IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. : W-02(NCC)(A)-1194-06/2019

BETWEEN

PERDANA PETROLEUM BERHAD

(Formerly known as Petra Perdana Berhad)

(Company No. 372113-A) ...APPELLANT

AND

1. TENGKU DATO' IBRAHIM PETRA BIN

TENGKU INDRA PETRA

2. DATIN CHE NARIZA HAJJAR HASHIM

3. WONG FOOK HENG

4. TIONG YOUNG KONG …RESPONDENTS

[In the matter of the Originating Summons No. WA-24NCC-391-08/2018 in the High Court of Malaya at Kuala Lumpur

In the matter of Section 289 (3) (a) and (b), 4(a), (b) dan (c) of the Companies Act 2016;

And

In the matter of Article 170 of the Memorandum and Articles of Association of Petra Perdana Berhad (Subsequently known as Perdana Petroleum Berhad (Company No. 372113-A);

And

In the matter of Order 88 Rule 2 of the Rules of Court 2012;

And

In the matter of the High Court of Malaya at Kuala Lumpur Civil Suit No. D-22NCC-735-2009;

And

In the matter of the High Court of Malaya at Kuala Lumpur Civil Suit No. D-22NCC-1057-2011;

And

In the matter of the Court of Appeal Civil Appeal No. W- 02(NCC)(W)-736-04;

And

In the matter of the Federal Court Civil Applications No. 08-446 09/2015 and No. 08-443-09/2015;

And

In the matters of the Federal Court Civil Appeals No. 02(f)-8-03/2016 (W) and 02(f)-8-03/2016(W)

Between

1. Tengku Dato' Ibrahim Petra Bin

   Tengku Indra Petra

2. Datin Che Nariza Hajjar Hashim

3. Wong Fook Heng

4. Tiong Young Kong ...Plaintiffs

And

Perdana Petroleum Berhad (Formerly known as

Petra Perdana Berhad (Company No. 372113-A)) ...Defendant]

CORAM

LEE SWEE SENG, JCA

DARRYL GOON SIEW CHYE, JCA

HAJI GHAZALI BIN HAJI CHA, JCA

JUDGMENT

Introduction

[1] This appeal relates to a claim by the Respondents, as former directors of the Appellant Company, to be indemnified by the Appellant for their legal expenses and costs incurred in having to defend two legal proceedings that were brought against them, both of which, it was claimed, were resolved in their favour. On 29th May 2019, the High Court in Kuala Lumpur allowed the Respondents' claim. This then is the Appellant's appeal against that decision.

[2] Specifically, the central issue in this appeal concerns the enforceability of a provision for indemnification of directors that is found in the articles of association of the Appellant, a company incorporated pursuant to the provisions of the Companies Act of 1965 ("**CA 1965**"), prior to the coming into force of the Companies Act of 2016 ("**CA 2016**").

[3] Although under CA 2016, the memorandum and articles of association of a company incorporated prior to its coming into force are now known as the company's constitution, the term "articles of association" will continue to be used for the purposes of this judgment. This is largely because this case concerns, primarily, only the articles of association of the Appellant

with no particular involvement of its memorandum of association and to a minor extent, the nostalgic appeal of the term.

[4] The four Respondents were all former directors of the Appellant. All four Respondents ceased to be directors of the Appellant on 4th February 2010. Their claims for indemnity against the Appellant were in respect of two separate actions namely (i) Kuala Lumpur High Court Civil Suit No. D-22NCC-735-2009 ("**Suit 735**") and (ii) Kuala Lumpur High Court Civil Suit No. D-22NCC-1057-2011 ("**Suit 1057**").

Suit 735

[5] While still serving as directors of the Appellant, Suit 735 was commenced against the four Respondents. Suit 735 was a derivative action brought on behalf of the Appellant by a minority shareholder of the Appellant by the name of Shamsul Bin Saad. Among the allegations levelled against the Respondents were breaches of their statutory and fiduciary duties as directors. The reliefs sought were several declarations pertaining to their alleged breaches of duty including a claim for damages allegedly suffered by the Appellant.

[6] Suit 735 was, however, dismissed by the Court on 16th August 2010, upon an application by the Respondents and a determination of a point of law pursuant to Order 14A of the then applicable Rules of the High Court 1980.

[7] Suit 735 was premised upon an allegation of a fraud on the minority and commenced as a common law derivative action, as an exception to the rule in *Foss v Harbottle*. However, subsequent to the commencement of Suit 735, the Respondents were removed as directors of the Appellant by its shareholders in an extraordinary general meeting held on 4th February 2010.

[8] It was upon those circumstances that the High Court ruled, pursuant to the Respondents' application invoking Order 14A of the Rules of the High Court 1980, that the substratum for maintaining the derivative action had collapsed and the action was held no longer "suitable in fact and law". It could no longer be maintained that the Appellant was still under the control of the Respondents, necessitating a derivative action. Upon those circumstances the High Court dismissed Suit 735 on 16th August 2010. In dismissing Suit 735, costs of RM10,000.00 was awarded in favour of the Respondents.

[9] Following the dismissal of Suit 735, the Respondents commenced Originating Summons No. D-24NCC-73-02/2012 ("**OS 73**") against the Appellant. OS 73 was commenced with the view of obtaining an indemnity from the Appellant for the legal expenses and costs incurred by the

Respondents in Suit 735. The amount claimed by the Respondents was a sum of RM304,500.00.

[10] The Respondents' claim to be indemnified in OS 73 was premised upon Article 170 of the Appellant's articles of association.

[11] The Respondents' claim in OS 73 was, however, dismissed by the High Court on 6th September 2012. OS 73 was dismissed on the ground that the Respondents were not found to have been innocent of the allegations in Suit 735, a condition required to be met under Article 170. The learned High Court Judge, Mohamad Ariff J. (as his Lordship then was), found that:

> '[34] … the derivative action was dismissed purely on the ground of failure of substratum since the plaintiffs here, being dismissed at the EGM, were no longer in control of the company to attract the exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461 (VC) and to support the derivative action. There was no judgment in relation to the issue of liability of the plaintiffs for the alleged breaches of duty as directors. The plaintiffs have not been held innocent of the allegations nor vindicated. The company itself is now pressing ahead with its own claim against them based essentially on the same allegations. It will be grossly wrong in these circumstances to allow the company's assets to be used to pay the legal costs incurred by the plaintiffs."

This decision of the High Court was reported in the law reports as *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors v Perdana Petroleum Bhd (formerly known as Petra Perdana)* [2013] 8 MLJ 280.

[12] There was no appeal filed by the Respondents against this decision of the High Court in OS 73. However, by then, the Appellant had already commenced Kuala Lumpur High Court Civil Suit No. D-22NCC-1057-2011 ("**Suit 1057**").

Suit 1057

[13] Suit 1057 was commenced by the Appellant, as plaintiff, against the 1st, 3rd and 4th Respondents and four others. The 2nd Respondent was not cited as a party. The 1st, 3rd and 4th Respondents were cited as the 1st, 2nd and 3rd defendants.

[14] In Suit 1057, the allegations against the 1st, 3rd and 4th Respondents were again allegations of breaches of duties as directors. In addition, there was also an allegation of a conspiracy to injure the Appellant.

[15] The trial of Suit 1057 ended with a dismissal of the claims against the 3rd and 4th Respondents, by the High Court, on 21st March 2014. As for the 1st Respondent, he was found liable for being negligent and in breach of

a duty owed to the Appellant for appointing an unlicensed placement agent. In consequence of which the 1st Respondent was ordered to pay the Appellant a sum of RM192,780.00. The decision of the High Court of 21st March 2014 was followed by an order made on 8th May 2014 on the quantum of the costs to be awarded to the defendants in Suit 1057, after having heard submissions on the issue.

