bought in 1967/68 for \$60,000 and the action was approved at a meeting of the Directors held on 27th December 1967. The minutes of that meeting were signed by the Chairman, which is all that is required by Article 92 to validate them. (In addition 5 Directors signed the minutes recording their attendance at the meeting).

30 I have been informed that the shophouse was bought cheaply from the previous owner who had fallen into financial difficulties. Since it was bought, it has been rented out at \$200 per month. It is retained as an investment.

(2) Houses and Land at Green Road, Kuching were bought as an investment in 1967/68. The purchase was approved on 14th February 1969. Lot No. 419 was bought for \$60,000 and Lot No. 730 for \$95,000. The houses were bought at the same time as the Aurora Hotel and were used in connection with the running of the hotel. The house on Lot No. 419 was occupied by Mr. Cheng Yiew Kiew who was employed by the Company and became the Executive Director, Kuching in 40 February 1969. Mr. Cheng became the manager of Hock Thai Finance Corporation Berhad and continued to occupy that house after it was sold to Hock Thai Finance for \$77,177. The house on Lot No. 730 was originally used to house the

In the Federal  
Court in  
Malaysia

singers that were employed in the Aurora Hotel Night Club. Later it became the residence of the Aurora Hotel Manager and is still used for that purpose.

No. 21

The expenses in connection with the houses to which Mr. Peattie refers are properly charged -

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

Para 70:	Rewiring and supplying electrical fittings at Mr. Cheng Yew Kiew's residence	RM 1,801.35	
76:	Quit rent, Town Board assessment and insurance	1,161.80	10
113:	- do -	1,243.45	

AURORA HOTEL

(References : Originating Motion, Para. 17  
Mr. A.D. Peattie's Affidavit, Paras, 36, 37,  
66, 67 and 99)

The applicant asks that Dato Ling Beng Siew pay to the Company interest on all sums expended by KTS on Aurora Hotel Sdn. Bhd. including the original purchase price. This seems a strange request. If he had asked for repayment of all sums expended in relation to Aurora Hotel it would have been more in keeping with the other parts of the Originating Motion. The fact that he refers to Aurora Hotel Sdn. Bhd. is an indication that he does not understand the position. 20

The land, building, fittings and business of Aurora Hotel and Aurora Chambers, Kuching were bought by the Company under an Agreement dated 6th January 1968. The consideration was RM2,000,000 made up as follows:-

Land and Buildings, Aurora Hotel	RM 1,250,000	
Land and Buildings, Aurora Chambers	500,000	30
Furniture and Fittings	100,000	
Goodwill	150,000	
	<u>RM 2,000,000</u>	

The additional RM14,861, making the total of RM2,014,861 referred to by Mr. A.D. Peattie in para. 36 of his affidavit represents solicitors fees and stamp duties. The goodwill of RM150,000 was taken to represent the value attaching to the name Aurora Hotel which had been in existence in Kuching for many years.

The hotel was operated by KTS from 1st February, 1968 and losses were made in the period ended 30th September, 1968 and the years ended 30th September, 1969 and 1970. During this period, extensive renovation work was done and additional capital expenditure was incurred as follows:-

Period ended 30.9.68	₹183,816.03
Year ended 30.9.69	409,222.82
Year ended 30.9.70	292,802.08

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

10 Apart from renovation work, in the financial years 1969/70 and 1970/71, extension was made to the number of bedrooms available which increased from 36 to 53 rooms. The cost of extension, incurred in 1969/70 is included in the above figures. That so much money was spent on capital works at the hotel is the reason for "advances" having to be made from the Sibü office as referred to in paras. 66 and 99 of Mr. A.D. Peattie's affidavit. In the latter paragraph he refers to the hotel having a debit balance with Kong Thai of ₹2,964,749.01. This merely represents an inter-branch balance and once the separate Branch accounts are put  
20 together to form the accounts of the Company as a whole, the balance disappears.

In para. 37 of his affidavit, Mr. A.D. Peattie comments on features in the Accounts of the period ended 30th September 1968. In particular -

30 (a) Bar sales are ₹300 per day which is lower than Mr. Peattie would expect. They had increased to ₹513 per day in the year ended 30th September 1970. He says that hotels normally have a mark-up of about 100%. I do not know if he is referring to Kuching hotels and do not know if the figure of 100% is correct. In my experience hotels charge as much as they can in the context of their location, in other words their mark-up is related to the mark-up of others offering the same facilities in the same area. This might be anything. I am informed that when the Aurora Night Club is in operation the prices of drinks are greatly inflated for Night Club patrons whereas in the bar, which adjoins the Night Club, prices remain unchanged. The average mark-up in the year ended  
40 30th September 1970 is 56%. To some extent these average mark-up percentages are affected by the 30% discount given to the Directors. This discount is deducted from sales for accounts purposes. If it is added back, the mark-up of about 40% for 1967/68 becomes 45% and for 1969/70 the mark-up becomes 60% instead of 56%.

In the Federal  
Court in  
Malaysia

—  
No. 21  
Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

(b) The Dining Room salaries are high in relation to the volume of sales being in 1967/68 34% of the selling price. In 1968/69 they increase to 60%. In 1969/70 there are no separate figures for Dining Room salaries but indications are that the percentage went down a little in relation to sales.

(c) The Dining Room purchases amount to approximately 73% of the Dining Room income over the whole period from 1968 to 1970, equivalent to a mark-up of about 35% on the cost of food.

10

(d) The Hotel Shop kept a stock of toilet requisites, cosmetics, native handicraft, shirts, stockings and socks for the convenience of hotel patrons. It was obviously running at a loss and, as the first of the economies of the new management, it was by and large shut down in August 1968. At the end of that period a small stock of toilet requisites was retained. No value was put on the remaining stock which, I am informed, was stored for several years and then given away to the Red Cross.

20

In the 3 periods under review, the Aurora Hotel made losses (after charging all expenses) of -

8 months to 30th September, 1968	₹ 80,218
Year ended 30th September, 1969	172,936
Year ended 30th September, 1970	52,626

During all of these periods, business was affected to some degree by renovation work. The Bar and Dining Room between them made losses. There was a great amount of capital expenditure which aggravated the loss situation because depreciation is charged on the basis used for income tax purposes, with an initial allowance of 20% on additions in the year of purchase plus an annual allowance, in 1968/69 initial allowances totalled ₹67,146.

30

The renovation work has given new impetus to the business and the provision of additional bedrooms has already had an encouraging effect as the following figures show -

	<u>Month</u>	<u>Rate of Occupancy</u>	<u>Gross Room Rental</u>	In the Federal Court in Malaysia
	1968 February	60.4%	₹ 15,996	_____
	March	68.9	20,116	
	1969 February	75.3	20,450	No. 21
	March	89.4	25,927	
	1970 February	80.2	22,819	Affidavit of Charles Henderson filed 14th February 1975
	March	89.0	27,821	
10	1971 February	65.4	31,662	
	March	70.7	39,137	
	July	81.7	45,057	

The provisional Trading and Profit & Loss Account prepared for the information of the Managing Director for the period from 1st October, 1970 to 31st July 1971 shows a net profit for the ten months of ₹72,681. This rate of profit will be reduced by initial allowances on the capital expenditure incurred during 1970/71 but the indications are that there will be a profit for the year ended 30th September 1971.

20 Dato Ling Beng Siew and Dato Ling Beng Siong are given a discount of 30% on their bills at the hotel. Members of the hotel staff also pay less than normal hotel price for food and drink. It is agreed that there was no formal approval of this by the Board of KTS but it appears to me to be the form of decision that might well be made by local management. Much of the expenditure incurred by Dato Ling Beng Siew and Dato Ling Beng Siong in the hotel was of the nature of entertaining guests of KTS. Since the Aurora Hotel is merely a Branch of KTS, it would not be correct to allow it to profit at the expense of KTS.

30 Mr. A.D. Peattie in para. 37 of his affidavit says that the fact that the hotel was making losses was "never discussed or mentioned, so far as Kong Thai's records show, at any Kong Thai's meetings". The minutes of KTS Board meetings merely record decisions made, not discussions and it is therefore possible that there was discussion of the position. The fact that losses were being made is certainly shown in the Accounts. Approval of the extension of the hotel to provide additional 17 rooms at an approximate cost of ₹250,000 was given at a Directors meeting held on 9th November, 1970. One must assume that Dato Ling Beng Siew exercised the powers granted to him to put in hand such renovations and extensions as he thought fit, without  
40 reference to the Board.



In the Federal  
Court in  
Malaysia

No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February

Mr. Chong Yew Kiew was appointed to the Board of Directors on 14th February 1969 and became the Company's executive director for Kuching. In addition to the Directors' Fees and proportion of Directors' Bonus paid to him from Sibu office, he was paid a salary and bonus totalling \$15,420 in each of the years 1968/69 and 1969/70 by Aurora Hotel. This has never been approved by the Company in general meeting.

In para. 67 of his affidavit, Mr. A.D. Peattie makes mention of items in the hotel accounts for 1968/69 which, he says, require explanation. The items are :-

10

- (a) Bar Sales Mark-up which has been considered above.
- (b) Travelling and Transport - an analysis of expenditure is :-

Petrol, Oil and Repairs to hotel cars	\$ 5,874
Mr. Cheng Yew Kiew and hotel staff visits to Singapore	5,376
Fares of singers for Night Club	2,940
Taxies and miscellaneous local travel	<u>1,107</u>
	<u>\$15,297</u>

20

- (c) Hotel Cars - three were bought during the year as Mr. Peattie says but two were disposed of. It is not now considered extravagant to instal a tape recorded in a car, even in a car used for business purposes.

MALAYSIA DAILY NEWS SENDIRIAN BERHAD

(References : Originating Motion, Para. 33  
Mr. Peattie's Affidavit, Paras, 68 and 100)

Malaysia Daily News Sdn. Berhad was incorporated in Malaysia on 20th November, 1968 with an authorised capital of \$200,000 being 2,000 shares of \$100 each. The first issue of 7 subscribers shares were taken up by Dato Ling Beng Siew, Dato Ting Lik Hung, Tai Sing Chii, Chieng Hio Kwong, Chen Ko Ming, Ting Ka Siang and Ting Huong Sing. On 2nd February, 1969, 1,493 were allotted; 9 each to the original subscribers, 10 each to Yong Ping Kuai, Tiang Kuong Ho and Ling Beng Hung and 1,400 to Kong Thai Sawmill (Miri) Sdn. Berhad which then became the parent company. On 1st October, 1969, 100 shares were allotted to Sarawak United Sawmills Sdn. Berhad. All of the original subscribers plus Ling Beng Hung were or became Directors

30

40

during the period covered by this review.

The subsidiary began in December, 1968 to publish a Chinese language newspaper, The Malaysia Daily News. The loss for the period ended 30th September, 1969 amounted to \$71,732 and for the year ended 30th September, 1970, \$47,812. Thus at the latter date, the company had lost \$119,544 of the issued share capital of \$160,000. In addition, it owed the parent company \$81,505.67.

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

10 The applicant asks that Dato Ling Beng Siew pay to Kong Thai Sawmill (Miri) Sdn. Berhad all sums advanced or invested or otherwise expended on Malaysia Daily News Sdn. Berhad. He says in his affidavit that there was no reason why KTS should purchase a major share in the newspaper which was losing money and continued to lose money; that the newspaper was acquired to serve as a mouthpiece for Dato Ling Beng Siew and Dato Ling Beng Siong and it was used by them to obtain publicity and to further their personal political ambitions.

20 At the time the investment was made, it was probably known that the newspaper was not making a profit - I would assume that no newspaper does within the first two months of publication.

30 The newspaper is published in the Chinese language and I am therefore unable to comment on the charge that in fact it acted as a mouthpiece for the respondents. I am also unable to say whether the respondents derived political or personal advantage derived from the ownership by KTS of the newspaper company. However, as is said elsewhere in this report, Dato Ling Beng Siew is not a representative in either the State or Federal Governments nor was he a candidate in the most recent State or Federal elections. Dato Ling Beng Siong is a member of the State Council Negeri.

#### DONATIONS

(References : Originating Motion, Paras. 7, 13, 24, 35 and 52.  
A.D. Peattie's Affidavit, Paras. 15, 26, 52,  
74, 110, 111, 120, 143)

40 1965/1966 : The amount of the donations, \$18,246.10 is agreed.  
1966/1967 : The amount of the donations, \$44,962.40 is agreed.  
1967/1968 : The amount of the donations, \$138,614.80 is agreed.  
The amount donated to the Sarawak Chinese Association, Binatang is \$21,200; the balance of \$15,000 was given to the Sibu Branch of the Sarawak Chinese Association

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1965

1968/1969 : The amount of the donations, \$1,304,743.49 is agreed as is the analysis in the affidavit.  
1969/1970 : The amount of the donations of Kong Thai Sawmill (Miri) Sdn. Berhad excluding Aurora Hotel is actually \$507,563.86. The group total is \$512,167.00. The analysis shown in the affidavit is correct.

Comments

1. The Memorandum of Association at clause (qq) contains general powers to make donations. 10
  
2. The amount of donations paid in each year is shown in the Accounts.
  
3. Section 109(6) of the Companies Act 1965 requires that the Directors shall state in their reports whether or not the results for the year have been materially affected by items of an abnormal character. Because it is sometimes difficult to form an opinion as to whether an item is abnormal for this purpose and perhaps to avoid duplicating information that is otherwise given (either in the Accounts or the notes thereto) it has become fairly common for Directors' Reports to state that the results for the year have not been materially affected by items of an abnormal character other than those items referred to elsewhere in the Report or in the Accounts. This practice has been followed by the Directors of Kong Thai Sawmill (Miri) Sdn. Berhad in the Accounts for the years ended 30th September, 1967, 1968, 1969 and 1970. 20
  
4. The Auditors' Report to the shareholders of Kong Thai Sawmill (Miri) Sdn. Berhad in respect of the years ended 30th September, 1969 and 1970 respectively contains these qualifications "Donations were mostly through the Managing Director" and "Donations were mostly through the Directors". Subject to those observations, the Auditors were satisfied that the Accounts were properly drawn up so as to reflect a true and fair view of the Company's affairs. I am unable to say what interpretation the shareholders would have put on these qualifications but clearly, they would have had the effect of drawing shareholders' attention to the item in the Accounts and, if shareholders took objection or wanted clarification, they had the opportunity to raise their queries at the Annual General Meeting. 30
  
5. The Company depended for its continued existence on timber licences which are issued by the State Government. 40

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

10 It was therefore in the interests of the Company to ensure that within its powers it assisted what might be called a benevolent government to be in office following the 1969 elections. This may be the prime reason for making such generous donations to political parties. It is suggested in para. 39 of Mr. Ling Beng Sung's affidavit that the donations to political parties were made to further the personal political ambitions of Dato Ling Beng Siew. It is relevant to note that Dato Ling was not a candidate in either the State Council Negeri or the Federal Parliamentary elections. Dato Ling Beng Siong is, I believe, an elected member of the Council Negeri.

6. It is correct to say that specific approval of the 1968/1969 donations was given at a meeting of the Directors on 10th June, 1970. The four Directors present at the meeting are correctly listed in Mr. Peattie's affidavit.

20 7. It is not uncommon for individuals to be confused with the Companies they represent and this may explain why receipts were made out by recipients of donations in the name of Directors instead of in the Company's name.

ADVANCES TO SHAREHOLDERS AND ADVANCES AND PAYMENTS  
TO OTHER INDIVIDUALS

(References : Originating Motion, Paras, 22, 28, 41, 44,  
45, 57

Mr. A.D. Peattie's Affidavit, Paras. 9, 19, 45,  
46, 47, 48, 60, 61, 62, 63, 83, 90, 91,  
92, 93, 95, 118, 138, 140)

30 The applicant asks that Dato Ling Beng Siew pay interest upon or repay with interest the amounts advanced to or paid by way of salary and/or bonus to various individuals.

Advances to Shareholders

No reference is made in the Originating Motion to certain advances made to shareholders to enable them to take up shares in the Company, but there are references in both affidavits. These advances constitute a breach of the Companies Act, 1965 and of the Articles of Association of the Company, for which the whole Board of Directors would be held responsible and not just the two Directors named in the Originating Motion. The relevant facts follow.

40 At a meeting of the Directors on 3rd September, 1965, it was resolved to issue further shares to a value of \$120,000 to the natives of Sarawak. In pursuance of this resolution, at a meeting of the Directors on 16th July, 1966, shares to

In the Federal  
Court in  
Malaysia

No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

a value of ~~£~~45,000 were allotted to :-

Datu Tuanku Bujang	150	shares of <del>£</del> 100 each
Edmund Jugah	100	"
Linggi Jugah	100	"
Jonathan Bangau	50	"
Temenggong Oyong Lawai		
Jau	50	"

The remaining shares reserved for natives were issued to existing shareholders.

The shares allotted to Datu Tuanku Bujang were duly paid for. The accounts of the other members were debited with the value of the shares allotted to them. Mr. Peattie in his affidavit at paras. 9, 19, 47, 61 and 90 described the transactions on the accounts up to 30th September, 1970. In summary, the balances at the various balance dates are as follows:-

10

Balances at 30th September

	<u>1966</u>	<u>1967</u>	<u>1968</u>	<u>1969</u>	<u>1970</u>
Edmund Jugah	<del>£</del> 10,000	<del>£</del> 10,964	<del>£</del> 10,964	<del>£</del> 11,406	<del>£</del> 11,406
Linggi Jugah	10,000	9,500	9,500	9,550	11,550
Jonathan Bangau	5,000	4,500	3,265	790	Nil
Tg. Oyong	5,000	4,500	3,525	3,525	3,525

20

It may be that the Directors regarded these advances as being made in furtherance of the State Government's policy that as much assistance and encouragement as possible should be given to natives of the State to enable them to take an interest in business.

