NOTES ON CASES

Oppression of Minority: S. 181 Companies Act 1965 Re Kong Thai Sawmill (Miri) Sdn. Bhd.[1]

This case involves an application by originating motion by a minority shareholder in Kong Thai Sawmill (Miri) Sdn. Bhd. (hereinafter "the Company") under S. 181 of the Companies Act 1965 for (1) the removal from office of the Managing Director (Lim Beng Siew, Second Respondent) and one other director (Ling Beng Siong, Third Respondent), (2) the appointment of a receiver and manager to conduct the business and investigate the affairs of the Company (3) the repayment to the Company of various sums of money which the second and third respondent had taken or paid out from the Company's funds wrongfully or without proper authorisation or for unauthorised purposes and (4) alternatively that the Company be wound up.[2] The alleged grounds of complaint were (1) a loan to one, Harun Ariffin, (2) remuneration (salary, fees and bonus) paid to Beng Siew (Second Respondent), (3) travelling and entertainment expenses (4) advances to and investment in joint ventures (5) investment in a newspaper company, the Malaysian Daily News Sdn. Bhd. (6) purchase of a hotel, the Aurora hotel, (7) purchase and outfitting of a motor yacht "Berjaya Malaysia" (8) donations to political parties (9) drawings by Beng Siew and Beng Siong from the Company's funds. (p. 63)

This case is worth noting for the reason that it provides yet another opportunity for an academic writer to fathom the depth, scope and complexity of an application under S. 181 of the Companies Act, 1965. Various criticisms (as well as platitudes) can be levelled at the purpose and meaning of S. 181. The most trenchant criticism which the writer has come across is that said by the Ontario Select Committee on Company Law 1967 as follows:

> "7.2.12 ... In our opinion Section 210 [i.e. of the U.K. Companies Act, 1948 which is equivalent but not identical to the Malaysian S. 181] raises as many problems as it lays to rest and, more importantly is objectionable on the ground that it is a complete dereliction of the established principle of judicial non-interference in the management of companies. The underlying philosophy of S. 210 has an air of reservation and defeatism about it, as if the legislature was unable to offer any solution to the plight of minority share-

[1] [1976] 1 M.L.J. 59 F.C.

[2] The originating motion in fact contained some 60 prayers but these appear to have been summarised by the Federal Court into four as above.

holders other than abandoning the problems to the judiciary to be dealt with *ad hoc* on the basis of determining, from case to case, whether or not 'the affairs of the company are being conducted in a manner oppressive to some part of the shareholders."[3]

The 'many problems' referred to can be found in the case under review. More particularly, these problems have now been highlighted by Phillip Pillai in his article, "Enforcement of Directors' Duties and Oppression: In re Kong Thai Sawmill (Miri) Sdn. Bhd."[4] Phillip Pillai in his article has raised in the present writer's view certain fundamental issues with regard to an application under S. 181. It is proposed in this case-note to respond to some of these issues with a view hopefully that a thesis may emerge. The issues are: (1) "S. 181 does not give the court the power to interfere with the internal management of a company;" (lxxiv) (2) "that a breach of director's duties may be remedied at the instance of a minority shareholder is a remarkable and far reaching proposition which has not been established by authority." (lxxxvii)

In essence both issues are inextricably linked to the broader issue of whether the rule in *Foss* v. *Harbottle* (1843) 2 Hare 461 still functions in an application under S. 181. But it is suggested here for ease of presentation to discuss the first issue separately and then to discuss the second issue together with the rule in *Foss* v. *Harbottle* which is more far reaching and complicated.

S. 181 AND INTERNAL MANAGEMENT

The context in the case in which the question of S. 181 and non-interference in internal management as discussed by Phillip Pillai occurs firstly in the Federal Court's holding with respect to the remuneration of Beng Siew. The Federal Court found that in the years 1966 to 1970, Beng Siew received remuneration (salary, fees and bonus) of $1,135,326 and that he also received $840,396 for travelling and entertainment allowances. It then held in relation to the amount of remuneration that "that amounts to oppression of the shareholders" (p. 65) and in relation to the travelling and entertainment expenses that "although in general it is for the 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 S. 181 of the Companies Act." (p. 65). In short, the Federal Court has interpreted S. 181 to allow itself to interfere in the internal management of a company, in this case the payment of remuneration and expenses even though these

[3] This abstract is taken from Hahlo, *A Casebook on Company Law* (1970) 517.

