

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1995] SGCA 2

Civil Appeal No 121 of 1994, No 130 of 1994, No 131 of 1994

Between

GROUND OF DECISION

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Kumagai Gumi Co Ltd v Zenecon Pte Ltd & Ors

[1995] SGCA 2

Civil Appeal No 121 of 1994, No 130 of 1994, No 131 of 1994
Karthigesu JA; L P Thean JA; Yong Pung How CJ
05 January 1995

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Judgment:

2 Coram: The Honourable Yong Pung How CJ The Honourable M

Karthigesu JA The Honourable L P Thean JA

3 < Delivered by L P Thean JA >

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5 **Cur Adv Vult**

6 JUDGMENT These three appeals have been brought by various

parties against the decision of Warren Khoo J in Originating

Petition No 9 of 1992 and Companies Winding Up Petition No 23 of 1992. Civil Appeal No 131 of 1994 has been brought by the following parties: Zenecon Pte Ltd ('Zenecon'), Low Hua Kin ('Low'), Teo Yit Bee ('Teo') and Loo Yong King ('Loo'). Their appeal is against the whole of the decision of the learned judge in Originating Petition No 9 of 1992. This effectively is the main appeal before us, and we shall refer to these parties collectively as 'the appellants'. Zenecon and Low have also appealed against the whole of the decision of the learned judge in respect of Companies Winding Up No 23 of 1992 by way of Civil Appeal No 130 of 1994. In addition to these two appeals, Kumagai Gumi Co Ltd ('Kumagai') have appealed against certain parts of the decision of the learned judge in Originating Petition No 9 of 1992 by way of Civil Appeal No 121 of 1994. We heard all the

three appeals together.

7 The facts Kumagai is a Japanese corporation and had been doing business in Singapore as building contractors. The relationship between Kumagai and Low started in 1972, when Low was a lecturer in what was then the University of Singapore. Kumagai, with the consent of the university, engaged Low as a consultant and advisor. In 1976, Low resigned from the university and thenceforth was employed by Kumagai as their advisor.

8 With the consent of Kumagai, Low incorporated Zenecon which at all material times was under his control. He was the chairman and a director of Zenecon and had the controlling shares. The other directors and shareholders include his wife, Teo, and his brother, Loo. One Lim Chong Tiong @ Jason Lim ('Lim') was the company secretary of Zenecon.

9 In 1983, Kumagai and Low agreed to enter into a joint venture, and Low decided to use Zenecon as a party from his side to the joint venture. On 25 April 1983, a shareholder agreement and memorandum of understanding were entered into between Kumagai and Zenecon whereby they agreed to incorporate a company, Kumagai-Zenecon Construction Pte Ltd ('KZ'), for the purpose of engaging in the business of building contractors and property development. Under the agreement, Zenecon was to hold 51% and Kumagai 49% of the shares of KZ. As for management, the agreement provided for a board of six directors, with three directors to be nominated by each party. The quorum for a meeting of directors was to be four with two nominees from each side; decisions were to be by majority and there was no provision for a casting vote. Pursuant to the agreement, KZ was incorporated on 3 June 1983 and

shares in the proportions as agreed were allotted to the parties. However, article 83 of KZ's articles of association deviated from the agreement and provided that the quorum shall be two and that in the case of an equality of votes, the chairman shall have a casting vote. The chairman of KZ was a Kumagai nominee, but Low was the managing director. Zenecon's other two nominee directors in KZ were initially Teo and one Low Woon Hock, the latter being an executive director. Subsequently in July 1986, Low Woon Hock resigned as a director and he was replaced by Low's brother, Loo.

10 An additional director nominated by Kumagai was subsequently appointed as a result of a board meeting held on 17 February 1987. Thenceforth, Kumagai had four nominees as opposed to Zenecon's three on the board of KZ.

11 Lim joined the company as an employee in 1984. He was appointed the company secretary in March 1986, as well as its

general manager of finance and administration in July 1989 and its general manager of projects in July 1991.

12 KZ has a subsidiary initially known as Kumagai Property Marketing Pte Ltd ('KPM') which later changed its name to Kumagai Investment Pte Ltd. KPM was incorporated in November 1984 with the agreement of Kumagai. Its initial purpose was to act as the marketing arm of KZ. Teo and Low Woon Hock were the subscribers, each holding one subscriber share. On 12 November 1984, KZ was allotted 9,000 shares and Lim Thye San, Low's brother-in-law and property manager of KPM, was allotted 1,000 shares. Low was appointed the representative of KZ. All these were done with the approval of Kumagai. The directors of KPM were Low, Teo, Loo and Lim, and there was no Kumagai nominee on the board of KPM. On 16 January 1986, Low Woon Hock's one subscriber share in KPM was

transferred to Low. On 8 March 1989, Lim Thye San's 1,000 shares were transferred to Lim who had become KPM's property manager and these shares were later transferred by Lim to Low on 19 June 1989.

13 Between 22 June and 3 July 1989, KPM bought three tranches of shares in Guthrie GTS Ltd ('Guthrie'). By these purchases, KPM acquired some 12.57% of the shares capital of Guthrie. At about the same time in July, Low also bought for his own account 10.5m shares in Guthrie, representing 7.9%. Hence, together with the shares held by KPM he was in a position to command a voting power supported by over 20% of the issued shares of Guthrie. We will refer to the transactions involving Guthrie shares as 'the Guthrie share transactions'. The financing of the purchase of Guthrie shares was arranged by Low himself against his own

guarantee. On 5 July 1989, Low became a director of Guthrie and subsequently its chief executive officer. At the same time he brought KZ into business relationship with Guthrie. On 6 July, Low signed on behalf of KZ a memorandum of understanding for a joint venture between Guthrie and KZ. KPM was also joined as a party, Lim signing on its behalf. The authority for entering into the joint venture was in the form of a resolution dated 6 July 1989 signed only by the three Zenecon nominee directors. The purchase of the Guthrie shares and the signing of the memorandum of understanding for the joint venture were carried out by Low without any prior consultation with Kumagai. With the alleged exception of one M Otsuka ('Otsuka'), who was the general manager of the overseas division of Kumagai reporting directly to the president of Kumagai and a nominee director of Kumagai on the

board of KZ, nobody in Kumagai knew anything about the Guthrie share purchases or the proposed joint venture with Guthrie. They learnt about them only from the newspapers.

14 As a result, between 14 and 20 July 1989, Low attended meetings with the staff of Kumagai in Tokyo. No conclusion was reached at that time. Machida, the chairman of Kumagai, took the unusual course of writing directly to Guthrie telling the latter that the joint venture had yet to be approved by the board of KZ. At a further meeting on 19 and 20 August 1989, an agreement was reached in the form of signed minutes. The agreement provided, inter alia, that the proposed joint venture between KZ and Guthrie should be carried out. In order to procure financial facilities for the joint venture, it was agreed that Kumagai would take up 9.244m redeemable preference shares of \$1 each in

the capital of KZ. The redemption was to be made from the operating profits of KZ. It was agreed that Low would have N Kano ('Kano') as his deputy and an executive director of KZ. It was also agreed that the business performance of KZ would be reviewed after three years and if Low's performance was found by Kumagai to be unsatisfactory, Low would have to relinquish his management post. Kano was duly appointed director of KZ on 3 November 1989.

