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Low Thiam Hoe & Anor v Sri Serdang Sdn Bhd & Ors

B

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-459–08 OF 2019
DARRYL GOON J
14 JANUARY 2020

C

Companies and Corporations — Directors — Removal — Plaintiffs removed directors pursuant to resolutions passed at extraordinary general meetings — Whether requisition of extraordinary general meeting invalid — Whether board meetings convened invalid — Whether convening of and resolutions passed at extraordinary general meeting invalid — Whether plaintiffs' removal unlawful — Companies Act 1965 s 147 — Companies Act 2016 ss 206, 210 & 311

D

This originating summons was brought by the plaintiffs to challenge the validity of certain board meetings and extraordinary general meetings ('EGM') of the defendant companies, and the validity of the resolutions passed thereat. The first, second, third and fourth defendants were wholly owned subsidiaries ('the subsidiaries') of the fifth defendant company, which was a holding and investment company. On 16 July 2019, the board of directors of the fifth defendant passed a resolution entitled 'Restructuring of Composition of Board of Directors of Wholly Owned Subsidiary Companies'. The sixth defendant was appointed by the fifth defendant as its corporate representative. In accordance with the resolution, on 29 July 2019, the sixth defendant signed four requisitions, one for each of the subsidiaries, to convene an EGM to, inter alia, remove the plaintiffs and the ninth defendant as directors. On 31 July 2019, the eighth defendant as the company secretary of the subsidiaries, emailed the directors of the first, second, third and fourth defendants, informing them of the requisition. The eighth defendant also sent separate emails to the directors of the subsidiaries informing them that a director in each of the companies had convened a board meeting of each of those companies with the agenda being to call an EGM pursuant to the relevant article in their respective articles of association. The board meetings convened for the subsidiaries were all to be held on 5 August 2019. On 3 August 2019, the first plaintiff informed the eighth defendant that he was not available on 5 August 2019 and would update the eighth defendant in due course of his availability. On 5 August 2019, the board of directors of the first defendant at the board meeting resolved to hold the EGM requisitioned, on 8 August 2019. In respect of the second, third and fourth defendants, the board meetings could not go on as there was insufficient quorum. The EGM of the first defendant was held as scheduled on 8 August 2019 and the proposed resolution that the first and second plaintiffs be removed as directors was passed. The ninth defendant had tendered his resignation as a director on 8 August 2019, before the EGM, and

therefore the proposed resolution to remove him as a director was withdrawn. The board meetings convened for the second, third and fourth defendants on 20 August 2019 requested by the first plaintiff could not be held because there was no quorum. As no EGM of the second, third and fourth defendants was called within 21 days of the requisitions, on 22 August 2019 the fifth defendant as the sole member of these companies exercised its right under their respective articles of association to convene an EGM of the companies. The EGMs were convened for 26 August 2019 and it was resolved, inter alia, that the first plaintiff be removed as a director. There were also written statements signed by the sixth defendant as the corporate representative of the fifth defendant, agreeing to the short notice given for the EGMs. The plaintiffs contended that they had been unlawfully removed as directors of the first, second, third and fourth defendants.

Held, dismissing the originating summons with costs:

(1) Section 147 of the Companies Act 1965 ('the CA 1965') did not preclude a corporate representative from performing any act that was not within the powers or authority prescribed by that section. In addition, the act of requisitioning an EGM on behalf of a corporate member was not an act that offended or was inconsistent or incompatible with what s 147(3) of the CA 1965 was concerned with, namely, corporate representation at meetings. When the sixth defendant signed the requisitions for an EGM to be held by the subsidiaries, he did so pursuant to the authority conferred by the board of directors of the fifth defendant and not the powers conferred upon him, qua corporate representative, under s 147(3) of the CA 1965. The requisitions were those of the fifth defendant, made as a member and made on its behalf by the sixth defendant. The requisitions were in compliance with ss 310–311 of the Companies Act 2016 ('the CA 2016'). Therefore, the requisitions for an EGM to be held by each of the subsidiaries made on 29 July 2019, were requisitions made by the fifth defendant and they were valid requisitions (see paras 40–41, 43 & 46–47).

(2) There was really no evidence that the convening of the board meetings was in bad faith or were predicated upon an improper purpose of preventing a proper and informed board deliberation. There was no evidence that either the eighth or the ninth defendant knew, before notice of the board meeting was given, that the first plaintiff would not be available, to suggest that there was an intention to deliberately convene a meeting on a date which the first plaintiff was not able to attend. There was nothing to indicate that the first plaintiff was not available due to any important or unavoidable commitment. There was no element of discrimination to suggest impropriety or difference in treatment when the eighth defendant dutifully complied the first plaintiff's request for a board meeting of the subsidiaries to be convened for the 20 August 2019.

There was no authority given to suggest that board meetings may only be convened on a date when all board directors were available. Therefore, the eighth defendant's convening of the board meeting for the subsidiaries, and particularly that of the first defendant, was not invalid or a nullity (see paras 58 & 60–64).

(3) The necessary quorum was met for the board meeting of the first defendant convened for the 5 August 2019. In light of the foregoing, the convening of the board meeting of the first defendant or the resolution passed at the first defendant's board meeting of 5 August 2019 to convene an EGM of the first defendant on 8 August 2019 was not invalid, ineffective or null and void (see paras 65 & 70).

(4) Sections 310–311 of the CA 2016 were different and independent provisions did not however present any conclusion that the invocation of one, should it fail to result in an EGM, precluded the invocation of the other. There was no logical or rational reason why, should the invocation of s 311 of the CA 2016 failed to result in the EGM requisitioned, a member may not then invoke s 310 of the CA 2016 to secure the desired EGM. The fifth defendant having invoked s 311 of the CA 2016, may subsequently invoke s 310 of the CA 2016 (see paras 74–75).

(5) Section 206(1)(a) of the CA 2016 was expressly made 'subject to the constitution' of the private company. Therefore, if the removal of a director in was catered for in a private company's constitution, reliance need not be placed on s 206(1)(a) of the CA 2016 to remove a director by ordinary resolution. Section 206(1)(a) of the CA 2016 gave primacy to the constitution of the private company; in which case, there would not be any removal of a director under s 206 of the CA 2016. Instead, it would be a removal of a director under the constitution of the company. The subsidiaries were private companies and their articles of association provided for the removal of directors. No requirement of special notice was to be found in the provisions if the articles of association of the subsidiaries. Therefore, s 206(3) of the CA 2016 was not applicable and no special notice was required for the removal of the first plaintiff as a director of the subsidiaries and the second plaintiff as a director of the first defendant. The removals of the plaintiffs as directors were based on the provisions in the articles of association of the subsidiaries and thus not 'under' s 206 of the CA 2016 (see paras 89 & 93–94).

(6) The alleged lack of bona fides was predicated in the main, upon the bases given for the alleged invalidity of the convening of the board meetings of the subsidiaries, the convening of the EGMs and the resolutions passed thereat. As these allegations were not made out, they could not be legitimate foundation upon which to hoist the plaintiff's contention of lack of bona fides. Nothing improper was done. There was nothing disclosed in the evidence to suggest why their removal was somehow not

permissible. The articles of association of the subsidiaries did not provide for reason or cause to be established for the removal of a director. Neither did s 206(1)(b) of the CA 2016. The speed in which the plaintiffs were removed as directors were carried out in accordance with the articles of association of the subsidiaries. Thus, the manner of the plaintiffs' removal as directors were not unlawful or wrong (see paras 100–101, 103 & 106–107).