[4] [1976] 1 M.L.J. lxxii. Hereinafter, unless otherwise stated, roman numerals appearing within brackets refer to this article.

payments may have been expressly authorised by the Board and affirmed by the general meeting. Indeed, in many cases of minority oppression, the majority would ensure that whatever they do would be constitutional i.e. in supposed compliance with the law and the articles of association.

The basic question therefore is whether the Court under S. 181 has authority to interfere in the internal management of a company. Phillip Pillai seems to suggest that as far as the question of remuneration is concerned, the answer is in the negative. He cites two authorities for this proposition: *Re Jermyn Street Turkish Bath Ltd.* [1971] 3 ALL E.R. 184 and *Re Bright Pine Mills Pty. Ltd.* [1969] V.R. 1002. The relevant passage relied on in *Re Jermyn Streets Turkish Bath Ltd.* reads;

> "If a director of a company were to draw remuneration to which he was not legally entitled in excess of the remuneration to which he was legally entitled, this might no doubt found misfeasance proceedings or proceedings for some other kind of relief, but it would not, in our judgment, of itself amount to oppression. Nor would the fact that the director was a majority shareholder in the company make any difference, unless he had used his majority voting powers to retain the remuneration or to stifle proceedings by the company or other shareholder in relation to it . . ."[5]

Phillip Pillai argues, "[a] fortiori in this case where the drawings were not illegal in the sense that they were not in breach of the Board's resolution or the company's articles." (lxxiv)

It is respectfully submitted that the passage in *Re Jermyn Streets* case cannot be authority for the proposition that a Court cannot enter into the realm of remuneration in an action under S. 181. The basis of this submission lies in the meaning of the second sentence and the words "of itself" in the first sentence of the passage cited above. It seems clear in the second sentence that if a majority shareholder who is also a director "has used his majority voting powers to retain the remuneration or to stifle proceedings by the Company or other shareholders . . ." a case of oppression is made out, provided of course that the remuneration is "excessive and out of proportion" to the director's shareholding, the test laid down in this case-noted. Now, what is meant by using "majority voting powers to retain the remuneration. . ."? One writer has interpreted this to mean "to procure or ratify" the payment of unjustifiably high remuneration.[6] Indeed Buckley L.J. could be said to mean by "retain" a procurement by the majority shareholders if one were to back step to his earlier statement in the same paragraph cited. He said;[7]

[5] [1971] 3 All E.R. 184 at 199. (per Buckley L.J.)

[6] Pennington, *Company Law*, (1973) 575 Cf. Ford, *Principles of Company Law* (1974) at 403 who uses "procure or retain."

[7] [1971] 3 All E.R. 184 at 199.

"What does the word 'oppressive' mean in this context? In our judgment, oppression occurs when shareholders, having a dominant power in a company, either (1) exercise that power to *procure* that something is done or not done in the conduct of the company's affairs or (2) *procure* by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs; and when such conduct is unfair .... Oppression must, we think import that the oppressed are being constrained to submit to something which is unfair to them as the result of some over-bearing act or attitude on the part of the oppressor..." (emphasis added).