15 Kumagai did not subscribe to the 9.244m redeemable preference shares. Instead, they provided KZ with a S\$9m guarantee for banking facilities totalling \$15m which KZ obtained from The Development Bank of Singapore Ltd.

16 The joint venture agreement with Guthrie was signed on 14 March 1990. However, within three months, Low told Kano that the Guthrie shares held by KPM should be sold quickly as the price

was going to drop. Kano later discovered from newspaper reports that Low had sold most of KPM's shares in Guthrie between 29 June and 3 August 1990. The sale of these shares resulted in a huge profit of \$6.2m to KPM. Without the voting power, Low failed to get re-elected to the Guthrie board and also ceased to be the chief executive officer.

17 On 12 and 13 September 1990, Low met again with Kumagai officials in Tokyo. There were discussions about what to do with the profit earned from the sale of the Guthrie shares and about the winding up KPM. Kumagai wanted the profits to be distributed so as to help KZ to discharge its liabilities and thereafter KPM to be wound up. Low, however, did not agree, and in consequence no agreement was reached between Low and Kumagai at that time.

18 The Guthrie joint venture undertook three projects. In December 1990, without Low's influence on its board, Guthrie

terminated the joint venture with KZ, except as to existing projects. In June 1991, KZ bought out Guthrie's interests in the outstanding projects for \$300,000.

19 In early 1991, Kano told Low not to tender for any new projects. Low nevertheless submitted tenders on behalf of KZ. Tender deposits amounting to \$100,400 were paid. Of this amount, \$250 was not refundable, \$45,000 was refunded to KPM as at 31 December 1991, and \$55,150 was billed by KPM to the company on 30 December 1991.

20 In May 1991, Kano learnt from the newspapers that a company known as Kumagai Investment Pte Ltd had bought 7.321m shares in Pacific Can Investments Holdings Ltd ('Pac Can'). Upon investigation, Kano discovered that the company was actually KPM, whose name had been changed on the authority of a special

resolution passed at a general meeting of KPM held on 23 April 1991. On the authority of another resolution passed at a general meeting held on 1 July 1991, the objects clause of KPM's memorandum of association was altered to allow investment in shares as part of its businesses. Kumagai, however, knew nothing of these changes. In August 1991, 278,000 more Pac Can shares were purchased by KPM, again without Kumagai's knowledge. We will refer to the transactions involving Pac Can shares as 'the Pac Can share transactions'.

21 At about this time, KPM also took an investment in a company called KZ Investments Pte Ltd ('KZ Investments'). KZ Investments was formerly known as KZ Consultants Pte Ltd and was incorporated in December 1983. Originally, it was almost wholly owned by Zenecon. The directors were Low, Teo and Loo. In November 1990, a

Taiwanese corporation, Harvestec Holding Pte Ltd, became a minority shareholder of KZ Investments holding 49% of the shares.

On 11 June 1991, KPM without the knowledge of Kumagai was allotted and took up 1,314,525 shares of \$1 each of KZ Investments, representing 22% of the shares of that company; the remaining 29% was held by Zenecon. The allotment of shares in KZ Investments to KPM will be referred to below as 'the KZ Investments share transaction'.

22 In September 1991, KZ Investments bought 3,117,000 shares in a Malaysian company, Aokam Tin Bhd ('Aokam'). This was reported in the newspapers and KZ Investments was described as being part of the Kumagai group. Low himself bought 2.011m shares in Aokam. Again, Kumagai found out about KZ Investments' purchase only from the newspapers. These transactions will be referred to as 'the

Aokam share transactions'.

23 On 17 September 1991, a requisition was made by Zenecon, signed by Low, for an extraordinary general meeting of KZ to be convened for the purpose of considering and, if thought fit, of passing a resolution to remove a Kumagai nominee, Okazaki, as director of KZ and to appoint Lim in his place. This move, however, was eventually abandoned. Notwithstanding that, matters between the two joint venture partners came to a head and from December 1991 onwards, Zenecon nominee directors did not attend board meetings called by Kano to discuss company matters. These matters included the replacement of Lim as company secretary, KZ's role in KPM and alleged improper use of funds in KPM.

24 In January 1992, Kano wrote to KZ's solicitors who had acted in one of KZ's projects, the Mimosa project, asking to see KZ's

files on the purchase of the Mimosa land but Low had instructed the solicitors not to allow Kano to see the files. On 11 February 1992, Kumagai succeeded in obtaining a court order appointing provisional liquidators of KZ. The provisional liquidators found that much of KZ's accounting and financial records, including much of those relating to the Mimosa project, were missing and some of KPM's computer files had also been erased. In particular, most of KZ's accounting records from 1983 to 1988 could not be found. It was found that documents had been removed before the appointment of the provisional liquidators.

25 While the provisional liquidators were taking over the affairs of KZ, Zenecon's shares in KZ Investments were being transferred to Zenecon Holdings Pte Ltd ('Z Holdings') and the board of KPM resolved by a resolution, dated 21 February 1992 signed by Low,

Teo, Loo and Lim, authorising any two of its directors to sign a waiver of the pre-emptive rights under the articles of association of KZ Investments. Low and Teo had interests in Z Holdings.

26 On 29 January 1992, Kumagai filed a petition seeking reliefs under s 216 of the Companies Act (Cap 50, 1990 ed)('the Act') in respect of KZ. In a lengthy petition Kumagai sought, inter alia, the following orders: that KZ and KPM be wound up; that Low, Teo, Loo and Lim be required to account to either KZ or Kumagai for any benefits acquired by them in breach of their duties to KZ; that they be required to make good any loss or damage suffered by KZ or Kumagai; and that they be required to purchase from KPM its KZ Investments shares at the price paid by KPM or the price upon valuation, whichever is the higher. Subsequently, Kumagai amended

the petition by making additional allegations that there had been misuse of KZ's funds from 1983 to 1985, which had been discovered by Kumagai after the appointment of the provisional liquidators. Kumagai also filed a separate petition seeking the winding up of KZ on just and equitable grounds.

27 Findings of trial judge The learned trial judge found that the 1991 share purchases, like the Guthrie share transactions, were all Low's ideas and had been executed without consultation with anyone in Kumagai. He held that these share purchases and the associated changes of name and objects of KPM in order to enable the acquisition of shares to take place were acts of oppression within s 216 of the Act. The shareholder agreement and the memorandum of understanding did not contemplate such investments and Kumagai should have been consulted on any change in

direction. KPM and KZ Investments were merely vehicles by which the oppressive acts were committed. The purchases of the Pac Can shares were merely intended to boost Low's voting power in Pac Can, and it was no coincidence that at the same time, Low acquired large quantities of shares himself. The learned judge held that the Guthrie share ventures were similarly acts of oppression and the subsequent ratification by Kumagai was only an acceptance of a fait accompli.

28 The learned judge found that the investment by KPM in KZ Investments made no commercial sense. It had the effect of locking in \$1.3m of KPM's fund in KZ Investments. The learned judge accepted counsel's submission on behalf of Kumagai that the only reason for the transaction was to enable Zenecon to hold or retain 51% voting power in KZ Investments. It was prejudicial to

Kumagai and was solely for Low's own purpose. The learned judge held that, like the Pac Can share transactions, the KZ Investments share transactions constituted minority oppression.