[16] The Appellant, however, appealed the decision of the High Court in Suit 1057. The Court of Appeal having heard the appeal (Civil Appeal No. W-02(NCC)(W)-736-04/2014), allowed the Appellant's appeal in respect of the 1st, 3rd and 4th Respondent on 25th August 2015, and set aside part of the order of the High Court against them of 21st March 2014, save for the order in paragraph (2) of the High Court's decision. The order in paragraph 2 of the decision of the High Court is referred to below. The 1st, 3rd and 4th Respondents were found liable by the Court of Appeal and the reliefs sought in Suit 1057 for inter alia declarations of their breaches of duty, including an order for assessment of damages, were granted by the Court of Appeal. Orders for costs were also made against the 1st, 3rd and 4th Respondents.

[17] The matter did not end at the Court of Appeal. The 1st, 3rd and 4th Respondents, being dissatisfied with the decision of the Court of Appeal, sought and were granted leave to appeal to the Federal Court. Following the grant of leave to appeal, the 1st Respondent on his own and the 3rd and 4th

Respondents jointly, filed separate appeals to the Federal Court against the decision of the Court of Appeal of 25th August 2015.

[18] On 14th December 2017, the Federal Court allowed the 1st Respondent's appeal as well as the 3rd and 4th Respondents' appeal.

[19] In allowing the 3rd and 4th Respondents' appeal (Federal Court Civil Appeal No.: 02(f)-8-03/2016(W)), the Federal Court set aside the decision of the Court of Appeal of 25th August 2015 and reinstated the decision of the High Court of 21st March 2014 and its order for costs of 8th May 2014. The Federal Court also granted costs of RM60,000.00 to the 3rd and 4th Respondents.

[20] In allowing the 1st Respondent's appeal (Federal Court Civil Appeal No.: 02(f)-7-03/2016(W)), the Federal Court also set aside the decision of the Court of Appeal of 25th August 2015 *and reinstated* the decision of the High Court of 21st March 2014 and its order for costs of 8th May 2014. The 1st Respondent was awarded costs of RM60,000.00.

[21] Thus, the final outcome of Suit 1057 remained that of the decision of the High Court of 21st March 2014 and its order for costs of 8th May 2014, a decision in which the 2nd and 3rd Respondents were exonerated from any wrongdoing while the 1st Respondent was found to have been negligent.

[22] In respect of the outcome of Suit 1057, the 1st Respondent had been less than candid. In the current Originating Summons, in the High Court, paragraph 17 of the 1st Respondent's affidavit in support stated as follows:

> "17.… by virtue of this Judgment, the 3rd and 4th Plaintiffs and I are held to be innocent and/or are vindicated of the allegations made in Suits 735 and 1057. …"

[23] In his subsequent affidavit in reply of 14th September 2018, the 1st Respondent, seeking to clarify the orders made in respect of costs, stated as follows:

> "6.2In particular, I refer to paragraph 14.1 of the Affidavit in Reply and paragraph 6(i) of the Affidavit in Support. I wish to clarify that the sum of RM192,780.00 which the High Court had ordered me to pay to the Defendant in relation to Suit 1057 *was not costs awarded by the Court*, but was a refund of the appointment fees paid to Fiduciary Limited. The sum of RM192,780.00 has been duly refunded by me to the Defendant."
>
> (Emphasis added)

No mention was made by the 1st Respondent of the basis of this order for a "refund".

[24] The relevant portion of the judgment entered by the High Court in Suit 1057 on 21st March 2014, states as follows:

"MAKA ADALAH PADA HARI INI DIHAKIMI BAHAWA

(1) Kesemua tuntutan Plaintif dalam tindakan ini terhadap Defendan-Defendan ditolak melainkan perenggan (2) di bawah;

(2) *Defendan Pertama hendaklah membayar kepada Plaintif jumlah wang sebanyak RM192,780.00 sebagai kos pelantikan Fiduciary Limited;* dan

(3) Kos di dalam tindakan ditanggung oleh Plaintiff dan akan dikuantifikasikan ("quantified") selepas mendengar hujahan kaunsel-kaunsel yang ditetapkan pada 28.3.2014."

(Emphasis added)

[25] In a detailed and carefully considered judgment in Suit 1057, the learned trial Judge, Nallini Pathmanathan J (as her ladyship then was), in the concluding paragraphs of her judgment had, in fact, stated and held as follows:

"490. The Plaintiff has therefore failed to prove its claim. The Plaintiff's claim is therefore dismissed in its entirety *save for one exception*.

491. The one exception is the appointment of Fiduciary Limited to sell the shares falling within the purview of the Second Divestment. *I have earlier concluded that Tengku Ibrahim alone was negligent or breached his duty of care in appointing a placement agent or broker that was unlicensed under the CMSA*. Accordingly it is

ordered that Tengku Ibrahim pay the sum of RM192,780.00 being the costs of appointment of Fiduciary Limited to the Plaintiff."

(Emphasis added)

"Tengku Ibrahim" was the 1st Defendant in Suit 1057 and the 1st Respondent in this appeal. The judgment of her ladyship may be found in [2014] 1 LNS 236 in the Current Law Journal.

[26] The Court of Appeal did not set aside paragraph (2) of the judgment of the High Court of 21st March 2014 that required the 1st Respondent to pay the Appellant a sum of RM192,780.00. As for the Federal Court, it reinstated the decision of the High Court.

[27] Therefore, the outcome of Suit 1057 was in fact the exoneration of the 3rd and 4th Respondents of wrongdoing but not the 1st Respondent. The finding of his liability to pay the Appellant a sum of RM192,780.00 remained at all stages of the case.

The Respondents' claims for indemnity

[28] In light of the foregoing, the Respondents' claims for indemnity against the Appellant in this Originating Summons consisted of the following:

(i) In re Suit 735

A joint claim by all the Respondents for a sum of RM304,500.00, after deducting a sum of RM10,000.00 being costs awarded against them. This amount consisted of the legal fees, tax and disbursements incurred by the Respondents in defending Suit 735.

(ii) In re Suit 1057 (including the appeals to the Court of Appeal and Federal Court)

(a) The 1st Respondent's claim for a sum of RM1,446,189.06 after deducting the various awards of costs received. This amount consisted of the legal fees, tax and disbursements incurred by the 1st Respondent in respect of Suit 1057, including the appeals to the Court of Appeal and Federal Court.

(b) The 3rd and 4th Respondents' claim for a sum of RM565,973.60 after deducting the various awards of costs received. This amount consisted of the legal fees, tax and disbursements incurred by the 3rd and

4th Respondents in respect of Suit 1057, including the appeals to the Court of Appeal and Federal Court.

(iii) Additional indemnity claimed

The Respondents' claim for a sum of RM68,168.22 being legal costs incurred in seeking the indemnity claimed.

(iv) In re the current Originating Summons

The Respondents' claim for a sum of RM254,701.46 being legal costs incurred in commencing the current Originating Summons.

[29] Thus, the total amount of indemnity sought by the Respondents was RM2,639,532.34, although in the Originating Summons itself, there were no orders sought for the RM68,168.22 and RM254,701.46 claimed.

[30] Based on the affidavits in support and the Originating Summons, the bases given in support of the Respondents' claim for indemnity are the provisions in Article 170 of the Appellant's articles of association and section 289 of the CA 2016.

[31] It would be convenient to hereunder set out Article 170 of the Appellant's articles of association. Article 170 provides as follows:

"INDEMNITY

170. *Every director*, managing director, agent, auditor, secretary, and other officer *for the time being of the Company shall be indemnified out of the assets of the Company against any liability incurred by him in defending any proceedings,* whether civil or criminal, *in which judgment is given in his favour* or in which he is acquitted or in connection with any application under the Act in which relief is granted to him by the court in respect of any negligence, default breach of duty or breach of trust."

(Emphasis added)

[32] As for section 289 of CA 2016, based on submissions by counsel for the Respondents, reliance was placed specifically on sections 289(3)(a) and (b) and (4)(a), (b) and (c). These provisions under the CA 2016 state as follows:

"Indemnity and insurance for officers and auditors

289. (1) …

(2) An indemnity given in breach of this section shall be void.

