IN THE COURT OF APPEAL OF MALAYSIA

(Appellate Jurisdiction)

CIVIL APPEAL NO. S-02(NCVC)(W)-1989-10/2016

BETWEEN

KWAN HUNG CHEONG (NRIC NO. 630727-12-5053) … 1ST APPELLANT

ELAINE GAY CHOW SONG … 2ND APPELLANT

(USA PASSPORT NO. 451404461)

AND

ZUNG ZANG TRADING SDN BHD … RESPONDENT

(COMPANY NO. 297320-P)

(In the Matter of Suit No. SDK-22NCVC-31/9-2014

In the High Court in Sabah And Sarawak at Sandakan

Between

Zung Zang Trading Sdn Bhd … Plaintiff

(Company No. 297320-P)

And

Kwan Hung Cheong (NRIC NO. 630427-12-5053) … 1st Defendant

Elaine Gay Chow Song … 2nd Defendant)

(USA Passport No. 451404461)

CORAM : DAVID WONG DAK WAH, JCA
: ABANG ISKANDAR BIN ABANG HASHIM, JCA
: YEOH WEE SIAM, JCA

JUDGMENT OF THE COURT

APPEAL

[1] This is an appeal by the 1st and 2nd Defendants ("the Appellants") against the whole of the decision of the High Court of Sabah and Sarawak at Sandakan given on 17.11.2017.

BACKGROUND FACTS

Introduction

[2] The Plaintiff company ("the Respondent") is alleged to be a wholly-owned subsidiary of Kwan Chee Hang Sdn Bhd ("KCHSB"), which was set up by the late Kwan Chee Hang and his wife, Wong Wyuk Chin, as a family investment holding company.

[3] The 1st Appellant is one of the sons of the late Kwan Chee Hang. He was put in charge of the family-owned companies. The 2nd Appellant is the wife of the 1st Appellant.

[4] The Respondent alleged that by way of a Directors' Circular Resolution dated 2.12.2010, and another Directors' Circular Resolution dated 16.10.2013, KCHSB had appointed one Mr. Kwan Hiuang @ Kwan Huang Cheng ("Michael") (PW1) as KCHSB's corporate representative for all General Meetings of the Respondent (AR Vol 2(1) pg 429 and pg 431 respectively).

The EGM

[5] We note from the Judgment of the High Court that there was a 1st EGM and a 2nd EGM held for the Respondent. For the purpose of this appeal, we would only deal with the 2nd EGM ("EGM") of the Respondent in this Judgment.

[6] By a letter dated 26.5.2014, PW1, as the corporate representative of KCHSB, requisitioned the Board of Directors ("BOD") of the Respondent to hold an EGM ("the Requisition"). The 1st Appellant, as a director of the Respondent, issued the notice for the EGM to be held on 26.7.2014. However, in his letter dated 13.6.2014 to PW1, the 1st Appellant stated that the EGM was convened on a without prejudice basis.

[7] The 1st Appellant alleged that on 26.7.2014 at the EGM, at 2.30pm, which was the scheduled time for the EGM, there was insufficient quorum. In addition the EGM was not validly requisitioned for in the first place. The 1st Appellant had no choice but to announce at about 2.35pm that the EGM was aborted. The 1st Appellant and one Mr. Chung Teck Kan then left the meeting.

[8] After that, PW1 proceeded with the EGM, and chaired the said meeting. The Respondent alleged that at the EGM, the majority shareholders of the Respondent resolved, inter alia, the following:

(a) Removal of Directors

"That pursuant to Article 69 of the Company's Articles of Association, Mr. Kwan Hung Cheong and Ms Elaine Gay Chow Song be and are hereby removed from their office of Directors of the Company with immediate effect".

