**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR**

**(BAHAGIAN DAGANG)**

**SAMAN PEMULA NO: WA-24NCC-229-06/2020**

Dalam perkara Tiger Synergy Berhad (No. Syarikat: 325631-V)

Dan

Dalam perkara Mesyuarat Agung Tahunan Tiger Synergy Berhad (No. Syarikat: 325631-V)

Dan

Dalam perkara seksyen 208, 346 dan 351 Akta Syarikat 2016

Dan

Dalam perkara Aturan 7 Kaedah 2, Aturan 29, Aturan 88 Kaedah 2 dan Aturan 92 Kaedah 4 Kaedah-Kaedah Mahkamah 2012

Dan

Dalam perkara seksyen 41, 42, 52 dan 53 Akta Relief Spesifik 1950

**ANTARA**

**SAFARI ALLIANCE SDN BHD**
(No. Pendaftaran : 201901021044)
[No. Syarikat : 1330373-A] **… PLAINTIF**

**DAN**

**1. TAN LEE CHIN**
(No. K/P: 691106-05-5102)

**2. DATO' TAN WEI LIAN**
(No. K/P: 681028-05-5561)

**3. DATO' CHUA ENG CHIN**
(No. K/P: 590518-05-5413)

**4. DATO' KHOO SENG HOCK**
(No. K/P: 480729-05-5045)

**5. LOW BOON CHIN**
(No. K/P: 481117-10-5173)

**6. DATIN SEK CHIAN NEE**
(No. K/P: 670809-07-5182)

**7. DATO' LEE YUEN FONG**
(No. K/P: 500111-05-5209)

**8. TIGER SYNERGY BERHAD**
(No. Pendaftaran: 199401039944)
[No. Syarikat: 325631-V] **… DEFENDAN-DEFENDAN**

# JUDGMENT
**(Enclosures 1, 3 and 16)**

**[1]** This was an action by Plaintiff against the Defendants via Originating Summons dated 23.6.2020 for oppression pursuant to section 346 of the Companies Act 2016 ("**CA 2016**") ("**Originating Summons**").

**[2]** In its Originating Summons the Plaintiff sought for a total of 20 declaratory orders and 10 orders consequential to the declarations, not including the sub-prayers, covering about 13 pages of the English version of the Originating Summons.

**[3]** This Originating Summons essentially concerns the decisions made and resolutions passed at the Annual General Meeting of the 8th Defendant held on 9.6.2020 at 11.00 a.m. ("**AGM**").

**[4]** The main declarations sought in this Originating Summons are as follows:

*"1. A declaration that the affairs of the 8th Defendant are being conducted in a manner oppressive to the members of the 8th Defendant;*

*2. A declaration that the following rulings made by the 1st Defendant during the Annual General Meeting **("AGM")** of the 8th Defendant held on 9.6.2020 at 11.00 a.m. whereby the 1st Defendant had:*

*2.1. rejected the proxy form of Tan Say Cheong appointing the Chairman of the meeting to vote on his behalf and carrying the votes for 69,523,800 shares in the 8th Defendant;*

*2.2. rejected the proxy form of Lau Teng Fun & Sons Sdn Bhd appointing the Chairman to vote on its behalf and carrying the votes for 55,400,000 shares in the 8th Defendant;*

*2.3. rejected the proxy form of Koh Pee Seng appointing the Chairman to vote on his behalf and carrying the votes for 1,000,000 shares in the 8th Defendant;*

*2.4. rejected the proxy form of Foo Meng Ju appointing the Chairman to vote on her behalf and carrying the votes for 500,000 shares in the 8th Defendant;*

*2.5. rejected the proxy form of Wong Guang Seng appointing the Chairman to vote on his behalf and carrying the votes for 30,010,000 shares in the 8th Defendant."*

*are null and void and of no effect whatsoever."*

**[5]** The other declarations that were sought are substantially consequential to and arises from the reliefs sought in the above prayers 1 and 2 of this Originating Summons while the other orders sought are essentially a revision of the results of the AGM by reversing their outcome.

**[6]** By way of Notice of Application dated 23.6.2020 ("**Enclosure 3**") the Plaintiff sought, inter alia, the following interim reliefs against the Defendants:

*"1. An order that the 1st to 7th Defendants be prohibited from using the funds of the 8th Defendant in defending this suit and/or any other suit arising therefrom;*

*2. An order that the 8th Defendant be prohibited from issuing and/or allotting new shares pending the disposal of this Originating Summons;"*

**[7]** By way of Notice of Application dated 25.6.2020 ("**Enclosure 16**") the Plaintiff sought, inter alia, the following interim reliefs against the 2nd and 3rd Defendants:

*"1. That the 2nd and 3rd Defendants be and is hereby restrained from acting as or otherwise holding themselves as directors of the 8th Defendant;*

*2. That the 2nd and 3rd Defendants be and is hereby restrained from attending or participating in any board meetings and/or any other affairs of the 8th Defendant;*

*3. An order that the 8th Defendant publish via an announcement made on Bursa Malaysia Securities' website for the making of announcements that the Inter-partes Interim Injunction has been granted within 24 hours from when the Order is pronounced by this Honourable Court;"*

**[8]** An Ex Parte Injunction Order was granted substantially in respect of prayer 1 of Enclosure 3 on 25.6.2020 to restrain the 8th Defendant from issuing and allotting new shares pursuant to Resolution No. 5 passed at the AGM. By consent of parties an Ad Interim Injunction Order was then granted on 7.7.2021 upon essentially the same terms as the Ex Parte Injunction save for reference to Resolution No. 4 instead of 5, until the disposal of Enclosure 3.

**[9]** This Originating Summons was heard together with Enclosures 3 and 16 and the hearing took 2 days to complete. Parties primarily submitted on this Originating Summons as the decision thereof would also dispose of Enclosures 3 and 16.

**[10]** After the conclusion of the hearing I reserved my decision which was then delivered on 9.6.2021 where I dismissed this Originating Summons and accordingly Enclosures 3 and 16. Below are the grounds of my decisions.

## A] SALIENT BACKGROUND FACTS

**[11]** The background facts leading to the AGM and what transpired at the AGM are generally not in dispute.

**[12]** The Plaintiff is substantial shareholder of the 8th Defendant. As at 17.4.2020 to the date this Originating Summons was filed the Plaintiff held 10.922% interest in the 8th Defendant.

**[13]** The 1st Defendant is a director of the 8th Defendant.

**[14]** The 2nd and 3rd Defendants were former directors of the 8th Defendant and were re-elected as directors of the 8th Defendant at the AGM whereas the 4th Defendant was retained as the independent director of the 8th Defendant at the AGM. The Plaintiff sought to invalidate the re-election of the 2nd and 3rd Defendants and the retention of the 4th Defendant in this Originating Summons.

**[15]** The 5th, 6th and 7th Defendants are also directors of the 8th Defendant.

**Events Prior to the AGM**

**[16]** By a notice dated 15.5.2020 the 8th Defendant gave notice of the AGM that is its 24th Annual General Meeting to be held on 9.6.2020 at 11.00 a.m. ("**1st AGM Notice**")

**[17]** The AGM was to be held as a "fully virtual meeting" due to the limitations on physical gatherings as a result of the Conditional Movement Control Order ("**CMCO**").

**[18]** The Plaintiff exercised its right to nominate 5 persons as candidates for directors. In this regard, the Plaintiff issued a Notice of Intention to Propose Director(s) for election pursuant to paragraph 7.28 of the Main Market Listing Requirements and the Constitution of Tiger Synergy Berhad dated 21.5.2020 (8th Defendant) ("**Plaintiff's Notice of Intention**") which was left at the registered address of the 8th Defendant.

**[19]** The individuals nominated by the Plaintiff as candidates for appointment as directors at the AGM were also recently put up for election by the Plaintiff **3 months prior**, during an Extraordinary General Meeting convened by the Plaintiff on 2.3.2020 ("**Safari EGM**"). During the Safari EGM, the shareholders of the 8th Defendant also voted against and rejected the appointment of these proposed individuals as directors of the 8th Defendant.

**[20]** By a letter dated 27.5.2020 to the Plaintiff, the 8th Defendant replied stating that there was an error in the Plaintiff's Notice of Intention and also required a sum of RM 59,150.00 to be paid.

**[21]** By another letter dated 28.5.2020, the 8th Defendant wrote to the Plaintiff requesting that the Plaintiff issue the revised Plaintiff's Notice of Intention by 5pm, 28.5.2020. This letter was received by the Plaintiff via email at 1.16pm on 28.5.2020.

**[22]** By a letter dated 28.5.2020, the Plaintiff replied to the 8th Defendant stating that there was an inadvertent typographical error in the 6th line of paragraph 1 of the Plaintiff's Notice of Intention, wherein the time of the AGM should read as 11am and not 10am as inadvertently stated.

**[23]** The 8th Defendant had required the payment of RM59,150.00 pursuant to Article 72A of the Articles of Association of the 8th Defendant.

**[24]** The Plaintiff replied and forwarded a Malayan Banking Berhad Banker's Cheque No (033445) dated 29.5.2020 for the sum of RM59,150.00 and reserved its right to require the 8th Defendant to account for the cost of printing, mailing, postage, label and the insertion costs in respect of the Plaintiff's Notice of Intention.

**[25]** By an announcement dated 29.5.2020, the 8th Defendant announced that new resolutions will be added to the AGM. By the same announcement, the 8th Defendant attached a Revised Notice of AGM and a revised proxy form ("**2nd AGM Notice**"). The 2nd AGM Notice and revised proxy form was also circulated by post to shareholders.

**[26]** The 2nd AGM Notice was issued as a result of the Plaintiff's Notice of Intention, as subsequently rectified upon the 8th Defendant's notification that the said notice contains an error as to the time of the AGM.

**Plaintiff's Request to Appoint its Own Additional Scrutineer**

**[27]** By a notice dated 22.5.2020, the Plaintiff requested that it be allowed to appoint a scrutineer.

**[28]** By a letter dated 28.5.2020, the 8th Defendant declined the Plaintiff's request to appoint an additional independent scrutineer for the AGM.

**[29]** By Kuala Lumpur High Court Originating Summons WA-24NCC-194-06/2020 ("**OS 194**") dated 29.5.2020, the Plaintiff amongst others, applied to appoint an independent scrutineer to inquire into and to verify the processes of AGM of the 8th Defendant on 9.6.2020.

**[30]** OS 194 was dismissed with costs on 4.6.2020.

**The Digital Ballot Form ("DBF")**

**[31]** Shareholders who wish to attend the AGM were directed to register online. An addendum to the Notice of AGM sets out the administrative details of the meeting.

**[32]** Shareholders who wish to appoint a proxy are required to physically submit a proxy form at the registered office of the 8th Defendant.

**[33]** Shareholders and proxies of shareholders who wish to attend the virtual meeting are required to register for the Digital Ballot Form ("**DBF**"). Instructions will be given via email to shareholder or the shareholder's proxy.

