# MINORITY OPPRESSION AND REMEDY: A REVIEW OF *AUSPICIOUS JOURNEY SDN BHD V EBONY RITZ SDN BHD*

*Choong Kwai Fatt*[*]

*Yap Sze Yinn*[†]

**ABSTRACT**

An analysis on the law and relief for minority oppression as provided by Section 346 of the Companies Act 2016 as recently propounded in the decisive landmark case of the Federal Court in *Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & 5 Ors* [2021] 3 AMR 777 wherein the court ruled that the imposition of liability on directors and third parties ultimately depends on the circumstances of the case.

**Keywords**: minority oppression, section 346 Companies Act 2016, majority rule

[*] Dr Choong Kwai Fatt is currently practising as an advocate and solicitor at Kwai Fatt & Associates. He holds a Bachelor degree in law (honours) from the University of London; a Master degree in Comparative Law and a Doctorate (PhD) in Taxation Law both from the International Islamic University of Malaysia

[†] Yap Sze Yinn is a Legal Assistant at Albar & Partners.

## INTRODUCTION

Corporate sovereignty allows majority shareholders to chart the business direction of a company without prejudicing the interests of the minority shareholders. The Companies Act 2016 ("**CA 2016**") provides a statutory remedy for minority oppression in section 346 (previously Section 181 in the repealed Companies Act 1965 ("**CA 1965**")), allowing shareholders to dispose their shares to exit from a company or to wind up the company on just and equitable grounds.

However, in order to do so, minority shareholders bear the burden of proving that their interests have been compromised, adversely affected, abused or unduly prejudiced by the decisions and actions of the majority shareholders.

Section 346 CA 2016 confers upon the Court wide powers of discretion, and in exercising such powers, the Court would review and examine the factual matrix of the case before deciding on the appropriate remedy.

### The Case of *Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & 5 Ors*[1]

*Auspicious Journey Sdn Bhd* v *Ebony Ritz Sdn Bhd & 5 Ors*[2] was a landmark decision on minority remedy. It was decided by the Federal Court with a panel comprising Azahar Mohamed CJ (Malaya), Nallini Pathmanathan, Abdul Rahman Sebli, Zaleha Yusof and Zabariah Mohd Yusof FCJJ. The judgment was delivered by Nallini Pathmanathan FCJ on 9 March 2021.

In *Auspicious Journey Sdn Bhd*, the plaintiff (AJSB) and a Singaporean company, Hoe Leong Corporation Ltd (HLCL) incorporated Ebony Ritz Sdn Bhd (Ebony Ritz) as a joint venture company to acquire 49% of Semua International Sdn

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1 [2021] 3 AMR 777
2 [2021] 3 AMR 777

Bhd (SISB), a company involved in the tanker chartering business for over 20 years at a consideration of RM44.1 million from Sumatec Resources Bhd (Sumatec).

The acquisition accorded Ebony Ritz, an irrevocable option to acquire not less than 2% of the shares in SISB, and AJSB an irrevocable option to acquire not less than 49% shares in SISB.

The directors of Ebony Ritz were Andy Kuek (nominated by AJSB) and Paul Kuah and James Kuah (Kuah brothers), nominated by HLCL.

To the unawareness of AJSB and Andy Kuek, HLCL entered into conditional sale with Sumatec to acquire 51% equity interest in SISB, unilaterally waived the 2% option of Ebony and disregarded the 49% share option which was supposed to be exercised by AJSB.

AJSB, being the minority shareholder, then filed a minority oppression claim that both AJSB and Ebony had been undermined and caused detriment due to the following:

(a) Ebony Ritz's 2% call option was expropriated by HLCL at Ebony Ritz's expense;

(b) AJSB's 49% call option was expropriated by HLCL and its nominee which caused detriment and was prejudicial to AJSB;

(c) In order to achieve the foregoing, HLCL and the Kuah brothers had utilised HLCL's majority powers to waive Ebony Ritz's entitlements under the profit shortfall guarantee and Ebony Ritz's 2% call option; and

(d) HLCL and the Kuah brothers had also furnished an indemnity to keep Sumatec indemnified in the event any claims were made against Sumatec. There was also a re-assignment of dividends previously payable such that all previous conditions were waived. This was clearly to the detriment of Ebony Ritz.