(b) Appointment of Directors

"That the following persons have given their consent to act, be appointed as Directors of the Company with effect from the date of completion of the Statutory Declaration in compliance with Section 123(4) of the Companies Act, 1965.

i) Kwan Pui Ha (f) (NRIC: 590411-12-5100)

ii) Wong Nyuk Ching (f) (NRIC: 391026-12-5006)

iii) Kwan Hiuang @ Kwan Huang Cheng (NRIC: 571230-12-5263)"

(c) Appointment of Governing Director and Managing Director

"That Mr. Kwan Hiung @ Kwan Huang Cheng be and is hereby appointed as Governing Director of the Company with immediate effect."

(d) Change of Registered Office

"That the registered office of the Company be and is hereby changed from Block G, Lot 1, 1st Floor, Mile 4, Bandar Kim Fung, 90000 Sandakan, Sabah to Ground Floor, Lot 23, BDC 4, Jalan BDC, Batu 1½ Jalan Utara, 90000 Sandakan, Sabah."

RESPONDENT'S CLAIM

[9] In its Statement of Claim, the Respondent claims against the 1st and 2nd Appellants jointly and severally the following reliefs:

"(1) An Order that the 1st and 2nd Defendants do within 4 days of the date of service of this Order on them deliver or cause to be delivered up to the Plaintiff the Register Book, Minute Book, Common Seal, secretarial files, all the accounting and other statutory records, bank statements, bank-in slips, cheque butts, books, files and agreements of the Plaintiff as may be within the custody, control and/or possession of the Defendants and/or their agents and servants;

(2) An Order that the 1st and 2nd Defendants do within 4 days of the date of service of this Order hand over and surrender to the Plaintiff the possession, custody and control of all the movable properties of the Plaintiff including the trading goods, building materials, stocks in trade and vehicles;

(3) The 1st and 2nd Defendants whether by themselves or their servants or agents or otherwise howsoever be restrained from trespassing on the business premises of the Plaintiff at Mile 3½, North Road, Sandakan (TL 077550737) or interfering with and/or meddling in the business operations and affairs of the Plaintiff or holding themselves out as director or officer of the Plaintiff;

(4) An account of all monies received by the 1st and 2nd Defendants in their former capacity as the directors of the Plaintiff;

(5) An order for the payment by the 1st and 2nd Defendants to the Plaintiff of all sums found to be due from them to the Plaintiff on the taking of the account under (4) above;

(6) Interest on the sums founds to be due;

(7) Damages to be assessed;

(8) All such further inquiries or other orders and/or directions be made or given that this Honourable Court deems just; and

(9) Costs."

DECISION OF THE HIGH COURT

[10] The Appellants withdrew their Counterclaim at the outset of the trial. The High Court then proceeded to hear the Respondent's claim. On 23.9.2016, the High Court gave its decision and allowed the Respondent's

claim against the Appellants with costs of RM25,000.00 The Appellants' Counterclaim was struck out.

OUR DECISION

[11] We heard this appeal on 15 and 16.11.2017 On 17.11.2017, we delivered our unanimous decision and allowed the Appellants' appeal.

GROUNDS OF DECISION

[12] The crux of the appeal before us is whether KCHSB has the right to issue the Requisition to the Respondent for the EGM to be held, and whether the EGM of the Respondent held on 26.7.2014 and the resolutions passed therein are valid in law to entitle the Respondent to the reliefs applied for in the present civil suit before the High Court.

Whether KCHSB is 100% owner of the shares in the Respondent.

[13] The present action of the Respondent is premised on KCHSB being the 100% owner of the Respondent. As required in sections 101(1), 102 and 103 of the Evidence Act 1950, the burden of proof is on the Respondent to prove the facts that KCHSB is the sole shareholder and owner of the Respondent.

[14] The Respondent relies on the Federal Court Order dated 7.10.2013 in Federal Court Civil Appeal No. 02-50-07/2012(S) and 02-51-07/2012(S) between the Respondent, and KCH & 2 Ors and 2 Ors (AR Vol 2(1) pg 426-428) ("the FC Order") to prove its ownership of KCHSB. Order (2) of the FC Order states:

> "That the shareholdings of the members of Zung Zang Wood Products Sdn Bhd **to be restored** to the position as at 3.6.2003" (emphasis added)

(Note: Zung Zang Wood Products is now known as Zung Zang Trading i.e. the Respondent).