29 The learned judge held that the transfer of the 1,000 shares in KPM from Lim to Low was in breach of the pre-emptive provision in the articles of KPM. So also was the transfer by Low Woon Hock of one subscriber share. The articles required the directors of KPM to offer the shares of an intending transferor to existing shareholders of KPM in proportion to their existing shares. The learned judge held that the transfers of these shares without complying with the pre-emptive provisions in the articles of association of KPM were another instance of oppressive conduct.

30 The learned judge held that the allegations by Kumagai of misuse of funds were very serious, amounting to allegations of misappropriation of funds. He felt that apart from allegations

that the transfers of funds were made to entities in which some or other of the respondents in the petition had interest, there was no particularisation by Kumagai as to why the transfers were improper. The learned judge was of the view that such allegations should only be made with specificity and that sufficient notice must be given. He held that Kumagai's argument amounted to presenting ten year old accounts and asking Low and the others to show that they were bona fide. That being the case, it was an oppressive way of conducting litigation. The learned judge decided that Kumagai should at least establish a prima facie case of fraud first.

31 As for the use of KPM's funds for KZ's tenders, Low's explanation was that he never agreed not to submit further tenders. He alleged that there was an agreement with Kano that KZ

should continue to tender but at inflated prices so as to keep KZ in the market. This was rejected by the learned judge on the ground that if there had been such an agreement, Low would not have to resort to using KPM funds. He held that the use of KPM funds for projects which Low wanted to carry out against Kumagai's opposition and without the knowledge of Kumagai was 'exactly the same sort of modus operandi which Low had used for the Guthrie and other share purchases' and that it was another instance of oppressive conduct.

32 The learned judge held that the refusal of Zenecon's nominees to attend board meetings called by Kumagai's nominees could not amount to oppression as by that time, Kumagai 'was fighting Low on equal or more than equal terms'. The learned judge felt it was not a situation where those in control did things in the name of

the company to the detriment of shareholders not in control. The learned judge held that the attempt to remove Okazaki also could not constitute oppressive conduct as it was an attempt made openly with an invitation to Kumagai's nominee directors to join in the proposed resolution and was in any event abandoned.

33 It was not disputed at the trial that Lim ordered the removal of company documents. Lim's explanation for the removal of company documents before the appointment of the provisional liquidators was that the removal of them prevented unnecessary complications. He further alleged that the store manager had taken it upon himself in June 1991 to burn KZ's documents. The allegation was disbelieved by the learned judge. The learned judge held that the denial to Kumagai's nominees of their access to the company documents was within the general rubric of

oppressive conduct and that it was compounded by the removal of documents just before the provisional liquidators came in. He also held that the reliance on certain invalid resolutions also constituted oppressive conduct and that it was unacceptable that the company secretary should act in a partisan manner. The learned judge therefore concluded thus:

34 On the evidence before me, it is clear that from the middle of 1989 onwards, Low was set on a course of conduct of the company's affairs in total disregard of Zenecon's obligations as a joint venture partner, and of Kumagai's right and interest as a shareholder. He had conducted the affairs of the company as if he was the sole owner.

35 Orders made below In the event, the learned judge ordered KZ and KPM be wound up. He held that Low should be held accountable

for the \$2.98m loss suffered by KPM on the Pac Can share transactions, but felt himself unable to hold the other directors liable, as Kumagai had not sufficiently shown how they were involved. He ordered Low to reimburse KPM for the loss, brushing aside Low's argument that the loss could be attributed to the appointment of the provisional liquidators, on the ground that Low should not have gone into the venture in the first place. The learned judge similarly ordered Low to reimburse KPM for the whole of the tender deposits less what had been refunded to KPM. He also ordered Low to purchase or procure the purchase of the shares in KZ Investments held by KPM at a fair price to be fixed by independent valuers or at the cost to KPM, whichever is higher.

36 As for the 1,001 shares in KPM transferred to Low in breach of

the pre-emptive provisions of KPM's articles of association, the learned judge decided that 900 out of the 1,000 shares held by Lim should have been offered to KZ, since KZ and Zenecon held shares in KPM in the proportion 9:1 respectively. Similarly, Low Woon Hock's one subscriber share should have been offered to KZ. He held that a fair way to remedy the breach was to declare that Low held 901 shares out of the 1,001 shares in trust for KZ.

37 Furthermore, the learned judge ordered Zenecon to pay KZ the fair market rental of the various items of equipment for the period they were used by Zenecon.

38 No order was made on the winding up petition as the learned judge was of the view that there was clearly oppressive conduct established in the petition under s 216 of the Act.

39 As regards costs, the learned judge was of the view that the proceedings had been unnecessarily enlarged and prolonged by the

inclusion of matters prior to the 1989 Guthrie ventures, as well as matters which did not fall within section 216. He awarded Kumagai only 60% of their costs.

40 The appeals Findings of oppressive conduct Before us the appellants attacked the following findings of oppressive conduct made by the learned judge: (i) that the 1991 share transactions entered into by KPM and the associated changes of name and objects of KPM to enable these transactions to be carried out were acts of oppression; (ii) that the acquisition by KPM of shares in KZ Investments did not make commercial sense and was prejudicial to KZ and Kumagai; (iii) that there was a breach of the pre-emptive provisions in the articles of association of KPM in respect of the transfer of 1001 shares to Low and such breach amounted to oppressive conduct and that accordingly Low held 901

out of the 1001 shares in trust for KZ; and (iv) that in 1991, notwithstanding the instruction from Kano not to tender for projects, Low went ahead and tendered for projects in the name of KZ but using KPM's funds as deposits for such tenders and such acts on the part of Low were another instance of oppressive conduct. Before we turn to consider the argument advanced on behalf of the appellants against these findings, we should clarify the term 'oppressive' or 'oppression' in relation to the acts or conduct of Low as found by the learned judge. As we understand it, the learned judge used such terms not in the ordinary sense but in the broader sense as contemplated by s 216 and such term includes acts or conduct which were carried out in disregard of the interest of Kumagai or which were unfairly discriminatory against or prejudicial to Kumagai as a shareholder

of KZ.

41 In respect of the first finding, the appellants complained that the learned judge was wrong in disbelieving Low. Low's explanations for these transactions were first, that in respect of the Guthrie share transactions, they were made with the full knowledge of Otsuka and the latter approved the proposal so long as it would result in KZ making a profit, and secondly, that as for the 1991 shares purchases he had had confidential discussions with Otsuka and the latter had entrusted Low to steer a path for KZ and its subsidiary as he thought fit, and that Otsuka and he had agreed to turn KPM into an investment company. Hence, in line with these discussions, Low decided that KPM should invest in Pan Can shares and KZ Investments shares and that KZ Investments should invest in Aokam shares. The learned judge did not accept

these explanations. It was submitted on behalf of the appellant that the learned judge erred in this respect. These are essentially findings of fact made by the learned judge who had seen and heard Low and other witnesses who gave evidence. In not accepting Low's explanation, the learned judge analysed Low's evidence in some detail and tested it against other evidence and came to the conclusion that 'the alleged agreement with Otsuka either for the Guthrie share purchases or the 1991 share purchases, < was > nothing but a convenient afterthought on Low's part'. In our judgment, this conclusion of the learned judge, on the evidence before him, was unimpeachable.

