DATO' SHUN LEONG KWONG & ANOR v. MENANG CORPORATION (M) BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
WAN MUHAMMAD AMIN WAN YAHYA JC
[ORIGINATING SUMMONS NO: WA-24NCC-95-03-2021]
21 MAY 2021

COMPANY LAW: *Directors – Suspension – Whether company had power, express or implied, to suspend directors – Whether provisions of Companies Act 2016 expressly provide for suspension of director – Whether memorandum and articles of association of company expressly provide for power to suspend director – Whether Parliament intended for such power to be included*

COMPANY LAW: *Directors – Meetings – Whether directors deliberately excluded from board meeting – Whether directors' exclusion from board meeting mere irregularity – Whether ratifiable – Whether company duty bound to summon meeting under ss. 311 and 312 of Companies Act 2016 – Whether there was abuse of power – Whether decisions made by company's board valid and lawful*

The plaintiffs in this originating summons (encl. 1) essentially sought for the following reliefs, *inter alia* (i) a declaration that the suspension of the first plaintiff and the second plaintiff as directors of the first defendant company ('first defendant') pursuant to the notices issued by the first defendant and signed by the second defendant was null and void; and (ii) a declaration that the exclusion by the first plaintiff and the second plaintiff from the meetings of the board of directors of the first defendant including the board of directors meeting on 25 February 2021 was unlawful. The first plaintiff and the second plaintiff were both directors of the first defendant. The underlining dispute arose from a tussle for control of the board of directors of the first defendant basically involving the first plaintiff and the parties aligned to him and the second to fourth defendants and the parties aligned to them. The brief chronology of events leading to the 30 March 2021 Extraordinary General Meeting ('EGM') were that on 29 January 2021, the first defendant's board of directors ('board') resolved to appoint seven directors to its board which included both plaintiffs as non-independent, non-executive directors. Upon their appointment, the first defendant's board had a total of nine directors. On 12 February 2021, a memorandum which contained the preliminary finding of a due diligence exercise that was conducted by the first defendant was issued. The preliminary finding showed, *inter alia*, irregularities on the part of the plaintiffs. On 15 February 2021, by a written resolution, the plaintiffs were suspended from exercising their duties and functions as director of the first defendant until the investigative committee had completed their finding, and the plaintiffs were notified of this. On

17 February 2021, (i) a notice of meeting (for a virtual/online meeting) and the online meeting link (Microsoft Team meeting) for the first defendant's fourth audit and risk management committee meeting ('fourth audit meeting') scheduled for 25 February 2021 was emailed to the invitees which did not include the plaintiffs in the circulation list; (ii) a notice of meeting (for a virtual/online meeting) and the online meeting link (Microsoft Team meeting) for the first defendant's board meeting scheduled for 25 February 2021 ('the 25 February 2021 board meeting') was emailed to the directors of the first defendant, including the plaintiffs. On 22 February 2021, a notice of requisition was issued to move the resolution to remove the plaintiffs as directors of the first defendant. On 25 February 2021, the first defendant proceeded with its fourth audit meeting and the 25 February 2021 board meeting. The board during the 25 February 2021 board meeting also discussed the issue of fixing a date for the EGM which was requisitioned by its two shareholders, Dato' Lee Chin Hwa and Nicholas Pun Chee Cheang, pursuant to ss. 311(3) and 312(1)(a) of the Companies Act 2016 ('Companies Act'). The plaintiffs could not join the 25 February 2021 board meeting as they were not able to log in by using the link provided for the said board meeting. On 16 March 2021, a Directors' Circular Resolution of the first defendant ('DCR') was issued to ratify, confirm, accept and/or approve the decisions made by the board on 25 February 2021. The plaintiffs did not sign the DCR. On 18 March 2021, the DCR was approved by seven out of the nine directors of the first defendant and the resolutions contained therein were carried out. The plaintiffs' urgency in having the originating summons heard quickly was because of their argument that if the court finds that the decisions made by the board on 25 February 2021 were invalid which included a decision to call for the 30 March 2021 EGM, then the said EGM could not proceed on 30 March 2021. As a compromise to having the originating summons disposed of before 30 March 2021, the parties had entered into an agreement and a consent order was entered to that effect on 12 March 2021 which included the questions for the court's determination (i) whether, on the facts presented before the court, the first defendant had the power, express or implied, to suspend the plaintiffs as directors appointed pursuant to art. 110 of the constitution of the first defendant (question 1) ; and (ii) what was the effect in law on the board of directors' decisions including the decision to call for a meeting of members pursuant to the notice of requisition (question 2).

Held (allowing originating summons in part):

(1) The Companies Act is a comprehensive Act of Parliament and has specific provisions which govern the powers of a board and its directors. This court was unable to agree that the power to suspend a director which is not specifically provided in the Companies Act could be implied given the extensiveness of the said Act. Further, the first

defendant's own articles did not provide for it. If both the Companies Act and the first defendant's own articles did not expressly provide for the power to suspend a director, be it board appointed or member appointed, then it must mean that Parliament and the first defendant (insofar as its articles are concerned) did not intend for such a power to be included. The law draws no distinction between a director appointed under art. 110 or s. 208(4) of the Companies Act or one appointed under art. 108 by the members of the company. A director, howsoever appointed, is a director whose rights, duties and obligations are the subject matter of uniform regulation under the Act as well as the articles. (paras 44, 46 & 47)

(2) Unless expressly provided for in the memorandum and articles of association of a company, the suspension of a director could not be implied. A director has specific statutory duties under the Companies Act and suspending a director from office will prevent him from carrying out those duties which are mandatory. This could expose the director and the company to liability. As the provisions of the Companies Act do not expressly provide for the suspension of a director, a director's suspension will not be recognised by the Companies Commission of Malaysia ('CCM') as the statutory body which regulates companies, nor would third parties dealing with the 'suspended' director be aware of his suspension since he would remain on CCM's record as a director of the company. Thus, the director's suspension has no effect on outsiders dealing with the company. This court answered question 1 in the consent order in the negative. The first defendant did not have the power, express or implied, to suspend the plaintiffs as directors appointed pursuant to art. 110 of the constitution of the first defendant. (paras 52, 56 & 57)

(3) The plaintiff did not have actual proof that they were deliberately excluded from the 25 February board meeting. The plaintiff could only, at best, infer from the surrounding facts leading to the 25 February board meeting that they were excluded. This court had difficulty in accepting the plaintiffs' allegations in view of the explanation given by the first defendant and its company secretary as well as the overall facts of this case. The word 'deliberate' means with intent or that the act was done knowingly. The plaintiffs sought to prove the 'intent' by way of affidavit evidence for which there was no actual proof save and except from inferences made from the surrounding circumstances. The burden of proof was on the plaintiffs to prove the alleged wrongful 'intentional' act of the first defendant. Firstly, it did not stand to reason why the first defendant would issue the plaintiffs the notice of the 25 February 2021 board meeting and later deliberately exclude them from attending. Secondly, it was also unreasonable and devoid of merits for the plaintiffs

to expect the court to reject the explanation given by the first defendant which included all the directors present at the 25 February 2021 board meeting (as these matters were also stated in, *inter alia*, the DCR approved by the same seven directors) as well as the explanation given by the first defendant's company secretary, based on the plaintiffs' allegations alone. Thirdly, although the suspension of the plaintiffs as directors were null and void, this did not mean that it was done in bad faith or that it could not be treated as an administrative act without affecting the plaintiffs' duties and responsibilities as director. Fourthly, there was no change in the venue save that some of the directors were at the first defendant's office while the other directors were joining from outside including the plaintiffs. This did not mean the venue of the 25 February 2021 board meeting had changed or that it was tantamount to convening a meeting at venue A but holding it at venue B. Fifthly, all that was required for the first defendant to do was to issue a notice of meeting and the agenda of the meeting which it had done. Thus, the non-dissemination of the board papers to the plaintiffs would not render the 25 February 2021 board meeting unlawful or improperly constituted. (paras 75, 95-98, 103 & 105)

