DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN MALAYSIA
(BAHAGIAN DAGANG)
SAMAN PEMULA NO. WA-24NCC-438-08/2019

Dalam perkara Afandi Bin Hussain (No. KP: 730705-11-5399);

Dan

Dalam perkara Aturan 7 and Aturan 28 Kaedah-Kaedah Mahkamah Tinggi 2012;

Dan

Dalam perkara kedudukan Afandi Bin Hussain sebagai Pengarah Global Advanced Broadband Solutions (M) Sdn Bhd (No. Syarikat: 713237-M);

Dan

Dalam perkara keesahan pelantikan Ahmad Faridz Bin Abdullah (No. KP: 611205-02-5205) sebagai Pengarah Global Advanced Broadband Solutions (M) Sdn Bhd berkuatkuasa 4/07/2016;

Dan

Dalam perkara pemindahan 550,000 unit saham oleh Afandi Bin Hussain kepada Rabih Daher (No. Paspot: HH583092);

Dan

Dalam perkara peruntukan, Artikel 20, 67 dan 72(e) Jadual A Jadual Keempat Akta Syarikat 1965;

Dan

Dalam perkara Seksyen 57, 59 dan 602(5) Akta Syarikat 2016.

ANTARA

AFANDI BIN HUSSAIN
(No. KP: 730705-11-5399) **… PLAINTIF**

DAN

1. **GLOBAL ADVANCED BROADBAND SOLUTIONS (M) SDN BHD**
   (No. Syarikat : 713237-M)

2. **RABIH DAHER**
   (No. Paspot : HH583092)

3. **AHMAD FARIDZ BIN ABDULLAH**
   (No. KP : 611205-02-5205)

4. **SURUHANJAYA SYARIKAT MALAYSIA** **… DEFENDAN-DEFENDAN**

JUDGMENT

[1] The Plaintiff in this Originating Summons (Enclosure 1) ("**Originating Summons**") sought for various declaratory orders to essentially declare that he is still a director of the 1st Defendant and that the transfer of 550,000 of the Plaintiff's shares in the 1st Defendant to the 2nd Defendant by the 2nd Defendant is unlawful and invalid. Amongst others, the Plaintiff sought for the removal the 3rd Defendant who was re-appointed as a director of the 1st Defendant in place of the Plaintiff and for the rectification of the Register to reflect that the Plaintiff is the rightful owner of 700,000 shares in the 1st Defendant.

[2] This Originating Summons arose from the Plaintiff's allegations, inter alia, that he was wrongfully removed as a director of the 1st Defendant and that the transfer of the 550,000 shares of the Plaintiff's in the 1st Defendant to the 2nd Defendant was invalid.

A] Parties

[3] The Plaintiff was a director of the 1st Defendant who was appointed on 13.7.2009 until 4.7.2016. The Plaintiff previously held 700,000 shares in the 1st Defendant. The Plaintiff current holds 150,000 shares in the 1st Defendant.

[4] The 1st Defendant is a company incorporated on 20.10.2005 which nature of business involve the provision of engineering services, supply of telecommunication equipment and accessories and provision of telecommunication network.

[5] The 2nd Defendant is a director and shareholder of the 1st Defendant from the date of its incorporation together with the 3rd Defendant. The 2nd Defendant initially held 300,000 shares in the 1st Defendant and currently holds 849,9999 shares in the 1st Defendant.

[6] The 3rd Defendant was a director and shareholder of the 1st Defendant from the date of its incorporation together with the 2nd Defendant. The 3rd Defendant later ceased to be a director and shareholder of the 1st Defendant but was reappointed as a director on 4.7.2016. The 3rd Defendant currently holds 1 share in the 1st Defendant.

[7] The 4th Defendant is a statutory body which is responsible for, inter alia, the registration of corporations and regulating their compliance to the Companies Act 2016.

B] Service of the Originating Summons

[8] Only the 1st and 4th Defendants in this Originating Summons were represented by solicitors. The 2nd and 3rd Defendants were not represented. Therefore, from the outset on 13.7.2020 I had requested for the Plaintiff to file an Affidavit of Service to show that this Originating Summons has been properly served on the 2nd and 3rd Defendants.

[9] The 2nd and 3rd Defendants are material parties to this Originating Summons and there are reliefs sought therein which directly affect them namely the orders sought for the removal of the 3rd Defendant as a director of the 1st Defendant and the retransfer of 550,000 shares currently held by the 2nd Defendant to the Plaintiff.

[10] Following my request, the Plaintiff filed an Affidavit of Service (Enclosure 52) ("**Affidavit of Service**") on 4.8.2020 about 3 days prior to the Hearing of this Originating Summons which was on 7.8.2020.

[11] The AR Registered Card intended for the 2nd Defendant which was exhibited in Exhibit "MM-3" in the Affidavit of Service was not signed. It is further stated in paragraph 4 of the Affidavit of Service that the AR Card was not returned by Pos Malaysia. In this regard the Court of Appeal in **Chung Wai Meng v. Perbadanan Nasional Bhd [2018] MLRA 331** held at page **339**:

*"..... it is **not for the court** as in the case of* Sivamurthy (supra)*, and* Yap Ke Huat (supra) ***to dispense with the requirement to prove receipt** of the Writ and SOC by the person named in the AR registered post, or proof that*

the acknowledgement of the ***AR registered posting has been returned and duly acknowledged by the intended recipient****."*

(own emphasis added)

[12] Insofar as the 3rd Defendant is concerned the AR Registered Card intended for him was signed though not by the 3rd Defendant himself. This coupled with the fact that the 3rd Defendant had affirmed affidavits on behalf of the 1st Defendant would lean in favour of the Plaintiff's argument that the 3rd Defendant has been properly served with this Originating Summons.

[13] However, I am not satisfied that there was proper service of this Originating Summons on the 2nd Defendant and accordingly raised this with learned counsel for the Plaintiff, Mr. Praveen Paniselvam.

[14] In response thereto, learned counsel for the Plaintiff brought to my attention the Court's Notes of Proceedings ("**NOP**") of the first Case Management of the Originating Summons on 4.9.2019 before the learned Deputy Registrar taken from the Court's Case Management System ("**CMS**"). Through this NOP learned counsel for the Plaintiff sought to show that the 2nd Defendant was represented by Mr. Saravanan of Messrs Saravanan Veerappan and therefore the Originating Summons has been properly served.

[15] It is not in dispute that Messrs Saravanan Veerappan was the previous solicitors for the **1st** Defendant and that they have been replaced by Messrs M. Mahendra & Co. who are the now the current solicitors for the 1st Defendant.

[16] However, the question of whether Messrs Saravanan Veerappan acts or have acted for the **2nd** Defendant is a matter of contention. When Messrs Saravanan Veerappans' applied to discharge themselves (Enclosure 39), it was only in respect of the 1st Defendant. Further, from NOP of the CMS on 15.6.2020, Mr Saravanan of Messrs Saravanan Veerappans had informed the Court that he does not act for the 2nd or 3rd Defendants.

[17] In addition to this there are no cause papers which includes any affidavit filed on behalf of the 2nd Defendant in this Originating Summons and neither was a Notice of Appointment of Solicitors filed by Messrs Saravanan Veerappan stating that they act for the 2nd Defendant.

[18] Having given due consideration to the above, I am not convinced that the Originating Summons has been served on the 2nd Defendant. The 2nd Defendant has a fundamental right to be heard and to defend himself. The 2nd Defendant is a material party to this action where his conduct is being challenged by the Plaintiff and reliefs sought against him.