In summary, AJSB sought a declaration that HLCL as the majority shareholder, and the Kuah brothers as directors:

(a) Conducted the affairs of Ebony Ritz in a manner that was oppressive to AJSB and in disregard of its interests as a member of Ebony Ritz; and

(b) Had procured and/or caused to be done and/or threatened to procure or cause to be done to Ebony Ritz an event(s) which unfairly discriminated against, or which was or is prejudicial to AJSB as a member of Ebony Ritz.

The High Court made findings of facts that the matters set out in (a) – (d) were proven. This resulted in a finding in law that the affairs of Ebony Ritz were conducted in a manner oppressive to, and which discriminated against or prejudiced AJSB, the minority shareholder.

The High Court also decided that the most appropriate course of action was to wind up Ebony Ritz, having regard to the financial situation of Ebony Ritz and disagreement between the shareholders, it was not viable to keep it as a going concern. The relationship between the shareholders had broken down completely and it was neither just nor equitable for the company to proceed. Moreover, the ultimate purpose for the joint venture had not been and could no longer be met.

Significantly, the High Court took into account the fact that if a buy-out of AJSB's shares was ordered, SISB would be in breach of the provisions of the Merchant Shipping Ordinance 1952 ("**the MSO**") which requires that any company involved in the oil tanker industry to be a majority-Malaysian company.

The Court of Appeal held that to order a buy-out would unjustly enrich AJSB, and that it should not be allowed to use these proceedings to divest itself of a bad bargain. Further, the buy-out would alter Ebony Ritz's position because SISB would be a wholly-owned subsidiary of HLCL, a Singaporean entity, thus violating section 11 of the MSO.

The Court of Appeal also concurred with the High Court that the breakdown in the relationship between the parties was a factor that was relevant and correctly applied by the High Court to order that Ebony Ritz be wound up. The Court of Appeal additionally expressed the view that it would not be appropriate for the court to make a buy-out order when such an order would not be meaningful because the company was no longer a going concern.

The issue left determined by the Federal Court was whether the Kuah brothers in their capacity as directors of Ebony Ritz and the other two third parties ought to be made personally liable for their oppressive, detrimental and/or prejudicial conduct vis-à-vis the minority shareholder, AJSB.

The High Court and the Court of Appeal were of the opinion that the directors i.e. Kuah brothers had acted in the best interest of the company despite being in breach and in infringement of minority rights.

The background facts revealed that AJSB did not want to extend any further monies for the joint venture and even expressly refused to do so. This is to be contrasted with the conduct of HLCL in injecting no less than RM38 million into SISB in order to keep it afloat. It is an unavoidable inference that AJSB did not wish to throw good money after bad, in the sense that it was not prepared to come up with the requisite funds to purchase either its share of the 2% call option available to Ebony Ritz, far less the 49% call option in its own favour. The latter particularly would have required a considerable capital investment which it refused to make. It was a finding of fact that HLCL had injected RM50 million into SISB while AJSB did not make any corresponding contribution.

The Federal Court took into consideration and concurred with the finding of these facts by the High Court in determining whether liability ought to be attributed to the directors.

Nallini Pathmanathan FCJ concluded at p 826:

*"(h) It follows from the foregoing that the acts of the majority shareholder and its nominated directors in Ebony Ritz were directed towards a salvage and warehousing situation as Auspicious Journey did not wish to expend further monies to effect such salvage of Ebony Ritz's investment. While the acts themselves and the manner in which they were carried out may be categorised as prejudicial and detrimental to the minority shareholder Auspicious Journey, it remains an inexorable reality that the conduct was ultimately related to salvaging Ebony Ritz. This weighs in favour of a non-attribution of liability as the court is bound to consider what is "fair and just" in all the circumstances of the case.*

*(i) Taking into account therefore, the entirety of the circumstances as set out above, I am of the view that the High Court and the Court of Appeal concluded correctly that liability ought not be visited upon the directors or third parties."*

### *Court's Action and Decision*

In every suit involving minority oppression, the relationship between shareholders inevitably has soured due to differences in perspectives and opinion, disagreements and conflicts of interests. However, the Courts have maintained the view that winding up is considered a drastic and extreme remedy for oppression, as expounded by Lord Wilberforce in the cases of

*Cumberland Holdings Ltd v Washington H Soul Pattinson & Co Ltd*[3] and *Re Kong Thai Saw Mill (Miri) Sdn Bhd*[4].