(3) A company may indemnify an officer or auditor of the company for any costs incurred by him or the company in respect of any proceedings—

(a) that relates to the liability for any act or omission in his capacity as an officer or auditor; and

(b) in which judgment is given in favour of the officer or auditor or in which the officer or auditor is acquitted or in which the officer or auditor is granted relief under this Act, or where proceedings are discontinued or not pursued.

(4) A company may indemnify an officer or auditor of the company in respect of—

(a) any liability to any person, other than the company, for any act or omission in his capacity as an officer or auditor; and

(b) costs incurred by that director or officer or auditor in defending or settling any claim or proceedings relating to any such liability except—

(i) any liability of the director to pay—

(A) a fine imposed in criminal proceedings; or

(B) a sum payable to a regulatory authority by way of a penalty in respect of non- compliance with any requirement of a regulatory nature, however arising; or

(ii) any liability incurred by the director—

(A) in defending criminal proceedings in which he is convicted; or

(B) in defending civil proceedings brought by the company, or an associated company, in which judgment is given against him; or

(c) in connection with an application for relief under this Act."

[33] Apart from denying the Respondents' claims, the Appellant also contended that section 289 of the CA 2016 may not be relied upon by the Respondents as the basis for the claims had occurred prior to the coming into force of the CA 2016, i.e. 31st of January 2017, save for Division 8 of Part III (sections 394-430) which came into force on 1st March 2018, but which is of no particular relevance to the issues in dispute.

[34] Suit 735 was dismissed by the High Court on 16th August 2010. The Respondent's claim for indemnity in OS 73 for the legal expenses incurred in Suit 735 was dismissed on 6th September 2012 and there was no appeal against this decision of the High Court.

[35] The decision of the Federal Court in respect of the 1st, 3rd and 4th Respondents' appeal was on 14th December 2017.

[36] *Ex facie* part of the claims for indemnity arose from a decision before the coming into force of the CA 2016 while the other, from a decision post the coming into force of the CA 2016.

The legal status of articles of association

[37] The legal status of the articles of association of a company is traceable to 1844, with very minor variations over time, to what forms the core of the subsequent statutory formulations adopted.

[38] In addressing section 20 of the UK Companies Act 1948, in the Third Edition of the Principles of Modern Company Law, by LCB Gower, it is stated, at p 261 as follows:

> " The wording of this section [section 20 of the Companies Act 1965] can be traced back with variations to the original Act of 1844 which *adopted the existing method of forming an unincorporated joint stock company by deed of settlement (which did of course constitute a contract between the members who sealed it) and merely superimposed incorporation on registration.* The 1856 Act substituted the memorandum and articles for the deed of settlement and introduced a provision on the lines of the present section 20. Unhappily, full account was not taken of the vital new factor, namely, the fact that the incorporated company was a separate legal entity, and the words "as if …signed and sealed by each member" did not have added to them "and by the company." This oddity has survived into the modern Acts."
>
> (Emphasis added)

[39] The UK Joint Stock Companies Act of 1844 was the legislation that facilitated the creation of joint-stock companies otherwise than by royal charter or a private act of parliament; arguably the genesis of

modern company law. It was only by subsequent legislation that limited liability was introduced.

[40] Whether a clause in the articles of a company (article 118) to the effect that the plaintiff should be solicitor to the company to transact all legal business of the company and that he may not be removed save for misconduct, may be enforced as a contract, was the question before the English Court of Appeal in *Eley v The Positive Government Security Life Assurance Company, Limited* (1876) 1 Ex D 88. Lord Cairns, LC, with whom Lord Coleridge C.J, and Mellish L.J. concurred, stated of the articles as follows, at p. 90:

> "This article is either a stipulation which would *bind the members*, *or else a mandate to the directors.* In either case it is a matter between the directors and shareholders, and not between them and the plaintiff."
>
> (Emphasis added)

[41] In should be noted that the articles were treated as binding *vis a vis* members, but *vis a vis* the directors of the company, they were treated as a mandate conferred upon directors. In *Eley*, the company had even

acted on the article in question but subsequently chose no longer to instruct the plaintiff as solicitor. Lord Cairns LC in his judgment observed as follows, p. 90:

> "Now it may be considered that *Art. 118 would have warranted the directors in entering into an agreement with the plaintiff by which they should contract to employ the plaintiff; but I ask, was such a contract ever made*? … Nothing of the kind exists here; and *if the article is not an agreement on which the plaintiff can rely, there is nothing in the case before us but the fact of his employment* and would entitle him to remuneration only for work he has done."
>
> (Emphasis added)

See also the decision in *Browne v La Trinidad* (1887) 37 Ch D 1 in which the decision in *Eley* was cited and relied upon.

[42] In *Hickman v Kent or Romney Marsh Sheep-Breeders' Association* [1915] 1 Ch 881, Astbury J, had to grapple with what then existed of conflicting views, not only among authors and "texts books of the highest repute", but also dicta in various reported cases as to the legal status and nature of the articles of association of a company.

[43] In *Hickman* the legislation in question was the Companies (Consolidation Act) 1908. The provision that Astbury J had to consider was section 14(1) which stated as follows:

> "The memorandum of and articles shall, when registered, *bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member*, *and contained covenants on the part of each member,* his heirs, executors, and administrators, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act."
>
> (Emphasis added)

The foregoing section 14(1) was a formulation that appeared originally in section 16 of the UK Companies Act of 1862.

[44] After a careful consideration of the various decisions and opinions given, Astbury J observed in *Hickman*, at p 900 of the report, as follows:

> " It is difficult to reconcile these two classes of decisions and the judicial opinions therein expressed, but I think this much is clear, *first*, that no article

can constitute a contract between the company and a third person; *secondly,* that no right merely purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as, for instance, as solicitor, promoter, director, can be enforced against the company; and, *thirdly,* that articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively."

(Emphasis added)

[45] Equally significant is the observation of Buckley L.J. in *Bisgood v Henderson's Transvaal Estates Ltd* [1908] 1 Ch 743, which was quoted by Atsbury J in *Hickman*, at p 900 of the report, that "The purpose of the memorandum and articles is to define the position of the shareholder as shareholder, not to bind him in his capacity as an individual."

[46] Closer to the modern formulation of how memorandum and articles are described is to be found in section 20(1) of the UK Companies Act of 1929 which stated as follows:

"Subject to the provisions of this Act, the memorandum and articles shall, when registered, *bind the company and the members thereof to the same extent as*

if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles."

(Emphasis added)

[47] In *Beattie v E. & F. Beattie, Limited* [1938] 1 Ch.708, the English Court of Appeal had to deal with an issue involving an application by a member of a company to have a dispute resolved by way of arbitration, as provided in article 133 of the articles of association of the company. The dispute was in respect of allegations of defaults by him as a director. Considering section 20 of the UK Companies Act 1929, and in light of the member's assertion, Sir Wilfred Greene M.R. observed, at p 721:

" In my judgment, that argument is based on an incorrect view both as to the effect of the article and as to the effect of s. 20 of the Companies Act. The question as to the precise effect of s. 20 has been the subject of considerable controversy in the past, and it may very well be that there will be the considerable controversy about it in the future. *But it appears to me that this much, at any rate, is good law*: *that the contractual force given to the articles of association by the section is limited to such provisions of the articles as apply*

to the relationship of the members in their capacity as members."

(Emphasis added)

In support of this conclusion, reference and reliance was placed on the decision and observations of Astbury J in *Hickman's* case, which remains highly regarded.

[48] Further on in his judgment in *Beattie*, Sir Wilfred Greene M.R. observed, at p 722:

" It is to be observed that the real matter which is here being litigated is *a dispute between the company and the appellant in his capacity as a director,* and when the appellant, relying on this clause [article 133], seeks to have that dispute referred to arbitration, it is that dispute and none other which he is seeking to have referred, and by seeking to have it referred *he is not, in my judgment, seeking to enforce a right which is common to himself and all other members*."