[19] In **London Passenger Transport Board v Moscrop [1942] 1 ALL ER 97 at page 104** Viscount Maugham held:

".. . The present appellants were not directly prejudiced by the declaration and it might even have been thought to be an advantage to them to subm it to the declaration, but, on the other hand, the persons really interested were not before the court... ***the courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence****, and that, except in very special circumstances, all persons interest should be made parties, whether*

by representation orders or otherwise, before a declaration by its terms affecting their rights is made... "

(own emphasis added)

[20] Similarly, in **Lim Choon Seng v Lim Poh Kwee [2020] MLJU 1155**, the Federal Court recently made a similar pronouncement of the general rule that no orders can be made against a non-party:

"[70] ..... 1. As for the second part of the question, the ***general rule is that the court has no jurisdiction over any person other than those brought before it and no order can be made for or against or bind a non-party****: See* Kheng Chwee Elan v Wong Tak Thong [1983] 2 MI J 320 *where Seah FJ delivering the judgment of the former Federal Court said:*

> *'Tn our judgment, the court below has no jurisdiction inherent or otherwise, over any person other than those properly brought before it, as parties or as persons treated as i f they were parties under statutory provisions [*Brydges v. Brydges & Wood; Re Shephard and Coleman*], The terms "judgment" and "order" in the widest sense may be said to include any decision given by a court on a question or questions at issue between the* ***parties to a proceeding properly before the court*** *[see para 501 of* Halsbury's *Laws of England (4th ed.) Vol.26 at page 237]"*

(own emphasis added)

[21] Though both these cases are regarding a non-party to an action, nevertheless, the general rule can be applied here in that as the Originating Summons was not served on the 2nd Defendant he can be considered a non-party to the action since he was not properly brought before the Court to respond to the Plaintiff's allegations.

[22] Therefore, the failure to serve the Originating Summons on the 2nd Defendant is fatal to the Plaintiff's case and this Originating Summons can be dismissed on that ground alone.

[23] Nevertheless, for completeness and giving the benefit of the doubt to the Plaintiff, I proceeded to hear the Originating Summons on its merits.

C] Factual Background

i) Plaintiff's Factual Background

[24] The main factual chronology of events provided by the Plaintiff which are largely not in dispute are as follows:

24.1 The Plaintiff was employed as a Technical Director of the 1st Defendant pursuant to a Letter of Appointment dated **1.12.2006** ("**Letter of Appointment**").

24.2 On **13.7.2009**, the Plaintiff was appointed as a director on the 1st Defendant's Board of Directors together with the 2nd Defendant.

24.3 Based on paragraph 6 of the Plaintiff's Affidavit In Support (Enclosure 2) ("**Plaintiff's Affidavit In Support**"), the Plaintiff was given 700,000 shares in the 1st Defendant in 2

tranches, the first tranche being 550,000 shares and the second tranche, 150,000 shares.

24.4 The Plaintiff avers in paragraph 7 of the Plaintiff Affidavit In Support that parallel with the holding of 550,000 shares in the 1st Defendant ("**the 550,000 Shares**") the Plaintiff also executed a blank Transfer of Shares, Form 32A of the Companies Act 1965 ("**Form 32A**"), in respect of the 550,000 Shares.

24.5 On or about **June, 2016**, a misunderstanding occurred between the Plaintiff and the 2nd Defendant.

24.6 A resignation letter dated **4.7.2016** was issued by the Plaintiff to the 1st Defendant ("**Resignation Letter**"), the relevant portion of which are reproduced below:

"Please accept this letter as my formal notice of resignation from Global Advanced Broadband Solutions (M) Sdn Bhd, effective 4th July 2016 from ***all current holding position****.*

Thank you very much for the opportunity to be in the company"

(own emphasis added)

24.7 The Form 32A was executed and dated **18.7.2016** to transfer the 550,000 Shares from the Plaintiff to the 2nd Defendant.

24.8 A covering email with the Resignation Letter attached to it was sent by the Plaintiff on 25.7.2016 ("**Plaintiff's Cover**

Email"). The contents of the Plaintiff's Cover Email are reproduced below:

"Salam rabih
Attached my resignation letter as staff
Fendi"

24.9 On **19.10.2016**, the Plaintiff did a company search and discovered that:

i) The 1st Defendant is no longer the director of the 1st Defendant.

ii) The 3rd Defendant's name was included as a director of the 1st Defendant effective 4.7.2016 which is the same date the Plaintiff had issued the Resignation Letter.

iii) The Plaintiff continues to hold 700,000 shares of the 1st Defendant.

24.10 Through a Whatsapp communication on **25.10.2016** between the Plaintiff and the 1st Defendant's Company Secretary, En Saharudin bin Mohd Basar ("**En Saharudin**"), En Saharudin extended to the Plaintiff documents pertaining to the Plaintiff's resignation as a director of the 1st Defendant.

24.11 The Plaintiff lodged an online complaint with the 4th Defendant on **6.12.2016** for the 4th Defendant to investigate

the 1st Defendant's actions made through the 2nd Defendant's instructions. The Plaintiff also reported regarding the issue of the wrongful transfer of the 550,000 Shares to the 2nd Defendant without the Plaintiff's knowledge and consent.

24.12 Following 2 letters written by the Plaintiff's solicitors, Messrs Nor Affiza & Co., ("**Plaintiff's solicitors' letter**") dated **26.1.2017** and **31.1.2017** respectively to the 1st Defendant's company secretary, JS Corporate Services Sdn Bhd, the 1st Defendant's company secretary then replied by letter dated **2.2.2017** to the Plaintiff's solicitors stating that they have been instructed by the 1st Defendant not to release any documents to the Plaintiff's solicitors.

24.13 By an email dated **4.4.2018** the 4th Defendant informed the Plaintiff's solicitors, inter alia, that their investigation regarding his complaint against the 1st Defendant has been completed and that a "No Further Action" ("**NFA**") was decided by the Deputy Public Prosecutor by reason that the Resignation Letter encompasses the Plaintiffs resignation as a director of the 1st Defendant.

24.14 Being dissatisfied with this decision the Plaintiff's solicitors, Messrs Nor Affiza & Co. ("**Plaintiff's solicitors' letter**"), wrote a letter dated **12.8.2018** to the 4th Defendant, inter alia, seeking clarification regarding the NFA status.

24.15 By letter dated **4.3.2019**, the 4th Defendant replied to the Plaintiff's solicitors' letter of 12.8.2018 where the 4th Defendant maintained their stand and further, inter alia, stated as follows:

"Lain-Iain sebab. Tiada maklumat palsu yang diserahsimpan di SSM berkaitan perletakan jawatan Afandi Hussain sebagai pengarah syarikat GABSSB. Pihak tuan boleh mengambil tindakan sivil di bawah seksyen 602 AS 2016 bagi pembetulan daftar pengarah dan pemegang saham GABSSB"

24.16 On **23.4.2019**, the Plaintiff's solicitors wrote to the 4th Defendant, inter alia, requesting for a Board Resolution ("**Resolution**") which had caused the name of the Plaintiff to be changed based on the 1st Defendant records.

24.17 By letter dated **7.5.2019**, the 4th Defendant replied to the Plaintiff's solicitors' letter of 23.4.2019 declining to furnish the Plaintiff with the said Resolution and asked the Plaintiff to make his request to the 1st Defendant instead.