This general test clearly imports that if controlling directors use their voting power to procure or ratify the payment of "excessive and out of proportion" remuneration, that act would be oppressive. Consequently, this proposition would embrace both illegal as well as legal remuneration so that in the case of illegal remuneration, it is not even necessary to proceed on misfeasance or proceedings for some other kind of relief. An application under S. 181 would suffice.[8]

Indeed, the Cohen Committee which is responsible for the inclusion of S. 210 into the United Kingdom Companies Act 1948 specifically mention the taking of the whole of the Company's profits by way of remuneration so as to leave nothing for distribution by way of dividend as an evil which S. 210 was intended to cure. (Cmd. 6659 p. 60)

So much for the authority of *Re Jermyn Street Turkish Baths Ltd* vis-a-vis internal management. As for the authority of *Re Bright Pine Mills Pty. Ltd.* [1969] V.R. 1002, the following passage from the case itself would seem to clarify the real situation:[9]

"It is true to say, however, that it was not intended by S. 186 ... [the Australian equivalent to but not identical of S. 181 Malaysia] to give jurisdiction to the Court (a jurisdiction the courts have always been loath to assume) to interfere with the internal management of a company by directors who in the exercise of the powers conferred upon them by the memorandum and articles of association are acting honestly and without any purpose of advancing the interests of themselves or others of their choice at the expense of the company or contrary to the interests of other shareholders. On the other hand,it was accepted by Mr. Young, for the appellants that conduct would be oppressive within the meaning of

[8]See also, H. Rajak, "The Oppression of Minority Shareholder" 35 M.L.R. (1972) 157 at 165.

[9]At p. 1011.

S. 136 if directors or shareholders holding a controlling power in the direction of the Company's affairs were to pursue a course of conduct designed by them to advance their own interests or the interests of others of their choice to the detriment of the company or to the detriment of other shareholders. . ."

It is clear again from the second sentence above that the Court would intervene in the situation described therein even if it were a matter of internal management.

ENFORCEMENT OF DIRECTOR'S DUTIES BY MINORITY SHAREHOLDERS

Thus far, the discussion is confined to a re-analysis of the two cases relied on by Phillip Pillai. But the proposition that the court will not interfere in the internal management of a company may take a higher plane and this is in relation to the rule in *Foss* v. *Harbottle* (1843) 2 Hare 461. It is submitted that this rule and its ramifications have been allowed to cloud discussion over an application under S. 181. The rest of this case-note will be devoted to illustrate such confusion and hopefully to provide some answers. The internal management rule or more popularly called the rule of the supremacy of the majority takes its genesis from *Foss* v. *Harbottle*. A clear statement of this rule can be found in Jenkins L.J.'s judgment in *Edwards* v. *Halliwell* [1950] 2 All E.R. 1064 at 1066 where he says:

> "The rule in *Foss* v. *Harbottle*, as I understand it comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the company or association is in favour of what has been done then *cadit questio*."[10]

Academic writers are agreed that the rule in *Foss* v. *Harbottle* is irrelevant in an application under S. 181.[11] Yet somehow it creeps back into S. 181. Hence, in the case noted, one of the defences raised is that the claims made by the applicant constitute claims for damages for

[10] For a local reaffirmation of faith in the rule of *Foss* v. *Harbottle* see Wong Weng Kwai, "Minority Shareholders Action: A Commentary on *Federal Transport Service Co. Ltd.* v. *Abdul Malik*" [1974] 2 M.L.J. xxxiv. See also *Paidah Genganaidu* v. *Lower Perak Syndicate Sdn. Bhd.* [1974] 1 MLJ 220.

[11] e.g. Gower, *The Principles of Modern Company Law* (3rd Ed.) p. 599, Pennington, Op. Cit., 574 and cf. Pillai, Op. cit., lxxv

misfeasance or breach of trust against Beng Siew and Beng Siong and that those claims if valid are properly claims to be made by the Company and not by a single shareholder (p. 73). Phillip Pillai has also made similar points. Hence, commenting on the Federal Court's holding that Beng Siew buy over the luxury yacht "Berjaya Malaysia" and reimburse the company the money paid out as political donations, he states, "If the Court so ordered on the basis that these were in breach of directors' duty to the company *then the company ought to be the plaintiff and not the minority shareholder*(lxxxvi) (emphasis added). Again, commenting on the Federal Court's concluding statement on the position of directors, Phillip Pillai asserts, "[t]he above consequence that a breach of director's duties may be remedied at the instance of a minority shareholder is a remarkable and far reaching proposition which has not been established by authority." (lxxvii) Finally, commenting on the Court's "heavy" reliance on *Guth* v. *Loft Inc* 5 All Rep. (2d) Del. 503, he says "[t] he two distinct features of the American position, make the case of limited value to the Malaysian Court and does not further the Court's result of *allowing recovery at the instance of the minority shareholder.*" (lxxviii) (emphasis added).