(Emphasis added)

[49] The UK Companies Act 1948 was the next legislation significant, in particular, in respect of the development of our company law. In relation to the memorandum and articles of a company, section 20 of the UK Companies Act 1948 provided as follows:

> "General Provisions with respect to Memorandum and Articles
>
> 20. – (1) Subject to the provisions of this Act, the memorandum and articles shall, when registered, *bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member* to observe all the provisions of the memorandum and of the articles.
>
> (2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company, and in England be of the nature of a specialty debt."
>
> (Emphasis added)

[50] Section 20(1) of the Companies Act 1948, was also consistently interpreted as being a contract between a company and its members *qua* members.

[51] *In re Compania De Electricidad De La Provincia De Buenos Aires Ltd*. [1980] Ch 146, at p 187, Slade J observed that:

> “The decision of Astbury J. in *Hickman v. Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch. 881 indicates that section 20 (1) (which does not differ in any respect material for present purposes from section 14 (1) of the Companies (Consolidation) Act 1908, on which his decision was based) has the effect that the memorandum and articles when registered are by virtue of the subsection to be treated as constituting a contract between the company and each member. Astbury J. said, at p. 897:
>
> > "*A company cannot in the ordinary course be bound otherwise than by statute or contract and it is in this section that its obligation must be found*. As far as the members are concerned, the section does not say with whom they are to be deemed to have covenanted, but the section cannot mean that the company is not to be bound when it says it is to be bound, as if, &c, nor can the section mean that the members are to be under no obligation to the company under the articles in which their rights and duties as corporators are to be found. Much of the difficulty is removed if the company be regarded, as the framers of the section may very well have so regarded it, as being treated in law as a party to its own memorandum and articles."
>
> (Emphasis added)

I feel no difficulty in accepting the propositions that by virtue of section 20 (1) of the Companies Act 1948 (a) a contract between a company and its members is deemed to arise when its memorandum and articles are registered; (b) such contract is deemed to have been executed by the *members* of the company under seal."

[52] In *Malayan Banking Ltd v Raffles Hotel Ltd* [1966] 1 MLJ 206, the Federal Court, Singapore, had to deal with the assertion of a right provided in the articles of association of the respondent company. In considering the right being asserted, the Court had to consider the effect of section 22(1) of the Companies Ordinance (Cap. 174) which corresponded with section 14 of the UK Companies Act of 1929. Ambrose J in his judgment, which met with the concurrence of Tan Ah Tah AGCJ and Chua J, stated as follows:

"I will now deal with this submission. Section 14 of the Companies Act of 1929, which is referred to in the passage cited, corresponds to section 22(1) of the Companies Ordinance (Cap. 174), which provides as follows:–

"Subject to the provisions of this Ordinance, the memorandum and articles shall, when registered *bind the company and the*

members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member his executors and administrators to observe all the provisions of the memorandum and of the articles."

In considering this section, it must be borne in mind that the articles do not in any circumstances, *as between the company and a person who is not a member, constitute a contract of which that person can take advantage:* see 6 *Halsbury's* Laws of England, 3rd edition, p 129, paragraph 270. As was said by Astbury J. in *Hickman Kent Or Romney Marsh Sheep-Breeders' Association* [1915] 1 Ch 881 at p 897 and 900, pp 897 and 900 respectively:–

"An outsider to whom rights purport to be given by the articles in his capacity as such outsider, whether he is or subsequently becomes a member, cannot sue on those articles treating them as contracts between himself and the company to enforce those rights. Those rights are not part of the general regulations of the company applicable to all shareholders and can only exist by virtue of some contract between such person and the company, and the subsequent allotment of shares to an outsider in whose favour such an article is inserted does not enable him to sue the company on such an article to enforce rights which are *res inter*

alios acta and not part of the general rights of the corporators as such.

…

I think this much is clear, first that no article can constitute a contract between the company and a third person; secondly, that no right merely purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as, for instance, as solicitor, promoter or director, can be enforced against the company; and, thirdly, that articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively."

(Emphasis added)

Thus, the decision of Astbury J. in *Hickman* was again taken as the applicable law.

[53] His lordship Ambrose J then concluded as follows:

"For the above reasons I come to the conclusion that article 77 of the plaintiff's articles of association is not binding on the plaintiff company as

between the plaintiff company and an outsider; *that without having recourse to a contractual right the defendant company, being an outsider, cannot take advantage of a power purporting to be given by article 77*; and that the defendant company's appointment of itself as a director of the plaintiff company in exercise of the power purporting to be given to it by article 77 is invalid, that is, has no legal effect. In the result, I would dismiss this appeal with costs."

(Emphasis added)

While the case was not concerned with the status of the articles of association vis a vis a lawfully appointed director, it is nevertheless based on the principle enunciated in *Hickman* which treats even a director, other than qua member, as an outsider.

[54] We then come to section 33 of our CA 1965. Section 33 provided as follows:

"33. (1) Subject to this Act the memorandum and articles shall when registered *bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and*

contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles."

(Emphasis added)

[55] As can be seen, section 33(1) of CA 1965 is identical to section 20(1) of the UK Companies Act 1948 save that section 33(1) does not contain the words "the provisions of" in its opening.

[56] CA 1965 was replaced by CA 2016. Section 33(1) of CA 2016 states as follows:

"Effect of constitution

33. (1) The constitution shall, when adopted, *bind the company and the members to the same extent as if the constitution had been signed and sealed by each member and contained covenants on the part of each member* to observe all the provisions of theconstitution."

(2) All moneys payable by any member to the company under the constitution shall be a debt due from such member to the company."

(Emphasis added)

[57] Section 34(c) of CA 2016 caters for companies incorporated under CA 1965, where the term "memorandum and articles of association" was still used. Section 34(c) states as follows:

> **"Form of constitution**
>
> 34. The constitution of a company—
>
> (a) …
>
> …
>
> (c) in the case of a company registered under the corresponding previous written law, is the memorandum and articles of association as originally registered or as altered in accordance with the corresponding previous written law,
>
> and includes any alteration or amendment made under section 36 or 37, if any, as the case may be."

[58] As can be seen, the express statutory formulation describing the memorandum and articles has remained consistent throughout the years. So too has the Court's interpretation that the memorandum and articles constitute a contract between the members, *qua* members, and the company.

[59] Thus, traceable back to 1844, at the core of what enables a company to operate and be governed and managed, despite a membership that may run into very many individuals and legal persons, is the binding nature of the memorandum and articles of association as a contract between the members and the company.

[60] Having regard to the foregoing, whether it be under CA 1965 or CA 2016, the legal status of the memorandum and articles of association of a company remains the same. It is a contract between the members, as members, and the company.

[61] There are also authorities to the effect that not only is the memorandum and articles of association a contract between a company and its members, it is also enforceable as a contract amongst the members *inter se*.

[62] Controversial at one time, this issue was described by Vaisey J in *Rayfield v Hands and Others* [1960] Ch 1, at p 4, as follows:

> "The next and most difficult point taken by the defendants, as to which it would appear that there is no very clear judicial authority, is that article 11,

> as part of the company's articles of association, does not do what it looks like doing, that is, to create a contractual relationship between the plaintiff as shareholder and vendor and the defendants as directors and purchasers. This depends on section 20 (1) of the Companies Act, 1948, which reads …"

[63] The controversy was patent having regard to the various authoritative text and judicial views referred to by Vaisey J. In *Rayfield,* what the plaintiff sought was to enforce the provisions in the articles of a company, article 11, against the directors of the company who were also shareholders. The company itself was not made a party to the suit.

[64] After reviewing the authorities including section 20(1) of the UK Companies Act 1948, Vaisey J concluded that the articles of association of the company constituted a contract among its members *inter se* as well as being a contract between the company and its members. Setting out one of the issues he was confronted with and his conclusion, Vaisey J stated, at p. 6 :

> "Now the question arises at the outset whether the terms of article 11 relate to the rights of members inter se (that being the expression found in so

many of the cases), or whether the relationship is between a member as such and directors as such. *I may dispose of this point very briefly by saying that, in my judgment, the relationship here is between the plaintiff as a member and the defendants not as directors but as members*."

(Emphasis added)

[65] Vaisey J also held that it was a contract that may be enforced between members *inter se* without the need to cite the company as a party to the suit.