In *Auspicious Journey Sdn Bhd,* the Federal Court upheld both the decisions of the Court of Appeal and High Court to wind up the company and held that although a buy-out may be efficient and practical, winding up should not be precluded as a remedy given the unique factual matrix of the case, which include:

(a) the requirement for compliance with the MSO;

(b) the subject company Ebony Ritz was insolvent;

(c) the complete breakdown of the parties' relationship; and

(d) Ebony Ritz being a failed joint venture and insolvent, a buy-out would lead to further disagreement on valuation, both in terms of the basis and the valuer and a buy-out would not yield a fair price.

Nallini Pathmanathan FCJ held at p 829:

> *"The courts have ordered a winding up where there is a deadlock between the parties such that the business cannot effectively continue. This signifies a breakdown in the relationship between the parties which is the case here. Coupled with the potential statutory contravention and Ebony Ritz's insolvent state, winding up is justified."*

Most importantly, the Federal Court held that minority oppression as a statutory remedy provided by the CA 2016 should not be used to salvage a bad investment, as would be the result if a buy-out was given in favour of AJSB.

Nallini Pathmanathan FCJ held at p 829:

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3 (1977) 2 ACLR 307

4 [1978] 2 MLJ 227

> *"In asking for a buy-out of its shareholding in Ebony Ritz, it appears that Auspicious Journey is seeking, in effect, to escape from a bad bargain, or to recoup its investment in the joint-venture with Hoe Leong. The risk factor ancillary to an investment cannot be ignored. There is always a risk that an investment may not pan out in the way it was intended. In our view, ordering a share buy-out would be tantamount to insulating Auspicious Journey from the risk that their capital was subject to. This is certainly not what s 346 was meant to protect against."*

It is also trite that the essential remedy that is sought by the minority shareholders must never result in double recovery or prejudice the creditors or stakeholders of the company.

The Federal Court affirmed both the decisions of the Courts below in refusing to grant the relief of a buy-out order as sought by AJSB, as winding up of Ebony Ritz was the most appropriate remedy, taking into account the circumstances of the case prevailing at the time of the hearing and not at the start of the proceedings.

***Legislation***

Section 346 of CA 2016 provides for the statutory remedy on oppression. An act of oppression features both a personal wrong against the minority shareholder and corporate wrong against the company.

Section 346 of CA 2016 was legislated to ensure that the behaviour, actions and business decisions of the majority shareholders do not impute, cause or result in oppression, unfair dealings or unduly prejudicial results adversely affecting the interests of minority shareholders.

The predecessor of section 346 is Section 181 of the repealed CA 1965. They are identical in form. The Federal Court in *Auspicious Journey Sdn Bhd* acknowledged that

section 346 (then section 181) comprises one of the broadest and most comprehensive statutory shareholders remedies available in the common law world. It equips the Court with wide powers to provide the equitable relief to achieve a just and fair result.

Nallini Pathmanathan FCJ held at p 789:

> *"... Section 181 (now s 346) provides for the broad involvement of the courts in fashioning a wide-ranging series of remedies for the beleaguered shareholder/s who are able to establish oppression, prejudice or discriminatory acts or omissions by those in control, generally the majority."*

The Federal Court has also assessed the function and utilisation of the equivalents of section 346 of other jurisdictions, namely the United Kingdom, Canada and Hong Kong, and noted that these jurisdictions have interpreted and construed this section to confer wide powers of discretion upon the courts, empowering the courts to grant relief in ways which allow liability against directors in respect of their conduct of the affairs of the company or their acts or omissions in relation thereto.

The Federal Court then turned to the provisions of section 181(1) of CA 1965 (now section 346 of CA 2016) and noted that it has two limbs, which allow redress against majority shareholders, directors of the company in question, and also third parties who have occasioned, been instrumental or closely connected with the course of the oppressive conduct which disregarded or unfairly discriminated against the interests of the minority.