(4) There was no dispute the notice of 25 February 2021 board meeting and its agenda were given to the plaintiffs, however, they could not join the said meeting using the Microsoft Team meeting link given. This court accepted the first defendant's explanation that the plaintiffs were inadvertently excluded from joining the 25 February 2021 board meeting. The explanation given by the first defendant that it went on with the 25 February 2021 board meeting after the fourth audit meeting ended using the same Microsoft Team meeting link used for the fourth audit meeting did not sound sinister or out of place, especially when the people in the Fourth Audit Meeting were the same as those attending the 25 February 2021 board meeting. It was a genuine mistake and neither did the first defendant's company secretary realise this mistake as the person who was administratively involved in the running of the said meeting. Therefore, the plaintiff's exclusion from the 25 February 2021 board meeting was a mere irregularity and was ratifiable. (paras 110-112)

(5) Since the exclusion of the plaintiffs from joining the 25 February 2021 board meeting was an irregularity, therefore, it could be cured by a subsequent meeting of the first defendant's board which, in this case, was done by way of the DCR. The DCR sought to ratify, confirm, accept and/or approve all the decisions made at the 25 February 2021 board meeting. The DCR was validly issued. The plaintiffs did not object *per se* to the DCR or its issuance. The DCR was approved by seven out of

the nine directors of the first defendant and the resolutions contained therein were passed. Therefore, the irregularity in the said 25 February 2021 board meeting was validly ratified by the DCR. (paras 118, 119 & 121-124)

(6) The first defendant's board was duty bound to summon a meeting under the provisions of both ss. 311 and 312 of the Companies Act as it was mandatory. Under s. 588(1)(b) of the Companies Act, it is an offence if the directors do not summon the meeting. Thus, the outcome of the 25 February 2021 board meeting would inevitably be the same with regards to the fixing of the 30 March 2021 EGM as it was mandatory for the first defendant's board to do so. There was no discretion on the part of the first defendant's board to refuse to call for the EGM where the relevant provisions of s. 311 of the Companies Act were satisfied. (paras 128, 131 & 132)

(7) Whilst the plaintiffs disagreed with the decisions of the majority of the first defendant's board, but as long as the said majority were not abusing their powers and were not depriving the plaintiffs as minority of their rights, there was no reason for the court to interfere with the said decisions of the majority. In answer to question 2 in the consent order, the decisions made by the first defendant's board, in particular, the decisions made at the 25 February 2021 board meeting and including the decision to call for a meeting of members pursuant to the notice of requisition to be held on 30 March 2021, were valid and lawful. (paras 136 & 137)

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(refd)***

AG of Belize v. Belize Telekom [2009] 2 BCLC 148 ***(refd)***

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639 CA ***(refd)***

Bentley-Stevens v. Jones & Ors [1974] 2 All ER 653 ***(refd)***

Browne v. La Trinidad (1888) 37 Ch D 1 ***(refd)***

Fong Poh Yoke & Ors v. The Central Construction Company (Malaysia) Sdn Bhd [1998] 4 CLJ Supp 112 HC ***(refd)***

Hooper v. Kerr (1900) 83 LT 729 ***(refd)***

Jerry Ngiam Swee Beng v. Abdul Rahman Mohd Rashid & Anor [2003] 3 CLJ 739 HC ***(refd)***

Khoo Choon Yam v. Gan Miew Chee & Ors [2000] 2 CLJ 788 HC ***(refd)***

Kwan Teck Hian v. Insulflex Corporation Sdn Bhd [2018] 2 CLJ 335 HC ***(refd)***

La Compagnie de Mayville v. Whitley [1896] 1 Ch 788 ***(refd)***

Lee Tak Suan & Anor v. Tunku Dato Seri Shahabudin & Ors [2009] 4 CLJ 365 FC ***(refd)***

MacDougall v. Gardiner [1875] 1 Ch D 13 ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Re Land Credit Company of Ireland (Ex-parte) (1869) LR 4 Ch Ap 473 ***(refd)***

A *Re Portuguese Consolidated Copper Mines, Limited Ex Parte Badman Ex Parte Bosanquet (1890) 45 Ch D 16* ***(refd)***
Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal [2018] 2 CLJ 641 FC ***(refd)***
Yap Kian @ Yap Sin Tian v. Poh Chin Chuan & Ors [2015] 1 LNS 456 HC ***(refd)***

B **Legislation referred to:**
Companies Act 1965 (repealed), s. 131B, Fourth Schedule
Companies Act 2016, ss. 206, 207, 208(4), 211(1), (2), 311(3), 312(1)(a), 588(1)(b)
Interpretation Acts 1948 and 1967, ss. 2, 3, 47
Rules of Court 2012, O. 14A

C *For the plaintiffs - Michael Chow & Wong Zhi Khung; M/s Michael Chow*
For the defendants - Yap Boon Hau & Yeap Chi Cheng; M/s Mah-Kamariyah & Philip Koh

Reported by Suhainah Wahiduddin

D **JUDGMENT**

Wan Muhammad Amin Wan Yahya JC:

[1] The plaintiffs in this originating summons (encl. 1) ("originating summons") essentially sought for the following reliefs:

E 1. a declaration that the suspension of the 1st Plaintiff and the 2nd Plaintiff as directors of the 1st Defendant pursuant to the notices issued by the 1st Defendant and signed by the 2nd Defendant is null and void;

2. a declaration that the exclusion by the 1st Plaintiff and the 2nd Plaintiff from the meetings of the board of directors of the 1st F Defendant including the board of directors meeting on 25.2.2021 is unlawful;

3. a declaration that all and any decision of the 1st Defendant, whether taken at the board of directors' meetings or otherwise, where the Plaintiffs or any of them have been excluded or otherwise G not been informed of, including any decision to convene any meetings of the 1st Defendant or the placement of shares of the 1st Defendant, are null and void in law;

4. an injunction to restrain the Defendants or any of them from adopting or in any way giving effect to any decision of the 1st H Defendant, whether taken at the board of directors' meetings or otherwise, which have been arrived at without the involvement of the Plaintiffs or where the Plaintiffs or any of them have been excluded from participating including any decision to convene any meetings of the 1st Defendant or the placement of shares of the 1st Defendant;

I 5. damages to be assessed against the Defendants or such of the Defendants as the Court deems appropriate;

[2] There were originally four separate applications filed by parties as follows:

(i) Enclosure 6 – the plaintiffs' application for an *ex parte* injunction against all the defendants which I had converted to an *inter partes* application. Enclosure 6 was filed with a certificate of urgency. The main relief prayed for in encl. 6 is as follows:

> an order for injunction to restrain the Defendants from giving effect to any decision purportedly made by or on behalf of the board of directors of the 1st Defendant without the knowledge or participation of the Plaintiffs including any decision to convene any meetings of the 1st Defendant or the placement of shares of the 1st Defendant.

(ii) Enclosure 14 – the plaintiffs' O. 14A of the Rules of Court 2012 ("ROC") application for the court to determine two main questions. Enclosure 14 was also filed with a certificate of urgency.

(iii) Enclosure 17 – the second to seventh defendants' application *inter alia*, to strike out the originating summons against the second to seventh defendants.

[3] The plaintiffs' urgency to have encl. 14 heard expeditiously (which would essentially dispose of the originating summons) was due to an Extraordinary General Meeting ("EGM") scheduled on 30 March 2021 which agenda is to remove the plaintiffs as directors of the first defendant.

[4] Due to the plaintiffs' urgency to have encls. 6 and 14 heard quickly, I had raised this issue with both learned counsel for the plaintiffs, Mr Michael Chow, and the defendants, Mr Yap Boon Hau, and highlighted to them that that it would appear to the court that the plaintiffs' main questions for the court to determine in their originating summons are confined to two issues. I further highlighted that if parties are able to limit the issues for the court to determine in respect of the originating summons, this would save time and effort and the originating summons could be heard before 30 March 2021. Then encls. 6 and 14 would no longer be necessary. Learned counsel for the defendants was open to this suggestion but wanted the plaintiffs to withdraw the suit as against the second to seventh defendants as the main reliefs prayed for in the originating summons did not concern the second to seventh defendants.

