CIVIL APPEAL NO. 02(F)-77-08/2022(W)

BETWEEN

DATO' AZIZAN BIN ABD RAHMAN & ORS ... APPELLANTS

AND

CONCRETE PARADE SDN BHD & ORS ... RESPONDENTS

[heard together with Civil Appeals No. 80, 81 and 82]

CORAM:
TENGKU MAIMUN BINTI TUAN MAT, CJ
NALLINI PATHMANATHAN, FCJ
RHODZARIAH BINTI BUJANG, FCJ

SUMMARY OF JUDGMENT

Background to the Appeals

1. In the present appeals, the proposed allotment and issuance of new shares put forward by directors of a company for the purposes of part-financing a business merger, triggered litigation by dissenting shareholders, albeit after considerable delay. This came in the form of an oppression action brought by a dissenting minority shareholder of **Apex Equity Holdings Berhad ('Apex Equity')**, one **Concrete Parade Sdn Bhd ('Concrete**

Parade'). Concrete Parade maintained that it had been oppressed by the proposed merger.

2. In essence Concrete Parade maintained that:

(i) Its pre-emptive rights as a shareholder of Apex Equity under **section 85(1) of the Act** had been adversely affected, and the said section contravened;

(ii) **Section 223 of the Act**, relating to disposals or acquisitions of substantial assets of the company by the directors of Apex Equity, was contravened by the failure of the directors to procure shareholder approval for the proposed merger at the correct or relevant time alleged to be prescribed in that section;

and independently of these two grievances, that

(iii) Share buy-back transactions undertaken by Apex Equity between 2005 and 2017, were *ultra vires* its articles of association **('AA')**. In this context, the acts of the management or directors of Apex Equity in seeking and obtaining an order of the High Court, validating the prior share buy-back transactions, without giving adequate notice to its shareholders amounted to an act of oppression.

3. Ultimately, the proposed merger failed. The decision of the Court of Appeal in construing **sections 85 and 223 of the Act**, in particular, which affected the viability of the proposed merger, comprise the subject matter of these appeals.

The Legal Issues in these Appeals

4. Before us, the Appellants put forward several questions of law relating to the pre-emptive rights of shareholders under **section 85 of the Act**; and questions relating to the relevant point in time when the law permits the directors of a company to procure shareholders' approval for the acquisition or disposal of the property or undertaking of a company under **section 223 of the Act**.

5. Accordingly, these appeals raise significant issues in relation to the construction of **sections 85** and **223 of the Act** in the context of business mergers.

6. The appeals also require a consideration of whether share buy back transactions conducted over several years in contravention of a condition stipulated in **the Act** amounted to an act of oppression *vis a vis Concrete Parade*. The issue of whether such contravention may be rectified under **section 582(3) of the Act** also arose for consideration.

What is the Correct Legal Construction to be Afforded to Section 85(1) of the Act?

7. These appeals are of importance because of the implications to companies at large in this jurisdiction, on the permitted means of raising capital for entrepreneurial purposes. The allotment and issuance of new shares by a company to third parties by way of private placement for the purposes of raising capital, is, and has long been utilised as a mode of raising capital by companies, where the constitution allows it.

8. There is a balance to be achieved as borne out by the express words used in **section 85(1)**, namely ***'Subject to the constitution'***. These words in **the Act**, accord recognition to the constitution of a company, as representing the contractual relationship bargained for and arrived at, between the various stakeholders in a company, delineating the relationship between the shareholders, directors and the company itself.

9. As such, the legal issue that arises in these appeals is the construction to be accorded to **section 85 of the Act** in the context of the balance to be achieved**.** Must shareholders' approval be obtained in every instance where newly issued shares are to be allotted and issued for the purposes of raising capital or do exemptions and exceptions subsist by virtue of the constitution of the company? If they do, can they be given effect?

What is the Correct Legal Construction to be Afforded to Section 223 of the Act?

10. Secondly, the issue of the precise point in time when directors are to obtain shareholders' approval for the acquisition or disposal of an undertaking or property of a substantial value, in the context of **section 223 of the Act** is another matter of pivotal significance, warranting analysis. This relates to the proper construction to be accorded to **section 223 of the Act**.

11. A great deal of the argument and decision in the Courts below turned on whether certain preparatory agreements to the merger had the effect of the directors causing Apex Equity to *"enter or carry into effect any arrangement or transaction for the acquisition of an undertaking or property of a substantial value; or the disposal of a substantial portion of the company's undertaking or property"* without previously obtaining shareholders' approval.

12. The pivotal questions here include:

    (i) How is **section 223**(**1)(b)(i)(ii) of the Act 2016** to be construed? This includes a consideration of the correct time when shareholders' approval is to be obtained. Prior to the entry into any negotiation at all, or upon some basic aspects of the merger being

agreed upon in principle, and the entirety subject to shareholders' approval? In other words, does entry into an agreement setting out the proposed details of the merger but which is specifically subject to a series of conditions precedent requiring *inter alia*, shareholder approval, amount to entering into the merger or carrying into effect the merger?

(ii) How is the use of the word 'or' in **section 223** to be construed? Is it to be construed **disjunctively** or **conjunctively**? The Court of Appeal held that it was to be read **conjunctively** and this is a key issue that requires scrutiny;

(iii) The answer to the last question defines the extent of the fetter placed on management/directors in relation to the acquisition or disposal of assets within a company. Is it open to directors to exercise their powers of management to expand the business of the company by negotiating and putting into writing conditional contracts which are subject to shareholders approval, or are the directors constrained to revert to the general body of shareholders prior to entry into conditional contracts?

13. These matters have a practical and substantive impact on the feasibility and viability of new business transactions for

a company, which directors, exercising their entrepreneurial functions, seek to apply on a regular basis.

14. Requiring the convening of general meetings to obtain shareholder approval for negotiation, even **before** clear or final terms for a proposed transaction have been negotiated, can be costly and time consuming, and can even result in the proposed transaction being aborted. On the other hand, the importance of ensuring that directors are not dissipating or acquiring assets without the full knowledge of the shareholders cannot be ignored.

Does a Contravention of the Act (which Concrete Parade Acquiesced to) in Relation to the Validation of Share Buy-Back Transactions Amount to an Act of Oppression *vis a vis Concrete Parade*?
Can Section 582(3) be Utilised to Rectify such a Contravention?