All these arguments, it is submitted, are based on the 'proper plaintiff' rule i.e. the first part of the rule in *Foss* v. *Harbottle*. If this is so, (and the writer cannot find any other basis for thinking otherwise) then a proper assessment must be made as to the relationship, if any, between the rule in *Foss* v. *Harbottle* and an application under S. 181. As a starting point, Phillip Pillai has made this revealing remark,

> "More significantly the court finally interred the rampant confusion by holding quite correctly that *Foss* v. *Harbottle* is no bar to a section 181 action and that 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." (lxxv)

It is not clear why Phillip Pillai prefers to use the phrase "quite correctly" only. Perhaps this is to foreshadow his later points. But whatever the word "quite" may be taken to mean, it is submitted on other authorities that the Federal Court has truly and "finally interred" the relevance of *Foss* v. *Harbottle* in a S. 181 action.

In the first place, it has already been pointed out that some academic writers are of the view that the rule in *Foss* v. *Harbottle* is irrelevant in a S. 181 application [12] In addition, the following statement by Joske J. in *Re Associated Tool Industries*[13] is directly in point. In response to the

[12] See Supra, fn. 11.

[13] (1963) 5 F.L.R. 55 (Supp. Ct., A.C.T.)

defendant's argument that S. 186 (Aust.) should be interpreted in relation to the rule in *Foss* v. *Harbottle*, Joske, J. said:

> "... a limitation or restriction upon any right of action given by [S.186] is not to be inferred by reason of what the prior law may have been ... Indeed, being a remedial measure and not to be construed narrowly, *it should be regarded as intended to terminate defects in the pre-existing law.*"[14] (emphasis supplied)

Surely, the "defects in the pre-existing law" must be the procedural as well as substantive difficulties created by *Foss* v. *Harbottle*. Further authorities as to the amending effect of S. 186 can be gleaned from some general statements made by some of their Lordships in *Scottish Co-operative Wholesale Society* v. *Meyer*.[15] In regard to interpreting the English S.210, Lord Denning stated that S. 210 was "a new section designed to suppress an acknowledged mischief"[16] and should be given a construction designed to advance the remedy. Similarly, Viscount Simonds said "... the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view".[17] In *Re Bright Pine Mills Pty Ltd.*.[18] the Court rejected contentions that S. 186 (Aust.) was designed to do no more than give a new remedy in respect of conduct which previous to its enactment was remedial in some other way and that the word "oppressive" connotes in the contex conduct which was hitherto treated by the law as wrongful in the sense that it is conduct for which a remedy was already provided. The court said in this regard, "In our opinion, the word 'oppressive' in sub-section (1) cannot be given so restricted a meaning".[19]

There exists a contrary view that S.181 may have to be interpreted in the light of pre-S. 181 precedents. This view seems to be expressed by Jacobs J. in *Re Broadcasting Station 2GB Pty. Ltd.*[20] In a discussion of how such vague terms as "fairness" and "burdensome, harsh and wrongful" should be interpreted, his Lordship said:

> "... When is such conduct oppressive? ...[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 interest of the Company as a whole."[21]

[14] *Id.* at p. 67.
[15] [1959] A.C. 324.
[16] *Id.* at 369.
[17] *Id.* at 343.
[18] [1969] V.R. 1002.
[19] *Id.* 1012.
[20] [1964 – 65] N.S.W. 1648
[21] *Id.* a 1662.