1.1 Section 181(1)(a)(Section 346(1)(a))

The wordings 'affairs of the company are being conducted' and 'the powers of the directors are being exercised in a manner oppressive' in section 181(1)(a)

indicate that directors who are entrusted with the management of affairs of the company could be held personally liable for oppressive conduct or disregard of the interests of the minority shareholders.

The Federal Court in *Auspicious Journey Sdn Bhd* firmly held that the construction of Sections 181(1)(a) and (2) gave the Court a wide discretion and freedom to impose personal liability on directors when such directors exercised their powers in such a way that oppressed the minority or disregarded the minority interests.

Section 181(1)(a) operates on two levels - against the board of directors and the majority shareholders, respectively. The 'affairs of the company' involves the company and its directors; whilst 'the power of directors' implicates the directors alone.

1.2 Section 181(1)(b)(Section 346(1)(b))

Section 181(1)(b) refers to an act of the company or a resolution of its members which unfairly discriminates against or is otherwise prejudicial to one or more of its members.

1.3 Section 181(2)(Section 346(2))

Section 181(2) provides for the powers of the Court in providing relief. The phrase 'without prejudice to the generality of subsection (1)' in section 181(2) denotes that it is not an exhaustive provision circumscribing the powers of the Court in providing relief. It allows a wide discretion on the Court to formulate a remedy that is just and equitable based on the factual matrix of the case. This would include placing liability on third parties such as directors who have participated in the act giving rise to minority oppression.

The Court may make an order as to:

(a) direct or prohibit any actor cancel or vary any transaction or resolution;

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

(c) provide for the purchase of the shares or debentures of the company by other members or debenture holders of the company or by the company itself;

(d) in the case of a purchase of shares by the company, provide for a reduction accordingly of capital of the company; or

(e) provide that the company be wound up.

In *Auspicious Journey Sdn Bhd*, Nallini Pathmanathan FCJ held at p 807:

> *"... Oppression, it should be borne in mind, is a minority shareholder remedy against those controlling the company. That will naturally include the directors who manage the company at the behest of the majority, as well as the majority itself. Therefore, relief against the directors is a natural and logical consequence, if they have indeed behaved oppressively to the minority. This is so by reason of the express provisions of s 181."*

The Federal Court held that section 346 is unique and worded distinctively. It is necessary to construe it as it reads, and not so as to be consonant with the legislation in any other jurisdiction particularly.

Nallini Pathmanathan FCJ held at pp. 807-808:

> *"... The Legislature saw fit to word s 181 (now s 346) as it states, and accordingly judicial construction must accord the provision the intention Parliament sought fit to enact, namely a wide and broad remedy encompassing not only the majority, or the*

> *company, but also the directors and third parties where necessary, with a view to bringing the oppressive or prejudicial conduct to an end or remedying it."*

In conclusion, section 346 is wide in scope and requires a liberal and broad interpretation to protect the interests of the minority shareholders with the adequate, just and equitable remedy depending on the circumstances of the case. Considering the demands of commercial and business realities, the Court in deciding the appropriate remedy, has to approach with discretion that is consistent with the intent of the legislature.

### *Principle of Majority Rule*

A company is a legal construct created by legislation. Upon its incorporation, it has a legal identity, which is distinct and separate from its members and management. While the company is a separate legal entity, it comprises of two distinct organs, namely the shareholders and board of directors.

A company is managed by the board of directors, who are appointed by the shareholders to manage, operate and run the company. As decisions made in a company are based on the majority vote of its members, the company is controlled by its majority shareholders. The Federal Court in *Auspicious Journey Sdn Bhd* acknowledged the principle of majority rule and that it is not for the Court to interfere with the decisions of the majority.