15. The third legal issue in this appeal relates to whether the validation of a series of share buy-back transactions effected by Apex Equity **(with shareholder approval)** between 2005 and 2017 vide **a validation order of the High Court on 29 August 2018** amounts to act/acts which are oppressive of Concrete Parade as a minority shareholder. The central complaint is that these transactions were effected when the AA (now the constitution) of the company did not provide or allow for any such buy-back transactions.

16. The Appellants also maintain that **section 582(3) of the Act** may be utilised to rectify the unknowing contravention of the **Companies Act**.

The Utilisation by Concrete Parade of the Statutory Oppression Provisions Under Section 346 of the Act

17. The fourth legal issue that warrants consideration is whether the use of the oppression provision is indeed the proper means of remedying Concrete Parade's grievances, if such grievances are made out.

18. The relationship between shareholders and directors is analogous to that of principal and agent. The disputes that arise in core company law between shareholders and management/directors, may conveniently be divided into three categories:

    (a) Disputes arising between the management or directors and the shareholders as a class;

    (b) Disputes arising between majority shareholders and minority shareholders; and

    (c) Disputes arising between the controllers of the company (whether directors or majority shareholders) and non-shareholder stakeholders.

19. The instant case is premised on an oppression action and relates to the second category in that the basis of such a claim is oppression by the majority over the minority. In this context, it is also relevant that this is a public listed company.

20. The primary bone of contention of Concrete Parade here, is that the management or directors have contravened several statutory provisions of **the Act** as outlined above. These acts or omissions comprise the basis for the oppression action. Such contraventions, if true, beg the question whether they affect the shareholders as a class, in which case it is moot whether the grievances should fall within the first category, or the second category, namely oppression, as the Respondent has done. In short, what is the proper classification for these complaints?

21. Secondly, has Concrete Parade established how it has suffered in its capacity as a shareholder as a consequence of the action of the majority shareholders? More particularly in a public listed company where the majority of shareholders at general meeting voted in favour of the proposed merger?

22. Is the primary complaint of contraventions, if established, more properly brought against the acts of the management or directors in relation to the business merger, or do such alleged contraventions amount to acts of oppression by the

majority shareholder against Concrete Parade itself as a dissenting minority shareholder? In this context, the primary complaint appears to be centred against the acts and/or omissions of the directors.

23. This issue ultimately also falls for consideration, in order to assess whether the Court of Appeal was correct in concluding that Concrete Parade, as a minority dissenting shareholder of Apex Equity, suffered oppression perpetrated by the wrongful acts of the majority, as envisaged under **section 346 of the Act**.

24. In this summary, we shall not read out the salient facts as they are known to the parties.

Section 85(1) the Act

25. We turn to the first issue relating to **section 85(1) of the Act**, in order to ascertain whether the events underlying these appeals, as set out above, amounted to a contravention of **section 85(1) of the Act**.

26. The question of law in relation to **section 85(1)** is **Question 4**:

> *"Where the constitution of a company provides that shareholders' pre-emptive rights under **section 85 CA 2016** is "Subject to direction to the contrary that may be given by the company in general meeting, whether*

(a) This allows shareholders at a general meeting to waive such pre-emptive rights in full; and not just the manner and proportion in which shares are to be offered to existing shareholders?

(b) If the answer to Question 4(a) is in the affirmative, whether a proposed resolution for the allotment and issuance of new ordinary shares to persons other than existing shareholders must expressly state:

(i) shareholders have pre-emptive rights under section 85 of the CA 2016;

(ii) passing of the proposed resolution amounts to a waiver of those rights, for the resolution to constitute a valid waiver of pre-emptive rights?

(c) Whether an agreement between the company and persons other than existing shareholders for the allotment and issuance of new ordinary shares ("subscription agreement") infringes section 85 CA 2016 even though

(i) The subscription agreement is conditional on shareholders' approval in a general meeting; and

(ii) Shareholders approval in a general meeting was obtained before any allotment and issuance of the shares

The Decision of the High Court on Section 85 and Shareholders' Pre-emptive Rights in Relation to the Proposed Allocation and Issuance of Placement Shares to Third Parties

27. The High Court held that there was no contravention of **section 85(1)**.

The Decision of the Court of Appeal on Section 85(1) of the Act

28. The Court of Appeal reversed the decision of the High Court, holding that Concrete Parade had a legal right, **both statutory and contractual, to be offered new shares in Apex Equity,** prior to the proposed issue being offered to third party places**.** That right could only be denied if there was 'direction to the contrary' given during a general meeting before such shares were offered to outsiders.

29. In this context, the Court of Appeal held that the placement resolution could not constitute a valid **'direction to the contrary'** because:

    (a) Such a direction had mandatorily to be obtained before the offer of any shares to outsiders. As the resolution was passed after the execution of the subscription agreements conditionally offering placement shares to the third parties, the direction could not be construed to be operative retrospectively. This amounted to a violation of the law;

    (b) Further, in order to be in compliance with the law, the proposed resolution had to expressly set out the shareholders' pre-emptive rights under **section 85(1)** and the consequences of the ceding of such pre-emptive rights in full;

(c) The Court of Appeal also referred to, and followed a decision of the Indian High Court in **Shanti Prasad Jain v Kalinga Tubes Ltd and others [1952] 49 AIR 202** where it was held that the Indian statutory provision which contained the term "subject to any directions to the contrary" (which is found in **Article 11** of the constitution of Apex Equity) was held to refer only to the manner and proportion in which the new shares proposed to be issued have to be offered to the existing shareholders and could not mean any direction not to offer at all to existing shareholders. In other words the pre-emptive right of existing shareholders was found to be mandatory and not capable of being renounced.

Our Analysis

30. In the course of our judgment, we have analysed the law in relation to this section by looking at case law and the legislative history in relation to shareholder pre-emption rights, the legislative history preceding **section 85 of the Act**, and the effects of the present **2016 Act**. We have also considered how **sections 75 and 85** are to be construed.

Analysis of the Decision of the Court of Appeal

31. The Court of Appeal construed **section 85(1) of the Act** together with **Article 11 of the AA of Apex Equity** (now the constitution), as imposing a **mandatory duty and/or obligation** on Apex Equity to offer any proposed issuance of new shares to the existing shareholders first, before being considered or offered for private placement to third parties. This brings to the fore the weight to be accorded to the words *'Subject to the constitution'* in **section 85(1) of the Act**, and the rationale or intent of **the Act** as discussed above.

