IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
[SUIT NO: WA-22NCC-84-03/2021]

BETWEEN

DATO' SHUN LEONG KWONG
(NRIC No.: 381205-10-5167) ...PLAINTIFF

AND

DATO LEE CHIN HWA
(NRIC No.: 330914-71-5419) ...DEFENDANT

GROUNDS OF DECISION

Introduction

[1] *Vide* enclosure 5, the Plaintiff sought from this Court the following reliefs pursuant to O. 29 and/or O. 92 r. 4 of the Rules of Court 2012:

i) An order for injunction to restrain the Defendant from in any way exercising his rights as member of Menang Corporation (M) Berhad ("the Company") including his voting rights to remove the Plaintiff and one Marianna binti Ali Shun as directors of the Company or in any way to affect the position of the Plaintiff and the said Marianna binti Aly Shun as directors of the Company; and

ii) An order for injunction to restrain the Defendant whether by himself or his agents and/or his servants

or howsoever from acting in breach of the 26 January Agreement.

[2] After hearing both parties, the Court dismissed the application. These are the full grounds of the Court.

Background facts

[3] The Plaintiff and the Defendant are the shareholders of the Company.

[4] On 29.1.2021, the Board of Directors of the Company ("the Board") resolved that several additional candidates including the Plaintiff and her daughter, Marianna binti Aly Shun were appointed as the directors of the Company.

[5] Shortly after, by way of an announcement dated 15.2.2021, the Plaintiff and Marianna were suspended as directors by the Board.

[6] Following the suspension, a Notice of Requisition dated 22.2.2021 for resolutions to remove the Plaintiff and Marianna were issued by the Defendant and his grandson, Nicholas Pun Chee Chiang. Pursuant to the Notice of Requisition, a Notice of Extraordinary General Meeting pursuant to s. 312 (1) of the Companies Act 2016 dated 5.3.2021 ("Notice of EGM") was issued by the Company to convene an Extraordinary General Meeting ("EGM") to be held on 30.3.2021.

Parties' contention

[7] The complaint of the Plaintiff is premised on the following:

[7.1] On 26.1.2021, an agreement was reached between the Plaintiff and the Defendant arising from discussions which

took place between Too Kok Leng, also known as Colin Too, as intermediary and representative of the Plaintiff, and the Defendant ("26 January Agreement");

[7.2] The principal and salient terms of the 26 January Agreement as alleged by the Plaintiff are as follows:

(a) the Board of the Company would be reconstituted with the resignation of substantially the entire Board including Dr. Christopher Shun Kong Leng, the son of the Plaintiff and Raja Shahruddin Rashid with the exception of Colin Too and Chiam Tau Meng who was an independent non-executive director appointed since 2005;

(b) the son of the Defendant, Lee Min Huat who is also known as Jim Lee, Toh May Fook and Liew Sook Pin together with Yee Chun Lin and Chee Wai Hong as their nominees would be appointed to the Board;

(c) the Plaintiff and Marianna would also be appointed to the Board;

(d) the Plaintiff and the Defendant together with the Defendant's confederates would cooperate in the management of the Company; and

(e) the Defendant and/or the Defendant's confederates would acquire or caused to be acquired 10% of the Plaintiff's block of shares in the Company for a price no less than RM0.625 per share the moment the board of the Company has been reconstituted in the manner set out above.

[7.3] Further, it was contended that implicit in the 26 January Agreement is that:

(a) the Defendant and the Defendant's confederates will exercise their voting shares in the manner consistent with and not contrary to the salient terms set out above;

(b) the Plaintiff and Marianna would continue to be involved in the management of the Company, albeit with the participation of the new members of the reconstituted Board; and

(c) parties shall at all times act in good faith in their dealings with each other *vis-a-vis* the affairs of the Company.

[7.4] Hence, it was argued by the Plaintiff that the Defendant had acted in breach of the 26 January Agreement when he Issued the Notice of Requisition to remove him and Marianna from the Board of the Company.

[8] Consequent to the issuance of the Notice of Requisition, the Plaintiff filed enclosure 5.