24.18 The Plaintiff's solicitors then wrote a letter dated **7.5.2019** to the 1st Defendant's company secretary, JS Corporate Services Sdn Bhd, requesting for the various Board resolutions appointing the 3rd Defendant as a director and accepting the resignation of the Plaintiff as a director as well as approving the transfer of the 550,000 Shares to the 2nd Defendant.

ii) 1st Defendant's Factual Background

[25] The following are facts provided by the 1st Defendant which are largely not in dispute:

25.1 The 2nd Defendant and the Plaintiff executed a Trust Deed dated **27.7.2009** ("**Trust Deed**") which essentially stipulates that the Plaintiff holds the 550,000 Shares as a trustee for the 2nd Defendant who is the beneficiary of the same upon the terms and conditions of the Trust Deed.

25.2 On **1.7.2016** the Plaintiff incorporated a company called "GABS Network Solutions Sdn Bhd" ("**GABS**"). Though there are no specific document exhibited to show that GABS was incorporated by the Plaintiff, however, the Plaintiff admits to this in paragraph 25(ii) of his Affidavit In Reply (Enclosure 8).

25.3 The 1st Defendant, through the 3rd Defendant, had lodged a police report against the Plaintiff on **5.10.2016** ("**Police Report**") alleging that the Plaintiff had, inter alia, wrongfully misappropriated the 1st Defendant's funds and committed criminal breach of trust.

25.4 In **2017** criminal prosecution against the Plaintiff was initiated in the Kuala Lumpur Sessions Court in case no. 62K-211-09/2017 ("**Criminal Proceedings**").

25.5 On **29.11.2018** the 1st Defendant commenced a civil suit against GABS, the Plaintiff and 2 others at the High Court of Malaya at Shah Alam vide suit no. BA-22NCvC-595-11/2018 ("**Shah Alam Civil Suit**"). In the Shah Alam Civil Suit, the 1st Defendant alleged that the Plaintiff had conspired with GABS and the other defendants therein to fraudulently mislead, cheat, steal and deprive the 1st Defendant of monetary gains through contracts from the Plaintiff's customers. The 1st Defendant also claimed for infringement of trademark, goodwill and passing off against the Plaintiff and the other defendants in the Shah Alam Civil Suit. The 1st Defendant further alleged that the Plaintiff had wrongfully misappropriated the 1st Defendant's funds.

[26] It is pertinent to highlight at this juncture that the Plaintiff did not mention nor exhibit the Trust Deed in his Affidavit In Support.

D] Plaintiff's Preliminary Objections

[27] The Plaintiff raised 2 preliminary objections against the 1st Defendant Affidavit in Reply (Enclosure 7) ("**1st Defendant's 1st Affidavit**") and the 1st Defendant 2nd Affidavit in Reply (Enclosure 17) ("**1st Defendant's 2nd Affidavit**") (collectively referred to as the "**1st Defendant's Affidavits**") under Order 41 Rule 5(1) of the Rules of Court 2012 ("**ROC**") and Order 41 Rule 6 ROC on the following basis:

i) The 1st Defendant's Affidavits (Enclosure 7 and 17) contain facts and matters outside of the 3rd Defendant's personal knowledge

and ought to be held as hearsay evidence, therefore deemed inadmissible;

ii) The 1st Defendant's Affidavits contain scandalous, irrelevant and oppressive depositions,

i) Plaintiff's 1st Preliminary Objection

[28] Order 41 Rule 5(1) ROC provides:

"5. Contents of affidavit (O. 41 r. 5)

(1) Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit ***may contain only such facts as the deponent is able of his own knowledge to prove****.*

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings ***may contain statements of information of belief with the sources and grounds hereof****."*

(own emphasis added)

[29] The paragraphs in the 1st Defendant's Affidavit (Enclosure 7) which the Plaintiff sough for the Court to expunge are as follows:

i) Paragraph 12 - ".... *saya telah* ***dinasihati*** *dan ingin menegaskan bahawa Defendan Kedua pada setiap masa material bertanggungjawab sepenuhnya terhadap operasi perniagaan dan perkhidmatan Defendan Pertama.... "*

ii) Paragraph 14 - ". ... *saya telah* ***dinasihati dan percaya bahawa*** *pada setiap masa material semasa Plaintif menjadi pengarah disyarikat Defendan Pertama, Defendan Kedua masih mengekalkan kawalan dan penyeliaan penuh ke atas kegiatan perniagaan Defendan Pertama ..."*

iii) Paragraph 15 – *"... saya telah* ***dinasihati dan sesungguhnya percaya*** *bahawa pemberian 550,000 unit saham Defendan Pertama kepada Plaintif adalah keputusan Defendan Kedua sendiri yang telah mempunyai strategi untuk mengembangkan perniagaan Defendan Pertama... "*

iv) Paragraph 16 - *"...Saya telah* ***dinasihatkan dan percaya*** *bahawa tidak wujud sebarang pra-syarat lisan berhubung dengan milikan 550,000 unit saham tersebut melainkan apa yang telah dinyatakan dan dipersetujui oleh Defendan Kedua dan Plaintiff di bawah perjanjian ikatan amanah tersebut. Syarat-syarat yang dinyatakan oleh Plaintiff di Perenggan 7(i) hingga (iv)* ***adalah tidak benar dan direka semata-mata untuk menyokong tindakan Plaintif di sini(self serving****). "*

[30] The Plaintiff claimed the above paragraphs in the 1st Defendant's Affidavit offend Order 41 Rule 5(1) ROC and raised the following arguments:

i) They contain facts formulated outside the personal knowledge of the 3rd Defendant and deposed by virtue of advice by the 3rd Defendant's solicitors.

ii) In deposing the facts in the said offending paragraphs of the 1st Defendant's 1st Affidavit, the records and access allegedly referred to by the 3rd Third Defendant had not been exhibited as evidence in the 1st Defendant's 1st Affidavit;

iii) It is improbable and impracticable for the 3rd Defendant's solicitors who are strangers to the 1st Defendant to advise the 3rd Defendant about the material facts which had taken place privately at the 1st Defendant during the absence of the 3rd Defendant.

iv) It was also not deposed in the 1st Defendant's 1st Affidavit that the 3rd Defendant's solicitor had only advised the 3rd Defendant on legal questions and issues in deposing the 1st Defendant's Affidavit. Therefore, any material facts asserted by the 3rd Defendant which is based from the advice provided by the solicitors of the Third Defendant are hearsay.

[31] The Plaintiff referred to cases such as **Kassim bin Sulong & Anor v Guthrie Estates Holding Ltd & Ors [1993] 3 MLJ 303** and **AmInvestment Bank Bhd v NEP Holdings (M) Bhd v [2014] 8 MLJ 271** which essentially require the deponent of an affidavit to disclose the source of his information or the person who had advised him otherwise the averments would be hearsay. Further, that hearsay evidence is not admissible in proceedings which are not interlocutory.

[32] The 1st Defendant responded to the Plaintiff's allegations in paragraphs 8 and 10 of the 1st Defendant's 2nd Affidavit (Enclosure 17) in that:

i) The 3rd Defendant has personal knowledge of the Plaintiff's actions;

ii) The source of the 3rd Defendant's (as deponent of the 1st Defendant's Affidavits) information is from records and documents kept by the 1st Defendant to which the 3rd Defendant has access to; and

iii) The 1st Defendant included further documents in the 1st Defendant 2nd Affidavit.