42 Next, we turn to the appellant's challenge of the learned judge's finding on the purchase of shares in KZ Investments. The learned judge found that KPM without the knowledge of Kumagai was

allotted and took up 1,314,525 shares, and he said:

43 Thirdly, in the case of the investment in KZI < KZ Investments > , it had the effect of locking \$1.3 million of KI's < KPM's > funds into KZI, as KI went in as a minority shareholder. KI would have great difficulty in recovering this investment. The investment therefore does not make commercial sense for KI. I think there is much in the submission of Kumagai's counsel that the only reason why KI was asked to take the shares was to help Zenecon to gain a 51% voting power in KZI. It was a transaction ultimately prejudicial to Kumagai for Low's own purpose. The same goes for the Pac Can shares.

44 We find that the learned judge was fully entitled to come to this conclusion. Counsel for the appellants submitted that it is not open to the court to question the soundness of commercial

decisions. That may be so in the usual run of cases, but here the bare fact remains that the return of KZ Investments filed with the Registrar of Companies in 1991 stated that 'THE COMPANY HAS CEASED OPERATING SINCE 1ST JANUARY 1988' and the 1990 return showed no profit and no material assets. The effect of the transaction was to lock in a significant amount of KPM's funds in a minority holding in a private company which according to such documentary evidence was at that time practically inactive. It is one thing to say that the court should not question the soundness of commercial decisions, and it is quite another when the so called commercial decisions made absolutely no commercial sense on any objective basis.

45 We now come to the transfer of 1001 shares in KPM to Low. As we have recounted, KPM was formed as a subsidiary of KZ and was

intended to be the marketing arm of KZ. Teo and Low Woon Hock, then the executive director of KZ, were the two subscribers each subscribing for one share upon incorporation. Later, on 12 November 1984 KZ was allotted 9000 shares and Lim Thye San, Low's brother-in-law, was allotted 1000 shares. All these were done with the approval of Kumagai. It was not the case of Kumagai that Lim Thye San, Teo and Low Woon Hock held their shares totalling 1002 shares in trust for KZ. The reasonable inference to be drawn from all these facts were as follows: that KPM was not intended to be a wholly owned subsidiary of KZ; that KZ would hold 9000 shares and Low or his group 1002 shares of KPM, and that Kumagai had agreed to and were content with such share holdings. In procuring the transfers to him of the 1000 shares which were allotted to Lim Thye San and the one subscriber share held by Low

Woon Hock, Low was in effect re-arranging the holding of these 1002 shares within his own group. In so doing, technically there was a breach of the pre-emptive provisions of the articles of association of KPM, but we do not think that such breach in the circumstances could be considered as oppressive conduct on the part of Low or Zenecon or in breach of any understanding reached with Kumagai.

46 It is true that these transfers were effected at about or just before the time of the Guthrie share transactions and the learned judge held that it was 'a justifiable inference that the transfer was with a view to profiting Low personally in the expectation that the venture would be profitable'. Assuming this was so, Low was doing no more than consolidating his small share holding in KPM within his own group. Vis-a-viz Kumagai Low did not deviate

from their previous understanding as to the shareholdings in KPM.

We are therefore unable to agree with the learned judge that the transfers of the 1001 shares to Low were an instance of oppressive conduct.

47 Lastly, we turn to the finding by the learned judge that tenders of KZ for the new projects in 1991 submitted by Low or on his instructions and the use of KPM's funds by Low as deposits for such tenders were another instance of oppressive conduct on the part of Low. He held as follows:

48 As stated above, in early January 1991, Kano had told Low not to tender for any new projects. Kumagai took this position because they expected Low to submit future business plans following the dissolution of the Guthrie joint venture and Low had not done so. It is not disputed that Low nevertheless went ahead and submitted tenders. To circumvent the difficulty of

getting Kano to authorise the use of the company's funds for this purpose, he made use of the funds of KPM (now known as KI). Tender deposits amounting to \$100,400 were paid. Of this amount, \$250 was not refundable, \$45,000 was refunded to KI as at 31 December 1991, and \$55,150 was billed by KI to the company on 30 December 1991.

49 Admitting all that the learned judge has found, we do not think that what Low did amounted to oppressive conduct. In submitting the tenders of KZ for the new projects, Low was carrying out what was part of the business and operations of KZ. He was not tendering the projects for himself or Zenecon. What he did was fully legitimate business activity and, in our view, it is questionable whether Kumagai or Kano was entitled or justified to ask Low not to tender for any new projects in the name of KZ.

This was more an instance where the two rival parties disagreed on the operations of KZ than one of oppressive conduct on the part of Low.

50 Scope of affairs of KZ We turn to the next issue: whether on the facts as found by the learned judge there were acts of oppression in the affairs of KZ falling within s 216 of the Act. It is submitted on behalf of the appellants that the matters complained of were not matters 'in the affairs of the company', i.e. KZ. It is convenient at this stage to set out, in so far as relevant, the provisions of s 216 which are as follows:

51 (1) Any member or holder of a debenture of a company ... may apply to the Court for an order under this section on the ground -

52 (a) that the affairs of the company are being conducted or the

powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

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

54 Counsel submits that there are two limbs in s 216(1) which attract liability: the first relates to the manner in which the affairs of the company are being conducted, and that falls under para (a) of sub-s (1), and the second focuses on some particular act or resolution of the company, and that falls under para (b)

of sub-s (1). Under either limb, the affairs or acts or resolutions relied upon must be those of or in relation to the company which is the subject matter of the application before the court, which in this case is KZ. Such affairs, acts or resolutions are not, and do not include, the affairs, acts or resolutions of any of its subsidiaries or sub-subsidiaries.

55 Reverting to the facts of the case, counsel pointed out that the Pan Can share transactions, the KZ Investment share transactions and the use of KPM's funds for submitting the tenders of KZ were transactions not carried out by KZ but by KPM, a subsidiary of KZ, and these were therefore not affairs of KZ but KPM. In brief, his submission was that in order to attract liability under s 216 it must be shown that the oppressive conduct or unfair discriminatory acts complained of are in

respect of the affairs of KZ and not KPM. We are unable to accept this argument. It seems to us that counsel has adopted a much too legalistic approach relying on the separate legal personalities of KZ and KPM. KPM is a subsidiary of KZ and the affairs of KPM were very much under the control of KZ and both were managed and run by Low and his group.

56 The authorities relied upon by counsel on analysis do not really support his contentions. First is the case of *Scottish Co-Operative Wholesale Society Ltd v Meyer and anor* < 1959 > AC 324. There, the society formed a subsidiary company, the subject of the proceedings, ('the subject company') to carry on the business of manufacture and sale of rayon materials. The two petitioners were appointed joint managing directors of the subject company, and were the minority shareholders while the

society was the majority shareholder and appointed 3 nominees as directors of the subject company. The business of the subject company had been very lucrative and the company prospered. The society sought to purchase the shares of the minority shareholders at an under-value. When their attempt failed, they adopted the policy which had the effect of transferring the subject company's business to a new department within the society, thereby causing a decline in the value of the subject company's shares. The nominee directors of the society on the board of the subject company, though aware of the society's policy, did not inform the petitioners of such policy but promoted the society's plans. The petitioners presented a petition under the then s 210 of the United Kingdom Companies Act 1948. The House of Lords held that the society had acted

oppressively towards the minority shareholders in the affairs of the subject company, and ordered the society to purchase their shares.