**[34]** Proxies are given a PDF document that contains links to join the webinar or the video footage and participation of the AGM and a link to the voting

page. The link will take the proxy to a pre-filled in ballot form where the voting direction of the shareholder had already been followed. This is the DBF. The proxy's only task is to electronically submit the DBF and the proxy has no discretion or liberty to amend the voting directions contained in the form.

**[35]** Mega Corporate Services Sdn. Bhd. ("**Mega**") was appointed as the poll administrator ("**Poll Administrator**") for the AGM and the DBF was operated by Mega at the AGM.

**The AGM on 9.6.2020**

**[36]** At the commencement of the AGM of the 8th Defendant on 9.6.2020, the 1st Defendant announced that she was the Chairman of the meeting. The 1st Defendant, as the Deputy Chairman of the Board of Directors of the 8th Defendant, presided as Chairman of the AGM in accordance with Article 54 of the 8th Defendant's Articles of Association ("**8th Defendant's Articles**"), as the 2nd Defendant, as Chairman of the 8th Defendant's Board of Directors, did not act as the Chairman of the AGM.

**[37]** The 1st Defendant then immediately announced that 5 proxy forms were rejected ("**Impugned Proxy Forms**"), the brief details of which are as follows:

| Name of Shareholder | No. of Shares |
|---|---|
| Tan Say Cheong | 69,523,800 |
| Lau Teng Fun & Sons Sdn Bhd | 55,400,000 |
| Koh Pee Seng | 1,000,000 |
| Foo Meng Ju | 500,000 |
| Wong Guang Seng | 30,010,000 |
| | **156,433,800** |

**[38]** The Impugned Proxy Forms were rejected by the 1st Defendant as they were said to be "defective" in that no individuals were named as proxy nor was the Chairman of the meeting named as the proxy in the Impugned Proxy Forms. This decision by the 1st Defendant is a one of the grounds raised by the Plaintiff in this Originating Summons and will be dealt with in greater detail later in this judgment.

**[39]** The 8th Defendant has a total of 1,464,710,583 issued shares, which is referred to at pages 155 of its 2019 Annual Report. The Rejected Proxy Forms carried with them 156,433,800 shares, which represents around 10.68% of the total voting rights of the 8th Defendant.

**[40]** The 8th Defendant has a total of 1,398,460,584 issued shares, which is referred to at pages 122 of the 2019 Annual Report. The Rejected Proxy Forms carried with them 156,433,800 shares, which represents around 11.186% of the total voting rights of the 8th Defendant according to this total.

**[41]** As at 5.5.2020, the total issued shares of the 8th Defendant amounts to 1,464,710,583 ordinary shares.

**[42]** As a result of the rejection of the Impugned Proxy Forms, the votes of the affected shareholders were removed. These shareholders were not parties to this Originating Summons.

**[43]** The brief result of the AGM in respect of **Resolutions No. 1 to 5** and special resolution tabled and voted at the AGM are as follows:

i) Resolution No. 1: to approve the payment of directors' meeting allowance - carried;

ii) Resolution No. 2: to re-elect the 2nd Defendant - carried;

iii) Resolution No. 3: to re-elect the 3rd Defendant - carried;

iv) Resolution No. 4: authority to allot shares pursuant to Section 75(1) of the CA 2016 - carried;

v) Resolution No. 5: to retain the 4th Defendant as the independent director of the 8th Defendant – carried; and

vi) Special Resolution: to adopt a new constitution - not carried.

**[44]** The Plaintiff's votes were taken into account in respect of Resolutions No. 1 to 5 above.

**[45]** During the progress of the AGM on 9.6.2020, the 1st Defendant unilaterally withdrew Proposed Resolutions No. 6 to 11, which are resolutions for the election of the following persons as directors:

i) Goh Ching Mun;

ii) Tan Say Cheong;

iii) Leong Keng Wai;

iv) Ng Leong Teck;

v) Azmi bin Osman; and

vi) Yeoh Lam Huat.

**[46]** The 1st Defendant had during the course of the AGM on 9.6.2020 answered that the decision to withdraw Proposed Resolutions No. 6 to 11 was made on 8.6.2020. The 1st Defendant did so based on the advice of Messrs Sanjay Mohan and exercised her discretion as the Chairman of the meeting.

**[47]** The 1st Defendant withdrew and did not allow for Proposed Resolutions No. 6 to 11 to be put to a vote at the AGM as they did not comply with section 201 CA 2016. This is another matter of contention.

## B] LEGAL PRINCIPLES ON OPPRESSION UNDER S. 346 CA 2016

**[48]** This Originating Summons is premised on **section 346 CA 2016** which is in *pari materia* with **section 181 of the Companies Act 965**. Section 346 CA 2016 provides as follows:

> *1) Any member or debenture holder of a company may apply to the Court for an order under this section on the ground —*
>
> *a) that the **affairs of the company** are being conducted **or** the **powers of the directors** are being exercised in a **manner oppressive to one or more of the members** or debenture holders including himself or **in disregard of his or their interests as members, shareholders** or debenture holders of the company; or*
>
> *b) that **some act of the company** has been done or is threatened or that some resolution of the members, debenture holders or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including himself.*
>
> (own emphasis added)

**[49]** In the *locus classicus* case of **Re Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. King Beng Sung [1978] 2 MLJ 227**, a case commonly cited in cases involving oppression, the Privy Council speaking through Lord Wilberforce held as follows:

> *"Secondly, for the case to be brought within section 181(l)(a) at all, **the complaint must identify and prove "oppression" or "disregard"**. **The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough**. Those who take interests in companies limited by shares have to accept majority rule. **It is only when majority rule passes over into rule***

***oppressive*** ***of the minority, or in*** ***disregard*** ***of their interests, that the section can be invoked. As was said in a decision upon the United Kingdom section*** ***there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play*** ***which a shareholder is entitled to expect before a case of oppression can be made*** *(Elder v Elder & Watson Ltd 1952 SC 49): their Lordships would place the emphasis on "visible". And similarly "****disregard****" involves something* ***more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure*** *(per Lord Clyde in Thompson v Drysdale 1925 SC 311 315). Neither "****oppression****" nor "****disregard****"* ***need be shown by a use of the majority's voting power to vote down the minority****: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line."*

(own emphasis added)

**[50]** Therefore, based on **Re Kong Thai** (supra) the Plaintiff must prove that the affairs of the 8th Defendant (company) are being conducted in a manner oppressive to and/or in disregard of the Plaintiff's interest qua shareholder.

**[51]** In this regard, the principle of oppression qua shareholder or member is further explained in the case of **Khor Lye Hock & Anor v. Makassar Engineering & Construction Sdn Bhd & Ors [2011] 8 CLJ 476** where it was held:

*"[10] It is a principle of the law relating to the grant of relief under s. 181 that* ***mismanagement in itself is not actionable****. Disputes relating to policy or management do not entitle a member to relief under the section.* ***More significantly the oppression in question must affect the petitioning member qua member****. The acts complained of* ***must affect the member in his capacity as a member****, (see Re Chi Liung & Son Ltd; Tong Chong Fah v. Tong Lee Hwa & Ors [1967] 1 LNS 145 and In The Matter Of Tong Eng Sdn Bhd [1994] 2 CLJ 775 per*

*Selventhiranathan J. Prayer (a): This prayer relates to the removal of P1 as a Managing Director. It seeks to cancel the resolution dated 15 May 2009 that removed P1 as Managing Director. The complaint here and relief sought relates to P1's contractual position as Managing Director. It does not relate to his rights as a member. The Board of Directors, moreover is empowered under art. 91 of Table A to remove P1. It is significant that he has not been removed as a director nor has any attempt been made to adversely affect his shareholding. ….."*

(own emphasis added)

**[52]** In **Pan-Pacific Construction v. Ngiu Kee Corp [2010] 6 CLJ 7218**, the Federal Court summarised the position of the law on oppression based on section 181 CA 1965 and identified 4 categories of conduct and how they corelated to the concept of "unfairness" as the basic theme:

*"[25] Therefore, in order to succeed in its petition pursuant to s. 181 the petitioner has to establish and 'must eminently be determined according to the facts' of this case that* ***the affairs of the company are being conducted or that the powers of the directors*** *are being exercised* ***in an oppressive manner*** *or* ***in disregard of its interests****, or to its prejudice some* ***unfairly discriminatory or prejudicial act*** *of the company has been* ***done or threatened****, or that some resolutions of the members, debenture holders or any class of them has been passed or is proposed to be passed.*

*[26] In other words s. 181 permits judicial remedy on* ***four categories of conduct****, namely,* ***oppressive*** *conduct, conduct in* ***disregard of interests****,* ***unfairly discriminatory*** *conduct or* ***prejudicial conduct****.*

*[27] It may also be noted that from the wordings of s. 181* ***its basic theme is 'unfairness'****. However, unfairness 'does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. "The court … has a very wide discretion, but it does no sit under a palm tree'". (See:* O'Neil v. Philips *[1999] 2 All ER 961).*

*[28] In* Re Saul D Harrison & Sons plc *[1995] 1 BCLC it was explained (Hoffmann LJ [as he then was]) that in 'deciding what is fair or unfair for the purposes of s. 459, it is important to have in mind that* ***fairness is being used in the context of a commercial relationship****. The articles of association are just what their name implies: the contractual terms which govern the relationships of the shareholders with the company and each other. They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case under s. 459 will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association … The answer to this question often turns on the fact that the powers which the shareholders have entrusted to the board are fiduciary powers, which must be exercised for the benefit of the company as a whole … But the fact that the board are protected by the principle of majority rule does not necessarily prevent their conduct from being unfair within the meaning of s. 459'.*

*[29] Thus, in* Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] *1 LNS 170 the term 'disregard of interests' is to be understood to mean 'unfair disregard' while 'oppression' denotes an 'unfairly prejudicial conduct' which means a conduct 'departing from standards of fair dealing and a violation of conditions of fair play'. But 'a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted'. And 'trivial or technical infringements of the articles were not intended to give rise to petitions under s. 459'. (See:* Re Saul D Harrison & Sons Plc *(supra).*

(own emphasis added)

**[53]** Having laid out the position of the law on oppression under section 346 CA 2016, I will now address the complaints raised by the Plaintiff against the Defendants which is said to be oppressive.

## C] THE OPPRESSIVE CONDUCT COMPLAINED OF AND THE RELIEFS SOUGHT BY THE PLAINTIFF

**[54]** The principle complaint of the Plaintiff is in respect of the conduct of the 1st Defendant as the Chairman of the AGM with regard to the 2 rulings that she made which are essentially as follows:

i) Rejection of the 5 Impugned Proxy Forms involving 5 different shareholders of the 8th Defendant ("**Proxy Ruling**"); and

ii) Withdrawal of the 6 resolutions (Proposed Resolutions No. 6 to 11) which were proposed by the Plaintiff ("**Plaintiff's Resolutions**") for the appointment of 6 additional directors to the Board of the 8th Defendant ("**Directors' Resolutions Ruling**").