[66] In concluding Vaisey J, in *Rayfield*, at p 9, stated as follows:

"I am encouraged, not I hope unreasonably, to find in this case *a contract similarly formed between a member and member-directors in relation to their holdings of the company's shares in its articles*. The conclusion to which I have come may not be of so general an application as to extend to the articles of association of every company, for it is, I think, material to remember that this private company is one of that class of

companies which bears a close analogy to a partnership; see the well-known passages in *In re Yenidje Tobacco Co*."

(Emphasis added)

[67] In the course of argument, the issue of whether CA 1965 or CA 2016 applied was raised. On this issue of the legal status of the memorandum and articles, it matters not. As can be seen by reference to the legislative formula used, the status of the memorandum and articles remained the same under both legislation.

[68] While the memorandum and articles of a company constitute a contract between the members and the company and among the members *inter se,* there is no reason why, in principle, its provisions where relevant may not be incorporated into a contract between a company and a third party, be it its director or otherwise, by agreement, expressed or implied.

Incorporation of the articles

[69] In *Globalink Telecommunications Ltd v Wilmbury Ltd and others* [2003] 1 BCLC 145, p 154, Stanley Burton J stated in lucid terms as follows:

> "[30] The articles of association of a company are as a result of statute a contract between the members of a company and the company in relation to their membership. *The articles are not automatically binding as between a company and its officers as such*. In so far as the articles are applicable to the relationship between a company and its officers, *the articles may be expressly or impliedly incorporated in the contract between the company and a director*. They will be so incorporated if the director accepts appointment 'on the footing of the Articles,' and *relatively little may be required to incorporate the articles by implication*: per Ferris J at para [26] of his judgment."
>
> (Emphasis added)

[70] As can be seen, reliance was place by Stanley Burton J on the views expressed by Ferris J in *John and others v Price Waterhouse (a firm) and another* [2002] 1 WLR 953, pp. 959 - 960, where the latter stated thus:

"[26] I found greater substance in Mr Hirst's point that the articles are not, or may not be, part of the contract between the EJ companies and PW. *The articles of a company constitute a contract between the members of the company inter se and between each of them and the company but they do not, without more, constitute a contract between the company and its directors or auditors*. Nevertheless, the terms of regulations 136 and rr8 appear clearly to contemplate that directors and auditors (amongst others) will have a right, which could only be a contractual right, to be indemnified as there mentioned. *It seems to me that comparatively little will be required to satisfy the court that, in particular cases, the indemnity provided for by regulations 136 and 118 is incorporated in the contract which is made when the company appoints a director or an auditor*."

(Emphasis added)

[71] In the case of *John,* Ferris J also considered the decision *In re City Equitable Fire Insurance Company, Limited* [1925] Ch 407. One of the issues in that case concerned a provision in the articles of association of the company, article 150, and whether it had effect in modifying the ordinary legal obligations of an auditor. Warrington LJ in addressing that issue stated, at p 520:

"In the first place, I think that that article, as the learned judge has held expressly in the case of the directors and impliedly, if not expressly, in the case of the auditors, *does in such a case as the present form part of the contract between the company and the auditors, and for the reason that auditors are engaged without any special terms of engagement. When that is the case, then if the articles contain provisions relating to the performance by them of their duties and to the obligations imposed upon them by the acceptance of the office, I think it is quite plain that the articles must be taken to express the terms upon which the auditors accept their position*. Of course if the terms of their engagement are expressed in a separate document, then that document must be taken to define the conditions of their engagement, and it would not be proper to assume any implied terms either from the provisions of the articles or elsewhere."

(Emphasis added)

[72] Ferris J, after citing the forgoing passage from Warrington LJ, observed, at p 961, that:

"The other two members of the court, Sir Ernest Pollock MR and Sargant LJ, agreed that the auditors were exonerated by article 150 *but did not discuss the means by which that article had been incorporated in the relevant contract*: see pp 515-518 and pp 531-532."

(Emphasis added)

Ferris J seemed to have agreed with counsel before him who had submitted that Warrington LJ did hold that the article in question would not be incorporated if there were express terms of engagement. This suggests that, again, the circumstances of the appointment would be relevant as to whether any provision in the articles could be said to have been incorporated or included in the auditors' appointment.

[73] In our view, *without more,* the articles of association do not become terms in a contract between a company and a third party (i.e. person or persons other than its members qua members), whether it be officers of the company or otherwise. However, the articles *may be incorporated* into such contracts, expressly or impliedly. It is also the case that Courts take the view that comparatively little is required for the incorporation of a term in the article that provides indemnity to an auditor or director who is appointed. However, it remains necessary that there be an incorporation of the particular article in question.

[74] It is also in this context that the decision in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors v Perdana Petroleum Bhd* [2013] 8 MLJ 280 is to be understood. On the issue of the incorporation of articles

of association into contracts between directors and the company, Mohamad Ariff J stated as follows:

> [27] … *The cases suggest the incorporation depends on whether the director's appointment is done on the footing of the articles.* In this connection again, a healthy dose of commercial reality will assist in understanding and formulating a rational basis for the law. I am tempted to ask: in these days of sophisticated corporate affairs and detailed company law provisions, how else can directors be appointed to the board except on the footing of the articles? It is an obvious necessary pre-condition for a valid board appointment. *In this sense, the view that it takes very little to incorporate the articles into the director's contract can be more readily and realistically understood. I am therefore of the view that principles so ably stated in Isaac's case should be preferred, and bear repetition for emphasis*:
>
> > I think, then, that where a man has accepted the office of director, and acted as such, there ought to be inferred an agreement between him and the company, on his part that he will serve the company on the terms as to qualification and otherwise contained in the Articles of Association, and on the part of the company that he shall receive the remuneration, and all the benefits which those articles provide for directors.

FINDINGS AND CONCLUSIONS ON THE LAW

…

[29] On this point, *I am therefore of the view that it takes very little to incorporate article 170 into the contract between the plaintiffs and the company since obviously these persons must have been appointed on the footing of the articles* , just as they were subsequently dismissed on the same footing at the EGM of the company.

(Emphasis added)

[75] Thus, however little it may be, it still takes something to conclude that the articles have been incorporated as a term in the contract of appointment of a director. It is also left to be seen, based on the facts and circumstances of a given case, the particular articles that may be incorporated and those that may not be so obviously incorporated.

[76] *Anglo-Austrian Printing and Publishing Union, Re, Isaacs' Case* [1892] 2 Ch 158, was the case cited and relied on by Mohamad Ariff J as providing the preferred view. It was a case that concerns a summons for the removal of a director, Sir Henry Isaacs, from the list of contributories

of the company which had been wound up. Article 71 of the company's articles of association provided that the qualification of a director shall be the holding of shares of the company. It was also provided in that article that a first director may act before acquiring his qualification but shall so acquire within one month of his appointment and unless he shall do so, he shall be deemed to have agreed to take the said shares from the company and the same shall be forthwith allotted to him.

[77] Sir Henry Isaacs was a first director named in article 72 and he accepted his appointment as director by signing on the memorandum and articles of association. He, however, neither applied for nor was formerly allotted any shares in the company. It was in those circumstances that in the Court of Appeal, in affirming Stirling J's judgment at first instance in dismissing the application, Lindley LJ stated:

> "[His Lordship then read articles 71 and 72, and continued:-]
>
> *Those are the terms upon which Sir Henry Isaacs became a director, and those articles he signed. I do not think that the latter circumstance is essential, but it is not unimportant*; it certainly carries this case further than the *Eley Case* (1), and the case of *Browne v. La Trinidad* (2). Regarding the articles simply as an offer to Sir *Henry Isaacs*, and other

people, of terms on which they are to become directors, and this is perhaps the proper view of them, still Sir *Henry Isaacs* accepted those terms and he became a director. *He became a director, to my mind, by signing the articles; under sect. 72 he assented to do so at once. But any possible doubt as to any inference to be drawn from the mere signing is removed by the fact that he actually acted as a director. There is no question as to his having accepted the terms*.

