IN THE COURT OF APPEAL OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO.: W-02(NCC)(A)-2198-11/2019

BETWEEN

GOLDEN PLUS HOLDINGS BERHAD
(Company No.: 113076-T) ... APPELLANT

AND

TEO SUNG NGIAP
(NRIC NO.: 601017-12-5007) ... RESPONDEN

(Heard together with)

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(Company No.: 113076-T) ... APPELLANT

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TEO SUNG NGIAP
(NRIC NO.: 601017-12-5007) ... RESPONDEN

[In the matter of Originating Summons No.: WA-22NCC-354-07/2019 in the High Court of Malaya at Kuala Lumpur

Between

Golden Plus Holdings Berhad
(Company No.: 113076-T) ... Plaintiff

And

Teo Sung Ngiap
(NRIC No.: 601017-12-5007) ... Defendant]

CORAM:

SURAYA OTHMAN, JCA
VAZEER ALAM MYDIN MEERA, JCA
S. NANTHA BALAN, JCA

JUDGMENT OF THE COURT

Introduction

[1] This is an appeal against the decision of the High Court in Kuala Lumpur dated 15 November 2019 whereby the learned Judicial Commissioner ("**the JC**") dismissed the appellant's *inter partes* application for various injunctive relief ("**the injunction**") and the Originating Summons (Enclosure 1) ("**the OS**"). At the outset, it ought to be mentioned that the OS was predicated on s.333 of the Companies Act 2016 ("**CA 2016**"). The other statutory provisions in the intitulement of the OS are ss.41 and 42 of the Specific Relief Act 1950, Orders 88 and 92 rule 4 of the Rules of Court 2012 ("**ROC**"). The relief sought in the OS and the injunction are identical. The decision of the JC is reported as ***Golden Plus Holdings Berhad v Teo Sung Ngiap*** **[2019] 1 LNS 2145; [2019] AMEJ 1706**. In this judgment, we shall refer to the respondent, Teo Sung Ngiap as "**Jason**".

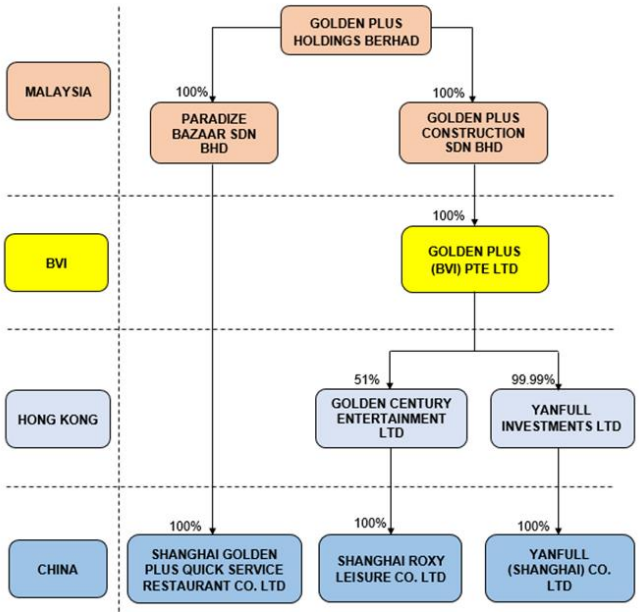
[2] The appellant lodged two appeals, namely Civil Appeal No: W-02(NCC) (A)-2198-11/2019 ("**the OS appeal**") and Civil Appeal No. W-02(NCC) (A)-2199-11/2019 ("**the injunction appeal**"). On 20 July 2020, both appeals came up for hearing.

[3] Counsel for the appellant contended that the OS appeal will determine both appeals. As such, counsel decided to proceed with the OS appeal, whilst not expressly abandoning the injunction appeal. After hearing counsel, we dismissed both appeals. These are the reasons for our decision.

The Corporate Structure

[4] The appellant is a holding company with no operating business of its own. Its business is conducted through its various subsidiaries. The appellant directly held controlling shares in companies which were incorporated in Malaysia and these subsidiaries in turn held controlling shares in companies which were incorporated in the British Virgin Islands ("**BV1**") and in Hong Kong, which in turn held controlling shares in the ultimate companies which are incorporated in the People Republic of China ("**PRC**"). The corporate structure of the appellant and its subsidiaries is as follows:-

GOLDEN PLUS CORPORATE STRUCTURE



[5] Under PRC law, the appellant's indirect subsidiaries in the PRC had to appoint a Legal Representative ("**LR**") for each company. Jason was the LR for the three PRC subsidiaries. Jason had previously been appointed a director of the Malaysian subsidiaries and was also its Corporate Representative ("**CR**").

[6] The appellant's position is that at all material times, Jason was the CR **and** LR of the appellant in the "**Golden Plus Companies**" (as defined in paragraph [10] below). The appellant decided to remove Jason as the CR and LR of the Golden Plus Companies and appointed Teh Wei Kian as the new CR and LR to replace Jason.

[7] From the chart, it can be seen that:-

a. the appellant owns 100% of 2 Malaysian companies, Paradize Bazaar Sdn Bhd and Golden Plus Construction Sdn Bhd;

b. the 2 Malaysian companies are themselves holding companies as well;

c. Paradize Bazaar holds 100% of the shareholding in a PRC company, Shanghai Golden Plus Quick Service Restaurant Co Ltd ("**QSR**") which in turn, operates a restaurant;

d. Golden Plus Construction holds all the shares in a BVI company, Golden Plus (BVI) Pte Ltd, which is also a holding company;

e. Golden Plus (BVI) Pte Ltd in turn, holds:-

i. 51% of Golden Century Entertainment Ltd ("**GCE**") incorporated in Hong Kong, which holds 100% of a PRC company, Shanghai Roxy Leisure Co Ltd ("**SRL**"), which in turn, operates a theme park; and

ii. 99.99% of Yanfull Investment Ltd ("**YIL**") incorporated in Hong Kong, which holds 100% of a Chinese company, Yanfull (Shangai) Co Ltd ("**YSL**"), which in turn, is in the business of property development.

Reason for Jason's ouster

[8] On 29 June 2019, the board of the appellant, as the ultimate holding company, determined that Jason was not acting in the best interest of the Golden Plus Companies. There were allegations of fraud. According to counsel, the appellant does not need to prove its displeasure with Jason to succeed in this appeal. As a result of the appellant's determination, the board resolved in writing to remove Jason from his position as a director as well as CR and LR. This was done by the appellant directly and without the resolutions of the Golden Plus Companies.

The OS

[9] The appellant's follow-up action was to file the OS and the injunction to restrain Jason from holding himself out in those positions and for delivery up of the assets of the companies including their books and seals.

[10] The relief sought in the OS are as follows:-

(a) an injunction to restrain Jason, from acting or holding himself out as the CR and LR of the appellant in the following companies (collectively referred to as "**the Golden Plus Companies**"):-

(i) Golden Plus (BVI) Pte Ltd (incorporated in British Virgin Islands);

(ii) Shanghai Golden Plus Quick Service Restaurant Co. Ltd (incorporated in People's Republic of China);

(iii) Golden Century Entertainment Ltd (incorporated in People's Republic of China);

(iv) Shanghai Roxy Leisure Co. Ltd (incorporated in People's Republic of China);

(v) Yanfull Investments Ltd (incorporated in Hong Kong); and

(vi) Yanfull (Shanghai) Co. Ltd (incorporated in People's Republic of China).