[15] We agree with the submissions of the Appellants that the FC Order does not state explicitly that KCHSB is the 100% owner of the Respondent. It contains no declaration that KCHSB is the 100% owner of the Respondent.

[16] Upon a perusal of the Judgment of the Federal Court dated 7.10.2013 (AR Vol 2(1) Pt C pg 359-455) in respect of the FC Order, it is noted:
At pg 362, that:

> "KCH wholly owned the 1st Appellant (Zung Zang Wood Products Sdn Bhd) (ZZ Wood) (see paragraph 9 of 121 AR read together with paragraph 7 of 141 AR)"; and

At pg 363, that:

> "The corporate structure of KCH and its subsidiaries was not intricate. KCH held the entire equity of ZZ Wood."

(Note: "KCH" refers to KCHSB in the present case)

[17] Thus, based on the Judgment of the Federal Court and the FC Order it can be accepted as evidence that as on 7.10.2013, the Respondent owns 100% of the shares in the Respondent provided that the shareholdings of the members of the Respondent are restored to the position as at 3.6.2003.

[18] However, as contended by the Appellants, there must be something done to the register of the Respondent to effect the restoration of such shares. This was acknowledged by PW1 in the contempt proceedings that KCHSB initiated against the Appellants for wilfully disobeying the FC Order. PW1 during his cross-examination in those same proceedings had taken the stance that KCHSB "had not been restored as a member of the Plaintiff" (i.e.

the Respondent), which means that the shares of KCHSB in the Respondent have not been restored yet.

[19] It must be noted that the FC Order had set aside all the orders of the High Court and the Court of Appeal when it stated:

"AND IT IS FURTHER ORDERED that all orders of the courts below be set aside …"

[20] Thus, there was no evidence before the High Court in the present case that KCHSB is the 100% owner of the Respondent at the material time to entitle KCHSB to issue the Requisition to the BOD of the Respondent to call for the EGM. The learned High Court Judge ("Judge") had therefore erred when, without any finding of fact that KCHSB owned 100% of the shares of the Respondent, ruled as follows:

> "I am in agreement with the learned counsel for the Plaintiff that since KCHSB is the sole shareholder/member of the Plaintiff company, the directors of KCHSB are competent and legally entitled under Section 147(3) of the Companies Act, 1965 to appoint PWI to be its Corporate Representative to exercise its powers."

[21] The Judge ought to have considered the requirement of section 144(1) of the Companies Act 1965 ("CA 1965") that requisitionists should be:

> "members holding at the date of the deposit of the requisition not less than one-tenth of such of the paid up capital as at the date of the deposit carries the right of voting at general meetings".

[22] It is clear that the Judge had erred in merely assuming that KCHSB is the sole shareholder of the Respondent at the time of the Requisition without requiring this allegation to be established as evidence.

[23] The Respondent further submits that KCHSB is beneficially entitled to all the shares of the Respondent. The Respondent relied on section 147(6) of the CA 1965 which provides as follows:

> "(6) Where a holding company is beneficially entitled to the whole of the issued shares of a subsidiary and a minute is signed by a representative of the holding company authorized pursuant to subsection (3) stating that any act, matter, or thing, or any ordinary or special resolution, required by this Act or by the memorandum or articles of the subsidiary to be made, performed, or passed by or at an ordinary general meeting or an extraordinary general meeting of the subsidiary has been made, performed, or passed, that act, matter, thing, or resolution shall, for all purposes, be deemed to have been duly made, performed, or passed by or at an ordinary general meeting, or as the case requires, by or at an extraordinary general meeting of the subsidiary."

[24] Apart from holding that KCHSB is legally entitled to all the shares in the Respondent, the Judge at the same time also held that KCHSB is beneficially entitled to all the issued shares of the Respondent without finding any evidence to establish this, and without giving the basis for such decision.