Now, Mr. *Buckley* contends that no contract between Sir *Henry Isaacs* and the company is to be implied. *Why not? He has assented to be treated as if he had agreed, and he has acted as if he had agreed, to take the shares from the company*. And what is the position of the company? They are to be treated as having agreed forthwith to allot the shares to him accordingly. What more can be wanted? It appears to me, I confess, that the Inference here is too plain to be mistaken, and that Sir *Henry Isaacs* is a contributory for the qualification shares to the amount of £1000. The appeal must be dismissed with costs."

(Emphasis added)

[78] Bowen LJ, sitting with Lindley LJ, stated at p. 167:

“Here is an article which provides that the qualification of a director is to be the holding of a certain number of shares in the company; and that a director, though he may act before he has a qualification, shall in any case acquire the same within one month from his appointment. *Now, if it had stopped there, it may be, and probably would be, that a director, who had never taken shares, would not be held, upon the mere fact that he had been a director upon those terms, to have agreed to become a member of the company*; *and the reasoning upon which that conclusion would have been founded is as follows*: "*This article binds the members of the company only. It is not in itself a contract between the director and the company; and although it is true that by signing it the director bound himself to submit to it, it does not in terms go so far as to say that he is to be deemed to be a member of the company."* …

…

What is the effect of the signature of the articles of association by this gentleman? At all events, as soon as he acts as a director of the company, and places himself in the position for which the articles provide, *these articles shew the terms of the implied contract which thereupon arises between himself and the company*. That is the effect of these articles - they amount to an offer put forward by the company to persons intending to become directors of the terms on which the directors are to act. It is perfectly true that the offer is contained in articles, which are not drawn up as between the company and the

directors, but nevertheless the company puts forward the terms of the articles as the terms by which it will be bound; and the director by becoming and acting as director of the company accepts that position.

…. It seems to me *whether you put it as a case of an agreement created by reason of his signature to the articles of association, or whether you put it - as I think I myself should put it - as an implied contract arising out of his position as a director of the company coupled with the articles which he has accepted*, or whether you put it as a plea of estoppel, *the inference is equally clear.*

[79] It is therefore clear that it was the circumstances of Sir Henry Isaac's appointment as director, his signing the articles, that gave rise to an implication that he had agreed to the terms of his appointment which included the articles that provided for his qualification as director. He "became a director, …, by signing the articles; …". There was thus more, in the circumstances of the case than just the fact of Sir Henry Isaac's appointment as director. This too can be seen emphasised in Bowen LJ's statement quoted above though he did point out that he would have put it as an implied contract.

[80] In *Swabey v Port Darwin Gold Mining Co* (1889) 1 Meg 385, the plaintiff was appointed a director and, it would appear, was remunerated in accordance with what is stated in the articles of association. The facts as stated in the report is as follows:

> " By the Articles of Association of the Port Darwin Gold Mining Company, a company was incorporated under the Companies Act, the remuneration to be paid to the directors was to be at the rate of 200L. per annum. The plaintiff was one of the directors and remained such down to 1888."

[81] In *Swabey*, the company sought to alter the articles of association to reduce the remuneration of directors and that such reduction to take effect retrospectively to a date prior to the resolution. The English Court of appeal held that the amendment to the articles which purports to have effect on remuneration earned by the plaintiff could only take effect prospectively. In the words of Lord Halsbury LC:

> "The articles do not themselves constitute a contract, they are merely the regulations by which provision is made for the way the business of the company is to be carried out. *A person who acts as a director with those articles before him enters into a contract with the company to serve as a director, the remuneration to be at the rate contemplated by the articles*.

> The person who does this has before him, as one of the stipulations of the contract, that it shall be possible for his employer to alter the terms upon which he is to serve, in which case he would have the option of continuing to serve, if he thought proper, at the reduced rate of remuneration. *In so far as the contract on those terms had already been carried into effect, it is incapable of alteration by the company*."
>
> (Emphasis added)

[82] In Lord Halsbury LC's statement, it appears accepted that there was a contract between the plaintiff and the company and its terms in relation to remuneration included those in the articles of association that might affect the remuneration to be paid. How those terms in the articles relating to remuneration, and the power to alter the articles such as might in turn affect the remuneration provided in the articles, became incorporated into the contract with the Plaintiff was not explained. However, it would seem to be implicit in the facts and in Lord Halsbury LC's statement above quoted, that the plaintiff had *accepted and was paid* the remuneration stipulated in the articles having express knowledge that the articles might be altered, and was thus taken to have been appointed upon those terms. It would be an implied incorporation of those provisions in the articles into the terms of the plaintiff's appointment as director.

[83] *In re New British Iron Company, ex parte Beckwith* [1898] 1 Ch 324, was another case that demonstrates that articles may be incorporated into the terms of a director's employment, if such be found upon the facts of the case. In his judgment Wright J stated as follows:

> "That article is not in itself a contract between the company and the directors; it is only part of the contract constituted by the articles of association between the members of the company inter se. *But where on the footing of that article the directors are employed by the company and accept office the terms of art. 62 are embodied in and form part of the contract between the company and the directors*."
>
> (Emphasis added)

[84] In *Shalfoon v Cheddar Valley Co-Operative Dairy Co Ltd* [1924] NZLR 561, at pp 580 - 579, Salmond J in the Court of Appeal of New Zealand, stated the following:

> "… there is no legal reason why the terms on which a company so proposes to contract either with strangers or with its own members should not be set out in the document known as the articles of association. *In such a case, on the existence of the contract being proved, aliunde in the individual*

instance, the articles of association can be referred to as evidence of the terms of the contract. For instance, it is not uncommon for articles of association to provide that the directors of the company shall acquire or possess a certain number of shares as a qualification for their office. *Such a clause is not in itself a binding regulation imposing any enforceable obligation upon the directors to acquire such shares*; *but it is operative as the basis of an express or implied contract made by each director with the company when he accepts office – a contract, that is to say, that he will acquire the qualification shares prescribed by the articles*. This rule is illustrated by such a case as *Swabey v Port Darwin Gold Co*. (1). "The articles," said Lord Esher, "do not themselves form the contract, but from them "you get the terms upon which the director is serving. See also *In re New British Iron Co.* (2); *Isaacs' case* (3)."

(Emphasis added)

[85] Similarly, in *Bailey v New South Wales Medical Defence Union Ltd* (1995) 132 ALR 1, Brennan CJ, Deane and Dawson JJ in the High Court, observed as follows:

"Whilst the articles of association of a company regulate the relations of the members amongst themselves as members and with the company, *they do*

not preclude a member from contracting individually with the company upon terms which may or may not be defined by reference to the articles."

(Emphasis added)

[86] Whether the terms of an article providing for a right to be indemnified out of the assets of the company was incorporated into the appointment of its auditors was an issue that the Court of Appeal of Singapore had to deal with in *Cheong Kheong Mah Chaly and others v Liquidators of Baring futures (Singapore) Pte Ltd* [2003] 2 SLR (R) 571. Chao Hick Tin JA delivering the judgment of the Court held as follows:

"*Ultimately, it would be a matter of construction*. It is true that Articles of Association constitute a contract between a company and its members and they do not bind third parties: see Hickman v Kent Or Romney Marsh Sheep-Breeders' Association [1915] 1 Ch 881. But the *articles do provide for appointment and duties of, inter alia, directors and auditors*. Thus, w*hether a particular appointment of such third party incorporates the provision in the articles relating to that appointment is to be inferred from all the circumstances.*"

(Emphasis added)

It is to be observed the appointment of “directors and auditors” is regarded as appointments of third parties and whether such appointment had incorporated any article in the articles of association of the company “is to be inferred from all the circumstances”. This would suggest clearly that the mere fact of appointment, whether as auditor or even as director, *would not automatically* result in an incorporation of specific articles into their terms of appointment. The circumstances pertaining to the appointment of the auditors were such that the auditors were sent a letter of offer to appoint them with the company’s memorandum and articles of association enclosed and which offer was accepted. As there were no terms of appointment save for the memorandum and articles of association that accompanied the letter of offer of appointment, which was accepted, it was found that the articles *were incorporated* into the auditors’ contract of appointment.

