LOW THIAM HOE & ANOR v. SRI SERDANG SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
DARRYL GOON SIEW CHYE J
[ORIGINATING SUMMONS NO: WA-24NCC-459-08-2019]
14 JANUARY 2020

COMPANY LAW: *Directors – Removal – Removal pursuant to resolutions passed at extraordinary general meeting ('EGM') – Whether EGM validly convened – Whether requisition for EGM valid – Whether there was element of discrimination against directors sought to be removed – Whether resolutions validly passed at board meeting – Whether board meetings may only be convened when all board directors available – Whether 'special notice' required to remove directors – Whether removal under s. 206 of Companies Act 2016 or article of association of company – Whether removal of directors were lawful – Companies Act 2016, ss. 310 & 311*

The Board of Directors of the fifth defendant, on 16 July 2019, 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, the first, second, third and fourth defendants, to convene an extraordinary general meeting ('EGM') to, *inter alia*, remove the plaintiffs and the ninth defendant as directors. The requisitions were each issued under the letterhead of the fifth defendant and were each signed by the sixth defendant as the corporate representative for Golden Plus Holding Bhd. On 31 July 2019, the eighth defendant, the company secretary of the subsidiaries, emailed the directors of the first, second, third and fourth defendants, informing them of the requisition dated 29 July 2019. 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 ('AA'), attaching the notices of the Board of Directors' meetings. 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 would not be able to attend on 5 August 2019 and that he would update the eighth defendant 'in due course' of his availability. On 4 August 2019, the first plaintiff reiterated that he was not able to attend the scheduled board meeting. However, up to the 5 August, the first plaintiff had never informed the eighth defendant when he might be available. The board meetings were convened for 5 August 2019. In respect of the first defendant, its board meeting for the 5 August 2019 proceeded as scheduled. The Board of Directors of the first defendant, at the board meeting, resolved to hold the EGM requisitioned, on 8 August 2019. The chairperson of the board

meeting, the seventh defendant, together with the sixth defendant, being corporate representatives of the fifth defendant, consented and agreed to a short notice of the EGM. In respect of the second, third and fourth defendants, there were no board meetings held on 5 August 2019 as there was no quorum. The EGM of the first defendant was held as scheduled on 8 August 2019. The first defendant, being its wholly-owned subsidiary, the fifth defendant was the sole shareholder in attendance of the EGM. The sixth defendant, as the corporate representative of the fifth defendant attended the EGM 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 meeting convened for 20 August 2019, at the request of the first plaintiff, for each of the second, third and fourth defendants also could not be held for lack of quorum. As no EGM of the second, third and fourth defendants was called within 21 days of the requisition dated 29 July 2019, the fifth defendant as the sole member of these companies, on 22 August 2019, exercised its right under their respective AA 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, contending that they had been unlawfully removed as directors of the first, second, third and fourth defendants, sought to challenge the validity of the board meetings and EGMs and the resolutions passed thereat. The declarations sought by the plaintiffs were, *inter alia*, that: (i) the requisitions of the EGMs by the fifth defendant through the sixth defendant were invalid and of no effect; (ii) the board meetings of the subsidiaries of 5 August 2019 were invalid and ineffective; (iii) the resolutions passed at the board meeting of the first defendant on 5 August 2019 were invalid, ineffective and null and void; (iv) the EGM of the first defendant were invalid and ineffective; (v) the resolutions passed at the EGM of the first defendant were invalid, ineffective and null and void; (vi) that the EGM of the second, third and fourth defendants convened by the sixth defendant as a corporate representative for the fifth defendant on 22 August 2019 was invalid and ineffective; and (vii) the resolutions passed at the respective EGM of the second, third and fourth defendants on 26 August 2019 were invalid, ineffective, null and void.

Held (dismissing OS with costs):

(1) Section 147(3) of the Companies Act 1965 ('CA 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. 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, s. 147 does not preclude a corporate representative from performing any act that is not within the powers or authority prescribed by that section. 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. (paras 39 & 40)

(2) The sixth defendant, in signing the requisitions for an EGM to be held by the subsidiaries, 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 and 311 of the Companies Act 2016 ('CA 2016') and 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. (paras 41, 43, 46 & 47)

(3) The board meetings of the subsidiaries were convened at the request of the ninth defendant who himself was the subject of removal as a director. There was no evidence that either the eighth or the ninth defendants knew, before the 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. Further, the eighth defendant had dutifully complied with the first plaintiff's request for a board meeting of the subsidiaries to be convened for 20 August 2019. There was no element of discrimination to suggest impropriety or difference in treatment. Also, there was no authority to suggest that board meetings may only be convened on a date when all board directors were available. Therefore, the eighth defendant convening of the board meeting for the subsidiaries, and particularly that of the first defendant, was not invalid or a nullity. (paras 58 & 60-64)