(b) An injunction to restrain Jason from managing the affairs of the Golden Plus Companies;

(c) (i) An Order that Jason must return and deliver up to Teh Wei Kian, the new CR and LR of the appellant in the Golden Plus Companies, all the books, records, bank statements, all seals (including but not limited to common seals, official seals, finance seals and legal representative seals), and stamping tools of the Golden Plus Companies which are in his direct or indirect possession, control or custody; or alternatively

(ii) An Order that Jason be restrained and prohibited from dealing with the books, records, bank statements all seals (including but not limited to common seals, official seals, finance seals and legal representative seals), and stamping tools of the Golden Plus Companies which are in his direct or indirect possession, control or custody;

(d) An Injunction to restrain Jason whether by himself, his nominees, officers, relatives, partners, employees, servants, agents, contractors, representatives or any of them in combination or otherwise howsoever, until further order, forthwith from operating and/or carrying on any business or transaction relating to all the bank accounts of the Golden Plus Companies including issuing any cheques, effecting any transfer and/or opening any banking accounts on behalf of the Golden Plus Companies without the prior written approval of the (appellant) or Teh Weh Kian;

(e) An Injunction to restrain Jason whether by himself, his nominees, officers, relatives, partners, employees, servants, agents, contractors, representatives or any of them in combination or otherwise howsoever, until further order, forthwith from causing the Golden Plus Companies to enter into any further transactions, arrangements or agreements;

(f) An Injunction to restrain Jason whether by himself, his nominees, officers, relatives, partners, employees, servants, agents, contractors, representatives or any of them in combination or otherwise howsoever from destroying and/or tampering with his computers (including laptops, tablets, smartphones and all other electronic devices), records, and documents of the (appellant);

Brief grounds for the OS

[11] Briefly, the grounds for the OS are:-

(i) Jason has been removed as the appellant's CR and LR in the Golden Plus Companies.

(ii) Jason has failed to act in the appellant's best interest by *inter alia*, failing to report and update the appellant's Board of Directors on the true financial affairs and operations of the Golden Plus Companies.

(iii) The appellant recently discovered that there are improprieties and unusual activities in the management of the Golden Plus Companies, whereby *inter alia*, substantial amounts of monies were utilized and paid out purportedly as expenses incurred by Jason.

(iv) Jason has been involved in wrong-doings and has breached his duties owed to the appellant thereby resulting in substantial losses to the appellant, the full extent of which is still subject of on-going investigations.

(v) Jason has committed fraud or caused a fraud to be perpetrated on the appellant.

Chronology of events

[12] The chronology of events are as follows:-

DATE	EVENTS
16.1.1984	The appellant was incorporated under the Companies Act 1965 as a public company.
29.11.1984	The appellant (formerly known as Dayapi Industries (Malaysia) Berhad) was listed on the Main Board of Bursa Malaysia Securities Berhad.
9.5.2012	Tan Say Han was appointed director in the appellant.
2.4.2013	Mohd Salleh bin Lamsin and Adey bin Liun were appointed director in the appellant.
14.4.2016	The appellant was delisted from Bursa Malaysia.
8.12.2017	Jason was appointed as a director of Yanfull Investments Limited, Golden Century Development Entertainment Ltd, Yanfull (Shanghai) Co. Ltd, Shanghai Golden Plus Quick Service Restaurant Co. Ltd.
23.3.2018	Teh Soon Seng (Jason's brother) died.

DATE	EVENTS
7.4.2018	Yanfull Shanghai Co. Ltd and Yanfull Investments Limited appointed Jason as LR of Yanfull (Shanghai) Co. Ltd. Shanghai Roxy Leisure Co. Ltd and Golden Century Entertainment Limited appointed the Jason as LR of Shanghai Roxy Leisure Co. Ltd.
2.5.2018	The appellant appointed Jason as the CR.
28.2.2019 - 20.3.2019	The Draft Management Accounts of the Shanghai Companies and the 2 Hong Kong Companies for the period ending 2018 were submitted to the appellant.
27.5.2019	Tan Say Han and Mohd Salleh bin Lamsin signed off the appellant's Financial Statements for the year ended 31 December 2018
28.6.2019	The appellant's Financial Statements for the year ended 31 December 2018 was tabled and approved at the appellant's Annual General Meeting ("**AGM**").
29.6.2019	The appellant passed a Directors' Resolution to purportedly revoke the appointment of Jason as the CR and LR of the Golden Plus Companies; and to purportedly appoint Teh Wei Kian as the CR and LR of the Golden Plus Companies.
4.7.2019	The appellant filed Originating Summons against Jason in the Kuala Lumpur High Court Originating Summons No.: WA-24NCC-354-07/2019.

DATE	EVENTS
	The appellant applied for an interim injunction against Jason to *inter alia* restrain Jason from acting and holding himself out as the CR and LR of the appellant in the Golden Plus Companies.
8.7.2019	The High Court granted an *ex-parte* interim injunction order to the appellant pending the *inter-partes* hearing of the interim injunction on 18.7.2019.
18.7.2019	The High Court dismissed the appellant's application for *ad interim* injunction and the *inter-partes* hearing for the interim injunction was fixed on 20.9.2019.
15.11.2019	The High Court dismissed the appellant's OS and Interim Injunction application.

The issue

[13] The principal question in the appeal is whether the appellant as a holding company can terminate the appointment of Jason as CR and LR in indirect subsidiaries without the board of those indirect subsidiaries doing so. The appellant's position is that this can be validly done provided they, as the holding company can show that as the ultimate shareholder of these companies its decisions would have been subsequently ratified or that it could have caused the necessary resolutions to be passed by the board of the respective indirect subsidiaries.

Jason's stand

[14] Jason opposed the OS/Injunction and took the position that the only party that could lawfully terminate his position were the subsidiaries themselves and even then, he could not be removed without the PRC subsidiaries being in breach of PRC law.

[15] Jason contended that he is a director of Yanfull Shanghai, Shanghai Roxy Leisure, Shanghai Golden Plus Quick Service Restaurant (collectively "**the 3 Shanghai Companies**"), Golden Century Entertainment and Yanfull Investments. Save for the 3 Shanghai Companies, Jason asserted that he is not the LR of the Golden Plus Companies. He was merely appointed by the appellant as CR of the Golden Plus Companies and that his appointment as LR of the 3 Shanghai Companies was pursuant to the laws of the PRC, the Articles of Association of the 3 Shanghai Companies and with the mandate and authorization of the shareholders of those companies. Jason also contended that he is neither a director nor shareholder of Golden Plus (BVI). Jason maintained that the OS is an abuse of process as the appellant has no *locus standi* to seek for an injunction as they are not a member nor a shareholder of the 3 Shanghai Companies. Essentially, it was submitted on behalf of Jason that through the acts of purportedly issuing non-binding resolutions in Malaysia the appellant is wrongfully interfering with the internal management of the 3 Shanghai Companies by side stepping proper corporate procedures of obtaining the necessary resolutions from the shareholders and the Board of Directors of the 3 Shanghai Companies.