(both the Proxy Ruling and Directors' Resolutions Ruling collectively referred to as the "**Chairman's Rulings**")

**[55]** Based on the above complaints the reliefs sought by the Plaintiff can be summarised as follows:

i) to invalidate the Chairman's Rulings;

ii) to invalidate the results of the AGM **and** to **substitute** the actual outcome of AGM with an outcome which the Plaintiff claims as the inevitable outcome of the AGM if the Chairman's Ruling were invalidated; and

iii) Consequential orders arising from the above.

## D] THE DEFENDANTS' POSITION

**[56]** All the Defendants' generally took the same position in response to the Plaintiff's allegations and can be divided into 2 categories as follows:

i) the Plaintiff has not crossed the requisite **threshold** under section 346 CA 2016 to file this Originating Summons or oppression action and/or to obtain the reliefs sought; and

ii) that in any event the Chairman's Rulings were **correctly made**.

**[57]** On the issue of whether the Plaintiff has not crossed the threshold of section 346 CA 2016, both learned counsels for the 1st and 8th Defendants, Mr Ranjit Singh, as well as for the 2nd to 7th Defendants, Mr Alvin Tang, argued that:

i) the conduct of the 1st Defendant as Chairman of the AGM does not constitute the "*affairs of the company*" or the "*powers of directors*" within the meaning of section 346 CA 2016;

ii) the Plaintiff has no *locus standi* to complain about the Proxy Ruling since the Proxy Ruling does not affect the Plaintiffs rights as a shareholder of the 8th Defendant. The Impugned Proxy Forms were not the Plaintiff's.

iii) The Plaintiff has no interest in the rights of other members bearing in mind that the 5 shareholders of the Impugned Proxy Form are **not parties** to this action.

**[58]** Regarding the correctness of the Chairman's Rulings it was argued on behalf of the Defendants that:

i) the Impugned Proxy Forms were defective and correctly rejected because **no proxy was named** and/or appointed in the said Proxy Forms; and

ii) the Plaintiff's Resolutions for the appointment of 6 additional directors to the 8th Defendant's Board of Directors could not be tabled because the individuals nominated for election as directors **failed to make the requisite declarations** in compliance with section 201 CA 2016, and consequently cannot in law be appointed as directors.

## E] *LOCUS STANDI* - WHETHER THE CHAIRMAN'S RULINGS FALL WITHIN THE MEANING OF S. 346 CA 2016

**[59]** It was argued on behalf of the Defendants that the Chairman's Rulings must relate to the affairs of the 8th Defendant or the exercise of powers by the directors, not that of an **individual**.

**[60]** In response to this argument it was essentially submitted on behalf of the Plaintiff that:

i) The conduct of the Chairman of the meeting and the determination as to who may be directors by shareholders at a meeting fall within "*affairs of the company*".

ii) Results of a meeting are binding on shareholders and every shareholder is entitled to challenge the results of a meeting and the conduct of a Chairman of that meeting.

iii) The Chairman's Rulings are a departure from the standards of dealing and violation of fair play. It is alleged that the Chairman's Rulings were planned and/or done in bad faith.

**[61]** Before dealing with the Plaintiff's allegations of wrongdoing and more so the issue of the correctness of the Chairman's Rulings, there is a threshold test on a point of law which has to be determined first and that is whether the Chairman's Rulings come within the meaning of section 346(1) CA 2016.

**[62]** This issue turns upon 2 legal questions:

i) Do the Chairman's Rulings come under the "*affairs of the company*" under section 346(1) CA 2016? and

ii) Do the Chairman's Rulings come under the exercise of the "*powers of the directors*" under section 346(1) CA 2016?

**[63]** First and foremost, it must be made clear that the Plaintiff's complaints are against the **conduct** of the **1st Defendant** in respect of the Chairman's Rulings.

***"Powers of The Directors"***

**[64]** The Chairman's Rulings were in fact made by the 1st Defendant at the AGM. The 1st Defendant averred on affidavit and at the AGM that the

Chairman's Rulings were made in her capacity as the chairman of the AGM.

**[65]** Therefore, whilst the 1st Defendant is also a director of the 8th Defendant, the Chairman's Rulings cannot be construed as a decision of the 8th Defendant's Board. In this connection it was held in **Kumaraisen Subachandragopal v. Prabagar Segadevan & Ors [2019] MLRHU 333** as follows:

*"[25] Did this refusal to sign the draft accounts amount to conduct of the affairs of the company or the exercise of the powers of a director? To my mind, it cannot be said to be conduct of the affairs of the 3rd Defendant as such. Rather, it was the refusal of a single director to sign the draft accounts because he could not verify them. Equally, it was also not the exercise of "the powers of the directors". **Powers of the directors of a company are exercised as a board.** Here, however and again, is the case of a single director refusing to sign draft accounts which he had no opportunity to verify."*

(own emphasis added)

**"*Affairs of the Company*"**

**[66]** In respect of the meaning and effect of the term "*affairs of the company*" under section 346 CA 2016 to the present case, learned counsel for the 1st and 8th Defendants as well as learned counsel for the 2nd to 7th Defendants both cited and heavily relied on the case of **Sun Hung Kai Investment Services Ltd v. Metals X Ltd [2019] FCA 1673** where the Federal Court of Australia held as follow:

*"30. Section 230B requires proxy documents to be received by the company at least 48 hours prior to the meeting. For listed companies, the company must specify in the notice of meeting a place and fax number for receipt of proxies and may specify an electronic address for such receipt. However, receipt of*

*such documents in accordance with those provisions does not give proxy forms the character of documents that belong to the company. They are notifications to the company for the purposes of the meeting of members. They are provided for the purpose of exercise by the member of the private right to vote at the general meeting.* ***The separate legal person that is the company does not participate in the meeting or have any power or authority to exercise concerning the proxies.*** *The company is performing a secretarial role, imposed by statute, for the purposes of its members being able to participate in a general meeting by proxy. Indeed, it was once the case that articles provided for proxies to be simply 'deposited' with the company for later use at the meeting of members: see, for example, McLaren v Thomson [1917] 2 Ch 261."*

……..

*32.* ***The company itself has no part to play in the shareholders meeting. The meeting is constituted only by the members****. When exercising their individual votes as members of the company they do not embody the corporate character of the company.*

*33.* ***It is not for the company to consider and decide upon the validity of the proxies. Rather, they are to be provided to the chairman of the meeting of shareholders (who may or may not be the chairman of the board of directors of the company and who, in any case, acts in a different capacity) for the purposes of conducting the meeting. Therefore, if the chairman is a member of the board then the duties owed in relation to dealings with proxies in favour of the chairman are not directors duties, they are duties owed as chairman to the party who appointed the chairman as proxy****:* Whitlam v Australian Securities and Investments Commission *[2003] NSWCA 183; (2003) 57 NSWLR 559.*

(own emphasis added)

**[67]** On the other hand, learned counsel for the Plaintiff, Mr Mak Lin Kum, submitted that the term "*affairs of the company*" under section 346 CA 2016 should be given wide meaning and cited several cases. I do not

propose to deal with all the cases learned counsel for the Plaintiff cited save for the main few as follows:

i) The English case of **Re Cumberland Holdings Ltd (1976) 1 ACLR 361** where the words "*affairs of the company*" were defined as:

> *"The words 'the affairs of the company' are as wide as one could well have. They are not limited to* ***business or trade matters,*** *but encompass* ***capital structure, dividend policy, voting rights, considerations of take-over offers,*** *and indeed,* ***all matters which may come before the board for consideration****."*
>
> (own emphasis added)

ii) The English Court of Appeal in **Re Neath Rugby Ltd (No. 2) Hawkes v. Cuddy and others (No 2) [2009] 2 BCLC 427** which also decided on the definition of "*affairs of a company*" under section 994 of the English Companies Act 2006:

> *"[48] I entirely accept that the affairs of a company are to be liberally determined for the purposes of s 994. ....."*
>
> *.....*
>
> *[50] The judge cited the observations of Powell J in Re Dernacourt Investments Pty Ltd (1990) 2 ACSR 553 at 556:*
>
> > *"The words "****affairs of a company****" are extremely wide and should be construed liberally: (a) in determining the ambit of the 'affairs' of a parent company for the purposes of s 320, the court looks at the business realities of a situation and does not confine them to a narrow legalistic view;* ***(b) 'affairs' of a company encompass all matters which may come before its board for consideration;*** *(c) conduct of the 'affairs' of a parent company includes refraining from procuring a subsidiary to do. something or condoning by inaction an act of a subsidiary, particularly when the directors of the parent and the subsidiary are the same ..."*

***I would accept these propositions, but with some qualification. Proposition (b) may extend to matters which are capable of coming before the board for its consideration, and may not be limited to those that actually come before the board: I do not accept that matters that are not considered by the board are not capable of being part of its affairs.*** *Nonetheless, like the judge, I am unable to see how it can be said that the affairs of Neath and of Osprey were so intermingled that all of the affairs of the latter were the affairs of the former. It would, for example, be quite irrational to suggest that Mr Blyth, when acting as a director of Osprey, was conducting the affairs of Neath."*

(own emphasis added)

iii) The English Court of Appeal case of **Re Coroin Ltd (No 2); McRillen v. Misland (Cyprus) Investments Ltd and others [2013] 2 BCLC 583** applied and quoted the above passage in paragraph 50 of **Re Neath** (supra) and concluded after reference to the said passage:

*"It no doubt goes without saying that the **affairs of the company** will **also** encompass matters which must go to the company **in general meeting, rather than the board, for consideration**."*

(own emphasis added)

It was also held in **Re Coroin** (supra) as follow:

*"[48] I entirely accept that the **affairs of a company** are to be **liberally determined** for the purposes of s 994."*

(own emphasis added)

iv) The English High Court case of **Re Unisoft Group Ltd (No 3) [1994] 1 BCLC 609** which involved an application to strike out parts

of a petition under the previous section 459 of the English Companies Act 1985 for minority oppression petition held:

*"It is of course obvious that a company may act or conduct itself in a manner affecting a shareholder's rights in respect of his shares, for example the board may refuse to sanction a transfer of shares for improper reasons. The action of the board is conduct of the affairs of the company and so, if damage is alleged, may raise the ground of 'unfair' prejudice, and a petition under s 459 may be presented to the court. Further, a shareholder by exercising his own private right to vote his shares may cause the company to act, by the passing of some resolution in general meeting, in a matter alleged to be unfairly prejudicial to some members.* ***Again it is not the act of the shareholder in voting that will found a petition but the result of that act if it produces action, or inaction, by the company. In my judgment the vital distinction between acts or conduct of the company and the acts or conduct of the shareholder in his private capacity must be kept clear****. The first type of act will found a petition under s 459; the second type of act will not*."