[Bahasa Malaysia summary

Saman pemula ini dibawa oleh plaintif untuk mencabar kesahihan mesyuarat lembaga dan mesyuarat agung luar biasa ('EGM') tertentu syarikat defendan, dan kesahihan resolusi yang diluluskan di situ. Defendan pertama, kedua, ketiga dan keempat adalah anak syarikat penuh ('anak syarikat') syarikat defendan kelima, yang merupakan syarikat pegangan dan pelaburan. Pada 16 Julai 2019, lembaga pengarah defendan kelima meluluskan resolusi bertajuk 'Penyusunan Semula Komposisi Lembaga Pengarah Anak Syarikat Penuh'. Defendan keenam dilantik oleh defendan kelima sebagai wakil korporatnya. Berikutan dengan resolusi itu, pada 29 Julai 2019, defendan keenam menandatangani empat permintaan, satu untuk setiap anak syarikat, untuk mengadakan EGM untuk, antara lain, memecat plaintif dan defendan kesembilan sebagai pengarah. Pada 31 Julai 2019, defendan kelapan sebagai setiausaha syarikat anak syarikat, menghantar emel kepada pengarah defendan pertama, kedua, ketiga dan keempat, memberitahu mereka mengenai permintaan tersebut. Defendan kelapan juga mengirim emel berasingan kepada pengarah anak syarikat yang memaklumkan kepada mereka bahawa pengarah di setiap syarikat telah mengadakan mesyuarat lembaga bagi setiap syarikat tersebut dengan agenda untuk memanggil EGM berdasarkan artikel yang relevan dalam artikel persatuan masing-masing. Mesyuarat lembaga yang diadakan untuk anak syarikat akan diadakan pada 5 Ogos 2019. Pada 3 Ogos 2019, plaintif pertama memberitahu defendan kelapan bahawa dia tiada pada 5 Ogos 2019 dan akan memberitahu defendan kelapan ketersediaannya pada masa yang sesuai. Pada 5 Ogos 2019, lembaga pengarah defendan pertama dalam mesyuarat lembaga memutuskan untuk mengadakan EGM yang diminta, pada 8 Ogos 2019. Mengenai defendan kedua, ketiga dan keempat, mesyuarat lembaga tidak dapat diteruskan kerana korum tidak mencukupi. EGM defendan pertama diadakan seperti yang dijadualkan pada 8 Ogos 2019 dan resolusi yang dicadangkan agar plaintif pertama dan kedua dipecat sebagai pengarah diluluskan. Defendan kesembilan telah mengemukakan peletakan jawatannya sebagai pengarah pada 8 Ogos 2019, sebelum EGM, dan oleh itu resolusi yang dicadangkan untuk memecatnya sebagai pengarah ditarik balik. Mesyuarat lembaga yang diadakan untuk defendan kedua, ketiga dan keempat pada 20 Ogos 2019 yang diminta oleh plaintif pertama tidak dapat diadakan kerana ketiadaan kuorum. Oleh kerana tidak ada EGM defendan kedua, ketiga dan keempat yang dipanggil dalam 21 hari dari tarikh permintaan, pada 22 Ogos 2019 defendan kelima sebagai satu-satunya anggota syarikat

menggunakan haknya di bawah artikel persatuan masing-masing untuk mengadakan EGM syarikat. EGM diadakan pada 26 Ogos 2019 dan diputuskan, antara lain, bahawa plaintif pertama disingkirkan sebagai pengarah. Terdapat juga pernyataan bertulis yang ditandatangani oleh defendan keenam sebagai wakil korporat defendan kelima, yang bersetuju dengan notis singkat yang diberikan untuk EGM. Plaintif berpendapat bahawa mereka telah disingkirkan secara tidak sah sebagai pengarah defendan pertama, kedua, ketiga dan keempat.

Diputuskan, menolak saman pemula dengan kos:

(1) Seksyen 147 Akta Syarikat 1965 ('Akta 1965') tidak menghalang wakil korporat untuk melakukan tindakan yang tidak berada dalam kuasa atau autoriti yang dinyatakan oleh seksyen itu. Sebagai tambahan, tindakan meminta EGM bagi pihak ahli syarikat bukanlah suatu tindakan yang melanggar atau tidak konsisten atau tidak sesuai dengan apa yang berkaitan dengan s 147(3) Akta 1965, iaitu, wakil korporat dalam mesyuarat. Semasa defendan keenam menandatangani permintaan agar EGM diadakan oleh anak syarikat, dia melakukannya berdasarkan kuasa yang diberikan oleh lembaga pengarah defendan kelima dan bukan kuasa yang diberikan kepadanya, sebagai wakil korporat, di bawah s 147(3) Akta 1965. Permintaan itu adalah daripada defendan kelima, dibuat sebagai anggota dan dibuat atas namanya oleh defendan keenam. Permintaan itu mematuhi s 310 dan s 311 Akta Syarikat 2016 ('Akta 2016'). Oleh itu, permintaan untuk EGM diadakan oleh setiap anak syarikat yang dibuat pada 29 Julai 2019, adalah permintaan yang dibuat oleh defendan kelima dan ia adalah permintaan yang sah (lihat perenggan 40–41, 43 & 46–47).

(2) Tidak ada keterangan bahawa pengadaan mesyuarat lembaga adalah niat buruk atau didasarkan pada tujuan salah untuk mencegah mesyuarat lembaga yang tepat dan betul. Tidak ada bukti bahawa defendan kelapan atau kesembilan tahu, sebelum notis mesyuarat lembaga diberikan, bahawa plaintif pertama tidak akan ada, untuk menunjukkan bahawa ada niat untuk sengaja mengadakan mesyuarat pada tarikh yang plaintif pertama tidak dapat hadir. Tiada yang menunjukkan bahawa plaintif pertama tiada kerana komitmen penting atau tidak dapat dielakkan. Tidak ada unsur diskriminasi untuk menunjukkan ketidaksesuaian atau perbezaan perlakuan ketika defendan kelapan memenuhi permintaan plaintif pertama agar mesyuarat lembaga anak syarikat diadakan pada 20 Ogos 2019. Tiada otoriti yang diberikan untuk menunjukkan bahawa mesyuarat lembaga hanya dapat diadakan pada tarikh ketika semua lembaga pengarah ada. Oleh itu, mesyuarat lembaga yang diadakan oleh defendan kelapan untuk anak syarikat, dan terutama yang dilakukan oleh defendan pertama, adalah tidak batal (lihat perenggan 58 & 60–64).

(3) Kuorum yang diperlukan telah dipenuhi untuk mesyuarat lembaga defendan pertama yang diadakan pada 5 Ogos 2019. Sehubungan dengan itu, pengadaan mesyuarat lembaga defendan pertama atau resolusi yang diluluskan pada mesyuarat lembaga defendan pertama pada 5 Ogos 2019 untuk mengadakan EGM defendan pertama pada 8 Ogos 2019 adalah tidak batal dan sah (lihat perenggan 65 & 70).

(4) Seksyen 310 dan 311 Akta 2016 adalah berbeza dan peruntukan bebas tidak memberikan kesimpulan bahawa pemakaian satu, sekiranya gagal menghasilkan EGM, melarang pemakaian yang lain. Tidak ada alasan logik atau rasional mengapa, sekiranya pemakaian s 311 Akta 2016 gagal menghasilkan EGM yang diminta, seorang ahli tidak boleh kemudian mengguna pakai s 310 Akta 2016 untuk mendapatkan EGM yang diinginkan. Defendan kelima yang menggunakan s 311 Akta 2016, boleh mengguna pakai s 310 Akta 2016 (lihat perenggan 74–75).