Advances to Other Individuals

(a) Yew Pui Ing (Mr. A.D. Peattie's paras. 45 and 60) was an employee of the Company, a tractor driver who was killed whilst working in the forest. An amount of ~~£~~3,000 was paid to his family by way of compensation additional to what was paid under the Company's Workman's Compensation policy. The amount was written off as Compensation in the Accounts of the year ended 30th September, 1970.

30

(b) Ling Lee Soon (Mr. A.D. Peattie's paras. 46 and 60) is Alex Ling, the son of Dato Ling Beng Siew. A sum of ~~£~~30,000 was advanced to him in 1967/68 and remained outstanding in his name until March, 1970 when it was

40

transferred to the account of Ling Beng Siew & Co. There was no authority from the Board for the advance and, although there was no question of misappropriation (as the applicant calls it in the affidavit at para. 24), it is not unreasonable that interest should be charged. I continue that an appropriate adjustment has now been made.

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

- 10 (c) Ling Beng Hui (Mr. A.D. Peattie's paras. 48, 62, 92 and 138) is a younger brother of Dato Ling Beng Siew and a shareholder in the Company. He was given an advance of \$100,000 during 1967/68. The advance was approved by the Board at a meeting on 10th June, 1970 at a rate of interest of 7% per annum back-dated to August, 1968 when the advance was made. This is not the only debt on which the Company has charged interest.
- 20 (d) Harun Ariffin (Mr. A.D. Peattie's affidavit paras. 63 and 93) was the Malaysian Federal Secretary in Sarawak. He was given a loan of \$10,000 in March, 1969 and signed an agreement providing for interest at 6 1/2 per annum and repayment over 16 months. The loan agreement was made under the Common Seal of the Company, affixed under witness by Dato Ling Beng Siong and Eng Kheng Hin, the Secretary. The granting of the loan was approved by the Board at a meeting held on 10th June, 1970. On 7th October, 1969, a further advance of \$3,000 was made to him. This has not been approved by the Board and no loan agreement was drawn up. Interest has now been taken up on the account. No repayment instalments were paid in the period under review.
- 30 However, in July and August, 1971 the Company received repayment of \$500 in each month.
- (e) Pau Tien Ha (Mr. A.D. Peattie's affidavit para. 95) is a Sibu merchant who has no connection with the Company. He was given a loan of \$10,000 during 1969/70. The loan is being repaid by regular instalments of \$1,000 per month and at the date of my examination of the books, only \$1,000 remained to be repaid.

#### Payments to Other Individuals

40 Kong Sieng Ong is Dato Ling Beng Siong's personal secretary and interpreter. According to the applicant's affidavit Kong Kuek Hiew, Penghulu Poh, Pengarah Chundi, Chen Ko Ming, Yii Sok Hoi and Sng Ching Joo are political associates of Dato Ling Beng Siew and Dato Ling Beng Siong and have never been employed in connection with the Company's business. I am not in a position to say whether or not this is correct. Chew Kwan Loke is in Singapore and his

In the Federal  
Court in  
Malaysia

services are utilised by the Company in connection with purchases of supplies from Singapore. Wong Yew Ming is the manager of the subsidiary company Malaysia Daily News Sdn. Berhad.

No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

The applicant asks that the monies paid to the above persons by way of salary and bonus during 1968/69 and 1969/70 or by way of advances, be repaid with interest to the Company by Dato Ling Beng Siew.

The amounts concerned are -

Mr. A.D. Peattie's  
Affidavit Ref. ....

10

Para. 60	Chen Ko Ming - advance	₹ 1,383.70	
03(1968/69)	Kong Sieng Ong - salary & bonus	15,800.00	
	Kong Kuck Miew "	5,100.00	
	Panghulu Poh "	3,600.00	
	Pengarah Chundi "	3,600.00	
	Wong Yew Ming "	2,100.00	
	Chew Kwan Loke "	4,009.50	
	Chan Ko Ming "	1,600.00	20
91(1969/70)	Yii Sok Hoi - advance	250.00	
113	Penghulu Poh - salary	3,600.00	
	Pengarah Chundi	3,600.00	
	Sng Ching Joo	12,000.00	
	Kong Kuck Miew	4,800.00	
	Wong Yew Ming	3,600.00	
	Kong Sieng Ong	12,600.00	
	Vincent Bujang	1,800.00	
		<u>₹79,443.20</u>	

In the Originating Motion, the applicant in para. 41 asks for repayment of ₹32,209.50, representing the bonus and salaries paid to named individuals in 1968/69. The amount paid was actually ₹35,809.50.

30

With reference to the above list, Vincent Bujang is the Company's office boy. If Mr. Wong Yew Ming's salary were not charged in the Company's accounts it would merely go to increase the losses of the subsidiary, Malaysia Daily News Sdn. Berhad.

VEHICLES & MOTOR YACHT

(References : Originating Motion, paras. 14, 15, 16, 18, 19 and 49.

Mr. A.D. Peattie's Affidavit, Paras. 31, 32, 33, 38, 39, 42, 69, 80, 81, 87, 101, 102, 116, 117 and 141)

In the Federal Court in Malaysia

—  
No. 21

Motor Cars

Affidavit of Charles Henderson filed 14th February 1975

10 The applicant asks that Dato Ling Beng Siew pay to KTS the cost of Chevrolet Impala KA7000, Chevrolet SV2144 and Mercedes 300 S 3456 with interest thereon from date of original purchase.

20 With regard to KA7000, Mr. A.D. Peattie at para. 31 of his affidavit states that the car was acquired in 1967/68 and kept in Kuching although KTS had no business there. This is not correct KTS acquired the property and business of Aurora Hotel in January 1968 and there was, therefore, justification for having a car there of a type commensurate with the status of Dato Ling Beng Siew and Dato Ling Beng Siong. According to the applicant's affidavit, para. 17, 20 the latter was a Minister of the State of Government and used KA7000 as his official car because he considered the car provided to him by the State unsuitable for him. It is more likely, in my opinion, that Dato Ling Beng Siong required another car due to a reluctance to use the car provided to him as a Minister, for personal business purposes. In this case the applicant may have intended to ask for payment for the car from the THIRD and not the SECOND Respondent.

30 KTS began to associate itself with The Borneo Company Limited, Singapore in joint ventures in Indonesia and Singapore. There were frequent visits to Singapore by Dato Ling Beng Siew and other members of the staff and the car SV2144 was kept for their use in Singapore.

Mercedes S3456 is in Sibul and is used as the Managing Director's car. There is nothing extraordinary in the fact that the Company provides a car for the use of its Managing Director.

40 In para. 80 of his affidavit, Mr. A.D. Peattie lists a number of vehicles which he says were kept by the Company. The list does not include three vehicles owned at the time by the Aurora Hotel branch. It includes two vehicles, S1662 and S6283 which, although maintained by the Company, actually belonged to two senior members of KTS staff.



In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

With regard to para. 87 of Mr. A.D. Peattie's affidavit, it is correct that two mechanics came to Sibu from Singapore to attend to the Mercedes car. The amount of the expenditure is correct but it relates to 1969/70 year, not 1968/69. It should be said that the amount of air fare included in the bill was only \$223 so that it must be assumed that the mechanics did not visit Sarawak exclusively to attend to the Company's car. In other words, no question of needless extravagance was involved and I can see no reason for asking the THIRD respondent to repay the amount to the Company as the applicant does in his affidavit at para. 47.

10

With regard to para. 102 of Mr. A.D. Peattie's affidavit, the details are correct. Amphicar S4049 is amphibious and has been in use to bring the Managing Director from house to office during floods. Mercedes KA505 is used in Kuching now.

#### HOVERCRAFT

Mr. A.D. Peattie's Affidavit, para. 38 and the applicant's affidavit, para. 20. A deposit of £2,250 equivalent to \$16,575.05 was paid to HOVERMARINE LTD. of England for a small hovercraft. Hovermarine fell into financial difficulties following a fire at their premises and went into liquidation. In October, 1970, the Company received a first distribution of one shilling in the pound from the liquidator, equivalent to \$323.24 and more may be forthcoming. The order was placed in the name of Dato Ling Beng Siew.

20

I have seen a picture of the type of hovercraft made by Hovermarine. It is a small craft, sitting no more than 2/3 people abreast. In outside dimensions it is probably smaller than a 3 ton truck.

30

#### MOTOR YACHT - "BERJAYA MALAYSIA"

The applicant asks that the whole of the cost of the vessel and the operating expenses related thereto be charged to Dato Ling Beng Siew with interest.

The cost of the vessel is referred to in Mr. A.D. Peattie's affidavit in paras, 39, 42, 69 and 101 and the cost of running it in paras. 81 and 116.

The hull of the vessel was bought for \$48,000 in January 1968 and conversion and construction into a motor yacht commenced almost immediately. At 30th September, 1968, \$59,284 had been spent on the hull and various fittings which

40

had been ordered and delivered (including the food freezer and radio). In addition, \$225,781 had been paid to the boat-builder who was doing the conversion. I am informed that the yacht was completed in March, 1969. By 30th September, 1969, the cost had reached \$505,698. At a meeting of the Directors held on 20th June 1969, the Directors resolved to approve the purchase of a second hand boat and to reconstruct it at a total cost of approximately half a million dollars. The registered name of the boat is "Berjaya Malaysia". The boat was originally registered in the name of Dato Ling Beng Siew and, during the year ended 30th September, 1970 \$5,011 was expended by way of stamp duty and registration fee to transfer ownership to KTS. This amount was capitalised and forms the main part of the additional capital expenditure of \$6,396 incurred during 1969/70, referred to in para. 101 of Mr. A.D. Peattie's affidavit.

The figures quoted by Mr. A.D. Peattie as the cost of running the vessel in 1968/69 and 1969/70 have been checked by the Company's staff and are substantially correct.

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

10

Generally

Dato Ling Beng Siew had been given general powers to buy such equipment as was necessary for the operation of the Company. So long as he can show that the items referred to above were necessarily bought, he has not exceeded his powers. There is specific authority from the Board in relation to the reconstruction of "Berjaya Malaysia" so that if it were concluded that the acquisition of the vessel was not necessary for the operation of the Company, the whole Board would be answerable to the shareholders, not only Dato Ling Beng Siew.

20  
30

ENTERTAINMENT

(References : Originating Motion, Paras. 8, 9, 25, 36 and 54  
A.D. Peattie's Affidavit, Paras. 14, 16, 53,  
75, 112)

1965/1966 : Entertainment expenses of \$7,081, being one third of the total expense was disallowed for tax purposes.

1966/1967 : Entertainment expenses of \$10,849 were disallowed for tax purposes.

40 1967/1968 : Entertainment expenses of \$20,291 were disallowed for tax purposes. This represents one quarter of the \$63,809.68 shown in the Sibul books plus \$4,339 from the Aurora Hotel expenses. The dinner for Enche Semu cost \$1,309.

In the Federal  
Court in  
Malaysia

\_\_\_\_\_

No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

- 1968/1969 : A nominal ~~£~~20,000 of the total entertainment expenses of ~~£~~116,364 was added back for tax purposes.
- 1969/1970 : The total of entertainment expenses was ~~£~~116,677 after those of Aurora Hotel are taken into account.

Comments

1. The claim under this head is based on the premise that the amount disallowed for tax purposes was not spent in the Company's interests. This is not necessarily so, even when a taxpayer enters into correspondence with the Inland Revenue Authorities on what should be allowed and what should not. In this case, no discussion with the Authorities was entered into and the Company accepted disallowance of an arbitrary proportion of the expenses. 10

2. It is preposterous to suggest that the whole of the entertainment hosted by Dato Ling Beng Siew in 1969/70 should be charged to his account with interest. Included in the total of ~~£~~31,449.54 is an amount of ~~£~~5,671.24 for whisky given to the Captains of vessels that call at Miri to pick up the Company's logs. Also included is ~~£~~6,023.15 representing the cost of the Company's New Year party. 20

3. The Company has a constant stream of visitors but it would not now be possible to list the occasion or the person entertained for each entertainment bill.

STAFF TRAVEL & TRANSPORT

(References : Originating Motion, Paras. 26, 39 and 56  
A.D. Peattie's Affidavit, Paras. 54, 79, 115)

1967/1968 : Of the expenses in this year totalling ~~£~~146,943 not including Aurora Hotel, none was disallowed for tax purposes 30

1968/1969 : The total expenditure is actually ~~£~~221,435, made up of Sibü office ~~£~~206,168, Aurora Hotel ~~£~~15,267. Of the total ~~£~~30,000 was added back for tax purposes.

1969/1970 : The total expenditure is ~~£~~136,769, made up of Sibü office ~~£~~130,459 and Aurora Hotel ~~£~~310. The tax position is not settled.

Comments

1. The claim under this head is that the expenses disallowed 40

for tax purposes, save to the extent that they can be shown to have been legitimately spent on Kong Thai's business and in Kong Thai's name, should be charged to Dato Ling Beng Siew.

In the Federal  
Court in  
Malaysia

2. For 1968/69, details of expenditure quoted by Mr. A.D. Peattie in para. 79 of his affidavit are correct. The credit of \$50,000 referred to represents reimbursement to Dato Ling Beng Siew of travel expenditure, all of which is supported by vouchers. The actual figures are \$27,856 credited on 27th July, 1969 for local travel and \$23,339 credited on 13th September, 1969 for foreign travel.

No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

3. For 1969/70 the details listed in Mr. A.D. Peattie's affidavit in para. 115 are correct except that the amount in item (3) should be \$3,753. The \$635.74 was the cost of a driver, one BURMAWI taking the Company's car to Kuala Lumpur from Singapore on two occasions. Mr. Chen Siong Seng is a senior member of the staff in Sibul and Dato Ling Beng Siew's personal assistant. He was granted a leave passage to Hongkong. I do not know what Mr. G.F. Paterson of International Executive Corps. did in the course of his visit. This item is related to that referred to in para. 114 of Mr. A.D. Peattie's affidavit.

4. I have not verified the purposes of each journey and each item of expense.

#### MISCELLANEOUS

It should be noted that following the filing of his affidavit, Mr. Peattie called at the Company's office again and saw the tax papers which were not made available to him before. Para. 23 : Tong Aik Timber & Co. and Union Timber Co. are timber extraction contractor's to the Company and it is true that equipment was supplied to them. The cost, plus interest on the outstanding balances was debited to their accounts. The balances were reduced by withholding a certain amount from their earnings as contractors. Corresponding to the debit balances of \$162,642 and \$138,698 referred to by Mr. Peattie, there were credit balances on the extraction accounts of \$23,899 and \$24,484 respectively. In my experience, the practice of providing equipment for contractors to use or providing money for them to buy equipment is not unusual. Para. 27: Mr. Peattie refers to the Profit and Loss Appropriation Account showing a loss on sale of fixed assets. He says this is abnormal and that accounting practice requires an explanation. He is not referring to the fact that a loss occurred but that the loss is shown in the Appropriation Account. I should have

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

thought that the explanation would be obvious to him.

Depreciating a fixed asset is, by and large, intended to reduce its value to its disposable value at the end of its useful life. To the extent that the depreciated value of an asset does not equal the amount realised on disposal there is a profit or loss on disposal which represents the amount by which the asset has been over-depreciated or under-depreciated in prior years. Thus, in its purest sense, a profit or loss on disposal of an asset is an adjustment relating to prior years and not to the year in which a disposal takes place. 10

At one time, a Profit and Loss Account included everything that related to the Revenue as opposed to the Capital Account. A refinement of this was the separation of items which were not expenses of the business e.g. dividends and transfers to reserves, which were appropriations of the profit earned. Those items were then shown in a separate section of the Accounts which was called a Profit and Loss Appropriation Account. The next development in the form of accounts was that it was found necessary to show the profits of the year being reported on before taking account of prior year adjustments and the Profit and Loss Account in its horizontal form became split into two, followed by the Appropriation Account. The next developments took place quite quickly in the 1950's and 1960's. The vertical Profit and Loss Account appeared more commonly, it was found that what was and what was not an appropriation of profits was resolved by omitting the heading Profit and Loss Appropriation Account etc. In more advanced centres the title "Profit and Loss Appropriation Account" has almost entirely disappeared. 20 30

Sibu is naturally slow to follow developments in the presentation of accounts but in the year following that to which Mr. Peattie refers, a vertical form Profit and Loss Account with no separate Appropriation Account was presented. In the year to which he refers, i.e. 1966/67 and in the previous year there is an Appropriation Account which, in addition to a tax charge includes the writing off of Preliminary Expenses, adjustment of depreciation account and the loss on disposal of fixed assets. The presentation is not correct in that none of these is an appropriation of profit but, take away the title of the account, and nothing is wrong. The accounts show all they were required to show by law. 40

Paras. 29 and 51 : Fines and damages paid to the Government Forest Department are a normal hazard of a business

of this nature. As penalties for breach of the law they must be disallowed by the Inland Revenue Department. Under its licence, the Company must cut down and remove all trees of a certain girth from its concession area. Fines are charged under the licence for leaving trees uncut, for leaving too high stumps after cutting down trees and for not removing logs. The Company finds that it is cheaper to pay the penalty than to remove trees that are of unmarketable species or condition or which cannot float unsupported on water. Hence, the fines are incurred, imposed and paid. To the extent that fines are incurred for technical faults the contractors are surcharged. In 1967/68 to which Mr. Peattie refers in his para. 51, penalties paid amounted to \$80,118 of which \$1,365 was charged to the extraction contractors.