[25] We are of the view that as in the case where the Respondent had failed to prove that the shareholdings of KCHSB in the Respondent have been restored to the position as at 3.6.2003 pursuant to the FC Order, similarly, the Respondent had also failed to prove that it is beneficially entitled to the whole of the issued shares of the Respondent.

[26] Thus, the Respondent cannot rely on section 147(6) of the CA 1965 and contend that the Minutes of the EGM signed by PW1 as the corporate representative of KCHSB as the holding company of the Respondent "shall be deemed to have been duly made, performed or passed" at the EGM of the Respondent, as a subsidiary.

[27] It follows that the Respondent also cannot rely on section 152A(1) of the CA 1965 which provides:

"**152A. Resolution signed by all members deemed to be duly passed at meeting**.

(1) Notwithstanding anything to the contrary in this Act or the articles of the company, a resolution in writing signed by or on behalf of all persons for the time being entitled to receive notice of, and to attend and vote at general meetings of a company shall, for the purpose of this Act and the articles of company, be treated as a resolution duly passed at a general meeting of the company and, where relevant, as a special resolution so passed."

[28] The Judge further erred when, without any analysis or justification, after citing sections 147(6) and 152A(1) of the CA 1965 held:

> "Therefore, since KCHSB is beneficially entitled to all the issued shares of the Plaintiff company at the material time, by virtue of Section 147(6) of the Companies Act, 1965 read together with sub-section (3) thereof, the minutes signed by PW1 in respect of the resolutions passed at the second EGM on 26.07.2014 shall be deemed to have been duly made, performed or passed at the second EGM."

A corporate representative cannot make a requisition

[29] Section 147(3) of the CA 1965 provides that:

"A corporation may by resolution of its directors or other governing body-

(a) If it is a member of a company, authorize such person as it thinks fit **to act as its representative**, either **at a particular meeting or at all meetings of the company** or of any class of members; or

(b) If it is creditor (including a holder of debentures) of a company, authorize such person as it thinks fit to act as its representative either at a particular meeting or at all meetings of any creditors of the company,

and a person so authorized **shall, in accordance with his authority** and until his authority is revoked by the corporation be entitled to exercise the same powers on behalf of the corporation as the corporation could exercise if it were an individual member, creditor or holder of debentures of the company." (emphasis added)

[30] It must be noted that section 147(3) only refers to a corporate representative acting at a particular meeting or at all meetings of the company, and does not refer to issuing notices or doing things outside of the meeting or meetings or the company.

[**31]** Further, section 147(3) makes it clear that the corporate representative's exercise of powers on behalf of the company "shall" be "in accordance with" the authority given.

[32] PW1 had signed the letter dated 26.5.2014 for the requisition of an EGM purportedly as a corporate representative of KCHSB (AR Vol 2(2) pg 481-482). PW1 testified that he was appointed as corporate representative of KCHSB by a Directors' Circular Resolution dated 2.12.2010 (AR Vol 2(1) pg 429). The said Resolution, inter alia, spells out the scope of PW1's powers as a corporate representative:

> "That pursuant to Section 147(3) of the Companies Act, 1965, Mr. Kwan Hiuang @ Kuan Huang Cheng … hereby appointed as Company's representative **to attend and vote** for and on behalf of the Company **at any meeting of a Company in which the Company is a member**". (emphasis added)

[33] Therefore, it is clear from the above Resolution that PW1, as the corporate representative, is only appointed "to attend and vote" on behalf of KCHSB at any meeting of a company in which KCHSB is a member. There is no mention of the corporate representative being able to issue notices or exercise other such powers or authorisations on behalf of KCHSB.

[34] The above Resolution is actually consistent with section 147(3) of the CA 1965. We take note of the decision in **Drico Ltd v. Drico Water Specialist Sdn Bhd** [2011] MLJU 439 cited by the Appellants which held:

> '[43] In any event the statute itself makes it clear that a **corporate representative is only authorised to attend meetings** on behalf of its appointer. **This authority does not extend to executing agreements** on behalf of the appointer. As such, any act performed or agreement executed by Kinoshita in his capacity as "corporate representative", including the Share Transfer Agreement must necessarily be invalid.' (emphasis added)

[35] In the present case, from a perusal of the Directors' Circular Resolution dated 2.12.2010, clearly PW1 was not authorized to issue any requisition on behalf of KCHSB, to the Respondent to call for an EGM. Since PW1 had issued the Requisition as a corporate representative of KCHSB, it follows that the Requisition for the EGM is invalid.

