IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(COMMERCIAL DIVISION)

ORIGINATING SUMMONS NO: WA-24NCC-92-02/2020

In the matter of **PESAKA CONSOLIDATED SDN BHD (Co. No. 732957-W)** and its Constitution.
And
In the matter of **JATI CAKERAWALA SDN BHD (Co. No. 769282-K)** and its Constitution.

And

In the matter of Section 346 of the Companies Act, 2016

And

In the matter of Sections 123, 204, 245 and any other relevant Section of the Companies Act, 2016

And

In the matter of Order 88 and another other relevant provision in the Rules of Court 2012

BETWEEN

DATO' SHABARUDDIN BIN IBRAHIM
(NRIC No.: 560106-03-5363) **… PLAINTIFF**

AND

1. **DATO' RUSLAN BIN ALI OMAR**
   (NRIC No.: 520502-10-5013)

2. NOR FAIRUZ BIN RUSLAN
(NRIC No.: 800103-14-5663)

3. FIRDAUS BIN RUSLAN
(NRIC No.: 920713-14-5675)

4. FAUDZY ASRAFUDEEN BIN SAYED MOHAMED
(NRIC No.: 610320-07-5975)

5. PESAKA CONSOLIDATED SDN BHD
(Co. No. 732957-W)

6. PESAKA VENTURES SDN BHD
(Co. No. 733743-D)

7. JATI CAKERAWALA SDN BHD
(Co. No. 769282-K) **… DEFENDANTS**

GROUNDS OF JUDGMENT

Introduction

[1] In an oppression action by minority shareholders, the Court will need to determine the true or real complaint by the aggrieved party and whether the alleged wrongs are in fact wrongs done on the company for which the more appropriate remedy would be by way of a derivative action by the minority shareholders. There could be instances where the wrongs have features of both corporate wrongs and personal wrongs against the minority shareholder. Under what circumstances would the bringing of an oppression action in such an instance would not be an abuse of the court

process? Further, can the Court look at conduct post the oppression action including the manner the legal proceedings are being conducted to determine the likelihood of the oppressive action continuing in the future? These are issues explored in this judgment.

Salient Facts

[2] The Plaintiff together with 1st to 4th Defendants are the Directors of the 5th to the 7th Defendants abovenamed.

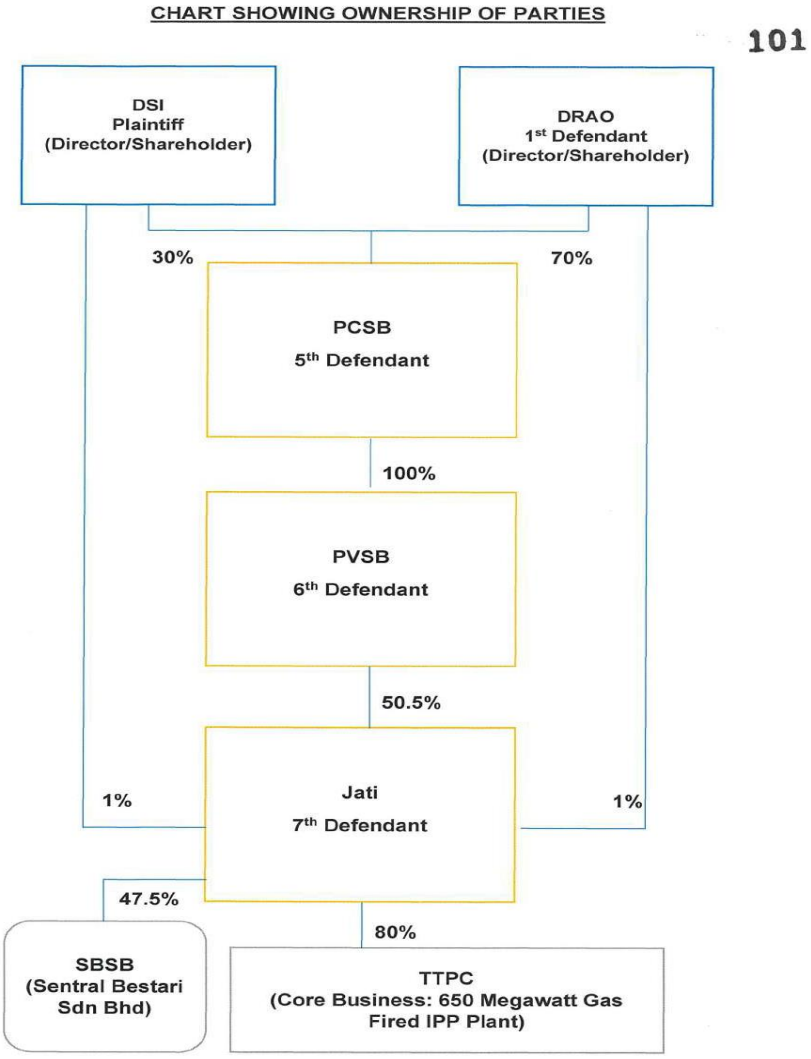
[3] The 5th Defendant ('**PCSB**') has an issued and paid capital of RM 1,000,000.00 divided into 1,000,000 ordinary shares of RM 1.00 each and the Plaintiff ('**DSI**') and 1st Defendant ('**DRAO**') are the registered and beneficial owners of the issued and paid up capital in the following proportion:

a) DSI : 300,000 ordinary shares – 30%
b) DRAO : 700,000 ordinary shares – 70%

[4] The 6th Defendant ('**PVSB**') is a wholly owned subsidiary of PCSB.

[5] The 7th Defendant's ('**Jati**') 4,001,600 ordinary shares of RM 1.00 each are held by PVSB (50.5%), Sentral Bistari Sdn Bhd (47.5%), DSI (1%) and DRAO (1%).

[6] A chart showing the corporate structure of the Group is set out below:



[7] The core business of the Group, namely owning and operating an independent power producing facility is held under "TTPC", an 80% owned subsidiary of Jati in which DSI and DRAO each own one share.

[8] On or about January 2018, UMNO filed a suit ('**UMNO Suit**') against DSI, DRAO, PCSB, Jati and one Dato' Seri Abdul Azim Bin Mohd Zabidi (a former treasurer of UMNO) in the High Court of Malaya at Kuala Lumpur Suit No. WA-22NCVC-4-01/2019.

[9] The UMNO suit is based on UMNO's alleged claim that UMNO is the beneficial owner of 100% shareholding of PCSB and the 2% shareholding of Jati held by DSI and DRAO.

[10] The main remedies in the UMNO suit are against DSI and DRAO to enforce an alleged trust to ultimately reclaim ownership of the shares. It should be emphasized that notwithstanding the UMNO Suit, DSI and DRAO are and remain the registered and beneficial owners of the shares registered in their respective names in PCSB and Jati.

[11] Notwithstanding that both DSI and DRAO consistently maintained that they have good defences to the UMNO suit, DSI claimed that on or around 13.1.2019, DRAO had approached DSI and expressed the fervent desire to settle.

DSI's Version of Settlement Negotiation with UMNO

[12] According to DSI's version of the story, DRAO explained that even though he denied the claims by UMNO, DRAO was suffering from a relapse of intolerable mental stress as a result of the UMNO suit.

[13] DRAO was so concerned for his health and well-being that DRAO insisted and persuaded DSI to use his connections and good relationships within UMNO to negotiate a settlement on their behalf.

[14] DRAO was so keen to settle that DRAO expressed that he would be willing to fund the entire cost of such a settlement.

[15] In the same vein, DRAO also expressed that he did not want to continue as a shareholder of PCSB as his health would not permit him to bear the stress. Therefore, DRAO also expressed his desire to sell his 70% stake in PCSB to DSI.

[16] On DRAO's behalf and after complicated negotiations with UMNO, DSI claimed that DSI and UMNO had reached a stage where a draft Settlement Agreement was prepared.