(5) Seksyen 206(1)(a) Akta 2016 dengan khusus dibuat 'tertakluk kepada perlembagaan' syarikat swasta. Oleh itu, jika pemecatan seorang pengarah disediakan dalam perlembagaan syarikat swasta, pergantungan tidak perlu diletakkan pada s 206(1)(a) Akta 2016 untuk memecat seorang pengarah dengan resolusi biasa. Seksyen 206(1)(a) Akta 2016 memberikan keutamaan kepada perlembagaan syarikat swasta; dalam hal ini, tidak akan ada pemecatan pengarah di bawah s 206 Akta 2016. Sebaliknya, penyingkiran pengarah adalah di bawah perlembagaan syarikat. Anak syarikat adalah syarikat swasta dan artikel persatuan mereka menyediakan untuk pemecatan pengarah. Tidak ada syarat notis khas yang dapat ditemukan dalam artikel persatuan anak syarikat. Oleh itu, s 206(3) Akta 2016 tidak terpakai dan tidak ada notis khas yang diperlukan untuk pemecatan plaintif pertama sebagai pengarah anak syarikat dan plaintif kedua sebagai pengarah defendan pertama. Pemecatan plaintif sebagai pengarah adalah berdasarkan peruntukan dalam artikel persatuan anak syarikat dan oleh itu bukan di bawah s 206 Akta 2016 (lihat perenggan 89 & 93–94).

(6) Dakwaan kekurangan bona fide itu didasarkan pada asasnya, berdasarkan asas-asas yang diberikan untuk dakwaan tidak sahnya mesyuarat lembaga anak syarikat, pengadaan EGM dan resolusi yang diluluskan di dalamnya. Oleh kerana tuduhan-tuduhan ini tidak dibuktikan, ia tidak boleh menjadi landasan yang sah untuk mengangkat hujahan plaintif mengenai kekurangan bona fide. Tidak ada yang tidak wajar dilakukan. Tiada apa-apa yang dinyatakan dalam keterangan yang menunjukkan mengapa pemecatan mereka tidak dibenarkan. Artikel persatuan anak syarikat tidak memberikan alasan atau sebab yang ditetapkan untuk pemecatan pengarah. Begitu juga s 206(1)(b) Akta 2016. Kepantasan plaintif dipecat sebagai pengarah dilaksanakan sesuai dengan artikel persatuan anak syarikat. Oleh itu, cara pemecatan plaintif

A sebagai pengarah tidak menyalahi undang-undang atau salah (lihat perenggan 100–101, 103 & 106–107).]

Cases referred to

Dato' Raja Azwane bin Raja Ariff v Dato' Man bin Mat & Ors [2011] 9 MLJ 467, HC (distd)
Kwan Hung Cheong & Anor v Zung Zang Trading Sdn Bhd [2018] 4 MLJ 773, CA (distd)
LC O'Neil Enterprises Pty Ltd v Toxic Treatments Ltd (1986) 4 ACLC 178, SC (refd)
North-West Transportation Co Ltd and Beatty v Beatty (1887) 12 App Cas 589, PC (refd)
Pender v Lushington (1877) 6 Ch D 70, Ch D (refd)
Tien Ik Sdn Bhd & Ors v Kuok Khoon Hwong Peter [1992] 2 MLJ 689, SC (distd)
Yeo Ann Seck v Astakajaya Corp Sdn Bhd [2011] MLJU 877, HC (refd)
Yeung Bing Kwong Kenneth v Mount Oscar Ltd [2019] HKCU 2413, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 128(2), 147, 147(3), (6)
Companies Act 2016 ss 31, 34(c), 206, 206(1)(a), (3), 310 , 311, 316, 322(1), 333(1), (5)
Hong Kong's Companies Ordinance [HK] ss 462, 463

P Gananathan (Iris Tan Li Chie with him) (Gananathan Loh) for the plaintiffs.
Leong Wai Hong (Anita Natalia and Alya Hazira with him) (Skrine) for the first to seventh defendants.
Gopal Sreenevasan (PL Leong with him) (Sreenevasan Young) for the eighth to ninth defendant.

Darryl Goon J:

[1] This originating summons was brought by the plaintiffs to challenge the validity of certain board meetings and extraordinary general meetings of the defendant companies, and the validity of the resolutions passed thereat.

[2] At the heart of this originating summons was the plaintiffs' contention that they had been unlawfully removed as directors of the first, second, third and fourth defendant companies.

THE PARTIES

[3] The first, second, third and fourth defendants are wholly owned subsidiaries of the fifth defendant company, which is a holding and investment

company. For ease of reference the first, second, third and fourth defendants shall hereinafter be referred to, collectively, as the 'subsidiaries'.

[4] The first plaintiff was director of the subsidiaries before his removal as a director.

[5] The second plaintiff was a director of the first defendant before his removal as a director.

[6] The sixth defendant was a director of the first and second defendant.

[7] The seventh defendant was a director of the first defendant.

[8] The eighth defendant was the company secretary of the subsidiaries.

[9] The ninth defendant was, at the material time, also a director of the subsidiaries.

BACKGROUND AND ISSUES

[10] On the 16 of July 2019, the board of directors of the fifth defendant passed a resolution entitled 'RESTRUCTURING OF COMPOSITION OF BOARD OF DIRECTORS OF WHOLLY OWNED SUBSIDIARY COMPANIES' ('fifth defendant's resolution of 16 July 2019') to, inter alia:

(a) remove the plaintiffs and the ninth defendant as directors of the first defendant;

(b) remove the first plaintiff and ninth defendant as directors of the second defendant and that the seventh defendant be appointed a director of the second defendant;

(c) remove the first plaintiff and ninth defendant as directors of the third defendant and that the seventh defendant be appointed a director of the third defendant; and

(d) remove the first plaintiff and the ninth defendant as directors of the fourth defendant and that the sixth and seventh defendants be appointed as directors of the fourth defendant.

[11] It was also part of this resolution of 16 July 2019 that the fifth defendant's corporate representatives in the subsidiaries be and were '... authorised and empowered to do all acts and things and take all such steps as may be considered necessary to give full effect to the removal and appointment in the abovementioned companies and in all matters relating thereto'.

[12] The sixth defendant was appointed by the fifth defendant as its corporate representative on the 2 March 2015. The sixth defendant's certificate of appointment of corporate representative of 2 March 2015 states as follows:

> THAT pursuant to Section 147(3) of the Companies Act 1965, Mr Tan Say Han (NRIC No. 521023-08-5443), or failing him, Encik Mohd Salleh Bin Lamsin (NRIC No. 550316-12-5093) be and is hereby appointed to act as the Corporate Representative of the Company to attend, to consent to short notice (if necessary) and vote on behalf of the Company at all general meetings of all subsidiary companies of the Company in Malaysia and at any adjournment thereof, and without prejudice to the generality of the foregoing to exercise the same powers contained in Section 147(6) of the Companies Act, 1965.
>
> THAT such appointment shall remain effective until otherwise resolved. Dated this 2 March 2015.

[13] In accordance with the fifth defendant's resolution of 16 July 2019, on 29 July 2019, the sixth defendant signed four requisitions, one for each of the subsidiaries, to convene an extraordinary general meeting ('EGM') to, inter alia, remove the plaintiffs and the ninth defendant as directors in accordance with the fifth defendant's resolution of 16 July 2019. The proposed resolutions to be passed were expressed to be special resolutions. These requisitions were each issued under the letterhead of the fifth defendant and were each signed by the sixth defendant as 'CORPORATE RESPRESENTATIVE FOR GOLDEN PLUS HOLDINGS BERHAD'.