32. The Court of Appeal held that **section 85 of the Act** was breached in that Apex Equity effectively deprived all of its shareholders, including Concrete Parade, of both their statutory and contractual pre-emptive rights in relation to the proposed placement shares. The consideration shares which were also to be allocated and issued to Mercury were not a subject of grievance.

33. There is no reasoning accorded as to why or how the Court of Appeal arrived at this conclusion, save that it chose to accept Concrete Parade's argument, and reject that of Apex Equity and the directors of Apex Equity.

34. Firstly, **section 85(1) was construed in vacuo** with no consideration accorded to related provisions, or the underlying intent of **the Act**.

35. With respect, the Court of Appeal, by undertaking an approach which failed to consider the purpose and intent of **the Act**, in interpreting **section 85(1)**, failed to give consideration to the statutorily prescribed mode of statutory construction specified in **section 17A of the Interpretation Acts 1948 and 1967**. The omission to consider the purpose and/or intent of **the Act** often results in a construction that does not meet or adhere to the objective of **the Act**. The consequences are considered further below.

36. In the judgment of the Court of Appeal, **section 85(1) of the Act** is reproduced as is **Article 11** of the AA. It is evident from the reproduction and juxtaposition of **section 85(1) above Article 11** that:

    (i) The Court of Appeal chose to read **section 85(1) concurrently with Article 11 AA,** rather than construing the statutory pre-emptive rights accorded by **section 85(1)** as being **subject to, or conditional upon** the contents of the **AA** of Apex Equity as expressly provided for in the statutory provision;

    (ii) The use of such a concurrent approach is, with respect, flawed, because the express terms of **section 85(1)** provide that the right of pre-emption in relation to a proposed allocation and issue of new shares are **subordinated to the content of**

the constitution of a company. The Court of Appeal failed to comprehend that as such, the pre-emptive rights of shareholders in the very statutory provision affording shareholders protection, is subject to, or subordinated to what is stipulated in the constitution of the company.

37. If full effect had been given to the express words of **section 85(1),** the Court of Appeal would have recognised that **the Act** does not confer **absolute mandatory pre-emptive rights** in respect of the new issuance of shares by a company. This is because of the express words, *"Subject to the constitution"* in **section 85(1)**.

38. As such, it is open to the shareholders to determine that they wish to relinquish or accede to the proposed issuance of new shares for the purposes of part consideration for a corporate exercise if they so determine. And such determination is ascertained at general meeting by votes taken on the proposed resolution. That is the effect of **Article 11** of the AA of Apex Equity. If they wish to assert their pre-emptive rights then they may do so by voting against the resolution for the proposed business merger which involves part payment by way of private placement. If they wish to vote in favour of the business merger, then they may do so by voting in favour of the same, which means that those private placement shares which are necessary to provide the capital to secure the merger, will not be available for purchase by them. They effectively

choose to disapply or cede their option to purchase the same by voting in favour of the merger.

39. Put another way, Parliament has determined that the pre-emptive rights of shareholders can be **disapplied or not**, depending on the free contracting will of the shareholders, as expressed in the constitution.

40. It follows further that the historical treatment of pre-emptive rights of shareholders continues to prevail. Such rights are neither absolute nor mandatory in this jurisdiction.

41. The Court of Appeal erred in the approach it undertook to align the pre-emptive statutory rights together with **Article 11** by ignoring the fact that the former was **subject to the content of the constitution** as embodied in **Article 11**.

42. So given this broad power of issuance of new shares under **the Act**, particularly as in the instant case, for the purposes of part consideration for the acquisition of Mercury, can it be said that **section 85(1)** and **Article 11** must be read as imposing a stringent and mandatory regime restricting the rights of management exercised a *bona fide* to expand the growth of the company? The answer must be a resounding no.

43. This brings us to the question of whether the shareholders at the two general meetings of Apex Equity on 19.06.2019 and 18.11.2019 did, or did not, yield or relinquish their pre-

emptive rights to the proposed placement shares for the purposes of the acquisition of Mercury.

What is the Legal Construction to be Accorded to the Words Subject to Direction to the Contrary by the Company at General Meeting in Article 11 of the Memorandum and Articles of Association?

44. The Court of Appeal went on to construe **Article 11** of the AA of Apex Equity. Although the Court of Appeal applied the express provision prefacing **section 85(1)** which states that such rights of pre-emption are ***"Subject to the constitution"***, it held that the approval of the private placement resolutions, albeit at the first or the second extraordinary general meetings of **Apex Equity** held to gain shareholders' approval for the proposed merger, did not amount to *"direction to the contrary"* as envisaged in **Article 11** of Apex Equity's memorandum and articles of association, i.e. its constitution.

45. This is because it read **section 85(1) of the Act** together with **Article 11** of the AA of Apex Equity, as imposing a mandatory duty and/or obligation on Apex Equity to offer any proposed issuance of new shares to be offered first to the existing shareholders before being considered for private placement.

46. It further read the exemption to the right of pre-emption in **Article 11** as being operative, only if the party waiving it,

namely the general body of shareholders "*had knowledge of its legal rights and with that knowledge, consciously chose not to exercise the same*".

47. The Court of Appeal construed *'subject to direction to the contrary at a meeting of the company'* to mean that the company or its management/directors **must** advise the shareholders, **prior to** the proposed issuance of new shares for the raising of capital to be preceded by:

    (a) an express reminder to the shareholders of their pre-emptive rights under **section 85(1)** in relation to the proposed issuance of new shares, in a circular preceding the meeting, explaining the proposed corporate exercise and proposed resolutions to the shareholders; followed by

    (b) a clear and express statement that by the resolution they comprehend and acquiesce to a waiver of their pre-emptive rights to the new shares proposed to be issued at a general meeting.

48. However neither the constitution of Apex Equity nor **the Act** contain any such stipulations. In the absence of such requirements, should such conditions be read into **Article 11** or **section 85(1)**?

49. By so construing these provisions and imposing these conditions, the Court of Appeal extended and augmented the natural and ordinary meaning of the words ***'subject to***

direction to the contrary by the company at general meeting'.

50. The term **'subject to direction'**, means subject to instruction or order or stipulation. Applied to **Article 11**, these words in their plain and ordinary sense mean that where the shareholders at general meeting **'direct'** or instruct, or command, or communicate that they:

    (i) do not oppose the business merger or the private placement for purposes of part payment; or

    (ii) do not want to exercise their pre-emptive rights under **Article 11 (and section 85(1),** then that is sufficient to allow the management i.e. the directors to proceed with the raising of capital by issuing new shares to third party placees.