High Court's decision

[16] Jason's arguments found favour with the JC. On 15 November the JC dismissed the injunction and the OS. The relevant parts of the JC's grounds of judgment which supported the arguments that were made on behalf of Jason are:

> "[26] It is on this reason that this Court finds favour in the argument by the Defendant that the appointment of a LR must be made by the BOD of each of the Shanghai companies. The LR being the only recognised officer of the company to deal and run the company, must be someone that the board must approve of. The Defendant exhibited his appointment as LR by the 3 Shanghai Companies as found in his Affidavit In Reply at Exhibits 'TSN-1" and "TSN-2". These letters of appointment clearly support the contention of the Defendant that the LOA issued by the Plaintiff has no standing. As such, the revocation of the LOA on 29.6.2019 by the Plaintiff's BOD has no bearing to the Defendant's appointment as the LR of the Shanghai Companies.
>
> b) Whether the Plaintiff has the right to remove the Defendant as LR i.e. issue of locus standi
>
> [27] The six (6) Golden Plus Companies that were mentioned in the LOA are separate legal entities. They are governed by their own board of directors. It was also brought to the attention of this Court that the Plaintiff is not a member of any of the Golden Plus Companies. Accordingly, the resolution of the Plaintiff BOD cannot bind the Golden Plus Companies.
>
> [28] The Plaintiff's BOD resolution to remove the Defendant as LR has no effect in law on the Defendant or the 3 Shanghai Companies. It also inevitably means that the Plaintiff has also no right to demand that the seals, books and records of the 3 Shanghai Companies.
>
> [29] The injunction seeks to have the said seals, books and records of the 3 Shanghai Companies delivered by the Defendant to the Plaintiff. Such acts, if done by the Defendant would incapacitate the companies. It would also expose the Defendant to breaches of Chinese laws as it effectively means taking away company property and propriety information.

[30] This follows that the Plaintiff has no right to refrain the Defendant from managing the affairs of the Golden Plus Companies in particular the 3 Shanghai Companies. It is only the 3 Shanghai Companies that have the right to remove the Defendant from acting as the LR and subsequently bar him from managing the affairs of the said companies.

[31] In *Abdul Rahman Aki v. Kerubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551; [1995] 3 MLJ 417, the Court of Appeal outlined affirmatively the proper plaintiff principle as enunciated in *Foss v. Harbottle* [1843] 67 ER 189. Gopal Sri Ram JCA held as follows:

> "We begin with the rule in *Foss v. Harbottle* [1843] 67 ER 189. The rule has two limbs. The first limb of the rule - and the present appeal has nothing to do with its application - is that a Court will not interfere with the internal workings of a corporation upon a matter which is capable of being ratified by a majority of shareholders present and voting at a general meeting of the company. The content of the first limb, although it derives its name from the case just cited, in truth finds its origins in the earlier decision in *Mozley v. Alston* [1847] 41 ER 833. The modern restatement of the rule is to be found in the judgment of Harman LJ in *Bamford v. Bamford* [1970] Ch. 212.
>
> The second limb of the rule is of much wider purport and is universal in its application. It is based upon the doctrine that only he who has been injured may sue. Translated into company law, the proposition may be stated thus. If a wrong has been done to a company, then it is the company which is the proper plaintiff in an action brought to redress the injury. An individual shareholder or even a group of shareholders forming a minority on the floor of a general meeting of the company have no locus standi to bring an action to remedy a wrong done to a company. See *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* [1982] Ch. 204. Perhaps the clearest statement of the rule is to be found in the judgment of Jenkins LJ in *Edwards v. Halliwell* [1950] 2 All ER 1064, 1066:
>
> > The rule in *Foss v. Harbottle,* as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself.

> Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*."
>
> (Emphasis added)

[32] Although the above case involves a derivative action, nonetheless, the principles remain relevant.

[33] It is trite law that the holding company and its wholly owned subsidiary are separate legal entities. The board resolution of the holding company cannot bind the subsidiary company as each company are separate legal entities (See *Tan Sri Tajuddin Ramli v. Rego Multi-Traders Sdn Bhd* [2018] 7 CLJ 197).

[34] From the above analysis, it is the finding of this Court that the Defendant was only appointed as a CR for the Plaintiff in the Golden Plus Companies. He was not appointed as LR to the said companies, in particular the 3 Shanghai Companies. Any resolution passed by the Plaintiff's BOD cannot bind the 3 Shanghai Companies. The Plaintiff therefore has no right to restrain the Defendant from acting as the LR as it was solely the prerogative of the 3 Shanghai Companies. More importantly, the Plaintiff has no *locus standi* to demand that the Defendant be restrained from functioning as LR and demand the production of the seals, books and records of the 3 Shanghai Companies."

The appellant's arguments

[17] The appellant contends that the JC erred in holding that Jason could only be removed by the indirect companies and that no injunction should lie given the potential that the PRC subsidiaries companies would be in breach of PRC law. It was contended that the JC erred in failing to appreciate that Jason was undoubtedly appointed to his various positions in the indirect subsidiaries by the appellant or with the appellant's concurrence. As such, Jason could only remain in those position so long as the appellant desired.

[18] It was also contended that the JC erred in failing to hold that whether the subsidiaries were in breach of PRC law is not an impediment and cannot prevent the removal of Jason who is an alleged defaulting director or LR.

[19] Counsel for the appellant pointed to the fact that the legal position under PRC law was confirmed by expert evidence where it was opined that the 3 Shanghai Companies would not incur criminal liabilities due to the removal of a LR alone.

[20] It was emphasized that the appellant's business is conducted through the 3 Shanghai Companies. The appellant is the ultimate holding company of the 3 Shanghai Companies and that its shareholding is sufficient for it to irrefutably command the majority of the voting rights in any of the subsidiaries. It was argued that the appellant can exercise its majority control in all of these subsidiaries including the 3 Shanghai Companies, to appoint and remove directors. Counsel referred to the decision of Jonathan Parker J in ***Re Astec (BSR) plc*** **[1998] 5 WLUK 106**; **[1999] B.C.C. 59; [1998] 2 B.C.L.C. 556** at page 586 where he said,

> "In the instant case the power expressly given to shareholders under the company's articles of association to appoint and remove directors and appoint others in their place has to be considered in the light of the above authorities. **The exercise by a majority shareholder of his right to vote at a general meeting for the removal or appointment of directors is the exercise of his private right, which is neither conduct of the affairs of the company nor an act of the company**. In my judgment it is only in exceptional cases where some special circumstances exist that the resolution which results from the exercise of such private voting rights can give rise to any complaint under s.459. In this connection I have already noted that there is no allegation in the petition that Emerson exercised its voting rights in bad faith.

…

> So far as the appointment of directors is concerned, **there is no legal impediment to a majority shareholder appointing persons connected with it to hold office as director of a subsidiary company, whether that subsidiary is wholly-owned or partly owned.** Likewise there is no legal impediment to persons connected with a majority shareholder accepting office as such directors. Having accepted office they are subject to the same fiduciary duties; as the other directors."

[**Emphasis** added]

[21] At the time the action was commenced in the High Court, Jason was a director of the following subsidiaries:-

a. YIL;
b. QSR;
c. SRL; and
d. YSL.

He was the sole director of GCE.