(own emphasis added)

v) In English Court of Appeal in **Re Legal Costs Negotiators Ltd [1999] 2 BCLC 171**, a case which was also based on section 459 of the English Companies Act 1985, it was held as follows:

*"Secondly, that the essence of the powers under s 459 is to give a remedy where there is complaint about* ***the way the company's affairs are being conducted*** *through the use (or failure to use) powers in relation to the conduct of the company's affairs provided by the* ***company's constitution****. Examples will be cases which concern the powers of the board to run the business, to dismiss employees (eg the petitioner himself who finds himself excluded from the company) etc or powers in relation to the declaration of dividends or disposal of the company's assets or the making of other corporate decisions.* ***It is concerned with 'standards of corporate behaviour'*** *to use the expression used by*

Arden J in Re BSB Holdings Ltd *(No 2) [1996] 1 BCLC 155 at 243. That I think emerges especially from the passages I have emphasised. It seems to me further to follow from the fact that the section is concerned with* ***the conduct of 'the company's affairs' rather than the affairs of individuals****. Moreover, the concluding words of the section require the demonstration of actual or proposed* ***acts or omissions "of the company' which includes acts or omissions on its behalf****. Those words indicate that such part of the section is concerned with* ***acts done by the company or by those authorised to act as its organs****. It would be odd if the other part of the section was not directed to that sort of corporate behaviour. It would also explain why, as I note below, the cases show a reluctance to act where the petitioner is able to control the relevant conduct by his own powers. Rather the cases are concerned with cases in which the petitioner is otherwise powerless to stop the conduct by powers he has under the company's constitution. This approach to the purpose of the section is also consistent with the section being generally regarded as a section for the protection of minorities, with the historical background to the section to which I have referred above and explains why the textbook writers, whilst allowing of the possibility that majority shareholders might be able to use the section, give as examples cases where the majority is not in fact in control of the relevant aspect of the company because another has a power to stop them doing what they would like to do. Whilst I would not presume to suggest that there can never be a case which does not have the characteristics 1 have attempted to identify, and recognising the deliberate flexibility of the remedy provided by the section, I would imagine such cases to be exceptional.*

(own emphasis added)

**[68]** Section 459 of the English Companies Act 1985 which was referred to in some of the above English cases was replaced by section 994 of the English Companies Act 2006 which is similar but **not identical** with our section 346 CA 2016. Section 459 of the English Companies Act 1985 and section 994 of the English Companies Act 2006 are reproduced below:

**Section 459 of the English Companies Act 1985**

*'A member of a company may apply to the court by petition for an order under this Part on the ground that the* ***company's affairs*** *are being or have been conducted in a manner which is* ***unfairly prejudicial*** *to the interests of its members generally or of some part of its member; (including at least himself) or that* ***any actual or proposed act or omission of the company*** *(****including an act or omission on its behalf****) is or would be so prejudicial.'*

(own emphasis added)

**Section 994(1) of the English Companies Act 2006**

*"(a) that the* ***company's affairs*** *are being or have been conducted in a manner that is* ***unfairly prejudicial*** *to the interests of members generally or of some part of its members (including at least himself), or (b) that an actual or* ***proposed act or omission of the company*** *(****including an act or omission on its behalf****) is or would be so prejudicial."*

(own emphasis added)

**[69]** Firstly, based on the highlighted **difference** in the wordings of the English section 459 of its Companies Act 1985 and section 994(1) of its Companies Act 2006 with our section 346 CA 2016, I am of the considered view that one must be careful in applying the principles in these English cases to our section 346 CA 2016. This is because the English section 459 of its Companies Act 1985 and section 994(1) of its Companies Act 2006 uses the words "*proposed act or omission of the company (****including an act or omission on its behalf****)*" which do not appear or have similar equivalent words in our section 346 CA 2016.

**[70]** Secondly, whilst I would agree with learned counsel for the Plaintiff that the definition of "*affairs of the company*" should be given wide meaning, however, it cannot be without limitation and must be within the ambits of section 346 CA 2016.

**[71]** In connection to this, I agree with learned counsel for the 1st and 8th Defendants that the acts complained of must relate to the affairs of the company itself or the exercise of powers by the directors, **not that of an individual**. Learned counsel cited the following cases:

i) **Jet-Tech Materials Sdn Bhd v. Yushiro Chemical Industry Co Ltd [2013] 2 MLJ 297** (FC) at page 318:

*"[37] ..... In this regard we are in agreement with the submission of learned counsel for the respondents that breaches of a shareholders agreement cannot be a basis for bringing a petition under s 181. A complaint under s 181 of the CA* ***must be confined to matters relating to the affairs of the company****.* ***Shareholders' agreement and breach of the same clearly are not matters relating to the affairs of the company****. They are private matters enforceable by the parties to the shareholders agreement ....."*

(own emphasis added)

ii) **Koh Jui Hiong v. Ki Tak Sang [2009] 8 MLJ 818 at pages 828-829**:

*"[25] Section 181 (1)(a) sets out three essential elements which the petitioners have to establish, viz:*

*(1) oppressive conduct or conduct in disregard of interests;*

*(2)* ***the conduct must relate to the affairs of the company, or the exercise of powers by the director(s)****; and*

*(3)* ***the conduct affects one or more of the members of the company including the petitioner(s)****."*

(own emphasis added)

**[72]** Regarding the earlier mentioned cases cited by learned counsel for the Plaintiff, it is observed that:

i) None of those cases are in respect of a decision or decisions made by a chairman of a company at a meeting of its members or whether the acts of the chairman at such a meeting constitutes "*affairs of the company*".

ii) The case of **Re Cumberland** (supra) is regarding the breach of directors' duties when they act in the interests of another company of which they are also directors and shareholders. In such a situation, the directors were held to be acting in their own interests.

iii) The case of **Re Neath** (supra) is regarding the decision of a director towards the shareholder (person or company) that nominated him as a director.

iv) The case of **Re Coroin** (supra) is regarding an allegation of breach of a shareholders' agreement.

v) Both **Re Neath** (supra) and **Re Coroin** (supra) involve the interpretation of "*affairs of the company*" to include decisions made by the board of directors and matters which may not come before the board.

vi) In **Re Unisoft** (supra), in striking out parts of the petition, the High Court held:

> *" ..... **the court should be extremely careful** to ensure that oppression is not caused to the parties to a s.459 petition by allowing the parties to trawl through facts which have given rise to grievances but which **do not***

***constitute the conduct of affairs of the company*** *and therefore cannot found a petition.* ***Large parts of the amended points of a claim would be struck out on the grounds*** *that they either* ***disclosed no cause of action as the conduct alleged was not conduct of the affairs of the company or did not affect the petitioner qua member*** *… "*

(own emphasis added)

vii) It was further held in **Re Unisoft** (supra):

*"**Nothing was done by the board or by any officer of the company. In my view this is not a matter which can be maintained in this petition**."*

(own emphasis added)

viii) I must highlight here that the words "*or by any officer of the company*" is not applicable in the instant case as they do not fall under the definition of the "*powers of the directors*" under section 346 CA 2016 (**Kumaraisen** (supra)). Further **Re Unisoft** (supra) was based on section 459 of the English Companies Act 1985 where the following words appear "*proposed act or omission of the company (including an act or omission on its behalf)*" which are not in our section 346 CA 2016.

ix) The case of **Re Legal Costs Negotiators** (supra) involved the oppression of the majority (not the minority) which was in control of the company. The petition was struck out and the following decision of the English High Court was upheld:

*"(3)* ***The meaning of conduct of the company's affairs under s 459 was limited and should not include the acts of shareholders acting in a private capacity****. The essence of s 459 was to provide a remedy where a complaint existed concerning the way in which a company's affairs were being conducted through the use of, or failure to use,*

*corporate powers in relation to the conduct of the company's affairs, as provided by the company's constitution. The respondent's refusal to sell his shareholding was a private matter and did not involve company affairs.* ***The respondent's conduct was not derived from the exercise or failure to exercise any power by the respondent given to him by the company's constitution****. As regards the alleged previous conduct of the respondent, the petitioners had already been able to remedy this wrong by terminating the respondent's employment and producing his resignation as director.* ***The petition must therefore fail****."*

(own emphasis added)

**[73]** In his written submissions, learned counsel of the Plaintiff, inter alia, attempted to equate the Chairman's Rulings, in particular the Proxy Ruling, to a decision by the 8th Defendant through its board of directors (paragraph 12 of Enclosure 53) which was made based on the legal advice obtained prior to the AGM, paid by the 8th Defendant. Taking this argument at its highest and even if it is taken further to say that the 1st Defendant consulted the 8th Defendant's Board of Directors before she made the Chairman's Rulings, the principle in the case of **Re Neath** (supra) relied on by the learned counsel for the Plaintiff himself does not make this conduct wrongful that it would constitute oppression.

**[74]** **Re Neath** (supra) involved the issue of whether a director nominated by a particular shareholder owed a duty to the said shareholder who nominated him. The issue also arose regarding the said director consulting with the shareholder that nominated him. Stanley Burton LJ speaking on behalf of the English Court of Appeal answered these issues as follows:

*"[45] In these circumstances,* ***I consider that the judge's finding that the only effective duty of Mr Cuddy when acting as a director of Osprey was to consult with Mr Hawkes was justified****.* ***The purpose of such consultation would have been for Mr Cuddy to be better informed when deciding what was, in his view, in the best interests of Osprey****.*

*[46] The fact that there were occasions when Mr Cuddy when acting as a director of Osprey* ***did in fact seek to advance Neath's interests is <u>not</u> inconsistent with this conclusion****: it does* ***not show*** *that Mr Cuddy was* ***under a legal duty to do so. <u>Nor does it show that Mr Cuddy acted in what he did not see were the interests of Osprey</u>****."*

(own emphasis added)

**[75]** It must be borne in mind that **Re Neath** (supra) involved the conduct of a **director** of the company whereas in the instant case the 8th Defendant (whilst also a director of the 8th Defendant) was acting in her capacity as the **chairman** of the AGM.

**[76]** As the chairman of the AGM, the 1st Defendant's position is **different** than that of a director and her conduct at the AGM cannot be equated with the conduct of a director of the 8th Defendant or construed as the exercise of the powers of the directors of 8th Defendant within the meaning of section 346 CA 2016.

**[77]** Further and in any event, similar to **Re Neath** (supra) there is nothing before the Court to show that the 1st Defendant was not acting in the interest of the 8th Defendant or its shareholders. The Chairman's Rulings were made after obtaining legal advice. There is nothing wrong with that and it is prudent to do so.

**[78]** Having reviewed the cases submitted by both learned counsel for the Plaintiff and the Defendants, I find that the case of **Sun Hung Kai** (supra) is more relevant to the issue at hand on whether the 1st Defendant's conduct as chairman of the AGM constitute "*affairs of the company*" or the exercise of the "*powers of the directors*" under section 346 CA 2016.

**[79]** I accept that **Sun Hung Kai** (supra) is not an oppression action, however, it dealt with the different roles and capacities between:

i) a **member** or shareholder of a company,
ii) the **directors** of a company,
iii) the **company** itself, and
iv) the **chairman** of a meeting of members of a company.

**[80]** **Sun Hung Kai** (supra) referred to the Australia Court of Appeal case of **Whitlam v. Australian Securities and Investments Commission [2003] NSWCA 183; (2003) 57 NSWLR 559** in concluding that "***if the chairman is a member of the board*** *then the duties owed in relation to dealings with proxies in favour of the chairman are* ***not directors duties****, they are duties owed as chairman to the party who appointed the chairman as proxy*".