51. **'Direct'** or **'direction'** does not, of itself, require that either pre-emptive rights to shares or **section 85(1)** be explained to shareholders, whether by way of circular or otherwise.

52. To therefore impose conditions as stated above amounts to an unwarranted expansion of the intent and purpose of **section 85(1)**.

53. Is it necessary to explain the law in **section 85** to shareholders of a public listed company before approval for acquisitions or disposals or mergers or the procuring of

capital can be evoked? Does the concept of pre-emptive rights commencing from **section 75 and section 85 of the Act** require explanation in every circular relating to issuance of new shares?

54. The Court of Appeal failed to consider that the shareholders, by voting in favour of the business merger and therefore the private placement as part consideration, did comprehend or ought to have comprehended, that:

    (a) Their shareholding would be diluted by the proposed issuance of shares for the private placement;

    (b) They were disapplying or yielding their pre-emptive rights to those shares comprising the subject matter of the proposed placement, in favour of the business merger.

55. It must be remembered that pre-emptive rights of shareholders in a company's constitution are contractual in nature and that the final contract relating to such rights are determined by the shareholders and the management of the company. If shareholders want pre-emptive rights to be mandatory, they can contract so. And if they choose to allow such matters to be surrendered, yielded or ceded, or partially so at general meeting, then they contract to that effect in the constitution.

56. Therefore the Court of Appeal erred in finding that the private placement could not supersede the shareholders' including Concrete Parade's pre-emptive rights under **section 85(1)**. This is what the Court of Appeal held at paragraph 27 of the judgment:

> *'[27] We find that the placement resolution cannot displace the appellant's statutory pre-emptive rights to the placement shares which breach is oppressive because it has resulted in: (i) the unjustified dilution of the appellant's shareholding in Apex Equity because an additional 20 million new shares have been issued to the outsiders despite the statutory safeguard in s 85 of the CA 2016, where the legislative intent was to 'maintain the relative voting and distribution rights of those shareholders.'; and (ii) the loss of opportunity to enhance the appellant's shareholding in Apex Equity by subscribing for part of the placement shares.'*

57. For the reasons set out above, the conclusion that there was an '*unjustified*' dilution of Concrete Parade's shareholding in Apex Equity *'despite the safeguard in section 85'* is wrong. The further conclusion that this resulted in oppression to Concrete Parade is also aberrant given that the majority of the shareholders in Apex Equity voted in favour of the proposed private placement, which would indubitably have the consequence of diluting their existing shareholding.

58. Given that the purpose and intent of **the Act** is to facilitate rather than stultify the growth of companies albeit with

sufficient regulation, the construction accorded to **section 85(1) and Article 11** is not tenable and erroneous in law. With respect, the decision of the High Court is to be preferred as it adopts the correct approach.

What Constitutes *'Direction to the Contrary'*?

59. Reverting to the issue of what constitutes *'direction to the contrary',* the Court of Appeal placed great reliance on the Indian High Court decision in **Shanti Prasad Jain v Kalinga Tubes ltd [1965] AIR 1535**.

60. The citation of the Indian High Court decision and reliance by counsel for Concrete Parade on this authority was fundamentally wrong. This is because the Indian Supreme Court found the decision of the High Court to be incorrect. It held that shareholders at a general meeting, having decided that new shares should not be issued to the existing shareholders but to others, did NOT amount to a contravention of section 81 of the Indian Companies Act 1956 and that the resolution held was in accordance with law and was valid.

61. It is therefore clear that the Court of Appeal erred not only in its finding that pre-emptive rights under **section 85(1)** are effectively mandatory, but also that any complaint by a dissenting minority in relation to an alleged contravention of the section does amount to an act of oppression as envisaged under **section 346 of the Act**.

62. In conclusion in relation to this issue, the complaint of an alleged contravention of **section 85(1)** fails. As such there can be no occasion for a complaint of oppression.

63. We answer **question 4(a) in the affirmative**. This means that shareholders may at general meeting vote on a resolution to disapply their pre-emptive rights in full, not just in relation to the manner and proportion in which shares are offered to existing shareholders.

64. We answer **Question 4(b) in the negative**. It is not necessary for the proposed resolution to expressly stipulate or explain the nature of pre-emptive rights under **section 85(1) of the Act** and that the passing of a proposed resolution amounts to a disapplication of those pre-emptive rights.

65. We answer **question 4(c) in the negative**. An agreement for the allotment of shares to third party placees, other than existing shareholders, which is conditional on shareholders' approval at general meeting, **does not contravene section 85(1) of the Act.** This is all the more so where shareholders' approval in general meeting was obtained prior to any allotment or issuance of the shares.

The Second Issue: The Legal Construction of Section 223 of the Act

66. Next we turn to the second issue in this appeal, namely how **section 223 of the Act** is to be construed. As stated at the outset, this issue is of pivotal importance because the answer to this question determines and defines:

    (i) The juncture or point in time when management i.e. the directors, are bound to seek shareholders' approval in relation to the acquisition or disposal of assets within a company. Under **section 223**, must shareholders' approval necessarily and/or mandatorily be obtained prior to entry into a conditional contract, i.e. when the company and the counter party or parties are at the negotiation stage?

    (ii) Or do the directors have the discretion to execute contracts for entry into a **proposed** acquisition or disposal **which is expressly made subject to shareholders' approval, amongst other conditions**?

67. Secondly how is the word **'or'** in **section 223(b)** interspersed between **(i) and (ii)** to be interpreted? Conjunctively or disjunctively?

68. These are key issues arising for consideration in the construction of **section 223** that require scrutiny.

The High Court Decision in Relation to the Legal Construction of Section 223 of the Act

69. The learned High Court Judge concluded that the effect of **section 223(1) of the Act**, is that it suffices if only one of the conditions in **sub-paras (i) or (ii)** is fulfilled.

The Court of Appeal's Decision in Relation to Section 223(1) of the Act

70. The Court of Appeal reversed the decision of the High Court.

71. In construing **section 223(1) at paragraph 36** of its judgement, it held that upon a reading of the section, two separate and distinct restrictions were placed upon the directors of a company:

    (a) To enter into an arrangement or transaction which has to be made subject to and/or contain a condition precedent for shareholder approval in conformity with **section 223(1)(b)(i) of the Act**; ***and***

    (b) To carry into effect an arrangement or transaction, for which prior shareholder approval must first be

obtained in conformity with **section 223(1)(b)(ii) of the Act**.