(4) The necessary quorum for the board meeting of the first defendant convened on 5 August 2019 was met. At this meeting, it was resolved that an EGM of the first defendant be held on 8 August 2019. Pursuant to the authority as the appointed corporate representatives of the fifth defendant, the sixth and seventh defendants consented and agreed to short notice being given for the EGM, as provided under article 64(b) of the AA of the first defendant. In addition, at the EGM, the sixth defendant again agreed to the short notice given for the EGM. In this

light, 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 was not invalid, ineffective, or null and void. (paras 65 & 67-70)

(5) 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 invoke s. 310 to secure the desired EGM. Therefore, the fifth defendant, having invoked s. 311 of the CA 2016, may subsequently invoke s. 310. (para 75)

(6) Section 206(3) of the CA 2016 provides that 'special notice' is required to remove a director 'under this section', *ie*, under s. 206 itself. Pursuant to s. 206(1)(b), a special notice has to be given for the removal of a director from a public company before the expiration of his period of office. In relation to a private company, 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 is expressed to be 'subject to its constitution'. The section gives primacy to the constitution of the private company. Therefore, if the removal of a director 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. The subsidiaries were private companies and their AA provided for the removal of directors and there was no requirement of special notice. The removals of the plaintiffs as directors were based on the provisions in the AA of the subsidiaries and not 'under' s. 206. Therefore, s. 206(3) 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. (paras 84, 86-89, 93 & 94)

(7) The plaintiffs' allegation of lack of *bona fide*, predicated in the main, upon the bases given for the alleged invalidity of the convening of the board meeting of the subsidiaries, the convening of the EGMs and the resolutions passed, were not made out. Hence, they could not be legitimate foundation upon which to hoist the plaintiff's contention of lack of *bona fides*. There was no evidence to suggest that the removal of the plaintiffs as directors was not permissible. The AA of the subsidiaries did not provide for reason or cause to be established for the removal of a director and neither does 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 AA of the subsidiaries. Therefore, the manner of the plaintiffs' removal as directors were not unlawful or wrong. (paras 100, 103, 106 & 107)

Case(s) referred to:
Dato' Raja Azwane Raja Ariff v. Dato' Man Mat & Ors [2011] 8 CLJ 633 HC ***(dist)***
Kwan Hung Cheong & Anor v. Zung Zang Trading Sdn Bhd [2018] 10 CLJ 517 CA ***(dist)***
LC O'Neil Enterprises Pty Ltd & Anor v. Toxic Treatments Ltd [1986] 4 ACLC 178 ***(refd)***
North-West Transportation Co Ltd v. Beatty [1887] 12 App Cas 589 ***(refd)***
Pender v. Lushington (1877) 6 Ch D 70 ***(refd)***
Tien Ik Sdn Bhd & Ors v. Peter Kuok Khoon Hwong [1993] 1 CLJ 9 SC ***(refd)***
Yeo Ann Seck v. Astakajaya Corporation Sdn Bhd [2011] 1 LNS 1047 HC ***(refd)***
Yeung Bing Kwong Kenneth v. Mount Oscar Ltd [2019] HKCU 2413 ***(refd)***

Legislation referred to:
Companies Act 1965 (repealed), ss. 128(2), 147(3), (6)
Companies Act 2016, ss. 31, 206(1)(a), (b), (3), 310, 311, 316, 322(1), 333(1), (5), 34(c)

Companies Ordinance, (Cap 622) [HK], ss. 462, 463

Other source(s) referred to:
Companies Act 2016, The New Dynamics of Company Law in Malaysia, pp 98 to 101
Corporate Powers Accountability, 3rd edn, paras 3-125, p 162
The New Dynamics of Company Law in Malaysia, pp 98-101

For the plaintiffs - P Gananathan & Iris Tan Li Chie; M/s Gananathan Loh
For the 1st to 7th defendants - Leong Wai Hong, Anita Natalia & Alya Hazira; M/s Skrine
For the 8th to 9th defendants - Gopal Sreenevasan & PL Leong; M/s Sreenevasan Young

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JUDGMENT

Darryl Goon Siew Chye 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 defendants' 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 defendants.

[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 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*:

(i) remove the plaintiffs and the ninth defendant as directors of the first defendant,

(ii) 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;

(iii) 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

(iv) 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 Representative For Golden Plus Holding Berhad".

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

(i) 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";

(ii) the second defendant, informing them of the requisition made on 29 July 2019 stating that, "Pursuant to article 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";

(iii) the third defendant, informing them of the requisition made on 29 July 2019 stating that, "Pursuant to article 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

(iv) 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 articles 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 3 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 was the director the who requested the board meetings and reiterated the question why he was not consulted as to his availability before the notices were issued. In his penultimate paragraphs 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.