[36] It is noted that the 1st Appellant, on behalf of the Respondent, as director, had written a letter dated 13.6.2014 to PW1 and made it clear that PW1's Requisition was invalid and the EGM was being convened on a without prejudice basis and under protest (AR Vol 2(2) pg 662).

[37] Therefore, the Judge had erred in failing to consider that PW1, even if he can be properly appointed as a corporate representative of KCHSB, had no authority to make the Requisition for the EGM.

Whether the Requisition must be made by more than one requisitionists

[38] Section 144(1) to (4) of the CA 1965 provides as follows:

> **"144 Convening of extraordinary general meeting on requisition**
>
> (1) The directors of a company, notwithstanding anything in its articles, shall on **the requisition of members** holding at the date of the deposit of the requisition not less than one-tenth of such of the paid-up capital as at the date of the deposit carries the right of voting at general meetings or, in the case of a company not having a share capital, of members representing not less than one-tenth of the total voting rights of all members having at that date a right to vote at general meetings, forthwith proceed duly to convene an extraordinary general meeting of the company to be held as soon as practicable but in any case not later than two months after the receipt by the company of the requisition.
>
> (2) The requisition shall state the objects of the meeting and shall be signed by **the requisitionists** and deposited at the registered office of the company, and may consist of several documents in like form each signed by one or more requisitionists.
>
> (3) If the directors do not within twenty-one days after the date of the deposit of the requisition proceed to convene a meeting **the requisitionists**, or any of them representing more than one-half of the

total voting rights of all of them, may themselves, in the same manner as nearly as possible as that in which meetings are to be convened by directors convene a meeting but any meeting so convened shall not be held after the expiration of three months from that date.

(4) Any reasonable expenses incurred by **the requisitionists** by reason of the failure of the directors to convene a meeting shall be paid to **the requisitionists** by the company, and any sum so paid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration in respect of their services to such of the directors as were in default." (emphasis added)

[39] The Appellants submit that from the wording in section 144, the Legislature had intended that any requisition must be made by more than one requisitionist (see **Granasia Corporation Bhd v. Chong Wye Lin** [2008] 4 CLJ 893).

[40] Although it had not been raised before us by both parties, we take note of section 4(1) and (3) of the Interpretation Acts 1948 and 1967 (Act 388) which provide as follows:

"4. (1) Where any word or expression is defined in a written law, the definition shall extend to all grammatical variations and cognate expressions of the word or expression so defined.

(2) …

(3) Words and expressions in the singular include the plural, and words and expression in the plural include the singular."

[41] Going by section 4(3) of Act 388, words in the singular include the plural, and vice versa. We are therefore of the opinion that the words "members" and "requisitionists" in section 144 of the CA 1965 may be construed to refer to "member" and "requisitionist" in the singular in that

section, as the case maybe. Thus, it cannot be held against the Respondent if there is only one requisitionist, and not more than one requisitionist, who made the Requisition for the EGM. Be that as it may, having held earlier that the Requisition issued by PW1 is invalid, we do not think that this issue raised by the Appellants is material at this stage.

Whether there is insufficient quorum for the EGM

[42] In view of the fact that this Court has ruled that the Requisition issued by KCHSB through PW1 is invalid, it is also no longer an issue whether the EGM is invalid for being held despite an insufficient quorum. Nonetheless, for completeness, we now address this issue raised by the Appellants.

[43] Article 46 of the Respondent's Articles of Association (AR Vol 2(1) pg 201-229 at pg 219) provides as follows:

> '**PROCEEDINGS AT GENERAL MEETINGS**
>
> 46. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business. Save as herein otherwise provided, two members present in person shall be quorum. For the purposes of this Article "member" includes a person attending as a proxy or as representing a corporation which is a member.'