[22] It is contended that Jason was appointed to the boards of appellant's subsidiaries with the appellant's concurrence. This is apparent merely from the appellant's direct and indirect shareholding in these subsidiaries. Counsel for the appellant said that no director of the subsidiaries could have been appointed without the appellant's concurrence. Prior to 2 May 2018, Jason was a director of all of these subsidiaries, except for QSR.

[23] On 2 May 2018, the appellant appointed Jason as its CR and his appointment was described as such:-

> "Corporate Representative of [the appellant's] investment in the People's Republic of China ("China"), in particular the following:-

(a) Golden Plus (BVI) Pte Ltd
(b) [GCE]
(c) [SRL]
(d) [YIL]
(e) [YSL]
(f) All other companies that will be set up in the People's Republic of China to support the operations and businesses of the companies listed under (a) to (e) above."

[24] While the appointment was made on 2 May 2018, by the appellant's Directors' Resolution in writing dated 2 May 2018 that appointment was to take retrospective effect from 23 March 2018.

[25] Jason's appointment as the appellant's CR arose because of the untimely demise of the previous CR, the late Teh Soon Seng, who was Jason's elder brother. The late Teh Soon Seng died on 23 March 2018. The scope and responsibilities of Jason's appointment were similar to that of the late Teh Soon Seng. The duties and the responsibilities of the CR as provided in both the letters of appointment are as follows:-

"Your duties and responsibilities shall include but not limited to the following:

(a) Devote your time and attention to the business of the Group in China and shall at all time use your best endeavours to promote the interest and welfare of [the appellant's] investments in China;

(b) Exercise and carry out all such powers and duties and shall observe all such directions and instructions as the Board of Directors may from time to time confer and impose;

(c) Oversee the overalls (sic) operations of and protect the interests of [the appellant's] investment in China."

[26] It was submitted that the CR is the appellant's agent to manage the appellant business in PRC. The CR reports directly to the appellant's board and QSR, YSL and SRL being companies incorporated in PRC, require a person to be named as the LR. The late Teh Soon Seng was the LR of these companies before being replaced by Jason. While the appellant belatedly found out that Jason caused his own appointment as the LR of YSL and SRL in April 2018 i.e. before his appointment as the CR was finalised on 2 May 2018, nothing turns on this given that his appointment as the CR took retrospective effect from 23 March 2018. At the time, the appellant did not object to Jason's appointment as the LR of these companies.

[27] While the LR holds wide powers, such appointment may be terminated by the boards of these companies. In this regard, it was Jason's contention that his appointment as these companies LR may only be terminated by the boards of these companies.

[28] It was accordingly argued for the appellant that Jason's appointment both as the CR and the LR constituted him an agent of both the appellant and its subsidiaries. (See: ***Meridian Global Funds Asia Ltd v Securities Commission*** **[1995] 2 AC 500** at page 506-507)

Jason's Ouster

[29] On 29 June 2019, the appellant decided to terminate Jason's appointment as the CR and LR and director of:-

a. Golden Plus (BVI) Pte Ltd;

b. QSR;
c. GCE;
d. SRL;
e. YIL; and
f. YSL.

[30] On the same day, Teh Wei Kian was appointed to be the new CR and LR of, *inter alia*, the same companies from which Jason was ousted.

[31] The OS was filed on 4 July 2019 to essentially restrain Jason from acting as the appellant's CR and LR given his ouster and for Jason to return to the appellant all the paraphernalia of the subsidiaries, including the common and official seals that he has in possession, control or custody.

[32] Subsequent to the commencement of the OS, the appellant took steps to ratify its decision to terminate Jason from YSL and QSR in the following way:-

a. In respect of YSL, the board of its immediate holding company, YIL, at a board meeting held on 15 July 2019, resolved to inter alia remove Jason as the LR, Chairman and director of YSL, to be replaced by Teh Wei Kian. This was ratified on 18 August 2019.

b. This was followed by the Notice of Dismissal dated 16 July 2019 by YIL, dismissing Jason as the Chairman/LR of YSL.

c. In respect of QSR, the board of its immediate holding company, Paradise Bazaar, passed a directors' resolution on 26 August 2019 to remove Jason as the director, Chairman, CR and LR of QSR to be replaced by Teh Wei Kian.

d. This was followed by the issuance of the Dismissal Letter dated 27 August 2019 by Paradize Bazaar, dismissing Jason as the Chairman/LR of QSR.

[33] This left only one company, namely SRL that had not formally ratified the decision of the appellant. Counsel said that nothing turns on this. According to the appellant, the relevant question is whether the appellant has the right to directly terminate Jason as the CR and the LR. Insofar as it relates to his position as CR, it is clear that the appellant can do so given that he was appointed by the appellant to that position.

[34] Counsel said that the answer to the question whether the appellant has the right to directly terminate Jason as the LR, is to be found in the corporate structure of the appellant's group. In this regard, counsel for the appellant said that the only question is whether the subsidiaries could subsequently ratify the decision of the appellant.

[35] He said that this is a matter of pure mathematics and that it can be shown that as a matter of mathematics the appellant controls the shareholding in each of the subsidiaries involved to the extent that it can get its decision ratified. As such, the law will not require the appellant to have to satisfy purely technical requirements before it is entitled to exercise its will.

[36] Counsel said that against the backdrop of the allegations relating to Jason, the appellant needed to act quickly to remove Jason and appoint someone in his stead. It also needed to secure the assets of its subsidiaries, in particular the seals, which were in Jason's possession.

[37] It was submitted that the appellant acted out of necessity in the manner as described by VC George J (as he then was) in ***Avel Consultants Sdn Bhd & Anor v Mohd Zain Yusof & Ors*** **[1984] 1 CLJ (Rep) 482** (p. 486 & p. 487);

> "It seems to me that the doctrine of Agency of Necessity is not without application in this case. In Halsbury's Laws of England 3rd Edn. Vol. 1 p. 157 para. 373 deals with the application of the doctrine, portions of which read as follows:
>
> > Agency of necessity arises wherever a duty is imposed upon a person to act on behalf of another apart from contract, and in circumstances of emergency, in order to prevent irreparable injury. It may also arise where a person carries out the legal or moral duties of another in the absence or default of that other, or acts in his interest to preserve his property from destruction.
> >
> > The conditions which entitle an agent to exceed his authority under the doctrine of necessity are (1) that he could not communicate with his principal; (2) that the course he took was necessary in the sense that it was in the circumstances the only reasonable and prudent course to take; and (3) that he acted bona fide in the interest of the parties concerned. At the same time, though a strong case is required, it is not essential that any other course shall be an impossibility."

[38] This aside, the law also recognises that where "one can forecast with certainty the outcome, the court is not in the business of making people jump through unnecessary hoops and therefore you will not wait for the outcome of a preordained meeting." Counsel referred to ***Breckland Group Holdings Ltd v London & Suffolk Properties Ltd*** **[1989] BCLC 100** ("***Breckland***") at page 103.

[39] In the present case, counsel said that it is certain that Jason can be removed as the LR upon the appellant exercising its majority control over its subsidiaries. Thus, it was argued that the JC erred in concluding that only SRL, YSL and QSR could remove Jason as the LR.

[40] In any event, both YSL and QSR (i.e. 2 of the 3 relevant subsidiaries) had removed Jason as the LR and what was left to be done was only the registration of the removal which axiomatically could not be done because Jason himself had possession of the seals. Thus, YSL and QSR had, in effect ratified the decision of the appellant to remove Jason.