[9] The Defendant on the other hand denied having entered into any agreement dated 26.1.2021 with the Plaintiff. It was submitted that the appointment of the Plaintiff and his daughter as directors of the Company was proposed by Collin Too. In fact, it was argued that the resolutions to appoint them as the directors was made pursuant to Article 110 of the Company's constitution.

[10] In resisting enclosure 5, the Defendant submitted that:

i. the Plaintiff has failed to prove any serious issues to be tried;

ii. the Plaintiff's remedy, if any, should be limited to damages;

iii. the balance of convenience lies in the dismissal of the injunction application; and

iv. status quo of the members exercising their voting rights at the EGM of the Company on 30.3.2021 must be maintained.

Analysis and findings of the Court

[11] In essence, this is an application for an injunction. The principles in granting an injunction has been clearly laid out in the case of

Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193. It is incumbent on the Plaintiff to demonstrate that he is entitled to this equitable relief by showing to this Court that factually:

i. There is a serious issue to be tried;

ii. Damages are not adequate; and

iii. Balance of convenience weighs in favour of granting an injunction.

The factual considerations

Whether there is a serious issue to be tried

[12] It is crucial at the onset for this Court to ascertain the facts surrounding the case. It is evident that the Plaintiff contended that an agreement was reached between the Plaintiff and Defendant on 26.1.2021 in which the alleged salient terms were agreed upon. The Defendant however, disputes that there was such an agreement reached between the two parties.

[13] It is for this reason that this Court finds the affidavit filed by Collin Too to be pivotal. Collin Too had sworn an affidavit stating that the meeting that was held on 26th of January 2021 was a meeting which he had brokered on his own accord. He was not acting on anyone's behalf. Collin Too's averment although not tested in cross examination at this stage does suggest that the Defendant had independent evidence to corroborate his version of events. Most importantly, the Defendant did not make any promises or agreements with the Plaintiff during the said meeting.

[14] Be that as it may, the 26 January Agreement, was not all and be all, the most crucial issue. A more important point to note is the power to appoint directors. Appointment of directors are within the powers of the Company's Board of Directors. It cannot be disputed that the appointment of the Plaintiff and his daughter was made by the Board of the Company. It is consistent with the provision of Article 110 of the Company Constitution.

[15] The Defendant was a shareholder. However, the power of appointment does not lie with a shareholder. Thus, irrespective of the Agreement, the ultimate decision lies with the Board of Directors and not the Defendant.

[16] The next factual issue to be considered by this Court is the proposed removal of the Plaintiff and his daughter as directors. It was highlighted to this Court that the Board had discovered irregularities which implicated the Plaintiff. The Plaintiff's daughter was alleged to have been involved in organizing the previous annual general meeting, which the Board found to contain discrepancies. As a result of this said issues, the Board decided that there was sufficient reason for the suspension of the Plaintiff and his daughter from the Board on 15.2.2021. This eventually led to the proposed removal of the Plaintiff via a joint requisition dated 22.2.2021 to be carried out during the

proposed extraordinary general meeting to be held on the 30.3.2021. The removal of the Plaintiff and his daughter therefore, was based on a reason that the Board saw fit to act upon. Thus, it was not solely at the behest of the Defendant.

[17] It is the view of this Court that the factual background by itself, does not convince this Court to agree with the contention of the Plaintiff that there is a serious issue to be tried.

[18] The failure of the Plaintiff to support his version of events does not assist him in persuading this Court to rule in his favour. More so, when a witness had given evidence contrary to what the Plaintiff contended.

The restriction to vote based on implication

[19] The Plaintiff also argued that the Defendant is restricted from exercising his voting rights by implication. Paragraph 17 of the Statement of Claim is reproduced below:

> *17. The Plaintiff will further contend that implicit in the 26 January Agreement is that:*
>
> *(a) the Defendant and the Defendant's Confederates will exercise their voting shares in the manner consistent with and not contrary to the salient terms set out in paragraph 26 above;*
>
> *(b) the Plaintiff and his daughter would continue to be involved in the management of Menang, albeit with the participation of the new members of the reconstituted board of Menang; and*
>
> *(c) parties shall at all times act in good faith in their dealings with each other vis a vis the affairs of Menang.*

[20] With respect, this Court is unable to agree with the Plaintiff's proposition.

[21] This Court will not readily imply an abandonment of a statutory right conferred by statute. The abandonment of a statutory right must be express.