[14] On 31 July 2019, the eighth defendant as the company secretary of the subsidiaries emailed the directors of:

(a) the first defendant, informing them of the requisition made on 29 July 2019 stating that, 'Pursuant to Articles 60 and 61 of the Sri Serdang Sdn Bhd the directors shall call an EGM within 21 days from whenever a requisition in writing signed by members of the Company holding in the aggregate not less than one-tenth in amount of the issued capital of the Company deposited at the registered office of the Company';

(b) the second defendant, informing them of the requisition made on 29 July 2019 stating that, 'Pursuant to Articles 58 of Corporate Business (M) Sdn Bhd the directors shall call an EGM within 21 days from whenever a requisition in writing signed by members of the Company holding in the aggregate not less than one-tenth in amount of the issued capital of the Company deposited at the registered office of the Company';

(c) the third defendant, informing them of the requisition made on 29 July 2019 stating that, 'Pursuant to Articles 59 of Paradize Bazaar Sdn Bhd the directors shall call an EGM within 21 days from whenever a requisition in writing signed by members of the Company holding in

the aggregate not less than one-tenth in amount of the issued capital of the Company deposited at the registered office of the Company'; and

(d) the fourth defendant, informing them of the requisition made on 29 July 2019 stating that, 'Pursuant to Articles 59 of Golden Plus Construction Sdn Bhd the directors shall call an EGM within 21 days from whenever a requisition in writing signed by members of the Company holding in the aggregate not less than one-tenth in amount of the issued capital of the Company deposited at the registered office of the Company'.

[15] Also, on 31 July 2019, the eighth defendant sent separate emails to the directors of the subsidiaries informing them that a director in each of those companies had convened a board meeting of each of those companies with the agenda being to call an EGM pursuant to the relevant article in their respective articles of association. The respective notices of the board of directors' meetings were attached. The board meetings convened for the subsidiaries were all to be held on the 5 August 2019 at the same venue at 11, Jalan KP1/3, Kajang Prima, 47000 Kajang, Selangor, sequentially at 9am, 9.05am, 9.10am and 9.15am.

[16] At 10.23am on the third of August 2019, the first plaintiff emailed the eighth defendant complaining that he was not consulted as to his availability to attend the scheduled board meetings. The first plaintiff ended his email by stating, 'I am not available on 5 August 2019 and will update you in due course of my availability'.

[17] Just over an hour later at 11.43am on 3 August 2019, the eighth defendant replied the first plaintiff informing him that the directors' meeting was called by a fellow director in accordance with the respective articles of association of the subsidiaries. The first plaintiff was also informed that under the articles of association of the respective subsidiaries, '... a director may, and on the request of a director, the secretary shall, at any time summon a meeting of the directors'.

[18] On 4 August 2019 at 12.36pm, the first plaintiff replied the eighth defendant. In this email the first plaintiff, among other things, asked who the director was who requested the board meeting and reiterated the question why he was not consulted as to his availability before the notices were issued. In his penultimate paragraph the first plaintiff stated, 'I reiterate that I am not available on the 5 August 2019'. In neither of the first plaintiff's two emails did he state when he might be available.

THE BOARD MEETINGS OF 5 AUGUST 2019

[19] On 5 August 2019, in respect of the first defendant, two out of the four directors attended the board meeting convened. They were the sixth and the seventh defendants. Pursuant to article 123 of the first defendant's articles of association, a minimum of two directors were required to form a quorum. The board of directors of the first defendant at this board meeting resolved to hold the EGM requisitioned, on 8 August 2019. The chairperson at this board meeting, the seventh defendant, together with the sixth defendant, being corporate representatives of the fifth defendant, consented and agreed to a short notice for the EGM. The first defendant being its wholly owned subsidiary, the fifth defendant was therefore the sole shareholder of the first defendant.

[20] In respect of the second defendant, the board meeting convened for 5 August 2019 could not go on as there was insufficient quorum. Only one out of three directors attended. The sixth defendant attended, but the first plaintiff and the ninth defendant did not attend.

[21] In respect of the third and fourth defendants, their board meetings convened for 5 August 2019 also could not proceed due to a lack of quorum. These two companies had two directors, namely the first plaintiff and the ninth defendant, and neither attended this board meeting.

THE FIRST DEFENDANT'S EGM OF 8 AUGUST 2019

[22] The EGM of the first defendant, which its board resolved on 5 August 2019 to be convened on 8 August 2019, was held as scheduled. A notice of the EGM was issued by the eighth defendant dated the same day, 5 August 2019.

[23] The first defendant being its wholly owned subsidiary, the fifth defendant was the sole shareholder in attendance at this EGM. The sixth defendant as the corporate representative of the fifth defendant attended this EGM and the proposed resolution that the first and second plaintiffs be removed as directors was passed.

[24] As for the ninth defendant, he had tendered his resignation as a director on 8 August 2019 itself, before the EGM. As such, the proposed resolution to remove him as a director was withdrawn.

BOARD MEETINGS CONVENED BY THE FIRST PLAINTIFF

[25] On the 15 August 2019, the first plaintiff sent an email to the eighth defendant to convene a board meeting for each of the second, third and fourth

defendants on the 20 August 2019, to be held at the same venue at 11, Jalan KP1/3, Kajang Prima, 47000 Kajang, Selangor, at 11am, 10am and 9am respectively. The agenda given for these board meetings were to discuss the requisitions for an EGM of these companies.

[26] On the same day, 15 August 2019, the eighth defendant informed the other board member/s of the second, third and fourth defendants that a board meeting had been convened for 20 August 2019. Notices for the board meetings convened were accordingly issued by the eighth defendant and they were dated 15 August 2019 as well.

[27] However, the board meetings convened for the 15 August 2019 could not be held because there was no quorum. The only director who attended was the first plaintiff.

EGM OF THE SECOND, THIRD AND FOURTH DEFENDANTS OF 26 AUGUST 2019

[28] As no EGM of the second, third or fourth defendant was called within twenty one days of the requisitions dated 29 July 2019 signed by the sixth defendant, on 22 August 2019 the fifth defendant as the sole member of these companies exercised its right under their respective articles of association to convene an EGM of these companies.

[29] EGMs for the second, third and fourth defendants were convened for the 26 August 2019 and the eighth defendant gave notice of the same to the directors by way of an email also dated 22 August 2019, with the formal notice of EGM attached.

[30] The EGMs of the second, third and fourth defendants convened were to be held at the same venue at 11, Jalan KP1/3, Kajang Prima, 47000 Kajang, Selangor, at 10.20am, 10am and 10.10am respectively.

[31] The convening of the EGMs by the fifth defendant were pursuant to article 58 of the articles of association of the second defendant and pursuant to articles 59(2) of the articles of association of the third and fourth defendants and s 310 of the Companies Act 2016.

[32] Being wholly owned subsidiaries of the fifth defendant, the second, third and fourth defendant also had only one shareholder, namely the fifth defendant. The sixth defendant attended the EGM of these companies convened for 26 August 2019, as the corporate representative of the fifth defendant.

[33] On the 26 August 2019, it was resolved, inter alia, at the EGMs of the second, third and fourth defendants that the first plaintiff be removed as a director. The ninth defendant had by then tendered his resignation as a director of these companies. There were also written statements signed by the sixth defendant as the corporate representative of the fifth defendant, agreeing to the short notice given for these EGMs.

THE DECLARATIONS SOUGHT

[34] Against the foregoing background, the plaintiffs sought declarations in respect of the following:

(1) ... that the requisition of the Extraordinary General Meeting ('EGM') by the 5th Defendant through the 6th Defendant in the 1st, 2nd, 3rd and 4th Defendants is invalid and of no legal effect;

(2) ... that the board meetings of the 1st, 2nd, 3rd and 4th Defendants convened on 5.8.2019 are invalid and ineffective;

(3) ... that the resolutions passed at the board meeting of the 1st Defendant on 5.8.2019 are invalid, ineffective and null and void;

(4) ... that the EGM of the 1st Defendant convened by the Board of Directors of the 1st Defendant on 5.8.2019 are invalid and ineffective;

(5) ... that the resolutions passed at the EGM of the 1st Defendant on 8.8.2019 are invalid, ineffective and null and void;

(6) ... that the EGM of the second, third and fourth Defendants convened by the 6th Defendant as corporate representative for the 5th Defendants on 22.8.2019 is invalid, ineffective;

(7) ... that the resolutions passed at the respective EGM of the 2nd, 3rd and 4th Defendants on 26.8.2019 are invalid, ineffective, null and void;

THE REQUISITIONS AN EGM OF 29 JULY 2019

[35] The essence of the plaintiffs' contention was that as a corporate representative, the sixth defendant did not have the capacity to requisition an EGM.