[33] The 2nd Defendant also submitted that it was always open to the Plaintiff to cross-examine the deponent of the 1st Defendant's Affidavits in the event there was disbelief and the basis for such disbelief in the truth of the contents of the affidavit filed (**Lim Tze Sian v. Coverright Surface Malaysia Sdn Bhd [2017] 1 MLJ 418**).

[34] That it was held by the Court of Appeal in **Lim Tze Sian** (supra), inter alia, as follows:

> *"**Affidavit evidence may contain admissible hearsay** in that **the source of the evidence must be disclosed** and the deponent must express his belief in its truth."*
>
> (own emphasis added)

[35] Based on the paragraphs of the 1st Defendant's 1st Affidavit referred to by the Plaintiff, the Plaintiff's objections are generally concerning the 550,000 Shares and matters that are said to be within the 2nd Defendant's knowledge and not the 3rd Defendant's.

[36] It is not denied that the 2nd Defendant is known to the 3rd Defendant and that the 3rd Defendant was the first director and shareholder of the 1st Defendant together with the 2nd Defendant based on the Memorandum ("**MOA**") and Articles of Association ("**AOA**") of the 1st Defendant. Therefore, there are matters which are within the 3rd Defendant's knowledge at least up to the time he ceased to become a director and shareholder and after he was reappointed as a director and became shareholder of the 1st Defendant on 4.7.2020. No documents were exhibited to show when the 3rd Defendant ceased to be a director and shareholder of 1st Defendant save from the 4th Defendant's corporate information report in exhibit "**AH-1**" of the 4th Defendant's Affidavit In Support (Enclosure 6), that the 3rd Defendant was no longer a shareholder and director of the 1st Defendant as at 13.7.2009.

[37] Having given due consideration to arguments by the Plaintiff and 1st Defendant on this preliminary objection, I have decided to confine myself to the averments of the 1st Defendant which are actually supported by documentary evidence (**United Malayan Banking Corporation v. Yap Peng Wai @ Yap Peng Hooi [1998] 5 MLJ 511; Ong Bee Yam v. Osprey Sdn Bhd & Ors [1997] 5 CLJ 408**) and, therefore, it is not necessary to expunge the paragraphs complained of by the Plaintiff's in his preliminary objection. In **Seow Mui Kim v. Perwira Habib Bank & Ors [1985] 2 MLRH 215** it was held, inter alia, that a Court can ignore the offending parts of an affidavit:

"In this case the proportion of hearsay evidence, which is irrelevant, to the relevant material is not so high that the whole of the plaintiff's affidavit (enclosure 2) should be removed from the file. Following the opinion of Lord Alverstone C.J. in Re J.L. Young Manufacturing Company Limited the

evidence on information and the sources of which have not been disclosed in paragraphs 2, 5(a) and 7 of the plaintiff's affidavit ***need not be looked at all****."*

(own emphasis added)

ii) Plaintiff's 2nd Preliminary Objection

[38] The Plaintiff's alleged that certain paragraphs in the 1st Defendant's Affidavits (Enclosures 7 and 17) contain scandalous, irrelevant and oppressive depositions and relied on Order 41 Rule 6 ROC which states as follows:

"Scandalous matter in affidavits (0.41, r. 6)

6. The Court ***may*** *order to be struck out of any affidavit any matter which is* ***scandalous, irrelevant or otherwise oppressive****."*

(own emphasis added)

[39] The alleged offending paragraphs are reproduced below:

Scandalous Depositions

i) Paragraph 5 of the 1st Defendant 1st Affidavit – *"... Defendan Pertama telah pun memfailkan satu tindakan sivil di Mahkamah Tinggi Shah Alam untuk menuntut gantirugi untuk penyelewengan dan penipuan yang telah dilakukan oleh Plaintif melibatkan syarikat Defendan Pertama. "*

ii) Paragraph 6 of the 1st Defendant 1st Affidavit – *"... tindakan Plaintif memulakan tindakan ini melalui permohonan Saman Pemula di Mahkamah Tinggi Kuala Lumpur adalah* ***suatu tindakan menyeleweng dan tidak jujur*** *semata-mata untuk mendapatkan perintah deklarasi berkenaan kedudukan Plaintif sebagai Pengarah Defendan Pertama untuk* ***mengelakkan dirinya daripada menjadi saksi melibatkan penyelewengan Plaintif untuk melesapkan wang syarikat Defendan Pertama."***

iii) Paragraph 8 of the 1st Defendant 1st Affidavit - *"…. hasrat sebenar Plaintif adalah* ***semata-mata untuk melengahkan prosiding di Mahkamah Tinggi Shah Alam serta melengahkan masa bagi kes jenayah terhadap Plaintif…. "***

iv) Paragraph 9 Paragraph 5 of the 1st Defendant 1st Affidavit – "... *saya telah mengikuti prosiding kes jenayah terhadap Plaintif di mana Plaintif* ***pernah bertindak untuk mendapatkan penangguhan bicara jenayah tersebut pada bulan Jun 2018 atas alasan kononnya Plaintif mengalami penyakit sakit jantung... Maka Plaintif di kini menggunakan prosiding di sini sebagai suatu taktik untuk melengahkan prosiding bicara penuh di Mahkamah Tinggi Shah Alam..."***

v) Paragraph 18 of the 1st Defendant 1st Affidavit - *"...telah* ***bertindak untuk mengambil alih pengendalian projek-projek Defendan Pertama untuk dirinya sendiri dengan menubuhkan syarikatnya sendiri atas nama GABS Network Solutions Sdn Bhd.*** *Tindakan Plaintif tersebut* ***adalah untuk menguntungkan dirinya sendiri tanpa mengira kepentingan Defendan Pertama.. "***

vi) Paragraph 12 of the 1st Defendant 1stAffidavit – ***"... penyelewengan dan salah laku yang telah dilakukan oleh Plaintif terhadap Defendan Pertama adalah benar dan berdasarkan kepada bukti-bukti nyata yang wujud dan yang telah saya lihat. Contohnya*** *Defendan Pertama telah memperolehi rekod pengeluaran wang dari akaun bank Defendan Pertama yang menunjukkan Plaintif telah melakukan pengeluaran wang sebanyak RM 120,608.16 ……."*

vii) Paragraph 13 of the 1st Defendant's 2nd Affidavit – "... ***Malah pertuduhan jenayah terhadap Plaintif di Mahkamah Sesyen Jenayah Kuala Lumpur adalah berdasarkan kepada salah laku yang telah dilakukan oleh Plaintif terhadap wang syarikat Defendan Pertama***."