57 Counsel for the appellant relied heavily on the following passage of the speech of Lord Morton of Henryton. His Lordship first stated, at p 344:

58 The < petitioners > , as members of the company, can only succeed if they prove that "the affairs of the company" - and I emphasise the words "of the company" - were "being conducted in a manner oppressive to some part of the members" ie to themselves.

59 Later, having dealt with the facts, his Lordship continued, at p 346:

60 My Lords, it is, I think, manifest that the oppressive

operations so clearly described were all operations in the conduct of the society's affairs, not in the conduct of the Company's affairs. The society so conducted its affairs as to oppress the company by shutting it off from its previous source of supply. By so doing the society did, I think, oppress the minority shareholders in the company; but as I have already pointed out, the respondents can only bring themselves within section 210 of the Act of 1948 if they prove that the affairs of the company whereof they are members are being conducted in a manner oppressive to themselves as minority shareholders. They cannot succeed, in my opinion, merely by proving that the affairs of another company are being so conducted, even if that other company holds the majority of the shares in the company whereof the petitioners are members, and nominates the majority of its

directors. It may be unfortunate that this form of oppression is not covered by the section; but this is, to my mind, the inevitable result of the words 'the affairs of the company are being conducted'.

61 His Lordship then turned to the acts of the nominee directors representing the society and said at p 347:

62 Counsel for the respondents contend that certain directors of the company, nominated by the society and constituting a majority of the company's directors, or the society acting by these directors, "conducted" the affairs of the company "in a manner oppressive" to the respondents. As these directors of the company were also directors of the society, they must, no doubt, be treated as parties to the oppression by the society in the conduct of its own affairs; but I have had great difficulty in arriving at a conclusion upon the question just

posed, which is directed only to the affairs of the company.

63 and then concluded thus:

64 ... I shall not detain your Lordships by referring in detail to the evidence. Suffice it to say that in the end I have reached the conclusion that there is evidence to justify the view that the affairs of the company were "conducted in a manner oppressive" to the respondents. I am not disposed to give a narrow meaning to these words, having regard to the manifest object of section 210. ...

65 The other members of the House adopted a more positive and definite approach and found in no uncertain terms that the oppression consisted of the deliberate acts and omissions of the society's nominee directors in the affairs of the subject company. Viscount Simonds had this to say of the nominee

directors of the society, at p 341:

66 They were the nominees of the society and, if the society doomed the company to destruction, it was not for them to put out a saving hand. Rather, they were to join in that work, and, when a frank and prompt statement to their co-directors might have enabled them to retrieve its fortunes, they played their part by maintaining silence. That is how they conducted the affairs of the company, and it is impossible to suppose that that was not part of the deliberate policy of the society. ... In the present case the society pursued a different course. It was ruthless and unscrupulous in design and it was effective in operation, and, as I have said, it was promoted by the action or inaction of the nominee directors.

67 He held that the affairs of the subject company were much controlled and dictated by the society. He said, at p 342:

68 It is not possible to separate the transactions of the society from those of the company. Every step taken by the latter was determined by the policy of the former.

69 We find this observation extremely apt and applicable here, and we respectfully adopt it. It is not possible to separate the transactions of KPM from KZ as managed by Low and his group which includes Zenecon.

70 Next, counsel relied on the Australian case of *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692. There, the plaintiff and the defendant had acquired shares in F company which in turn held shares in M company. Both were appointed directors of M company. The plaintiff and the defendant each held one share in F company and the remaining shares were divided and held by two trustees

appointed by them respectively under certain discretionary trusts. Subsequently, differences arose between them, and the plaintiff resigned as a director of M company and formed his own company. At a later date, M company paid large director fees and bonuses to the defendant. The plaintiff complained of oppression by the defendant and sought an order for the compulsory purchase of the shares in F company under s 320 of the Companies Code of New South Wales (the corresponding provisions of s 216 of our Companies Act) or alternatively for a winding up order. It was held that any relief in favour of the plaintiff pursuant to s 320 would be restricted only to the plaintiff's one share, as the legal owners of the other shares were not parties and had not sought any relief. Further, in so far as the defendant's conduct involved the voting in a meeting of directors of M company, he

was not, in effect, acting in the affairs of F company, and, in any event, the conduct of the defendant could not be said to be unfair within the meaning of that section. Young J said at p 705:

71 The central allegation of the plaintiff is that in exercising his votes as a member of the board of Metal Recyclers, the second defendant is acting in the affairs of the company which appointed him to that position, namely the first defendant. I do not consider that this is a correct analysis of the position.

72 In *Bennetts v. Board of Fire Commissioners of NSW* (1967) 87 WN (Pt 1) (NSW) 307, Street CJ in eq as the Chief Justice then was, held that where a person is appointed a member of a board to represent some other interest, he becomes subject to the overriding and predominant duty to serve the interests of the board in preference, on every occasion upon which any conflict

may arise, to serving the interests of the group which elected him. In general where a person is serving on a board of directors he is dealing with the affairs of the company that is being controlled by the board and whilst he is so acting he is not, and should not, be also involved in the affairs of some other entity.

...

73 It is of course true that a person who is what might be called a nominee director, may legitimately exercise his votes on a board in the interests of the person who appointed him without being in breach of a fiduciary duty to the company on whose board he sits...However I do not consider that this state of affairs is sufficient for one to conclude that when so taking part in a board meeting of a company one is acting in the affairs of the appointer company.

74 What Young J said, if we may respectfully say so, is correct, but is not of any assistance here and the facts here are different. As we have said, it is not possible in this case, so far as Low and his group were concerned, to separate the transactions of KZ from those of KPM, and vice versa.

75 The third case relied on is *Re Norvabron Pty Ltd* (1986) 11 ACLR 33 the applicants being the shareholder of Norvabron alleged that the affairs of Norvabron were being conducted oppressively and applied for orders under s 320 of the Companies Code of Queensland. The applicant was ordered to deliver pleadings and did so and the respondent demured to that part of the statement of claim which detailed 'the conduct of the affairs of the company' relied upon by the applicant. The objection taken was that the conduct so detailed was not pleaded to be that of

Norvabron but of its subsidiary. This demurer was upheld. At that stage, the case was decided wholly on the pleadings and the facts were not explored. That decision is not of much assistance to us in this case.