This statement has been commented by one writer as unfortunate.[22] The approach "is contrary to the intention of Parliament and is irreconcilable with the case law developed around the section in England and Australia."[23] More trenchantly, Afterman makes the following points:

> "Although one may sympathise with the fact that such terms as "fairness" and "burdensome" are vague and require elaboration, still the reason they were adopted was to avoid anachronistic technicalities and inadequacies of the common Law. No clarification of the term "oppression" may be derived from such a confusing and ambiguous source. It is only when the complained of actions have serious detrimental consequences to the petitioner that they will be designated as "unfair" or "burdensome, harsh and wrongful". In effect these words are technical terms to be invoked only in appropriate case law in which they have been developed and approved. This writer cannot agree that the statutory remedy for oppression is to be reserved for those few cases where it can be proven that the controllers failed to act with the best interests of the company in mind. To do so would be a giant step backward into the morass of "fraud on the minority" and lead to a neutralization of the section. These terms "fairness" and "burdensome" were developed to avoid this very result."[24]

On the balance of the foregoing authoritative statements, it is therefore submitted that in the interpretation and application of S.181 by a shareholder or debentureholder, the courts should not be haunted by any previous law governing minority shareholders' action, particularly the rule in *Foss* v. *Harbottle*. Indeed the Federal Court in this case noted has quite emphatically stated that "the rule in *Foss* v. *Harbottle* is no bar to an individual shareholder making an application to the court under section 181 of the Companies Act" (pp. 73–74), although it did devote a concessionary paragraph to meeting the respondent's argument on the rule in *Foss* v. *Harbottle* by holding that even if the rule did apply, it cannot be invoked where the act complained of constitutes a fraud on the minority.[25] But it is refreshing to note that in the only two other Malaysian cases when an application under s. 181 was invoked and was successful, the rule in *Foss* v. *Harbottle* did not raise its ugly head.[26]

[22] Afterman, *Company Directors and Controllers* (1970) p. 178.

[23] *Id.* 178.

[24] Id. 178 – 179.

[25] at p. 73. It may be worth emphasising here again that "the law surrounding 'fraud on the minority' and the Rule in *Foss* v. *Harbottle* is contradictory and confused to such an extent that it seems incapable of being rationalized"; Afterman, *Op. cit.*, 135

[26] *Re Chi Liung & Son Ltd.* [1968] 1 M.L.J. 97; *Re Coliseum Stand Car Service Ltd.* [1972] 1 M.L.J. 109.

More specifically therefore, the question is whether S. 181 can be used to enforce director's duties. Phillip Pillai, after quoting a part of the judgment (at p. 74) which clearly was intended to hold that Beng Siew had breached his fiduciary duties to the Company, says "[t]he above consequence that a breach of director's duties may be remedied at the instance of a minority shareholder is a remarkable and far reaching proposition which has not been established by authority. It is firstly necessary to establish that a breach of director's duties is oppression under section 181, in which case the court is quite correct. Two reasons exist which negative the court's reading." (lxxvii)

Two comments are necessary here. Firstly, if Phillip Pillai is referring "by authority" to the rule in *Foss* v. *Harbottle* then his argument, it is respectfully submitted, cannot stand in light of the foregoing discussion. A retreat back to pre S.181 precedents would nullify the effect of S. 181. Secondly, Phillip Pillai himself would seem to say that directors' breaches of duties can be enforced under S. 181 if it can be "established that a breach of director's duties is oppression. . ." Surely, this is as clear a statement as anyone would wish. But a further comment must be why we should think in terms of breach of director's duties in actions under S. 181 at all. The most important thing to prove under this section is to satisfy all the necessary ingredients of S. 181. Phillip Pillai has meticulously demonstrated that there are twelve possible alternative heads or causes of action under S.181(1) (lxxiv–lxxv). It is submitted that if a shareholder or debentureholder can prove facts which come within any of these heads, a remedy under S.181(2) should follow. Whether the facts show a breach of directors' duties should be irrelevant. The facts may establish that a breach has taken place or that it has not taken place. But if the shareholder or debenture holder can establish "oppression" or "discrimination" or under some other heads, then that should end the matter. Of course, it is conceivable that not every breach of director's duties would amount to oppression. Hence, it would be difficult to establish oppression say in cases like *Regal (Hastings) Ltd.* v. *Gulliver* [1943] 1 All E.R. 378 or *Industrial Dev. Consultants Ltd.* v. *Cooley* [1972] 2 All E.R. 162. But in cases where directors' breaches of duties happily coincide with or amounts to oppression, then it is submitted that the fact of breach of duty is still no bar to an application under S. 181. Such cases would be cases like *Scottish Co-Operative Wholesale Soc. Ltd.* v. *Meyer* (*supra*, where the House of Lords quite clearly held the nominee directors of the society to have acted in breach of their duty to the Company) and this case noted (where the Federal Court held that Beng Siew had "mis-used" and "improperly" paid away the Company's funds).