[17] In conjunction with the proposals for an agreement with UMNO, a draft Settlement Agreement (for the Sale and Purchase between DRAO and DSI) was also prepared between DSI and DRAO which reflected the terms of the buyout and the funds that would be used to pay for DSI's proposed settlement with UMNO.

[18] In summary, the agreed plan was for DSI to purchase all of DRAO's shares in PCSB and companies within the group (i.e. 70% in PCSB and 1% in Jati) for RM 85 million so that DRAO could exit immediately for a payment of RM15 million and then for DSI to effect the settlement with UMNO for the remaining RM70 million.

[19] However, sometime around July 2019 DRAO suddenly became hostile towards DSI and refused to communicate in a civil manner.

[20] In view of DRAO's change of heart, DSI had no choice but to halt negotiations with UMNO which according to DSI had caused DSI serious embarrassment and loss of credibility.

[21] DSI also had no choice but to abort his own fundraising exercise which he embarked on to finance the purchase and settlement. This resulted in wasted fees and effort.

[22] DSI's suspicions were confirmed when suddenly out of the blue DSI received 2 Notices of Special Board Meetings of PCSB and Jati dated 13.1.2020.

[23] From the Agendas, it was apparent that DRAO had hijacked the settlement negotiations with UMNO and now wanted to settle the UMNO Suit on his own terms by *inter alia* taking over all negotiations personally and arranging financing by using PVSB, which was not a Defendant in the UMNO suit, as the main vehicle to finance the settlement, rather than his own personal funds.

[24] DSI was never consulted and was not informed by DRAO or any other directors of PCSB or Jati of the new developments with regards to the UMNO negotiations even though from the Notices of meeting, it was clear that negotiations had been progressing for a long time and were well advance.

[25] Up until that time DSI had been under the impression that DRAO had abandoned plans to settle with UMNO since all attempts to meet DRAO privately to resolve issues were refused. However, when DSI received the Notices, he feared that DRAO had been making use of him.

[26] DSI further claimed that his fears that he was being used by DRAO to further negotiations with UMNO were justified and heightened

when on 21.1.2020 DSI received 2 Board Papers which contained the broad details of the matters discussed between DRAO and UMNO.

[27] Based on the Board Papers, it would appear that a settlement had been reached with UMNO for a sum of RM 70 million. The funding for the RM 70 million will come from an advance of RM 20 million to PCSB from DRAO, thereafter, a further RM 5 million will be from the dividends received from Jati and the final RM 45 million will be sourced by PCSB from an external loan. The first RM 20 million will be paid in March 2020 and the remaining will be paid 6 months after the first payment.

[28] DSI objected to DRAO's settlement scheme as the actual liability to pay the settlement sum should have fallen on DRAO from the outset. Instead, it was clear from DRAO's proposed scheme that PCSB would take over the RM20 million liability by treating it as a shareholder's advance to be repaid as well as assuming liability for the balance RM50 million which was liability that PCSB never had in the first place or in DSI's proposed settlement.

[29] DSI was also shocked to discover that DRAO's settlement scheme had been agreed and signed on 7.1.2020 without his knowledge or consent as a director of PCSB.

[30] DSI's primary source of income from the PCSB group is from dividends paid by Jati to PVSB and dividends from PVSB to PCSB.

[31] Thus under DRAO's proposed settlement scheme, DSI would effectively be deprived of any significant income from PCSB until 2024 since most of the dividends would be allocated to repay DRAO.

[32] DSI claimed that the documents presented at the Board meeting on 23.1.2020 confirmed the following:

a) DRAO without consulting or informing DSI had entered into another settlement with UMNO on behalf of PCSB and PVSB similarly for RM 70 Million;

b) PVSB would be the primary vehicle for the fund raising of the settlement sum;

c) Income stream would be diverted to DRAO under the pretext of repayment of a shareholder's advance to fund the initial payment to UMNO (which should not have come from PCSB in the first place);

d) Payment of dividends would be frozen so in effect the only shareholder receiving monies from PCSB would be DRAO under the pretext of repayment of the shareholder's advance which was not even necessary;

e) The assets and undertaking of PCSB and PVSB would be at serious risk of execution in the event of a default in the terms of settlement since they, rather than the shareholders

personally, would now be responsible to UMNO for settlement; and

f) The entire burden of the settlement would ultimately fall on PCSB and its subsidiaries, income would be diverted to DRAO, DSI would be frozen out of any income from the company for many years and the business and assets of PCSB would at risk in the event of a default on the payment of the settlement terms.

[33] DSI further claimed that even before the new proposals have been implemented, an expected payment of dividends by PCSB to DSI had already been blocked when for the first time since DSI had become a shareholder, PCSB was blocked from releasing dividends to DSI after a substantial dividends was paid by Jati to PVSB on 21.1.2020.

[34] The timing of this blocked dividends was telling since this occurred around the time DRAO became hostile with DSI.

[35] DRAO and the other directors had clearly embarked on an illegal settlement scheme that was in breach of Section 123 of the Companies Act 2016 since PCSB, PVSB and Jati appeared to be funding the settlement of the UMNO dispute between DRAO, DSI and UMNO.

[36] PCSB, PVSB and DSI are in substance providing financial assistance to DRAO to settle a claim which would ultimately

expose the companies and their respective directors including DSI to penalties and prosecution.

[37] DSI was also concerned that DRAO and the other directors were acting against the best interests of their respective companies since DRAO's proposed settlement scheme would put the companies in serious risk of defaulting on their obligations which could lead to execution on the assets of PCSB, PVSB and Jati. The assets of Jati, indeed are the main operating activities of the Group.

[38] DSI expressed his objections to the above events on numerous occasions during Board Meetings. However, all of DSI's objections fell on deaf ears since he was always outvoted by DRAO and the other directors without any avenue for recourse.

[39] All the directors except DSI supported the proposals as set out on the 2 Board Papers and voted in favour of the resolutions. The 1st to 4th Defendants were therefore all active participants in the oppression and wrongdoings alleged in this Suit and cannot be regarded as mere nominal Defendants.

The DRAO's Version of Settlement Negotiations with UMNO

[40] According to DRAO, on 2.2.2019, about 1 month after the UMNO Suit, DSI issued a letter proposing to buy DRAO's shares in PCSB and Jati ('**the 1st Offer**') for RM 25 million with a possible additional RM 2 million if the deal was completed within 6 months of the agreement.

[41] DSI suggested that he would ensure that the UMNO Suit would be settled and required that DRAO accept all settlement proposed provided it cleared the parties to the UMNO Suit of all past, present and future liabilities. DSI also sought that DRAO signs out all share transfer forms in favour of DSI which shares are to be transferred when DSI made the payment.

[42] However DRAO did not accept the 1st Offer.

[43] DRAO disputed DSI's version that DSI had engaged in discussions on a settlement of the UMNO Suit on the basis of DRAO expressing the desire that he was willing to settle at all costs and to also pay all costs of settlement and that DRAO had wanted to sell out to DSI.

[44] Although DRAO accepted that DSI had handed DRAO with a copy of the draft settlement agreement with UMNO sometime in June 2019, DRAO maintained that he did not agree with the draft and did not execute any proposed agreement.

[45] Instead on 19.7.2019, DRAO through his solicitors issued a letter proposing to sell his shares in PCSB and Jati for RM 155 million ('**the DRAO Offer**').

[46] On 1.8.2019, DSI through his lawyers rejected the DRAO Offer.

[47] According to DRAO, there being no agreement between DSI and him, the matter was left as it was and they no longer engaged on a mode of resolution by way of a sale of shares.

[48] DRAO does not deny that during the exchanges on a possible settlement, several corporate documents were prepared in anticipation but they were never executed and the company secretary had retrieved some of them. As the documents were not effected, the companies did not incur the costs and disbursements and the company secretarial services provider cancelled the invoices issued and sought DRAO to pay for the drafts instead which he did.

[49] DRAO had instead proceeded to negotiate with UMNO directly and on 8.1.2020, DRAO informed DSI of UMNO agreeing to a settlement and a special board meeting was convened vide a notice dated 13.1.2020 for a board meeting on 23.1.2020.