76 Lastly, *Re A Company* [1987] BCLC 141 was also cited in support. That was an entirely different case. Two shareholders of a company together with the respondent were the only shareholders and directors of the company presented a cross-petition under s 459 of the United Kingdom Companies Act 1985 (which is the corresponding provision of s 216 of our Act) alleging that the affairs of the company had been conducted in an unfairly prejudicial manner and seeking an order that the respondent sell her shares to them. The grounds of complaint were that the respondent had paid off a loan which the company owed to the bank

without informing the company and had taken the transfer of the bank's security; that the respondent had interfered in the day to day management of the company; that an ineffective notice for the repayment of the loan had been served on the company and that the respondent's personal solicitor had at a board meeting asked the petitioner to transfer their shares to the respondent and to resign as directors. A motion was taken out to strike out the cross-petition on the ground that it disclosed no cause of action or alternatively that it was an abuse of the process of the court or that it was bound to fail. It was held that the matters complained of were not the affairs of the company but the conduct of the respondent. Unquestionably in that case, the matters complained of were not the affairs of the company.

77 Reverting to the facts in the instant case, Low represented KZ

in KPM and was the nominee director of KZ on the board of KPM. It was certainly in the interests of KZ that Low should discharge his duties as directors of KPM properly. Therefore, when Low was acting as a director of KPM, he was also acting as nominee of KZ. When he and his co-directors of KPM carried on the business of KPM, which served only the interest of Low and/or Zenecon and in disregard of the interest of KZ, he acted in breach of his duty to KZ, and such conduct on his part was also conduct in the affairs of KZ and oppressive to Kumagai as a shareholder of KZ.

78 While it is uncontroversial that a nominee director may not prefer the interests of his principal over his duties to the company, nevertheless, when there is no conflict of such interests with his duty, he may take into account the interests of his principal. The principal clearly had an interest in how he

carries out his duties as a director of the subsidiary, as well as how he serves the interests of the principal. It does not follow that when a nominee is acting as a director of the company, he is only acting as a director of that company and not also as nominee of his principal. In *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* < 1990 > 3 All ER 404 at p 423, Lord Lowry in the Privy Council said:

79 House and August < the nominee directors > owed three separate duties. They owed in the first place to AICS < the subsidiary > the duty to perform their duties without gross negligence... < the second duty is irrelevant here > ...Finally, they owed a duty to their employer, the bank < the parent company > , to exercise reasonable diligence and skill in the performance of their duties as directors of AICS ... It

was in the interests of the bank that House and August should discharge with diligence and skill the duties which they owed to AICS ...

80 Counsel for the appellants urged on us that where there is a whole line of personalities involved, such as the present case, there is a danger in blurring the line and equating the acts of one with the acts of all. There would be a difficulty of knowing where to stop, as in a situation involving a parent company and its subsidiaries, and one can always say, as the learned judge did, that the subsidiary is a vehicle of the parent. This is a forceful argument, but it seems to us that these are questions of fact to be assessed by the court. Certainly, not all subsidiaries are mere vehicles of their parent company. However, subsidiaries come in all shapes and sizes; some are truly independent, while

others are not. In this case, on the facts, KPM had been used by Low as a mere vehicle of KZ.

81 In *R v Board of Trade, ex parte St Martins Preserving Co Ltd* < 1964 > 2 All ER 561, the appellant by a special resolution declared that its affairs ought to be investigated by an inspector appointed by the Board of Trade under s 164 of the Companies Act 1948 (corresponding to s 232(1)(c) of our Act). The Board of Trade contended that as the investigations proposed to be carried out by the inspector related to the acts or conduct of a receiver appointed by a debenture holder and such matters were not within s 164. It was held by the Queen's Bench Division that the Board of Trade was bound to appoint an investigator and matters to be investigated fell within the affairs of the appellant. Phillimore J said at p 565:

82 What are 'its affairs' when the company is in full control?

They must surely include its goodwill, its profits or losses, its contracts and assets including its shareholding in and ability to control the affairs of a subsidiary, and perhaps in the latter regard a sub-subsubsidiary such as Atholl Houses, Ltd. In ordinary parlance, the affairs of the applicant company must surely have included its shareholding in T G Tickler, Ltd < the subsidiary > , and its power in virtue of that shareholding to control the board of that subsidiary and the disposition of Atholl Houses, Ltd, the wholly owned sub-subsubsidiary.

83 In our opinion, this passage is equally applicable in this case in considering the acts complained of under section 216.

84 Reliefs under s 216 Counsel for the appellants submitted that the court does not have the jurisdiction under s 216(2) to grant the reliefs that were granted by the learned judge. Section

216(2) provides as follows:

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

86 (a) direct or prohibit any act or cancel or vary any transaction of resolution;

87 (b) regulate the conduct of the affairs of the company in future;

88 (c) authorise civil proceedings to be brought in the name of or on behalf of the company by such person or persons and on such terms as the Court may direct;

89 (d) provide for the purchase of the shares or debentures of

the company by other members or holders of debentures of the company or by the company itself;

90 (e) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

91 (f) provide that the company be wound up.

92 Counsel submitted that the jurisdiction of the court to grant relief under s 216(2) is limited by its express terms. The limitation is that the relief granted must be 'with a view to bringing to an end or remedying the matters complained of', and the 'matter complained of' means a matter rightly complained of, i e a matter falling within s 216. On this basis, counsel submitted that the learned judge had no power to make the following orders: that Low pay to KPM the sum of \$2,982,517.17; that Low purchase or procure the purchase of KPM's shares in KZ Investments, and that Zenecon pay to KZ the rental for the use of

certain items of equipment.

93 Both counsel for the appellants and counsel for Kumagai have referred us to various Australian and English authorities to show the extent of the orders which the courts in these jurisdictions have made under the corresponding statutory provisions. We do not find these authorities of much assistance, as the corresponding statutory provisions are much wider than s 216 of our Act. In the United Kingdom, the Companies Act 1985 by s 461(1) provides:

94 If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.

95 In Australia, s 320(2) of the Australian Companies Code provides as follows:

96 If the Court is of the opinion -

97 (a) that affairs of a company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members (in this section referred to as the 'oppressed member or members') or in a manner that is contrary to the interests of the members as a whole; or

98 (b) that an act or omission, or a proposed act or omission, by or on behalf of a company, or a resolution, or a proposed resolution, of a class of members of a company, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members (in this section also referred to as the 'oppressed member or members') or was or would be contrary to the interests of the members as a whole,

99 the Court may, subject to sub-section (4), make such order or orders as it thinks fit, including, but without limiting the generality of the foregoing, one or more of the following orders

...

100 However, there are a couple of Malaysian cases which are of some assistance. In *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd and ors* < 1994 > 2 MLJ 789 at p 829, Anuar J, in dismissing the petition and allowing the cross-petition made, inter alia, in respect of the cross-petition under s 181 of the Malaysian Act, an order requiring the petitioner to pay compensation to the second, third and fourth respondents for the loss sustained by those respondents, and the amount of such compensation to be determined at an inquiry to be conducted before him. The third respondent there was none other than Low himself. With the exception that para (c) of s 216(2) of our Act is not present in s 181 of the Malaysian Act, s 181 is in pari materia to our s 216(2) of our Act.