Phillip Pillai advances two reasons for his argument. Firstly, he says that only "those [breaches of directors' duties] which constitute a 'fraud on the minority' may conceivably be caught within the ambit of Section

181(1)(b)." (lxxvii) He reinforces this argument by comparing S. 218 (the equivalent S. 181 Malaysia) and S. 210 of the Ghana Companies Act, 1961. He argues that because S. 210 of the Ghana Act is specifically drafted to allow a Company or any member to enforce directors' breaches of duties and to recover any property to the Company "Section 181 (Section 218 Ghana) conceptual is unavailable at the instance of the minority shareholder to enforce a director's duty to the Company" (id). It is difficult to understand why enforcement of directors' duties can be enforced only if the breach falls under S.181(1)(b). Is this because of an irresistible pull backwards again by the old laws on fraud on the minority? Gower himself in his commentary on the Ghana Act, has stated *inter alia*, that an "application under paragraph (a) of subsection (1) [i.e. Ghana S. 218] is only intended to provide a remedy when there is a course of oppression or abuse and not where some isolated act of misfeasance has occurred in the past. In the latter event the member's remedy is under section 210 or 217 [i.e. of the Ghana Act]."[27] The implication here is strong that a misfeasance or abuse of power which is not an isolated act and which constitutes "a course of oppression" can still be remedied under S. 181(1)(a). Furthermore, it is respectfully submitted that the mere existence of S.210 of the Ghana Act which specifically provides for the enforcement of directors' duties by shareholders cannot necessarily imply that shareholders cannot enforce director's duties through any other section in the Companies Act. It is submitted here that on a proper reading of S. 218 and S. 210 of the Ghana Act together, interpretation by the maxim, *expressio unius, exclusio alterius* is not possible. This is because neither S. 218 nor S. 210 of the Ghana Act has expressly stated that all enforcement of directors' duties must be through S. 210. Furthermore, in the Malaysian context, there is no equivalent of S.210. Consequently, it can be concluded that enforcement of directors' duties should be allowed in a S.181 application when that breach of duty amounts to a satisfaction of all the necessary and sufficient ingredients of S. 181.

The second ground for Phillip Pillai's argument that S. 181 cannot be used to enforce directors' breaches of duties is that the Federal Court has erred in relying on *Guth v. Loft Inc* (5 All Rep. (2d) Del. 503) because this case "does not deal with the question whether such breach of duty is oppressive conduct. Secondly the American theory for recovery in such cases is to use the device of constructive trust . . . and through the mechanism of the derivative suit for which specific rules of procedure have been promulgated." (lxxviii) It is true to say that *Guth v. Loft Inc* is wrongly relied on by the Federal Court as this case only dealt with the

[27] Para 7 Gower's Commentary, which can be found in Pillai, *Sourcebook of Singapore and Malaysia Company Law* (1975) p. 951.