[50] Ahead of the board meeting, PCSB and Jati circulated the board papers on the proposed settlement scheme to all members of the board setting out the basic parameters of the proposed settlement scheme with UMNO dated 7.1.2020.

[51] On 23.1.2020, PCSB and Jati held their respective board of directors' meetings. It was at this meeting that DSI raised his objections to DRAO's proposed settlement scheme with UMNO. Notwithstanding DSI's objections, the board of directors proceeded to approve DRAI's proposed settlement scheme with UMNO.

[52] On 24.2.2020, DSI filed the present oppression action.

[53] On 9.3.2020, the 1st to 4th Defendants called for an urgent meeting and passed resolutions to appoint solicitors and decided on a

common representation. Messrs Badharul Baharain & Partners who always acted for the Defendants continue to act in respect of this action. The Defendants also decided to discontinue the discussions on the proposed settlement scheme with UMNO.

[54] It is not in dispute that at the time of the hearing of this action, the proposed settlement scheme of the UMNO Suit had not been concluded and all negotiations had ceased.

The alleged oppressive conduct

[55] DSI's main grounds in support of oppressive conduct are as follow:

a. Under the proposed settlement scheme with UMNO, the burden for the payments under the settlement falls on PCSB and its subsidiaries;

b. The income from Jati would be diverted to DRAO under the pretext of repayment of a shareholder's advance to fund the initial payment of RM 20 million. The payment of dividends would be frozen;

c. The business and assets of PCSB would be put at risk in the event of a default on the payment of the settlement sum;

d. The proposed settlement scheme is in breach of section 123 of the Companies Act 2016 since PCSB, PVSB and Jati would be funding or providing financial assistance for the

settlement sum which would result in UMNO withdrawing its claims of ownership of the shares;

e. In approving the settlement agreement with UMNO, the directors in exercising their majority voting powers, would be acting against the interests of PCSB, PVSB and Jati as the assets of the companies would be put at risks;

f. There is a propensity or tendency to oppress DSI through misuse of the majority powers by the Board of Directors at the time of the proceedings based on the following conduct *post* the filing of the action:

i. The manner in which the Defendants had conducted the present litigation, in particular, the refusal to provide discovery and misleading the Court about the existence of certain documents. DRAO had denied executing his letter of resignation and arranging for DSI's sons to be appointed directors;

ii. The documents and agreements would vindicate DRAO's version of the events and obviate the need for *viva voce* evidence.

DSI claimed that the aforesaid shows a clear propensity on the part of the Defendants to lie and act dishonestly not only towards DSI but also towards the Court in the conduct of their defence.

g. DSI claimed that since the filing of this action, the Defendants have shown a propensity to railroad through resolutions without proper discussion and refused DSI to explain his views at board meetings and even when he managed to voice his objections, the company minutes do not reflect any such objections resulting in a misleading minutes. The Defendants have also refused to permit the previous practice of recording Board meetings;

h. The Defendants are also using the company's funds to pay for their legal costs for the present action;

i. DSI is also obstructed from carrying out his duties as Chairman of the Audit Committee to check on the activities of TTPC. This means that DSI will not have access to important operational information of the subsidiary and will not be in a position to protect his interest.

Court's Analysis and Deliberations

[56] DSI's aforesaid grounds can be broadly categorised under 3 distinct heads, namely (a) oppressive action arising from the proposed settlement scheme with UMNO, (b) continuing oppressive action *post* filing of the action and (c) Defendants' action in the conduct of this action.

[57] Under the proposed settlement with UMNO, PCSB would ultimately be burden with the financial responsibility of paying UMNO the full settlement sum. Although DRAO would be

advancing RM 20 million out of the RM 70 million settlement sum, the said RM 20 million will be repaid to DRAO by PCSB from the dividend received from Jati. Further, PCSB will be responsible to pay RM 5 million from the dividend received from Jati and to bear the external loan of RM 45 million to pay the balance settlement sum to UMNO.

[58] Essentially, the assets of PCSB and its subsidiaries would be used to settle a dispute between UMNO and the shareholders of PCSB regarding their ownership of the shares of PCSB. It is not in the interest of the company that its assets are used for the personal interests of its shareholders. This is in fact a wrong perpetrated on the company and not the shareholders. This objection was specifically raised by the Plaintiff when the proposed settlement scheme was discussed on 23.1.2020 by the BOD of PCSB. However, the Plaintiff's objection was brushed aside by the Defendants exercising their majority votes. I will touch more on this below.

[59] DSI contended that he will be deprived of his dividends which would be frozen as the income from Jati will be channelled to pay the settlement sum. However, the freezing of the payment of dividends affect both DSI and DRAO. In fact it can be said that the settlement with UMNO benefits both of them as their ownership of the shares in PCSB will no longer be challenged.

[60] DSI contended that the proposed settlement scheme is in breach of section 123 of the Companies Act 2016 being a financial assistance, more specifically, section 123(2) which stipulates:

> '(2) Unless otherwise provided in this Act, a company shall not give financial assistance directly or indirectly for the purpose of reducing or discharging the liability, if –
>
> (a) A person has acquired shares in the company or its holding company;
>
> (b) The liability has been incurred by any person for the purpose of the acquisition of the shares.'

[61] On the other hand, the Defendants contended that the terms of the proposed settlement scheme have yet to be concretised and still subject to further discussions to give rise to any oppressive conduct. More importantly, learned counsel for the Defendants submitted that the proposed settlement scheme is no longer being pursued by the parties. Accordingly, the oppression if any, has since ceased.

[62] In the affidavits filed in this action, DSI had set out by way of background his version of the events relating to his negotiation with DRAO on settling the UMNO Suit. According to DSI, he had no desire to settle the UMNO Suit. Instead it was DRAO who was desperate to settle with UMNO and to exit the companies. This led to DSI initiating negotiations with UMNO to settle their claim in the sum of RM 70 million. DSI's arrangement with DRAO was for DSI to raise funds to purchase DRAO's entire shares in PCSB for RM 85 million. Out of the said sum, RM 70 million would be paid to UMNO as settlement and the balance RM 15 million would be paid the DRAO.

[63] DRAO however vigorously disputed DSI's version of the events. According to DRAO, sometime in February 2019, about 1 month

after the UMNO Suit was filed, DSI issued an offer to DRAO to purchase his shares for RM 25 million. The offer was subject to DRAO accepting all settlement proposed by the Plaintiff with UMNO provided the settlement cleared the parties from all liabilities. This was not accepted by DRAO. DSI had also forwarded draft settlement agreements to DRAO in June 2019 which was not agreed to by DRAO. Instead on 18.7.2019, DRAO had issued a letter proposing to sell his shares to DSI for RM 155 million which was not accepted by DSI.

[64] In an oppression action where the parties are relying solely on the affidavits filed, the Court will disregard substantially disputed facts and will only look at the undisputed facts. This is clear from the Privy Council decision in **Tay Bok Choon** v. **Tahansan Sdn Bhd** [1987] 1 WLR 413, where Lord Templeman held that where allegations are made by the complainant in affidavits and those allegations are credibly denied by the counter party, then in the absence of oral evidence or cross examination, the judge must ignore the disputed allegations and to decide by considering of the undisputed facts only.

[65] Accordingly, since there is a substantial disagreement between the parties on the discussions between DSI and DRAO with regards to the understanding reached between them, this Court shall give no consideration to the same save for the following facts which are common between the parties:

a. Both DSI and DRAO were desirous of reaching an out of court settlement with UMNO on its suit;

b. DSI had prepared the draft settlement agreement with UMNO and the draft settlement agreement with DRAO together with various corporate documents towards the settlements;

c. DRAO had also had negotiations with UMNO and had reached an in principle settlement scheme with UMNO which was presented at the Board Meeting of PCSB on 23.1.2020;

d. DRAO's proposed settlement scheme placed the entire burden of payment on PCSB.