10

20

30

Para. 30 : Despatch monies are earned as a result of the loading of vessels at a speed faster than an agreed standard rate. The shipper normally computes the despatch money due to him in respect of a shipment and claims it from the charterer. There may well be delays in reaching agreement on the amount due but I would not expect a delay of more than two months from the date of shipment in normal circumstances. Lengthy delays do occur when it comes to making payment of despatch monies, and I understand that the explanation is that Japanese charterers are unable to obtain foreign exchange approval to make remittances in settlement. In my experience, it is not unusual for a shipper of timber not to take credit for despatch monies in his Accounts until the despatch monies are actually received.

In this case, Sarawak United Sawmills Sdn. Berhad, which is the selling and shipping agent for KTS timber, passed credit to KTS, for the 1966 shipments in February and April, 1967. I have not sought an explanation for this from Sarawak United Sawmills but at my request it was ascertained that although credit was given to KTS on the aforesaid dates, Sarawak United Sawmills actually received the total of \$87,093.27 on the following dates -

40

21st April 1967	\$ 10,141.70
31st May 1967	13,219.17
1st August 1967	16,201.77
27th November 1967	10,329.39
30th May 1970	37,201.24
	<u>\$ 87,093.27</u>

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

Para 55 : Legal Expenses incurred were -

Yong & Wong:	Re - land purchase and mortgage in Brunei	£ 2,200	
	Successfully defending action taken against KTS under the Merchant Shipping Regulations	2,600	
	Retainer, writing letters, general consultation	500	
	Drawing up bills of sale	300	
	Re-licensing of vehicles in use in KTS forest area	200	10
Reddi & Co. :	Civil suit against Yong Khow & Sons Ltd. seeking compensation for equipment lost at sea when being transported	1,642	
	Sungei Rek Development (Collection of Rodyk & Davidson Bill of costs)	3,556	
Rodyk & Davidson :	Yong Khow & Sons Ltd. Civil suit	<u>2,000</u>	20
		<u>£12,998</u>	

Like Mr. Peattie, I was unable to find out anything about the Sungei Rek Development item. It is true that of the legal expenses, £12,693 was added back for tax purposes. There was no correspondence with the Revenue authorities about this and the amount represents the Assessor's view as to the amount that should not be allowed as a deduction.

The applicant asks that Dato Ling Beng Siew be required to pay to KTS with interest, the amount disallowed by the Inland Revenue authorities. Apart from the Sungei Rek Development item on which I cannot express an opinion, I am satisfied that all of the expenditure was incurred in connection with the business of KTS. Some of the expenditure (e.g. that incurred in connection with Yong Khow & Sons Ltd. action) is properly disallowed as a charge for tax purposes because it relates to matters of a capital nature but this is no ground for suggesting that the expenditure should be recovered from Dato Ling Beng Siew.

Paras. 73 and 106 : Pan Sarawak Company Sdn. Berhad deals in supplies to logging companies and KTS made purchases from Pan Sarawak during 1968/69 and 1969/70 in amounts exceeding £400,000 in each of those years. The Register of Directors of KTS shows that Dato Ling Beng Siew, Hii Yi Chiong and

30

40

Lau Hui Kang are also Directors of Pan Sarawak Co. Sdn. Berhad. It is true that the minutes of Directors meetings of KTS do not indicate that formal notice of the extent of the interest of those Directors are given to the Board.

In the Federal  
Court in  
Malaysia

—  
No. 21  
Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

The applicant asks that Dato Ling Beng Siew be required to account to KTS for his share of the profits of Pan Sarawak derived from the proportion of that Company's business that was done with KTS during the years in question. A penalty of this nature if valid constitutes a claim by the company, not by any individual shareholders.

10 Paras. 77 and 114 : Mr. Peattie refers to certain items of expenditure and says that so far as he can discover they are unconnected with KTS's business. In fact, the expenses relate to projects that the Company considered as possible avenues for diversification.

#### Survey of Tonsei

20	Maru	£1,746.00	Relates to a marine survey of a vessel which the Company contemplated purchasing.
	Mining Survey	£ 945.30	
	Antimony Survey	<u>590.55</u>	1,535.85 Self explanatory.
	Analysis of silica	540.00	
	Analysis of glass sample	<u>950.00</u>	1,490.00 This is part of the expenditure on the Glass Project referred to in the section in this report dealing with Investments.
30	Payment to American International Executive Corps. - Advance monthly contribution	3,050.00	The Company has sought advice regarding certain proposed projects from the Corps. and this is part of the cost.
40	Cost of 1-day stopover by Corps. executive	137.25	Item (3) of para. 115 is related to this.



In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

Para. 78 : The Company's analysis of the telephone bills referred to in Mr. Peattie's affidavit is -

1.	Kong Sieng Ong	₪ 649.98
2.	Dato Ling Beng Siong	2,007.90
3.	Berjaya Malaysia	623.92
4.	Singapore	5,359.60
5.	Dato Ling Beng Siew's residence	1,772.20

The applicant asks that Dato Ling Beng Siong be required to pay to the Company, with interest, the amount of his telephone bill, item 2, above and that Dato Ling Beng Siew be required to pay items 1, 3, 4 and one half of item 5. The reason given in the applicant's affidavit for this request relate only items 1 and 2. He avers that Dato Ling Beng Siong was a Minister of the State Government during the relevant period and resided in Kuching in order to perform his Ministerial duties although his normal residence was in Sibu; that the telephone bills are in respect of calls made from Kuching. Those facts are correct. He further avers that Dato Ling Beng Siong does nothing for KTS and that Kong Sieng Ong does less. Dato Ling Beng Siong attended meetings of Directors and thus took part in the management of the business. Kong Sieng Ong is his interpreter and private secretary.

10

20

At this time, 1968/69, KTS was already involved with investments in Singapore and in other projects involving The Borneo Company in Singapore and although KTS itself did not have an office in Singapore it is not unreasonable that many telephone calls properly chargeable to KTS were made.

It is not unusual for a Company to ensure that its Managing Director may be constantly in touch with head office by paying for the telephone in his house or elsewhere. I can see no reason for charging Dato Ling Beng Siew with any proportion of his house telephone bill or that in respect of radio telephone calls from "BERJAYA MALAYSIA". Paras. 107, 108, 119, 126, 127 : On the subject of borrowings by KTS, Mr. Peattie's affidavit is repetitious. In summary, he says that KTS borrowed ₪1,000,000 from Hock Thai Finance Corporation Berhad and approximately ₪2,000,000 from the Bangkok Bank. This is correct.

30

40

At a meeting of the Directors held on 18th September, 1970 it was resolved to mortgage the land and buildings of Aurora Hotel and Aurora Chambers to Hock Thai Finance Corporation Berhad to secure loans to values of ₪1,500,000 and ₪1,000,000 respectively. The loan of ₪1,000,000 at 9% per annum was granted on 21st September, 1970. The Bangkok

Bank Account was opened in accordance with a resolution of the Directors at a meeting held on 11th April, 1970. The Minutes Book does not record that the Directors gave formal approval of the borrowing of money from The Bangkok Bank. According to the Articles of Association, Articles 41 and 76, the Directors may raise or borrow money and the power to do this cannot be delegated to the Managing Director or to committee. Proper authority for the loan from The Bangkok Bank was not therefore given. I understand that this loan is personally guaranteed by Dato Ling Beng Siew.

The applicant asks that Dato Ling Beng Siew be required to reimburse KTS for the interest on these loan accounts. In his affidavit at paras. 60 and 68 he gives several reasons, most of them speculative, as to the purpose of the loans or as to why it was found necessary to borrow money.

The following is a statement of the affairs of Kong Thai Sawmill (Miri) Sdn. Berhad drawn from the Consolidated Balance Sheet as at 30th September, 1970.

		<u>State of Affairs at 30th September, 1970</u>	
	FIXED ASSETS		\$ 9,088,595
	INVESTMENTS - Stocks and Shares	\$3,199,892	
	Advances to Associated Companies	1,111,846	
	Advances of the nature of Investments	<u>617,242</u>	
		4,928,980	
	Credit balance with Associated Company	<u>32,308</u>	4,896,672
30	CURRENT ASSETS -		
	Deposits	\$ 5,886	
	Stock	1,527,128	
	Prepayments	35,096	
	Debtors -		
	Sundries excluding Associated Companies and advances of the nature of investments	373,572	
	Trade debtors	291,386	
40	Cash	<u>108,951</u>	<u>2,342,019</u>
			\$16,327,286
	INTANGIBLES		<u>360,260</u>
	TOTAL FUNDS INVESTED		<u>\$16,687,546</u>

In the Federal Court in Malaysia

—  
No. 21

Affidavit of Charles Henderson filed 14th February 1975

In the Federal  
Court in  
Malaysia

SOURCES OF FUNDS

SHAREHOLDERS FUNDS

Issued Share Capital	₹ 1,360,000	
Retained Earnings including dividend not paid	<u>7,007,653</u>	₹ 8,367,653

CREDITORS & BORROWINGS

Taxation	₹ 4,359,338	
Sundry Creditors and Accrued Charges	847,190	
Borrowed money -		
Hock Thai Finance	1,004,262	
Bangkok Bank	1,954,143	
Hock Hua Bank	<u>154,954</u>	<u>8,319,893</u>
		<u>₹ 16,687,546</u>

Note: Included under Debtors are amounts totalling  
₹143,866 representing advances to native shareholders,  
Ling Beng Hui and Harun Ariffin.

In summary, the invested funds of ₹16,687,546 were  
finances as to one half by the shareholders and one half by  
loan and other creditors. Throughout its lifetime, the  
Company has been seriously under capitalised. However, during  
the earlier years, the income derived from timber extraction  
was very large and the shortfall of capital was made good by  
retaining earnings which were even sufficient to allow Dato  
Ling Beng Siew to borrow the Company's funds. By 1969/70,  
diversification through investment had taken up all the  
available funds and Dato Ling Beng Siew was lending money to  
the Company. Money that should have been set aside to pay  
income taxes had also been invested and the cash flow in  
1969/70 could not match the total taxes of some ₹4.5 million  
paid in that year against prior years' liability. It is no  
wonder that borrowings from Hock Thai Finance and The Bangkok  
Bank had to be made. Further, since there was an accrued  
liability of ₹1.9 million for 1970 tax, presumably payable  
before the end of that year, it is clear that further  
borrowings would have had to be made.

With reference to the petition and charges made by the  
applicant I would comment as follows:-

1. The loans were not obtained to provide funds for Kong Thai to lend to its Directors for their private purposes. It is true that there were advances to Dato Ling Beng Siong during the year in question and the loans might well have been reduced by the amounts advanced to him totalling \$185,730. However, Dato Ling Beng Siew's account (i.e. the account of Ling Beng Siew & Co.) was in credit in large sums during most of the year.
- 10 2. Interest has now been charged on the advances to Directors. Thus, even if the whole of the monies borrowed had been lent to Directors it would not be reasonable to ask them to pay also the interest on the monies borrowed by KTS.
3. It is true that had donations amounting to over \$500,000 not been made in the year in question the Company would have been that much better off and the loans might have been reduced by that amount.
- 20 4. Of the investments made not all have been successful and there has been little return on others so far, mainly because the projects invested in are new. However, the investments were properly authorised and the remarks of the applicant are not relevant to the issue of the loans under discussion.
5. The fact that Hock Hua Bank Berhad has failed to comply with the law in publishing its accounts has nothing to do with the present issue.
- 30 6. I have not sought an explanation as to why a loan was sought from The Bangkok Bank, Kuala Lumpur as opposed to some other Bank. The applicant speculates that Dato Ling Beng Siew arranged the loan because it tied in with other arrangements he had with The Bangkok Bank. Read in the context of the affidavit as a whole I take it that the applicant is suggesting that by placing this business with the bank, Dato Ling Beng Siew was able to derive some personal advantage. So far from this being the case, on the facts before me it is apparent that Dato Ling Beng Siew has, by giving his personal guarantee, pledged his personal fortune for the benefit of the Company.
- 40 Para. 127 : Mr. Peattie did not check the physical assets of KTS and has seen no evidence that the physical assets were ever checked by the Auditor. He says that unless a physical check of the assets is carried out by an independent party, it cannot be certain that the assets exist. From his

In the Federal  
Court in  
Malaysia

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

In the Federal  
Court in  
Malaysia

examination of the books, he speculates that it is unlikely that all of the assets exist in the possession of KTS.

—  
No. 21

Affidavit of  
Charles  
Henderson  
filed 14th  
February 1975

I have not attempted to carry out a physical examination of the assets, nor have I attempted to verify otherwise that they actually exist. I have seen a Plant Register in the form of a series of Capital Assets Cards, each of which deals with one item of plant or equipment showing inter alia details of its cost and the location where it is in use. While it might well be in the interests of the Company to carry out an inspection of all assets, particularly the logging plant and equipment, and to ensure that the information relating to the location in which each unit is situated or used is correct and to have a report made on its condition, this is not mandatory.

10

8th March 1972

(C. HENDERSON)

No. 22

No. 22

Judgment

JUDGMENT

—  
4th August 1975

JUDGMENT OF GILL, CHIEF JUSTICE

This is an appeal, from the dismissal by B.T.H. Lee J. of the appellant's application by way of originating motion in which, in his capacity as a member of the first respondent Company, he asked for a series of orders the gist of which was that the second and third respondents be removed from office as the Managing Director and Director respectively of the Company and a receiver and manager be appointed to conduct the business and investigate the affairs of the Company, that they do pay to the Company various sums of money which they had taken or paid out from the Company's funds wrongfully or without proper authorisation or for unauthorised purposes, and that in the alternative the Company be wound up.

20

30

As one of the grounds on which the application was opposed was that it was made by the appellant maliciously because of family disputes prior to the formation of the company, it will be useful to refer briefly to such disputes as a historical background of these proceedings.

The parties to the proceedings are the sons of the late Ling Chui Ming who died in 1955 leaving six sons whose names in order of seniority are Ling Beng Siew (the second respondent), Beng Tuang, Beng Siong (the third respondent), Beng Sung (the appellant) Beng Hui and Beng King. During his lifetime the father made each of his sons a partner in the two family partnership firms known as Kong Thai (M.K.) Sawmill, Sibü and Ban Hin Sawmill Mukah. After his death letters of administration of his estate were granted to Beng Siew and Beng Siong who also carried on the family partnership businesses.

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment  
—

4th August 1975

The first family dispute arose about the year 1958 when the younger brothers asked Beng Siew for accounts of the administration of their father's estate and were met with the answer that the accounts had been destroyed in accordance with the father's business practice. This dispute was settled without resort to the Court.

The second dispute arose in 1962 when the three younger brothers asked for accounts of the partnership business and were told that they had been lost in a flood. As a result of this dispute the three elder brothers brought an action against the three younger brothers in the High Court at Sibü for a dissolution of the partnerships and distribution of the assets. The action was defended but was ultimately disposed of by the Court making an order in the terms of a settlement as proposed by the parties through their solicitors.

The result of the settlement was that the elder brothers purchased the younger brothers' interest in Kong Thai (M.K.) Sawmill Sibü by transferring to the younger brothers their interests in Ban Hin Sawmill Mukah as part of the purchase price and paying the balance of the purchase price in cash amounting to over two million dollars. Thus Ban Hin Sawmill Mukah became the property of the three younger brothers and was incorporated in December 1962 as Mukah Sawmills (1962) Sendirian Berhad. Kong Thai (M.K.) Sawmill was eventually incorporated under the name of Kong Thai (1963) Sendirian Berhad. This company was entirely different from Kong Thai Sawmills (Miri) Sendirian Berhad, the first respondent Company, with which we are concerned in these proceedings.

Kong Thai Sawmills (Miri) Sendirian Berhad (hereinafter referred to as "the Company" or "K.T.S.") was formed by the three elder brothers Beng Siew, Beng Tuang and Beng Siong, each of whom was named a Director in the Articles of Association of the Company. The Company was incorporated in Sarawak on 29th June 1964 with an authorised

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

capital of three million dollars divided into 30,000 shares of \$100/- each. At the first formal meeting of the Company held on 16th January 1965, the first 10,000 shares representing a capital of one million dollars were issued. Beng Siew, Beng Tuang and Beng Siong were allotted 7,150, 1,000 and 500 shares respectively. In 1966, a further 3,600 shares were issued so as to increase the paid-up capital of the Company to \$1,360,000.

On 1st April 1965 a licence was issued to the Company to extract timber from a forest area in the Miri District of Sarawak for a period of ten years. Like all timber companies, K.T.S. faced financial difficulties in the early stages of its development and had to take a loan for a large sum of money from Kong Ming Bank belonging to the three younger brothers on the security of bills of sale over its working equipment. In 1966, 1,000 shares in K.T.S. were issued to Mukah Sawmills, the younger brothers' company. Those shares were subsequently transferred to the three younger brothers. Beng Sung and Beng Hui took 330 shares each and Beng King 340. Those were the shares which the younger brothers held in K.T.S. at the time of commencement of these proceedings when Beng Siew, Beng Tuang and Beng Siong had 7,582, 1,060 and 1,060 shares respectively.

Beng Siew was elected as Chairman and Managing Director of the Company with effect from 1st January 1965 at a Directors' meeting held on 20th January 1965 and he has occupied that position ever since. Beng Tuang and Beng Siong have been Directors of the Company since its formation. Beng Sung was made a Director on 2nd February 1967, but it is common ground that he took no active part in the affairs of K.T.S. Directors' meetings were held from time to time but there is nothing to indicate that notices of meeting or agenda were distributed. There is also nothing to indicate that notices of meetings or agenda or copies of the accounts were sent to shareholders prior to general meetings. Beng Sung attended one General Meeting, but he never attended any meetings of the Directors.