72. The Court of Appeal saw the two conditions as being conjunctive notwithstanding the fact that the statutory provision utilises the word ‘or’.

73. To summarise, the Court of Appeal held that **section 223(1)(ii) of the Act** was breached as:

(a) the HOA (being the starting point and/or the entering into of the merger exercise) which was completed on 18 December 2018 did not contain a condition precedent for shareholders’ approval; and

(b) the implementation and/or the carrying into effect of the HOA (being the execution of the BMA) required prior shareholders’ approval before it was executed on 18 December 2018. Therefore, a shareholders’ approval via the merger resolution obtained six months later on 19 June 2019 could not cure this transgression which had already occurred.

74. In the course of adjudicating on this issue, we studied the legislative history of the section which we do not propose to read out here.

Intention of Parliament Under Section 223(b)(1)(i) and (ii) of the Act

75. Does the new **section 223 of the Act** change or alter the intention of Parliament? When the two parts of **section 223(1)(b) (i) and (ii)** are perused, it is evident that:

1. (a) **Section 223(1)(b)(i)** addresses the situation at the onset of entering into an arrangement for the acquisition or the disposal of a substantive asset. It offers or details an additional option available to the directors whereby at the point of entry into any such agreement, the directors may make such agreement, which is subject to shareholders' approval.

(b) In practical terms this means that the need to advise the shareholders of the proposed acquisition or disposal may be made at the inception of the proposed transaction **by making the agreement underlying such transaction "subject to" the obtaining of shareholders' approval by way of a resolution**. In practical terms this means that neither the acquisition or disposal as the case may be can proceed to realisation unless shareholders' approval at a general meeting is obtained;

2. (a) **Section 223(1)(b)(ii)** addresses the situation at a later stage, namely at the point when ownership of the asset is either acquired or divested. Before the underlying primary agreement becomes binding and enforceable and prior to actual transfer of ownership either to, or from the company, the directors are bound to obtain shareholders' approval;

(b) In both instances, whether **(b)(i) or (b)(ii)**, shareholders' knowledge and approval is ensured for any such important acquisition or disposal by the directors on behalf of the company. To that extent the intent and purpose of **the Act** does not alter or change in any manner whatsoever. It is shareholders' knowledge and approval that is sacrosanct and that is protected in both those statutory provisions.

How is the Word 'or' Between Sub-Paragraphs (b)(i) and (b)(ii) to be Read?

76. Given the intention of the provision, the **key issue is this: Must both statutory provisions be complied with, or is it sufficient that only one or the other is complied with? And the answer to that question turns on how the word 'or' is to be construed**.

77. **The Court of Appeal held that the word 'or' meant 'and'**. Both **sub-paragraphs (b)(i) and (b)(ii) had to be applied and complied with, as they arose at different stages in the course of the transaction**.

78. The effect of such construction by the Court of Appeal is that any company seeking to acquire or dispose of an asset of substantive value needs to comply with both **sub-paragraphs (i) and (ii).** This in turn means that:

    (a) The directors have to ensure that when the company enters into any arrangement or agreement for the acquisition or disposal of property of a substantive nature, such agreement or arrangement must be put to the shareholders at general meeting, who pass a resolution approving the entry into the agreement for such acquisition or disposal. In other words, the Court of Appeal read **sub-paragraph 1** to mean that even prior to entry into an agreement to acquire or dispose of an asset, the approval of shareholders at general meeting had to be obtained.

79. However, the proper, linguistic, structural and accepted interpretation of **sub-paragraph (b)(i)** under the standard and accepted mode of reading the English language, is that <u>any entry into an agreement for such a transaction is made **conditional upon** the obtaining of shareholders'</u>

approval. In other words, a condition that must be complied with in order to achieve the acquisition or disposal of the company's asset is the obtaining of shareholders' approval at general meeting.

80. Reading the words "***subject to the approval of the company by way of a resolution"*** as amounting to a mandatory pre-condition to obtain actual approval **prior to entry into an agreement for acquisition or disposal,** with respect, distorts the ordinary, plain and correct grammatical construction of **sub-paragraph (b)(i)**. It is simply an incorrect use of the language to construe it thus.

81. This means that as long as it is understood between the company and the proposed vendor or purchaser that the acquisition or disposal will not go through unless and until shareholders' approval is obtained, the entry into such an agreement complies with the requirements of **section 223**. And this in turn is because, as stated earlier, the final acquisition or disposal **cannot be completed,** until such shareholders' approval is obtained. If shareholders' approval is not obtained the transaction simply cannot proceed and will be aborted as the condition relating to shareholders' approval was not complied with.

82. In relation to **sub-paragraph (b)(ii)**, the Court of Appeal held that it also had to be complied with, in addition to **sub-paragraph (b)(i)**, i.e. conjunctively, by reading 'or' as 'and'. The consequence of such a construction is that

shareholders' approval at general meeting has to be obtained **for a second time**, prior to the actual transfer of ownership of the asset to be acquired or disposed of, **for the same transaction**.

Our Conclusion on the Construction to be Accorded to Section 223(1)(b)(i) and (ii) of the Act

83. The use of the word 'or' means what it says, namely 'alternatively', and cannot be construed to mean 'and'.

84. The reason for our conclusion, apart from the foregoing analysis above is this:

(a) If the section is construed as the Court of Appeal held it ought to be read, namely conjunctively, the consequence would be that for any corporate transaction the directors would have to:

(i) First, obtain shareholders' approval **before** entering into any form of agreement for a proposed acquisition or disposal of a substantive asset. In the instant case it would mean that even prior to the HOA and prior to the BMA shareholders' approval would have to be obtained. The shareholders would have to agree to the proposed acquisition of Mercury without the full terms and the details

of the acquisition having been worked out in full.

(ii) It would be insufficient to make the HOA or the BMA 'subject to' shareholders' approval because the Court of Appeal reads **sub-paragraph (b)(i)** as imposing a mandatory requirement for such approval prior to entry into an agreement to that effect.

(iii) If shareholders' approval is obtained then the directors are allowed to proceed further to put into effect or complete the transaction.

(b) But matters would not end there. The shareholders' approval then **has to be obtained a second time prior to the actual transfer or putting into effect of the transaction**. When is this to be done? The Court of Appeal felt that such shareholders' approval would be necessary prior to the signing of the BMA (notwithstanding that the BMA itself is 'subject to' shareholders' approval).