[87] There is then the decision of the Singapore Court of Appeal in *Oro Negro Drilling Pte Ltd and others v Integradora de Servicios Petroleros Oro Negro SAPI de CV and others appeal* [2020] 1 SLR 226.

[88] In *Oro Negro*, it was argued by the appellants, a group of Singapore incorporated companies, that there existed a collateral contract between them and the former directors that incorporates the appellants' constitutions. The counter to that contention was that although the provisions in a company's constitution may be incorporated into an agreement between a non-member director and a company, a director's consent to being appointed *per se* was insufficient for such purposes.

[89] On this issue, the Court of Appeal speaking through Steven Chong JA held, at pp. 245 – 246, as follows:

> "58 In our view, the central question on this issue was whether the former directors' acceptance of their appointments as the appellant's directors was sufficient to cause them to be bound by the appellants' constitutional provisions.
>
> …
>
> 60 We were satisfied that the appellants had *a good arguable case* that the former directors were bound to observe the appellants' constitutions. In our view, the former directors' consent to being appointed as the appellants' directors *on the facts of this case*, gave rise to an

agreement that they would serve the appellants based on the terms of their constitutions."

(Emphasis added)

[90] It must be noted that what the Court of Appeal found was *a good arguable case* and that too, based on the facts of that case. Although whether there was anything more to the facts of the case other than the former directors' mere appointment as directors is not clear.

[91] The question that arises in the current case is therefore, was Article 170 incorporated, either expressly or impliedly, as a term in the Respondents' appointment as directors of the Appellant?

The Respondents and Article 170

[92] It is significant in this case that nothing pertaining to the circumstances of the Respondents' appointment as directors of the Appellant was alluded to or given in evidence.

[93] There was no mention made in the evidence of the Respondents of their appointment as directors, no evidence as to whether there was any written or oral contract of appointment or employment, no evidence whether their appointments were in writing or evidenced in writing. There was also no evidence led on record as to whether the Respondents were all shareholders of the Appellant.

[94] In short there was no reliance on any contractual basis, or how Article 170 might have been incorporated as a term of any such contract in the Respondents' attempt to enforce Article 170, save for the fact of its existence, and that they were former directors of the Appellant.

[95] The affidavits filed in respect of the Respondents' application were focused only on the indemnities claimed and the suits in respect of which the indemnities were sought.

[96] That the Respondents were seeking to enforce Article 170 *qua* director and not as member, cannot be doubted. Article 170 itself pertains to directors. Suit 735 and Suit 1057 were both suits against the

Respondents as directors and upon allegations of their breaches of duty as directors.

[97] We do not think the law has gone so far as to enable a director to enforce a provision in the articles of association, *qua* director, merely because he says he was a director, and without more.

[98] There was no evidence upon which the court may conclude that the Respondents were appointed “on the footing of the Articles”.

[99] Although, as is said, that it would take “comparatively little” *per* Ferris J in *John*, or “relatively little” per Stanley Burton J in *Globalink*, or “very little” *per* Mohamad Ariff J in *Tengku Dato’ Ibrahim Petra bin Tengku Indra Petra & Ors*, to incorporate a provision in the articles of association into a directors appointment, it must nevertheless be established, and there must be some material, no matter how little, upon which it may be established that an article was in fact incorporated into a director’s contract of appointment or employment.

[100] As Astbury J expressed in *Hickman* "A company cannot in the ordinary course be bound otherwise than by statute or contract …."

[101] Thus, before any provision in the articles of association may transcend its legal status and enforceability as being part of a statutory contract between a company and its shareholders and leaping into the bosom of a separate contract between the company and a director, legal principles would require more.

[102] This cannot happen automatically. Such would be too miraculous even for any legal fiction to countenance. This is so even though the words employed in Article 170 itself may be clear and emphatic.

[103] Learned counsel for the Respondents contended that no more need be done, or is required, save for the existence of Article 170. It was contended that any director who is employed or appointed in accordance with the terms of the Articles of Association of a company would be able to enforce provisions in the articles of association, such as Article 170.

This right, it was contended, will automatically be incorporated into the terms of a director's employment or appointment without more.

[104] With respect, this contention confuses between the role and legal status of the memorandum and articles of association of a company and a company's contractual liability in respect of contracts entered into with third parties.

[105] Under the CA 2016, section 35 provides for what may be contained in the constitution of a company. Under the CA 1965, there existed sections 18 and provisions under Division 2 relating to the memorandum and articles of association. Memorandum and articles of association serve to define the objects of a company and to provide the regulations by which the company would operate, be governed and be managed, statutorily deemed agreed to by its members.

[106] As Lord Cairns, LC, pointed out in *Eley* "This article is either a stipulation which would *bind the members*, *or else a mandate to the directors."*

[107] A director who is appointed in accordance with the articles of association merely attests to the fact that the appointment was validly made in accordance to what had been agreed to by the members in the articles of association. The fact of such an appointment does not *per se*, and without more, concern any contract that might have been entered into with a director by the company or the terms of a director's appointment. The Company's obligations in other contracts entered into with third parties, such as directors, even If they are shareholders, would depend on the terms of these separate contracts.

[108] It may be temptingly convenient to treat provisions in the articles of association of a company, specifically those pertaining to directors, as automatically incorporated into contracts of appointment of individuals as directors. However, such an approach is not without problems.

[109] Provisions in the articles, as stated, are mainly mandates and authority given to directors of a company, generally. In fact, the articles in Table A under the Fourth Schedule of CA 1965 is headed as "REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES". To automatically incorporate all articles (in the case of

companies incorporated under CA 1965 for example, the provisions in Table A under the Fourth Schedule) pertaining to directors (of which there are many and varied) into their contracts with the company would result in conferring contractual rights in respect of those provisions to directors in their personal capacity. What was intended to be mandates or authority pertaining to the office of a director would become personal rights vested in individual directors, enforceable as a contractual right against the company. A consequence not contemplated or intended by the statutory contract created by the various company legislation as one between the shareholders and the company, and the shareholders *inter se*. Thus, there must be, albeit not substantial, but nonetheless, some basis upon which it may be inferred or concluded that a *particular specific provision* in the articles had been incorporated.

[110] With respect we therefore find that we are unable to agree with the learned Judge's view which was expressed as follows:

> "79. In my view, the Articles of Association form part of the contract between the Company and the present plaintiffs (*qua former directors*) and are entitled to the indemnity under Article 170. It is unarguable that the present plaintiffs were appointed and later removed pursuant to the Articles

> of Association. It defies logic and common sense that the Articles are there only for appointment and removal of directors and that Article 170 should thereafter be ignored as being of no consequence from any contractual perspective."

[111] The singular problem upon the facts of this case is the complete absence of evidence pertaining to the Respondents' appointments, any terms that might exist of their appointment or the circumstances relating to their appointment.

[112] This very singular problem was precisely the problem encountered by Stanley Burton J in *Globalink*. In *Globalink* the third Defendant Mr Hall, a director of a company, sought an indemnity against the company in respect of his liability for his own costs which were incurred in an action against him that was struck out upon his application. The indemnity sought was based on article 18 of the company's articles of association. Article 18 provided that a, "director … shall be indemnified out of the assets of the company against all losses or liabilities which he may sustain or incur in or about execution of the duties of his office or otherwise in relation thereto, including any liability incurred by him defending any proceedings … in which judgment is given in his favour …".

[113] Thus, the indemnity sought and the basis upon which it was sought in *Globalink* were not dissimilar to those in the case at hand.

[114] The difficulty that Stanley Burton J encountered was similar. In *Globalink*, at p. 154, after stating in paragraph [30] that "The articles are not automatically binding as between company and its offices as such. In so far as the articles are applicable to the relationship between a company and its officers, the articles may be expressly or impliedly incorporated in the contract between the company and director.", Stanley Burton J went on to hold and state as follows:

> "[31] *In the present case I have no evidence as to the basis on which Mr Hall accepted his appointment as director of the company*. Neither of the articles of association of the company in general nor art 18 in particular are referred to in his witness statement. As far as I can see from the notes of the hearing from Master Foster, art 18 was not referred to, let alone relied upon. There is nothing to suggest that Mr Hall knew of art 18, or indeed that there might be relevant provisions in the constitution of the company, when he accepted his appointment, and given his total lack of experience or knowledge at to commercial matters he may have been ignorant of their

existence. *There is, it seems to me therefore, a real issue as to the incorporation of art 18 into any contract between Mr Hall and the company*."