[41] According to counsel, doctrinally, ratification occurs where an act is carried out on behalf of a company in an irregular fashion and is subsequently accepted by the company with the act of ratification. So too here, insofar as YSL and QSR are concerned. In so far as SRL is concerned, nothing turns on the fact that the act was not ratified given the legal recognition of majority rule in *Breckland.*

[42] Counsel referred to ***Bowstead and Reynolds on Agency*** **(Article 13, p.54 (17th ed))** which reflects this principle:-

> "Where an act is done purportedly in the name or on behalf of another by a person who has no authority to do that act, the person in whose name or on whose behalf the act is done may, by ratifying the act, make it as valid and effectual, subject to the provisions of Articles 14 to 20, as if it had been originally done by his authority, whether the person doing the act was an agent exceeding his authority, or was a person having no authority to act for him at all."

PRC Law Issue

[43] On the issue relating to PRC law and the removal of Jason as LR under that law, Jason's position was that he could not be removed without YSL, SRL and QSR being in breach of PRC law. To counter this, it was contended that for the appellant this was not an issue that should have merited any consideration insofar as the final relief was concerned. If the subsidiaries were in breach of PRC law, the subsidiaries would have to deal with it. The appellant submitted that even if the subsidiaries would be in breach of PRC law, this cannot be an obstacle to the removal of Jason if the appellant had determined that Jason was not acting in its best interest.

[44] Counsel said that in any event, a law firm in PRC, Messrs Jingtian & Gongcheng had provided an opinion dated 13 August 2019 to the effect that that neither the LR nor the companies he represents, would incur criminal liabilities due to the LR's removal. Thus, it was contended for the appellant that the JC erred in taking this issue into consideration.

Arguments for Jason

[45] In opposing the OS, it was primarily argued by Jason's counsel that the appellant lacked *locus standi*, and its Board of Directors' resolution cannot bind the 6 foreign companies as they are separate legal entities.

[46] It was contended for Jason that the JC had rightly found that the Letter of Appointment dated 2 May 2018 ("**the LOA**") "*did not intend to appoint [Jason] as a LR. The reason was obvious; Section 333 of the Companies Act 2016 only mandates for the appointment of a CR and not LR*."

[47] Counsel said that the OS was predicated on s.333 CA 2016 and the concept of CR and LR are distinct. In this regard, s.333 CA 2016 limits the appellant to the right to appoint a CR only to vote at meetings of Malaysian companies of which the appellant is a member. Counsel emphasized that s.333 CA 2016 does not govern the appointment of a LR in the 3 Shanghai Companies. S.333 reads as:

> "333. Representation of corporations at meetings of members
>
> (1) If a **corporation is a member of a company**, the corporation may **by resolution of its Board** or other governing body **authorize a person or persons to act as its representative or representatives at any meeting of members of the company**.
>
> (2) If the corporation authorizes only one person, the person shall be entitled to exercise the same powers on behalf of the corporation as the corporation could exercise if he was an individual member of the company.

2. Interpretation

“company” means a **company incorporated under this Act** or under any corresponding previous written law;”

[**Emphasis** and **underlining** added]

[48] It was pointed out that none of the 6 foreign companies that are the subject matter of the OS and the injunction are companies incorporated under CA 2016. Further, the appellant is not a member i.e. shareholder, of the 6 foreign companies. Jason is therefore not a CR of the appellant for the 6 foreign companies for the purposes of s.333 CA 2016.

[49] According to counsel, LR is a concept peculiar to PRC law. It relates to only 3 of the 6 foreign companies i.e. Yangfull Shanghai, Shanghai Roxy Leisure and Shanghai Golden Plus Quick Service Restaurant. The LR is a person who engages in civil matter such as the signing of contracts on behalf of the company, and is fully responsible for the operation and management of the company in the PRC of China.

[50] Hence, s.333 CA 2016 does not authorise the appointment of a LR under PRC law. Counsel said that the LOA dated 2 May 2018 issued by the appellant is consistent with this position. It only purported to appoint him as CR over the 6 foreign companies. The appellant did not appoint Jason as LR of these companies. Jason was appointed as the LR of the 3 Shanghai Companies by the Board of Directors and shareholders of each of the 3 Shanghai Companies, and not the appellant.

[51] Counsel for Jason also made the following additional points. She said that the appellant was faced with the insurmountable hurdle that they did not appoint Jason as the LR of the 3 Shanghai Companies.

[52] As such, the appellant had to argue in the High Court and again asserted in its Memorandum of Appeal (per item 3) that Jason's appointment as LR should be implied from the appellant's LOA because Jason's duties in the LOA extends beyond attending and voting at meetings. Counsel for Jason said that this argument is untenable because:

(i) this entire action is brought under s.333 CA 2016; and

(ii) Jason has produced the documents evidencing his appointment as LR of the 3 Shanghai Companies by their shareholders and their Boards. In contrast, the appellant has not produced any documents evidencing that Jason was appointed as the LR of the 3 Shanghai Companies by the appellant.

[53] According to counsel, the appellant's LOA does not confer Jason with power to sign cheques, or to manage the affairs of the 3 Shanghai Companies. Instead, it speaks of promoting the appellant's interest and overseeing management.

[54] Hence, the termination of Jason's position as the CR does not derogate from Jason's right to manage, the 3 Shanghai Companies, run their affairs, or use their seal; which are all governed by PRC law. Jason's power as LR is conferred by Board and members of the 3 Shanghai Companies. Thus, the LOA (*which was expressly made subject to prevailing laws and regulations*) cannot now be said to usurp CA 2016 and the corporate laws of PRC.

[55] Hence, it was contended that the JC correctly rejected the appellant's argument and concluded: "*this Court is unable to accept the proposition as it is too convenient an argument. If there was any intent to do so, at least a mention of the term LR must be made in the said LOA. Unfortunately, this was not done so. Asking this Court to read the LOA as impliedly appointing the Defendant as LR is without basis. An important appointment such as a LR must be expressly stated either in the LOA or a fresh document. No such document was produced*."

[56] In so far as *locus standi* is concerned, it was contended on behalf of Jason that the JC rightly found that the 6 foreign companies are separate legal entities that are governed by their own Board of Directors. The appellant is not even a member of the 6 foreign companies. Accordingly, the resolution of the appellant's Board cannot bind the 6 foreign companies.