[66] In any case, the background facts are not strictly relevant to the core issue of oppression in this case which as alluded above is based on the grounds under the 3 distinct heads outlined in paragraph 56 above.

[67] DSI's primary complaint stamped from the proposed settlement scheme that DRAO had reached with UMNO and which were present to the board of directors on 23.1.2020 for its approval. This settlement scheme was discussed with UMNO without DSI's knowledge and consent. DSI had never given DRAO the authority to negotiate with UMNO on the terms thereto. At the board of directors' meeting, DSI had objected to the use of the companies' funds to settle the personal obligations of the shareholders. However notwithstanding his objection, board of directors had approved the settlement terms and had authorised DRAO to proceed to conclude the settlement scheme with UMNO and to discuss with the potential lenders. In anticipation of the settlement,

the dividends that was declared and paid from Jati to PVSB on 21.1.2020 was not streamed upwards and declared and paid over to the shareholders as was the previous practice.

[68] There is nothing before this Court to suggest that the assumption of the financial burden to pay the settlement sum to UMNO by PCSB would be in the interest of the company. There is some force in DSI's contention that the Defendants as directors of PCSB had acted in breach of their fiduciary duties to the companies in approving and proceeding with the settlement scheme.

[69] But an action by the directors in breach of their fiduciary and statutory duties is a misconduct and a wrong done against the company and not the shareholders. The loss arising from such breach is a loss or injury suffered by the company and the loss to the shareholders are merely reflective of the loss of the company. DSI has not shown that his loss is distinct from that of the loss suffered by the company. With regards to such losses, the proper remedy in the case where the wrongdoers are in control of the company would be by way of a derivative action under section 347 of the CA 2016.

[70] The distinctions between an oppression action under section 346 and a derivative action under section 347 of the CA 2016 were highlighted by the Federal Court in **Koh Jui Hiong @ Koa Jui Heong & Ors** v. **Ki Tak sang @ Kee Tak Sang and another appeal** [2014] 3 MLJ 10 where His Lordship Jeffrey Tan noted the following distinguishing features:

a. where the wrong is alleged to have been done to the company in situations where the wrongdoer is in control of the company and will not permit action to be brought in its name, section 347 allows a minority shareholder to bring a claim on behalf of the company to seek proper redress for the company. The procedure is an exception to the rule in **Foss** v. **Harbottle** (1843) 2 Hare 461, 67 ER 189 that in any action in which a wrong is alleged to have been done to a company, the proper plaintiff is the company itself;

b. section 347 requires leave of the Court to bring a statutory derivative action. More specifically, under section 348(4) of the CA 2016, the Court shall take into account whether the complainant is acting in good faith and whether it appears *prima facie* to be in the best interest of the company that the application form leave be granted;

c. the oppression action under section 346 on the other hand is an action by a member of the company (including a member who held his share as nominee) in his personal capacity in respect of a personal wrong done to him where his interest as a member of the company had been deliberately overridden or set aside through conducts that visibly depart from the standards of fair dealing and a violation of the conditions of fair play by which the member is entitled to expect from the majority shareholders or directors of the company. No leave of court is required to commence the oppression action.

d. similar reliefs may be granted by the Court in both actions under section 346 and 347 but the Court has a much wider discretion as to the reliefs which it may grant under the former section. Section 346(2) (previously section 181(2) of the CA 1965) 'is a non-exhaustive list that does not limit other types of relief that the court **Re Kong Thai Sawmill** (Miri) Sdn Bhd 1978 2 MLJ 227 could fashion, with the view to bringing to an end or remedying the matters complained of'. As stated by Lord Wilberforce in, the provision 'leaves to the court a wide discretion as to the relief which it may grant, including among the options that of winding the company up'.

[71] I have in my judgment in **The Bank of Nova Scotia Berhad & Anor** v. **Lion DRI Sdn Bhd & Ors** in Suit WA-24NCC-248-05/2019 also dealt with the differences between the minority oppression action and derivative action and the policy reasoning underlying the same.

[72] Thus, where the loss suffered by the minority shareholder is merely reflective of the loss suffered by the company, the general rule is that the reflective loss is not recoverable by the minority as the company is the proper plaintiff to bring an action against wrongdoing controllers. Where no separate and distinct injury apart from the injury to the company is shown, the minority shareholder ought to commence a derivative action instead of an oppression action.

[73] In **Pan Pacific Construction Holdings Sdn Bhd** v. **Ngiu-Kee Corp (M) Bhd & anor** [2010] MLJU 269, the Federal Court held

that breach of fiduciary duties by one shareholder to the other does not automatically equate to conduct proscribed under the oppression provisions. The critical question was whether the breach of fiduciary duties was unfair to the complainant within the meaning of the section 181(1) of Companies Act 1965 (now section 346 of Companies Act 2016). The mere breakdown of quasi-partnership relationship in terms of trust and confidence was not in itself sufficient to justify the grant of relief under an oppression action.

[74] It is true that the cases suggest that corporate wrongs done to the company may in some circumstances also constitute a personal wrong against the minority shareholder and therefore permit of an oppression action by the minority shareholder. In **Ho Yew Kong** v. **Sakae Holdings Ltd** [2018] SGCA 33, the Singapore Court of Appeal was confronted with the difficult task of ascertaining whether an oppression claim is based on a personal wrong or a corporate wrong when it contains features of both types of wrongs.

[75] After surveying the various approaches in other commonwealth jurisdictions. Sundaresh Menon CJ proceeded to set out the analytical framework in his judgment to guide the court on the dividing line between oppression actions and statutory derivative actions where the facts present features of both personal wrongs and corporate wrongs. In particular, regards must be had to the kind of *remedy* sought as well as the kind of *injury* that is complained of and for which the remedy is sought. More specifically, the learned Chief Justice opined that to ascertain

whether a claim that is being pursued under an oppression action is an abuse of process, the Court should analyse the following:

(a) Injury

(i) What is the *real injury* that the plaintiff seeks to vindicate?

(ii) Is that injury distinct from the injury to the company and does it amount to commercial unfairness against the plaintiff?

(b) Remedy

(i) What is the *essential remedy* that is being sought and is it a remedy that meaningfully vindicates the real injury that the plaintiff has suffered?

(ii) Is it a remedy that can only be obtained under the oppression action?

[76] The learned Chief Justice then explained the aforesaid analytical framework in paragraphs 117 to 122 of his judgment which bear reproduction below:

> '117. … The focus on the essential remedy sought and its relation to the real injury which the plaintiff shareholder complains of picks up the approach first espoused in Re Charnley Davies. In our judgment, notwithstanding the criticisms that have been levelled at the focus on the essential remedy sought, this remains a very important part of the inquiry. After all, it is the remedies that we find one of the key differences between the two types of action since, unlike the position under s 216, remedies such as a winding up order or a

share buyout order are not available in an action under s 216A. If the essential remedy sought is one that can only be obtained in an action under s 216, then that would tend to be a strong indicator that the action brought under that provision is *not* an abuse of process…

118 We note that where the court finds that oppression has been established, it has "a wide discretion" to fashion such relief as it considers just … This extends to making orders for the errant shareholders or directors of the company concerned to make restitution to the company of moneys that they have wrongfully diverted from the company … The court may thus grant relief to the company in a s 216 action even though the same relief would happen to be also available in a statutory derivative action…

119. That said, we think it appropriate to highlight the words of caution of Bokhary PJ and Lord Scot in Re Chime against too readily granting what is in essence corporate relief in an oppression action. This is why it is necessary to focus on the ***essential*** remedy that the plaintiff is seeking. In our judgment, an oppression action under s 216 should generally not be permitted where the essential) or, as the case may be, the sole) remedy sought is a remedy for *the company* (such as a restitutionary order in favour of the company). Where that is the case, the presumptively appropriate remedy would be the statutory derivative action under s 216A. In such a case, it will also be evident that the plaintiff's primary purpose in bringing the action is not to obtain a remedy that bring to an end the situation by which it has been prejudiced or harmed as a shareholder. In contrast, a plaintiff who seeks an essential remedy directed to bring to an end the oppressive conduct which it has been subjected to as a shareholder will likely be permitted to pursue its claim by way of an oppression action under s 216 even if, as part of the essential remedy, it also seeks remedies in favour of the company such as restitutionary

orders. This will readily be seen to be the case where the remedies sought by the plaintiff such as a share buyout or a winding up order, will be impacted by suitable restitutionary orders in favour of the company.