[22] Regardless of the circumstances that gave rise to the abandoning of a statutory right, the abandoning of the said right is not an *estoppel* or waiver against the right to assert the right in future. The principle was made clear in the Court of Appeal case of *Powernet Industries Sdn Bhd V Golden Wheel Credit Sdn Bhd* [2020] 12 MLJ 412 where it was held as follows:

> *"[84] Based on the principles enunciated in the cases mentioned above, we are of the view that the Act is a manifestation of a social legislation and is designed to regulate the business of moneylending and to protect borrowers.* ***As such, regardless of the circumstances which gave rise to the waiver/estoppel, a moneylender cannot rely on such waiver/estoppel to preclude the borrower from asserting his rights as provided for under the under the Act.*** *Thus, in the context of a contravention of s. 16 of the Act, it is our view that the borrower is entitled to raise and rely upon the moneylender's contravention of the Act in opposing the claim for recovery of the monies that were lent."*
> (Emphasis added)

[23] In *Re Judy Blacious Af Pereira; Petitioner* [2015] 6 CLJ 1127 the following was held:

> ***"Be that as it may, the statutory right cannot be said to have been waived or abandoned and neither would estoppel apply against a statute."***

(Emphasis added)

[24] This Court is persuaded by the argument of the Defendant that if such an implied understanding is taken, it would mean that the Plaintiff and his daughter will be immune from removal, notwithstanding if there are valid reasons to do so. Applying the rationale to the facts of this case, it would mean that notwithstanding the allegation of irregularities against the Plaintiff and his daughter, they must remain as Board members. The Defendant on the other hand is hapless and is unable to utilize his statutory right. Such an interpretation is certainly contrary to public policy.

[25] In fact, it may extend to restraining the Defendant's right in all Annual General Meetings and other General Meetings when the position of the Plaintiff and his nominee is challenged. This would not be in the best interest of the Company and the Defendant as a member.

[26] This court finds that the alleged agreement for appointment of the Plaintiff and Marianna does not give rise to an implication that the Defendant cannot seek their removal or vote against their removal. This is a question of law which this Court can readily make a determination at this stage.

Whether there is a legal basis to issue an injunction against the Defendant to stop him from exercising his rights to vote

[27] The issue remains whether the purported 26 January Agreement can be the basis for an injunction to be granted against the Defendant in exercising his rights as a shareholder.

[28] Section 311 of the Companies Act 2016 ("the Act") confers the right on members to convene a meeting of the company.

[29] Section 206 of the Act provides for the removal of directors, subject to a special notice to be issue under s. 322 of the Act.

[30] Therefore, the right of a shareholder to convene a meeting of the company and the right to remove a director of the company are statutorily provided under the Act. (*Solaiappan v. Lim Yoke Fan & Ors [1968] 2 MLJ 21; Dato' HM Shah & Ors v. Dato' Abdullah bin Ahmad* [1991] 1 MLJ 91).

[31] Internally, the right of shareholders to remove a director at a general meeting is found at Article 109 of the Company's Constitution. It reads as follows:

> *"109. The Company may by Ordinary Resolution of which special notice has been given to the Company in accordance with the provisions of the Act remove any Director before the expiration of his period of office and may by an Ordinary Resolution appoint another person in his stead. The person so appointed shall be subject to retirement at the same time as if he had become a Director on the day on which the Director in whose place he is appointed was last elected a Director."*

[32] The Court of Appeal in *Tuan Haji Ishak Bin Ismail & Ors v. Leong Hup Holdings Bhd And Other Appeals* [1996] 1 MLJ 661 clearly outlined the position in law which provides that the right to remove a director lies with the shareholders. The Court of Appeal held as follows.