Under the powers given to them by Article 76 of the Articles of Association of the Company, the Directors by a resolution passed at a meeting held on 27th December 1967 authorised the Managing Director Datuk Ling Beng Siew "to purchase tractors, logging trucks, machines and any other equipment necessary for the operation of the Company." By a further resolution at the same meeting they delegated to the Managing Director the power to make such investments as he thought fit and proper on behalf of the Board of Directors and for that purpose to make use of the Company's seal.

10

20

30

40

On the authority of the powers delegated to him, Beng Siew in the years 1968 to 1970 advanced large sums of money from the Company's funds to other companies in which K.T.S. ultimately acquired considerable shares. Most of the investments in such other companies were acquired in the same manner. During the formative and exploratory period, expenses relating to a project were debited to an account with some suitable name and shown as advances in the account. Later, when it was decided to proceed with the project, shares were issued in consideration for the amounts advanced. Alternatively, if it was decided that the project was not viable, the amounts advanced were written off.

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment  
—

4th August 1975

These other companies with which we are concerned in this appeal are P.T. Kalimantan Sari, United Singapore Lumber (Pte.) Limited, Kong Thai Lumber Sendirian Berhad and Sabah Agency Sendirian Berhad. Kong Thai Lumber was formed to extract timber for Chalfont Investments Limited, a Hong Kong company in which Beng Siew and Beng Siong had shares. Similarly Sabah Agency was formed to extract timber for Glendale Investments Limited, another Hong Kong company in which also Beng Siew and Beng Siong had shares.

In January 1968 Beng Siew bought the land, building, fittings and business of Aurora Hotel and Aurora Chambers in Kuching for two million dollars. In February 1969 he acquired for K.T.S. a major shareholding in Malaysia Daily News Sendirian Berhad which published a Chinese language newspaper called the Malaysia Daily News. In January 1968 he purchased an ocean-going vessel called Berjaya Malaysia which was reconstructed by the company at a considerable cost. In 1969 on the authority of either Beng Siew or Beng Siong a sum of money was advanced from the company's funds to Encik Harun Ariffin who was then the Federal Secretary in Kuching. I mention this because this loan to Harun was raised as an issue in the proceedings and is the subject matter of this appeal.

During the initial stages the company was developing its concession when its future was uncertain. From 1966 onwards the concession proved to be very profitable. The company started making large profits and a lot of money was being distributed as dividends. During the years 1966 to 1970 the gross profits of the company before tax amounted to \$24,660,000 on which tax liability was \$15,895,000, so that the net profits amounted to \$8,765,000. The net amount paid out to shareholders after deduction of income tax was \$2,298,400. Remuneration and bonuses together with travelling and entertainment expenses amounted to \$2,224,000. Donations during the same period totalled \$2,018,000. The net position of the company, however, was



In the Federal  
Court in  
Malaysia

that it ran short of working capital and had to take a big loan from a bank the repayment of which was guaranteed by Beng Siew personally.

—  
No. 22  
Judgment

During the relevant period both Beng Siew and Beng Siong were politically active. For some years Beng Siew had been Chairman or President of the Sarawak Chinese Association and was previously the nominated Member of Parliament. Beng Siong became a Minister of the Sarawak Government in 1966. Perhaps this accounts for the fact that very large sums of money were donated to political parties during the said period on the authority of Beng Siew or Beng Siong.

10

4th August 1975

In 1970 the applicant-appellant Beng Sung saw the accounts of the Company which showed that large sums had been given away in donations during the financial year ending on 30th September 1969. This made him write a letter to the Secretary of K.T.S. on 27th April 1970 to ask for particulars of donations, debtors, investments, travelling expenses and details of the total money spent on entertainment. On receiving no reply to his letter he wrote again on 14th May 1970. There was still no answer.

20

On 29th September 1970, he 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 open to inspection by an approved company auditor acting on his behalf. In his affidavit in support of the application, he stated that he had for some time been and still was concerned about the manner in which the affairs of the Company were being conducted by Beng Siew and, in particular, that he was concerned about the application of the liquid assets and revenue of the Company. The application was not opposed by the respondents, and on 18th November 1970 the Court made an order appointing Mr. Andrew Peattie, a Chartered Accountant and an approved Company Auditor, to inspect the accounting and other records of the Company on behalf of the applicant.

30

At the next general meeting of the Company held on 16th February 1971 Beng Sung retired as Director and was not re-elected. He has not been a Director of the Company since that date.

In pursuance of the order of court dated 18th November, 1970, Peattie examined the books and records of the Company and put up two separate reports containing what he saw in the books of the Company. The contents of his reports were summarised and embodied in an affidavit which he affirmed on 10th August 1971. In September 1971 he conducted a further examination of the Company's books, in respect of

40

which he put up a third report but affirmed no affidavit.

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment  
—

4th August 1975

10 The originating motion from the dismissal of which this appeal has been brought was taken out by the applicant in the High Court in Borneo at Sibu on 1st September 1971. It was supported by Peattie's affidavit of 10th August 1971 which was reaffirmed on 27th November 1971 for the purpose of these proceedings. The originating motion was also supported by the affidavit of the applicant affirmed on 12th February 1972. The contents of that affidavit were largely hearsay in that they related to what the applicant had gathered from Peattie's reports. All he could do was to draw attention to the serious nature of the facts revealed in Peattie's report. Beng Siew filed two affidavits in the proceedings, the first affirmed on 30th September 1971 and the second on 14th March 1972. There were affidavits filed in relation to donations to political parties and the loan to Harun.

20 At the hearing of the motion the deponents to the affidavits were cross-examined and re-examined at great length. A large body of evidence was recorded and lengthy written submissions were made by Counsel on behalf of the parties to the proceedings. It would seem clear that the case for the applicant rested largely on the affidavit of Peattie, and to a lesser degree on the affidavit of the applicant, as well as on the evidence which they gave in court. All that evidence had to be considered in the light of what was contained in Beng Siew's affidavits and the evidence which he gave in court.

30 In his very long written submissions on the evidence of Peattie, counsel for the respondents emphasised again and again the fact that on his own admission Peattie had made statements in his affidavit, some of which were false, others misleading and the rest made recklessly and carelessly without sufficient inquiry. In the result it was submitted that Peattie was an unsatisfactory witness, so that his evidence should be rejected except where it was corroborated by documentary records. It was on the basis of these submissions that the learned Judge stated in his judgment that the course adopted by Peattie was unjustified in point of law and in fact, as it was assuredly repellent to the sense of professional decency.

40

With great respect to the learned Judge, all this castigation of Mr. Peattie was not justifiable, bearing in mind that some of the findings of fact which the learned Judge made were based on the candid admissions made by Peattie himself. Taking the evidence of Mr. Peattie as a whole, it would seem abundantly clear that there was no attempt on his part to mislead the court. As was submitted

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

by counsel for the applicant before the learned Judge, every material fact which was set out in his affidavit and on which he gave evidence in court was proved by exhibits from the respondent's own records which were produced in court. On all matters of substance the evidence of Peattie remained unchallenged and indeed could not possibly have been challenged because it consisted of the company's own records.

Peattie had a difficult duty to perform under the court order. He had to go through the voluminous records of the Company from January 1965 for a period of not less than 6 years in order to prepare his reports. As submitted by counsel for the applicant in the court below, it was a monumental task and involved the perusal of thousands of entries in the accounts and the copying of a great many of them. It involved extracting figures, making very many calculations, tracing figures through different accounts, analysing them and finally preparing a summary. If there were slight errors through an oversight this was only to be expected.

Why Peattie's affidavit contained some untruths was obvious. He affirmed the affidavit in August 1971 in which he stated with reference to several items that he had not received certain information. By the time he reaffirmed his affidavit in November 1971 he had received that information, but he failed to correct his affidavit or file a further affidavit. Indeed what he had seen in the interval made no material difference to his evidence on the basic facts. When giving evidence in court he admitted the falsity of such statements. In those circumstances, a submission by counsel for the respondents that Peattie had made a deliberate misrepresentation of facts in order to deceive the court was, to my mind, with all deference to counsel, nothing short of a red herring.

It is to be observed that the attack on Peattie's credibility was launched solely on the basis of the untruths in his affidavit, but the case was not tried on affidavits. The application was not an ex parte motion. It was clear right from the beginning that the application was going to be contested and that the parties would have to give evidence in court. In the final analysis the motion had to be decided not so much on the affidavit evidence but the viva voce evidence of the parties and witnesses in court.

To reiterate what I have already said, the material facts stated in Peattie's affidavit were proved not only by his evidence in court but independently by the production

10

20

30

40

of exhibits containing those facts. I can find nothing in the evidence of Peattie taken as a whole that he was a biased witness. He was entitled to express his professional opinion on the state of the accounts, but the court was not bound by such opinions. I must repeat that I can find nothing in the evidence of Peattie as a whole that he was not a witness of truth. Indeed, the learned Judge never said so in so many words. The harsh words which he used about Peattie were in relation to his affidavit alone. As I have already said, some of the Judge's finding of fact were based on the evidence of Peattie himself.

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment  
—

4th August 1975

As the learned Judge has stated at the beginning of his judgment, the question in these proceedings to which an answer had to be found lay within a small compass. That question was whether the applicant's motion was rightly made under s. 181 (1) of the Companies Act 1965, and whether the Court on the evidence before it and in all the circumstances of the case could make such orders as it thought fit, including the orders specified in s. 182(2) of the Act.

Section 181(1) of the Companies Act reads as follows:

" Any member ... of a company ... 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 ... including himself or in disregard of his or their interests as members, shareholders ... of the company; or (b) that some act of the company has been done or is threatened or that some resolution of the members ... or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members ... (including himself)."

Section 181(2) of the Act states as follows:

" 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;

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment  
—

4th August 1975

- (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."

10

It is to be observed that the jurisdiction of the court under s. 181(1)(a) of the Act arises if it is shown that the powers of the directors are being exercised in a manner oppressive to one or more of the members or in disregard of their interests. The word "oppressive" was defined in re R.H. Harmer Ltd. (1958) 3 All E.R. 689; (1959) 1 W.L.R. 62 to mean "burdensome, harsh and wrongful". In Scottish Co-operative Ltd. v. Meyer (1958) 3 All E.R. 66, 86 Lord Keith of Avonholm said:

" Oppression under s. 210 may take various forms. It suggests, to my mind, as I said in Elder v. Elder & Watson (1) (1952 S.C. 49), a lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members. The section introduces a wide power to the court to deal with such a situation in an equitable manner which it did not have in the case of a company prior to the passing of the Act of 1948. The court has here acted, in my opinion, within the powers conferred on it."

20

Section 181 of our Companies Act is derived from but is wider in scope than s. 210 of the English Act 1948 and s. 186 of the Australian Act.

30

The originating motion taken out by the applicant contained 60 prayers. The basis of each of those prayers was that Beng Siew and Beng Siang had over a long period committed breaches of their powers and duties as directors of the Company. It will therefore be necessary to consider what the powers and duties of directors of a company are. In Re Lands Allotment Co. (1894) 1 Ch 616, 631 Lindly L.J. said:

40

" Although directors are not properly speaking

trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint companies were invented directors have been liable to make good moneys which they have misapplied upon the same footing as if they were trustees .....

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

In the same case Kay L.J. said at page 638:

10 " Now, case after case has been decided that directors of trading companies are not for all purposes trustees or in the position of trustees, or quasi trustees, or to be treated as trustees in every sense; but if they deal with the funds of a company, although those funds are not absolutely vested in them, but funds which are under their control, and deal with those funds in a manner which is beyond their powers, then as to that dealing they are treated as having committed a breach of trust."

20 In the American case of Guth v. Loft Inc. 5 Atlantic Reporter (2nd series) (Del) 503, 510, which was cited by counsel for the applicant in the Court below and to us in this Court, Layton C.J., delivering the opinion of the court, said

30 " Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest ..."

40

The main complaints as contained in those prayers in the originating motion relate to the following matters:-

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

- (1) Loan to Encik Harun Ariffin;
- (2) Remuneration (Salary, Fees and Bonus) paid to Beng Siew;
- (3) Travelling and Entertainment Expenses;
- (4) Advances to and Investments in joint ventures;
- (5) Investment in the Malaysia Daily News Sendirian Berhad;
- (6) Purchase of the Aurora Hotel;
- (7) Purchase and outfitting of the motor yacht Berjaya Malaysia;
- (8) Donations to political parties;
- (9) Drawings by Beng Siew and Beng Siong from the Company's funds.

10

The complaints were based on the allegations that the resources and facilities of K.T.S. were used by Beng Siew and Beng Siong as if they had responsibility to no one but themselves. For the purpose of this appeal each of those complaints calls for a separate consideration.

1. Loan to Encik (later Datuk) Harun Ariffin

One of the prayers in the originating motion was that Beng Siew do pay to K.T.S. the sum of \$13,000/- together with interest, being the sum advanced by him or with his authority from K.T.S. funds to Encik Harun Ariffin who held the high position of Federal Secretary in Sarawak. The prayer was based on Harun's account with the Company which showed that a sum of \$10,000/- was paid to him on 3rd March 1969 and a further sum of \$3,000/- on 7th October 1969. Harun admitted the loan of \$10,000/- but denied that he had the further loan of \$3,000/- in respect of which he was alleged to have signed a receipt dated 3rd October 1969.

20

Apart from the debit of \$10,000/- and \$3,000/0 in his account, there was a debit note of \$2,526.60 made on 30th September 1971 and a further debit note of \$654/74 made on 28th April 1972 presumably on account of interest. On the credit side of the account were 10 entries in respect of cash payments of \$500/- each made between 28th August 1971 and 28th April 1972. Thus the amount due from Harun as shown in the account on 28th April 1972 was \$11,181/42.

30

By his letter dated 1st May 1972 Harun sent a cheque for \$12,925/- in respect of the loan of \$10,000/- and interest thereon at 6½%. On 12th May 1972 K.T.S. wrote to Datuk Harun to say that on checking his account the amount due from him was found to be \$11,182.42, details of which were shown in their statement which had been forwarded to him recently, and that they were enclosing therewith their cheque for \$1,743.58 being refund of overpayment. On 15th May 1972 Harun wrote to K.T.S. stating that he was not aware of the second loan of \$3,000/- and the payments which had been debited (should read credited) to his account, and asking for clarification. On 18th May K.T.S. replied to say that, according to their records, payment in respect of the loan of \$3,000/- made to him by their company was received by Datuk Ling Beng Siong on 7th October 1969 on his behalf and that the money was passed on to him with his acknowledgment on 10th October 1969, and that they were enclosing for his information photostat copies of their payment voucher with his written acknowledgment of the receipt of \$3,000/-. This photostat copy of the voucher which was produced in evidence does not bear Harun's signature.

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

Harun had signed a loan agreement in respect of the \$10,000/- received by him in March 1969. The granting of the loan was approved by the board at a meeting held on 10th June 1970, but there was no mention made at that meeting of the alleged further loan of \$3,000/-.

Harun filed two affidavits in these proceedings. In his first affidavit he stated that he had no recollection of the circumstances in which the alleged receipt for \$3,000/- was issued and denied that he had ever received any further loan of \$3,000/- either on 3rd October 1969, being the date of the purported receipt, or on 7th October 1969 as stated in the statement of account. He also gave evidence in court. When he was shown a receipt for \$3,000/- bearing what purported to be his signature, he said that it could be his signature but he was not sure. He denied the suggestion that he went to the office of Beng Siong where Beng Siong helped him with \$3,000/- in cash for which he signed a receipt. He said he did not ask for the money and did not receive the \$3,000/-. When further questioned, he agreed that the receipt appeared to be signed by him. He later said he could not think how the receipt for \$3,000/- had come into existence but that the signature on the receipt looked like his signature. He was shown various receipts for \$500/-; he denied he had made any payments or received any receipts. In re-examination he said he could not remember signing the receipt and that it was not signed by him.



In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment  
—

4th August 1975

Evidence was given by a hand-writing expert from London named Julius Grant, who had earlier filed an affidavit, that on comparison of other signatures of Datuk Harun with his alleged signature on the receipt there was a high probability that the signature on the receipt was that of Datuk Harun, but that he could not exclude the possibility of a clever forgery.

The learned Judge says this in his judgment regarding this loan of  $\text{RM}3,000/-$ :

" Having examined the receipt (Ex. DTS.47) myself I find as a fact that on the evidence the signature of Harun on the receipt for  $\text{RM}3,000/-$  is genuine, that the payment was in fact made to him, that it has since been repaid on his own admission and has been overpaid and that the company has not lost any money in the process. There is therefore nothing further to be done in this matter."

10

With respect to the learned Judge, there was no admission by Harun of any repayment in respect of the loan of  $\text{RM}3,000/-$ . It may not be possible to quarrel with the learned Judge's finding of fact that the signature of Harun on the receipt is genuine, but, with respect, there is no evidence whatsoever to support his further finding that the sum of  $\text{RM}3,000/-$  had in fact been paid to Harun. The evidence was that the money was paid to Beng Siong to be paid to Harun. There was no evidence that Beng Siong in fact paid the money over. The letter informing Harun that the money had been paid to Beng Siong to be paid over to him was no evidence of such payment. The one person who could prove payment was Beng Siong. He was a party to the proceedings and presumably was in court. Why did he not give evidence if he had nothing to hide? Why was it necessary to incur all that expenditure to bring an expert all the way from London to prove that the signature on the receipt was that of Harun when Beng Siong could easily have gone into the witness box to say that he had in fact paid the money over? His evidence to that effect together with the learned Judge's finding that the signature of Harun on the receipt was genuine would have clinched the matter.