120 At the same time, we do not think the question of whether an action under s 216 amounts to an abuse of process can be resolved by focusing solely on the essential remedy sought by the plaintiff… To properly invoke s 216, the plaintiff would have to identify the real injury which it has suffered and establish that that injury does amount to oppressive conduct against it as a shareholder. In this regard, it will be relevant to examine how the real injury which the plaintiff suffers as a *shareholder* is distinct from and not merely incidental to the injury which the *company* suffers. This will also have to be examined in the context of the essential remedy which the plaintiff is seeking and whether that remedy is in fact directed at the real injury which the plaintiff suffers as a shareholder … The crucial question in such a case is whether the plaintiff shareholder can demonstrate an injury to it that is distinct from the wrong done to the company.

121 In our view, as a practical matter, the application of the two pairs of questions pertaining to injury and remedy respectively will generally exclude recourse to oppression actions in cases involving publicly or widely held companies because either the essential remedies sought or the injury complained of will quite likely not bring the case within s 216. However it is not necessary for us to lay down a rule to this effect in order to dispose of the Main Appeals and we do not do so.

122 Finally, with regard to any concern that the rationale underlying the proper plaintiff rule and the reflective loss principle might be undermined by the analytical framework which we have set out at [116] above, in our judgment, where an action under s 216 gives rise to a risk of double recovery or

> prejudice to the creditors or shareholders of the company concerned, this should be dealt with by crafting the orders made in suitable terms to avoid such risk.'

[77] In the case of **Sakae Holdings,** the Singapore Court of Appeal found the present of *systemic* abuse by the majority shareholders in the management of the company's affairs. They had misappropriated large sums from the company without the complainants' knowledge and had engaged in fraudulent schemes to mislead them and conceal the true nature of the transactions from them.

[78] The Court of Appeal found that the transactions taken together coupled with the systemic nature of the abuse occasioned serious commercial unfairness to the complainants. This was the real injury which the complainants sought to vindicate, namely the injury to its investment in the joint venture and the breach of its legitimate expectations as to how the company's affairs generally and its financial investment in the company would be managed.

[79] On the remedy, the Court of Appeal opined that the essential remedy sought was to exit the company by either a winding up order or a buy-out order. This was notwithstanding that there were also reliefs in the form of restitution orders to the company as these restitution orders were necessary to ensure a fair value exit for the complainants. The essential remedy sought would bring an end to the matters that were complained of.

[80] Coming back to the real injury, the Chief Justice did not find it necessary to determine, in respect of some of the impugned transactions, the question whether any single one of them would have sufficed as a basis to grant the reliefs under the oppression action.

[81] Arguably in each of the impugned transactions involving misappropriation or abuse of company's funds, it can be said that the wrong against the company also separately amounted to a distinct personal wrong against the shareholders in that it would be a misuse of the shareholders' investment in the company and is in breach of the expectations as to how the company would be managed. In each of the impugned transaction, the minority shareholder had suffered a distinct personal wrong because the assets of the company was used by the wrongdoers for their self-serving interests. Yet, surely whilst an oppression action is theoretically available to the minority shareholder for each of the impugned transaction, it cannot be the case that the court will find that oppression is established. For instance, where the company's fund is used to pay legal fees amounting to RM 10,000 .00 for the wrongdoers' personal transactions, it would likely be an abuse of the court process if an oppression action is filed instead of a derivative action.

[82] The subsequent Singapore Court of Appeal case of **Suying Design Pte Ltd** v. **Ng Kian Huan Edmund** [2020] SGCA 46 clarified the legal framework in **Sakae Holding** (*supra*) in the following manner:

’30. …The nature of the loss relied on is of vital importance since it would follow as a matter of logical argument that most corporate wrongs would have some ill-effects on the interests of the shareholders of the company and its creditors (see Ng Kek Wee at [65]). To elaborate, the damage that the wrongdoer inflicts on a company may affect its ability to pay dividends to its members or return their capital in winding up, or its ability to pay its employees and other creditors and perhaps diminish the price at which members can sell their shares. Ordinarily, these ill-effects are put right when the company recovers what is due to it from the wrongdoer. It is thus not sufficient to simply claim, for example, that the misappropriation of the company’s assets has resulted in a decrease in the value of the shares held by a minority shareholder. Misappropriation of the company’s assets is by its nature unlawful and would reduce the assets of the company. Unless there is evidence to the contrary, the ‘injury’ to the minority shareholder in that situation is merely a reflection of the loss to the company…

34. It is clear that the framework we set out in Sakae Holding did not in any way limit or diminish the importance of the proper plaintiff rule. Rather, it remains a prerequisite, even where ‘overlapping’ wrongs are concerned, that a distinct injury must be suffered by the shareholder. The injury to the minority shareholder cannot merely reflect the injury suffered by the company. It must further be shown that the distinct injury amounts to commercial unfairness against the plaintiff as a member of the company. Commercial unfairness should be assessed against the behaviour the shareholder is entitled to expect or rely on, whether this expectation arises from a formal document or an informal understanding ..,

[110] To be clear, we do not think that the Court of Appeal’s decision in Sakae Holdings should be read as suggesting that the mere fact that injury has been caused to a shareholder’s

investment would be sufficient to constitute a distinct personal wrong. As emphasised above at [30], it is necessary to consider whether the injury to the minority shareholder is merely a reflection of that caused to the company. Further, while we accept that there may be certain standards of fair dealing and fair play which a shareholder is entitled to expect (see Over & Over ([29] supra) at [77]), particularly where the majority shareholder and wrongdoer is also a director of the company, it does not necessarily follow that a breach of these standards necessarily forms a distinct personal wrong. Sakae Holdings does not suggest otherwise. As we emphasised above, the impugned transaction in Sakae Holdings were carried out in breach of the rights which has been carefully negotiated for, and which were recorded in the joint venture agreement and other documents executed at the inception of the joint venture. Sakae Holdings was therefore an instance of a clear, egregious and fraudulent breach of an express understanding, and is distinguishable from the present case.

[113] In our judgment, these baseline expectations do not provide a sufficient basis on which to find that Mr Ng has suffered a distinct personal injury which would amount to commercial unfairness. To fins otherwise would, in our view, suggest that any misappropriation of moneys by a director would constitute a distinct injury to a shareholder. This would be too broad a construction of the framework the Court of Appeal set out in Sakae Holdings and make impermissible inroads into the proper plaintiff's rule. This simply cannot be the case. Further, the breach of this expectation would be remedied by the recovery of the misappropriated moneys by the company in a corporate action. The Company Act provides s 216A for this purpose.'

[83] How do one decide when would the line be crossed where a corporate wrong (be it a single act or otherwise) will also constitute a distinct personal wrong against the minority shareholder permitting a finding of oppressive conduct if a breach of some standards of fair dealing and fair play does not necessarily form a distinct personal wrong (being merely breach of some 'baseline expectation') more so where there is no discernible negotiated rights at the inception of the company or a document evidencing an express understanding as to the conduct of the affairs of the company?

[84] In the effort to seek clarity to the aforesaid issues, one must bear in mind that there is no universal definition on the meaning of 'oppression' and that 'it is quite impossible to lay down categories of conduct considered to be oppressive, each case has to be examine in the light of its own particular facts and thus the particular types of conduct in cases cited merely tend to illustrate whether such conduct can be regarded in law to be oppressive ,,, For there to be oppressive, there must be a visible departure from the standard of fair dealing or fair play or where the oppressed is constrained to submit to some overbearing act or attitude on the part of the oppressor.' [See: **Jaya Medical Consultants Sdn Bhd** v. **Island & Peninsular Bhd & anors** [1994] 1 MLJ 520].