[57] Counsel said that it is trite law that a holding company, and its wholly owned subsidiaries are separate legal entities. In this regard, in ***Tan Sri Dato' Tajudin Ramli v Rego Multi-Trades Sdn Bhd*** **[2018] 7 CLJ 197**; **[2018] 1 LNS 222**; **[2018] MLJU 147**; **[2018] 2 AMR 912**; **[2018] AMEJ 0119 CA**, Yeoh Wee Siam JCA in delivering the judgment of the Court of Appeal, held that :-

> "[65] **We are in full agreement with the judge who held that TRI, as a holding company, and its wholly-owned subsidiary company, the respondent, are separate legal entities. There is a plethora of cases which have decided that even in a group of companies, each company is a separate legal entity possessed of separate legal rights and liabilities. A board resolution of a parent or holding company cannot bind a subsidiary or wholly-owned company of that parent or holding company.**
> Thus, the directors must approach their duties as directors who recognise the separate legal personality of the two entities. Therefore in our view, the TRI BOD Resolution does not bind the respondent (see para 2.36 of Walter Woon on Company Law, 3rd edn, p. 51, Adams v. Cape Industries Plc [1990] BCLC 479 at p. 508 and 519, Thueringische Faser & Aktiengesellschaft Schwarza v. Bank Of Commerce (M) Berhad [2009] 4 CLJ 102; [2008] MLJU 908, and Lewis Holding Ltd v. Steel & Tube Holdings Ltd [2015] 2 NZLR 83).
>
> [66] The appellant submits that the judge overlooked that all the directors of the respondent were also directors of the TRI at the relevant time, and except for the appellant who had abstained from voting, they had resolved in favour of the Resolution of the TRI BOD.
>
> **In this regard, we are of the firm opinion that notwithstanding that fact, it is still trite law that a holding company (TRI) and its subsidiary (respondent) are separate legal entities. Hence, the TRI BOD Resolution cannot bind the respondent. Therefore TRI, as the holding company, cannot simply write off the debts of its subsidiary company, the respondent, ie, for the amount due to the respondent from Aras Capital."**

[**Emphasis** and **underlining** added]

[58] Thus, based on the principle which was posited by the Court of Appeal in *Tajudin Ramli (supra)*, it was argued that the appellant and the 6 foreign companies are separate entities. Each company operates within the structure of its Board of Directors and shareholders. Further, the appellant is not a member nor a shareholder of these companies. As such, any resolution of the Board of Directors of the appellant, does not bind the 6 foreign companies. Consequently, the purported resolution by the Board of Directors of the appellant to remove Jason as LR has no effect in law on Jason, or on the 3 Shanghai Companies.

[59] Essentially, Jason's counsel contended that the appellant has no power, capacity or right to remove Jason as LR of these companies. Consequently, the appellant does not have the right to demand that Jason should deliver the seals, books of the 3 Shanghai Companies to Teh Wei Kian. It was pointed out that Teh Wei Kian is not even appointed as the LR of the 3 Shanghai Companies.

[60] As such, the appellant has no *locus standi* to restrain Jason from acting as LR of the 3 Shanghai Companies, or to restrain Jason from managing the affairs of the 6 Foreign Companies. In the event the 3 Shanghai Companies demand that Jason should cease acting as LR, then it is for each of the 3 Shanghai Companies to commence appropriate action against Jason in Shanghai.

[61] In this regard, counsel for Jason relied on the following paragraphs from the judgment of Gopal Sri Ram JCA (as His Lordship then was) in ***Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors*** **[1995] 3 MLJ 417**; **[1995] 4 CLJ 551**; **[1995] 3 AMR 305 CA** in relation to the "proper plaintiff" principle:-

> "We begin with the rule in *Foss v Harbottle* (1843) 67 ER 189. The rule has two limbs. The first limb of the rule – and the present appeal has nothing to do with its application – is that a court will not interfere with the internal workings of a corporation upon a matter which is capable of being ratified by a majority of shareholders present and voting at a general meeting of the company. The content of the first limb, although it derives its name from the case just cited, in truth finds its origins in the earlier decision in *Mozley v Alston* (1847) 41 ER 833. The modern restatement of the rule is to be found in the judgment of Harman LJ in *Bamford v Bamford* [1970] Ch 212; [1969] 1 All ER 969; [1969] 2 WLR 1107.
>
> **The second limb of the rule is of much wider purport and is universal in its application. It is based upon the doctrine that only he who has been injured may sue. Translated into company law, the proposition may be stated thus. If a wrong has been done to a company, then it is the company which is the proper plaintiff in an action brought to redress the injury. An individual shareholder or even a group of shareholders forming a minority on the floor of a general meeting of the company have no locus standi to bring an action to remedy a wrong done to a company.** See *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204; [1982] 1 All ER 354; [1982] 2 WLR 31.
>
> **Perhaps the clearest statement of the rule is to be found in the judgment of Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER 1064 at p 1066:**
>
> **The rule in *Foss v Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself.**

> Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*."

[Emphasis and underlining added]

[62] Counsel for Jason emphasized that the appellant's allegations essentially are in respect of the 3 Shanghai Companies. Therefore, as the LR of the 3 Shanghai Companies, Jason is answerable to the Board of those companies and their shareholders and, not the appellant. The appellant is neither the Board of the 3 Shanghai Companies nor their shareholder. As such, any purported improprieties by Jason is a matter for the 3 Shanghai Companies and their Board of Directors to challenge.

Lack of Jurisdiction

[63] Turning next to the issue of jurisdiction, counsel for Jason argued that the lack of jurisdiction has been "*disguised*". According to counsel, the true parties are the 6 foreign companies; and within these, the 3 Shanghai Companies in which Jason is the LR as a matter of PRC law.

[64] However, the appellant seeks delivery of the assets of the 3 Shanghai Companies i.e. their books, assets and seals without making these 3 Shanghai Companies parties to the OS.

[65] Counsel said that Jason is merely an agent of the Hong Kong companies and the 3 Shanghai Companies. And it is trite law that it is the principal who should be sued, if at all, for the appellant's purported loss. In ***T & TT Enterprise Sdn Bhd v Lembaga Pembangunan dan Lindungan Tanah*** **[2009] 2 MLJ 205**; **[2008] MLJU 762 CA**, Low Hop Bing JCA in delivering the judgment of the Court of Appeal held that :-

> "[17] In law, where a party enters into a contract as an agent of the principal, s 179 of the Contracts Act 1950 would apply. Section 179 provides for the enforcement of the agent's contract against the principal in the following words:
>
> > 179 Enforcement and consequences of agent's contracts.
> >
> > Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.
>
> [18] Section 179 renders a principal liable for the act of his agent. As between the principal and third persons, the contract or act of the agent is one which is binding on the principal: see the commentary on s 226 (equipollent to our s 179) Pollock and Mulla on Indian Contracts and Specific Relief Acts, 12th Ed, at p 2290 (see also Bryant, Powis and Bryant Ltd per Lord MacNaghten at p 180).
> [19] In order to successfully invoke the law contained in s 226 in India and in our s 179, it is incumbent on the plaintiff to establish that the defendant is in fact the principal, failing which, the defendant cannot be made liable therefor: see *Watteau v Fenwick* [1893] 1 QB 346 (HC) per Wills J."