> *"The submission here is that, a public company cannot contract out of its right to remove a director by ordinary resolution notwithstanding anything in its articles and notwithstanding anything in any agreement between the company and the director that he should not be removed. Here, the Lau brothers had no such agreement with*

KFCM. If it was being suggested that the first three respondents had entered into such an agreement as agents of KFCM, that would not be of any assistance to Leong Hup either. ***It has not been suggested that the first three respondents entered into the so-called agreements as agents of the fourth to the seventh respondents; but even if that were so it could not affect the overriding effect of s. 128(1) of our Act. The Lau brothers held office as directors of KFCM by virtue of a contract with KFCM, and KFCM alone, an office to which they could only be elected by the shareholders of KFCM alone.***

Kenanga Nominees and TA Nominees, the sixth and seventh respondents, were not directors of KFCM. Even assuming that they as shareholders would vote along with the other shareholders to expel the

Lau brothers, the power to vote in general meeting is not a fiduciary power, and a shareholder owes no duty to anybody as to how he exercises his vote: Northern Counties Securities Ltd v. Jackson & Steeple Ltd [1974] 2 All ER 625."
(Emphasis added)

[33] To underscore that the right of a shareholder to vote on a resolution in a general meeting is a proprietary right, it is apposite to reproduce the English case of *Northern Counties Securities Ltd v. Jackson & Steeple Ltd* [1974] 2 All ER 625 which was referred to in ***Tuan Haji Ishak***. The court held as follows:

"I think that in a nutshell the distinction is this. When a director votes as a director for or against any particular resolution in a directors' meeting, he is voting as a person under a fiduciary duty to the

> *company for the proposition that the company should take a certain course of action.* ***When a shareholder is voting for or against a particular resolution he is voting as a person owing no fiduciary duty to the company who is exercising his own right of property to vote as he thinks fit. The fact that the result of the voting at the meeting (or a subsequent poll) will bind the company cannot affect the position that in voting he is voting simply as an exercise of his own property rights****."*
>
> (Emphasis added)

[34] This Court too had expressed the same view in *Teh Wei Kian & Anor v. Golden Plus Holdings Berhad & Ors* [2020] MLJU 1050.

[35] The Court of Appeal in ***Tuan Hj Ishak*** also stands for the proposition that courts will not take cognizance of an alleged private arrangement between two shareholders to control a public company. Further, if the agreement was critical for the parties, the purported agreement should have been documented. The court held:

> *"****So far as legitimate expectation is concerned, I need not go into the other cases cited; except to say that Re Tottenham Hotspur plc [1994] 1 BCLC 695 is yet another instance where the court declined to take cognizance of an alleged private arrangement between two shareholders as to control in a public company.*** *From any point of view, KFCM cannot be regarded as a quasi-partnership between just Leong Hup and Ishak and George Ting or the interests they are alleged to have represented in March 1993.* ***It may be that at that time these people were prepared to leave matters relating to their share ratios***

and increases of capital in KFCM fluid thus indicating mutual trust and confidence; but if they regarded these matters as important, we think it was imperative not only that agreements on such matters should have been put into writing but also the articles of association should have been amended so as to substantiate the claim that is now being made*."*
(Emphasis added)

[36] The reluctance of courts to interfere with a shareholder statutory rights was discussed in the case of *ISM Sdn Bhd v. Queensway Nominees (Asing) Sdn Bhd & Ors and other suits* [2021] 7 MLJ 506 which referred to ***Tuan Haji Ishak***. The court held as follows:

"[114] Moreover, the right of the company in general meeting to remove a director was an unfettered right of a public company conferred under the Companies Act 1965, and any agreement to the contrary would not be enforceable:

Transposed to s. 128(1) of our Act, the proper meaning of 'A public company may by ordinary resolution remove a director …' means that a simple majority of the shareholders of the company may vote to remove a director and no agreement made by the directors or the company can fetter that right. The courts will not interfere with the statutory right of shareholders to remove directors: Solaiappan v. Lim Yoke Fan & Ors [1968] 2 MLJ 21; Dato' HM Shah & Ors v. Dato' Abdullah bin Ahmad [1991] 1 MLJ 91, a Supreme Court decision which applied s. 128(1) and upheld the shareholders' right to terminate the appointment of the executive chairman and managing director of the

> ***company in the ninth month of a three-year contract with the company appointing him to those positions***."
> (Emphasis added)

[37] To the mind of this Court, the purported breach of the Agreement, cannot readily deny the right of the Defendant as a shareholder from voting. What more, when the existence of the Agreement is being challenged.

[38] The tenor of the cases discussed above points to the reluctance of courts denying the right of a shareholder from exercising his right to vote. This Court is therefore reluctant to grant an injunction against the Defendant from exercising his rights to vote as a shareholder on the strength of the law and the surrounding factual circumstances.