101 In fact, the very question before us was decided in another Malaysian case. In *Automobiles Peugeot SA v Asia Automobile Industries Sdn Bhd & Ors* < 1988 > 3 MLJ 209, the petitioner sought to amend the petition under s 181 of the Malaysian Act by adding a prayer seeking to make the alleged oppressor personally liable to pay damages to the company in which the oppression was said to have occurred. It was argued that the proper course was for the petitioner to file a writ by way of a derivative action. This was rejected by Siti Norma Yaakob J, who held at p 210:

102 The injured party in this action is the first respondent and s 181(1) and (2) of the Companies Act 1965, under which this petition is presented and relief sought, was specially enacted to overcome the problem posed by *Foss v Harbottle* < (1843) 2 Hare

461 > , and to strengthen the position of the minority shareholders in limited companies. Since there is now statutory sanction for a shareholder with a minority interest in a company to institute proceedings against directors from conducting the affairs of the company in a manner prejudicial to the company, there is no longer any need for a derivative action to be filed by the petitioner in the manner suggested by the second respondent as that would amount to a duplicity of actions relating to the same subject matter.

103 The learned judge in that case concluded further down as follows:

104 Since a claim for a < sic > damages against the second respondent would be a natural consequence should the wrong acts complained of by the petitioner be established, I had concluded that the particular amendment objected to by the second

respondent should not prejudice him in any way and that it is necessary in the circumstances to enable the court to determine the issues in dispute between the parties.

105 In the landmark Malaysian case of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd and ors v Ling Beng Sung* < 1978 > 2 MLJ 227, an argument similar to that made by counsel for the appellants was rejected by the Privy Council. Lord Wilberforce took special pains to point out that the Malaysian s 181, (which is more similar to our s 216 than either the United Kingdom or the Australian provisions), is wider than the then corresponding section of the United Kingdom Companies Act 1948. His Lordship said, at pp 228 - 229:

106 This section can trace its descent from section 210 of the United Kingdom Companies Act, 1948 which was introduced in that

year in order to strengthen the position of minority shareholders in limited companies. It also resembles the rather wider section 186 of the Australian Companies Act, 1951. But section 181 is in important respects different from both its predecessors and is notably wider in scope than the United Kingdom section. In sub-section (1)(a) it adds disregard of the interests of members, etc. to oppression as a ground for relief in this respect making explicit what was already inherent in the section (see *In re H.R. Harmer Ltd*). It introduces a new ground in sub-section (1)(b) and, most importantly, in sub-section (2), which sets out the kinds of relief which may be granted, it provides for "remedying the matters complained of" and states as a specific type of relief that of winding-up of the company.

107 ... The Malaysian section, on the other hand, requires (under

sub-section 1(a)) a finding of "oppression" or "disregard", and then 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. That option ranks equally with the others, so that it is incorrect to say that the primary remedy is winding-up. That may have been so before 1948 and even after the enactment of section 210, but is not the case under section 181.

108 Their Lordships consider it important that courts applying section 181 should do so according to its terms and its purpose and should not regard themselves as necessarily bound by United Kingdom decisions, which are based upon a different section, and in some cases restrictive. The same applies, though with less force, to reliance upon Australian decisions upon section 186.

109 Having emphasized the wide scope of s 181, his Lordship then turned to deal with counsel's arguments as follows:

110 There are three particular points of direct relevance in the present appeal. First, it is claimed by the appellants that the section is not a substitute for a minority shareholders' action and, specifically, that many if not most of the matters complained of would properly form the subject of such an action. Their Lordships agree with this part. Relief cannot be sought under section 181 merely because facts are established which would found a minority shareholders' action: the section requires (relevantly) 'oppression' or 'disregard' to be shown, and these are not necessary elements in the action referred to. But if a case of 'oppression' or 'disregard' is made out, the section applies and it is no answer to say that relief might also have

been obtained in a minority shareholders' action. To the extent that the appellants so contend their Lordships do not accept their argument.

111 In our opinion, there is a limitation on the order which the court can make under s 216. The order to be made must be made 'with a view to bringing an end or remedying the matters complained of' and we agree that 'the matters complained of' mean matters rightly complained of. Nevertheless, subject to this limitation, the jurisdiction to make an order under that section is very wide. Much depends on the matters complained of and the circumstances prevailing at the time of hearing.

112 At the time of the hearing below, provisional liquidators had been appointed over the affairs of KZ and KPM and at the conclusion of the hearing, both KZ and KPM were ordered by the learned judge to be wound up and liquidators were appointed. Such

an order would have a bearing on further order to be made. In *Fargro v Derek* < 1986 > 3 All ER 279, it was held that the appointment of liquidators removed the need to order a derivative action as the wrongdoers are no longer in control. Similarly, in *Re Hailey Group Ltd* < 1993 > BCLC 459 at 473, Mr Richard Sykes, QC sitting as a deputy judge observed:

113 Paradoxically, the appointment < of receivers > means that there is now no order which is appropriate for giving relief in respect of the matters complained of. I certainly take the view that s 461(1) requires me to consider what order is appropriate at the time of the hearing and not, for example, what order would have been appropriate at the date of the presentation of the petition. (Emphasis is ours)

114 But the appointment of liquidators is no bar to other reliefs,

if appropriate. It depends on the facts of the particular case, and the orders to be made by the court (subject to the limitation we have discussed) are ultimately discretionary. In *Re Hailey Group Ltd*, it was also said at p 473:

115 There might be circumstances in which, despite the appointment of an administrative receiver (or administrator or liquidator) before the hearing of the petition, the court would feel it necessary to impose on the respondents an obligation to purchase the petitioner's shares. Such an order would, in my view, be appropriate where the unfairly prejudicial conduct had prevented the petitioner from selling his shares at a proper price prior to the onset of insolvency...

116 We now turn to the matters complained of. Counsel submitted that the true matter complained of was the use of majority power to stifle proceedings which KZ could have brought against Low,

Teo, Loo and Lim. Therefore, the proper relief to be granted should be an order authorising Kumagai to bring a derivative action in the name of KZ against these persons. We are unable to agree. The complaints made by Kumagai were manifold. In summary, they were as follows. Low was the managing director of KZ and his company, Zenecon, was the majority shareholder of KZ, and in the conduct of the affairs of KZ, which included the affairs of KPM, Low disregarded the interests of Kumagai and treated KZ and KPM as if they were his own companies. On his own and without consultation with or consent of Kumagai, he used KPM as a vehicle and entered into the Guthrie share transactions on a substantial scale for his own benefit, and he then brought KZ into direct business relationship with Guthrie and caused KZ to enter into a joint venture with the latter, also without consultation with

Kumagai. These Guthrie share transactions and the joint venture were later adopted by Kumagai. However, within a short period of three months, Low again, acting on his own and without consultation with Kumagai, sold most of the Guthrie shares and as a result the joint venture with Guthrie was put in jeopardy and was subsequently terminated; arising from the termination KZ had to buy out Guthries' interest by incurring a sum of \$300,000. Again, in 1991 Low, without consultation with Kumagai changed the name and objects of KPM and through KPM entered into the Pac Can share transactions and KZ Investment share transactions. There was also the complaint by Kumagai that Zenecon without the consent of Kumagai had made use of the machinery and equipment of KZ for the business of Zenecon without making any payment therefor.