In this regard, Nallini Pathmanathan FCJ observed at p 803:

> *"Majority rule supports the position that it is legitimate for a majority of the shareholders to control the company through the appointment of directors, who in turn, have the responsibility of running the business of the company. If the majority are unhappy with the directors then they oust them. If they are*

> *prepared to overlook the wrong, then the majority principle dictates that it is not for the court to interfere with that decision of the majority..."*

The Federal Court emphasised that the operation of the separate legal entity principle and majority rule would mean that the company has every legal capacity to sue and address or overlook any wrongdoings of the company, and it is not for the Court to interfere with the company, which includes also the majority shareholders' decisions, so as to not jeopardise the company's independence as a separate legal entity with its own business decisions and concerns.

Nallini Pathmanathan FCJ opined at p 803:

> *"The second principle of a company being a separate legal entity, separate from its members and its management, further insulated the conduct of the affairs of a company from being scrutinised by the Judiciary. The concern was that the courts were not equipped to deal with, or assess business decisions, and interference would jeopardise the company's independent status and business. Therefore, if the company itself chose not to sue, then it was generally not appropriate for others to sue on its behalf..."*

### *Minority Protection*

CA 2016 accords minority protection as stated in section 346. However, minority shareholders always face an uphill task in demonstrating that the acts of the majority have been oppressive or detrimental to the interests of the minority shareholders.

Section 346 offers minority shareholders remedy against those controlling the company, i.e. majority shareholders and directors of the company. The activities or conducts of the

directors would be scrutinized by the Court for oppressive acts which are unfairly prejudicial to minority shareholders.

The common examples would be:

(a) dilution of the minority shareholder's shareholding through allotment of new shares to the majority shareholders;

(b) failure to obtain shareholders' approval for disposal of company property to the majority shareholders; and

(c) a scheme engineered to hive up the assets of the company at substantial undervalues.

In order to establish oppression, the occurrences of events have to tantamount to oppression which is detrimental to or prejudicial to the interests of minority shareholders.

The success of the claim premised upon minority oppression requires the minority shareholders to demonstrate that the majority shareholders have acted discriminatively or the affairs of the business have been carried out in a manner prejudicial to the minority shareholders. This is a question of fact which varies in every circumstance and is peculiar to each case.

***Directors are Agents***

CA 2016 recognises

a limited set of circumstances where a director of a company can be held personally liable, which include:

(a) the actions of a director prohibited by the statute;

(b) where a director breaches the fiduciary duty owed to the company;

(c) where a director is directly and personally involved in a wrongful act; and

(d) where a director has acted beyond the role as an agent of the company and personally benefited from the act.

The Federal Court in *Auspicious Journey Sdn Bhd* held that in relation to oppression matters, where the dispute is between shareholders, directors may be implicated to be personally liable for acts of oppression in situations that warrant the imposition of such liability as provided in section 346(1)(a) as it makes reference to the company itself as well as the directors' personal exercise of their powers which expressly provides for liability to devolve to directors themselves.

Furthermore, as section 346 involves internal disputes within the company which involves the directors and shareholders, section 346 would naturally implicate the directors who have actively participated or brought about decisions and acts which are deemed oppressive.

In this regard, the Federal Court in *Auspicious Journey Sdn Bhd* drew a sharp distinction between the concept of a director being an agent of the company in relation to contractual or tortious claims against the company, and the position of a director in the context of an oppression suit. Oppression claims can implicate the directors personally as they involve the acts of such directors in the conduct of the affairs of the company.

### *Extension of Liability*

The net cast by section 346 is wide and comprehensive as it captures the acts of directors and third parties connected with oppressive acts.

In determining whether to extend personal liability to a director, the degree of the directors' involvement and participation in the alleged prejudicial acts, the knowledge of

impugned transactions, the unjust enrichment from the conduct will be considered.

In *Wilson* v *Alharayeri,*[5] the Supreme Court of Canada propounded a two-fold test in attributing personal liability to the errant director, which is as follows:

(a) the oppressive conduct must be properly attributable to the direction because of his or her implication in the oppression; and

(b) the imposition of personal liability must be fit in all the circumstances.

In respect of the second limb, the Canadian Supreme Court fashioned four instructive indicia as guidance:

(a) the oppression remedy request must in itself be a fair way of dealing with the situation;
(b) any order should go no further than necessary to rectify the oppression;
(c) any order may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders; and
(d) a Court should consider the general corporate law context in exercising its remedial discretion.