[44] The Appellants contend that Article 46 of the Respondent's Articles of Association stipulates a quorum of two members for its general meetings. According to the 1st Appellant (DW1) and Mr. Chung Tet Kan (DW2) (see their Witness Statements in AR Vol 2 Pt B pg 164-167, and pg 168-170 respectively), there was no quorum for the EGM on 26.7.2014. Both the 1st Appellant and DW2 gave the same evidence regarding the quorum and the EGM. Suffice to quote one of them i.e. DW2 who stated the following:

"On Saturday, 26 July 2014, I went to the venue of the EGM, at the VIP Room 3, Ground Floor, Citi Club, Mile 3.5, Jalan Utara, 90000 Sandakan, together with the 1st Defendant, Mr. Kwan Hung Cheong, who was the Managing Director of the Plaintiff.

The EGM was scheduled to begin at 2:00 pm. We both arrived at around 1:45 pm.

When the EGM began at 2:05 pm, a few other people were present at the venue. However, when Mr. Kwan Hung Cheong requested all those who were present to write down their names on the Attendance List (DBD 140), they all refused to do so. As at 2:30 pm, only him and myself wrote our names down.

Seeing that none of those present were willing to record their presence, there was therefore no valid quorum of 2 members present in person, as stipulated by Article 46 of the Plaintiff's Articles of Association (DBD 19). As a result, Mr Kwan Hung Cheong called off the EGM at 2:35 pm. All these have been recorded in the Minutes of EGM prepared by Mr Kwang Hung Cheong (DBD 139), which I confirm as correct, based on my personal knowledge. The said Minutes, together with the Attendance List, were forwarded by the Plaintiff's letter dated 20 August 2014 (DBD 147) to Kwan Chee Hang Sdn Bhd and M/s Norbert Yapp & Associates.

However, despite the invalidity of the requisition, and what actually transpired during the EGM, Kwan Chee Hang Sdn Bhd still acted as if the EGM was validly convened and that the resolution was validly passed, and to proceed to alter the contents of the Plaintiff's Form 49 (DBD 154) to purportedly remove the 1st and 2nd Defendants as directors, and myself as the alternate director. Such information has been reflected in the corporate information available from the Companies Commission of Malaysia (DBD 150), thereby misleading the public."

[45] The 1st Appellant in his letter dated 20.2.2014 to KCHSB and its Solicitors (AR Vol 2(2) pg 494-496) disputed the so-called Minutes of the EGM held on 26.7.2014 at 2.00 pm. (AR Vol 2(2) pg 485-487). He stated, inter alia, the following:

> "The so-called Minutes, and the actions recorded therein, are clearly misguided. The EGM was called off by myself before I left the venue, due to the fact that no shareholder/shareholder's representative was present, and/or none of them bothered to record their attendance despite being requested by me to do so. The EGM, which was <u>not validly requisitioned for</u> in the first place, was therefore aborted due to lack of quorum. I enclose herewith a copy of the Minutes and the Attendance List for your attention, which records the events truly transpired during the said EGM." (AR at pg 494) (emphasis added)

[46] In the Minutes of the EGM that were prepared by the 1st Appellant (AR at pg 495), it was recorded that only the 1st Appellant was present as Director, and Mr. Chung Tet Kan as Alternate Director. No "member" or shareholder was recorded as present at the EGM. The said Minutes, inter alia, stated:

> "4. There being no valid quorum, Mr. Kwang Hung Cheong therefore, aborted adjourned the EGM at 2.35 p.m."

[47] The Attendance List (AR pg 496) only showed the attendance of the 1st Appellant and DW1 and their respective signatures.