Irrelevant Depositions

viii) Paragraph 17 of the 1st Defendant's 2nd Affidavit – "... ***memulakan prosiding ini untuk mendapatkan pengiktirafan Mahkamah yang Mulia ini terhadap kedudukannya sebagai Pengarah Defendan Pertama selepas Defendan Pertama telah memulakan tindakan sivil di Mahkamah Tinggi Shah Alam menerusi Writ Saman No BA-22NCVC-595-11/2018 adalah menyeleweng dan tidak jujur... "***

ix) Paragraph 20 of the 1st Defendant's 2nd Affidavit - "... *Mahkamah Sesyen Jenayah yang mendengar perbicaraan kes jenayah Plaintif telah membuat keputusan bahawa pihak pendakwaan telah berjaya membuktikan kes prima facie terhadap Plaintif, oleh*

itu telahh mengarahkan Plaintif mengemukakan pembelaannya. ***Pertuduhan terhadap Plaintif memang berasas dan disokong oleh bukti prima facie yang diterimapakai oleh Mahkamah Jenayah... ”***

Oppressive Depositions

x) Paragraph 14 of the 1st Defendant's 2nd Affidavit - "... ***Saya bertanggungjawab untuk menghalang Plaintif daripada melakukan atau mengambil tindakan yang boleh memprejudiskan kepentingan dan kesejahteraan syarikat Defendan Pertama.”***

xi) Paragraph 10 of the 1st Defendant's 2nd Affidavit - *“...Maka adalah* ***tidak munasabah dan tidak adil tindakan Plaintif di sini yang ingin mendapatkan pengiktirafan Mahkamah ini untuk satu deklarasi dan perintah bahawa Plaintif masih lagi menjadi pengarah di Syarikat Defendan Pertama... ”***

xii) Paragraph 18 of the 1st Defendant's 2nd Affidavit – "***... percubaan Plaintif kini untuk menafikan hakikat tersebut merupakan suatu tindakan selepas fakta (afterthought) yang*** *membuang masa Mahkamah dan pihak yang terlibat.... ”*

[40] The Plaintiff's complaint against the above paragraphs of the 1st Defendant's Affidavits mainly pertains to the allegations made by the 1st Defendant and the conclusions the 1st Defendant had drawn from the Shah Alam Civil Suit, the Police Report and the Criminal Proceedings.

[41] As these matters are currently being determined in their respective forum or Courts I have not taken heed of these allegations save for the existence and subject matter of the Shah Alam Civil Suit, the Police Report and Criminal Proceedings which are not disputed.

[42] Again, applying **Seow Mui Kim** (supra), the Court can ignore any part of these averments by the 1st Defendant where they are unsupported by documentary evidence.

E] 1st Defendant's Preliminary Objection

[43] The 1st Defendant has also raised a preliminary objection that this action ought not be commenced by way of an Originating Summons.

[44] The 1st Defendant relied on Order 5 rule 4 ROC which states:

> *"4. Proceedings which may be begun by writ or originating summons (O. 5 r. 4)*
>
> *(1) Proceedings-*
>
> *(a) in which the sole or principal question at issue is or is likely to be one of the construction of any written law or of any instrument made under any written law, or of any deed, will, contract or other document, or any other question of law; or*
>
> *(b) in which* ***there is unlikely to be any substantial dispute of fact****,*
>
> *are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under*

Order 14 or Order 81 or for any other reason considers the proceedings are more appropriate to be begun by writ."

(own emphasis added)

[45] The 1st Defendant submitted that the main issues are regarding the dispute on the Plaintiff's resignation and the 550,000 Shares, therefore, this action cannot be decided by affidavit evidence.

[46] The 1st Defendant had through a Notice of Application in Enclosure 12 applied to convert this Originating Summons to a Writ action. However, on 13.2.2020, the Court dismissed Enclosure 12 and parties were given leave to apply to cross-examine any deponent whose affidavit has been filed.

[47] There was no appeal against this decision on Enclosure 12 which was heard on the merits, therefore, the 1st Defendant is precluded from raising this issue again. Thus the 1st Defendant's preliminary objection was dismissed.

E] Merits of the Originating Summons – Substantial Issues

[48] The Plaintiff's substantive claim can be summarised as follows:

i) The Plaintiff did not resign as a director of the 1st Defendant and the Resignation Letter was wrongly construed ("misappropriated", the word used by the Plaintiff's solicitors) and used by the 1st Defendant to remove the Plaintiff.

ii) In the alternative, if the Resignation Letter is accepted as a valid notice of resignation as a director, the removal of the Plaintiff as director of the 1st Defendant is invalid and contravenes Sections 122(1) and 122(6) of the Companies Act 1965 ("**CA 1965**");

iii) The 3rd Defendant's appointment as a director of the 1st Defendant is in contravention of Sections 122(1) and 122(6) CA 1965 and Article 67 of the 1st Defendant's AOA.

iv) The 2nd Defendant cannot unilaterally enforce the Trust Deed to transfer 550,000 Shares to the 2nd Defendant.

E1: The Resignation Letter

[49] It was argued on behalf of the Plaintiff in paragraph 33 of the Plaintiff's Written Submissions (Enclosure 33) that he did not resign as a director of the 1st Defendant and only as a "*staff*" for the position of a Technical Director and other additional positions such as Office, Warehouse and Finance Manager vide the Resignation Letter.

[50] Apart from his position as a Technical Director which is evidenced by the Letter of Appointment, there are no other documents exhibited to support the Plaintiff's argument that he held other these positions in the 1st Defendant.

[51] The Plaintiff relied on 2 documents to prove that he did not resign as a director of the 1st Defendant. The first is the Resignation Letter which states:

> *"Please accept this letter as my formal notice of resignation from Global Advanced Broadband Solutions (M) Sdn Bhd, effective* ***4th July 2016*** *from* ***all current holding position****."*
>
> (own emphasis added)

[52] The Plaintiff argued that the Resignation Letter is to be read with the Plaintiff's Cover Email sent on 25.7.2016 which states,

> *"Attached my resignation letter as* ***staff****"*
>
> (own emphasis added)

[53] According to the Plaintiff, his resignation is therefore only as a *staff* or employee for the various positions he is employed by the 1st Defendant.

[54] As against this argument, the 1st Defendant argued that the Plaintiff did not hold any other position as an employee other than as a Technical Director. The other position the Plaintiff held was as a director of the 1st Defendant. Therefore, his resignation must mean he resigned as both an employee (Technical Director) and a director on the Board of Directors of the 1st Defendant.

[55] As there are no documents exhibited to show that the Plaintiff held any other position as an employee I have to accept that his employment in the 1st Defendant is *only* as a Technical Director. The other position

the Plaintiff held is that of a director of the 1st Defendant's Board of Directors.

[56] The 4th Defendant took a similar interpretation of the Resignation Letter when they arrived at the NFA decision following the Plaintiff's complaint to them.

[57] Therefore, the reasonable conclusion that can be arrived at based on the ordinary meaning given to the words, "***all current holding position***" in the Resignation Letter is that the Plaintiff had resigned as **both** an employee (Technical Director) and director of the 1st Defendant. Even if the Plaintiff is said to have held various positions as an employee of the 1st Defendant, the literal interpretation of the word, "***all***" in Resignation Letter would include the Plaintiff's position as a director.

[58] It is also important to note that the Plaintiff ended his Resignation Letter as follows:

"Thank you very much for the ***opportunity to be in the company****"*

(own emphasis added)

[59] The tone of the ending paragraph of the Resignation Letter seems unusual for a person who believes he will still be in the 1st Defendant. If the Plaintiff takes the position that he only resigned as an employee and will continue to remain in the 1st Defendant as a director of the 1st Defendant, then his parting words appear to point in the opposite direction giving the impression that he is leaving the 1st Defendant altogether. This further supports the argument that he resigned as an employee as well as a director.

[60] Further, from the chronology of facts provided by the Plaintiff, the Plaintiff claimed that he discovered his removal as director of the 1st Defendant on **19.10.2016** when he did a company search. He then lodged a complaint with the 4th Defendant on **6.12.2016** about **2 months** later.

[61] Interestingly, the Plaintiff did not raise his complaint with the 1st Defendant or 2nd Defendant directly except where he had asked for supporting documents related to his removal as a director from the 1st Defendant.

[62] Despite having solicitors representing him the Plaintiff also did not send any letter to the 2nd Defendant to seek an explanation for his removal as a director nor did the Plaintiff send a letter of demand to the 1st and 2nd Defendant when he felt that his removal was invalid.