(Emphasis added)

(See also *John and others v Price Waterhouse (a firm) and another* [2002] 1 WLR 953 and the case of *In re City Equitable Fire*, involving auditors who were appointed relying on the articles of association).

[115] Although unlike *Globalink*, the Respondents did refer to and relied on Article 170, it was nevertheless not as if the existence of "art 18" in *Globalink* was disputed or the fact that Mr Hall was a director, denied. It was the absence of evidence that gave rise to what Stanley Burton J referred to as "a real issue as to the incorporation of art 18 into any contract between Mr Hall and the company". So too, in the current case at hand.

[116] As with the case in *Globalink,* the mere fact that Article 170 exists and the Respondents were directors of the Appellant, without more, was insufficient to find that they had contracted with the company "on the

footing of the articles" such that Article 170 may be said to have been incorporated into their contract of appointment as directors.

[117] This similar problem was also encountered in *John.* The auditors appointed sought costs on an indemnity basis pursuant to, among several grounds, the articles of the claimants. It was submitted by counsel that based on the dicta of Warrington LJ in *City Equitable Fire,* terms of the articles would not be incorporated in a contract between a company and its auditors where the terms of engagement are expressed in a separate document. Ferris J then went on to observe, on that point, as follows at p 961:

> "32 … This means that it is necessary, in a case where auditors seek to rely on a provision of the company's articles, to examine carefully the terms on which the auditors were engaged. This could not reliably be done on a summary application of the present kind."

There was evidence in that case that the auditors were engaged on the terms of a document separate from the articles and in the circumstances, Ferris J went on to maintain that "Nevertheless it is impossible to say that there are not factual issues which may need to be examined in relation to

the argument that the articles were incorporated." The indemnity sought by the auditors was refused by Ferris J but it was made clear that this would not prevent the auditors from commencing separate proceedings for the indemnity. This outcome underscores the need for evidence on the facts and circumstances for a Court to determine if indeed a term in the articles of association of a company has been incorporated.

[118] Hence upon the authorities that exist, with respect, we cannot agree with the learned Judge's view that:

> "[78] …by virtue of having been appointed as directors via the Articles of Association, it follows that Article 170 is necessarily incorporated into the present plaintiffs' contractual relationship with the Company. The present plaintiffs may therefore rely on Article 170 to claim indemnity for costs incurred by them in defending Suit 735 and Suit 1057."

[119] Without any evidence as to their appointment or circumstances relating thereto, we are of the view that the Respondents have not enabled the Court to make any finding as to whether Article 170 was incorporated into their contract of appointment, either express or impliedly. For that reason, we hold that their claim to be indemnified fails.

[120] Notwithstanding and without derogating from the foregoing, we think it is also appropriate that the Respondents' claims themselves be examined.

Respondent's Claim for indemnity in respect of Suit 735

[121] Suit 735 against the Respondents was struck out by the High Court on 16th August 2010.

[122] If Article 170 be examined, one of the pre-conditions to its invocation is a judgment given in favour of the director claiming the indemnity. Thus, in respect of the legal expenses claimed in relation to Suit 735, that would have occurred on 16th August 2010, when the suit was struck out upon the Respondents' application.

[123] A claim based on Article 170, if maintainable, would be one founded in contract. Although limitation may be an issue that could have been raised, it was not. However, what was raised against the Respondents' claim was the doctrine of *res judicata*.

[124] The claim to be indemnified in respect of the expenses incurred in Suit 735 was the very subject of the Respondents' claim in OS 73. That claim was specifically dismissed by the High Court for the reasons disclosed above and there was no appeal against that decision by the Respondents. Therefore, can the Court countenance another attempt by the Respondents for indemnity in respect of Suit 735? We think not.

[125] *Res judicata* was specifically raised by the Appellant. In an often quoted decision of the Federal Court in *Asia Commercial Finance (M) Bhd v. Kawai Teliti Sdn Bhd* [1995] 3 CLJ 783 at p. 791*;* [1995] 3 MLJ 189 at p 197, Peh Swee Chin FCJ described *res judicata* in the following terms:

> "What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation - *interest rei publicae ut sit finis litium*."

[126] In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly contour Aerospace Ltd)* [2014] AC 160, at pp 180 and of *res judicata*, Lord Sumption JSC explained:

> "**Res judicata: general principles**
>
> 17 Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. … The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. *Secondly*, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. *Third*, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M & W 494, 504

(Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. ... *Fourth,* there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 State Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197-198. *Fifth,* there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. *Finally,* there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

(Emphasis added)

(See also *Arnold v National Westminster Bank plc* [1991] 2 AC 93 and *Takhar v Gracefield Developments Ltd and others* [2020] AC 450 as to the exception in cases of fraud).

[127] Lord Sumption's explanation of the various principles related to the doctrine was referred to and synopsised in the recent decision of the Federal Court in *Orchard Circle Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Ors* [2021] 1 CLJ 1 (see also *Small Medium Enterprise Development Bank Malaysia Berhad v Sigma Pelangi Systems Sdn Bhd* [2016] 1 LNS 943 and *Nasri Ahmad v Neoh Tong Hock & Anor* [2014] 1 LNS 1929).

[128] Clearly, the claim for indemnity in respect Suit 735 had been dealt with specifically and dismissed by the Court in OS 73 and the Respondents may not now seek to reassert their claim.

Respondents' claim for indemnity in respect of Suit 1057

[129] As mentioned above, Suit 1057 was brought only as against the 1st, 3rd and 4th Respondent. The 2nd Respondent was not a party and there is no claim for any indemnity by her.

[130] Again, apart from there being no evidence of any incorporation of Article 170 to his contract of appointment as a director, a point that

applies equally to the claims by the 3rd and 4th Respondents, there is another reason why the claim for indemnity by the 1st Respondent fails.

[131] The 1st Respondent was not exonerated by the Court in Suit 1057. He was found to be negligent and was ordered to pay the Appellant a sum of RM192,780.00.00. The Court of Appeal in allowing the Appellant's appeal against the decision of the High Court, specifically, did not reverse this finding of negligence by the High Court in respect of the 1st Respondent.

[132] The Federal Court, as pointed out, set aside the decision of the Court of Appeal and reinstated the decision of the High Court.

[133] In the ultimate, in respect of Suit 1057, the 1st Respondent did not secure a "a judgment given in his favour" and would not have satisfied the conditions in Article 170, even if it was part of his contract of appointment as director.

[134] Although not raised by the parties, it is also debatable whether the Respondents may maintain their claim under Article 170 bearing in

mind they were removed as directors, and any contract they had would be terminated, well before the decision of the Federal Court in Suit 1057.

Section 289 of the Companies Act 2016

[135] Reliance was also placed on section 289 of CA 2016, in particular sections 289(3)(a) and (b) and (4)(a), (b) and (c), by the Respondents.

[136] As worded, those provisions of CA 289 are merely permissive. They do no more than to authorise companies to indemnify their officers or auditors as provided in those provisions. They do not in themselves confer any statutory right to directors or auditors of companies such that they may solely by themselves be foundation for a claim for indemnity. Nothing more need be said on this point.

[137] Lee Swee Seng and Haji Ghazali Bin Haji Cha JJCA have both had the benefit of considering this judgment in draft and have expressed their concurrence with it.

Conclusion

[138] For the reasons given, there was merit to the Appellant's appeal and accordingly the appeal was allowed with costs here and below in the sum of RM30,000.00. The decision of the High Court of 29th May 2019 was set aside.

Dated this 15th day of October 2021

-sgd-
(DARRYL GOON SIEW CHYE)
JUDGE
COURT OF APPEAL MALAYSIA
PUTRAJAYA

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