[48] On the other hand, the Respondent's version of the Minutes of the EGM held on 26.7.2017 ("Respondent's Minutes") (AR Vol 2(2) pg 485-487)

stated in its heading that the EGM was held on 26.7.2014 at 2.00 p.m. It recorded that the following persons were present:

"Present	:	Kwan Hiuang @ Kwan Huang Cheng (Mr. Kwan) (As corporate representative for Kwan Chee Hang Sdn Bhd) Kwan Hung Cheong (Left as the meeting commenced)
By Invitation	:	Wong Nyuk Ching (f) Lam Chung Fatt (Mr Lam) Chung Tet Kan (Left as the meeting commenced)"

[49] It can be clearly seen from the Respondent's Minutes that PW1 attended the EGM as a corporate representative for KCHSB. It is disputed by the Appellants that KCHSB is the 100% shareholder of the Respondent. However, it is not disputed by the Appellants that KCHSB is a "member" or shareholder of the Respondent. Thus, it can be accepted that the PW1 had attended the EGM as a shareholder's representative i.e as KCHSB's representative. Therefore, the 1st Appellant's allegation in his letter to KCHSB and its solicitors dated 20.2.2014 that "no shareholder/shareholder's representative was present at the EGM" is not true.

[50] The Respondent's Minutes recorded that 3 persons namely, PW1, Madam Wong Nyuk Ching and Mr. Lam Chung Fatt, were present at the EGM even though the 1st Appellant and Mr. Chung Tet Kan left as the meeting commenced. Therefore, the requirement in Article 46 of the Respondent's Articles of Association that two members must be present in person to form the quorum, has been met. This point was correctly considered by the Judge.

[51] In our considered opinion, the EGM was conducted with sufficient quorum and cannot be challenged on that ground alone. That being the case, it can be accepted as a fact that the EGM did proceed on 26.7.2014.

No certificate given for appointment of corporate representative, effect thereof

[52] Section 147(5) of the CA 1965 provides as follows:

> "A certificate under seal of the corporation shall be prima facie evidence of the appointment of … a representative pursuant to subsection (3)."

[53] As rightly submitted by the Appellants, the Respondent did not produce any certificate under the seal of KCHSB to prove that PW1 was appointed as a corporate representative of KCHSB. There is therefore no prima facie evidence of PW1's appointment in that capacity to empower him to act on behalf of KCHSB in respect of the EGM. But we must hasten to add that such omission on the part of the Respondent was not in itself fatal. It just meant that the Respondent would have to lead other sufficient evidence to show that PW1 was indeed validly appointed as such.

[54] PW1 had merely issued a letter dated 26.5.2014 under the letterhead of KCHSB claiming to be the corporate representative of KCHSB (AR Vol 2(2) pg 481-482). The Appellants contended that no resolution by KCHSB was deposited with the Respondent to show that PW1 had been appointed as the corporate representative of KCHSB.

[55] The Judge had gone on the basis that the Directors' Circular Resolution dated 2.12.2010 is effective to prove the appointment of PW1 as the corporate representative of KCHSB:

> "… Article 79 of the Articles of Association of KCHSB as amended on 14.06.2007 provides that a resolution in writing signed by a majority of the directors for the time being in Malaysia shall be as effective as a resolution passed at a meeting of the directors duly convened [see Exhibit P1]. Hence, PW1 was validly appointed as the Corporate Representative of KCHSB vide the Directors' Circular Resolution dated 2.12.2010 [see page 259 PBOD]." (AR Vol 1 pg 20)

[56] It is observed that KCHSB's Directors' Circular Resolution dated 2.12.2010 (AR Vol 2(1) pg 429) appointing PW1 as Corporate Representative, though signed by all of its 3 directors was made pursuant to Article 109, and not Article 79 as referred to by the Judge, of the company's Articles of Association (AR Vol 2(1) pg 172-200). However, that Article 109 does not exist or appear in the Articles of Association exhibited by the Respondent. PW1's explanation is that the reference to Article 109 in the Directors' Circular Resolution was a typing error and it should have referred to Article 79. PW1 further stated that there has been an amendment made to Article 79 by way of the Notice of Resolution dated 14.6.2007. The said Notice of Resolution was challenged by the Appellants but admitted as exhibit P1 by the Judge. The new Article 79 (AR Vol 2(2) pg 194) provides that:

> "A resolution in writing signed by the majority of the Directors for the time being in Malaysia shall be as effective as a resolution passed at a meeting of the Directors duly convened and held and may consist of several documents in the like form, each signed by one or more of the Directors."