[66] Accordingly, since the proper parties are the 6 foreign companies, all of whom are not incorporated under the laws of Malaysia, the Malaysian Courts have no jurisdiction over them. The books and assets subject to the injunction which are sought, are all located outside Malaysia. All the acts complained of occurred outside Malaysia. Hence, the OS was commenced without jurisdiction

[67] Counsel referred to s.23 of the Courts of Judicature Act 1964 in relation to the civil jurisdiction of the High Court. It reads:-

> 23(1) Subject to the limitations contained in Article 128 of the Constitution every High Court shall have jurisdiction to try all civil proceedings where —
>
> (a) the cause of action arose, or
> (b) the defendant or one of several defendants resides or has his place of business, or
> (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
> (d) any land the ownership of which is disputed is situated,
>
> within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

[68] In ***Matchplan (M) Sdn Bhd & Anor v William D Sinrich & Anor*** **[2004] 1 CLJ 810**; **[2004] 2 MLJ 424 CA**, Gopal Sri Ram JCA (he then was) in delivering the majority judgment of the Court of Appeal, summarised the principles governing **jurisdiction** along the following lines :-

> "4 Before dealing with the merits of this appeal, it is appropriate that this opportunity be taken to re-state the principles generally governing jurisdiction in the field of private international law. They are beyond argument.
>
> 5 **To begin with, as a matter of private international law, the High Court in Malaya (and this applies equally to the High Court in Sabah and Sarawak) may entertain an action in personam only if it has jurisdiction to do so.** It is to be emphasized that the expression 'jurisdiction' is one that may be used in a variety of senses and therefore takes its colour from the context of its use (see *Lipohar v The Queen* [1999] 200 CLR 485, at pp 516-517). In the present context, it refers to the authority of the High Court in three senses, namely, jurisdiction over the parties; jurisdiction over the subject matter of the action; and jurisdiction over the cause of action.
>
> 6 First, jurisdiction over parties. The jurisdiction of the High Court is available to any plaintiff, Malaysian or foreign, save an enemy alien in time of war (see *Porter v Freudenberg* [1915] 1 KB 857). Next, any defendant, save those immune from suit, for example, foreign sovereigns, diplomats and other consular officers protected by written law, may be impleaded as a defendant to an action governed by principles of private international law.
>
> 7 Second, jurisdiction over the subject matter of the action. **Here, it is settled by what has come to be known as the rule in the *Mocambique (see British South Africa Company v Companhia de Mocambique* [1893] AC 602) that the High Court has no jurisdiction to adjudicate upon rights of property in or the possession of foreign immovable property even though the parties to the dispute are domiciled or resident in Malaysia (see *Potter v Broken Hill Pty Co Ltd* [1906] 3 CLR 479;*Hesperides Hotels Ltd v Muftizade* [1979] AC 508).**

> **The rule in the *Mocambique* may apply to foreign movable property as well (*seeTyburn Productions Ltd v Conan Doyle* [1991] Ch 75; *Pearce v Ove Arup Partnership* [1997] Ch 293).** However, in personam relief may be decreed in an action relating to foreign property if the defendant is resident within the jurisdiction of the High Court (see *Penn v Lord Baltimore* [1750] 27 ER 1132; *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424).
>
> 8 **Third, jurisdiction over the cause of action. The jurisdiction of the High Court over a cause of action rests on the twin pillars of effectiveness and submission. Effectiveness means that any judgment of the court in the given dispute can be enforced. Submission refers to a defendant submitting to the jurisdiction of the court. Absent either of these, the court cannot seise itself of the cause of action.** In Malaysia, the High Court is seised of jurisdiction over a dispute in any of the following three cases:
>
> (i) where the defendant is served with the writ or other originating process within the jurisdiction; or
> (ii) where any of the conditions set out in s 23 of the Courts of Judicature Act 1964 ('the CJA') are satisfied; or
> (iii) where a plaintiff is able to obtain leave of court to serve a defendant who is outside the jurisdiction of the court pursuant to O 11 of the RHC."

[**Emphasis** added]

[69] Counsel then referred to the appellant's assertion in per item 7 of the Memorandum of Appeal which states that Jason persistently refused to accept his purported termination as the LR of the 3 Shanghai Companies by their direct holding companies. In this regard, Jason had denied the validity of the appellant's resolutions as being invalid and improper and in breach of the provisions of Hong Kong Companies Ordinance and the respective Articles of Association of the shareholders of Yanfull Investments and Golden Century Entertainment.

[70] In any event, the issues relating to the appointment and removal of directors in the Hong Kong companies and the 3 Shanghai Companies, and the LRs in the 3 Shanghai Companies, are governed by Hong Kong and PRC laws respectively, and fall within the jurisdiction of the Courts of Hong Kong and China, and are not matters which fall within the jurisdiction of the Malaysia Courts.

Analysis and findings

[71] We start by referring to the intitulement of the OS which clearly and unmistakably states that the OS is predicated on s.333 CA 2016. There is no other provision of CA 2016 that is relied upon to bolster or support or to give rise to the appellant's claim or cause of action, if any. In this regard, it is instructive to refer to the Court of Appeal's decision in ***Cheow Chew Khoon (T/A Cathay Hotel) v Abdul Johari Bin Abdul Rahman*** **[1995] 1 MLJ 457**; **[1995] 4 CLJ 127**; **[1995] 1 AMR 759 CA,** Gopal Sri Ram JCA at p. 477

> "The plaintiff, as noted earlier, says that if one were to undertake a careful scrutiny of the originating summons and the affidavit in support, one would come to the conclusion that it is not an application made under O 89. The summons does not, as I observed very early in this judgment, state any particular rule of court in its intitulement. Now, I think that that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the court to determine which rule of court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court. It would make a mockery of the principle that there must be no surprise in civil litigation. If the submission of counsel be the law, then it is wrong. But I am firmly of the view that it is not.

> In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved: otherwise it would be an embarrassing pleading and be may be liable to be struck out, unless sooner amended."

[72] As rightly submitted by counsel for Jason, the OS is based on s.333 CA 2016, which only pertains to the appointment of a CR and that too *vis-à-vis* a company in Malaysia in which the appellant is a member. Clearly in the present case, the relief sought are in relation to the purported appointment of CR of companies which are outside the jurisdiction of this Court and plainly outside the ambit of CA 2016. Similarly, since s.333 CA 2016 does not deal with the appointment of LR, it follows that s.333 CA 2016 cannot be relied upon with respect to issues relating to the appointment or removal of Jason as LR. In any event, the LR issue is only with respect to the 3 Shanghai Companies and these are entities which are outside the jurisdiction of the Malaysian Courts.

[73] The appellant's main complaint against Jason is fraud and mismanagement. This was carefully and meticulously analyzed and rejected by the JC. In our view, rightly so. This is further fortified by the appellant's pursuit of the OS appeal rather than the injunction appeal.

[74] In any event, the precise issue that was ventilated by counsel for the appellant in the OS appeal was whether the appellant as the ultimate holding company can terminate the appointment of its CR/LR/agent *vis-à-vis* its ultimate subsidiaries, which are not parties to the OS, and incorporated under foreign law, in this case BVI, HK and PRC. Our immediate response is that the issue is not one which could be simplistically answered through an OS, especially where no declarations in this regard are sought.

[75] The reliefs sought in the OS are mainly injunctive in nature and the orders sought have the effect of dispossessing the assets of foreign companies, and directing the internal affairs and management of these foreign companies, who are not parties to the legal proceedings.

[76] In this regard, it is important to appreciate that as a matter of law, the ultimate holding company *qua* ultimate shareholder has no legal right to the assets of the 3 Shanghai Companies. This is a well-established principle. In ***Pioneer Haven Sdn. Bhd. v Ho Hup Construction Co. Bhd. & Anor and other appeals*** **[2012] 5 CLJ 169; [2012] 3 MLJ 616 CA**, the Court of Appeal said,

> "It is of course trite that the cornerstone of company law is that a company is a separate legal entity from its shareholders. As such, a shareholder cannot claim any right to any asset of the company, for it has no legal or equitable interest therein. (**See *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355**)."