[63] It was only about **3 years** after his Resignation Letter that the Plaintiff filed this Originating Summons.

[64] The 1st Defendant further argued that the timing the Resignation Letter was issued by the Plaintiff should also be taken into consideration given that the Resignation Letter was issued **3 days** after the Plaintiff incorporated GABS and that GABS, according to the 1st Defendant, was used to take over the business and project undertaken by the 1st Defendant.

[65] The company name GABS bears resemblance to the 1st Defendant in that it is the abbreviation of the 4 words in the 1st Defendant, Global

Advanced Broadband Solutions (M) Sdn Bhd and the 1st Defendant is said to be known by that abbreviation.

[66] Therefore, taking into consideration all the above matters which are summarised below:

i) The literal and ordinary meaning of the words, "***all current holding position***" in the Resignation Letter;

ii) The parting words of the Plaintiff in the Resignation Letter, "*Thank you very much for the opportunity to be in the company*";

iii) The Plaintiff's 2 months delay in making his complaint to the 4th Defendant;

iv) The circumstances surrounding the Plaintiff resignation in particular the setting up of his company GABS, the Police Report, the Criminal Proceedings and the Shah Alam Civil Suit;

v) The Plaintiff delay of about **3 years** in initiating this Originating Summons after finding out he was removed as a director and after the above events have occurred; and

vi) The fact that no demand was made against the 1st or the 2nd Defendant after the Plaintiff discovered he was removed as a director of the 1st Defendant;

it is difficult to conclude otherwise than that the Plaintiff had on his own volition resigned as a director of the 1st Defendant by way of the Resignation Letter.

[67] I would be remiss if I do address the Plaintiff's argument that in the Plaintiff's Cover Email the Plaintiff used the word, "*staff*". Firstly, the Plaintiff's Cover Email merely accompanies the Resignation Letter and therefore based on the normal usage of any cover email or cover letter for that matter, it is the document referred to in the Plaintiff's Cover Email being the Resignation Letter that takes priority rather than the Plaintiff's Cover Email itself. Secondly, with all due respect to the Plaintiff, it can be argued that the Plaintiff's use of the word, "*staff*" is mere semantics. The facts and circumstances surrounding the Plaintiff's resignation would lean in favour of the argument that by the word, "*staff*", the Plaintiff actually meant his position as a director as well as an employee of the 1st Defendant.

[68] Finally, it was also alleged on behalf of the Plaintiff in paragraph 46, 47 and 48 of the Plaintiff Written Submissions that by virtue of the 1st Defendant's averments in paragraph 19 of the 1st Defendant 1st Affidavit and paragraph 7 of the 1st Defendant's 2nd Affidavit, it is justified that the Plaintiff's Resignation Letter was utilised as a tool to compel the removal of the Plaintiff as a director of the 1st Defendant. As I have already concluded that Plaintiff had voluntarily resigned as both a director and employee of the 1st Defendant the Plaintiff argument here do not hold any weight. The 1st Defendant gave effect to the Resignation Letter and what it said thereafter is a matter *after* the fact. The removal of the Plaintiff as a director is a direct consequence of his resignation. The 1st Defendant's opinion (made

through the averments of the 3rd Defendant) that it is justified for the Plaintiff to be removed as a director of the 1st Defendant is immaterial at this point.

[69] Therefore, based on the aforesaid grounds it is reasonable to conclude that the Plaintiff had voluntarily resigned as a director of the 1st Defendant when he issued the Resignation Letter and that the 1st Defendant did not, as claimed by Plaintiff, "*misappropriate*" the Resignation Letter in removing him as a director.

E2: Whether the Removal of the Plaintiff as Director of the 1st Defendant is Invalid and Contravenes Sections 122(1) and 122(6) of the Companies Act 1965

[70] The Plaintiff argued that even if the Resignation Letter is accepted as a valid notice of his resignation as a director the removal is invalid in any event.

[71] The arguments advanced on the Plaintiff's behalf on this issue can be summarised as follows:

i) The 1st Defendant's AOA read together with the relevant provisions of CA 1965 provides that the 1st Defendant must have a minimum of 2 directors;

ii) Therefore, when the Plaintiff resigned the directorship of the 1st Defendant fell to less than 2 directors and therefore it is invalid.

[72] Sections 122(1) and (6) CA 1965 provides:

*"**Directors***

122(1) ***Every company shall have at least two directors**, who each has his principal or only place of residence within Malaysia.*

122(6) *Notwithstanding anything contained in this Act or in the memorandum or articles of a company or in any agreement with a company, **a director of a company shall not resign or vacate his office** if, **by his resignation or vacation from office**, **the number of directors of the company is reduced below the minimum number** **required by subsection (1)** and any purported resignation or vacation of office in contravention of this section **shall be deemed to be invalid**."*

(own emphasis added)

[73] The provisions of Article 4 of the 1st Defendant's AOA is in line with Sections 122(1) CA 1965 where it states:

*"Until and unless otherwise determined as aforesaid the number of directors **shall be not less than two** and not more than nine.*

(own emphasis added)

[74] The Plaintiff then went on to argue that Article 67 of the 1st Defendant's AOA required an ordinary resolution to be passed at a general meeting for the 1st Defendant to increase or reduce the number of directors in the 1st Defendant.

[75] Article 67 of the 1st Defendant's AOA states:

67. The company may, from time to time by ***ordinary resolution*** *passed at a* ***general meeting, increase or reduce the number of directors,*** *and may also determine in what rotation the increased or reduced number is to go out of office.*

(own emphasis added)

[76] It must be highlighted at this juncture that pursuant to **Article 4** of the 1st Defendant's MOA, the 1st Defendant had adopted Table A of the Fourth Schedule CA 1965. Therefore, Table A of the Fourth Schedule CA 1965 applies to the 1st Defendant's AOA:

"The regulations in ***Table A in the Fourth Schedule*** *to the Act* ***shall apply*** *except so far for those as specified or contained therein in these Articles."*

(own emphasis added)

[77] The Plaintiff's complaint is that:

i) The 1st Defendant ought to have only allowed the Plaintiff to resign (which the Plaintiff is denying in any event) **after** the 1st Defendant had appointed an additional director.

ii) The 1st Defendant breached Sections 122(1) and (6) CA 1965 for **not** calling for a general meeting to reduce the number of directors;

iii) In the event Article 67 of the 1st Defendant's AOA had been complied with the 1st and 2nd Defendants ought to have provided a **notice** of not less than fourteen (14) days to call for a general meeting to convene and address the Plaintiffs alleged resignation.

No such notice to call a meeting was received by the Plaintiff in breach of Section 145(2) CA 1965.

[78] Section 145(2) CA 1965 provides:

"Calling of meetings

145(2) A meeting of a company or of a class of members, other than a meeting for the passing of a special resolution, shall be called by notice in writing of not less than fourteen days or such longer period as is provided in the articles."

[79] The 1st Defendant in their Written Submissions had argued that CA 1965 is not applicable and it is instead CA 2016 that should be applied. However, during oral submissions before me, counsel for the 1st Defendant, Mr Mahendra Mahason, appeared to have dropped this argument.