20

30

As submitted by counsel for the applicant in the court below, it was difficult to think of any motive which Datuk Harun might have had for denying the additional loan of  $\text{RM}3,000/-$ , especially when it was said to have been repaid and there was no question of his being required to make any further payment. It was further submitted that it was even more difficult to conceive why Harun should have denied making those monthly payments of  $\text{RM}500/-$  if he actually made

40

them. Those payments shown in the account are alleged to have been made in cash. There was no evidence produced as to how Harun sent the cash from Kuala Lumpur where he then was. It is extremely unlikely that he made personal visits from Kuala Lumpur in order to make the payments in Sarawak. If the payments were made by cheque or Money Order, which were cashed, it should have been possible to produce evidence to that effect. The only evidence produced with regard to those instalment payments was the mere production of the company's statement of accounts.

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

I must say with all respect to the learned Judge that there was no evidence before him to connect Datuk Harun with the alleged monthly payments of \$500/- I agree with him that the company has not lost any money in the process, so that there is nothing more to be done in the matter. But there was nothing wrong about the applicant raising this issue. As submitted by counsel for the applicant, it was wrong for Beng Siew or Beng Siong on their own initiative and without approval of the Board to have taken the company's money in order to make a loan to a public servant.

In the final analysis nothing very much turned on this loan to Harun. Indeed it is a matter of regret that it should have been raised and that there should have been such a fight over it. Nevertheless, if Harun's story about his never having received the additional loan of \$3,000/- is true, and, as I have already said, there is 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.

2. Remuneration (Salary and Bonus) paid to Beng Siew

Article 68 of the Articles of Association of the Company provides that the remuneration of the directors other than the managing director shall be such as may be decided in general meeting. Article 74 provides that the directors may appoint the managing director upon such terms as they think fit. At the meeting held on 20th January 1965 at which Beng Siew was appointed Chairman and Managing Director, his salary was fixed at \$1,500/- per month. At the same meeting it was resolved that the directors' fee would be \$500/- per person annually and that the directors' bonus would be 5%, 4% for the managing director and 1% for the other directors. At the second annual general meeting it was resolved pursuant to the earlier resolution to pay \$500/- to every director holding office in 1965 and \$600/- per annum for each director holding office in 1966. No mention is made of the directors' fee in the minutes of the subsequent meetings until the 7th Annual General Meeting held on 16th February 1971, when "it was resolved to pay

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

annually directors' fee of \$600/- per person and directors' bonus of 5% of which 4% to the managing director and 1% to the other directors."

The resolutions regarding bonus to be paid to directors merely mentioned 5% but did not say of what. It is not clear whether the bonus was calculated on the profit after or before taking into account preliminary expenses, taxation, adjustment of depreciation on disposals and profits and losses on disposals of fixed assets. In 1967/68 the loss on Aurora Hotel was deducted from the profits before calculating the bonus. In 1968/69 and 1969/70 the loss on Aurora Hotel was not deducted before calculating the bonus, nor was the loss on the subsidiary company, Malaysia Daily News Sendirian Berhad. This would appear to be the only criticism which could be made about the total amount of bonus paid to the directors.

10

Up to the year ended 30th September 1967 Beng Siew took 4/5 of the bonus pool and the other directors shared the remaining 1/5. In the year ended 30th September 1968 and in subsequent years he successfully claimed a share of the remaining one-fifth along with the other directors. Beng Siew's account with the Company kept in the name of Ling Beng Siew & Co. was normally in debit, and before the books were closed a sum representing his share of the estimated bonus was credited to the account to help reduce the balance at the year end. The other directors were generally paid their share of the bonus pool in February or March when the audited figures became available.

20

During the period 30th September 1966 to 30th September 1970 Beng Siew received by way of salary, fees and bonus a sum of \$1,135,326/—, apart from the remuneration which he received from companies associated with K.T.S. There can be no dispute about the salary which was paid to Beng Siew, but there can be no doubt that his fees and bonus were huge when compared to the net amount paid to the shareholders during the same period. It was said that where bonuses are computed according to an agreed formulae and the liability to pay them is a contractual obligation, it is not unusual to credit an amount to the accounts of the persons concerned at the date of closing of books of account. It was further said that it was not unusual for persons to be allowed to draw moneys in anticipation of bonus.

30

40

Normally it would be wrong for the court to interfere with directors' fees and bonus as fixed by them at the appropriate meetings, but I think 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. In other words, a

majority shareholder must not take undue advantage of his voting powers to fix too high a bonus for himself as managing director. 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.

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

3. Travelling and Entertainment expenses

10 During the period 30th September 1966 to 30th September 1970 the total amount paid out from K.T.S. funds for entertainment and travelling was \$840,396/-. In the course of his travelling Beng Siew took with him his family, particularly his son, to expensive hotels and indulged in expensive entertainment. Travelling expenses included a daily allowance of \$60/- which was apparently paid to Beng Siew over and above his hotel expenses and meals etc., the only explanation offered for this daily allowance being that it was required to pay taxi fares etc. It was therefore not surprising that a substantial portion of the entertainment and travelling expenses were disallowed by the Income Tax Authorities.

20 The order which the applicant sought in relation to travelling and entertainment expenses was that Beng Siew should pay back to the company such sums as were disallowed by the Income Tax Authorities. Counsel for the respondents submitted in the court below that a company may and frequently does incur expenditure perfectly properly in the course of its business all or part of which may subsequently be disallowed for tax purposes. He went on to submit that in the absence of any other grounds on which these particular items were included by way of complaint the court should disregard them. The learned Judge accepted those submissions and held that the amount to be allowed for entertainment and travelling expenses was a matter for the directors, that those expenses were properly incurred and that there was no ground on which he could make the order asked for.

30 It is true that directors must decide how much to spend on entertainment and travelling, but where the amount spent is so patently excessive or inordinately high, a shareholder may justifiably apply to the Court to have the director removed. The question, however, is what can be done with directors who are controlling shareholders. Counsel for the appellant submitted to us that the proper order for the court in such a case would be a winding up order. There would appear to be some force in that argument because, although in general it is for the

40

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment  
—

4th August 1975

directors to decide how much to spend, yet the court may say in a proper case that it will interfere on behalf of a minority shareholder and may in the exercise of its discretion make such order as it deems fit under section 181 of the Companies Act.

4. Advances to and Investments in Joint Ventures.

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

Kalimantan Sari, an Indonesian company with a timber concession in Pontianak, was apparently incorporated during 1968. K.T.S. largely financed the setting up of the operations of Kalimantan Sari. In 1967/68 it contributed \$207,394.95 cts. By 1968/69 it had contributed \$758,038.49 cts. A further sum of \$463,724/- was advanced to it by K.T.S. in the year 1969/70. Notwithstanding the advancement of such large sums to Kalimantan Sari, for a substantial time K.T.S. had no shareholding in that company. At a meeting of the Board of Directors of K.T.S. held on 10th June 1970, it was resolved that the advance of \$952,841.38 cts made to Kalimantan Sari up to 30th April 1970 be approved. The Directors also resolved to approve the investment of \$1,800,000/- in Kalimantan Sari, representing 48% of the total issued capital of the company. It was also resolved that payment of capital to Kalimantan Sari be made by way of off-setting against the advances made by K.T.S. Thus K.T.S. did not have a shareholding in Kalimantan Sari until after 10th June 1970. 10 20

United Singapore Lumber (Pte.) Ltd. was incorporated in Singapore on 25th March 1969 with an authorised capital of \$3,000,000 divided into shares of 1.5 million "A" Ordinary and 1.5 million "B" Ordinary shares of \$1/- each. The capital for this company was provided by K.T.S. and the Borneo Company (Inchocape Group) jointly. As on 31st December 1970 the issued share capital was 2 "A" Ordinary shares of \$1/- each fully paid held one each by Beng Siew and Kenneth Gould who were the first directors of the company. Beng Siew was said to have held the share in trust for K.T.S. and Kenneth Gould in trust for the Borneo Company. Kenneth Gould retired on 5th July 1971 and was replaced by John Norman Hacking. K.T.S. resolved to take up 150,000 shares of the company, which were said to represent 50% of the shareholding, at the meeting of the directors held on 10th June 1970. Subsequently during the course of these proceedings 48% of such shares were transferred to K.T.S. and 2% to Beng Siew which he said he was holding in trust for some employees of K.T.S. and in respect of which he later executed a trust deed. 30 40

Kalimantan Sari sold substantially all of its timber won from the concession to United Singapore Lumber. The business of United Singapore Lumber was almost wholly, if not solely, the resale of timber supplied to it by Kalimantan Sari and other companies. In the earlier years of its operations Kalimantan Sari either made no profits or made very small profits compared to the profits made by United Singapore Lumber on the sale by it of the timber supplied by Kalimantan Sari. After the applicant had started making inquiries into the affairs of K.T.S., a change was made so that United Singapore Lumber purported to operate on a commission basis rather than by resale. The result was that in the year ended 31st December 1971 Kalimantan Sari made a profit for the first time.

In the Federal  
Court in  
Malaysia

\_\_\_\_\_  
No. 22

Judgment

\_\_\_\_\_  
4th August 1975

It was submitted on behalf of the applicant that Kalimantan Sari was not intended to and in fact did not make a profit, whereas United Singapore Lumber was intended to and did make a profit. This was achieved by United Singapore Lumber purchasing logs from Kalimantan Sari at less than their market value and selling them at their true value. This was denied by the respondents. On this question the learned Judge accepted the written submissions made by counsel for the respondents and arrived at the conclusion that there did not seem to be any evidence to support the applicant's allegation.

In view of the fact that all the shares which Beng Siew held in United Singapore Lumber have been transferred to K.T.S. with the exception of some shares in respect of which he has executed a trust deed, and the fact that no dividends were received by him, it would be idle to speculate on what would have happened if the applicant had not started making inquiries and subsequently brought these proceedings. But it would be wrong to say that the applicant's allegations in this regard were ill-founded and actuated 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) (a) Kong Thai Lumber Sendirian Berhad (Chalfont Investments Ltd.)  
(b) Sabah Agency Berhad (Glendale Investments Ltd.)

At the time of commencement of these proceedings Beng Siew and Beng Siong held 20,000 and 17,500 shares respectively out of the total 100,000 subscribed shares in Chalfont Investments Ltd., a company incorporated in Hong Kong on 5th September 1968. The shares to Beng Siew and

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment  
—

4th August 1975

Beng Siong were allotted on 31st December 1969. The only business of Chalfont is and has been the exploitation of various concessions in Indonesia by an agreement with the Indonesian concessionaires. For the extraction of timber Chalfont entered into an agreement with Kong Thai Lumber Sendirian Berhad (hereinafter referred to as "K.T. Lumber"), a company incorporated in Sabah on 28th December 1968. The only business carried on by K.T. Lumber has been to extract timber for Chalfont from those areas in which Chalfont had the right to exploit the concessions. Between 1968 and 1970 K.T.S. lent to K.T. Lumber to help in its operations a total sum of \$678,936.91 cts. The purchase price of the shares eventually issued to K.T.S. in K.T. Lumber was satisfied by the reduction of the amount owed by K.T. Lumber to K.T.S. From the time of its incorporation until 15th June 1970 the only issued shares in the capital of K.T. Lumber were the subscriber shares. On that date 8,998 shares were issued, 2,248 to Beng Siew and 3,375 each to K.T.S. and the Borneo Company (Singapore) Sendirian Berhad.

10

Beng Siew and Beng Siong also held 13,500 and 9,000 shares respectively out of the 60,000 subscribed shares in Glendale Investments Ltd., yet another company incorporated in Hong Kong on 15th November 1968. The shares of Beng Siew and Beng Siong in this company were also allotted on 31st December 1969. The only business of Glendale also is and has been the exploitation of forest concessions in Indonesia by an agreement with the Indonesian concessionaires. For the extraction of timber Glendale entered into an agreement with Sabah Agency Sendirian Berhad, a company incorporated in Sabah on 31st December 1968. The only business carried on by Sabah Agency has also been to extract timber from those areas in which Glendale has had the right to exploit the concessions. Between 1968 and 1970 K.T.S. lent to Sabah Agency a total sum of \$1,674,738.10 cts to help in its operations. The purchase price of the shares eventually issued to K.T.S. in Sabah Agency was satisfied by the reduction of the amount owed by Sabah Agency to K.T.S. From its incorporation in 1968 until 15th April 1970 the only issued shares in the capital of Sabah Agency were the subscriber shares. On that date 8,997 shares were issued, 1,349 to Beng Siew, 2,700 each to K.T.S. and the Borneo Company (Singapore) Sendirian Berhad and the rest to three other persons.

20

30

40

The agreements pursuant to which K.T. Lumber carried out work for Chalfont and Sabah Agency carried out work for Glendale were entered into on behalf of the Sabah companies by Beng Siew as their director. It is common ground that Beng Siew entered into these contracts without the approval

of the Board of Directors of K.T.S. and did not disclose to the directors of K.T.S. his interest in those contracts by reason of his shareholding in the Hong Kong companies. It was submitted for the applicant that those agreements by Beng Siew were so drawn up as to make it inevitable that the operations of K.T. Lumber and Sabah Agency would be unprofitable. This was because of the fixed price for the timber over a long period of years.

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

10 For the respondents it was contended that the Hong Kong companies were required under the contracts to provide all heavy equipment for the extraction of timber so that the risk in regard to the capital investment in the equipment rested entirely with them. The learned Judge took the view that as the respondents had made available all the accounts of the Hong Kong companies as asked for in the originating motion, there was nothing more to be done in the matter. He further found that apart from speculative allegations on the part of the applicant there was no evidence that the funds of K.T.S. were used for the purpose of financing those two  
20 Hong Kong companies.

It is not in dispute that whereas the Hong Kong companies were making profits, or at any rate not suffering great losses, right from the beginning, the Sabah companies suffered losses in the initial stages of their operations. I think it is also not seriously in dispute that any timber company is not likely to make profits within the first two or three years of its operations. The original agreements into which Beng Siew entered on behalf of the Sabah companies with the Hong Kong companies may be said to have been more  
30 advantageous to the Hong Kong companies but they were amended, so that matters have now been put right. In my view it is reasonable to assume that they may not have been put right but for these proceedings. The complaints in this regard by the applicant were therefore not ill-founded or made maliciously to discredit Beng Siew or to disparage him and his associate brothers as alleged in Beng Siew's first affidavit on 30th September 1971.

The question which arises out of those contracts entered into on behalf of the Sabah companies with the Hong Kong companies by Beng Siew without the approval of and  
40 without the disclosure of his interest in those contracts to the directors of K.T.S. is whether he is liable to account to K.T.S. for the profits which he made in the Hong Kong companies.

It was submitted at the hearing of the appeal before us by learned counsel for the appellant that he is so liable. The arguments in support of that submission proceeded on



In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment  
—

4th August 1975

these lines. A director is a trustee of the funds of the company and of his power over the company's affairs. He must use those powers solely for the benefit of the company. He is absolutely prohibited from entering into a transaction in which he is interested, although the company's articles may permit the other directors to enter into a contract in which one of their number is interested. But a director who is a managing director is absolutely prohibited from entering into a contract in which he is personally interested and cannot rely upon such an article. If a director enters into a contract in which he is interested in breach of this rule he is liable to account for the profits.

10

Counsel for the appellant went on to make further submissions as follows. Beng Siew was a director of Kong Thai Lumber in which Kong Thai Sawmill had a substantial investment. Clearly in exercising his powers as a director of Kong Thai Lumber he was bound to do so for the benefit of Kong Thai Lumber and therefore indirectly for the benefit of K.T.S. which was a shareholder in Kong Thai Lumber. As director of Kong Thai Lumber, Beng Siew entered into a contract with Chalfont, a company in which he was interested as shareholder, and that contract was one which no person who had the interest of K.T.S. at heart would have entered into. Precisely the same thing happened with Sabah Agency and Glendale. Those two contracts were clearly improper contracts. It is clear that this detriment to Kong Thai and Sabah Agency became apparent to Beng Siew and his advisers, because he filed a corrective affidavit to say that the matter had been put right and the agreements had been amended. However, there is conflict between what he said in his corrective affidavit and what he said in evidence. The fact is that both the original and subsequent agreements are disadvantageous to Kong Thai and Sabah Agency and advantageous to Chalfont and Glendale, the reason being that in both agreements there is a fixed price which could not be altered without further agreements with the Hong Kong companies. Beng Siew put himself in a position where his duties and interest were in conflict, thus abusing his power. The consistent pattern was one in which the controlling directors consistently put themselves in positions in which they were dealing on behalf of K.T.S. and its associate companies with companies in which they were themselves interested without previous authority from the board of directors of K.T.S. This was another reason why the applicant as a minority shareholder was entitled to say that he had justifiably lost confidence in the probity of the managing director to act fairly in the interest of the company.

20

30

40

It was contended for the respondents that no authority was produced for the proposition that Beng Siew should not

have entered into contracts on behalf of Kong Thai Lumber and Sabah Agency with Chalfont and Glendale in which he had an interest. The only other argument advanced was that Kong Thai Lumber and Sabah Agency were not subsidiaries of Kong Thai Sawmill.

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment  
—

4th August 1975

I do not think any authority is required for the argument advanced by counsel for the appellant as regards the liability of Beng Siew to account for the profits. But there is a good deal of substance in the argument that he has no direct liability to account to K.T.S. for contracts which he entered into on behalf of the Sabah companies in which K.T.S. was a shareholder like any other shareholder. The liability to account for the profits in my view is to those Sabah companies with which we are not concerned in these proceedings. However reprehensible Beng Siew's conduct may have been with regard to those contracts, I must hold that he is not liable to account to K.T.S. for the profits which he has made and will probably continue to make in those two Hong Kong companies.