Other considerations

[39] The test in ***Keet Gerald Francis*** stipulates that the first port of call that a court needs to determine is whether there is a *bona fide* serious issue to be tried. Only upon being satisfied that there is a serious issue to be tried should courts go on to consider the other factors. It would be apposite to reproduce the exact portion of ***Keet Gerald Francis*** for good measure where the Court of Appeal held as follows:

> "*To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:*
>
> *(1) he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that*

stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision on the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand, if he does find that there are serious question to be tried, he should move on to the nest step of his inquiry;

(2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly if he concludes that the defendant would suffer the greater injustice by

the grant of an injunction, he would be entitled to refuse relief.

...

(3) The judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, ... Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. ..."

[40] For completeness, this Court will go on to test the other elements necessary to be considered.

Whether on a balance of convenience it would be just to grant the injunction

[41] Given that that there are adequate safeguards under s. 207 of the Act for directors to defend themselves in the form of representations to be made at the EGM, the concern that the Plaintiff has of his removal is at this stage premature. In any event, there is no certainty that the Plaintiff will be removed. The Defendant holds only 8.31% of the voting rights. The will

of the majority shall ultimately determine the outcome of the resolutions.

[42] If the Defendant is stopped from exercising his rights to vote at the said EGM, it would result in irreparable harm. He would be deprived of his right to vote at the said EGM. The lost opportunity to vote at the EGM is definite.

[43] As discussed previously, the importance of allowing shareholders to vote is sacrosanct and there is a general reluctance for courts to interfere in the democratic process of a company. The right to vote is a proprietary right attached to the shares.

[44] The balance of convenience must tilt in favour of the Defendant and therefore the injunction must be denied.

Whether damages adequate

[45] On the facts, the Plaintiff and his daughter are not Executive Directors. They are pure members of the Board without executive powers. Their removal if any, is compensable by damages. The notion that they have a legitimate expectation to be on the Board of the Company and the loss of that opportunity is not compensable by damages is devoid of legal support. Again, in ***Tuan Haji Ishak***, the legitimate expectation of being on the board of the company was rejected unless it was part of an express term of the agreement or that the articles of association of the company amended to substantiate the claim.

Conclusion

[46] In the foregoing, this Court does not find that the equitable relief sought has been sufficiently justified by the Plaintiff. The facts of the case in itself conclusively point to the failure of the

Plaintiff to establish a serious issue to be tried. The legal position when considering to issue an injunction against a shareholder to vote at a meeting also leans in favour of the Defendant.

[47] Enclosure 5 is therefore dismissed with costs.

(AHMAD FAIRUZ ZAINOL ABIDIN)
Judge
High Court of Malaya
Kuala Lumpur

Dated: 28 MAY 2021

COUNSEL:

For the plaintiff - Michael Chow & Wong Zhi Khung; M/s Michael Chow
(Kuala Lumpur)

For the defendant - Yap Boon Hau & Maya Gayathri; M/s Mah-Kamariyah & Philip Koh
(Kuala Lumpur)

Case(s) referred to:

Powernet Industries Sdn Bhd v. Golden Wheel Credit Sdn Bhd [2020] 12 MLJ 412

Re Judy Blacious Af Pereira; Petitioner [2015] 6 CLJ 1127

Solaiappan v. Lim Yoke Fan & Ors [1968] 2 MLJ 21

Dato' HM Shah & Ors v. Dato' Abdullah bin Ahmad [1991] 1 MLJ 91

Tuan Haji Ishak Bin Ismail & Ors v. Leong Hup Holdings Bhd And Other Appeals [1996] 1 MLJ

Northern Counties Securities Ltd v. Jackson & Steeple Ltd [1974] 2 All ER 625

Teh Wei Kian & Anor v. Golden Plus Holdings Berhad & Ors [2020] MLJU 1050

ISM Sdn Bhd v. Queensway Nominees (Asing) Sdn Bhd & Ors and other suits [2021] 7 MLJ 506

Legislation referred to:

Companies Act 2016, ss. 206, 207, 311, 312 (1), 322

Rules of Court 2012, O. 29, O. 92 r. 4