[80] In any event, insofar as the MOA and AOA of the 1st Defendant are concerned the provisions of Section 619(3) CA 2016 clearly state:

"(3) The memorandum of association and articles of association of an existing company in force and operative ***at the commencement of this Act****, and the provisions of Table A under the* ***Fourth Schedule*** *of the* ***Companies Act 1965*** *if adopted as all or part of the articles of association of a company at the commencement of this Act,* ***shall have effect as if made or adopted under this Act, unless otherwise resolved by the company****."*

(own emphasis added)

[81] Therefore, the Fourth Schedule of CA 1965 shall continue to apply to the 1st Defendant's AOA unless otherwise resolved by the 1st Defendant.

[82] That being the case unless the 1st Defendant's AOA has been amended or changed via resolution by the 1st Defendant the later provisions of CA 2016 will not apply to it.

[83] Reverting back to the Plaintiff's arguments above that there was non-compliance by the 1st Defendant to Article 67 of the 1st Defendant's AOA, contravention of Section 122(1) and (6) CA 1965 and Section 145(2) CA 1965, learned counsel for the 1st Defendant in his oral submissions advanced a simple reply which can be summarised as follows:

i) The 1st Defendant did **not** at any time reduce its directorship below the minimum of 2 directors.

ii) The resignation of the Plaintiff and re-appointment of the 3rd Defendant took place **simultaneously**.

iii) There is no requirement under the 1st Defendant's AOA for a resolution to be passed for the resignation and appointment of a new director.

iv) Therefore, there was no breach of Sections 122(1) and (6) CA 1965 and Section 145(2) CA 1965.

[84] Upon closer examination of the 1st Defendant's AOA (the Fourth Schedule of CA 1965) the following relevant applicable provisions

pertaining to the appointment and resignation of a director can be found in Articles 68 and 72:

*"68. The directors shall have **power at any time, and from time to time, to appoint any person to be a director**, either **to fill a casual vacancy** or as an addition to the existing directors, but so that the total number of directors shall not at any time exceed the number fixed in accordance with these regulations. Any director so appointed shall hold office only until the next following annual general meeting, and shall then be eligible for re-election but shall not be taken into account in determining the directors who are to retire by rotation at that meeting."*

*72. The **office of director** shall become **vacant** if the director –*

(a) ceases to be a director by virtue of the Act;
(b) becomes bankrupt or makes any arrangement or composition with his creditors generally;
(c) becomes prohibited from being a director by reason of any order made under the Act;
(d) becomes of unsound mind or a person whose person or estate is liable to be dealt with in any way under the law relating to mental disorder;
*(e) **resigns his office by notice in writing to the company**;*
(f) for more than six months is absent without permission of the directors from meetings of the directors held during that period;
(g) without the consent of the company in general meeting holds any other office of profit under the company except that of managing director or manager; or
(h) is directly or indirectly interested in any contract or proposed contract with the company and fails to declare the nature of his interest in manner required by the Act."

(own emphasis added)

[85] Therefore, on the basis that the Plaintiff had resigned by virtue of the Resignation Letter, then pursuant to Article 68 of the 1st Defendant's AOA the 2nd Defendant can appoint another director to replace the "***casual vacancy"*** arising from the Plaintiff's resignation.

[86] I am mindful of the plurality in the second word in Article 68 that is, the "**directors**" shall have power to appoint. As there must be a minimum of 2 directors in the 1st Defendant at all times the logical inference is that the power is given to **both** the directors and is exercisable by **either** of them.

[87] I arrive at this interpretation also based on the fact that in the event the 1st Defendant only has 2 directors and one ceases to be a director due to reasons under Article 72 which automatically disqualifies him from being a director then it is left to the remaining director to appoint another director. There should be no difference in this interpretation if a director in a company with 2 directors suddenly resigns leaving the remaining director to exercise the power to appoint a replacement director. In this regard, it must be noted that the Resignation Letter states that the Plaintiff's resignation takes effect on, 4.7.2016, the **same date** as the Resignation Letter. It did not provide for a grace period for the Resignation Letter to take effect.

[88] Hence, upon reading Article 68 with Article 72 the logical conclusion is that ***either*** of the directors of the 1st Defendant may exercise the power to appoint another director. The word, "directors" must mean that the AOA confers on both of them the power to do so.

[89] Apart from Article 68, there does not appear to be any requirement in the 1st Defendant's AOA for the calling of a members/shareholders' or directors' meeting before a director can be appointed.

[90] Therefore, after the Plaintiff's resignation, the 2nd Defendant, being the remaining director of the 1st Defendant, is entitled to appoint another director and in this case the 3rd Defendant on 4.7.2016.

[91] Based on the 2 corporate information reports issued by the 3rd Defendant printed on 30.8.2016 and 19.10.2016 ("**SSM Searches**") as exhibited by the Plaintiff in exhibits "AH-2" and "AH-4" in his Affidavit In Support, the removal of the Plaintiff took place on 4.7.2016 and the appointment of the 3rd Defendant also took place on 4.7.2016.

[92] Apart from these SSM Searches there are **no** evidence to show that the 1st Defendant's directorship fell **below** the minimum 2 directors at any time.

[93] In fact these SSM Searches show a simultaneous removal of the Plaintiff as a director and appointment of the 3rd Defendant in his place or arguably vice versa.

[94] This being the case, I am inclined to agree with learned counsel for the 1st Defendant's abovesaid arguments that the 1st Defendant did not contravene Sections 122(1) and (6) CA 1965 and Section 145(2) CA 1965 in that:

i) The 1st Defendant directorship did not fall below the minimum of 2 directors.

ii) The resignation of the Plaintiff and re-appointment of the 3rd Defendant took place simultaneously.

iii) There is no requirement under the 1st Defendant's AOA for any resolution to be passed for the resignation and appointment of a new director.

[95] When I raised this issue regarding the simultaneous removal of the 1st Defendant and appointment of the 3rd Defendant with the 4th Defendant, learned counsel for the 4th Defendant, Cik Fadilah Abdul Wahab, agreed that there was no impropriety in doing so and that it is not uncommon in practice. The act is like "swopping" directors.

E3: Whether the 3rd Defendant's Appointment as a Director of the 1st Defendant is in Contravention of Sections 122(1) and 122(6) CA 1965 and Article 67 of the 1st Defendant's AOA

[96] This issue is related to the previous issue under heading E2 above which has already been addressed. For the sake of completeness, the Plaintiff's arguments on this issue are:

i) No notice to convene a general meeting pursuant to Article 67 of the 1st Defendant's AOA was presented to the Plaintiff for the appointment of the 3rd Defendant as the director of the 1st Defendant before the Plaintiff was removed.

ii) No general meeting pursuant to Article 67 of the 1st Defendant's AOA was held to appoint the 3rd Defendant as a director of the 1st Defendant.

iii) There was no ordinary resolution appointing the 3rd Defendant as a director of the 1st Defendant in breach of Article 67 of the 1st Defendant's AOA.

iv) No documentary evidence had been exhibited in both the 1st Defendant's Affidavits to prove that the Plaintiff as a director and majority shareholder of the 1st Defendant consented to the appointment of the 3rd Defendant.

[97] For Article 67 of the 1st Defendant's AOA to apply there must be an increase or reduction in the minimum number of directors of the 1st Defendant thereby necessitating a resolution to be passed. As the 1st Defendant neither increased nor decreased the minimum number of its directors Article 67 is thus not applicable here.

[98] The Plaintiff's consent is also not required for the appointment of the 3rd Defendant as a director of the 1st Defendant as the 2nd Defendant is empowered to appoint him pursuant to Article 68 of the 1st Defendant's AOA as I have dealt with above.