[36] It was maintained by the plaintiffs that the instrument of appointment of 2 March 2015 made it clear that the sixth defendant's appointment was pursuant to s 147(3) of the then Companies Act 1965. This appointment was only for the sixth defendant to, '... attend, to consent to short notice (if necessary) and vote on behalf of the Company at all general meetings of all subsidiary companies of the Company in Malaysia ..., and without prejudice to the generality of the foregoing to exercise the same powers contained in Section 147(6) of the Companies Act 1965'.

[37] It was maintained by the plaintiff that as a corporate representative appointed under s 147 of the Companies Act 1965, the sixth defendant was not empowered to convene any EGM. Referring to the decision of the the Court of Appeal in *Kwan Hung Cheong & Anor v Zung Zang Trading Sdn Bhd* [2018] 4 MLJ 773, it was contended that a corporate representative may only act within the authority that was conferred under s 147 of the Companies Act 1965.

[38] The requisitions made on 29 July 2019 were made by the sixth defendant pursuant to the resolution of the board of directors of the fifth defendant of 16 July 2019, to effectuate the board's decision to, inter alia, remove the plaintiffs as directors. Towards this end, this resolution expressly stated that the fifth defendant's corporate representative was, '... authorized and empowered to do all acts and things and take all such steps as may be considered necessary to give full effect to the removal and appointment in the abovementioned companies and in all matters relating thereto'.

[39] Section 147(3) of the Companies Act 1965 sets out what a company, which is a member of another company or a creditor, may do to appoint someone to represent it at meetings. Nothing in s 147(3) seeks to regulate how a company, which is a member of another, is to requisition an EGM.

[40] Equally important is that s 147 does not proscribe a corporate representative from doing any *other* act which the company may authorise him to perform. Therefore, contrary to the submissions of learned counsel for the plaintiffs, s 147 does not preclude a corporate representative from performing any act that is not within the powers or authority prescribed by that section. In addition, the act of requisitioning an EGM on behalf of a corporate member is not an act that offends or is inconsistent or incompatible with what s 147(3) was concerned with, namely, corporate representation at meetings.

[41] In my view, when the sixth defendant signed the requisitions for an EGM to be held by the subsidiaries, he did so pursuant to the authority conferred by the Board of Directors of the fifth defendant and not the powers conferred upon him, qua corporate representative, under s 147(3) of the Companies Act 1965.

[42] The factual circumstances of this case was unlike those in the case of *Kwan Hung Cheong & Anor v Zung Zang Trading Sdn Bhd* [2018] 4 MLJ 773. In *Kwan Hung Cheong* the requisition issued was without any authority. Paragraph 35 of the decision of the Court of Appeal in *Kwan Hung Cheong* states as follows:

> [35] In the present case, from a perusal of the Directors' Circular Resolution dated 2 December 2010, clearly PW1 was not authorised to issue any requisition on

behalf of KCHSB, to the respondent to call for an EGM. Since PW1 had issued the requisition as a corporate representative of KCHSB, it follows that the requisition for the EGM was invalid.

[43] In this case, the requisitions signed by the sixth defendant was expressed to be as a corporate representative *for* the fifth defendant and made under the letterhead of the fifth defendant. Coupled with what was stated in the body of the requisitions, it was abundantly clear that the requisitions were those of the fifth defendant, made as a member and made on its behalf by the sixth defendant.

[44] In this regard the term used in the fifth defendant's board of directors' resolution of 16 July 2019 ie 'corporate representative', had merely the effect of identifying the sixth defendant to effectuate its resolutions. The sixth defendant's authority to effect the requisitions on behalf of the fifth defendant was premised on the board's resolution of 16 July 2019 and not s 147(3) of the Companies Act 1965 or the instrument of his appointment as corporate representative dated 2 March 2015.

[45] For completeness, it may be mentioned that s 333(1) of the current Companies Act 2016 merely provides that a corporation, which is a member of a company, may authorise a person or persons to act as its representative or representatives at the company's meetings. It also provides under s 333(5) that a certificate of authorisation by the corporation shall be prima facie evidence of a representative's appointment or the revocation of his appointment.

[46] Having regard to the foregoing, and contrary to the plaintiffs' contention, the requisitions were in my view in compliance with ss 310–311 of the Companies Act 2016, as they were requisitions of the fifth defendant, as the sole shareholder of the subsidiaries, made on its behalf by the sixth defendant, having been properly authorised by its board of directors to do so.

[47] I am therefore of the view that the requisitions for an EGM to be held by each of the subsidiaries made on 29 July 2019, were requisitions made by the fifth defendant and they were valid requisitions. However, save for the first defendant, the directors of the second, third and fourth defendants were not able to and failed to convene the EGM requisitioned.

THE BOARD MEETINGS OF THE SUBSIDIARIES OF 5 AUGUST 2019

[48] The second and third declarations sought by the plaintiffs were in respect of the validity of the convening of the board meetings of the subsidiaries scheduled for 5 August 2019 and the resolution passed at the first defendant's board meeting of that date.

[49] It was contended by the first plaintiff that his availability to attend these board meetings ought to have been ascertained before they were convened. A

[50] On the facts, the board meetings were convened for 5 August 2019 without it being first determined whether the first plaintiff could attend. On 31 July 2019, the directors were informed that one among them had convened a meeting of the board scheduled for 5 August 2019. B

[51] It was only three days later, on 3 August 2019, that the first plaintiff informed the eighth defendant that he would not be able to attend on 5 August 2019 and that he would update the eighth defendant 'in due course' of his availability. C

[52] On the fourth of August, the first plaintiff reiterated that he was not able to attend the scheduled board meeting. However, up to the 5 August 2019, the first plaintiff never informed the eighth defendant when he might be available. D

[53] In respect of the first defendant, its board meeting for the 5 August 2019 proceeded as scheduled. In respect of the second, third and fourth defendants, there was in fact no board meeting held on 5 August 2019 as there was no quorum. As such the convening of the board meetings in respect of the second, third and fourth defendants is really of no moment. E

[54] It was contended that as the first plaintiff was not consulted as to his availability he was not afforded an opportunity to attend the board meeting of the first defendant on 5 August 2019. F

[55] In his affidavit of eighth October 2019, the ninth defendant explained that upon receipt of the requisitions for EGM of 29 July 2019, he consulted the eighth defendant. He was informed by the eighth defendant that the boards should meet to decide if the EGM requisitioned should be held and it was agreed between them that the boards of the subsidiaries should meet on 5 August 2019. The ninth defendant deposed that he had then instructed the eighth defendant to issue the notices calling for a board meeting for the subsidiaries. However, it appeared from the minutes of the first defendant's board meeting of 5 August 2019 that it was the sixth defendant who called for the board meeting. No issue was taken on this. Suffice it to say that either way, a director of the first defendant had called for the board meeting of 5 August 2019. G H I

[56] The ninth defendant was himself, at the material time, a director of the subsidiaries. However, he himself did not attend any of the board meetings convened for 5 August 2019. Knowing that he was to be removed as a director, the ninth defendant handed in his resignation as director of the first defendant

on 8 August 2019. This was followed by his resignation as a director of the second, third and fourth defendants on 26 August 2019, prior to their respective EGMs that were convened.