10

20 5. Malaysian Daily News Sendirian Berhad

The acquisition of the Malaysian Daily News was obviously not in line with the company's business as a timber company. There is no evidence that the newspaper has proved to be a profitable venture, nor is there any indication that it will ever be. The applicant's complaint is that the newspaper was acquired as an organ to further the political ambitions of Beng Siew and Beng Siong. There would appear to be no doubt as to the interest which Beng Siew and Beng Siong took in the politics of Sarawak. There can also be no doubt that a newspaper is a very valuable instrument for a politician. But there would appear to be no evidence, apart from speculation, that the newspaper has been used to further the political ambitions of either Beng Siew or Beng Siong. As I have already said, as a business venture the Malaysian Daily News has not proved to be profitable, but Beng Siew had been given a full authority by the board of directors to make such investments as he thought fit. In those circumstances I do not think it is open to this Court to make any order with regard to this investment.

30

40

6. Aurora Hotel

The basis of the complaint about the Aurora Hotel was that it was purchased without a proper survey as to its profitability and without calling a meeting of the Board of Directors. But the Board of Directors had given Beng Siew full authority to make such investments. The shrewd

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment  
—

4th August 1975

businessman that Beng Siew is, I do not think he needed any advice or survey as to the advisability of purchasing the Aurora Hotel. Here he was investing money in immovable property which in the nature of things continues to rise in price with inflation and rarely comes down even with deflation. There is some evidence that another immovable property was bought in Kuching and sold at a profit. Indeed, it will be correct to say that the Aurora Hotel building in itself is perhaps the most valuable asset which the Company now owns. The hotel may not have made profits in the early stages of its acquisition, but I do not think that it will continue to suffer losses. I therefore agree with the learned Judge's finding that there is no ground for complaint as regards the purchase of the Aurora Hotel. 10

7. Berjaya Malaysia

Beng Siew used \$48,000/- of the Company's funds to buy Berjaya Malaysia but he had it registered in his own name as his private property. The explanation he gave for doing that was that there were stricter safety regulations if the yacht was registered in the name of a company than if it was registered in the name of an individual. The boat was renovated at a cost to K.T.S. of more than \$500,000/-. The running expenses of the boat in the year 1968/69 were \$189,027.80 and in the year 1969/70 they were \$95,910.49. The total amount spent on Berjaya Malaysia up to the time of Peattie's inspection was \$797,031.91. That is a very large sum of money and the applicant as a shareholder was entitled to know what the Company got in return. 20

The records of K.T.S. contained no explanation about the expenditure and there was nothing in them to show that the boat was necessary or was used for the Company's business. The vessel is not a working boat. It is an extremely luxurious yacht and has been used as such by Beng Siew and Beng Siong. According to Beng Siew the boat was used for travel to Indonesia, but there is no evidence that it ever went there. There was a half-hearted suggestion that the boat could be used for travelling to Niah, but Beng Siew eventually admitted that they used a different boat for that purpose. From this admission it is clear that Berjaya Malaysia was unnecessary for the Company's business. 30 40

According to Beng Siew any director could have used the yacht if he wished to do so, but no director wanted to and so it was in fact used only by Beng Siew or Beng Siong. In any event, it is not right that the Company should pay such large sums of money merely for the amusement of the directors. Beng Siew's statement that it was used in

Singapore, Kuching and Penang etc. to entertain customers is beside the point. The Company did not sell timber to those places and in fact had no customers there, since it sold through an agency. The suggestion that purchasers of timber required entertaining has no support in evidence. Moreover all these places are easily accessible by air far more quickly and far more conveniently than by boat, and all of them possess excellent facilities for entertainment if there was any need to entertain any one. For the Company to have a boat costing more than half a million dollars merely for the purpose of entertaining customers is the height of absurdity, even if it could afford it. Needless to say, a luxury yacht can hardly be called an investment.

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th July 1975

The motion sought an order that Beng Siew should take over and pay for the boat. In his affidavit Beng Siew said that he was only too willing to take over the yacht. He tried to convey the impression that a number of people were eager to buy the boat and that it was worth more than was spent on it. He produced a letter which carefully avoided making a definite offer or mentioning a definite price. This letter was written after the proceedings had commenced. He said that the only thing deterring him from taking over the boat was the fact that this would mean a personal gain to him and a substantial loss to K.T.S. He himself gave the lie to the sincerity of his statement that he was willing to buy when he stated under cross-examination that he was not willing to do so.

No prior authority was given by the Board for the purchase of Berjaya Malaysia or for its reconstruction. But Beng Siew secured retrospective approval, as he secured retrospective approval for so many other things which needed to be put right from his two directors on 10th June 1970 when 24 resolutions were put through in 90 minutes.

On the subject of Berjaya Malaysia counsel for the applicant in the court below submitted as follows:-

" The evidence on Berjaya Malaysia as a whole shows conclusively that it was an extremely expensive vessel to buy and renovate, it is extremely luxurious, it is very expensive to run, that it is not the kind of boat which a logging company requires, that the contention that it was required to entertain people in Singapore, Penang etc., is preposterous, and that it was in fact used as a personal yacht principally by Beng Siew and also by Beng Siong, that K.T.S. money was used to provide and maintain this personal yacht for Beng Siew and Beng Siong, who spent not a cent of their own money on it but in this matter, as in so

In the Federal  
Court in  
Malaysia

many others, used K.T.S. funds to provide for all their own lavish requirements."

—  
No. 22

It would be difficult for any court not to agree with that submission in the circumstances of the case.

Judgment

The view which the learned Judge took about Berjaya Malaysia is stated in his judgment as follows:

—  
4th August 1975

" Peattie under cross-examination said that he had received a full explanation for the moneys spent on the Yacht and was satisfied that the expenditure was in accordance with the authority of the Board of Directors (See K.T.S. 46 Folio 36), of which at the relevant time the applicant was a member though he did not choose to attend the meetings. He also conceded that the vessel appeared to be used in connection with investment companies. Peattie agreed that it was a decision properly within the domain and discretion of the Directors."

10

With respect to the learned Judge, it did not matter what Peattie had to say about Berjaya Malaysia under cross-examination. The question which he had to decide was whether in the light of the evidence not only of Peattie but also of Beng Siew, it was right for K.T.S. to have been saddled with a white elephant at such an enormous expense. Beng Siew had general approval by the resolution of the Board of Directors of 27th December 1967 to purchase "tractors, logging trucks, machineries and other equipment necessary for the operation of the company." I find it quite impossible to agree that that authority covered the purchase of a luxury yacht. Whether or not the purchase and renovation of Berjaya Malaysia was approved ex post facto, it is open to this court to make an order under section 181 of the Companies Act, in fairness to the shareholders of the company, that the ex post facto resolution be cancelled and that Beng Siew be required to take over the boat and pay back to the company all the money that has been spent on its purchase, renovation and maintenance up to date. I would therefore make an order accordingly.

20

30

#### 8. Donations

##### (i) Sarawak Chinese Association (S.C.A.)

The investigation by Peattie revealed that a sum of ~~£~~2,018,674/- was paid out from K.T.S. funds as donations during the period 1966/70. By way of comparison a sum of ~~£~~2,298,400/- was paid out as dividends to the shareholders during the same period.

40

The amount of donations made to the Sarawak Chinese Association (S.C.A.) in the year 1968/69 as shown in the Company's books is \$1,009,800.69. It is with these donations that we are concerned in the appeal, as they were the ones which were questioned by the applicant when he started making the enquiries which resulted in these proceedings. A large number of these donations were not made direct by K.T.S. but were made by Beng Siew personally in his own name and later reimbursed by K.T.S. He was the Chairman or President of S.C.A., so that the donations were made by him in one capacity to himself in another capacity. In those circumstances, there was a heavy burden on him to show that the payments were actually made for the purposes of S.C.A., that they were properly authorised on behalf of K.T.S. and that they were made bona fide for the benefit of K.T.S. He failed to produce any evidence to substantiate any of these matters.

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

He was unable to remember exactly how the money had been spent. He claimed that the accounts of S.C.A. for the relevant period would show the payments and the way the money had been dealt with by S.C.A., but that the accounts had been burgled. The curious thing about the burglary was that it was not reported to the police until three weeks after it was alleged to have taken place and nothing else was stolen. In evaluating this evidence it is important to bear in mind that on two previous occasions when the applicant sought to obtain accounts from Beng Siew in relation to his administration of his father's estate and the management of the family partnerships, he had said in one case that the accounts had been destroyed in accordance with his father's usual business practice and in the other case that they had been lost in a flood. It is more than a coincidence that when asked to produce accounts of how the donations were utilised, he gives theft as an excuse for his failure to do so.

He claimed that the accounts had been audited, but he was unable to produce any copy from the auditors. At the adjourned hearing he admitted that during his period as President no accounts of S.C.A. had ever been audited. He also admitted that a large part of the donations which appear from the books of K.T.S. to have been made to S.C.A. were not made to S.C.A. but to other political parties. As regards the receipts in respect of the donations, he implied in his affidavit that they were issued when the payments were made. The receipts bear dates ranging from 1st October 1968 to 29th September 1969, although Beng Siew admitted that they were not issued until after the 1970 elections, that is, after the applicant had written a letter asking for details of donations. Later he said that the

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

the auditor asked for the receipts when he was auditing accounts, but the audited accounts were approved on 9th March by which time the auditor had done his work. The only inference from all the evidence which Beng Siew gave about the receipts would appear to be that they were issued in order to show them to the applicant's investigator.

The accounts lodged with the Registrar of Societies by the S.C.A. did not reveal the donations said to have been made by K.T.S. to S.C.A. An attempt was made to explain this by saying that the accounts for the headquarters of S.C.A. did not include the branches. Thus the only evidence about the donations was that of Beng Siew himself whose memory about them by his own confession was faulty. No evidence was given by other officers of the association who might be expected to know about the receipt and expenditure of the donations.

10

The payments together with receipts shown in the accounts of S.C.A. with the Hock Hua Bank did not account for all the payments shown in the books of K.T.S. as donations to S.C.A. and in fact paid to Beng Siew in reimbursement. No authority was given by the Board of Directors of K.T.S. for the payments made to Beng Siew and charged as donations to S.C.A. until the passing of the resolution of 10th June 1970 the hearing of the resolution shows conclusively that the purported donations were not authorised by the directors other than by Beng Siew or Beng Siong at the time they were made.

20

(ii) To Sarawak National Party (S.N.A.P.)

Peattie's affidavit disclosed that the books of accounts of K.T.S. showed donations to Sarawak National Party (S.N.A.P.) amounting to \$145,000/- during the year 1968/69. Datuk Stephen Kalong Ningkan filed an affidavit to say that these payments were never received by the treasurer of S.N.A.P. At his cross-examination in court, receipts purporting to be receipts by S.N.A.P. were produced and it was suggested that he had failed to make proper inquiries from the fund raising committee of S.N.A.P. However, the cross-examination of Beng Siew revealed that the payments were made not to S.N.A.P., but to candidates, in particular one Charles Ingka, to induce them to desert S.N.A.P., which had left the Alliance, and oppose it in the elections. At first Beng Siew denied that he knew that Charles Ingka had left S.N.A.P. when payments were made to him. Later he admitted that when he made the payments he had heard that Charles Ingka was no longer a member of S.N.A.P. It was thus clear that the payments were not made to S.N.A.P. but to persons opposed to S.N.A.P. Further, three of the

30

40

payments were made by Beng Siew personally and later reimbursed from the funds of K.T.S. No authority of the Board of Directors was given for these reimbursements of private donations made by Beng Siew until the resolution of 10th June 1970.

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

10 It was submitted for the applicant in the Court below that a large number of the donations were made by Beng Siew personally and subsequently reimbursed from K.T.S. funds without authority from the Board of Directors. It was also submitted that while a company has power to make donations for charitable and public purposes, such donations can only be justified if made bona fide for the benefit of the company by enhancing its public reputation. It was lastly submitted that the payments by Beng Siew enhanced and were made to enhance his own personal reputation.

20 Counsel for the respondents submitted that it was clear from Peattie's evidence and the documents which were referred to him in cross-examination that the Company had power to make donations of this nature, that the donations were in fact authorised by the Board and that so far as Peattie was concerned he had seen and was satisfied with the evidence of the receipt of the moneys by the recipients.

The learned Judge agreed with the submissions made by counsel for the respondents and made the following findings of fact.

" Upon the evidence and as agreed or conceded by Peattie before the Court I find as a fact:

- 30 (a) that donations were in fact made by Kong Thai (not by Beng Siew) in the amounts and to the recipients disclosed in the evidence from 1965 to 1970;
- (b) that the company has power in its memorandum to make donations;
- (c) that all the donations were reported at board meetings and approved by the directors and that the amounts were audited (see Ex. KTS 46 page 57);
- 40 (d) that the accounts containing reference to the donations were presented at the annual general meetings of the shareholders of the company and approved by the members without dissent.



In the Federal  
Court in  
Malaysia

(e) that the allegations made by Beng Sung in his affidavit (paragraph 77(c)) that the political donations were made for personal political advancement of Beng Siew have not been proved.

No. 22

It is desirable to point out that the applicant did not become a shareholder until 1st January 1967."

Judgment

4th August 1975

It would seem clear that the learned Judge relied on these findings of fact solely on the evidence of Peattie and completely overlooked the very unsatisfactory nature of Beng Siew's evidence in relation to the donations made to S.C.A. and S.N.A.P. in the year 1968/69. Beng Siew had no general authority delegated to him by the Board of Directors to make those donations on behalf of the Company. His story that he was given such authority when the Company was formed cannot possibly be true. If there had been any such authority it would have been in writing in a proper resolution like the authority which was delegated to him to purchase equipment necessary for the operation of the Company and to make investments. The authority by the Board was given ex post facto by one of their numerous resolutions passed on 10th June 1970 after the applicant had written to ask for particulars of donations. Beng Siew should have made no donation to himself as President of S.C.A. without the express approval of the Board before the donations were actually made. He had no authority, and neither the Board nor the Company in general meeting could give him authority, to reimburse himself moneys which he had spent for political purposes.

10

20

In my judgment on the evidence as a whole a case has been made out for this Court in the exercise of its jurisdiction under s. 181 of the Companies Act to order Beng Siew to pay back to the Company the total sum of \$1,154,800.69 which was paid out allegedly as donations to S.C.A. and S.N.A.P. in the year 1968/69. I would make an order accordingly.

30

9. Drawings by Beng Siew and Beng Siong

Substantial drawings by Beng Siew, Ling Beng Siew & Co. and Beng Siong were revealed in the books of K.T.S. for the financial years 1966 to 1970, as stated by Peattie in his affidavit. On the sums owing from time to time no interest was paid nor was security given for repayment. Furthermore, there was no authority given for these drawings which were in most cases in contravention of the provisions of the Companies Act, being loans to directors of a public company.

40

Both the total amounts and the balances from time to time

in respect of such drawings by Beng Siew and Beng Siong from K.T.S. funds were large. Furthermore, efforts were made to ensure that these balances did not appear in the accounts of K.T.S. by the expedient of temporary repayment of the amounts owing immediately before the end of the Company's financial year and taking out substantial sums again shortly after the end of the company's financial year.

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment  
—

4th August 1975

10 The evidence with regard to these drawings clearly shows that Beng Siew and Beng Siong took money from the company as and when they liked. They took it without authority. They took it because they controlled the funds. It is true that Beng Siew's account had large credit balances for a period in the year 1970. It is also true that Beng Siew had guaranteed a large loan from a bank to the Company. Moreover, the matters were put right by one of the numerous resolutions passed on 10th June 1970 that interest be charged on the balance of the amounts outstanding. But all that does not alter the fact that it was wrong for Beng Siew and Beng Siong to take money from the Company's  
20 funds in the way they did.

The learned Judge dealt with this question by agreeing with the written submission of respondents' counsel. This is what he says in his judgment:

30 " In regard to drawings and other payments the evidence shows that interest has now been credited. I am satisfied that the failure to charge interest prior to the commencement of these proceedings was not deliberate and accordingly further consideration of items falling under this category is not now necessary."

40 With respect to the learned Judge, the charges against Beng Siew and Beng Siong were very serious. I think it reasonable to assume that but for these proceedings nothing would have been done about these drawings. I do not therefore think that failure to charge interest was not deliberate or that it was due to inadvertence on the part of Beng Siew or Beng Siong. The truth is that these drawings were never shown in the annual accounts. They remained concealed from the other directors and from the shareholders because they were never discussed at any board meetings and were not shown in the annual accounts. The drawings by Beng Siong were inexcusable. His account was all the time in debit except when he made payment just before the end of the financial year. He filed no affidavit and gave no evidence to offer any explanation. How can it then be said in his case that the failure to charge interest was not deliberate?

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment  
—

4th August 1975

The fact that the matters were put right after the applicant started making inquiries is no answer to the charge. With respect, what the learned Judge failed to consider was that these drawings clearly showed lack of probity on the part of the controlling directors resulting in a justifiable lack of confidence in them as directors by any minority shareholder. The attitude of Beng Siew and Beng Siong clearly was that so long as they held control over the funds as directors they could do what they pleased. That obviously is not permitted when one is dealing with a public company.

10

In Loft, Inc. v. Guth, 5 Atlantic Reporter (2nd series) (Del) 503, 510, Layton C.J. delivering the opinion of the court said at 515:

" 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 inquire, 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 abuses, and without the knowledge or authority of the corporation's Board of Directors. Cunning and craft supplanted sincerity. Frankness gave way to concealment."

20

I am compelled to say that those words of the learned Judge apply equally to Beng Siew and Beng Siong.