[5] As a compromise to having the originating summons disposed before 30 March 2021, parties had entered into an agreement and a consent order was entered to that effect on 12 March 2021 which includes the questions for the court's determination. The terms of the consent order are as follows:

A (1) The following questions of law are to be determined:

(a) whether, on the facts presented before the Court, the 1st Defendant company has the power, express or implied, to suspend the Plaintiffs as directors appointed pursuant to Article 110 of the Constitution of the 1st Defendant; and

B (b) in the event the answer to the above is negative and having regards to the facts presented before the Court, what is the effect in law on the board of directors' decisions including the decision to call for a meeting of members pursuant to the notice of requisition received from Dato' Lee Chin Hwa and Nicholas Pun Chee Cheang dated 22-2-2021 to be held on 30-3-2021.

C (2) The above questions of law are agreed based on the following conditions:

(a) that in the event the Court answer question 1(a) in favour of the 1st Defendant, the claim against the 1st Defendant company shall be dismissed with cost to be determined by the D Court;

(b) that in the event the Court answer question 1(b) in favour of the Plaintiffs, the Court may direct further submissions on appropriate remedy;

E (c) that the Plaintiffs agree to withdraw claim against the 2nd to 7th Defendants to this action with no order as to costs;

(d) that the parties agree to withdraw applications in Enclosures 6, 14, 17 and 18 with no order as to costs;

(e) that only for the purpose of determination of the above F questions, the allegations of wrongdoing forming grounds of suspension against the Plaintiffs as set out in the announcement at the Bursa Malaysia Website dated 15.2.2021 are presumed to be true; and

(f) parties may rely on the affidavits filed, and unless any fact is G expressly admitted, absence of any specific reply or denial to any allegation of facts shall not be taken as admission thereof.

[6] As a result of the consent order, encls. 6 and 14 were withdrawn by the plaintiffs as well as the plaintiffs' claim against the second to seventh defendants. Therefore, encl. 17 was also accordingly withdrawn by the H second to seventh defendants.

[7] It is noteworthy for me to mention that parties' ability to reason with each other and isolate the main issues in dispute between them in this action is commendable. This had in fact helped expedite the hearing of the originating summons which hearing may have been derailed if the I interlocutory applications had proceeded. It was in the best interest of the parties to have the originating summons disposed of quickly given its impact on, *inter alia*, the legitimacy of the decisions made by the first defendant's board of directors and the affairs of the first defendant.

Salient Background Facts

[8] The first plaintiff is said to be substantial shareholder of the first defendant since 1989. The first plaintiff's shareholdings in the first defendant are as follows:

(i) directly, 16,902 shares; and

(ii) indirectly, 54,261,234 shares representing 11.29% of the voting shares in the first defendant held through Titian Hartanah (M) Sdn Bhd and Maymerge (M) Sdn Bhd.

[9] The first plaintiff's wife and son are also shareholders of the first defendant and collectively hold 96,246,081 shares or 20.02% of the voting shares of the first defendant.

[10] Both the plaintiffs are directors of the first defendant. The second plaintiff is the daughter of the first plaintiff.

[11] The underlining dispute arises from a tussle for control of the board of directors of the first defendant basically involving the first plaintiff and parties aligned to him, on the one hand, and the second to fourth defendants and parties aligned to them which includes one Dato' Lee Chin Hwa, who is the father of the second defendant.

[12] This tussle for the control over the board of the first defendant is said to have begun around the time of the Annual General Meeting ("AGM") of the first defendant on 30 December 2020.

[13] The first plaintiff had also commenced an action against Dato' Lee Chin Hwa *via* Kuala Lumpur High Court Suit No. WA-22NCC-84-03-2021 ("Suit 84").

[14] In Suit 84, the first plaintiff is seeking to enforce, by way of specific performance, an agreement allegedly entered between the first plaintiff and Dato' Lee Chin Hwa on 26 January 2021 ("the 26 January 2021 agreement"). This 26 January 2021 agreement is said to contain, *inter alia*, certain arrangements regarding the board of directors of the first defendant and the manner in which the first plaintiff's and the Dato' Lee Chin Hwa's factions (called "confederates" in Suit 84) would manage the first defendant as well as the purchase of the first plaintiff's shares in the first defendant.

[15] By a notice of application filed in Suit 84, the first plaintiff also sought to restrain Dato' Lee Chin Hwa from taking any further steps pursuant to the notice of requisition dated 22 February 2021 under s. 311 of the Companies Act 2016, seeking to requisition an EGM of the first defendant.

[16] This is the very same EGM which was scheduled for 30 March 2021 which agenda was to remove the plaintiffs as directors of the first defendant ("the 30 March 2021 EGM").

[17] The brief chronology of events leading to the 30 March 2021 EGM are as follows:

(i) On 29 January 2021, the first defendant's board of directors ("board") resolved to appoint seven directors to its board which includes both plaintiffs as non-independent, non-executive directors. Upon their appointment, the first defendant's board had a total nine directors. The seven directors that were appointed are as follows:

Directors	Designation
Toh May Fook (3rd Defendant)	Non-independent non-executive director
Liew Sook Pin (4th Defendant)	Non-independent non-executive director
Lee Min Huat (2nd Defendant)	Non-independent non-executive director
Chee Wai Hong (5th Defendant)	Independent non-executive director
Yee Chun Lin (6th Defendant)	Independent non-executive director
Dato' Shun Leong Kwong (1st Plaintiff)	Non-independent non-executive director
Marianna binti Aly Shun (2nd Plaintiff)	Non-independent non-executive director

(ii) On 1 February 2021 the first defendant's board of directors were redesignation as follows:

Directors	Designation
Toh May Fook (3rd Defendant)	Group Managing Director
Liew Sook Pin (4th Defendant)	Executive Director
Lee Min Huat (2nd Defendant)	Executive Director
Chee Wai Hong (5th Defendant)	Independent non-executive director
Yee Chun Lin (6th Defendant)	Independent non-executive director

Chiam Tau Meng (7th Defendant)	Independent non-executive director
Too Kok Leong	Non-independent non-executive director
Dato' Shun Leong Kwong (1st Plaintiff)	Non-independent non-executive director
Marianna binti Aly Shun (2nd Plaintiff)	Non-independent non-executive director

(iii) On 12 February 2021 a memorandum which contained the preliminary finding of a due diligence exercise that was conducted by the first defendant was issued. The preliminary finding showed, *inter alia*, irregularities on the part of the plaintiffs. The due diligence exercise was agreed in a board meeting on 1 February 2021.

(iv) On 15 February 2021, by written resolution, the plaintiffs were suspended from exercising their duties and functions as director of the first defendant until the investigative committee has completed their finding, and the plaintiffs were notified of this.

(v) On 17 February 2021:

(a) A notice of meeting (for a virtual/online meeting) and the online meeting link (Microsoft team meeting) for the first defendant's fourth audit and risk management committee meeting ("fourth audit meeting") scheduled for 25 February 2021 was emailed to the invitees which did not include the plaintiffs in the circulation list is concerned.

(b) A notice of meeting (for a virtual/online meeting) and the online meeting link (Microsoft team meeting) for the first defendant's board meeting scheduled for 25 February 2021 ("the 25 February 2021 board meeting") was emailed to the directors of the first defendant, including the plaintiffs.

(vi) On 22 February 2021, a notice of requisition was issued by Dato Lee Chin Hwa and Nicholas Pun Chee Cheang to move the resolution to remove the plaintiffs as directors of the first defendant.

(vii) On 25 February 2021:

(a) The first defendant proceeded with its fourth audit meeting and the 25 February 2021 board meeting.

(b) The board during the 25 February 2021 board meeting also discussed the issue of fixing a date for the EGM which was requisitioned by its two shareholders, Dato' Lee Chin Hwa and Nicholas Pun Chee Cheang, pursuant to ss. 311(3) and 312(1)(a) Companies Act 2016.

(c) The plaintiffs could not join the 25 February 2021 board meeting as they were not able to log in by using the link provided for the said board meeting. This issue will be dealt with in detail later in this judgment.

(viii) On 16 March 2021 a directors' circular resolution of the first defendant ("DCR") was issued to ratify, confirm, accept and/or approve the decisions made by the board on 25 February 2021. The plaintiffs did not sign the DCR.

(ix) On 18 March 2021 the DCR was approved by seven out of the nine directors of the first defendant and the resolutions contained therein were carried.