**[81]** In **Whitlam** (supra) the defendant failed to vote against the resolution as instructed by the shareholder who appointed him as proxy. Interestingly, a similar issue was dealt with in the English Court of Appeal case of **Re Neath** (supra).

**[82]** The above quoted passage by Colvin J in **Sun Hung Kai** (supra) is in relation to a chairman of a meeting of members acting as a proxy of a shareholder at the meeting. There, it was held that the chairman owed a duty to the proxy **shareholder** he or she represents, it is **not** directors duties.

**[83]** In the case of the 1st Defendant, she became the Chairman of the AGM by virtue of Article 54 of the 8th Defendant's Articles which states:

*"The **Chairman (if any) of the Board of Directors** shall preside **at every General Meeting** but if there be no Chairman, or if at any meeting he shall not be present within fifteen (15) minutes after the time appointed for holding the same, **or if he shall be unwilling to act as Chairman, the Deputy Chairman of the Company shall be the Chairman** or if the Deputy Chairman be not present or shall be unwilling to act as Chairman, the Members present shall choose some Directors, or if no Director be present or if all the Directors present decline to take the Chair, they shall choose some Member present to be Chairman of the meeting."*

(own emphasis added)

**[84]** As previously stated, as the chairman of the board of directors did not wish to be chairman of the AGM, the 1st Defendant, as the deputy chairman of the board of directors, became the Chairman of the AGM by default based on Article 54 of the 8th Defendant's Articles.

**[85]** Therefore, it could be said that the 1st Defendant became the Chairman of the AGM by consent of the members which includes the Plaintiff. All shareholders of the 8th Defendant are bound by the 8th Defendant's Articles.

**[86]** It is important to note that the 1st Defendant's "appointment" as Chairman of the AGM has nothing to do with the directors nor was it their decision for her to chair the AGM.

**[87]** In this regard, it was further submitted on behalf of the 1st and 8th Defendants that the Chairman's Rulings made by the 1st Defendant were within the purview of her powers and duties **as chair** of the AGM as such powers included:

i) determining the qualification of voters;
ii) deciding whether proposed motions are in order; and
iii) deciding points of order and other incidental matters.

**[88]** I agree with this submission and it is in line with Article 63 of the 8th Defendant's Articles which states:

> *"63. No objection shall be raised to the* ***qualification of any voter*** *except at the meeting or adjourned meeting at which the vote objected to is given or tendered and every vote not disallowed at such meeting shall be valid for all purposes.* ***Any such objection made in due time shall be referred to the Chairman of the meeting whose decision shall be final and conclusive****.*
>
> (own emphasis added)

**[89]** Thus, the Chairman's Rulings made by the 1st Defendant is within the powers conferred on her as the chairman of the AGM pursuant to Article 63 of the 8th Defendant's Articles.

**[90]** It must further be emphasised that the "*affairs of the company*" is "*the conduct of 'the company's affairs' rather than the* ***affairs of individuals***" and does not include "***acts of shareholders*** *acting in a* ***private capacity***" (**Re Legal Costs Negotiators** (supra)). Disputes in respect of a shareholders' agreement also do not fall within the meaning of "*affairs of the company*" (**Jet-Tech** (supra)).

**[91]** In the circumstances, the Chairman's Rulings cannot be said to fall within the meaning of "*affairs of the company*" or "*powers of the directors*" under section 346 CA 2016.

**Plaintiff Has No Interest in Rights of Other Members**

**[92]** The 5 shareholders of the Impugned Proxy Forms are not parties to this Originating Summons and this brings about a very important question and that is whether the Plaintiff can raise a complaint on behalf of other shareholders.

**[93]** More so, whether the Plaintiff can raise a complaint when the act complained of does **not** affect the Plaintiff in its capacity as a member of the 8th Defendant.

**[94]** In this regard, it must be highlighted that the Plaintiff was **not** precluded from voting at the AGM.

**[95]** In the case of **Jet-Tech** (supra) the Federal Court held at paragraph 38, pages 318-319 as follows:

*"We agree with the above view. In any event Yushiro's request to Chen to retire as a director of the company does not fall within the scope of s 181 of the CA.* ***This complaint is confined to the status of Chen as a managing director, not as a shareholder of the company****. Such request cannot be termed as 'oppression' within the meaning of s 181 of the CA. In* Soh Jiun Jen v Advance Colour Laboratory Sdn Bhd & Ors *[2010] 5 MLJ 342 at p 350, the Court of Appeal held:*

> *If the petitioners relies on sub-s (1)(a) of s181, there must be shown the element of 'oppression' or 'disregard'. It must involve,* ***at least****, an element of lack of probity or fair dealing* ***to a member against his right as member or shareholder****. Oppression or disregard of interest of a director of a company clearly does not come under the ambit of s 181 ...*

*We endorse the above view."*

(own emphasis added)

**[96]** The case of **Goldbelt Mines Inc Goldbelt Mines Inc (N.P.L) v. New Beginnings Resources Inc. [1984] B.C.J. No 2730**, involves a decision of the British Columbia Court of Appeal where the complaint was of an alleged oppression to warrant holders by the applicant who was not a warrant holder though a member of the company. While the facts are slightly different to the present case the issue was whether it

was open to the applicant to invoke the prejudice to other members of the company as a basis for relief in cases of oppression:

*"We asked counsel for Goldbelt whether or not Goldbelt must be one of the members who was oppressed or unfairly prejudiced within the meaning of s.224(1).* ***Mr. Hunter indicated that in his view Goldbelt must be one of the members that was oppressed or unfairly prejudiced and, with re(s)pect, I share that view.*** *On the evidence before the Court* ***I am not persuaded that Goldbelt suffers from any oppression or unfair prejudice by virtue of the meeting*** *being held on October 16, 1984. In those circumstances* ***I do not think that it is open to Goldbelt to invoke the prejudice to other members of the company as a basis for relief under s.224 of the Company Act.*** *That being so, it seems to me that the learned Chambers Judge made a fundamental error in principle in granting the relief which he granted in the course of making the order."*

(own emphasis added)

**[97]** It was submitted on behalf of the Defendants that the Plaintiff has no interest in the voting rights of other members of the 8th Defendant and the case of **Jaber and others v. Science and Information Technology Ltd and others [1992] BCLC 764** was cited as authority for this in particular where it was held as follows:

*"It is not alleged in the petition, and could not be so alleged, that Ramadani's right to vote at general meetings of Diwan in accordance with the articles of Diwan (including art 19 under which it is expressly provided that no member shall have more than one vote) has been denied. In my judgment it cannot be said that Ramadani has, in relation to voting rights, any interest more extensive than this. In particular* ***I decline to accept that a member, has in his capacity as member, any interest in the recognition of the voting rights of other persons claiming to be members****. Accordingly, I reject the first way in which Miss Stockton concluded that Ramadani's interests are being prejudiced. The facts alleged, even if proved, could not bring the case within s459 in this respect."*

(own emphasis added)

**[98]** In response to this issue raised by the Defendants, learned counsel for the Plaintiff argued that the results of a meeting are binding on shareholders that every shareholder is entitled to challenge the results of a meeting and the conduct of a chairman of that meeting. Learned counsel then went on to cite the following cases in support of his argument:

i) **Lee Eng Hock, Ho Kok Leong, Khoo Hoot How (on behalf of themselves and other shareholders) v. Malay-Siamese Prospecting Company, Limited [1935] 1 MLJ 63** regarding the wrongful rejection of proxies by the chairman of the meeting, where it was held:

*"Since the cause of the common grievance of all the plaintiffs is that the resolution was wrongly passed, on the same ground (viz. that proxies had been wrongly rejected) I am satisfied that* ***they were entitled to join in suing the company on behalf of themselves and all other shareholders who voted against or were opposed to the resolutions in question****, and, in this respect, had a common interest."*

(own emphasis added)

ii) **Mosely v. Koffyfontein Mindes, Limited [1911] 1 Ch** a case where the shareholders claimed the company's had acted *ultra vires* when it attempted to increase its share capital and where it was held as follows:

*"He might have sued on behalf of himself alone, but in an action in which he is suing on behalf of himself I cannot see any objection* ***to his joining with him all the rest of the shareholders who have like rights with him*** *by reason of their being shareholders, and suing not only in his individual right,* ***but also in a representative character****."*

(own emphasis added)

**[99]** With respect to learned counsel for the Plaintiff, I do not find the above authorities helpful for the following reasons:

i) They are not cases on oppression.

ii) They are **representative actions** or otherwise later known as derivative actions (equivalent to **section 347 CA 2016**). In this regard the Court of Appeal in **Abdul Rahim bin Aki v. Krubong Industrial Park (Melaka) Sdn Bhd [1995] 417** at pages 426 held as follows:

"*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."*

(own emphasis added)

iii) In **Lee Eng Hock** (supra) the shareholder whose proxy's vote was rejected was made co-plaintiff in the suit unlike in the present case where the 5 shareholders of the Impugned Proxy Forms were not made parties to this Originating Summons.

iv) In **Mosely** (supra) the complaint there related to the alteration of the company's articles of association which affected the plaintiff personally. In the instant case there is no injury suffered by the

Plaintiff as the Plaintiff was allowed to and did in fact vote at the AGM.

**[100]** Since the Proxy Ruling affects the 5 shareholders of the Impugned Proxy Forms therefore it is for them to raise their complaint, if any, and it is not for the Plaintiff to do so. The Plaintiff is not entitled to raise complaints on behalf the said 5 shareholders of the Impugned Proxy Forms. The issue of their proxy votes did not affect the Plaintiff's own right to vote.

**[101]** Therefore, I find that the non-joinder of the 5 shareholders of the Impugned Proxy Forms in this Originating Summons is fatal to the Plaintiff's complaint insofar as the Proxy Ruling is concerned.

**[102]** On this issue, in **London Passenger Transport Board v. Moscrop [1942] 1 ALL ER 97** at page 104 it was 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 submit 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)

**[103]** Further, the Federal Court in **Lim Choon Seng v. Lim Poh Kwee [2020] MLJU 1155**, reiterated the general rule that no orders can be made in respect of the non-party and held:

*"[70] .....* ***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 Idan v Wong Tak Thong [1983] 2 MI J 320 where Seah FJ delivering the judgment of the former Federal Court said:*

> *"**In 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 if they were parties under statutory provisions** [*Brydges v. Bydges & 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* Halsbuy's Law of England *(4th ed.) Vol. 26 at page 237]"*
>
> (own emphasis added)

**[104]** The Court cannot be expected to delve into or examine a complaint in an action for oppression under section 346 CA 2016 when the aggrieved party is not before the Court.

**[105]** At the risk of repetition and for sake of clarity, the Proxy Ruling affects the 5 shareholders of Impugned Proxy Forms, not the Plaintiff.

**[106]** In addition to this the Plaintiff is precluded from raising any complaint regarding the Impugned Proxy Forms when the 5 shareholders of those Forms are not before the Court.