[85] It seems to me that the guideline postulated by Gopal Sri Ram JCA (as he then was) in **Genisys Intergrated Engineers Pte Ltd** v. **UEM Genisys Sdn Bhd & Ors** [2008] 6 MLJ 237 which was followed by Jeffrey Tan J (as he then was) in **Lim King Kow** v. **Indra Kemajuan Sdn Bhd & Ors** [2010] 8 MLJ 831 is instructive,

namely, the question whether there is oppression in a given case is a question of fact to be answered not by a consideration of events in isolation but as part of a consecutive story. It is in the story that in some cases, even a single act or transaction which amounts to a corporate wrong may suffice to constitute oppression.

[86] The story must disclose an awareness of the minority interest and a conscious decision by the majority to override it or brush it aside or set to naught the proper company procedure [See: **Re Kong Thai Sawmill (Miri) Sdn Bhd** [1978] 2 MLJ 227 at 229].

[87] The corporate wrongs that the minority relied on are but '*evidence* of the manner in which the wrongdoer had conducted the company's affairs in disregard of the complainant's interests as a minority shareholder and where the complaint cannot be adequately addressed by the remedy provided by law for that wrong'.

[88] Further, the Court will need to look at the effect and consequences of the corporate wrongs done to determine if a firm tendency or propensity to oppress or disregard the interest of the minority exists and continues to exist at the time of the proceedings. Also, this firm tendency or propensity must be such that it would not be satisfactorily remedied with the mere order to compensate the company for the wrongs done to it.

[89] Thus, where the majority after falling out with the minority shareholders a few years after the incorporation of the company

with no discernible express expectations negotiated by the minority prior to inception may still succeed in an oppression action if the majority, as a consequence of the fallout, decided to run the company down by misappropriation of its assets. This is notwithstanding that the misappropriation is clearly a corporate wrong as the story shows (1) a conscious decision by the majority to override or brush aside or set to naught the proper company procedure against the minority interest, (2) the corporate wrong is mere *evidence* of the manner in which the wrongdoer had conducted the company's affairs in disregard of the complainant's interests as a minority shareholder and (3) where the complaint cannot be adequately addressed by the remedy provided by law for that wrong. This is because a derivative action by the minority which may result in the company being compensated for the misappropriation would still not redress the propensity by the majority to disregard the minority's interests.

[90] An example of such a case is **Chew Sang Hai** v. **Intan Kinabalu Sdn Bhd & Ors** [2012] 3 MLJ 244. In that case, the oppression action was based on a single transaction. The company, a property development company was 90% owned and managed by the Lim family of which the patriarch was the 2nd respondent. The 4th to the 7th respondents were the children of the 2nd respondent. The Lim family also owned 47% of the shares in Century Leasing & Development Sdn Bhd ('CLDSB') and 100% in the 3rd respondent. Sometime in 2002, the petitioner was approached by the 2nd respondent and offered him shares and directorship in the company conditional upon the petitioner succeeding in assisting the company to revive a joint venture agreement entered with

Lembaga Pembangunan Perumahan Dan Bandar ('LPPD') pertaining to a development project. The petitioner succeeded in reviving the joint venture and thereafter acquired 100,000 shares in the company for the sum of RM 230,000.00. He was also appointed a director of the company.

[91] The company had obtained a short term loan of RM 8 million from CLDSB. Sometime in middle of 2010, the 2nd respondent wanted to buy the entire phase 3 project from the company for RM 24 million. The petitioner opposed this move as the price was clearly undervalued. In an apparent move to subterfuge the petitioner's opposition, the 2nd, 3rd and 6th respondents held a board meeting of the company when the petitioner was on an overseas trip. At that meeting, the directors represented that the company needed another RM 5 million from CLDSB as working capital, thus increasing the loan from RM 8 million to RM 13 million. The directors then proposed to settle CLDSB's loan by accepting blocks J, K and L of phase 3 of the project. The petitioner was not notified of the meeting. Subsequently when the petitioner asked for the valuation report that was relied upon for the decision, he was denied the same.

[92] Undoubtedly, the impugned transaction was a clear corporate wrong against the company. However looking at the entire events leading to the impugned transaction as a consecutive story, one can understand why Abdul Rahman Sebli J (as he then as) allowed the oppression petition. It was the petitioner who had revived the development project for the company. The petitioner had acquired the shares of the company based on the success of

the project. The Lim family knew that the petitioner had opposed the sale of the phase 3 property to them at an undervalued price. The board meeting was intentionally convened without the petitioner's knowledge and when he was overseas. There was no urgency for the meeting. No notice of demand was issued by CLDSB for repayment of the RM 13 million. In fact, being a company owned by the Lim family, CLDSB would not in the ordinary course of business have called on the loan given to the company. The move was clearly engineered to enable the Lim family to dispose the properties of the company at an undervalue without regard for the petitioner's interest. A derivative action would not have brought an end to the petitioner's predicament as the majority had demonstrated a firm tendency to continue with their oppressive intention.

[93] In the present case, looking at the entire events, it is plain that DSI's real injury or complaint in respect of the settlement scheme is that the same constituted a wrong on the company in the sense that the assets of the company is being used for the settlement of the liability of both DRAO and himself in the UMNO Suit. This can be seen in the verbatim minutes of the meeting on 23.1.2020 where DSI raised the following concern:

> 'DSI: I have points to raise la pasal the settlement agreement tu… pertamanya I disagree that settlement via payments is favourable option to pcsb … Pcsb has zero liability in the court case … the liability rest solely on myself and dato Ruslan, being the two shareholders…. Pesaka consolidated, Pesaka ventures, jati … Will continue to own all assets even if the case is lost … settlement involving payment made by Pesaka

consolidated or its subsidiaries is not in the pesaka consolidated interests … Pcsb never has to make any payment to umno even if the case is lost… Settlement by payment will only benefit the two shareholders … dato Ruslan and perhaps myself … So I oppose any settlement … if it involves pcsb group making payment to umno … Payment should be made by ultimate shareholders … So it is not correct…'

'DSI: Saya faham dato … but the fiduciary duty rest on each director individual so I must make sure that this is recorded properly because when it becomes an issue nanti in terms of the not correct to raise the funding dekat the company to finance the settlement of shareholders then that can become something very difficult later on …'

'DSI: then to get the company to pay for its shareholder liability is not correct … settlement to be made on the court case between umno and dato ruslan and myself should be at our own expense … not the company's … it is not correct for anyone to place this liability on the company and impact the company's future negatively … Just to bail shareholders out from a legal dispute …'

'DSI :… The company should not borrow any money to pay for liabilities that belongs to its shareholders. To bail the shareholders out … this is not correct … And for the page 6 & 7 … cashflow … Why is pvsb taking a loan and making payments … the funds raised are to be used to pay for settlement on behalf of the shareholders … not for the company's benefit … This is not correct …and for the page 8 … advances by dato Ruslan … Dato Ruslan is making payment to umno … why is pvsb required to make payment to dato ruslan … the payment he made is on his personal capacity … it is not correct to ask the company to pay expenses made by the shareholders … pcsb and its subsidiaries have no liability to begin with … Doing this is an attempt to shift liability from shareholders to the company … this is not correct … and as a board member I must

also state that it is not in the interest of the company … This is my comment…'

[94] From the aforesaid, DSI did not at all complain that the settlement scheme also amounted to a separate and distinct personal wrong against him as a minority shareholder of the company. In fact, there is even a concession by DSI that he too would stand to benefit from the settlement scheme. The undisputed events suggest that both were equally keen to resolve the UMNO disputes either through personal funds or PCSB. Although DRAO's negotiation with UMNO was not discussed with DSI, it was nevertheless presented to the board of directors for approval where DSI was given express notice and had attended to voice his views. Although PCSB's funds were to be used for the proposed settlement scheme, both DSI and DRAO were the only 2 shareholders of the company. The facts are very different from what Abdul Rahman Sebli J (as he then was) had to deal with in **Chew Sang Hai** v. **Intan Kinabalu Sdn Bhd & Ors** (*supra*).