[18] The plaintiffs' urgency in having the originating summons heard quickly is because of their argument that if the court finds that the decisions made by the board on 25 February 2021 are invalid which includes a decision to call for the 30 March 2021 EGM then the said EGM cannot proceed on 30 March 2021.

[19] Having set out the salient background facts, I will now deal with the two questions posed in the consent order for the court to determine.

Question 1: Whether, On The Facts Presented Before The Court, The First Defendant Company Has The Power, Express Or Implied, To Suspend The Plaintiffs As Directors Appointed Pursuant To Article 110 Of The Constitution Of The First Defendant

[20] I will begin with the arguments advanced on behalf of the plaintiffs on this point which is quite straightforward.

[21] Learned counsel for the plaintiffs submitted that a company cannot suspend its directors. A company which is not satisfied with any of its directors can only go by way of the express provisions of the Companies Act 2016 to remove such a director, namely, by invoking s. 206 regarding removal of a director and the safeguards that come, such as those under s. 207 Companies Act 2016 regarding the right to be heard for directors of a public company against removal.

[22] It was further submitted that neither the Companies Act 2016 nor the articles of association of the first defendant or otherwise its constitution ("articles") contains any express provision on the suspension of a director.

[23] Therefore, the burden is on first defendant to show that it has the requisite power, express or implied, to suspend the plaintiffs as directors of the first defendant.

[24] Learned counsel for the first defendant's arguments on this issue can be broken into two main parts:

(i) A distinction should be made between directors which are appointed by the members of a company and directors appointed by the directors or board pursuant to art. 110 of the articles or s. 208(4) of the Companies Act 2016. Learned counsel for the first defendant then referred to a director appointed by the board as, "board appointed director".

(ii) As there is no express power to suspend a board appointed director under the first defendant's articles or the Companies Act 2016, the suspension is allowed by implication. This implied power is derived from the interpretation of the articles and the Companies Act 2016.

[25] Article 110 deals with the appointment of a director to fill a casual vacancy and also additional directors whereas s. 208 only deals with appointments to fill a casual vacancy. Article 110 and s. 208(4) Companies Act 2016 are reproduced below:

> **Article 110 of the 1st Defendant's Articles**
>
> 110. The **Directors** shall have powers at any time, and from time to time, **to appoint any person to be a Director, either to fill a casual vacancy or as an addition to the existing Directors,** but so that the total number of Directors shall not at any time exceed the number fixed in accordance with this Constitution. Any Director so appointed shall **hold office only until the next following annual general meeting,** and shall then be eligible for reelection but shall not be taken into account in determining the Directors who are to retire by rotation at such meeting.
>
> **Section 208(4) Companies Act 2016**
>
> (4) If a vacancy is created resulting from circumstances referred to in subsection (1), the **board shall have the power,** at any time, **to appoint** any person **to be a director to fill such casual vacancy** and the director so appointed shall hold office … (emphasis added)

[26] It was further submitted on behalf of the first defendant in advancing the above arguments that the source of such implied power to suspend comes from:

(i) The appointing authorities provided in the articles and the Companies Act 2016;

(ii) Necessary management power under the Companies Act 2016 and the common law.

[27] Further, that the plaintiffs were appointed by the board under art. 110 of the articles and were then subsequently suspended by the same appointing authority, namely the board.

[28] In short, what learned counsel for the first defendant is saying is that as the board had appointed the plaintiffs as directors, it is implicit that the same board has the power to suspend.

[29] In support of this argument, the first defendant relied on s. 47 of the Interpretation Acts 1948 and 1967 ("Interpretation Act 1967") which states:

> 47. Power to appoint includes power to remove, etc.
>
> **Where a power to make an appointment is conferred** by any written law, the appointing authority shall also have power (subject to any limitations or qualifications which affect the power of appointment) to remove, **suspend,** reappoint or re-instate any person appointed in the exercise of the power. (emphasis added)

[30] Reference was also made to the case of *Yap Kian @ Yap Sin Tian v. Poh Chin Chuan & Ors* [2015] 1 LNS 456; [2016] 7 MLJ 505 on the issue of whether the Central Committee (CC) can dissolve and re-elect the Central Executive Committee (CEC) before the expiry of its terms of office. The association's constitution was silent on the matter of the CC having the power to dissolve and reelect the CEC. The High Court then held:

> [33] Having considered the law and the facts, I find that there is no merit in the plaintiff's contention that the central executive committee once elected must serve out its full term of four years, and that it cannot be dissolved midstream. It is trite law that where a constitution or law confers powers to appoint, the appointing authority would also have the power to remove. This principle was very well restated by Syed Ahmad Idid J in *Sabdin Ghani v. Musa Haji Aman* [1992] MLJU 88; [1993] 2 CLJ 109 at p 11 (MLJU); p 113 (CLJ) as follows:
>
> > ... where the constitution confers *power to appoint,* the appointing authority should also have the power to remove, to *suspend,* to reappoint or reinstate.
>
> [34] *This principle is also statutorily embodied in ss. 47 and 94 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989)* in the following terms:
> ...
>
> ...
>
> [35] The Court of Appeal in *Lim Eye Thun v. Majlis Peguam Malaysia & Anor* [2010] 2 MLJ 444 at p 445 reiterated this principle in the following terms:
>
> > This power to appoint carries with it the power to revoke the appointment; see *SR Tewari*, where the Allahabad Supreme Court held that *the power to appoint ordinarily carries with it the power to terminate appointment, and a power to terminate may, in the absence of*

restrictions express or implied, be exercised subject to the conditions prescribed in that behalf by the authority competent to appoint. In Malaysia, this principle is given statutory expression in s 47 of the Interpretation Acts 1948 and 1967 in the following words ...

...

[39] The highest or supreme constitutional authority of Dong Zong, as provided in rule 5.1.1 of the constitution, is the general meeting. It is the General Meeting that elects the central committee, to supervise and oversee the affairs and management of the society. The central committee in turn elects the officer-bearers, who together with the three members appointed by the chairman, constitute the central executive committee. According to rule 5.3.3 of the constitution, the central executive committee shall during the adjournment of the central committee, be responsible for the running of the affairs of the society and shall execute all resolutions of the central committee. Therefore, *the central executive committee is a creature born out of the constitutional powers granted to the central committee,* and as such, *by implication, would at all times have the power to dissolve the central executive committee or remove any of its office bearers, unless otherwise expressly or impliedly provided in the constitution.* Since, there is no such express or implied prohibition in the constitution, the central committee must necessarily be taken to have the implied power to remove such office-bearers and dissolve and reconstitute the central executive committee during the pendency of their term of office.

(emphasis added)

[31] On the issue of the necessary management power under the Companies Act 2016 and common law, learned counsel for the first defendant relied on s. 211 of the Companies Act 2016 which states:

(1) The business and affairs of a company shall be managed by, or under the direction of the board.

(2) **The board has all the power necessary for managing and for directing and supervising the management of the business and affairs of the company** subject to any modification, exception or limitation contained in this Act or in the constitution of the company. (emphasis added)

[32] To take this point further, the case of *Tengku Dato' Ibrahim Petra Tengku Indra Petra v. Petra Perdana Bhd & Another Appeal* [2018] 2 CLJ 641; [2017] MLJU 1976 (FC) was referred regarding the application of s. 131B of the Companies Act 1965 which is in *pari materia* with s. 211 Companies Act 2016 where it was held:

[127] Section 131B which was inserted into the Act in August 2007, created a new provision that has a significant and wide-ranging consequence, primarily on directors. The new provision expressly declared that the board of directors must manage the *business and affairs of a company.* It is necessary to look at the operative word of the provision. The Legislature advisedly used the word "must", which highlighted legislative

A recognition that the board of directors is the principal management organ of a company. It is interesting to note that s. 157A of Singapore Companies Act, which is equivalent to our s.131B, provides that the business of a company shall be managed by or under the direction of the directors. In consequence, the statutory position in Malaysia is even stronger by s. 131B using the words the business and affairs of a company B "must be managed" by the board of directors. As the authors of Woon & Hicks, "*The Companies Act of Malaysia: An Annotation*" (LexisNexis, 2012) at p. 210 observed, s. 131B "makes it mandatory for the business and affairs of a company to be managed by or under the directions of the directors". The word comes along with phrase 'the board of directors has all the powers necessary for managing and for directing and supervising C the management of the business and affairs of the company' in sub-s. 2 of s. 131B. *The provision was drafted in the widest possible terms; it encapsulated the fundamental principle of our company law that a company's power of management is reserved to its directors, collectively called the board of directors and not its shareholders.* It has to be noted that s. 211 of our new Companies D Act 2016 provides that a board 'shall' manage the business and affairs of the company. We shall say no more about the new provision as the appeals before us deal with s. 131B.