**[107]** As a final point on this issue, I would be remiss if I did not consider the allegation raised by the Plaintiff that 4 out of the 5 shareholders of the Impugned Proxy Forms had written letters of complaint regarding the Proxy Ruling. However, having examined the wordings of these letters and apart from the fact that they all appear to be very similar which in itself raises doubt as to their authenticity, it still does not change the fact that in the absence of the 5 shareholders of the Impugned Proxy Forms

in this Originating Summons or even an affidavit affirmed by them to support the Plaintiff's allegation, these letters constitute hearsay evidence which are inadmissible in law (**Al Baik Fast Food Distribution Co SAE v. El Baik Food Systems Co SA [2016] 5 MLJ 768 (COA)** at pages 780-781).

**[108]** It is my judgment that the Plaintiff has no *locus standi* to initiate this action as the Chairman's Rulings do not fall within section 346 CA 2016 and hence on the ground on *locus standi* alone, it is sufficient for the Originating Summons to be dismissed.

**[109]** Nevertheless, for the purpose of completeness I have also considered the other issues regarding the correctness of the Chairman's Rulings and will deal with them specifically below.

## F] THE PROXY RULING

**[110]** As mentioned earlier in the setting out the salient facts of this Originating Summons, two AGM Notices were issued by the 8th Defendant and with them two separate proxy forms. The first was enclosed together with the 1st AGM Notice ("**Original Proxy Form**") and the second was enclosed in the 2nd AGM Notice ("**Revised Proxy Form**"). Both the Original Proxy Form and the Revised Proxy Form are the same except for the Plaintiff's Resolutions that were included as per the 2nd AGM Notice and the addition in the "Additional Notes" to the Revised Proxy Form.

**[111]** The 1st Defendant's decision in respect of the Proxy Ruling is essentially on the basis that **no proxy** was properly named and/or identified in the

Impugned Proxy Forms by the 5 shareholders of those forms ("**the 5 Proxy Shareholders**"). This resulted in the rejection of the Impugned Proxy Forms.

**[112]** This entire issue revolves around the manner in which the Impugned Proxy Forms were executed and therefore it is important to review them.

**[113]** The 8th Defendant's proxy forms are generally governed by Article 65 of the 8th Defendant's Articles which provides:

*"The instrument appointing a proxy shall be in the following form or in such other form as the Directors may approve:*

TIGER SYNERGY BERHAD
(325631-V)

I/ We, , of being a member/ Members of the abovenamed Company, hereby appoint of , or failing him, of as my/ our proxy to vote for me/us on my/ our behalf at the [Annual or Extraordinary, as the case may be] General Meeting of the Company, to be held on the day of 19 , and at any adjournment thereof.

Signed this day of 19

This form is to be used * in favour of against the resolution.

*Strike put whichever is not desire [Unless otherwise instructed, the proxy may vote as he thinks fit]

**[114]** A copy of one of the Impugned Proxy Forms of Tan Say Cheong ("**Impugned Proxy Form of Tan Say Cheong**") is reproduced below:

Acknowledged Receipt

Certified Signature of Authorised Personnel

6/6/2020
2.49 PM

Tiger Synergy BERHAD

Date:

# REVISED PROXY FORM

*(Please refer to the notes below before completing this form)*

TIGER SYNERGY BERHAD
(Registration No. 199401039944 (325631-V))
(Incorporated in Malaysia)

| | |
|---|---|
| Number of shares held | 69,523,800 |
| CDS Account No. | 047294491 |

| Shareholder | Email | Phone Number | NRIC | Address | % |
|---|---|---|---|---|---|
| TAN SAY CHEONG | ggsctan@gmail.com | +60165506050 | 730925085873 | No.26, Lorong Taman 2B<br>Taman Pertama<br>30100 IPOH PERAK | 100 |
| Proxy 1 | | | | | |
| | | | | | |
| Proxy 2 | | | | | |
| | | | | | |

or failing him/her, the CHAIRMAN OF THE MEETING as my/our proxy to attend and vote for me/us on my/our behalf at the Twenty-Fourth Annual General Meeting ("**AGM**") of the Company to be conducted fully virtual at Broadcast Venue, T3-13A-20, Level 13A, Menara 3, 3 Towers, Jalan Ampang, 50450 Kuala Lumpur Tuesday, 9 June 2020 at 11:00 a.m. or any adjournment thereof in the manner as indicated below:

**[115]** The Impugned Proxy Forms were rejected by the 1st Defendant as no proxy was named or identified as follows:

i) No proxy was specifically named under the column "Proxy 1" and/or "Proxy 2".

ii) The "**Chairman of the Meeting**" was not named or identified as a proxy under the column "Proxy 1" or "Proxy 2"

iii) The Proviso below the table is not activated (and cannot be automatically applied) unless an individual is named/appointed first as a proxy under the column "Proxy 1" or "Proxy 2". This is

because the said Proviso is merely to safeguard the shareholder's position in the event the nominated proxy does not attend the AGM. It is not intended to be an automatic substitution for the appointment of proxy with the "Chairman of the Meeting" unless a proxy or proxies have been named. The Proviso is reproduced below:

> "**or failing him/her,** the CHAIRMAN OF THE MEETING as my/our proxy to attend and vote for me/us on my/our behalf at the Twenty-Fourth Annual General Meeting ("AGM") of the Company to be conducted fully virtual at Broadcast Venue, T3-13A-20, Level 13A, Menara 3,3 Towers, Jalan Ampang, 50450 Kuala Lumpur Tuesday, 9 June 2020 at 11:00 a.m. or any adjournment thereof in the manner as indicated below:"

(own emphasis added)

iv) As no proxy was specifically named under the column "Proxy 1" or "Proxy 2" the words "***or failing him/her***" must either be struck out or the words "CHAIRMAN OF THE MEETING" circled to indicate the Chairman's appointment as was done by some of the other shareholders of the 8th Defendant. Since this was not done, the Proviso is not activated.

v) As can be seen from the Impugned Proxy Form of Tan Say Cheong which is the same with the other 4 Impugned Proxy Forms, **none** of the above were done.

**[116]** Before I deal with the Plaintiff's arguments as to the **intention** of the 5 Shareholders of the Impugned Proxy Forms when they signed the signed Impugned Proxy Forms, I must pause to again highlight that these are highly speculative arguments. The 5 Shareholders are not before the Court and **neither** have any of them filed any **affidavit** to support the Plaintiff's arguments. This inevitably goes back to the earlier

issue of *locus standi*. What is the thus value of the Plaintiff's allegations in this situation? They are mere conjecture.

**[117]** Having said that, I will now address the arguments raised by the Plaintiff regarding the Impugned Proxy Forms.

**[118]** Learned counsel for the Plaintiff's arguments in respect of the issue of the defect in the Impugned Proxy Forms can be summarised as follows:

i) The 5 Shareholders has appointed the Chairman of the AGM being the 1st Defendant as their proxy;

ii) There are no terms on the face of the Revised Proxy Form stating that the proxy, including the Chairman, possessing any power, authority or discretion in revoking the appointment;

iii) It is not open to the named proxy, or to the Chairman if named as proxy, to revoke or refuse the proxy;

iv) The 1st Defendant wrongly rejected the Impugned Proxy Forms; and

v) The 1st Defendant had "*selectively*" rejected the Impugned Proxy Forms to allegedly temper with the votes.

**[119]** There are 2 main issues arising from these allegations by the Plaintiff and they are:

i) Whether the Impugned Proxy Forms were wrongly rejected by the 1st Defendant or in other words the Proxy Ruling was wrong and invalid; and

ii) Whether there was improper motive on the part of the 1st Defendant when she rejected the Impugned Proxy Forms.

**[120]** To my mind, if the above first issue is answered in the negative then the second issue regarding the 1st Defendant's motive is not relevant, without even going into the merits of the allegation. This is because if the Proxy Ruling is correct in law and in fact then it does not matter whether the 1st Defendant is said to harbour some ulterior motive towards the Plaintiff. In any event, I will address the other complaints raised by the Plaintiff later in this judgment.

**[121]** Having examined the Impugned Proxy Forms in detail I find that no proxy was properly named or identified by the 5 Shareholders and therefore agree with the 1st Defendant's reasons for rejecting the Impugned Proxy Forms as stated in paragraph 114 above.

**[122]** Before I deal with the cases governing proxy forms, I must emphasise that a shareholder's right to vote is arguably his most important right as a shareholder or member of a company. Hence, when that right is to be exercised by way of proxy, exceptional care must be taken to ensure that the appointment of the said shareholder's proxy was done properly and the proxy clearly identified.

**[123]** A proxy will have to vote according to the wishes of the shareholder who appointed him and he is an agent of the said shareholder to whom "*fiduciary duties are owed to the particular member who appointed*" the proxy (**Whitlam** (supra)).

**[124]** Such are the duties and obligations of a proxy that are derived from the shareholder's fundamental right to vote.

**[125]** With such an important duty placed upon the proxy, it is equally important that he be identified with clarity as a proxy and that is precisely the reason a company's proxy form must be properly executed.

**[126]** In the case of the Impugned Proxy Forms it is not in dispute that a proxy was not named by the 5 Shareholders. This is in fact admitted by the Plaintiff in its Affidavit In Reply (Enclosure 35) at paragraph 18.2:

> *"All 5 revised proxy forms which were rejected by the 1st Defendant* ***did not name a proxy in the proxy rows*** *(please see Exhibits "GCM-20" to "GCM-24", Volume 3 of the Plaintiff s AIS).* ***The proxy rows were blank****;"*
>
> (own emphasis added)

**[127]** The Plaintiff claimed that as no proxy was named, the Chairman of the AGM was appointed as proxy of the 5 Shareholders of the Impugned Proxy Forms.

**[128]** It is clear from the wording of the Revised Proxy Form that the Proviso would *only* apply in the absence of the specifically named proxy which is why the words "***or failing him/her***" appear in Proviso. Due to the seriousness of the issue as stated earlier, the 1st Defendant as the Chairman of the Meeting cannot be expected to *infer* from the improperly executed Impugned Proxy Forms the intention of the 5 Shareholders. That is not only dangerous, but may also expose the 1st Defendant to liability.

**[129]** The 1st Defendant accepts that if either the words "***or failing him/her***" is crossed out **or** the words "CHAIRMAN OF THE MEETING" is circled then the Impugned Proxy Forms would have been accepted as was done by some other shareholders. In this regard the 2nd to 7th

Defendants have exhibited 2 Revised Proxy Forms of the 2nd Defendant and another shareholder of the 8th Defendant, Affin Hwang Nominees (Tempatan) Sdn Bhd where the words "***or failing him/her***" were crossed out (Exhibit "DT-6" of the 1st to 7th Defendants Affidavit In Reply in Enclosure 26). However, clearly this was **not** done by the 5 Shareholders.