question of breach of directors' duties and not when these breaches amount to oppression or discrimination under S. 181. Among other things, for a shareholder to succeed under S. 181 against a director, he should prove that "the powers of the directors are being exercised in a manner oppressive. . . or in disregard" of the interests of the shareholders. It is clear that an isolated breach of duty is insufficient to succeed under S. 181(1)(a) although it may be caught under S. 181(1)(b). But it is submitted that the Federal Court in its entire judgment did not intend to make the question of breach of directors' duties its *sole ground* for holding that the minority shareholder has succeeded in his application. In many places in the judgment, the Federal Court did refer back to the actual wording, effect or meaning of S. 181: hence, the Federal Court described the excessive directors' fees and bonus as amounting to "oppression of other shareholders" and were so large "that they were paid in complete disregard of the interests of the other shareholders" (p. 65); the ordering of Beng Siew to pay back the money spent on the luxury yacht "in fairness to the shareholders" (p. 69. Lack of "fairness" is sometimes advocated as the test for "oppression")[28]; the ordering of Beng Siew to reimburse the Company the political donations because "a case has been made out for this court in the exercise of its jurisdiction under section 181 of the Companies Act. . ." (p. 70. An obligue reference to "oppression" or "discrimination" having been established); the description of the unlicensed drawings by Beng Siew and Beng Siong as showing "lack of probity on the part of the controlling directors. . ." (p. 71. "Lack of probity" is also often used as a test of "oppression"); in reply to the argument that S. 181 cannot be a substitute for a minority shareholders' action, the description of the controlling directors' drawings, money spent on political donations and on the luxury yacht as "in complete disregard of the interests of the shareholders" (p. 73); and finally as if by way of a summing up, the Federal Court summarised its view for successful action under S. 181 as:

> "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." (p. 74)

From all the above passages, it is respectfully submitted that it is clear that the Federal Court did not intend to make the directors' breaches of duties, (either fiduciary or outside authority) as its sole ground of decision in this case noted. The line of reasoning of the Federal Court seems to be

[28] see Afterman, op. cit; pp. 181 – 189.

that these breaches of directors' duties also amount to oppression or a satisfaction of the ingredients of S. 181. True it is that one can read the Federal Court's decision as going solely on the basis of breaches of directors' duties (and there are ample passages that can support this), yet on balance it is submitted that the proper interpretation of the controlling law arising from this case should rather be that the controlling shareholders in the case have acted in breach of S. 181 and only incidentally in breach of their duties.

Finally, some comments are necessary on the question of the remedies which the court can order under S. 181. In particular, Phillip Pillai takes issue with the Federal Court on its order to Beng Siew to pay back to the Company all sums of money spent on the luxury yacht and also to pay back to the Company the amount of donations paid to the two political parties. Phillip Pillai argues that "[it] is not clear from the judgment on what basis the court so ordered". (lxxvi). He suggests three possible bases for the Federal Court's order and criticised them as follows:

> ". . .1. If the court so ordered on the basis that these were in breach of the director's duty to the company then the company ought to be the plaintiff and not the minority shareholder.
>
> 2. That the breach of duty equals oppression and therefore the orders are with a view to cancelling or remedying them. Again this proposition is too wide and cannot be established on authority and the Court's judgment does not appear to intend such a reading.
>
> 3. That while not amounting to oppression the court is empowered by Section 181(2) to remedy all complaints. This appears to be the case for the court in requiring repayment of the political donations states categorically that this is in exercise of its powers under section 181. This is erroneous for section 181(2) is surely contingent upon section 181(1). Thus the remedy cannot be out of proportion to the acts complained of. While section 181(2) does not limit the court's powers to the precise ones listed, it is also clear that the powers are contingent on remedying the oppression not other breaches of duty that may incidentally come to light." (Op. cit., lxxvi)

On the first proposition, it has been demonstrated above that the Federal Court did not only hold that the controlling directors were in breach of their duty but also that these breaches coincided or amounted to oppression. Hence, it is respectfully submitted that this alleged basis for the Federal Court's order cannot stand on re-examination. On another plane, it has also been demonstrated that S.181 allows a minority shareholder to enforce directors' breaches of duties so long as these are also acts of oppression or acts caught by S.181. The craving back towards the rule in *Foss* v. *Harbottle*, it is argued, should no longer be maintained for a S. 181 application. On the third proposition the writer would respectfully

agree with Phillip Pillai that S. 181(2) is contingent upon S. 181(1). If this is this case, then the third basis forwarded cannot be sustained because if there is no oppression or satisfaction of the necessary ingredients of S. 18 (1), S. 18 (2) cannot logically be brought into effect.