85. The net effect of such a construction would be that the appellant would have to obtain shareholders' approval once prior to entry and for a second time either before or soon after the BMA when time for the actual transfer of the shares and consideration is exchanged, including the private placement.

86. This begs the question, why? Why is shareholders' approval required twice in respect of the same transaction on the same terms? The need for two sets of shareholders' approval is, with great respect, irrational, unreasoned, unreasonable and runs counter to the principle of proportionality, given the purpose and intent of the section.

87. In terms of commercial sense, which is an essential element in construing commercial transactions and the Act, it is equally flawed. Requiring directors who are accorded full powers of management of the company, to keep reverting to the shareholders on a continuous basis, adversely affects the performance of the company in terms of growth and expansion. The underlying ethos of **the Act** is to ensure that commercial transactions are fostered and fortified, not stultified or stifled. The costs involved in procuring shareholders' approval are considerable. Of greater concern is the time expended in procuring such consent. Business efficacy is key in promoting economic activities. Many transactions will be aborted and opportunities lost when **the Act** is construed to impose greater regulation than it actually does, or needs to.

88. The requiring of two sets of shareholders' approval makes neither legal nor commercial sense, given the purpose and intent of **the Act**. As the primary purpose is to make shareholders aware of the proposed transaction and to get their approval for the overall aspects of the same,

including matters like the private placement in the instant case for the purposes of obtaining quick financing, it is sufficient that shareholders' approval was obtained once. Shareholders' approval should moreover be obtained at the point when most details have been ironed out so that the shareholders have a fair comprehension of the entirety of the proposed transaction.

89. This construction is in accord with both the purpose and accord of **the Act** and does not give rise to an absurd result. That absurd result being to obtain shareholders' approval twice for the same transaction at different points in time.

90. For these reasons we conclude that the Court of Appeal erred when it held that **section 223(b)(i) and (ii)** ought to be read conjunctively such that both **sub-paragraphs (i) and (ii)** are to be complied with in respect of any proposed corporate transaction.

91. The Court of Appeal further erred when it held that shareholders' approval was required for entry into the HOA and the BMA. It failed to appreciate or comprehend that:

    (a) The HOA was specifically stated to be a record of the understanding between Apex Equity and Mercury in respect of the proposed transaction. The fact that JF Apex which was a crucial party, did not even execute the agreement, precludes it

from comprising any form of legal and binding document. The Court of Appeal chose to ignore the fact that the HOA was merely a record of an understanding of what would later materialise into a fuller agreement between all the relevant parties;

(b) It was not tenable for the Court of Appeal to ignore a clear term in an agreement, namely the HOA, stipulating that shareholders' approval was a pre-requisite to the transaction. Even if the HOA is construed as a legally binding document, which it cannot possibly be, a salient term of any future agreement was that shareholders had to approve the transaction at a general meeting. To that extent, the HOA complied with **section 223(1)(b)(i)**, even though there was no necessity for such compliance at that juncture as JF Apex was not even a party;

(c) The Court of Appeal erred when it ignored, or sought to contend that the clear condition precedent in **clause 5 of the HOA** did not comply with **section 223**. It would appear, with respect, that the Court of Appeal arrived at that conclusion in order to conform with its construction of the requirement for shareholders' approval even prior to entry into an agreement;

(d) Similarly, the Court of Appeal erred when it failed to recognise or comprehend that the BMA, by providing expressly for a condition precedent, had made the entry into the corporate transaction **'subject to' shareholders' approval** at a general meeting as required under **section 223(1)(b)(i)**. It further failed to, or did not comprehend that if shareholders' approval had not been obtained, as it was in the instant case, the corporate transaction would not have gone through. In such manner the shareholders' rights would have been fully preserved as intended under **the Act**;

(e) The Court of Appeal committed an error of law and fact when it failed to recognise that it was open to the company to obtain shareholders' approval at any time prior to the actual transfer of ownership of the shares of Mercury. In point of fact the transaction could not have been carried out or implemented without shareholders' approval and would have been aborted in the absence of such approval;

(f) In adopting an aberrant and unreasonable construction of **section 223(1)(b)(i) and (ii)**, by ignoring the plain and obvious word **'or'** and applying a conflicting meaning to the said term, the Court of Appeal arrived at a conclusion that was not logical and contrary to both normal legal

principles of statutory interpretation, as well as commercial sense and practice. The net result of the decision was that the entire transaction was aborted.

92. For all these reasons we reject the reasoning and the ultimate decision of the Court of Appeal in relation to section 223(1)(b)(i) and (ii). The decision of the High Court is sound, correct and to be preferred. For clarity we reiterate that it is sufficient if either section 223(1)(b)(i) OR (b)(ii) is adhered to. It is not necessary to comply with both limbs of the sub-paragraph.

‘Unfair Prejudice’ – Not Established

93. The Court of Appeal also erred in concluding that the merger would ‘unfairly prejudice’ Concrete Parade as a shareholder because the value of its investments in Apex Equity would diminish. It failed to comprehend that the shareholders at general meeting had voted in favour of the merger. If the majority approved the merger, how then was Concrete Parade unfairly prejudiced? All shareholders would have suffered the same fate.

94. More importantly it is majority rule that prevails. The fundamental principle of governance in companies is the majority rule. As stated by the High Court, while **section 346** represents a statutory intrusion into that rule, it is fundamental that unfairly prejudicial conduct must be

established. **Section 346** or the cry of oppression, cannot be utilised in an attempt to circumvent a situation where majority rule prevails *bona fide*, as is the case here.

95. Having completed our analysis, we now go on to answer **Questions 1, 2 and 3** as follows:

1. **<u>Question 1</u>**

1.1. Where a company enters into any arrangement or transaction falling within **section 223 of the Act**: -

(a) Can **section 223 (1)(i) and (ii) of the Act** be read disjunctively, such that it is sufficient if either:

(i) the agreements relating to the arrangement or transaction are expressly made subject to the approval of the company by way of a resolution; or

(ii) the carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution?

1.2. **Answer to Question 1**:

Yes. For the reasons we have set out above we answer question 1 in the affirmative.

2. **Question 2**

2.1. Where two or more agreements are construed as forming one composite transaction constituting an arrangement or transaction falling within **section 223 of the Act** for the acquisition or disposal by a company of substantial property, then:

(a) Would **section 223(1)(i) of the Act** be satisfied if at least one of the agreements forming the composite transaction contains an express condition precedent requiring a resolution of the shareholders of the company for the said arrangement or transaction?