The Supreme Court concluded that the directors' liability cannot be a surrogate for other forms of statutory or common law relief, particularly where it may be more fitting in the circumstances. It depends on the peculiar facts of each case.

In *Auspicious Journey Sdn Bhd*, Nallini Pathmanathan FCJ held at p 817 and 818:

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5 [2017] 1 SCR 1037

> *"From the liberal construction accorded to s 181 CA 1965 (now s 346 CA 2016) above, and a detailed consideration of the jurisprudence from other jurisdictions, all of which seek to achieve the same underlying purpose of achieving fairness for minority shareholders where there has been abuse by the majority vide directors or third parties, it may be concluded that it is open to the courts in this jurisdiction to impose liability against directors or third parties provided there is a sufficiently close nexus between the oppressive or unfairly discriminatory conduct, or disregard of the minority's interests or otherwise prejudicial conduct and that party. It requires something more than the mere fact of their being directors who had conduct of the affairs of the company at the material time. It requires deliberate involvement in the impugned transactions, or a sufficiently close nexus, participation or connection to warrant the imposition of liability to directors or third parties."*

The legal test of attribution of liability to the directors enunciated by the Federal Court was succinctly explained as follows:

(a) Firstly, there should be evidence of deliberate involvement or participation in, or a sufficiently close nexus to the oppressive or detrimental or prejudicial conduct alleged by the minority, to warrant the attribution of liability to a director or third party.

(b) The imposition of liability should be fair or just in all the circumstances of the particular case.

(c) In assessing whether the imposition of such liability is fair or just, the court should be satisfied that the remedy results in fairness to the parties concerned as a whole. In this context, liability may well be more easily assessed and imposed where a director has breached his duties, acquired personal benefit or where his acts or omission will result in prejudice to other shareholders. However, the foregoing examples do not comprise conditions without which liability will not be imposed. Ultimately

the facts and factual matrix of each particular case will determine whether or not the imposition of liability on directors and/or third parties is justified. Such an assessment is undertaken on an objective basis.

(d) The attribution or imposition of liability should be circumspect, going no further than is necessary to remedy the breach complained of or to stop the oppressive or prejudicial conduct.

(e) Such imposition of liability must be reasonable, and serve to alleviate the legitimate concerns of the shareholders of the company in question.

(f) In exercising its powers under Section 181 CA 1965 (now Section 346 CA 2016) the court should bear in mind general corporate law principles, such that imposition of liability on directors does not become a substitute for other statutory or common law relief.

(g) In summary, the question for the court is whether in the context of Section 181 CA 1965, the defendant was so connected to the oppressive, detrimental or prejudicial conduct that it would be fair and just to impose liability against him for such conduct.

The Federal Court affirmed that the ambit of Section 346 allows the imposition of personal liability on directors and third parties and emphasised with great length in the judgment that such attribution must be sparingly used and must be fair and just in accordance with the facts and circumstances of each case.

Nallini Pathmanathan FCJ opined at p 824:

> *"While s 181 CA 1965 (now s 346 CA 2016) permits the imposition of personal liability on directors and/or third parties, such imposition of liability must be fair and just in accordance with the facts and circumstances of the case."*

The Federal Court then applied the legal test based on the facts of the case and concluded that no liability should be imposed upon the directors or third parties as it would not be just and fair. The acts of the Kuah brothers may have been

prejudicial and detrimental to AJSB, but it was done to salvage the company. This is also in stark contrast to AJSB's reluctance to inject further monies to do the same and the Kuah brother's actions, though prejudicial, were viewed as justifiable.

## CONCLUSION

The landmark decision of *Auspicious Journey Sdn Bhd* in acknowledging the legislature's intention and objective for CA 2016 to promote fair dealing and good corporate governance, set out the ambit of section 346 which provides for the wide discretion conferred upon the courts to provide for remedies against directors and third parties in cases of minority oppression. However, the Federal Court is also careful in exercising its discretion and emphasised that the imposition of liability on directors and third parties ultimately depends on the circumstances of each particular case and whether it is fair and just to allow for the devolvement of such liability onto directors and third parties who would otherwise be protected by the principles of the majority rule and separate legal entity.