(emphasis added)

[33] Learned counsel for the first defendant then went to great length to E explain and illustrate the scope of the following words in ss. 211(1) and 211(2) Companies Act 2016:

i) "business and affairs of the company"; and

ii) "all power necessary for the management";

F **[34]** He further cited a number of cases to support his arguments. I do not intend to go through all those cases for the simple reason that they do not pertain to the power of the board of directors to suspend a board appointed director or even a director appointed by the members of a company.

[35] There were only a few cases cited which dealt with the suspension of G a director of a company but before I refer to them, I will first address the issues raised by the first defendant above.

[36] The first defendant agreed that there is no express power to suspend a director either in the Companies Act 2016 or the articles of the first defendant.

H **[37]** Therefore, the real question is whether such a power to suspend can be implied.

The Interpretation Act 1967

[38] I agree with learned counsel for the plaintiffs' submission that the first I defendant's reliance on the Interpretation Act 1967 is misplaced based on the following reasons:

(i) The reference to the Interpretation Act 1967 in cl. 7 of the articles is limited only to the incorporation of the definition section in s. 3 of the Interpretation Act which sets out the definition of various "words and expressions". In this regard s. 2 of the Interpretation Act 1967 provides:

> 2. Application
>
> (1) Subject to this section, Part 1 of this Act shall apply for the interpretation of and otherwise in relation to:
>
> (a) **this Act and all Acts of Parliament** enacted after 18th May 1967;
>
> (b) **all laws,** whether enacted before or after the commencement of this Act, revised under the Revision of Laws Act 1968;
>
> (c) **all subsidiary legislation** made under this Act and under Acts of Parliament enacted after the commencement of this Act;
>
> (d) **all subsidiary legislation,** whether made before or after the commencement of this Act, revised under the Revision of Laws Act 1968;
>
> (e) **all subsidiary legislation** made after the 31st December 1968, under the laws revised under the Revision of Laws Act 1968.
>
> (2) Part 1 shall **not apply** for the interpretation of or otherwise in relation **to any written law not enumerated in subsection (1).**
>
> (3) Part 1 shall not apply where there is:
>
> (a) express provision to the contrary; or
>
> (b) something in the subject or context inconsistent with or repugnant to its application. (emphasis added)

(ii) The first defendant's articles cannot be construed as "written law" by any stretch of the language. The first defendant's articles was governed by the Companies Act 2016 and under the Companies Act 2016, the adoption of a constitution thereunder is no longer mandatory. This must be differentiated with the position under the Companies Act 1965 which imposes the mandatory requirement for a company's constitution to include the default provisions provided for in Table A to the said 1965 Act which comes under its Fourth Schedule. In other words, the Table A articles might arguably constitute "written law" for the purpose of the Interpretation Act 1967. However, this is not the case with regards to the first defendant's articles.

(iii) Further, it is clear that the articles contain provisions which are contrary to the framework of the Interpretation Act (see for example art. 172(1) and art. 173) and therefore militate against any incorporation of the substantive provisions of the Interpretation Act 1967.

[39] Therefore, the Interpretation Act 1967 does not apply here and cannot be used to aid in the interpretation of articles of the first defendant.

[40] The case of *Yap Kian* (*supra*) relied on by learned counsel for the first defendant is not applicable for the reasons stated in para. 38 above in particular para. 38(ii). In this regard, it must be highlighted that *Yap Kian* (*supra*) is a case where the Interpretation Act 1967 was used in aid of a society's constitution which incorporates the default provision under the Schedule I of the Societies Act 1966.

Section 211 Of The Companies Act 2016

[41] Similar to his argument with regards to the articles of the first defendant, learned counsel for the first defendant attempted to interpret s. 211 Companies Act 2016 in a way that the board's powers to manage the "business and affairs" of the first defendant includes the power to suspend a director.

[42] As I have mentioned earlier, none of the cases relied on s. 211 Companies Act 2016 by the first defendant dealt with the issue of whether a company or its board has the power to suspend a director.

[43] Further, with all due respect to learned counsel for the first defendant, I cannot see how the wordings of s. 211 Companies Act 2016 can be stretched to include the power to suspend. Whilst I agree that the cases cited, in particular the case of *Tengku Dato Ibrahim Petra* (*supra*), where it was held that the definition of the words "affairs of a company" is wide, however, these cases neither raised nor even touched upon the issue of a company's power to suspend a director.

[44] I cannot put enough emphasis on the fact that the Companies Act 2016 is a comprehensive Act of Parliament and has specific provisions which govern the powers of a board and its directors. Therefore, I am unable to agree that the power to suspend a director which is not specifically provided in the Companies Act 2016 can be implied given the extensiveness of the said Act.

[45] Further, the first defendant's own articles do not provide for it when they could have included such a power in their articles. In *AG of Belize v. Belize Telekom* [2009] 2 BCLC 148, in dealing with the construction of articles of association of a company the Privy Council held:

> The **court has no power to improve** upon the instrument which it is called upon to construe, whether it be a contract, a statute or **articles of association. It cannot introduce terms to make it fairer or more reasonable.** It is concerned only to discover what the instrument means However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the

> instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors' Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 BCLC 493 at 547, 548, [1998] 1 WLR 896 at 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of **Parliament,** or the intention of **whatever person or body** was or is **deemed to have been the author of the instrument.** (emphasis added)

[46] The inevitable conclusion that I can reasonably arrive at is that if both the Companies Act 2016 and the first defendant's own articles do not expressly provide for the power to suspend a director, be it appointed or member appointed, then it must mean that Parliament and in the first defendant (insofar as its articles are concerned) did not intend for such a power to be included.

[47] In this regard, I would agree with learned counsel for the plaintiffs that the law draws no distinction between a director appointed under art. 110 or s. 208(4) Companies Act 2016 or one appointed under art. 108 by the members of the company. A director, howsoever appointed, is a director whose rights, duties and obligations are the subject matter of uniform regulation under the Act as well as the articles.

[48] I will now deal with the authorities which actually dealt with the issue of the suspension of a director and they are as follows:

(i) *Fong Poh Yoke & Ors v. The Central Construction Company (Malaysia) Sdn Bhd* [1998] 4 CLJ Supp 112; [1998] MLJU 478 (HC); and

(ii) *Kwan Teck Hian v. Insulflex Corporation Sdn Bhd* [2018] 2 CLJ 335; [2017] MLJU 1300 (HC).

[49] In *Fong Poh Yoke* (*supra*) the board of directors of the defendant there convened a board meeting and suspended the fifth defendant on the allegation that the fifth defendant had breached his fiduciary duty to the defendant. Justice Dato' Abdul Malik Ishak (as he then was) held that the defendant's board of directors had the authority to suspend the plaintiff in the special circumstances of this case. The relevant passages of his judgment on this issue are, *inter alia*, as follows:

> No doubt *the right to remove a director may rest with the shareholders at a general meeting but the lesser right to suspend the director must necessarily remain with the board of directors* until such time as the shareholders can properly determine at the earliest possible opportunity whether to re-elect LLN as a director of the defendant or not. In my judgment, *LLN's suspension was exercised in good faith, with due authority and solely done in the interest of the defendant. ...*
>
> ...