**[130]** In **Macdonald v. EPS 522, [2019] B.C.J. No 986A**, the British Columbia Supreme Court considered the validity of proxy forms which did not identify any individual as a proxy holder and set out the manner in which the proxy form should be executed, Young J held as follows:

*"104. Proxies must be in writing and signed by the person appointing the proxy: SPA, s.56(2)(a).* ***Blank proxies are invalid****.*

*105.* ***A proxy form must identify an individual as a proxy holder****. A proxy which says "any council member" is irregular and should not be certified.*

*106.* ***A proxy form with no named appointee is an invalid proxy. The name of the council member should be written in or typed before the proxy is signed****. If a proxy is completed and then the appointee's name is crossed out and replaced with a different appointee's name, the proxy may or may not be invalid. What is important is that the appointee's name was written or rewritten on the form before it was signed by the owner. Changes must be initialled by the owner in order for the proxy to be valid."*

(own emphasis added)

**[131]** The 1st Defendant, as the Chairman of the AGM, is entitled to consider the validity of the Impugned Proxy Forms and make the Proxy Ruling. In this connection, it was held in **Veto Insurance Ltd v. Kassem and Others [2010] NSWSC 838** as follows:

*"[57] Implicit in reg 5.6.28 is the expectation that the person with whom the proxy is lodged will perform a function of examining it and ascertaining the*

*voting power is exercisable at the meeting by the person appointed…Part of that task - or, at all events,* ***the task of the meeting's chairman - is to consider the regularity and validity of instruments of proxy. No one could possibly say that the chairman of the meeting was not entitled (indeed, bound) to reject and rule out of order proxy*** *purporting to be given by John Brown on which there appeared no signature at all or the signature of John Black, without any evidence of the authority of Black to sign for Brown."*

(own emphasis added)

**[132]** In **Sun Hung Kai** (supra), the Federal Court of Australia also acknowledged the right of the chairman of a meeting to determine the validity of proxy forms and that such right is different than his role and capacity as chairman of the board of directors:

*"[34] ….* ***It is for the chairman of the meeting of members to determine whether a proxy should be rejected (not the company)****: Rtf K Wong Holdings Pty Ltd (1983) 1 HCLC 738 (Needham J, a case concerned with the approval of a scheme of arrangement); and Cordiant Communications (Australia) Pty Ltd v Communications Group Holdings Pty Ltd (2005) 55 ACSR 185; [2005] NSWSC 1005 at [92]—[107] (Palmer J, a case that reviewed a number of authorities concerned with the effect of an erroneous ruling by a chairman as to acceptance of proxies)…*

*[41] … However, for reasons I have given, proxy documents are not provided to the company for the purpose of any deliberation by the company through its directors as to the validity of the proxies.* ***The arbiter of the validity of the proxies is the chairman of the meeting (who may or may not be the chairman of the company and who, in any case, acts in a different capacity)****."*

(own emphasis added)

**[133]** In the circumstances, I find that the Proxy Ruling is correct and the 1st Defendant was right in rejecting the Impugned Proxy Forms. That being

the case it is unnecessary for me to deal with the allegation of ulterior motive of the 1st Defendant that was raised by the Plaintiff.

**[134]** There is, however, another complaint raised by the Plaintiff which I have considered and that is regarding the allegation of different treatment by the 1st Defendant in respect of other Revised Proxy Forms that are said to have been completed and executed similar to the Impugned Proxy Forms.

**Plaintiff's Allegation of Different Treatment in respect of Other Similar Revised Proxy Forms similar to the Impugned Proxy Forms**

**[135]** On this issue the Plaintiff exhibited in its Affidavit In Support two Revised Proxy Forms which are said to belong to the 2nd Defendant and Affin Hwang Nominees (Tempatan) Sdn Bhd ("**Plaintiff's 2 Disputed Proxy Forms**").

**[136]** The Plaintiff's 2 Disputed Proxy Forms are different than the ones exhibited by the 2nd Defendant which I had referred to earlier in paragraph 128 above ("**2nd Defendant's & Affin's Proxy Forms**") in that the words "*or failing him/her*" were not crossed in the Plaintiff's 2 Disputed Proxy Forms.

**[137]** The Plaintiff did not disclose nor explain where or how the Plaintiff obtained the Plaintiff's 2 Disputed Proxy Forms.

**[138]** As all the Revised Proxy Forms were submitted to the 8th Defendant prior to the AGM, the actual copy must be the one in the 8th Defendant's possession.

**[139]** The 8th Defendant confirms the 2nd Defendant's & Affin's Proxy Forms to be the ones actually submitted to it. Also, 2nd Defendant has confirmed the copy the 2nd Defendant's & Affin's Proxy Forms are as per the ones submitted to the 8th Defendant.

**[140]** Therefore, in the absence the Plaintiff's explanation on how or where it obtained the Plaintiff's 2 Disputed Proxy Forms and in the absence of any specific evidence to show that the 2nd Defendant's & Affin's Proxy Forms are not the actual 2nd Defendant's and Affin Hwang Nominees (Tempatan) Sdn Bhd's Revised Proxy Forms that were submitted to the 8th Defendant, I accept the Defendants arguments that the Plaintiff's allegations on this issue are bare allegations (**Pintaran Timur (M) Sdn Bhd & Ors v. Small Medium Enterprise Development and another appeal [2020] MLJU 457** at page 7 paragraph 21-23).

**The Poll Administrator and Independent Scrutineer**

**[141]** The Plaintiff's other complaints related to the Proxy Ruling are as follows:

i) The alleged contrary views of the Poll Administrator and Independent Scrutineer.

ii) That there is a conflict of interest in the appointment of the Independent Scrutineer and/or Poll Administrator.

**[142]** Firstly, the Plaintiff complaints are essentially regarding the acts of the 1st Defendant in respect of the Chairman's Rulings and not with regards to the acts of the Poll Administrator and Independent Scrutineer.

**[143]** Secondly, it is ironic that the Plaintiff on one hand relies on the Poll Administrator and Independent Scrutineer disagreement with the Proxy Ruling but at the same time seek to challenge their appointment and participation in the AGM.

**[144]** Therefore, this seriously undermines the value of the Plaintiff's complaint and allegation on this issue.

**[145]** Insofar as the alleged contrary views or statements of the Poll Administrator and Independent Scrutineer are concerned, they are hearsay evidence and are inadmissible (**Al Baik** (supra)). Neither have the Poll Administrator and Independent Scrutineer filed any affidavit in this Originating Summons to support the Plaintiff's allegations.

**[146]** The appointment of scrutineer is as set out in paragraph **8.29A(2) of Bursa's Main Market Listing Requirements** which states:

> *"A listed issuer must appoint at least 1 scrutineer to validate the votes cast at the general meeting.* ***Such scrutineer must not be an officer of the listed issuer or its related corporation****, and must be independent of the person undertaking the polling process. If such scrutineer is interested in a resolution to be passed at the general meeting, the scrutineer must refrain from acting as the scrutineer for that resolution. For this purpose, "****officer****" has the meaning given in section 2 of the Companies Act"*
>
> (own emphasis added)

**[147]** There is no non-compliance with paragraph 8.29A(2) of Bursa's Main Market Listing Requirements as the Independent Scrutineer, one Eugne Teow from Cygnus Corporation Services Sdn Bhd is **not** an officer of the 8th Defendant and is also **not** related to the person undertaking the polling process, one Alfred John from Mega, the Polling Administrator.

**[148]** In any event the Plaintiff is estopped from raising its complaint regarding the appointment of Independent Scrutineer in view of the fact that this has been raised and decided in OS 194 (**Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank [1995] 3 MLJ 331; Tenaga Nasional Berhad v. Irham Niaga Sdn Bhd & Anor [2011] 1 MLJ 752**).

## G] THE DIRECTORS' RESOLUTIONS RULING

**[149]** The Plaintiff's Resolutions were based on declarations made by each of the six individuals nominated for the appointment of directors of the 8th Defendant ("**Plaintiff's Proposed Directors**").

**[150]** These declarations are governed by **section 201 CA 2016** which provides as follows:

> *"A person shall **not be appointed as a director** of a company **unless** he has consented in writing to be a director **and make a declaration that he is not disqualified** from being appointed or holding office as a director of a company **under this Act**."*
>
> (own emphasis added)

**[151]** Section 201 CA 2016 must be read with **Section 198 CA 2016** which provides for instances where a person is disqualified from being a director:

> *"(1) A person **shall not hold office** as a **director** of a company or whether directly or indirectly be concerned with or takes part in the management of a company, if the person —*
>
> *(a) is an undischarged bankrupt;*

*(b) has been convicted of an offence relating to the promotion, formation or management of a corporation;*

*(c)* ***has been convicted of an offence*** *involving* ***bribery****, fraud or dishonesty;*

*(d) has been convicted of an offence under sections 213, 218, 218,228 and 539; and*

*(e)* ***has been disqualified by the Court under section 199****."*

(own emphasis added)

**[152]** **Section 199 CA 2016** provides as follows:

*(1) The Court may, on an application by the Registrar, make an order to disqualify any person from acting or holding office as a director or promoter of a company, or be concerned with or taking part in the management of a company whether directly or indirectly, if-*

*(a) within the last five years, the person has been a director of two or more companies which went into liquidation resulting from the company being insolvent due to his conduct as a director which contributed wholly or partly to the liquidation;*

*(b) due to his contravention of the duties of a director; or*

*(c) due to his habitual contravention of this Act.*

**[153]** Both sections 198 and 201 CA 2016 use the word "*shall*" which makes them mandatory (**Tan Boon Thien & Anor v. Tan Poh Lee & Ors [2020] 3 CLJ 28**). Therefore, before any individual can be appointed as a director of a company, he must first make a declaration that he is not disqualified under **all** the specific disqualification instances set out in section 198 CA 2016.

**[154]** However, none of the declarations made by Plaintiff's Proposed Directors in the Plaintiff Resolutions have declared that:

i) they have **not** been convicted of an offence involving "**bribery**" under **section 198** CA 2016; and/or

ii) they have **not** been **disqualified** by the Court under **section 199** CA 2016.

**[155]** It was submitted by learned counsel for the 1st and 8th Defendants that Section 201 CA 2016 is prohibitory in nature. Such non-declarations by the Plaintiff's Proposed Directors contravened CA 2016 as Section 201 CA 2016 absolutely prohibited such appointments. Further, it is to be noted that **section 591(2) CA 2016** imposes a criminal offence if such declarations are false.

**[156]** Therefore, it was further argued that in the Originating Summons the Plaintiff is essentially seeking the assistance of the Court to order that the Plaintiff's Proposed Directors be appointed to the Board of the 8th Defendant and this would be in breach of sections 198 and 199 CA 2016. In furtherance of this argument, it is submitted that it is trite that the Court cannot grant any relief on a claim which is founded on illegality (**Norihan bt Talib v. Mohd Nassir bin Hassan [2018] 3 MLJ 670 at page 681 paragraph 26**; **Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619**).

**[157]** The Plaintiff did **not** deny that the Plaintiff's Proposed Directors did **not** make the declarations required under sections 198 and 199 CA 2016 as stated above.