(b) Would **section 223(1)(ii) of the Act** be satisfied by the passing of a resolution of the company in a general meeting approving the said arrangement or transaction before the arrangement or transaction becomes unconditional and binding on the parties to the arrangement or transaction and is carried into effect?

2.2. **Answer to Questions 2(a) and (b)**:
Yes. We answer the question in the affirmative.

2.3. In the instant case the HOA contained a **'subject to'** clause, although the Court of Appeal did not recognise it as such. As the HOA was not a legally binding or enforceable agreement by reason of the presence of such a condition, and as JF Apex was not a party to the same, it was not necessary for such a condition to be inserted. But as we have reasoned above, such a clause was clearly provided for in the same.

2.4. As for the BMA, it contained an express condition precedent to the effect that the acquisition was **subject to shareholders' approval at a general meeting** and therefore was compliant with **section 223(1)(b)(i)**. It further follows from our analysis that there was no necessity for **a second set of shareholders' approval to be obtained prior to the actual acquisition taking effect**.

2.5. Further, as the BMA could **not** possibly have the effect of **'carrying into effect'** or **'implementing'** or **'executing'** the agreement by reason of the existence of the condition

precedent, it is incorrect to say that it was in breach of **section 223(1)(b)(i) or (ii).**

3. **Question 3**

3.1. Does **section 223 (1) of the Act** impose an *"incumbent duty on the directors to inform shareholders"* of **any intention** to *'enter into'* and/or *'carry into effect'* an acquisition or disposal of substantial assets of a company" based on the decisions in **Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor and Other Appeals [2012] 3 MLJ 616 and Smithton Ltd (formerly Hobart Capital Markets Ltd) v. Naggar [2015] 1 WLR 189?**

3.2. **Answer to Question 3**:
No. We answer question 3 in the negative.

96. We now turn to the third issue that arises in these appeals:

Issue 3: Does a contravention of the Act (which Concrete Parade acquiesced to) in relation to share buy-back transactions which were subsequently validated, amount to an act of oppression vis a vis Concrete Parade?

Secondarily, can section 582(3) be utilised to rectify such a contravention?

97. The question that arises for consideration is whether a contravention of **section 67A(1)** in itself amounts to an illegality rendering all the share buy-back transactions void and unenforceable.

98. We examined the purpose and object of introduction of **section 67A** vide the **Companies (Amendment) Act 1997**.

99. We conclude that:

(i) Firstly the share buy-back transactions as contracts, are not in themselves prohibited by the statute. In point of fact **sections 67A and 127** permit such share buy-back transactions by a public listed company, provided the other sub-sections are met. So there was no illegality per se in undertaking such transactions as may be the case under **sections 67 and 123 of the Acts** respectively;

(ii) It is a question of construction of **sections 67A and 127** as to whether the share buy-back transactions in the instant appeals that were undertaken allegedly *ultra vires* the constitution are illegal;

(iii) The construction of those two sections and the legality of the share buy-back transactions are not the central issue in the instant appeals. It is not

the subject matter of determination in these appeals. It requires separate adjudication in relation to the legality or otherwise of those transactions specifically.

(iv) Here, the central issue is whether the undertaking of those share buy-back transactions amounted to conduct oppressive to the minority shareholder Concrete Parade by the majority, causing it to suffer unfair prejudice.

100. In relation to **section 67A**, it is not possible to stipulate with any certainty whatsoever that the share buy-back transactions undertaken without authorisation in the articles of association of Apex Equity amounted to an illegality *per se*.

101. As it is not possible to so conclude it follows that the alleged illegality of those share buy-back transactions cannot form the basis for a complaint of oppression. Perhaps more significantly, even if it did, it is not evident how Concrete Parade suffered unfair prejudice as compared to any of the other shareholders. Concrete Parade as a minority shareholder cannot be said to have suffered as a consequence of any oppressive act on the part of the majority. The majority themselves, if indeed there was an illegality perpetrated, have suffered the consequences in exactly the same manner as Concrete

Parade. Therefore there can be no case of oppression made out under this head.

102. Moving on to **section 127 of the Act**, the position is even clearer. **Section 127 of the 2016 Act**, is worded differently. It provides as follows:

> ***'Purchase by a company of its own shares, etc.***
>
> ***127(1) Notwithstanding section 123, a company whose shares are quoted on a stock exchange may purchase its own shares if so authorised by its constitution.***
>
> ***(2) A company shall not purchase its own shares unless –***
>
> ***(a) the company is solvent at the date of the purchase and will not become insolvent by incurring the debts involved in the obligation to pay for the shares so purchased;***
> ***(b) the purchase is made through the stock exchange on which the shares of the company are quoted and in accordance with the relevant rules of the stock exchange; and***
> ***(c) the purchase is made in good faith and in the interests of the company.***
>
> *……*
>
> *……*
>
> *(16) A company shall lodge with the Registrar and the stock exchange a notice of the purchase of the shares in a manner to be determined by the Registrar within fourteen days from the purchase of the shares.*

> ***(17) The company, every officer and any other person or individual who contravene subsection (2) commit an offence and shall on conviction be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.***
>
> *(18) The company and every officer who contravene subsection (6) shall, on conviction be liable to a fine not exceeding fifty thousand ringgit and in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.*

[Emphasis ours]

103. It is evident from the new provision that the mischief **the Act** seeks to catch and make an offence relates primarily to the purchase of its own shares by a public listed company where:

    1. the company is insolvent;

    2. the purchase is not conducted through the stock exchange (although there are further exceptions in the section); and

    3. where such purchases are not made in good faith or in the best interests of the company.

104. Therefore, it would be difficult to conclude with any degree of certainty that the fact of the share buy-back transactions being *ultra vires* is, in itself, an illegality. It is again a matter of construction of the statute.

105. In any event that is not the thrust of the complaint by Concrete Parade. Concrete Parade instead contends that it has been **unfairly prejudiced** by the action of the majority in carrying out these transactions.

106. However the fact that there has been a contravention of **sub-sections 1 of sections 67A and/or 127,** does not equate to Concrete Parade being unfairly prejudiced by the majority in the carrying out of these share buy-back transactions.