The writer would therefore prefer Phillip Pillai's second proposition as establishing the basis for the Federal Court's orders. The writer cannot, with respect, see how this proposition is "too wide." As for authority, indeed there appears to be ample authority in the actual wording of S.181(2) itself which allows the Court ". . . with the view to bringing to an end or remedying the matters complained of, [to] make such order as it thinks fit. . .". Herein lies a blanket power to the court to make such order as it wishes but only so long as such orders are with a view to bringing to an end or remedying the matters complained of. The exact scope and meaning of "bringing an end or remedying" matters complained of must depend on the nature of the complaint. Hence, one may ask, how would the Federal Court bring to an end or remedy the complaint that money has been spent on a luxury yacht in disregard of shareholders' interests? One answer would be that the Court could order the sale or auction of the luxury yacht. But such an order would pertain towards the "ending" of the oppression only, as the yacht may have to be sold at a price much below the cost. In other words, the harm done to the company i.e. loss of money through improper application may not be adequately "remedied" through a mere sale of the yacht only. To remedy this harm suffered by the company, it is submitted that the Federal Court has rightly ordered Beng Siew to reimburse the Company the full cost of the luxury yacht. The same argument would apply equally to the political donations. Here the Federal Court not only ordered the "ending" of future political donations except those made in the name of the company and with the board of directors' approval but also remedied the past defalcations by ordering Beng Siew to repay them. The presence of the word "remedying" in S.181(2) which is absent in the English equivalent of S.210 or the Australian equivalent of S.186, makes previous English and Australian cases inapplicable in this particular respect and gives the Federal Court a free hand to give it an appropriate meaning. It is respectfully submitted that the Federal Court has interpreted S. 181 (2) in the proper manner. As a matter of policy, the court's order, although punitive in nature, serves as a fair warning to future directors of companies not to act in disregard of the interests of shareholders. In addition, the basis of the order cannot also be described as far fetched or without analogous authority for in a shareholders' action under the exceptions to the rule in *Foss* v. *Harbottle*, it is conceivable that the court would come to make similar orders.

Re Kong Thai Sawmill (Miri) Sdn. Bhd. must be regarded as a very important landmark case in the company law scene in Malaysia. It illus-

trates the potentialities of the relatively new S. 181 of the Companies Act, 1965, the difficult issues which this section may give rise to and the way these issues have been resolved or at least adverted to. S. 181 is without doubt a brave new weapon for minority shareholders whose full use has yet to be carefully but purposely charted by future cases.

Of the full impact and ramifications of S. 181, Afterman theorised as follows:

> "It may be said of S.181 (and similar provisions) that it is so broad and open ended that it is difficult, if not impossible, to anticipate what type of actions would fall under the categories of "oppression", "disregard of interest", "unfair discrimination", and "prejudice". The fact that all four of these terms have been used in the same section indicates that they are to be interpreted separately. Under S.C.A., S.181, [i.e. Singapore Companies Act] therefore almost all internal corporate disputes are judically cognizable, and almost any remedy is permissible."[29]

Re Kong Thai Sawmill (Miri) Sdn. Bhd. shows how true the above last sentence is.

M.H.K. Lim*

Sau Soo Kim v. *Public Prosecutor*[*]
AUTREFOIS ACQUIT DOUBLE JEOPARDY

One of the fundamental liberties provided in the Malaysian Constitution is that a person who has been acquitted or convicted shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted – clause (2) of article 7.

This common law rule against double jeopardy or better known as autrefois acquit or autrefois convict has been reiterated by the Criminal Procedure Code F.M.S. Cap. 6 in section 302(i) which provides:

> "A person who has been tried by a court of competent jurisdiction for an offence and acquitted of such offence shall, while such acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge

[29] *Company Directors and Controllers*, (1970) p. 222.

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[*] [1975] 2 M.L.J. 134.