[95] Learned counsel for the Plaintiff had sought to establish that the Plaintiff does have a distinct personal wrong or injury by contending that the majority directors had commenced freezing the dividend payments to the Plaintiff in anticipation of the settlement scheme. In addition, learned counsel contended that DRAO would unfairly derive benefit from the settlement scheme as the company had approved prepayment of RM 20 million to DRAO for his advances to the company as part of the settlement scheme. According to the Plaintiff, this payment to DRAO is a devise to channel dividend payments to DRAO to the exclusion of the

Plaintiff. This is because DRAO should be personally liable to pay the RM 20 million for the settlement with UMNO and there is no reason or justification for the company to reimburse him for the same.

[96] On the issue of dividend, it is not disputed that Jati had paid PVSB dividend in January 2020. Whilst there was arguably some delay in the dividends being streamed up to PCSB, it is common ground that the dividends were in fact subsequently declared and paid to the shareholders in the usual course of business.

[97] Notwithstanding the aforesaid, even if indeed the payments of the dividends were to be frozen had DRAO's proposed settlement scheme with UMNO were proceeded with, this would affect not only DSI but also DRAO as well. It is therefore not something that is distinctively a loss only to DSI.

[98] As regards the prepayment of the RM 20 million to be advanced from DRAO, I am unable to agree with learned counsel for DSI that this was a scheme to unfairly benefit DRAO. Under DRAO's settlement scheme, the entire funding for the same was to be borne by PCSB. The initial RM 20 million payment was to be advanced by DRAO as a source of funds for PCSB. There was no question of DRAO or for that matter DSI, as shareholders of PVCSB, having to personally bear the settlement sum which upon full payment would benefit both DSI and DRAO.

[99] The only question is whether the corporate wrong in this case, namely, arranging for PCSB to bear the financial burden and risks

for the payment of the settlement sum also constitute a distinct and personal wrong against DSI or is such a departure of fair dealings and or fair play expected from the majority shareholder such that it is not an abuse for an oppression action to be filed instead of a derivative action.

[100] As shown above, the gist of DSI's main complaint against DRAO's settlement scheme is the wrong done to PCSB. Therefore the true remedy in such a case would be an action by PCSB against the directors for acting in breach of their fiduciary duties. This can be achieved through a derivative action under section 347 of the CA 2016.

[101] Further, I fail to see how the proposed settlement scheme can be said to be in contravention of section 123(2) of the Companies Act 2016. Learned counsel for DSI has not in fact demonstrated how the said section is applicable to the facts of the present case. In fact, given that both DSI and DRAO had consistently maintained in the UMNO Suit and in this action that they are both the true legal and beneficial owners of the shares in PCSB, the proposed payment of the sum of RM 70 million to UMNO to settle the UNO Suit can only be construed to be nothing more than a 'commercial settlement' and has not connection at all with the acquisition of the shares.

[102] In any case, it is common ground that at the time of the hearing of the oppression action, DRAO's settlement scheme with UMNO was no longer being pursued. Negotiations with UMNO had come to an end.

[103] Notwithstanding the aforesaid, learned counsel for DSI citing **Re Kong Thai Sawmill (Miri) Sdn Bhd** [1978] 2 MLJ 227 at 229 submitted that there is still existing at the time of the proceedings a firm tendency or propensity by the Defendants to oppress DSI or to disregard his interests. This is based on the following passage by Lord Wilberforce in the aforesaid case:

> '…What is attacked by sub-section (1)(a) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be 'oppressive' or 'in disregard' even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that, as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section…'

[104] Learned counsel for DSI then relied on the complaints under the headings (b) and (c) above as evidence of the continuing tendency or propensity by the Defendants to oppress and or disregard DSI's interests.

[105] More specifically, learned counsel for DSI pointed to the continuing oppressive conduct *post* the filing of the oppression action. After the action commenced, there had been 2 further board of directors' meetings called on 9.3.2020 and 12.3.2020. DSI complained that in both these meetings, the Defendants have shown a propensity to railroad through resolutions without proper discussions and refused to allow DSI to explain his views and that even when he

managed to voice his objections, the minutes do not reflect any such objections and hence are misleading.

[106] DSI further claimed that proceedings are being conducted and minutes are being doctored in such a way as to ensure that DSI's rights are being completely side-lined. The Defendants had even refused to permit the previous practice of recording board meetings to ensure accuracy of the minutes.

[107] DSI also raised objection to the decision of the board of directors for the companies to appoint solicitors to represent the Defendants in the oppression action and to bear the legal fees as the oppression action is essentially a disputes between shareholders.

[108] Further, at the board meeting of TTPC, the operating subsidiary, DSI alleged that he was obstructed by DRAO from carrying out his duties as Chairman of the Audit Committee. According to DSI, this meant that DSI would not have access to important operational information and would not be in a position to protect his interests and prevent abuse in the operational subsidiary.

[109] Starting with the board meetings on 9.3.2020 and 12.3.2020, having perused the verbatim minutes of the meetings, I do not see how DSI can be said to have been oppressed. At the meeting on 9.3.2020, the board of directors' of PCSB and PVSB had unanimously agreed to the appointment of Messrs Badharul Bahrain & Partners to act for all the Defendants in the present oppression action filed by DSI and to authorise DRAO to sign all

relevant court papers in respect thereof. DSI had quite rightly, abstained from voting.

[110] At this meeting, DRAO informed the board that the settlement negotiation with UMNO has been discontinued. However, upon the advice of the company secretary, it was agreed that a separate board meeting would be convened to approve the discontinuation of the settlement negotiation as this was not included in the agenda and there were 2 directors who were not present.

[111] On 12.3.2020, at the PCSB board meeting, the abolition and cancellation of the proposed settlement with UMNO was formally tabled and unanimously approved with DSI abstaining. When DSI pressed for the reasons for the cancellation, DRAO merely stated that 'the board feels like we want to cancel that's all. I don't have to give other reasons or what not. That's why the board needs to approve…'.

[112] Learned counsel for DSI submitted that the aforesaid is evidence of DSI's rights and interests being continually side-lined by the majority directors. With respect, I do not agree.

[113] In the first place, DSI's complaint in this matter has to do with DSI's position *qua* director and not *qua* shareholder. Section 346 is a provision to redress complaints by a member of the company *qua* his status as a shareholder and not director. The oft-cited passage from **Re Lundie Brothers Ltd** [1965] 1 WLR 1051 is reproduced below:

> 'His main grievance is, as he admitted in the witness box, that he had been ousted as a working director. That, it seems to me has nothing to do with his status as a shareholder in the company at all. The same thing is equally true in regard to his complaint that his remuneration as a director of the company has been reduced. That relates to his status as a director of the company, and not to his status as a shareholder of the company.'

[114] More significantly, DSI failed to show how the decision to cancel the settlement negotiation with UMNO is prejudicial to him as a shareholder of the company. The mere use of the majority power to secure the passing of resolution to cancel the settlement negotiation with UMNO which DSI may oppose, cannot constitute oppression. Our Court of Appeal in **Hoy Pak Kwai (suing on behalf of himself and for the benefit of the company Aerial Product Industries Sdn Bhd)** v. **Leong Kon Fah & Ors** [2007] 1 MLJ 508 held as follows:

> '[66] As to the appellant's claim of there being a breach of fiduciary duty, I find this absurd. As correctly pointed out by the trial judge, the first and second respondents are substantial shareholders and are directors of API. They owe no fiduciary duty to the appellant in exercising their vote at board meetings and as shareholders they owe no duty to anybody as to how they exercise their vote (Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd and other appeals [1996] 1 NLJ 661). And the 'mere use of voting power at board meetings or at a general meeting to secure the passing of resolutions which other members of the board or shareholders oppose, would not in general constitute oppression for the purpose of the section or for any other purpose.'.