[57] The Judge had erred by accepting the Respondent's evidence that KCHSB had appointed PW1 as its corporate representative under Article 79

of its Articles of Association when clearly the Directors' Circular Resolution states that the appointment was made under the non-existing Article 109. In addition, it must also be noted that the version of Article 79 of the Articles of Association of KCHSB which was included in the Respondent's Bundle of Documents for the trial did not include the amended version of Article 79. Instead, it contained the original version which reads as follows:

> "79. A resolution in writing signed by all the directors shall be as valid and effectual as it has been passed at a meeting of the directors duly called and constituted."

[58] Though this important fact was not considered by the Judge, it appears to us that the Notice of Resolution dated 14.6.2007 (P1) and the amended Article 79 are mere afterthoughts by the Respondent. In addition, it is observed that the other Directors' Circular Resolution of KCHSB dated 16.10.2013 (AR Vol 2(1) pg 431), which is at a date after the other Resolution dated 2.12.2010, which also purports to appoint PW1 as the corporate representative of KCHSB, also refers to the same non-existent Article 109 of KCHSB's Articles of Association. This fortifies our view that the purported amendment of Article 79 is all the more an afterthought by the Respondent.

[59] Due to such error, in our view**,** the appointment of PW1 as the corporate representative of KCHSB should not have been accepted by the Judge as valid. Furthermore, we agreed with the Appellants that there is no evidence to show that Article 79 was actually and in fact amended. The Notice of Resolution dated 14.6.2007 merely resolved that Article 79 be amended. Based on the unamended or original version of Article 79, it is therefore doubtful whether the Directors' Circular Resolution dated 2.12.2010 was in fact passed by all the directors of KCHSB when the signature of Kwan Chee Hang as a director clearly does not appear in the

said Resolution. Without the approval of all the directors of KCHSB, the appointment of PW1 as corporate representative is invalid to begin with. Without a valid appointment, it follows that apart from having no authority to requisition the EGM, PW1 also did not have the authority to attend and vote in the EGM. Consequently, all the resolutions passed at the EGM are not valid and hence not enforceable against the Appellants.

The Respondent failed to prove its claim

[60] From the totality of the evidence adduced before the High Court, it is clear that the Respondent had failed to prove its claim on a balance of probabilities.

[61] Regarding the reliefs sought in the Statement of Claim ("SOC"), we agree with the Appellants' submissions that in respect of prayers (1) and (2), these prayers presuppose that the Appellants are keeping those documents or things in their custody or control in their personal capacities, as opposed to their capacities as directors of the Respondent. In any event, as submitted by the Appellants, there is evidence that most of the documents and items asked for under prayer (1) have been taken into MACC's custody and control.

[62] Prayer (3) of the SOC also presupposes that the Appellants are entering onto the business premises of the Respondent in their personal capacities, as opposed to their capacities as directors of the Respondent.

[63] Furthermore, there is no cogent evidence adduced by the Respondent of any wrongdoing by the Appellants to support prayers (4), (5), (6) and (7) of the SOC.

[64] Without having proved its claim, there is no basis for the High Court to grant the Respondent the reliefs prayed for.

CONCLUSION

[65] After considering the submissions of both learned Counsels, and having perused the Record of Appeal, we are satisfied that there are merits in this appeal. We find that there was insufficient judicial appreciation of the facts and the law by the Judge. There are clearly appealable errors made by the Judge which warrant our appellate intervention.

[66] Accordingly, we allowed the appeal of the Appellants and set aside the decision and order of the High Court. We ordered costs of RM30,000.00 here and below to be paid by the Respondent to the Appellants, subject to payment of the allocator fee. The deposit is to be refunded to the Appellants.

Sgd
YEOH WEE SIAM
Judge
Court Of Appeal, Malaysia
Putrajaya

Dated: 28 February 2018

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