> In my judgment, *the power to suspend a director vested in the directors themselves as that power had not been expressly taken out by the articles of association of the defendant.* The three directors had acted *bona fide* in the interest of the defendant in suspending a deceiving director. The resolutions that were passed at the board meeting were not extraordinary but rather regular and in keeping with the records and the statutory provisions.
>
> (emphasis added)

[50] In contrast, the more recent case of *Kwan Teck Hian* (*supra*) appear to take the opposite direction with regards to the power to suspend a director where the learned High Court Judge, Justice Mohd Nazlan Ghazali, held:

> [46] I accept that the board, having a fiduciary duty to act in the best interest and welfare of a company in question must surely be empowered to prevent a recalcitrant director from potentially further damaging the company.
>
> [47] However, I emphasise that in situations *where a director fails in the proper discharge of his powers as a director,* when the powers are exercised for ulterior or improper purposes, which are invariably not in the interest of the company or when his act injures the interest of the company he was supposed to serve, the board has the right to seek for his removal or for action be taken for such transgressions. *However, a suspension of directorship per se pending removal is at best only an administrative arrangement. In the absence of any legal basis for suspension in the articles, the rights, duties and powers of a company director cannot be affected or whittled down, what more suspended altogether by the mere decision of the board to effect the 'suspension'.*
>
> …
>
> [56] As such my answer to the question posed by the defendant is as follows. *The plaintiff could not legally and validly be suspended of his director's powers and responsibilities as a director of the defendant company. Thus, the fact that the plaintiff was suspended does not in any event have the effect of "suspending" the exercise of his rights and responsibilities as a director.*
>
> (emphasis added)

[51] The case of *Fong Poh Yoke* (*supra*) was discussed by the learned author Mr Loh Siew Cheng in his book *Corporate Powers Accountability* (3rd edn) where he opined that a company has no power to suspend its directors:

> It appears therefore that **a company has no power to suspend its directors** from office **unless such power is expressly granted** under its articles of association. (emphasis added)

[52] I am inclined to follow the position taken by Justice Mohd Nazlan Ghazali in *Kwan Teck Hian* (*supra*) for the following reasons:

(i) Unless expressly provided for in the memorandum and articles of association of a company, the suspension of a director cannot be implied.

(ii) A director has specific statutory duties under the Companies Act 2016 and suspending a director from office will prevent him from carrying out those duties which are mandatory. This could expose the director and the company to liability.

(iii) As the provisions of the Companies Act 2016 do not expressly provide for the suspension of a director, a director's suspension will not be recognised by the Companies Commission of Malaysia ("CCM") as the statutory body which regulates companies, nor would third parties dealing with the "suspended" director be aware of his suspension since he would remain on CCM's record as a director of the company. Thus, the director's suspension has no effect on outsiders dealing with the company.

(iv) Whilst the suspension of a director was considered necessary by the respective board of directors in both *Fong Poh Yoke* (*supra*) and *Kwan Teck Hian* (*supra*), there are other remedies available to the company to deal with a director who has not acted in the best interest of the company or has otherwise acted in breach of his statutory or fiduciary duties. Suspension is not one of them.

[53] These issues were also dealt with in detail in *Kwan Teck Hian* (*supra*) and can be seen from, *inter alia*, the following passages:

> [48] But *this does not mean that the powers of the director alleged to be in default cannot be restricted.* The *Board may commence a suit against the director,* say for breach of statutory and fiduciary duties, and if necessary, *apply for appropriate interim injunctive relief* to ensure non-interference with company matters pending removal. I agree that the Board or the other directors have the fiduciary duty to act in the interest of the company which under such circumstances, may even include the need to restrain the miscreant director from effectively performing his own director's duties given the breach by the latter. *But any action by the directors in this regard must be founded on surer premise mandated by law especially given the fact that such action seeks to constrain the exercise of a statutory right by the director in question.*
>
> …
>
> [50] A *suspension of directorship brings into play a host of uncertainties which are inimical to the proper and efficient management of a company by its Board of Directors.* After all, it makes little sense for a director to be denied the exercise of his rights and powers such as access to company documents and attendance at board meetings without also excusing him from performing his duties as a director which brings with it the potential liabilities for the breach of such duties.
>
> [51] The rights and the responsibilities operate hand in hand. *It is common sense that a director cannot be faulted for a breach of director's duty if he is prevented from exercising his powers as a director.* This I venture to add is what was meant in *Jerry Ngiam Swee Beng* when a suspension of directorship is

construed as giving "holidays" to the director in question. That is undesirable. *It creates an unjustified category of those validly appointed as company directors, under the law and in fact, instead not to be directors during the period of suspension.* Thus, for example, they would be immune to legal action, even criminal prosecutions if they engage in acts or conduct that would have been prohibited if they were directors. The justice system cannot and does not function in this manner. Incoherence and confusion cannot be allowed to reign supreme.

[52] Further, *parties dealing with the company* in question would not know the status of the director who may have been suspended. Just like in the instant case, the company search shows that plaintiff to be a director. Third parties would thus be perfectly within their legal rights to rely on the well established indoor management rule in their dealings with the plaintiff as a director representing the defendant company. If the suspension is given full effect to, such reliance would be bereft of basis.

[53] As such, any action to be taken to restrict the powers of a director must be based on clear and specific legal provisions. Resorting to suspension of directorship is woefully inadequate and ought to be avoided. The court should deprecate and not countenance such cause of action. *Other than the well-entrenched process of removal of directors and disqualification in certain liquidation situations, most modern articles also incorporate provisions sanctioning automatic disqualification of directors.* If these do not apply, the company and the Board must consider other legal options to achieve the desired outcome. *They do not, however, include suspension of directorship.* (emphasis added)

[54] The case of *Jerry Ngiam Swee Beng v. Abdul Rahman Mohd Rashid & Anor* [2003] 3 CLJ 739; [2003] 6 MLJ 448, which was referred to in *Kwan Teck Hian* (*supra*) also appear to take the position that a company cannot suspend its directors when the High Court in *Jerry Ngiam* (*supra*) declined to validate a resolution to suspend one of the company's directors.

[55] On the argument earlier raised by learned counsel for the first defendant that as the board had appointed the plaintiffs as directors, it is implicit that the same board has the power to suspend, it could also be argued in the opposite that if there is no inherent power to remove a director, there is no inherent power to suspend him. I am of the respectful view that later argument is to be preferred. The proposition of law as I understand it is this: the greater power includes the lesser but the lesser power cannot include the greater.

[56] Having given due consideration to both learned counsel for the plaintiffs' and defendants' submissions on this issue, I answered question 1 in the consent order in the negative.

[57] The first defendant company does not have the power, express or implied, to suspend the plaintiffs as directors appointed pursuant to art. 110 of the constitution of the first defendant.

Question 2: What Is The Effect In Law On The Board Of Directors' Decisions Including The Decision To Call For A Meeting Of Members Pursuant To The Notice Of Requisition

[58] It appears to me that when this second question was initially framed by the plaintiffs (essentially similar to the first question in encl. 14, the plaintiffs' O. 14A application) it was on the basis that the plaintiffs' suspension led to or was the reason for their exclusion from attending and participating in the 25 February 2021 board meeting. However, at that point in time, the defendants had not filed any affidavit yet. Therefore, the plaintiffs could not have known the defendants' position on this and more specifically the first defendant's response to the plaintiffs' allegations.

[59] The plaintiffs' allegations against the first defendant can be summarised as follows:

(i) The first defendant had unlawfully suspended the plaintiffs as directors of the first defendant.

(ii) The decision to wrongfully suspend the plaintiffs and the deliberate exclusion of the plaintiffs from the 25 February 2021 board meeting was a precursor to such eventual exclusion. That the said decision was in bad faith and for the ulterior motive to control the affairs of the first defendant.

(iii) The first defendant had intentionally and unlawfully excluded the plaintiffs from the 25 February 2021 board meeting.

[60] In other words, what the plaintiffs are alleging is that the suspension of the plaintiffs as directors by the first defendant was done to enable the first defendant to later justify the subsequent exclusion of the plaintiffs from attending the 25 February 2021 board meeting.

[61] Three affidavits were filed on behalf of the first defendant and one affidavit was filed on behalf of the first defendant's company secretary ("first defendant's affidavits").

[62] Through the first defendant's affidavits, the first defendant disputed the plaintiffs' allegations and denied that the first defendant had deliberately excluded the plaintiffs from the 25 February 2021 board meeting.