107. Concrete Parade's grievance is that they were not accorded notice of the validation proceedings which deprived them of the opportunity to challenge or resist the validation order. However, such an allegation lacks credibility in view of the fact that notice was accorded publicly, as set out earlier, vide Apex Equity's announcement of its intention to seek validation proceedings. Concrete Parade took no steps to advise Apex Equity of its opposition to any proposed validation proceedings at this juncture. It made no attempt to ask to be advised of the date of the proposed validation proceedings, as it could have. It only complained of a lack of notice as a part of its oppression grievance in the suit.

Was there Oppression Against Concrete Parade by Reason of the Share Buy-Back Transactions, which were *Ultra Vires* the Constitution of Apex Equity?

108. The key question in these appeals, for this Court is whether, given the lack of authorisation in the articles of Apex Equity for such buy-back transactions, has the minority shareholder, Concrete Parade been unfairly discriminated against or suffered unfair prejudice at the hands of the majority shareholders so as to amount to oppression as envisaged under **section 346 of the Act**?

109. Our considered view is that it is difficult and untenable to conclude that the lack of compliance with **sub-section (1) of section 67A of the Companies Act 1965 or 127 of the Act** respectively, **i.e. the fact of the purchases being *ultra vires* the constitution**, resulted in oppressive conduct against Concrete Parade. In any event it is moot whether there has been a lack of compliance with **subsection (1) of section 67A of the Companies Act 1965 or 127 of the Act** respectively, when the articles do not prohibit share buy-backs under either **section 67A or 127**.

110. The fact of the share buy-back transactions being *ultra vires* Apex Equity's constitution does not necessarily equate to an illegality. Secondly, and more importantly, Concrete Parade has failed to establish how the fact of the

share buy-back transactions being *ultra vires* the constitution, unfairly prejudices it as a minority shareholder. What is the damage that it has suffered *qua* shareholder?

111. Given that all the shareholders of Apex Equity were equally affected by these transactions, how is Concrete Parade alone singularly and unfairly prejudiced as compared to the majority of the shareholders of Apex Equity?

112. In this context, the Court of Appeal erred in:

(i) Concluding with certainty that the *ultra vires* transactions comprised an illegality under the relevant sections, when for the reasons we have given, this issue remains in doubt;

(ii) Concluding that such *ultra vires* transactions, which involved the entirety of the shareholders of Apex Equity, resulted in unfairly prejudicial conduct against Concrete Parade as a minority shareholder. The Court of Appeal failed to consider that all the shareholders would be equally affected by the share buy-back transactions;

(iii) Failing to consider that Concrete Parade itself had approved the transactions from the years 2013 or 2014 onwards when it became a

shareholder. In this context its delay and acquiescence are salient matters that ought to have been taken into consideration when considering the allegation of oppression, that too against the directors, and not the majority shareholders.

113. In these circumstances we are satisfied that oppression has not been made out and that the Court of Appeal erred in so concluding in respect of the share buy-back transactions. The decision of the High Court is correct and is preferred.

Can Section 582(3) of the Act be Utilised to Rectify an Illegality?

114. Given our analysis above, where we have concluded that oppression is not made out, we do not think it necessary to finally determine this issue. Suffice for it to be said that we accept the position of *amicus curiae* in general that **section 582 of the Act** ought not to be utilised to rectify an illegality.

115. As the issue in these appeals is whether or not the *ultra vires* share buy-back transactions conducted between 2005 and 2017 amounted to unfairly prejudicial conduct vis a vis Concrete Parade, it is not necessary for us to examine this issue.

The Decision on Validation by the High Court dated 29 August 2018 and the Decision of the Court of Appeal in this Action Declaring the High Court Order Void

116. Finally, we note that the Court of Appeal made a declaration that the decision of the High Court dated 29 August 2018 validating the share buy-back transactions was wrong in law or illegal, and purported to collaterally declare the same as void and to set it aside, applying the principle in **Badiaddin**.

117. As it is in doubt whether an illegality has been clearly established by reason of the contravention **of sections 67A(1) and 127(1) of the Acts** respectively, the Court of Appeal ought not to have utilised the case of **Badiaddin** to seek to set aside the validation order granted by the High Court on 29 August 2018 collaterally, on the grounds that it is a nullity.

118. For these reasons we choose not to answer Questions 5 and 6 as they are not necessary to dispose of these appeals.

The 4th Issue: Is this Oppression Action Properly Brought?

119. We now turn to the final issue and **Question 7**. As stated at the outset, the fourth issue in this appeal is **whether the use of the oppression provision is indeed the proper**

means of remedying Concrete Parade's grievances, if such grievances are made out.

120. This relates to question 7 which we answer in the negative.

121. Our reasons for answering so have effectively been addressed throughout the grounds of judgment.

122. As is stated in the course of the judgement, can Concrete Parade's grievance amount to oppression when the majority of the shareholders **approved the merger and the consequent 'dilution' of their shareholding**?

123. As the majority approved the merger, meaning that majority rule was in favour of the merger, how can unfairly prejudicial conduct prevail or even come into operation in light of the majority vote of the shareholder organ of the company?

124. The Court of Appeal failed to appreciate or comprehend this fundamental issue in determining this appeal, with respect. *(*See also ***Re Tong Eng Sdn Bhd (Loh Loon Keng, petitioner) [1994]2 CLJ 775; [1994] 1 MLJ 451 (HC); Pan Choon Weng v Mexvin Chow Yew Hoong & Ors [2022] CLJU 2248; [2022] 1 LNS 2248; [2022] MLJU 2357 (HC); Seah Eng Toh & Daniel & Anor v Kingsley Khoo Hoi Leng (HC)****).*

125. No attempt has been made to explain how Concrete Parade was unfairly prejudiced in its capacity as a minority shareholder, as a consequence of the proposed merger and the alleged contraventions, **any more than any other shareholder**. Of particular significance is the failure or omission of Concrete Parade to establish or display evidence of:

(a) Unfairly prejudicial conduct which it alone suffered (given that all the shareholders were affected in an identical manner);

(b) Unfairly prejudicial conduct by the majority that has affected Concrete Parade as a minority shareholder;

(c) How it can claim unfairly prejudicial conduct against it as a shareholder when the majority of the shareholders voted in favour of the merger. The majority will prevails and does not constitute grounds for oppression;

(d) The majority were not even joined and relief was sought against the directors in the oppression action signalling that the action was brought for a collateral purpose. It amounted to an abuse of the statutory process under **section 346**.

Conclusion

126. The appeals are therefore allowed with costs. We set aside the decision of the Court of Appeal and reinstate the decision of the High Court.