[57] From his email in reply to the first plaintiff of 3 August 2019, the eighth defendant clearly had in mind the articles of association of the subsidiaries. In relation to the first defendant, article 124 of its articles of association states as follows:

> 124. A Director may, and on the request of a Director, the Secretary shall, at any time summon a meeting of the Directors.

A similar provision exists in the articles 107 of the articles of association of the second defendant and articles 104 of the articles of association of the third and fourth defendants.

[58] Although it was asserted that the convening of the board meetings were in bad faith or were predicated upon an improper purpose of preventing a proper and informed board deliberation, there was really no evidence of this. The board meetings were convened at the request of the ninth defendant who was himself the subject of removal as a director.

[59] As for the eighth defendant, he was acting on the instructions of a director and was required to do so pursuant to articles of association of the subsidiaries.

[60] There was no evidence that either the eighth or the ninth defendant knew, before notice of the board meeting was given, that the first plaintiff would not be available, to suggest that there was an intention to deliberately convene a meeting on a date which the first plaintiff was not able to attend.

[61] On the other hand, the first plaintiff himself did not indicate why he was not available. Although he stated in his email of 3 August 2019 that he would 'update' the eighth defendant of his availability in due course, he did not do so. When, in his email of 4 August 2019, he reiterated that he was not available for the board meeting convened for 5 August 2019, he again did not state why he was not available. There was nothing to indicate that he was not available due to any important or unavoidable commitment (see *Yeo Ann Seck v Astakajaya Corp Sdn Bhd* [2011] MLJU 877 where similar considerations were taken into account in respect of the plaintiff's alleged inability to attend an EGM called to remove him as a director).

[62] In this regard, it is also relevant to note that when the first plaintiff requested for a board meeting of the subsidiaries to be convened for the

20 August 2019, the eighth defendant also dutifully complied. There was no element of discrimination to suggest impropriety or difference in treatment. A

[63] There was no authority given to suggest that board meetings may only be convened on a date when all board directors were available. Such a requirement would result in an enormous impediment to the management of the affairs of a company. It is in this respect significant that articles of association of companies generally, and so too the articles of association of the subsidiaries, provide for a minimum quorum necessary for a board meeting. Clearly, if that minimum quorum is met, the board will have the required numbers to make decisions and to pass such resolutions as are required that will bind the company. Equally significant in the circumstances of this case, was the fact that the fifth defendant was the sole shareholder of the subsidiaries. B C

[64] I therefore do not see that the eighth defendant's convening of the board meeting for the subsidiaries, and particularly that of the first defendant, was invalid or a nullity. D

[65] In this case the necessary quorum was met for the board meeting of the first defendant convened for the 5 August 2019. It was resolved at this meeting that an EGM of the first defendant be held on 8 August 2019. E

[66] Article 63 of the articles of association of the first defendant provides that a twenty one day notice be given when a special resolution is proposed to be passed. The requisitions for an EGM of the subsidiaries specified that the proposed resolutions at the EGM were to be special resolutions. F

[67] Article 64(b) of the articles of association of the first defendant provides that in the case of a meeting other than an annual general meeting, a shorter notice of the meeting may be agreed to: G

> (b) ... by a majority in number of the members having a right to attend and vote thereat, being a majority which together holds not less than ninety-five per centum in nominal value of the shares given a right to attend and vote.

H

A similar, but not identical, provision exists under s 316 of the Companies Act 2016.

[68] The two directors who attended this board meeting, namely the sixth and the seventh defendant, were also the appointed corporate representatives of the fifth defendant. Pursuant to their authority as corporate representatives they consented and agreed, at this board meeting of the first defendant, to short notice being given for the EGM of the first defendant to be held on 8 August 2019. I

[69] In addition, at the EGM of the first defendant held on 8 August 2019, the sixth defendant who attended as the corporate representative of the fifth defendant again agreed to the short notice given for the EGM.

[70] In light of the foregoing, I do not find that the convening of the board meeting of the first defendant or the resolution passed at the first defendant's board meeting of 5 August 2019 to convene an EGM of the first defendant on 8 August 2019 was invalid, ineffective or null and void.

CONVENING OF, AND RESOLUTIONS PASSED AT, THE EGM OF THE SECOND, THIRD AND FOURTH DEFENDANTS' OF 26 AUGUST 2019 INCLUDING THE RESOLUTIONS PASSED AT THE FIRST DEFENDANT'S EGM OF 8 AUGUST 2019

[71] Also challenged by the plaintiffs were the validity of the convening of the EGMs of the second, third and fourth defendants for 26 August 2019 by the fifth defendant's corporate representative, the sixth defendant, on 22 August 2019 and the validity of the resolutions passed thereat.

[72] It was contended by the plaintiffs that once s 311 of the Companies Act 2016 is invoked to convene an EGM, the provisions under s 310 of that Act may not be invoked to convene an EGM. In the circumstances, ss 311 and 310 are set out in full below:

> 310 Power to convene meetings of members
>
> A meeting of members may be convened by —
>
> (a) the Board; or
>
> (b) any member holding at least ten per centum of the issued share capital of a company or a lower percentage as specified in the constitution or if the company has no share capital, by at least five per centum in the number of the members.
>
> 311 Power to require directors to convene meetings of members
>
> (1) The members of a company may require the directors to convene a meeting of members of the company.
>
> (2) A requisition under subsection (1) —
>
> (a) shall be in hard copy or electronic form;
>
> (b) shall state the general nature of the business to be dealt with at the meeting;
>
> (c) may include the text of a resolution that may properly be moved and is intended to be moved at the meeting;
>
> And
>
> (d) shall be signed or authenticated by the person making the requisition.

(3) The directors shall call for a meeting of members once the company has received requisition to do so from — A

(a) members representing at least ten per centum of the paid up capital of the company carrying the right of voting at meetings of members of the company, excluding any paid up capital held as treasury shares; or

B

(b) in the case of a company not having a share capital, members who represent at least five per centum of the total voting rights of all members having a right of voting at meetings of members.

(4) Notwithstanding subsection (3), in the case of a private company, members representing at least five per centum of the paid up capital of the company carrying the right of voting at meeting of members of the company may require a meeting of members to be convened if more than twelve months has elapsed since the end of the last meeting of members convened pursuant to a requisition under this section and the proposed resolution is not defamatory, vexatious or frivolous. C

(5) A resolution may properly be moved at a meeting unless the resolution— D

(a) if passed, would be ineffective whether by reason of inconsistency with any written law or the constitution;

(b) is defamatory of any person;

(c) is frivolous or vexatious; or E

(d) if passed, would not be in the best interest of the company.

(6) For the purposes of subsections (3) and (4), the right of voting shall be determined at the date the requisition is deposited with the company.

F

[73] The plaintiffs' contended that having regard to the dissenting judgment of Kirby P JJA in *LC O'Neil Enterprises Pty Ltd v Toxic Treatments Ltd* (1986) 4 ACLC 178 at p 181, on the New South Wales equivalent of ss 310–311 of the Companies Act 2016, these provisions had important differences. That being so, they are independent provisions and this would somehow require that reliance on either being mutually exclusive. G

[74] There was really no authority given for this contention despite the observations of Kirby P JJA in his dissenting judgment on the differences of the New South Wales provisions. That ss 310–311 are different and independent provisions do not however present any conclusion that the invocation of one, should it fail to result in an EGM, precludes the invocation of the other. H

[75] There is no logical or rational reason why, should the invocation of s 311 fail to result in the EGM requisitioned, a member may not then invoke s 310 by way of self-help as it were, to secure the desired EGM. I do not see that the plaintiffs' contention that the fifth defendant, having invoked s 311 of the Companies Act 2016, may not subsequently invoke s 310, in the circumstances of this case. I

[76] In addition it was contended that pursuant to s 206(3) of the Companies Act 2016, special notice is required of a resolution to remove a director. For the purposes of the Companies Act 2016, where special notice is required, at least twenty eight days' notice of the intention to move the proposed resolution must be given. Section 322(1) of the Companies Act provides as follows:

> 322 Resolution requiring special notice
>
> (1) Where special notice is required of a resolution under any provision of this Act, the resolution shall not be effective unless notice of the intention to move it has been given to the company at least twenty-eight days before the meeting at which it is moved.