Having dealt with the matters complained of by the applicant, I now come to the grounds on which the application was resisted.

30

As I have stated at the beginning of my judgment, the first ground on which the application was opposed was that the proceedings were brought with an ulterior motive. In this connection the written submission made by learned counsel for the respondents in the Court below reads as follows:

" The respondents to these proceedings invite the Court to dismiss them summarily on the grounds that they are made with an ulterior motive namely that they form part of a long history of family disputes and represent an attempt by the applicant to vent his personal spite on his elder brother, the respondent. It is common ground between the parties that since the

40

death of the father in 1955 there has been a long history of family disputes between the three older brothers on the one hand and the three younger brothers on the other. In his original affidavit, the applicant as one would have expected because it was not then an issue, made no reference to this history of family disputes. It was, however, dealt with in the affidavit of Beng Siew who was cross-examined with a view to establishing that he was the one to blame and in re-examination, he was asked to and did give in much fuller detail an account of the relevant facts relating to some parts of this dispute. It is, it is submitted, a material fact which the Court is bound to take into account in considering this aspect of the matter that the applicant did not see fit either to file an affidavit in reply to the evidence given by Beng Siew or perhaps more significantly to put himself in the position of having to answer questions on matters which were raised in the cross-examination of Beng Siew. Counsel for the applicant expressly stated that he did not propose to read a supplementary affidavit on the grounds that he did not wish to subject him, the applicant, to further cross-examination. The Court is, therefore, bound to conclude that any evidence which the applicant would have given by way of rebuttal would have been adverse to his own case and should, therefore, accept the only evidence being that of Beng Siew on the nature and history of the family dispute a part of which included the circumstances under which the shares of the three younger brothers in the company came to be held by them in the first instance. This evidence, taken in conjunction with the other matters adverted to elsewhere in these submissions as being relevant on the question of motive, lead to the conclusion, and the Court is invited to so find, that the prime and only real purpose of these proceedings is the destruction both financially and in the way of his reputation, of Beng Siew and that the applicant is seeking an Order which will best give effect to this purpose irrespective of the financial damage which it might do not only to himself but also to the other minority shareholders, none of whom have come out in support of this application and some of whom by implication in the affairs of the company, as appears from the records of the company which are in evidence, must be taken to have approved the various courses of action which are now the subject of complaint by the applicant."

There is no dispute about the existence of ill-feeling that exists in the family. It is also equally clear that this

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment  
—

4th August 1975

In the Federal  
Court in  
Malaysia  
—  
No. 22  
Judgment  
—  
4th August 1975

ill-feeling began with the dispute which arose when the younger brothers asked for the accounts of the administration of their father's estate of which Beng Siew and Beng Siong were the administrators. The second dispute arose in relation to the accounts of the partnerships which were being carried on by Beng Siew and Beng Siong. It is the younger brothers who were aggrieved over the failure of Beng Siew and Beng Siong to produce accounts. The explanation given on those two occasions was that the accounts had been destroyed or were lost in a flood. The explanation given by Beng Siew when he was asked to produce the accounts of Sarawak Chinese Association as to how the donations were utilised was that the only copy of the accounts showing how they were spent had been stolen by somebody who had broken into the office, with nothing else stolen. But those disputes were settled long ago. How then does any question of motive by the applicant in making the present application arise?

10

I do not know what dispute there can be as to the circumstances in which the shares of the three younger brothers were issued to them. What Beng Siew said in his affidavit was that he gave the younger brothers shares in the company because Beng Sung begged him, and that the relationship between them soured when he was unable to get them a further 2,000 shares. If it was proposed to put all this to Beng Sung, why was he not cross-examined on the point when he gave evidence? How could the court therefore conclude that any evidence which the applicant would have given by way of rebuttal would have been adverse to his own case. Even if the evidence of Beng Siew on the nature and history of the family dispute, a part of which included the circumstances under which the shares of the three younger brothers in the Company came to be held by them in the first instance, were to be accepted fully, it does not show any malice on the part of the applicant.

20

30

The shares in the Company were first allotted to Mukah Sawmills which belongs to the three younger brothers. A sum of \$100,000/- was paid in cash for the shares on 25th December 1965 when the Company was still developing its timber concession and was short of cash. There is evidence that some equipment was bought with that money. The shares were not allotted until the following year. The company had borrowed money from the three younger brothers' bank. Assuming that Beng Siew had done the three younger brothers a favour by giving them shares in the company, is that any reason why the applicant should not have brought these proceedings to question the way in which the affairs of the company were being managed by Beng Siew? I do not think so. The fact that it required the

40

directors to pass 24 resolutions on 10th June 1970 to put right matters which were wrong is sufficient to refute any argument that these proceedings were brought maliciously with some ulterior motive. Indeed in those circumstances motive was entirely irrelevant. In my judgment the whole argument about motive was another red herring which, with great respect to the learned Judge, completely misled him into making a finding of fact that these proceedings were actuated by malice.

In the Federal Court in Malaysia

—  
No. 22

Judgment

—  
4th August 1975

10 Perhaps it would be useful to quote the Judge's views as to his finding of malice. This is what his Lordship says in his judgment:

" A fact which calls for mention is that the applicant accused the second respondent Beng Siew of having misappropriated funds of Kong Thai to make donations in his own name or for the furtherance of his own personal or political ambitions and those of the third respondent.

20 This considered in the light of Peattie's evidence is not true for Peattie in his cross-examination said 'as far as I know there is not a jot of evidence to suggest anything improper.' 'Agreed that donations were made and approved.' (Page 751 and 76A of Record).

In paragraph 77 of his affidavit applicant again accused the second respondent of misappropriating and converting moneys to his own use without the knowledge or authority of the directors or shareholders.

30 This seems to be an expression of opinion which is upon the evidence unfounded and unsupported and I hold that this was motivated by malice.

Further allegations were made by applicant that Beng Siong with the authority and connivance of Beng Siew and without the knowledge or authority of the other directors or shareholders misappropriated and converted to his own private and personal use certain funds of the company.

... ..

In the present motion, there is no evidence to support any allegation of misappropriation by either the second or third respondent (see page 170 of Record).

40 The Prayers asked by the application sought relief as an oppressed minority shareholder upon the ground that the affairs of the Company are being conducted or

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

the powers are being exercised in a manner oppressive to him (Section 181(1)(a)). They do not show any honest belief that he is being oppressed. In my view therefore there is abundant evidence on which the court could properly conclude that the allegations are actuated by malice and I so find.

From these statements, it seems to the Court that the applicant's complaints appear to me to be so ill-founded as to be consistent with a firmly fixed and unalterable determination of the applicant to wreck the company without regard to whether such a course is justified." 10

With great respect to the learned Judge, far from there being abundant evidence that the allegations were founded on malice, there was no evidence whatsoever for that conclusion. The learned Judge says that there was no evidence to support the allegation of misappropriation by either the second or third respondent. With respect, there was ample evidence. The fact that the two respondents were helping themselves to the company's money as and when they liked, even though for short periods, was nothing short of misappropriation of the company's funds. The fact that the accounts they had with the company were current accounts does not alter the fact that moneys were drawn without any reference to the Board and were very cleverly kept out of the annual accounts. 20

The second ground for opposing the application was that in so far as the acts complained of were specifically or generally authorised or approved by the directors, it is all the directors including the applicant who would be liable if the applicant was successful; yet the other directors have not been made parties to these proceedings. I do not think there is any merit in this ground. 30

A director is not liable for the acts of his co-directors of which he has no knowledge and in which he has taken no part, as his fellow directors are not his servants or agents to impose liability on him. Non-attendance at board meetings has been held not to impose liability on a director for the acts of the board. (See re Denham & Co. 1884 25 Ch. D. 752). When a director has misapplied the company's funds by advancing money for a non-authorized purpose he is not entitled to obtain contribution from the other directors. Every director is entitled to have reasonable notice of a meeting. There is no evidence that the applicant had reasonable notice of any meeting. 40

The complaint against the respondents as regards

drawings was that they were never specifically or generally authorised. They were ratified by the directors ex post facto after the applicant had started making inquiries. The same is true of the donations. The authorisation in respect of Berjaya Malaysia was given ex post facto. The vessel was bought in the name of Beng Siew and was not transferred to the company until 1970. The powers delegated to Beng Siew did not cover the purchase of a luxury yacht. There was no power delegated to him at any time in writing to make donations to political parties in his own name and at his discretion and to get himself reimbursed from the company's funds. The applicant himself never took part in the ratification of any of the acts. I do not think his being present at any of the board meetings would have made the slightest difference.

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

It is to be observed that the three serious transgressions by the respondents are alleged to be in relation to the purchase of Berjaya Malaysia, the political donations, and the drawings made by them from the Company's funds. It was argued before us that during the time that all these transgressions took place the applicant was a director of the Company and as such responsible for the acts of the Company. He took all the remuneration due to him as director but chose not to concern himself with the affairs of the Company. He therefore acquiesced in what Beng Siew and Beng Siong had done. It was next argued that if he had performed his duties correctly he would have known what was going on.

The truth is that if the applicant had attended all the Board meetings he would have learned about the purchase of Berjaya Malaysia but only after it had been purchased. He would not have learned anything about the donations because they were never disclosed at Board meetings. He would have learned about them from the annual accounts but there were no big donations until the year 1968/69. It was when he saw the accounts for that year in 1970 that he immediately started inquiries, and in his letter of 27th April 1970 the first subject of inquiry was the donations. I do not think, therefore, that he acquiesced in those donations. He would not have learned of the drawings because they were never discussed at any Board meetings and they were not shown in the annual accounts. It is true that he would have learned a lot if he had attended the meeting of 10th June 1970, but by then he had obviously made his choice and was making his own inquiries which ultimately brought about these proceedings. Moreover, it is extremely unlikely that he was given notice of this meeting.



In the Federal  
Court in  
Malaysia  
—  
No. 22  
Judgment  
—  
4th August 1975

Quite apart from what is alleged against Beng Siew, it must be acknowledged that it was his business acumen and genius which made the Company what it was. I do not think he could be accused of having made any bad investments except perhaps in the case of the Malaysian Daily News. He was largely responsible for building up what has been referred to as the K.T.S. empire. It would seem clear that he ran the whole show without referring any important matter to the Board of Directors. He controlled the majority of votes in general meetings. It will be true to say of him, as was said of Mr. McLaren by Lord Shaw of Dunfermline in Loch v. John Blackwood Ltd. (1924) A.C. 783, 794, that for reasons not unnatural he had come to be of opinion that the business owed much of its value and prosperity to himself. But he appears to have proceeded to the further stage of feeling that in these circumstances he could manage the business as if it were his own. This obviously he had no power to do. That is the gravamen of the complaints against him.

10

The third ground on which the application was opposed was that the complaints which are made do not affect the applicant in his capacity as a shareholder though, if established, they might affect him in his capacity as a director. If I understand this ground correctly, a short answer to it is to be found in Re R.H. Harmer Ltd. (1958) 3 All E.R. 689; (1959) 1 W.L. R. 62 in which it was held that once it was shown that the acts complained of were oppressive to the petitioners as members of the company, it was irrelevant that the petitioners also were directors, for oppressed members who were also directors were not, by virtue of holding such office, disqualified from obtaining relief.

20

30

The last ground on which the application was opposed was that the relief sought in the originating motion is outside the scope of s. 181 of the Companies Act. In this connection it was said that the facts relied upon by the applicant, even if found to be true, do not constitute oppression within the meaning of s. 181. It was next said that the complaints made, even if established, which may constitute breaches of the Act have their own remedies prescribed by the Act for which s. 181 may not be used as a substitute. It is further said that s. 181 is not a substitute for a minority shareholder's action.

40

In my judgment the evidence with regard to drawings by Beng Siew and Beng Siong by itself constituted oppression.

I do not think it can possibly be said that these drawings were not in disregard of the interests of the applicant as shareholder or those of the other minority shareholders. The Act forbids them, they were not authorised by the Board and they were clearly wrongful. Coupled with the drawings are the large sums of money paid out as donations to political parties in the year 1968/69 and the moneys spent for the purchase, reconstruction and maintenance of Berjaya Malaysia. To my mind, the purchase of Berjaya Malaysia and the payment out of more than one million dollars as donation, without the prior approval of the Board, were in complete disregard of the interests of the shareholders.

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

It was argued that most of the claims made by the applicant constitute claims for damages for misfeasance or breach of trust against Beng Siew and Beng Siong and that those claims if valid are properly claims to be made by K.T.S. and not by a single shareholder. The basis for that argument is the rule in Foss v. Harbottle (1843) 2 Hare 461: 67 E.R. 189, that where the majority of the shareholders claim and are held to have ratified alleged incidents of misfeasance or breach of trust against directors and where no fraud is alleged in the application, it is the company which must take action because of the rule that in the absence of fraud it is the majority that governs the affairs of the company.

It is clear from the rule itself that it cannot be invoked where the act complained of constitutes a fraud on a minority of the shareholders and the company is prevented from taking action against the wrongdoers by the votes controlled by the latter. It was said in the court below and repeated before us that there were no allegations of fraud. That to my mind is not true. There were the clearest allegations of fraud by the applicant in his affidavit in relation to the donations made by Beng Siew in his name for which he had himself reimbursed from the company's funds without any authority from the Board and in relation to the drawings from the company from time to time both by him and Beng Siong. What was and is alleged is that Beng Siew and Beng Siong have been guilty of conduct rendering them liable to account to K.T.S. and that as they are the majority shareholders and control K.T.S. they can ensure that no proceedings are taken by K.T.S. to make them account for the moneys which ought properly to be accounted for to K.T.S.

Quite apart from the question of fraud, the rule in Foss v. Harbottle, in my opinion, is no bar to an individual shareholder making an application to the Court under s. 181 of the Companies Act. Speaking of the corresponding s. 210

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

in the English Act, Palmer's Company Law (21st Edn.)  
says at page 512:

" The court has unfettered discretion to make any order which it considers to be appropriate, e.g., for the appointment of additional or other directors; for the removal or the restriction of the powers of a director, for the distribution of dividend or the issue of new shares; or for the prohibition of any of these measures. It can also order or authorise the purchase of the shares of the minority by the majority, the company or others at a price to be fixed by the court. Moreover, since the court may order or authorise the purchase of the shares of any member, the majority might find itself bought out by the minority under the section, a risk which might considerably affect the attitude of a majority in its negotiations with the minority."

10

At page 513 it is stated that "despite the somewhat restricted wording of section 210, the requirements of the section should be interpreted in a liberal spirit in order to carry out the intention of Parliament, which designed this remedy in order to suppress an acknowledged mischief." In this connection reference is made to Re H.R. Harmer Ltd. (1958) 3 All E.R. 689; (1959) 1 W.L.R. 62 in which the Court of Appeal affirmed the order of Roxburgh J. that the company should contract for the services of the father, who had continued to regard the business of the company as his own, as consultant at a stated salary, that he should not interfere in the affairs of the company otherwise than in accordance with the valid decision of the board of directors, and that he should be appointed president of the company for life, but that this should not impose any duties or confer any rights or powers.

20

30

It was further argued that s. 181 exists for the purpose of bringing to an end or remedying the matters complained of and not for the destruction of the company. In this connection we were referred to In re Bellador Silk Ltd. (1965) 1 All E.R. 667. That was a case in which the petitioner applied under s. 210 of the English Act asking, among other things, for the suspension of a director from office. He did not ask for a winding up order, such order being wholly inappropriate to an application under that section. He admitted in cross-examination that his true object was not to obtain the relief which he ostensibly claimed in the petition, but to bring pressure on the other shareholders and directors to pay moneys to other companies in which he was interested. That being so, the Judge had no alternative but

40

to dismiss the petition as an abuse of the process of the court. In my judgment that case has no bearing on the case before us. It was contended that the applicant here was trying to do the same as the applicant In re Bellador Silk Ltd. I must say that I can find no evidence whatsoever in support of this contention. There is ample evidence that a large number of the applicant's complaints were well-founded. As I have previously said, there is no evidence of any malice on his part, and certainly there is no evidence to suggest that his whole object in bringing these proceedings was to bring about a destruction of the company.

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment  
—

4th August 1975

As regards the contention that even if the complaints made by the applicant have been established there are other remedies prescribed by the Act, I do not think I need concern myself with any other remedies that may be found in the Act when s 181(2) of the Act itself would appear to me to provide the most appropriate remedy in all the circumstances of the case. In this connection I would refer to the case of Re Coliseum Stand Car Service Ltd. (1972) 1 M.L.J. 109, in which Abdul Hamid J. held that the applicant there was entitled to a relief aimed at bringing an end to or remedying the matters complained of, and made an order for some of the shares of the first respondent, the majority shareholder, to be purchased by the applicant. In my judgment that case was rightly decided. It was cited to the learned Judge in the court below, but his Lordship was of the opinion that it threw no light upon the questions which arise in the present case because it was not a reasoned judgment. I do not agree, because similar questions do arise here. All that the learned Judge had to decide in that case was whether the application therein had been rightly brought under s.181 of the Companies Act. The same question arises here. For a shareholder to be able to invoke the provisions of this section in aid of his application, all that is required is that the conduct complained of should at least involve a visible departure from the standards of fair dealing and the violation of conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely. (See Buckley on Companies Act 13th edn. page 423).

I do not think it necessary to consider any of the English and Australian authorities which were cited in the Court below and to us on the interpretation of s. 181 of the Act which, as I have stated earlier, is wider in scope than the provisions of the English and Australian Acts from which it is derived.