[115] As regards the appointment of Messrs Badharul Bahrain & Partners as solicitors for the Defendants and the use of the company's funds to pay their fees, learned counsel for DSI relied on the case of **Dato' Tan Toh Hua** v. **Tan Toh Hong** [2001] 1 MLJ 369 at 373 where the Court of Appeal quoted with approval the following statement by Harman J in **Re A Company (No 004502 of 1988); ex p Johnson** [1992] BCLC 701 where Harman J at pp. 702-703 said:

> 'The principle was drawn to the profession's attention by the decision of Hoffman J in Re Crossmore Electrical & Civil Engineering Ltd [1989] BCLC 137 at p 138 where he said:
>
> > 'The company is a nominal party to the s 459 petition, but in substance the dispute is between the two shareholders. It is a general principle of company law that the company's money should not be expended on disputes between shareholders.'
>
> That reminder of the classic view was based on Hoffman J on Pickering v. Stephenson (1872) LR 14 Eq 322, so nobody can suggest that it is a new development.'

[116] Harman J had in the said case proceeded to hold that such expenditure by the company is a misfeasance and ought not to be permitted.

[117] Arguably, the use of the company's funds in this case to pay for the Defendants' legal fee in this action is a misuse of the company's assets and is a corporate wrong. I said 'arguably' because in this case, the 2nd and 3rd Defendants are sued in their capacity as directors of the companies. In any case, the loss to

DSI, if at all, would be merely reflective of the loss to the companies. It cannot be said that there is a distinct and separate wrong done to DSI arising from the same.

[118] As regards the alleged obstruction by DRAO against DSI from carrying out his duties as Chairman of the Audit Committee, this has nothing to do with DSI's position as a shareholder of PCSB which is the focus of section 346 of the CA 2016. This is quite apart from the fact that the alleged obstruction is vigorously disputed and hence, not established based on undisputed facts. Further, TTPC is a separate legal entity from PCSB.

[119] The last head of complaints relates to the Defendants' conduct in the present proceedings. Learned counsel for DSI sought to make heavy weather of the Defendants' 'dishonest refusal to produce documents and to give false and misleading statements on affidavits and through counsel to the Court' and submitted that as a matter of law, the manner in which the Defendants conducted the action including the position taken by the Defendants on DSI's request for documents can be considered as evidence of likelihood or pattern of oppressive conduct.

[120] This relates to DSI's version of the story above where as part of the explanation of the arrangement for DRAO to sell his shares and exit the company, DSI had referred to documents to effect DRAO's resignation and for DSI's sons to be appointed as directors and the fact that the documents had been returned to the company secretary after execution by DSI and his sons.

[121] DRAO had in his affidavit disputed DSI's version of his story.

[122] In order to prove his allegations, DSI had requested for the production of the resignation letter, the appointment of DSI's sons as directors and the agreements and documents signed between UMNO and DRAO from the Defendants.

[123] Upon the Defendants' failure to produce the documents, DSI filed a formal application for discovery of the documents. However, on the actual day of the hearing, learned counsel for the Defendants submitted that DSI as a director could have simply obtained the documents from the company secretary and conceded to the application with the proviso that DRAO denied that there had been a proposal for DRAO to resign and therefore that it was not possible for the company secretary to produce the resignation letter.

[124] It was however subsequent determined from the company secretary that the resignation letter does exist and this was subsequently produced by the Defendants.

[125] Learned counsel for DSI submitted this as a clear example of the propensity of the Defendants to lie and mislead the Court in the conduct of their defence.

[126] With respect to learned counsel for DSI, I cannot see how the Defendants' conduct in dealing with DSI's request for discovery of documents in this action can have a bearing on the issue of oppression in this action.

[127] The oppression action filed in this Court is governed by the Rules of Court 2012 and the proceedings cannot be treated as an extension of the management of the company and or a reflection of the manner in which the affairs of the company is being conducted.

[128] The suggestion that a party's conduct in the litigation may be looked at as further support of a claim of oppression is based on the United States case of **Davis** v. **Sheerin (In re Davis)** 3 F. 3rd 113, 1993 U.S. App. In that case, the Court of Appeals had based its holdings that there was sufficient evidence of oppression on amongst others, the majority shareholder's denial of the minority shareholder's ownership of their shares notwithstanding clear documentary evidence of ownership.

[129] **Davis** v. **Sheerin (In re Davis)** was a case decided based on the Texas Business Corporation Act which does not expressly provide for the remedy of a 'buy-out'. This is of course very different from our section 346 of the Companies Act 2016. We must be slow to follow court decisions from jurisdictions which jurisprudence and laws on oppression are different from ours.

[130] Accordingly, I am unable to accept the submissions of learned counsel for DSI that there is evidence of continuing oppression or an existence of a firm tendency or propensity to oppress DSI from the conduct of the majority post the filing of the oppression action and or from the manner in which the majority had conducted the legal proceedings in this action.

[131] In fact, based on my conclusion that DSI's real complaint in respect of the DRAO's settlement scheme is really a wrong done to PCSB, there was never a case made out for oppression by DSI to begin with. Thus, the contention that there is a 'continuing tendency or propensity to oppress' post the filing of this action is premised upon a non-existing state of affairs and is bound to fail.

[132] In the premises, I dismissed the Plaintiff's oppression action under Enclosure 1 with costs fixed at RM 50,000.00 as agreed by the parties subject to the payment of allocator.

Dated: 26 October 2020

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(**ONG CHEE KWAN**)
Judicial Commissioner
High Court of Malaya, Kuala Lumpur,
Commercial Division, NCC2.

COUNSEL:

1. Mr. Lim Kian Leong and Mr. Tobias Lim for the Plaintiff.
   (Messrs. Lim Kian Leong & Co. (Kuala Lumpur))
2. Ms. Jasneeta Bhullar for the Defendant.
   (Messrs. Azmi Fadzly Maha & Sim (Kuala Lumpur))

CASE REFERENCE:

1. Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 WLR 413.
2. Koh Jui Hiong @ Koa Jui Heong & Ors v. Ki Tak sang @ Kee Tak Sang and another appeal [2014] 3 MLJ 10.
3. Foss v. Harbottle (1843) 2 Hare 461, 67 ER 189.
4. Re Kong Thai Sawmill (Miri) Sdn Bhd 1978 2 MLJ 227.
5. The Bank of Nova Scotia Berhad & Anor v. Lion DRI Sdn Bhd & Ors in Suit WA-24NCC-248-05/2019.
6. Pan Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corp (M) Bhd & anor [2010] MLJU 269.
7. Ho Yew Kong v. Sakae Holdings Ltd [2018] SGCA 33.
8. Suying Design Pte Ltd v. Ng Kian Huan Edmund [2020] SGCA 46.
9. Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Bhd & anors [1994] 1 MLJ 520.
10. Genisys Intergrated Engineers Pte Ltd v. UEM Genisys Sdn Bhd & Ors [2008] 6 MLJ 237.
11. Lim King Kow v. Indra Kemajuan Sdn Bhd & Ors [2010] 8 MLJ 831.
12. Chew Sang Hai v. Intan Kinabalu Sdn Bhd & Ors [2012] 3 MLJ 244.
13. Re Lundie Brothers Ltd [1965] 1 WLR 1051.
14. Hoy Pak Kwai (suing on behalf of himself and for the benefit of the company Aerial Product Industries Sdn Bhd) v. Leong Kon Fah & Ors [2007] 1 MLJ 508.
15. Dato' Tan Toh Hua v. Tan Toh Hong [2001] 1 MLJ 369.
16. Re A Company (No 004502 of 1988); ex p Johnson [1992] BCLC 701.
17. Davis v. Sheerin (In re Davis) 3 F. 3rd 113, 1993 U.S. App.

LEGISLATION REFERENCE:

1. Sections 123 and 346 of the Companies Act 2016.
2. Section 181(1) of Companies Act 1965
3. Texas Business Corporation Act.