[63] The first defendant provided an explanation as to why the plaintiffs could not join the 25 February 2021 board meeting.

[64] The position taken by the first defendant is that the plaintiffs' suspension had nothing to do with the fact that they were not able to join the 25 February 2021 board meeting.

[65] The first defendant went on to explain that the plaintiffs' exclusion from the 25 February 2021 board meeting was inadvertent.

[66] This was the issue of contention between parties insofar as the second question in the consent order is concerned.

[67] Learned counsel for the plaintiffs urged me to consider the totality of the facts and background of this matter and arrive at a conclusion that the first defendant had deliberately excluded the plaintiffs from the 25 February 2021 board meeting. The exact words used by the plaintiffs are that they were "intentionally and unlawfully excluded from the board meeting on 25 February 2021" (para. 4 of the plaintiffs' affidavit in reply (2) affirmed by the second plaintiff (encl. 27).

[68] Before I deal with facts leading to the second question in the consent order, it is important that I first address the legal principles applicable to the issue at hand.

[69] Simply put the position of the law in respect of question 2 is this:

(i) If the plaintiffs' exclusion from the 25 February 2021 board meeting was deliberate or intentional, then the decisions made at the board meeting are a nullity or invalid (*Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770 (COA); *Khoo Choon Yam v. Gan Miew Chee & Ors* [2000] 2 CLJ 788);

(ii) However, if the plaintiffs' exclusion from the 25 February 2021 board meeting is not deliberate or is unintentional, then the plaintiffs' exclusion from the 25 February 2021 board meeting is a mere irregularity and is ratifiable. (The following are some authorities that an irregularity can be ratified: *Hooper v. Kerr* (1900) 83 LT 729; *Re Land Credit Company of Ireland (Ex-parte)* (1869) LR 4 Ch Ap 473; *Re Portuguese Consolidated Copper Mines, Limited. Ex Parte Badman. Ex Parte Bosanquet.* (1890) 45 Ch.D. 16; *MacDougall v. Gardiner* 1 ChD 13; *Lee Tak Suan & Anor v. Tunku Dato Seri Shahabudin & Ors* [2009] 4 CLJ 365; [2009] 4 MLJ 759).

[70] Both learned counsel for the plaintiffs and the first defendant are generally in agreement with the above legal principles so much so that a number of cases cited by both of them are the same. That being the case, the answer to question 2 will depend largely on the facts of this case rather than the law.

[71] In this regard, the case of *Aik Ming* (*supra*) is similar to the present case in that it involved the issue of whether there was proper service of a notice of meeting of the board of directors. The Court of Appeal held:

> It must not be forgotten that the determination of the issue now under consideration is a **pure question of fact** turning upon the credibility of witnesses whom the trial judge had had the advantage of visual assessment. (emphasis added)

[72] Ironically, the consent order treats the two questions as questions of law rather than facts (para. (2) of the consent order).

Whether The Plaintiffs Were "Deliberately" Excluded From The 25 February 2021 Board Meeting?

[73] It was submitted on behalf of the plaintiffs that the following must be taken into account to arrive at the conclusion that the plaintiffs were "deliberately suspended and subsequently excluded" (para.15 of the plaintiffs' written submissions (encl. 33)) from the 25 February 2021 board meeting:

(i) The first defendant's contention that the plaintiffs' exclusion from the 25 February 2021 board meeting was inadvertently is clearly an afterthought and is an entirely improbable assertion and must be rejected by the court;

(ii) That this was never the position advanced by the first defendant. The position taken by the defendants is and has always been that the plaintiffs have been validly suspended from their duties and functions as directors since 15 February 2021;

(iii) The second plaintiff had before the board of directors' meeting on 25 February 2021 written to the first defendant's company secretary *vide* email dated 25 February 2021, and copied to all the other directors of the first defendant, to protest that the board papers have been deliberately withheld from the plaintiffs and that such action was entirely unlawful. The second plaintiff concluded the email with a statement that the plaintiffs would nevertheless continue to participate in the said meeting despite such defaults.

(iv) That from the minutes of the 25 February 2021 board meeting, the board was aware of the second plaintiff's email of 22 May 2021 and the non-dissemination of the board papers. It was raised in the said meeting that the plaintiffs might follow up with a legal action should the first defendant fail to respond.

(v) The notice of meeting had expressly mentioned that the 25 February 2021 board meeting would be held virtually and indeed a Microsoft team meeting link was sent together with the said notice of meeting, however, the first defendant in its supplementary affidavit affirmed by the third defendant (encl. 22) averred that except for the plaintiffs and the fifth defendant, the other directors who attended the 25 February

2021 board meeting were physically at the first defendant's office conference room. That this, at the very least, is tantamount to convening a meeting at venue A but holding it at venue B.

[74] The first defendant in disputing the above allegations by the plaintiffs had responded that there is no deliberate exclusion of the plaintiffs from the 25 February 2021 board meeting and that the meeting was properly constituted because:

(i) The notice of meeting and link for the meeting have been sent to the plaintiffs, notwithstanding the suspension.

(ii) The first defendant's company secretary has confirmed that there was no instruction from any of the directors of first defendant to exclude the plaintiffs.

(iii) The second plaintiff's message to the first defendant's company secretary was only read by the said company secretary after the 25 February 2021 board meeting.

(iv) That the continued use of the meeting link used for the audit and risk management had caused the plaintiffs to not be able to join the 25 February 2021 board meeting and that this was an inadvertent mistake, which the majority of board members noted and ratified on 18 March 2021.

[75] It cannot be denied that the plaintiffs do not have actual proof that they were deliberately excluded from the 25 February 2021 board meeting. The plaintiffs can only, at best, infer from the surrounding facts leading to the 25 February 2021 board meeting that they were excluded. These "surrounding facts" relied on by the plaintiffs need to be examined objectively.

[76] The facts which are clearly not in dispute are stated in para. 17, 17(i) to (ix) above and for ease of reference I shall summarise them below:

(i) The plaintiffs were suspended on 15 February 2021 and they were notified of this by the board on the same day.

(ii) The plaintiffs were given notice of the 25 February 2021 board meeting which includes the meeting's agenda on 17 February 2021 together with the online meeting link ("Microsoft team meeting link").

(iii) On 22 February 2021, a notice of requisition was issued by two shareholders of the first defendant to remove the plaintiffs as directors of the first defendant.

(iv) The plaintiffs were not able to join the 25 February 2021 board meeting using the Microsoft team meeting link that was given to them.

(v) On 16 March 2021 a DCR was issued to ratify, confirm, accept and/or approve the decisions made by the board on 25 February 2021 but the plaintiffs did not sign the DCR.

(vi) On 18 March 2021, the DCR was approved by seven out of the nine directors of the first defendant and the resolutions therein were passed.

[77] As stated earlier, the first defendant's company secretary, Mr Cheng Chia Ping, had affirmed an affidavit in encl. 37. Enclosure 37 was affirmed and filed on 24 March 2021 after both parties had filed their initial written submissions. At the hearing of the originating summons on 26 March 2021, learned counsel for the plaintiffs argued that as encl. 37 was filed after submissions had been filed, it should not be taken into account and that there were cases to support this argument.

[78] As I recall, this was only raised in the course of oral submissions at the hearing of the originating summons when encl. 37 was referred. There was no objection raised or an actual request made for encl. 37 to be expunged at the commencement of the hearing.

[79] I refer back to the following terms of the consent order which were agreed to by parties:

i) Paragraph 1(a) of the Consent Order states, "... on the facts presented before the Court,"; and

ii) Paragraph 2(f) states, "parties may rely on the affidavits filed, and unless any fact is expressly admitted, absence of any specific reply or denial to any allegation of facts shall not be taken as admission thereof".

[80] It is my understanding that parties inserted para. 2(f) in the consent order as they did not want a situation where the failure to respond to any affidavit filed by a party will be construed as an admission of facts asserted therein by the other party (applying the principle of the Court of Appeal case of *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281).

[81] Therefore, when para. 2(f) of the consent order is read together with the abovesaid sentence in para. 1(a), it gives the meaning that subject to the proviso, all affidavits filed can be relied on by parties. This includes encl. 37 but the averments in encl. 37 shall not be taken as admitted by the plaintiffs. Hence, I have done just that.