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 were 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 21 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 article 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 defendants 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 fifth defendant through the sixth defendant in the first, second, third and fourth defendants is invalid and of no legal effect;
>
> (2) ... that the board meetings of the first, second, third and fourth defendants convened on 5.8.2019 are invalid and ineffective;
>
> (3) ... that the resolutions passed at the board meeting of the first defendant on 5.8.2019 are invalid, ineffective and null and void;
>
> (4) ... that the EGM of the first defendant convened by the Board of Directors of the first defendant on 5.8.2019 are invalid and ineffective;
>
> (5) ... that the resolutions passed at the EGM of the first 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 sixth defendant as corporate representative for the fifth defendants on 22.8.2019 is invalid, ineffective;
>
> (7) ... that the resolutions passed at the respective EGM of the second, third and fourth 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 s. 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 Court of Appeal in *Kwan Hung Cheong & Anor v. Zung Zang Trading Sdn Bhd* [2018] 10 CLJ 517; [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, "... 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."

[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] 10 CLJ 517; [2018] 4 MLJ 773. In *Kwan Hung Cheong* (*supra*), the requisition issued was without any authority. Paragraph 35 of the decision of the Court of Appeal in *Kwan Hung Cheong* (*supra*) 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 were 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) of the Companies Act 2016 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 and 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 board of 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.

[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.

[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.

[52] On the 4 August, the first plaintiff reiterated that he was not able to attend the scheduled board meetings. However, up to the 5 August 2019, the first plaintiff never informed the eighth defendant when he might be available.

[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.

[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.

[55] In his affidavit of 8 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.

[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 article 107 of the articles of association of the second defendant and article 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 Corporation Sdn Bhd* [2011] 1 LNS 1047;

[2011] MLJU 887 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.

[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.

[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.

[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.

[66] Article 63 of the articles of association of the first defendant provides that a 21 days 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.

[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:

> (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.

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 defendants, 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.

[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 of the Companies Act 2016 are set out in full below:

> Power to convene meetings of members
>
> 310. 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.
>
> Power to require directors to convene meetings of members
>
> 311. (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) 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) 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.

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

(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

(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.

[73] The plaintiffs contended that having regard to the dissenting judgment of Kirby P JJ A in *LC O'Neil Enterprises Pty Ltd & Anor v. Toxic Treatments Ltd* [1986] 4 ACLC 178 at 181, on the New South Wales equivalent of ss. 310 and 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.

[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 and 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.

[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.

[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 28 days' notice of the intention to move the proposed resolution must be given. Section 322(1) of the Companies Act provides as follows:

> Resolution requiring special notice
>
> 322. (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:

> Removal of directors
>
> 206. (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) of the Companies Act 2016 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) of the Companies Act 2016, which is its memorandum and articles of association.

[83] As for the directors of a public company, s. 206(1)(b) of the Companies Act 2016 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 (of the views of the learned author of the 3rd edn of *Corporate Powers Accountability* at paras. 3-125 at p. 162; and see also *Companies Act 2016*, *The New Dynamics of Company Law in Malaysia*, at pp. 98 to 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 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. Peter Kuok Khoon Hwong* [1993] 1 CLJ 9; [1992] 2 MLJ 689 was relied upon by learned counsel for the plaintiffs for the proposition that special notice was required. In *Tien Ik (supra)*, there was a suggestion that special notice might be required for the removal of directors in a private company. However, *Tien Ik (supra)* 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:

> Constitution of a company
>
> 31. (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:

(i) 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;

(ii) 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;

(iii) 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

(iv) 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) of the Companies Act 2016 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 Raja Ariff v. Dato' Man Mat & Ors* [2011] 8 CLJ 633; [2011] 9 MLJ 467 at p. 641 (CLJ); p. 475 (MLJ), where Mohamad Ariff Yusof J (as he then was) stated:

> 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.

[97] *Dato' Raja Azwane Raja Ariff* (*supra*), 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:

> 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.

[98] In *Dato' Raja Azwane Raja Ariff* (*supra*), 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 5 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 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 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 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:

> [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 effect of removing the plaintiff as the finance director.

[99] The learned judge in *Dato' Raja Azwane Raja Ariff* (*supra*), 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 Azwane Raja Ariff* (*supra*) where it was not established that the second resolution was not backdated, 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 Azwane Raja Ariff* (*supra*).

[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 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 and 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* (3rd edn by Simon Mortimore QC at 7.02; *Introduction to Company Law* by Paul Davies at pp 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 Azwane Raja Ariff* (*supra*), 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.