117 These matters, among others, were held by the learned judge to be instances of oppressive conduct in the sense contemplated by s 216 of the Act and were therefore matters rightly complained of. In respect of the Guthrie share transactions and the joint venture with Guthrie, they were subsequently adopted by Kumagai and a substantial profit was made from the share transactions. No order was sought and no order was made in respect of these transactions. As for incurring the cost of \$300,000 in taking over the joint venture projects from Guthrie, the learned judge also did not make any order in respect thereof. We are of the opinion that the learned judge was unquestionably right in that respect.

118 We now turn to the orders made by the learned judge and propose to deal first with the order requiring Low to purchase or

procure the purchase of the KZ Investments shares acquired by KPM. We are firmly of the opinion that that was an appropriate order in the circumstances and that order should not be disturbed. We are of the same opinion with regard to the order that Zenecon pay an amount to KZ representing the fair market rental for the use of the various items of equipment.

119 We now turn to the main order that was seriously contested before us, namely, the order relating to the loss alleged to have resulted from the Pac Can share transactions. The learned judge made an order that Low ought to reimburse the loss sustained by KZ. He said:

120 ... in respect of the purchase of the Pac Can shares, the provisional liquidators' report shows that a loss of \$2,982,517.17 has been incurred as a result of this unauthorised venture. Low should reimburse KI this amount by way of

compensation. There was some argument as to whether he obstructed and delayed the sale of these shares by the provisional liquidators, but I prefer to base my decision on the premise that Low should not have gone into the venture in the first place, and the loss was a direct result of this wrongful act.

121 In principle, an order that Low ought to make good the loss falls within the purview of s 216, i e bringing to an end or remedying the matter complained of, if such an order is warranted by the evidence. But the question whether the loss sustained was the result or the direct result of Low entering into these transactions remains a controversial issue. The learned judge arrived at his conclusion by looking only at the provisional liquidators' report but the provisional liquidators themselves had not been called to give any evidence of such loss. Much of

what was stated in the report was heresay and has not been tested by cross-examination, and must remain highly contentious. In our view, there was really not sufficient evidence before the learned judge to determine (i) the causation of that loss, and (ii) the quantification thereof. In dealing with the losses alleged to have been sustained by KZ taking over the joint venture projects from Guthrie, the learned judge made the following observation:

122 The appointment of the provisional liquidators and their taking over the management of the company have introduced a new factor in the equation, which makes any estimate of loss to the company fraught with difficulties.

123 We find this observation equally apt in considering the loss alleged to have arisen from the Pac Can shares. We think that such an order ought not to have been made in the circumstances.

124 Both KZ and KPM are in liquidation and liquidators have been appointed. The liquidators are in a position to investigate the causation of such loss and have all the powers in their armoury to conduct the necessary investigations. If after investigation, they find that the loss was caused by or attributable to any breach of duty by Low to KZ or KPM, they may take out a misfeasance summons under s 341 of the Act or other appropriate action against him as they think fit.

125 We now turn to Civil Appeal No 121 of 1994 in which Kumagai appealed against certain parts of the learned judge's decision. First, Kumagai contended that the learned judge should have found that there was an agreement reached in Tokyo on 13 September 1990 between Low and Kumagai on the disposal of the profits earned from the sale of the Guthrie shares. Kumagai argued that the

non-compliance of this agreement, the attempt to remove Okazaki, the failure to attend board meetings called by nominee directors of Kumagai and the waiver of the pre-emptive rights to enable the transfer of Zenecon's shares in KZ Investments to Z Holdings should have been found by the learned judge as further instances of oppression. We disagree. In so far as the disposal of the profits, the attempted removal of a nominee director of Kumagai and the failure on the part of nominee directors of Zenecon to attend board meetings of KZ are concerned, they were instances of disagreements or dissensions between the two rival parties. As the learned judge said, the parties were fighting each other on equal terms. As for the waiver of the pre-emptive rights to enable Zenecon's shares in KZ Investments to be registered, Kumagai have really no cause of complaint whatsoever. After all,

they maintained that KPM should not have invested in any shares in KZ Investments, and they sought and obtained an order for these shares to be purchased by Low.

126 Secondly, Kumagai complained that the learned judge erred in holding that the shares in KPM were held by KZ and Zenecon in the ratio of 9:1, as Zenecon never had any interest in KPM, and that the learned judge should have ordered for a transfer of all the 1001 shares held by Low or his group to KZ. It is correct that there was an error in the learned judge's finding that Zenecon held 1000 shares in KPM. Zenecon did not hold or own any shares in KPM at any time. However, nothing really turns on this error, having regard to what we have decided on the 1002 shares held by Low and his group in Civil Appeal No 131 of 1994.

127 Kumagai also appealed against the finding of the learned judge that Teo, Loo and Lim could not be held accountable for the loss

arising from the Pac Can share transactions and that the allegations of improper use of KZ funds were not sufficiently particularised. In our opinion, there was clearly insufficient evidence before the learned judge to make any specific findings against Teo, Loo and Lim, and we do not see how he could hold that they are accountable for the loss alleged. We have already held that the order made by the learned judge against Low ought not to have been made. A fortiori, no such order should be made against Teo, Loo and Lim.

128 Lastly, Kumagai appealed against the learned judge's exercise of his discretion in awarding to them only 60% of the costs. We think that the learned judge was amply justified in making this order, and we are not disposed to disturb the order.

129 In the result, we set aside the following orders made below:

130 (i) the order that Low pay to KPM the sum of \$2,982,517.17
claimed to represent the loss resulting from the Pac Can share
transactions;

131 (ii) the order that Low pay to KPM the funds used as deposits
for the tenders of KZ for the new projects; and

132 (iii) the declaration that Low holds and has always held 901
shares of KPM in trust for KZ and the order that these shares be
transferred to KZ.

133 To the extent of the order we have made, the appeal in Civil
Appeal 131 of 1994 is allowed.

134 We now come to the question of costs in this appeal. The
appellants have not succeeded substantially on the issue of
oppression; on the other hand, they have succeeded on three of
the orders appealed against, and in this respect they have
substantially succeeded. In the circumstances, the fairest order

will be to let each party bear and pay his or their own costs. We so order. There will be the usual consequential order for refund to the solicitors for the appellants the deposit in court as security.

135 Lastly, in respect of the appeal in Civil Appeal No 130 of 1994, having regard to what we have held, that appeal obviously cannot be sustained: the learned judge was right in not making any order on the winding up petition, as he found that oppressive conduct had been established in the petition under s 216 of the Act. Accordingly, this appeal is dismissed with costs.

136 For the reasons we have given, the appeal in Civil Appeal 121 of 1994 by Kumagai also fails and is dismissed with costs.

137 There will be the usual consequential orders for payment to the respective respondents in Civil Appeals Nos 121 and 130 of

1994 of the deposits in court as security for costs.

Karthigesu JA
L P Thean JA
Yong Pung How CJ

Alan Thambiyah and Eric Chan (Rajah & Tann) for the appellant in
CA No. 121 of 1994 and the respondent in CA No. 130 of 1994 and
CA No. 131 of 1994
Alvin Yeo and Lawrence Tan (Wong Partnership) for the appellants
in CA No.130 of 1994 CA No. 131 of 1994 and the first to fourth
respondents in CA No. 121 of 1994
Alvin Tan (David Lim & Partners) for the fifth respondent in CA No.
121 of 1994