[99] Contrary to the Plaintiff's submission, a resolution is similarly not required in respect of the Plaintiff's resignation. There is no such requirement in the 1st Defendant's AOA and neither has the Plaintiff pointed to one. It therefore also follows that the Plaintiff's consent is not required for the appointment of the 3rd Defendant as a director of the 1st Defendant.

[100] With all due respect to learned counsel for the Plaintiff, his arguments on this issue is without merit and I therefore find that the 3rd Defendant was validly appointed as a director of the 1st Defendant on 4.7.2016.

E4: Whether the 2nd Defendant Can Unilaterally Enforce the Trust Deed to Transfer the 550,000 Shares to the 2nd Defendant

[101] On this issue the Plaintiff argued that no person shall be recognised to hold shares under a trust for other persons and relied on Article 7 of the 1st Defendant's AOA which states:

> *"7. Except as required by law,* ***no person shall be recognized by the company as holding any share upon any trust****, and the* ***company*** *shall not be bound by or be compelled in any way to recognize (even when having notice thereof) any equitable, contingent, future, or partial interest in any share or unit of a share or (except only as by these regulations or by law otherwise provided) any other rights in respect of any share* ***except an absolute right to the entirely*** *thereof in the* ***registered holder****."*
>
> (own emphasis added)

[102] The Plaintiff submitted that the 2nd Defendant's rights as the beneficiary of the Trust Deed is in *personam* between the 2nd Defendant and the Plaintiff and cannot be recognised by the 1st Defendant.

[103] As against this argument, the 1st Defendant argued that the 2nd Defendant affected the transfer the 550,000 Shares by executing the Form 32A based on Clause 9 of the Trust Deed which states:

> *"**9. Transfer of the Said Shares***
>
> *9.1* ***The Trustee shall be desirous of retiring***
>
> *9.2 a bankruptcy petition shall be presented against the Trustee*
>
> *9.3 the trustee shall be unable to pay its debts*
>
> *9.4* ***the Trustee shall no longer be able to act in accordance with the instructions of the Beneficiary***
>
> *then and in such case, the Trustee shall immediately inform the Beneficiary in writing and shall do execute and perform all acts and things necessary and expedient to transfer the Said Shares to either the Beneficiary or any nominee or nominees of the Beneficiary."*

(own emphasis added)

[104] These are in fact matters which the 2nd Defendant should respond to as they would be within his knowledge. This is one of the reasons I had from the beginning highlighted to learned counsel for the Plaintiff the importance of ensuring that the Originating Summons is served on the 2nd Defendant. In this situation the 1st Defendant's role was to merely give effect to the Form 32A by transferring the 550,000 Shares to the 2nd Defendant. It was rightfully an issue between the 2 shareholders.

[105] The Plaintiff had referred to the case of **Lim Chew Yin v Dato Suhaimi Ibrahim & Ors [2011] 5 CLJ 906** where it was held by the High Court:

"[13] Having found a relationship of trust existing between the 1st defendant as a trustee and the plaintiff as a cestuis que trust, counsel for ***the plaintiff urges the court to exercise its power in its equitable jurisdiction to grant an order in terms of prayer (c) & (d) of the plaintiffs statement of claim****. However this would have the effect in law of* ***causing the 2nd defendant to recognize the relationship of trust that existed between the 1st defendant as the Registered Shareholder of the 4th defendant and the plaintiff as the beneficial owner of the shares****. Abdoolcader J (as he then was) in the* ***Federal Court case of Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah [1979] 1 LNS 130; [1979] 2 MLJ at p 240 NB pg 242*** *citing a useful passage from the judgment of* ***Coleridge CJ in Re Perkins ex-parte Mexican Santa Barbara Mining Co*** *and I quote:*

> *"In the first place, it seems to me extremely important not to throw any doubt on the principle that* ***companies have nothing whatever to do with the relation between trustees and their cestuis que trust in respect of the shares of the company. If a trustee is on the company's register as the holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do; they can look only to the man whose name is upon the register****.*

(own emphasis added)

[106] In the present case herein, the transfer of the 550,000 Shares to the 2nd Defendant was done by executing the Form 32A which was signed by the Plaintiff. The 1st Defendant is **not** asked to recognise the Trust Deed nor the beneficiary thereunder. That is a matter between the Plaintiff and the 2nd Defendant as shareholders. The 1st Defendant recognised the **transfer** of the 550,000 Shares which was done using the Form 32A.

[107] Therefore, this case is different from the case of **Liew Chew Sin** (supra) and the 1st Defendant had not in any way deviated from the principle in that case. In this regard the passage quoted from **Coleridge CJ** in **Re Perkins ex-parte Mexican Santa Barbara Mining Co** is clear in that a company "*can look only to the man whose name is upon the register*".

[108] Thus, after the execution of the Form 32A the 1st Defendant recognised the 2nd Defendant as, "***the man whose name is upon the register***".

[109] In **Liew Chew Sin** (supra) the High Court was asked to give effect to the trust existing between the 1st defendant therein as a trustee and the plaintiff there as a *cestuis que trust*. This is not the case here where the transfer of the 550,000 Shares had already been affected by way of the Form 32A.

[110] The other cases relied on by the Plaintiff, the Federal Court case of **Yeng Hing Enterprise Sdn Bhd v Liow Su Fah [1979] 2 MLJ 240** and Court of Appeal case of **Rahaz Sdn Bhd v Faston Group Ltd & Ors and Other Appeals [2010] 1 MLJ 69**, both on this same issue, are also not applicable as they concern the recognition of a company of shares held on trust. The principle that a company only recognises the name of the shareholder on its register is trite and it is not the issue here.

[111] The other issue raised by the Plaintiff is that the transfer of the 550,000 Shares required the Plaintiff's approval pursuant to Article 20 of the 1st Defendant's AOA which states:

> *"20. Subject to these regulations* ***any member may transfer*** *all or any of his shares* ***by instrument in writing*** *in any usual or common form* ***or*** *in any* ***other form*** ***which the directors may approve****. The instrument shall be executed by or on behalf of the transferor and the transferor shall remain the holder of the shares transferred until the transfer is registered and the name of the transferee is entered in the register of members in respect thereof."*
>
> (own emphasis added)

[112] With respect, the Plaintiff's reliance on Article 20 of the 1st Defendant's AOA to say that the transfer of the 550,000 Shares required the Plaintiff's participation as a director is wrongly placed.

[113] It is clear from the wordings of Article 20 of the 1st Defendant's AOA that the transfer of shares of the 1st Defendant can be affected in 2 ways that is, "***by instrument in writing*** *in any usual or common form* ***or*** *in any* ***other form*** ***which the directors may approve***". Form 32A is a specific instrument provided for under CA 1965 and is commonly accepted as the usual method of transfer. Unless the directors of the 1st Defendant had approved for any "other form" for a transfer of shares to be affected then Form 32A under CA 1965 shall apply and does in this case.

[114] Therefore, based on the above reasons, I dismissed the Originating Summons in Enclosure 1 with costs of RM9,000 in respect of the 1st Defendant and costs of RM500 in respect of the 4th Defendant.

Dated this 23rd day of September 2020

-SGD-

WAN MUHAMMAD AMIN BIN WAN YAHYA
Judicial Commissioner
High Court of Malaya,
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- Order 41 Rule 6 Rules of Court 2012
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- Section 145(2) of the Companies Act 1965
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2. *Chung Wai Meng v. Perbadanan Nasional Bhd* [2018] MLRA 331
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12. *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 M LJ 240