To sum up, it would seem clear from the authorities that there are two fundamental principles as regards the position of directors. First, they are trustees of the

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

company's money and property in the sense that they must account for all the company's money and property over which they exercise control, and must refund to the company any of its money or property which they have improperly paid away. Secondly, they are trustees of the powers entrusted to them in the sense that they must exercise their powers honestly and in the interests of the company and the shareholders and not in their own interests, failing which they may render themselves liable for their mis-use of such powers. Bearing those principles in mind I am of the opinion that the purchase by Beng Siew of Berjaya Malaysia was mis-use of the company's funds and that the moneys which he paid out or for which he had himself reimbursed from the company's funds in respect of donations to S.C.A. and S.N.A.P. in the year 1968/69 were improperly paid away. He must therefore take over Berjaya Malaysia and pay to the Company all the money spent on it and also pay the Company the amount of the donations paid to those two political parties.

10

It is true that the applicant was a director during the relevant period. But he did not attend any of the directors' meetings and there is no evidence that he was ever given written notice of any board meetings at which the questions of Berjaya Malaysia and political donations were discussed. Indeed, there is no evidence that any elaborate discussions ever took place about either of the two items. It is extremely unlikely that he was invited to the meeting of the board of directors on 10th June 1970 at which the donations were ratified. There is no evidence that a sufficiently full and frank disclosure was made to the shareholders at that meeting of the facts upon which they were asked to vote. There were only two other directors present at the meeting and all the indications are that the very large number of resolutions passed at that meeting were rushed through. As Palmer's Company Law (21st Edn.) says at page 506, a minority can prevent the company from acting on a resolution obtained by a trick, and it would be a trick if the notice of the meeting did not give a sufficiently full and frank disclosure to the directors of the facts upon which they were asked to vote.

20

30

It was submitted in the Court below that in view of the obvious hostility of the applicant towards the respondents an appropriate remedy would be for the purchase by the majority of the applicant's minority shareholding. The learned Judge did not think fit to make such an order, so that it is not necessary for me to consider the point. In my judgment it would be wrong and unjust to order the minority shares of an aggrieved applicant to be sold without

40

his consent. As Buckley on the Companies Acts (13th edition) says at page 423, apparently no order for the purchase of shares by other members or by the company has ever been made under section 210 by the High Court in England otherwise than by consent.

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

10 In view of the orders which I have already indicated for the purpose of remedying the matters complained of, I do not think it would be right to make a winding-up order. As has been said again and again, 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 eventually wound up will not, in my opinion, be beneficial to all the parties concerned.

20 In many cases 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 the goodwill or "know-how" of the company, and the minority shareholder who, urged by the majority shareholders' oppression, petitions for a winding up order might, in effect, play his opponents' game (See Palmer's Company Law, 13th edition, page 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.

30 Counsel for the appellant submitted that apart from any orders which this Court might make to put right the past abuses by the respondents, the rights of the three younger brothers should be protected in future by attaching to their combined 1,000 shares the right to appoint one of them as a watch dog director on the Board. I entirely agree with that submission. I do not, however, agree with the further submission for the revocation of Beng Siew's appointment as Managing Director and for the appointment of a manager under the supervision of the Board, as I am of the considered opinion that the Company can best be managed by Beng Siew himself with this restriction that no bank account of the Company shall in future be operated without the signatures of two directors one of whom shall be a person other than Beng Siew, Beng Siong or Beng Tuang. I also think it necessary in all the circumstances of the case to make the orders 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 as in the past, that a three clear days' notice be given in writing of any directors' meetings, that bonus for the directors

40

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment  
—

4th August 1975

in future shall be 2% of the net profits of which 1% shall be for the Managing Director and 1% for the other directors, that no payment be made to any director in respect of bonus until after the passing of the accounts at the annual general meeting, that the power delegated to Beng Siew to make investments be cancelled and that no donations be made without the prior approval of the Board of Directors.

In the result I would allow this appeal, set aside the learned Judge's order dismissing the motion and make the following orders:

- (a) That Beng Siew do pay back to the Company within six months all such sums as were paid out of the Company's funds for the purchase, reconstruction and maintenance up to date of Berjaya Malaysia with interest at 6% per annum on the cost of purchase and reconstruction only as from 1st September 1971 to the date of payment, and that upon such payment the Company do transfer the boat to Beng Siew. 10
- (b) That Beng Siew do pay back to the Company within six months the sum of \$1,154,800.69 cts paid out from the Company's funds as donations to the Sarawak Chinese Association and Sarawak National Party in the year 1968/69 with interest thereon at 6% per annum from 1st September 1971 to date of payment. 20
- (c) That one of the three younger brothers be appointed as a 'watchdog' director to safeguard their interests, in rotation for each financial year of the Company beginning with the appointment of Datuk Ling Beng Sung and followed by Ling Beng Hui and Ling Beng King.
- (d) That no donations be made in future except in the name of the Company and with the prior approval of the Board of Directors. 30
- (e) That no bank account of the Company be operated without the signatures of two directors one of whom shall be a person other than Datuk Ling Beng Siew, Datuk Ling Beng Siong or Ling Beng Tuang.
- (f) That no moneys be withdrawn from the Company by the Managing Director or any of the other directors as in the past without the prior approval of the Board.
- (g) That a three clear days' notice be given in writing of any directors' meetings. 40

In the Federal  
Court in  
Malaysia

—  
No. 22

Judgment

—  
4th August 1975

(h) That the power delegated to Beng Siew to make investments on behalf of the Company be cancelled.

(i) That bonus in future shall be 2% of the net profits of which 1% shall be for the Managing Director and 1% for the other directors.

(j) That no bonus be paid until after the passing of the Company's accounts at the Annual General Meeting.

10 Having now heard arguments on the question of costs, I would order that the second and third respondents do pay the appellant's costs both here and in the Court below. They must also pay the separate costs of the first respondent Company, if any, both here and in the Court below. There will be a certificate for two counsel.

KUCHING  
4th August 1975.

(Sgd) S.S. GILL  
CHIEF JUSTICE

Wan Suleiman F.J. and Tan Chiaw 'hong J. concurred.

20 Mr. J.E. Vinelott, Q.C. with Mr. Peter Mooney and  
Mr. Joseph Tang for Appellant  
Mr. G. Darvall, Q.C. with Mr. Starforth Hill and  
Mr. C.T. Wong for Respondents  
Solicitors: Messrs. Tan & C. for Appellant  
Messrs. Yong & Wong for Respondents

TRUE COPY

(Sgd)

Secretary to Chief Justice  
High Court Malaya



In the Federal  
Court in  
Malaysia

No. 23

ORDER

CORAM: GILL, CHIEF JUSTICE, HIGH COURT, MALAYA;  
WAR SULEIMAN, JUDGE, FEDERAL COURT, MALAYSIA;  
TAN CHIAW THONG, JUDGE, HIGH COURT, BORNEO

IN OPEN COURTTHIS 4TH DAY OF AUGUST, 1975O R D E R

THIS APPEAL coming on for hearing on the 10th, 11th, 12th, 13th, 14th, 17th, 18th and 19th March, 1975 in the presence of Mr. J.E. Vinelott, Q.C. (with Mr. Peter Mooney and Mr. Joseph Tang) of Counsel for the Appellant and Mr. Cholmondeley Darvall Q.C. (with Mr. G. Starforth Hill and Mr. C.T. Wong) of Counsel for the Respondents AND UPON READING the Record of Appeal and Notice of Motion dated 15th February 1975 and the Affidavit of Joseph Tang sworn on the 15th February 1975 and all filed herein AND UPON HEARING the arguments of Counsel as aforesaid IT WAS ORDERED that judgment and the question of costs of this Appeal be reserved AND this Appeal coming on for delivery of judgment and argument on the question of costs this day in the presence of Mr. J.E. Vinelott Q.C. (with Mr. Joseph Tang) of Counsel for the Appellant and Mr. Cholmondeley Darvall Q.C. (with Mr. G. Starforth Hill and Mr. C.T. Wong) of Counsel for the Respondents IT IS ORDERED that this Appeal be and is hereby allowed and that the Judgment and Order of the Honourable Mr. Justice B.T.H. Lee dated the 12th day of July 1974 be and is hereby set aside AND IT IS ORDERED as follows :-

- (a) That Ling Beng Siew, the 2nd Respondent abovenamed, do pay back to the Company, the 1st Respondent abovenamed, within six (6) months from the date hereof all such sums as were paid out of the Company's funds for the purchase, reconstruction and maintenance up to date of Berjaya Malaysia together with interest on the sums paid for the purchase and reconstruction of Berjaya Malaysia at the rate of six per centum (6%) per annum from the 1st day of September 1971 to the date of payment and upon such payment the Company do transfer the boat to the 2nd Respondent;

10

20

30

40

No. 23

Order

4th August 1975

- (b) That Ling Beng Siew, the 2nd Respondent, do pay back to the Company, the 1st Respondent, within six (6) months from the date hereof the sum of \$1,154,800.69 paid out from the Company's funds as donations to the Sarawak Chinese Association and Sarawak National Party in the year 1968/69 together with interest thereon at the rate of six per centum (6%) per annum from the 1st day of September 1971 to the date of payment.
- 10 (c) That one of the three younger brothers be and is hereby appointed as a watchdog director to safeguard their interests, in rotation for each financial year of the Company, the 1st Respondent, beginning with Datuk Ling Beng Sung, the Appellant, and followed by Ling Beng Hui and Ling Beng King.
- (d) That no donations be made in future except in the name of the Company, the 1st Respondent, and with the prior approval of the Board of Directors.
- 20 (e) That no bank account of the Company, the 1st Respondent, be operated without the signatures of the two directors one of whom shall be a person other than Ling Beng Siew, the 2nd Respondent, Ling Beng Siong, the 3rd Respondent, or Ling Beng Thuang.
- (f) That no moneys be withdrawn from the Company, the 1st Respondent, by the Managing Director or any of the other directors as in the past without the prior approval of the Board.
- 30 (g) That three (3) clear days' notice be given in writing of any Directors' meetings.
- (h) That the power delegated to Ling Beng Siew, the 2nd Respondent, to make investments be and is hereby cancelled.
- (i) That bonus in future shall be two per centum (2%) of the nett profits of which one per centum (1%) shall be for the Managing Director and one per centum (1%) shall be for the other directors.
- 40 (j) That no bonus shall be paid until after the passing of the Company's, 1st Respondent's, accounts at the Annual General Meeting:

In the Federal  
Court in  
Malaysia

—  
No. 23

Order

—  
4th August 1975

AND UPON FURTHER HEARING the arguments of Counsel on the question of costs IT IS ORDERED that the 2nd and 3rd

In the Federal  
Court in  
Malaysia

No. 23

Order

4th August 1975

Respondents abovenamed do pay the costs of the Appellant both here and in the Court below AND IT IS ORDERED that the 2nd and 3rd Respondents do also pay the separate costs of the 1st Respondent, if any, both here and the Court below AND IT IS LASTLY ORDERED that the sum of \$500/- (Ringgit Five hundred only) lodged in Court by the Appellant as security for the costs of the Appeal be paid out to the Appellant AND THIS COURT DOETH CERTIFY that there be a Certificate for two Counsel.

GIVEN under my hand and the Seal of the Court this 4th day of August, 1975.

10

(Sgd)

CHIEF REGISTRAR,  
FEDERAL COURT, MALAYSIA.

No. 24

Order granting  
final leave to  
Respondents to  
Appeal to His  
Majesty the Yang  
di-Pertuan  
Agong

10th May 1976

No. 24

Order granting final leave to Respondents to Appeal to His Majesty the Yang di-Pertuan Agong

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUCHING  
(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 101 OF 1974

20

In the matter of Kong Thai Sawmill  
(Miri) Sendirian Berhad

And

In the matter of the Companies  
Act, 1965.

BETWEEN

LING BENG SUNG

....

APPELLANT

AND

KONG THAI SAWMILL (MIRI)  
SENDIRIAN BERHAD

....

1ST RESPONDENT

30

LING BENG SIEW

....

2ND RESPONDENT

LING BENG SIONG

....

3RD RESPONDENT

(In the matter of Originating Motion  
No. 1 of 1971 in the High Court in  
Borneo at Sibul

In the Federal  
Court in  
Malaysia

BETWEEN

LING BENG SUNG	...	APPLICANT
AND		
KONG THAI SAWMILL(MIRI) SENDIRIAN BERHAD	...	1ST RESPONDENT
LING BENG SIEW	...	2ND RESPONDENT
LING BENG SIONG	...	3RD RESPONDENT

No. 24

Order granting  
final leave to  
Respondents to  
Appeal to His  
Majesty the Yang  
di-Pertuan  
Agong

10

CORAM: SUFFIAN, LORD PRESIDENT, FEDERAL COURT, MALAYSIA;  
LEE HUN HOE, CHIEF JUSTICE, HIGH COURT IN BORNEO;  
WAN SULEIMAN, JUDGE, FEDERAL COURT, MALAYSIA.

10th May 1976

IN OPEN COURT

THIS 10TH DAY OF MAY 1976

O R D E R

UPON MOTION preferred unto Court this day by Mr. C.T. Wong of Counsel for the Respondents in the presence of Mr. Joseph C.C. Tang of Counsel for the Appellant AND UPON READING the Notice of Motion dated 6th day of April, 1976 and the Affidavit of Mr. C.T. Wong sworn on the 13th day of January, 1976 and filed herein AND UPON HEARING Counsel as aforesaid IT IS ORDERED that Final Leave be and is hereby granted to the Respondents to appeal to His Majesty the Yang di-Pertuan Agong against the Order of the Federal Court of Malaysia dated 4th day of August, 1975 AND IT IS ORDERED that the costs of and incidental to this Application be costs in the cause.

GIVEN under my hand and the Seal of the Court this  
 10th day of May, 1976.

(Sgd) Haji Abdullah Ghazali  
 CHIEF REGISTRAR  
 FEDERAL COURT, MALAYSIA.

L.S.

In the Federal Court in Malaysia

No. 25

Order granting final leave to Appellant to Appeal to His Majesty the Yang di-Pertuan Agong

No. 25

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUCHING  
(APPELLATE JURISDICTION)

Order granting final leave to Appellant to Appeal to His Majesty the Yang di-Pertuan Agong

FEDERAL COURT CIVIL APPEAL NO.101 of 1974

In the matter of Kong Thai Sawmill (Miri) Sdn. Bhd.

And

In the matter of the Companies Act, 1965.

10

10th May 1976

BETWEEN

LING BENG SUNG .. APPLICANT;

AND

KONG THAI SAWMILL (MIRI) SDN. BHD. .. 1ST RESPONDENT;  
LING BENG SIEW .. 2ND RESPONDENT;  
LING BENG SIONG .. 3RD RESPONDENT

(In the matter of Originating Motion No. 1 of 1971 in the High Court in Borneo at Sibn

20

BETWEEN

LING BENG SUNG .. APPLICANT;

AND

KONG THIA SAWMILL (MIRI) SDN.BHD. .. 1ST RESPONDENT;  
LING BENG SIEW .. 2ND RESPONDENT;  
LING BENG SIONG .. 3RD RESPONDENT.)

CORAM: SUFFIAN, LORD PRESIDENT, FEDERAL COURT, MALAYSIA;

LEE HUN HOE, CHIEF JUSTICE, HIGH COURT IN BORNEO;

WAN SULEIMAN, JUDGE, FEDERAL COURT, MALAYSIA

30

IN OPEN COURT

THIS 10TH DAY OF MAY 1976

O R D E R

10 UPON MOTION preferred unto Court this day by Mr. Joseph C.C. Tang of Counsel for the Appellant in the presence of Mr. C.T. Wong of Counsel for the Respondents AND UPON READING the Notice of Motion dated 8th day of April 1976 and the Affidavit of Mr. Joseph C.C. Tang sworn on the 27th day of February 1976 and filed herein AND UPON HEARING Counsel as aforesaid IT IS ORDERED that final leave be and is hereby granted to the Appellant to appeal to His Majesty the Yang di-Pertuan Agong against the Order of the Federal Court of Malaysia dated 4th day of August, 1975 AND IT IS ORDERED that the costs of and incidental to this Application be costs in the cause.

GIVEN under my hand and the Seal of the Court this 10th day of May, 1976.

(Sgd) Haji Abdullah Ghazali  
CHIEF REGISTRAR,  
FEDERAL COURT, MALAYSIA.

L.S.

In the Federal  
Court in  
Malaysia

—  
No. 25

Order granting  
final leave to  
Appellant to  
Appeal to His  
Majesty the Yang  
di-Pertuan  
Agong

—  
10th May 1976

O N A P P E A L  
FROM THE FEDERAL COURT OF MALAYSIA (Appellate Jurisdiction)

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

and

IN THE MATTER OF THE COMPANIES ACT 1965

---

---

B E T W E E N:

KONG THAI SAWMILL (MIRI) SDN. BHD. (First Respondent)

LING BENG SIEW (Second Respondent)

LING BENG SIONG (Third Respondent)

APPELLANTS

and

LING BENG SUNG (Applicant)

RESPONDENT

And by Cross-Appeal

B E T W E E N:

LING BENG SUNG (Applicant) APPELLANT ON  
CROSS-APPEAL

and

KONG THAI SAWMILL (MIRI) SDN. BHD. (First Respondent)

LING BENG SIEW (Second Respondent) and

LING BENG SIONG (Third Respondent)

RESPONDENTS ON  
CROSS-APPEAL

---

R E C O R D O F P R O C E E D I N G S

---

V O L U M E III

Coward Chance,  
Royex House,  
Aldermanbury Square,  
LONDON EC2V 7LD

Stephenson Harwood & Tatham,  
Saddlers' Hall,  
Gutter Lane, Cheapside,  
LONDON EC2V 6BS.

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

Solicitors for the Respondent  
and the Appellant on the Cross-  
Appeal