[77] In respect of the second, third and fourth defendants, notice of their EGM scheduled for 26 August 2019 convened by the fifth defendant as their sole shareholder to remove the plaintiffs as directors was given on 22 August 2019. The notices given were no more than four days.

[78] No special notice was given. No special notice was also given in respect of the resolutions to be passed at the first defendant's EGM of 8 August 2019.

[79] Therefore, if s 206(3) of the Companies Act 2016 applies, pursuant to s 322(1) of the Companies Act 2016, the resolutions passed at the EGM of the first defendant held on 8 August 2019 and at the EGM of the second, third and fourth defendants held on 26 August 2016, would not be effective.

[80] Section 206 of the Companies Act 2016 provides as follows:

> 206 Removal of directors
>
> (1) A director may be removed before the expiration of the director's period of office as follows:
>
> (a) subject to the constitution, in the case of a private company, by ordinary resolution; or
>
> (b) in the case of a public company, in accordance with this section.
>
> (2) Notwithstanding anything in the constitution or any agreement between a public company and a director, the company may by ordinary resolution at a meeting remove the director before the expiration of the director's tenure of office.
>
> (3) Special notice is required of a resolution to remove a director under this section or to appoint another person instead of the director at the same meeting.
>
> (4) Notwithstanding paragraph (1)(b), if a director of a public company was appointed to represent the interests of any particular class of shareholders or debenture holders, the resolution to remove the director shall not take effect until the director's successor has been appointed.

(5) A person appointed as director in place of a person removed under this section shall be treated, for the purpose of determining the time at which he or any other director is to retire, as if he had become a director on the day on which the person in whose place he is appointed was last appointed a director.

[81] In relation to a private company, as are the subsidiaries, s 206(1)(a) provides that its directors may be removed before the expiry of their term of office, by ordinary resolution. However, such removal as directors is expressed to be 'subject to its constitution', that is to say the constitution of the private company whose director is sought to be removed.

[82] Under the Companies Act 2016, the 'constitution', in respect of companies registered under the Companies Act 1965, is given the meaning ascribed to it under s 34(c), which is its memorandum and articles of association.

[83] As for the directors of a public company, s 206(1)(b) provides that they may be removed before the expiry of their period of office 'in accordance with' s 206.

[84] Section 206(3) of the Companies Act 2016 provides that 'special notice' is required to remove a director 'under this section'. The plaintiffs contended that this means that in order to remove them as directors, special notice must be given.

[85] The question then is whether s 206(3) applies for the purposes of the resolutions passed at the EGM of subsidiaries to remove the plaintiffs as directors.

[86] Section 206(3) has two limbs. The first concerns a resolution 'to remove a director under this section'. The second, concerns a resolution to 'appoint another person instead of the director at the same meeting'. It is only the first limb that is of concern in this case.

[87] The first limb of s 206(3) is concerned with the removal of a director under s 206, itself. Pursuant to s 206(1)(b), the removal of a director from a public company before the expiration of his period of office is one such case where special notice has to be given.

[88] In the case of a director of a private company, such as the subsidiaries, a director may be removed under s 206 ie specifically, under s 206)(1)(a), by an ordinary resolution. If the director is to be so removed, ie by way of an ordinary resolution under s 206(1)(a), and therefore under s 206, it appears that special notice may be required to be given (cf the views of the learned author of the

Third Edition of *Corporate Powers Accountability* at para 3–125 at p 162 and see also Companies Act 2016, *The New Dynamics of Company Law in Malaysia*, at pp 98–101). However, this was not the case in respect of the subsidiaries.

[89] Section 206(1)(a) is expressly made 'subject to the constitution' of the private company. Therefore, if the removal of a director in is catered for in a private company's constitution, reliance need not be placed on s 206(1)(a) to remove a director by ordinary resolution. Section 206(1)(a) gives primacy to the constitution of the private company; in which case, there would not be any removal of a director under s 206. Instead, it would be a removal of a director under the constitution of the company.

[90] The decision of the Supreme Court in *Tien Ik Sdn Bhd & Ors v Kuok Khoon Hwong Peter* [1992] 2 MLJ 689 was relied upon by learned counsel for the plaintiffs for the proposition that special notice was required. In *Tien Ik*, there was a suggestion that special notice might be required for the removal of directors in a private company. However, *Tien Ik* was concerned with s 128(2) of the Companies Act 1965. Quite the opposite of s 206(1)(a) of the current Companies Act 2016, s 128(2) opened with the words 'notwithstanding anything to the contrary in the memorandum or articles of the company, special notice shall be required of any resolution to remove a director ...'.

[91] Unlike s 128(2) of the Companies Act 1965, s 206(1)(a) of the Companies Act 2016 affords primacy to the constitution of a private company.

[92] Section 206(1)(a) should also be viewed from the perspective that that unlike the former Companies Act 1965, companies are not obliged to have a constitution. Section 31 of the Companies Act 2016 states as follows:

> 31 Constitution of a company
>
> (1) A company, other than company limited by guarantee, may or may not have a constitution.
>
> (2) If a company has a constitution, the company, each director and each member of the company shall have the rights, powers, duties and obligations set out in this Act, except to the extent that such rights, powers, duties and obligations are permitted to be modified in accordance with this Act, and are so modified by the constitution of the company.
>
> (3) If a company has no constitution, the company, each director and each member of the company shall have the rights, powers, duties and obligations as set out in this Act.

[93] In the case of the subsidiaries, they are private companies and their articles of association provided for the removal of directors. In the case of:

(a) the first defendant, it was provided in article 112 that a director may be removed by special resolution before the expiry of his period of office;

(b) the second defendant, it was provided in article 101 that a director may by notice be removed by ordinary resolution before the expiry of his period of office;

(c) the third defendant, it was provided in article 97 that a director may by notice be removed by ordinary resolution before the expiry of his period of office; and

(d) the fourth defendant, it was provided in article 97 that a director may by notice be removed by ordinary resolution before the expiry of his period of office.

No requirement of special notice is to be found in these provisions in the articles of association of the subsidiaries.

[94] Having regard to the foregoing, I find that s 206(3) was not applicable in the circumstances of this case and no special notice was required for the removal of the first plaintiff as a director of the subsidiaries and the second plaintiff as a director of the first defendant. The removals of the plaintiffs as directors were based on the provisions in the articles of association of the subsidiaries and thus not 'under' s 206. Accordingly, no special notice was required.

IMPROPER MOTIVE

[95] The plaintiffs also maintained that there was a factual pattern discernible that demonstrated that the powers exercised were not exercised for a bona fide purpose. This alleged 'factual pattern' arose from:

(a) the abuse of power by the corporate representative, in requisitioning the meetings when he was not authorised to do so,

(b) the blatant disregard and exclusion of all decision makers at the board level to jointly decide on the requisition for the general meetings;

(c) the hurriedness with which the meetings were called without giving reasonable opportunity for the Plaintiffs to make the requisite representations; and

(d) the disregard of the constitution and the 2016 Act requiring sufficient notice to be given and properly convening the meetings.