**[158]** Instead, the Plaintiff contends that:

i) It is submitted that the time for the 8th Defendant's Board to decide whether Plaintiff's Resolutions may be voted on is the date of the requisition (not at the AGM);

ii) 8th Defendant's Board did decide that the Plaintiff's Resolutions may be voted on by announcing the 2nd AGM Notice and did cause to be printed and circulated proxy forms containing spaces for filling in the voting instructions for the Plaintiff's Resolutions.

iii) The 1st Defendant is estopped from denying the validity of the Plaintiff's Resolutions given that the 8th Defendant's Board had accepted the Plaintiff Resolutions as the Plaintiff had proceeded to circulate them.

**[159]** The Plaintiff then relied on **section 311 CA 2016** which states:

*(1) The members of a company may require the directors to convene a meeting of members of the company.*

*(2) A requisition under subsection (1) -*

*(a) shall be in hard copy or electronic form;*
*(b) shall state the general nature of the business to be dealt with at the meeting;*
*(c) may include the text of a resolution that may properly be moved and is intended to be moved at the meeting; and (d) shall be signed or authenticated by the person making the requisition.*

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

*(a) members representing at least ten per centum of the paid up capital of the company carrying the right of voting at meetings of members of the company, excluding any paid up capital held as treasury shares; or*
*(b) in the case of a company not having a share capital, members who represent at least five per centum of the total voting rights of all members having a right of voting at meetings of members. 302 Laws of Malaysia Act 777*

*(4) Notwithstanding subsection (3), in the case of a private company, members representing at least five per centum of the paid up capital of the company*

*carrying the right of voting at meeting of members of the company may require a meeting of members to be convened if more than twelve months has elapsed since the end of the last meeting of members convened pursuant to a requisition under this section and the proposed resolution is not defamatory, vexatious or frivolous.*

*(5) A resolution may properly be moved at a meeting unless the resolution— (a) if passed, would be ineffective whether by reason of inconsistency with any written law or the constitution; (b) is defamatory of any person; (c) is frivolous or vexatious; or (d) if passed, would not be in the best interest of the company.*

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

(own emphasis added)

**[160]** The Defendants response to the Plaintiff's contention is fairly straight forward in that section 311 CA 2016 is in inapplicable in this case as:

i) Section 311 CA 2016 allows for the requisition of a **meeting** by **shareholders** who hold at least 10% of the shares in a company. This is not the case here as the AGM was not called upon a requisition by the Plaintiff;

ii) further, **section 311(6) CA 2016** provides that the voting right shall be determined at the **date of the requisition**. This refers to the 10% voting right of the **shareholders requisitioning** the meeting; and

iii) in respect of the AGM, shareholders could vote therein if their names appeared on the Record of Depositors of the 8th Defendant as at 27.5.2020 pursuant to the 1st AGM Notice read together with **section 147 CA 2016**.

**[161]** In short, the Plaintiff is confused between a meeting requisitioned by shareholders pursuant to section 311 CA 2016 and an annual general meeting in which the circulation of resolution proposed by shareholder of a public listed company is governed by **section 323 CA 2016** which provides as follows:

*"323. Power of members to require circulation of statements.*

*(1) The members of a public company may require the company to-*

*.....*

*(b) give notice of a resolution which may be properly moved and is intended to move at that meeting,*

*to members of the company entitled to receive notice of a meeting of members.*

*(2)* ***The directors shall be required*** *to circulate the statement referred to in paragraph (1)(a) or* ***give notice of a resolution referred to in paragraph (1)(b), as the case may be, once the company received the requisition from*** *—*

*(a) members representing at least two and a half per centum of the paid up capital of the company carrying the right of voting excluding any paid up capital held as treasure shares;*

*.....*

*(4) Unless the company resolves otherwise -*

*(a) the expenses of the company in complying with subsection (2) shall be paid by the members who requested the circulation of the statement; and*

*(b) it shall not be bound to comply with subsection (2) unless there is deposited with or tendered to the company, not later than one week, before the meeting a sum reasonably sufficient to meet its expenses in doing so.*

*(5)* ***For the purposes of subsection (2), the right of voting shall be determined at the date of requisition is deposited with the company.***"

(own emphasis added)

**[162]** Learned counsel for the 2nd to 7th Defendants submitted that it should be noted that **section 323(2) CA 2016** provides for a **mandatory obligation** on the directors to give notice of Plaintiff's Resolutions and therefore it's incorrect for the Plaintiff to suggest that there was somehow any "*decision*" made by the Board of the 8th Defendant in circulating the same via the 2nd AGM Notice.

**[163]** It was further submitted that the term "*right of voting*" set out in **section 323(5) CA 2016** relates only to the calculation of the requisite shareholding to be held by the member requesting for such notice to be circulated (as provided in **section 323(2)(a) CA 2016**). As such, this provision does **not** in any way show that the validity of the Plaintiff's Resolutions was in any way determined at the time of requisition, as contended by the Plaintiff.

**[164]** I agree with the above submissions of both the learned counsel for the 1st and 8 Defendants as well as submissions of learned counsel for the 2nd to 7th Defendants on this point.

**[165]** The Plaintiff has a mandatory duty to give notice of the Plaintiff's Resolutions by operation of the **section 323(2) CA 2016** and that cannot be construed as an acceptance or acquiescence by the Board of the 8th Defendant of the validity or correctness of the Plaintiff's Resolutions.

**[166]** As stated in **Vero Insurance** (supra) and **Sun Hung Kai** (supra), the decision regarding the Plaintiff's Resolutions ought to be made by the chairman of the meeting.

**[167]** In any event, the doctrine of estoppel cannot be invoked by the Plaintiff against the operation of a statute and/or where there is illegality as stated earlier and as further found in the case of **United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd [1988] 3 MLJ 352** where it was held as follows:

> *"**The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute**:* Jagabandhu v Radha Krishna *ILR 36 Cal 920, particularly when as here, the non-compliance goes to the root of the thing. In other words, if the terms of a statute are absolute and do not admit of any relaxation or exemption, anything done in contravention thereof will be ultra vires and no person can be estopped from putting forward the contention that what was done was illegal or void:* University of Delhi v Ashok Kumar Chopra *AIR 1968 Delhi 131."*
>
> (own emphasis added)

**[168]** Confronted with such non-compliance with sections 198 and 199 CA 2016, the 1st Defendant was right to have withdrawn the Plaintiff's Resolutions.

## H] RESULTS OF THE AGM & THE 1ST DEFENDANT'S ANNOUNCEMENT

**[169]** Another complaint raised by the Plaintiff is that the results of the AGM published onscreen at the AGM is different than that which was officially announced by the 8th Defendant.

**[170]** However, I find that the Defendants have satisfactorily explained and clarified this as follows:

i) The votes of the 5 Shareholders were not taken into account due to the rejection of the Impugned Proxy Forms by the 1st Defendant at the AGM.

ii) The Plaintiff's Resolutions were never voted on as they had been withdrawn by the 1st Defendant at the AGM.

iii) Nevertheless, due to the fact that the AGM was conducted virtually using the DBF system which is automated, the information regarding the votes of the Impugned Proxy Forms and the Plaintiff's Resolution could not be skipped or removed from the DBF system when the votes were tabulated. This is a design flaw in the DBF system.

iv) There is nothing sinister or wrong about Impugned Proxy Forms votes and Plaintiff's Resolutions appearing in the DBF system at the commencement of the AGM.

v) It was only after the Chairman's Rulings were made that the votes of the Impugned Proxy Forms and the Plaintiff's Resolution should be removed from the DBF system.

vi) However, it was solely due to the above design flaw in the DBF system that the Plaintiff's Resolutions were purportedly "tabled" or "voted" with the live feed continuously tabulating the purported "vote" count on the Plaintiff's Resolutions.

vii) The actual and correct results of the AGM are as announced by the 1st Defendant at the AGM.

**[171]** Therefore, the "DBF system's AGM Results" should not and cannot be taken as the actual result of the AGM. Is was simply a mistake which was rectified by way of, inter alia, an official announcement dated 10.6.2020.

## I] ENCLOSURES 3 AND 16

**[172]** As the Plaintiff's main claim on oppression under section 346 CA 2016 had been substantively determined via this Originating Summons and found to be without merits, it therefore follows that the Plaintiff's applications in Enclosures 3 and 16 would also fail.

**[173]** As such Enclosure 3 and 16 were accordingly dismissed.

## J] CONCLUSION

**[174]** As a final point, it is perhaps worth highlighting that the Plaintiff had previous attempted to appoint the same proposed directors to the 8th Defendant's Board by way of the Safari EGM three months prior to the AGM. The Plaintiff did not succeed in getting the shareholders to vote in its favour.

**[175]** The AGM is the Plaintiff's second attempt to appoint the Plaintiff's Proposed Directors to the 8th Defendant's Board in a relatively short span of time.

**[176]** The Plaintiff did not succeed in appointing the Plaintiff's Proposed Directors at the AGM resulting in this Originating Summons being filed.

**[177]** Similarly, the Plaintiff's attempt to appoint its own additional independent scrutineer for the AGM was also unsuccessful and that too resulted in the filing of OS 194 which decision was not in the Plaintiff's favour.

**[178]** Therefore, it would not be unreasonable to conclude that the Plaintiff is already at odds with the 8th Defendant and more so with the 1st to 7th Defendants.

**[179]** The Plaintiff's complaint in this Originating Summons were primarily directed at the 1st Defendant and the Chairman's Rulings which I have decided did not fall within the meaning of "*affairs of the company*" and the exercise of the "*powers of the directors*" under section 346 CA 2016 based on the facts of this case. This is because, inter alia, the 1st Defendant made the Chairman's Rulings in her capacity as the Chairman of the AGM and not on behalf of the 8th Defendant's Board.

**[180]** Nonetheless, I went further to also consider the validly and correctness of the Chairman's Rulings. As I had decided that the Chairman's Rulings were correct and that the 1st Defendant was justified in making them, it was not necessary for me to consider the issue of whether the Chairman's Rulings were made in bad faith.

**[181]** Having examined the Plaintiff's complaint in detail there cannot be any dispute that it was in respect of the Chairman's Rulings which were made by the 1st Defendant.

**[182]** The 1st Defendant made the Chairman's Rulings in her capacity as the Chairman of the Meeting, not on behalf of the 8th Defendant's Board nor in her position as a director (**Sun Hung Kai** (supra)).

**[183]** The acts complained of must relate to the affairs of the company itself or the exercise of powers by the directors, not that of an individual (**Jet-Tech** (supra)).

**[184]** If there was a wrong committed by the 1st Defendant to the Plaintiff, the remedy may lie elsewhere but certainly not be way of an oppression action under section 346 CA 2016.

**[185]** Based on the reasons that I have set out above, I dismissed this Originating Summons as well as Enclosures 3 and 16 and after hearing arguments on costs, awarded costs of RM50,000.00 in favour of the 1st Defendant and RM50,000.00 in favour of the 2nd to 7th Defendants.

Dated this 25th day of August, 2021

*-SGD-*

(**WAN MUHAMMAD AMIN BIN WAN YAHYA**)
Judicial Commissioner
High Court of Malaya,
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- Section 323(2)(a)
- Section 323(5)
- Section 346
- Section 347
- Section 591(2)

### Companies Act 1965

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