[77] Further, it is trite that the appellant and its indirect subsidiaries, namely the 3 Shanghai Companies are separate legal entities. (See: *Tajudin's* case). Thus, the resolution dated 29 June 2019 by the appellant's Board is in law ineffectual in terms of its legal effect *vis-à-vis* Jason's appointment as the LR of the 3 Shanghai Companies.

[78] Counsel for the appellant said that the appellant, as the ultimate shareholder can somewhat "remotely" make the decision to terminate Jason's appointments in the indirect subsidiaries. Counsel referred to *Re Astec (BSR) Plc* (see paragraph 20 above). We have carefully examined Justice Jonathan Parker's judgment in *Re Astec (BSR) Plc.* We do not see that judgment as suggesting that the separate legal entity principle can be emasculated via a resolution of the ultimate holding company. In our view, the correct legal position is as stated in *Tajudin's* case (*supra*). Tersely put, *Tajudin's* case provides the complete answer to the problem at hand.

[79] Thus, although ultimately the appellant, as the ultimate/indirect shareholder of the 3 Shanghai Companies, will or may be able to remove Jason as the LR or the 3 Shanghai Companies, until such time that it takes place, he remains the LR of these companies, as his removal will have to be in accordance with PRC corporate laws. The suggestion that the appellant's will (per its resolution dated 29 June 2019) should prevail as the outcome is a foregone conclusion (per *Breckland*) is misplaced.

[80] Our view is that the passage in *Breckland's* case which has been relied upon is only part of the picture. The correct position is to be gleaned from a reading of the whole paragraph at p.103 – 104 of the judgment of Harman J. *Breckland* was a case where a majority shareholder attempted to start litigation in the company's name against the managing director. The board challenged the litigation, arguing that the majority shareholder had no authority to do so even with a shareholder resolution. Harman J held that the litigation could not be continued. After noting that the responsibility of the board is collective and not individual and that the power of the board is invested in the board as a whole, he said,

> "One can plainly say that if and when a validly convened general meeting is held one can be sure of what the outcome will be. It would be an affirmative vote in favour of the wishes of Mr. Holmes and Crompton Enterprises. Thus, says Mr. Tuckey, it does not really matter whether the board meeting will or will not come to a conclusion in favour of ratifying and adopting action No. 1951 because **it can be foreseen now that that action will be ratified and adopted at a general meeting when one is properly convened, if necessary, and since one can forecast with certainty the outcome the court is not in the business of making people jump through unnecessary hoops and therefore will not wait for the outcome of a pre-ordained meeting**.
>
> I believe **that is sound argument so far as it goes**. It omits the difficult point of law with which I am faced at 4.20 on a Friday evening; can a general meeting in circumstances of this sort pass a resolution to adopt "material legal proceedings" when by the provisions of art. 80 of the articles of association which govern this company such a matter is within the remit of the board. It is not only placed within the remit of the board by the articles because of some drafting process. **The shareholders' agreement points to the shareholders thinking it was a matter that the board ought to control and consider. What is more the shareholders' agreement points to it being accepted by both parties that consent of both parties to the institution of legal proceedings at a board meeting was a requirement for such valid institution**."

[81] Thus, Harman J gave primacy and importance to the shareholder's agreement. As such, we do not read *Breckland* as supporting the appellant's theory that since the outcome of any shareholders meeting is a certainty or a foregone conclusion, the appellant can by its own Board resolution, by a "remote control" process terminate Jason's appointment as LR in the 3 Shanghai Companies.

[82] Consequently, in our view, Jason's removal as LR of the 3 Shanghai Companies must go through the shareholders and BOD of the respective PRC companies, which were not done when the OS was filed on 4 July 2019. Likewise, Teh Wei Kian was not lawfully appointed as the new LR to replace Jason at that point of time.

[83] As opined by Jason's legal expert (para 13 of the opinion) the removal of Jason as the LR must be done in accordance to PRC law, that is by the shareholders and BOD of each of the companies. In this regard, even if the LOA is to be construed as appointing Jason as the CR/LR of these companies, as contended, such appointment as per the appellant's BOD resolution is still subject to the laws of PRC. Hence, even if an injunction as sought, is to be granted by the court, it would not be of any utility as it would not be binding on the PRC subsidiaries which are all outside the jurisdiction of this Court.

[84] Lastly, it is necessary to state that the matters complained of *vis-à-vis* Jason's conduct as LR of the 3 Shanghai Companies are not within the jurisdiction of this Court and the respective causes of action, if at all, are within the jurisdiction of the court in the PRC (See: *Matchplan (supra*)). The Malaysian courts are therefore not seized of jurisdiction to hear these complaints.

[85] In the present case, we are satisfied that the JC had applied his mind to all the relevant facts and circumstances of the case. He also properly directed himself upon the principles of law that were applicable to the case before him. The appellant has failed to demonstrate any error on the part of the JC.

[86] Based on the grounds as stated above, we are impelled to the conclusion that there are no merits in both appeals and accordingly the appeals are dismissed with costs of RM20,000.00 for each appeal (subject to allocator). The High Court Order dated 15 November 2019 is hereby affirmed.

S. Nantha Balan
Judge
Court of Appeal
Malaysia

Dated 20 July 2020

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Statutes:

Section 333 Companies Act 2016
Section 41 Relief Act 1950
Section 42 Relief Act 1950
Order 88 rule 4 Rules of Court 2012
Order 92 rule 4 Rules of Court 2012
Section 23 Courts of Judicature Act 1964

Cases:

Golden Plus Holdings Berhad v Teo Sung Ngiap [2019] 1 LNS 2145; [2019] AMEJ 1706

Re Astec (BSR) plc [1998] 5 WLUK 106; [1999] B.C.C. 59; [1998] 2 B.C.L.C. 556

Meridian Global Funds Asia Ltd v Securities Commission [1995] 2 AC 500

Avel Consultants Sdn Bhd & Anor v Mohd Zain Yusof & Ors [1984] 1 CLJ (Rep) 482

Breckland Group Holdings Ltd v London & Suffolk Properties Ltd [1989] BCLC 100; [1988] 7 WLUK 279; (1988) 4 B.C.C. 542; [1989] P.C.C. 328; CHD; 22 July 1988

Tan Sri Dato' Tajudin Ramli v Rego Multi-Trades Sdn Bhd [2018] 7 CLJ 197; [2018] 1 LNS 222; [2018] MLJU 147; [2018] 2 AMR 912; [2018] AMEJ 0119 CA

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417; [1995] 4 CLJ 551; [1995] 3 AMR 305 CA

T & TT Enterprise Sdn Bhd v Lembaga Pembangunan dan Lindungan Tanah [2009] 2 MLJ 205; [2008] MLJU 762 CA

Matchplan (M) Sdn Bhd & Anor v William D Sinrich & Anor [2004] 1 CLJ 810; [2004] 2 MLJ 424 CA

Cheow Chew Khoon (T/A Cathay Hotel) v Abdul Johari Bin Abdul Rahman [1995] 1 MLJ 457; [1995] 4 CLJ 127; [1995] 1 AMR 759 CA

Pioneer Haven Sdn. Bhd. v Ho Hup Construction Co. Bhd. & Anor and other appeals [2012] 5 CLJ 169; [2012] 3 MLJ 616 CA