[96] It was contended that there was a misuse of corporate power by the fifth defendant and also by the subsidiaries. Reference was made to the decision in *Dato' Raja Azwane bin Raja Ariff v Dato' Man bin Mat & Ors* [2011] 9 MLJ 467 at p 475, where Mohamad Ariff J (as he then was) stated:

A The factual pattern here demonstrates an exercise of corporate power done mala fide and for an improper purpose in law. The ultimate reason might at the end of the day be capable of justification, but the manner of arriving at that decision must be regarded as also important.

B **[97]** *Dato' Raja Aswane bin Raja Ariff,* was a case that involved the removal of a finance director by directors pursuant to a circular resolution passed by the majority pursuant to article 90 of the company's articles of association. Article 90 of the articles of association of the company concerned provided as follows:

C A resolution in writing signed by a majority of the directors present in Malaysia entitled to receive notice of meeting of the directors, shall be valid and effectual as if it had been resolved at the meeting of the directors duly convened and held.

D **[98]** In *Dato' Raja Aswane bin Raja Ariff,* there were two circular resolutions passed. The first sought to have the plaintiff resign as finance director and was sent to the plaintiff enclosed in a letter dated fifth January 2010. The second, which purported to be a 'corrective' resolution and in which the word 'resign' was replaced with 'removal' was appended to a letter dated 25 January 2010. It E was claimed that this second circular resolution, which was also signed by the majority, was prepared on the very same day as the first resolution, when the 'mistake' was discovered. The mistake being the word 'resignation' versus the word that was intended ie 'removal'. Cross-examination of the witnesses was ordered and the learned judge, after hearing the cross-examination, doubted F the version relating to the second resolution proffered by the defendants. In the words of the learned judge:

However, as already noted, this second resolution was only sent by the letter of 25 January 2010. No credible explanation was offered why this was so, and why in the very same letter the plaintiff was expressly informed the removal was to take G effect from 1 January 2010. Thus, I find upon an assessment of the evidence, the first defendant's version of the facts to be inherently improbable.

This would mean therefore, the plaintiff's explanation was the more likely and that was, the second resolution was backdated. As the learned judge held:

H [16] It appears evident to me that the intention of the first resolution was to seek a unanimous decision on the resignation of the plaintiff, which of course the plaintiff refused. The second resolution was then prepared and circulated to him for approval. It was not, and could not, have been a 'corrective' resolution prepared on the same day as the first resolution. In any event, both resolutions have the intended I effect of removing the plaintiff as the finance director.

[99] The learned judge in *Dato' Raja Aswane bin Raja Ariff,* held that:

... A director affected by a circular resolution must be given adequate prior notice. The requirements of article 90 on the facts of this case are no different. And I must

hasten to add, equitable considerations must surely require that the notice must be not only a procedurally proper notice, it must also be bona fide and an effective notice. The underlying assumption is to allow the recipient to have knowledge of any proposed action and then present his views. A fait accompli document cannot achieve these purposes.

[21] To send a circular for signature as a *fait accompli*, and to attempt to achieve a unanimous decision to have a director 'retire' as a finance director in that context, cannot in my view be an act that should be allowed to pass as a valid decision. The factual pattern here demonstrates an exercise of corporate power done mala fide and for an improper purpose in law.

[100] The alleged lack of bona fides in the current case was predicated in the main, upon the bases given for the alleged invalidity of the convening of the board meetings of the subsidiaries, the convening of the EGMs and the resolutions passed thereat. As these allegations were not made out they cannot be legitimate foundation upon which to hoist the plaintiff's contention of lack of bona fides.

[101] Unlike in the case of *Dato' Raja Aswane bin Raja Ariff* where it was not established that the second resolution was not back dated, nothing improper was done in the current case. The current case did not have the imprimatur of impropriety that was found in the case of *Dato' Raja Aswane bin Raja Ariff*.

[102] The board meetings of the subsidiaries that were convened by the eighth defendant were to enable the boards to respond to the request for an EGM. The removal of the plaintiffs was not to be effected at these board meetings. Besides, the first plaintiff's conduct was unreasonable. He gave no reason for his inability to attend the board meetings convened and offered no alternative date for consideration even though he said he would.

[103] The objections of the fifth defendant were plain. They were to remove, inter alia, the plaintiffs as directors. There was nothing disclosed in the evidence to suggest why their removal was somehow not permissible.

[104] In *Pender v Lushington* (1877) 6 Ch D 70 at pp 75–76, Jessel MR observed:

There is, if I may say so, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest.

See also the opinion of the Privy Council in *North-West Transportation Co Ltd and Beatty v Beatty* (1887) 12 App Cas 589.

[105] One facet of that right of shareholders continue to survive in s 206(1)(a) of the Companies Act 2016 in relation to the removal of directors of private companies. In *Yeung Bing Kwong Kenneth v Mount Oscar Ltd* [2019] HKCU 2413 the Hong Kong Court of Appeal considered the powers for the removal of directors provided under ss 462–463 of Hong Kong's Companies Ordinance, Cap 622. Although these provisions are closer to those of our Companies Act 1965 than those of s 206 of our Companies Act 2016, the common theme is the same and it relates to the shareholders' power to remove directors. Of this power, the Hong Kong Court of Appeal had this to say:

> [22] The power given to the shareholders is unfettered and may be used for a number of aims. It allows shareholders to remove directors who are performing poorly, as well as those acting competently and within their powers but in a way that may be contrary to the wishes of the shareholders. This is an apparently 'tough mandatory rule' that allows the shareholders by ordinary resolution at any time to remove any or all of the directors from office without having to assign a reason for so doing (*Companies Directors: duties, Liabilities and Remedies* (third ed) by Simon Mortimore QC at 7.02; *Introduction to Company Law* by Paul Davies at p 17 and 125). There is simply no requirement that the power to remove a director must be exercised for cause.
>
> [23] Closely related to the above is the elementary principle of law that the court will not interfere with the internal management of companies acting within their powers and in fact has no jurisdiction to do so (*Burland v Earle* [1902] AC 83 at 93; *Kwok Ping Sheung Walter v Sun Hing Kai Properties ltd* [2009] 2 HKLRD 11 at 19 to 20). Further, the court holds fast to the rule not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularity complained of can be set right at any moment (*Browne v La Trinidad* (1887) 37 Ch D 1 at 17). Hence, the court had refused to grant an interlocutory injunction to restrain a company from acting on a resolution to remove a director on the ground that the resolution was a nullity due to irregularities, as the irregularities could be cured by going through the proper processes and the ultimate result would be the same (*Bentley-Stevens v Jones* [1974] 1 WLR 638).

The Hong Kong Court of Appeal also observed that as the statutory right to remove a director was unqualified, there was no requirement that reasons be provided for a director's removal or the director to be given a right to be heard.

[106] In this current case, the articles of association of the subsidiaries do not provide for reason or cause to be established for the removal of a director. Neither does s 206(1)(b) of the Companies Act 2016.

[107] Perhaps what was most apparent in the current case was the expedited process and the alacrity in which the plaintiffs were removed as directors. However, this facet alone does not equal lack of bona fides that could nullify their removal. The speed in which the plaintiffs were removed as directors were carried out in accordance with the articles of association of the subsidiaries.

That such speed could be achieved was in part also due to the fact that the subsidiaries were wholly owned companies of the fifth defendant. Thus, unlike in *Dato' Raja Aswane bin Raja Ariff,* the manner of the plaintiffs' removal as directors were not unlawful or wrong.

CONCLUSION

[108] In conclusion and for the reasons given above, the declarations sought by the plaintiffs were not made out and the originating summons was dismissed with costs to the defendants.

Originating summons dismissed with costs.

Reported by Ahmad Ismail Illman Mohd Razali