[82] As encl. 37 is an affidavit affirmed by the first defendant's company secretary, it is naturally of importance in this action for, *inter alia*, the following reasons:

(i) The company secretary was present at the 25 February 2021 board meeting and therefore has actual knowledge of what transpired at the said meeting;

(ii) He was also the minute-taker as well as presenter of certain of the agenda items of the board at the 25 February 2021 board meeting;

(iii) In the plaintiffs' affidavit in reply (2) in encl. 27, the plaintiffs made certain averments regarding the first defendant's company secretary which includes the issue of the Microsoft team meeting link for the 25 February 2021 board meeting and certain WhatsApp messages the second plaintiff had sent to the said company secretary which were not replied to. Therefore, the company secretary's response to these averments are important.

[83] Another reason why encl. 37 is important is because by virtue of his position as the first defendant's company secretary, Mr Cheng Chia Ping, is supposed to be a neutral officer of the first defendant as he cannot take sides with regards to the dispute or tussle between the directors and must remain independent and unaffected by such disputes.

[84] Therefore, the question I am faced with is whether there is any reason why I should not believe or accept the averments of the first defendant's company secretary in encl. 37.

[85] It was suggested to me that as encl. 37 was filed very late in the day, it is an afterthought and only seeks to improve the first defendant's position after the initial submission have been filed.

[86] Whilst I do agree that encl. 37 was filed somewhat late that is after the initial submissions have been filed, however, this does not in itself mean its contents are untrue. With all due respect to learned counsel for the plaintiffs, except for the delay, there is no evidence before the court to say that first defendant's company secretary's statements in encl. 37 are untrue or cannot be believed especially when he is not an interested party in these proceedings.

[87] Therefore, I see no reason to exclude encl. 37 given the applicable terms of the consent order I had referred to earlier.

[88] That being the case, I will now examine the averments made by the first defendant's company secretary in encl. 37, the material parts are reproduced below:

> 4.1. From the commencement of Fourth Audit and Risk Management Committee Meeting at 2:30p.m. I have received numerous whatsapp messages from various parties/clients, to which I could only read and attend to those messages after the completion of the Board Meeting at 4:40p.m. as I was the Minute-taker as well as presenter of certain agenda items of the Board;

4.2. The 11th Board of Directors' Meeting commenced from 3:45p.m. **upon the completion** of the Fourth Audit and Risk Management Committee Meeting at 3:40p.m. by **using the same meeting link for the Fourth Audit and Risk Management Committee Meeting.** The Board **continue using** the Fourth Audit and Risk Management Committee Meeting link for the Board Meeting;

4.3. The whatsapp messages from Ms. Marianna (exhibit M-2 of Encl. 27) were only read by me upon the conclusion of the 11th Board of Directors' Meeting at 4:40p.m. in view that I was the Minute-taker as well as presenter of certain agenda items of the Board;

4.4. **No directors of the 1st Defendant have requested me to exclude the Plaintiffs to join the Board meeting by using the meeting link established for the 11th Board of Directors' Meeting.**

(emphasis added)

[89] This is consistent with the chronology of events as stated in the first defendant supplementary affidavit in encl. 22.

[90] In encl. 22, the first defendant explained that the reason the plaintiffs were not able join the 25 February 2021 board meeting is because the Microsoft team meeting link which was intended to be used for the said meeting was not used despite it being circulated to all the directors of the first defendant. The first defendant's email sent by the first defendant's company secretary enclosing the notice of the 25 February 2021 board meeting was exhibited in encl. 22 to show, *inter alia*, that the same Microsoft team meeting link for the said meeting was sent to all the first defendant's directors including the plaintiffs.

[91] The other directors of the first defendant who attended the 25 February 2021 board meeting were also participants in the fourth audit meeting which was held earlier that same day just before the 25 February 2021 board meeting commenced. The plaintiffs were not part of the fourth audit meeting.

[92] The explanation given by the first defendant in encl. 22 as to the reason the plaintiffs could not use the Microsoft team meeting link given to join the 25 February 2021 board meeting is, *inter alia*, as follows:

4.5. On 25-2-2021 *after* the convening of the Fourth Audit and Risk Management Committee Meeting, the directors *continued with the Board Meeting;*

4.6. *As the requisite quorum being present* pursuant to Clause 127 of the Constitution of the Company, I being the elected Chairman of the Board Meeting, called the Board Meeting to order on 25-2-2021 at 3:45p.m. *The Board consented to proceed with the Board Meeting by using the same Microsoft Team connection link utilised by the Fourth Audit and Risk Management Committee Meeting held earlier.* The Microsoft Team connection link for Board Meeting was not utilised;

A

4.7. All of the directors (except Mr. Chee Wai Hong and the Plaintiffs), Mr. Simon Wee Howe Yew (Group Chief Financial Officer) and Ms. Khoo Wei Lee (Group Company Secretary) *attended the Board Meeting physically* at Conference Room, 8th Storey, South Block, Wisma Golden Eagle Realty, 142-A Jalan Ampang, 50450 Kuala Lumpur.

B

4.8. Whereas Mr. Chee Wai Hong and the other officers i.e Cheng Chia Ping (Joint Company Secretary) and Tee Zhen Wan (Assistant of the Joint Company Secretary), attended the meeting by using the Microsoft Team connection link for the Fourth Audit and Risk Management Committee Meeting;

C

4.9. During the Board Meeting, I was not aware nor informed of any attempt by the Plaintiffs to join the Board Meeting by using the Microsoft Team connection link.

4.10. *I did not give any instruction to reject or refuse the Plaintiffs to join the Board Meeting. To the best of my knowledge, no other Board member had instructed to reject or refuse the Plaintiffs from joining the Board Meeting;*

D

4.11. The Board proceeded with the Board Meeting and discussed several matter, contents of which are found in the Board Minutes dated 25-2-2021, including fixing date for the EGM on 30-3-2021. (emphasis added)

E

[93] The plaintiffs asked the court not to accept the above explanation given by the first defendant as well as the averments of the first defendant's company secretary in encl. 37. Instead, the court was asked to conclude that the plaintiffs' exclusion from the 25 February 2021 board meeting was deliberate or intentional.

F

[94] That is, to conclude that the suspension of the plaintiffs and the exclusion of the plaintiffs from attending the 25 February 2021 board meeting were all planned. I used the word "planned" because for the act to be deliberate or intentional, it must have been planned from around the time the due diligence was conducted into the plaintiffs' conduct by the first defendant, to the suspension of the plaintiffs and finally, the plaintiffs' inability to join the 25 February 2021 board meeting.

G

[95] I have difficulty in accepting the plaintiffs' allegations in view of the explanation given by the first defendant and its company secretary as well as the overall facts of this case. The word "deliberate" means with intent or that the act was done knowingly. The plaintiffs sought to prove the "intent" by way of affidavit evidence for which there is no actual proof save and except from inferences made from the surrounding circumstances. The burden of proof is on the plaintiffs to prove the alleged wrongful "intentional" act of the first defendant (*Aik Ming* (*supra*)).

H

I

[96] Firstly, it does not stand to reason why the first defendant would issue the plaintiffs the notice of the 25 February 2021 board meeting and later deliberately exclude them from attending.

[97] Secondly, it is also unreasonable and devoid of merits for the plaintiffs to expect the court to reject the explanation given by the first defendant which includes all the directors present at the 25 February 2021 board meeting (as these matters were also stated in, *inter alia*, the DCR approved by the same seven directors) as well as the explanation given by the first defendant's company secretary, based on the plaintiffs' allegations alone.

[98] Thirdly, though I have found that the suspension of the plaintiffs as directors are null and void, this does not mean that it was done in bad faith or that it could not be treated as an administrative act without affecting the plaintiffs' duties and responsibilities as directors. In this regard, para. 2(e) of the consent order states:

> that only for the purpose of determination of the above questions, the **allegations** of wrongdoing **forming grounds of suspension** against the Plaintiffs as set out in the announcement at the Bursa Malaysia Website dated 15.2.2021 are **presumed to be true**; (emphasis added)

[99] The effect of this clause in the consent order is that the court is to presume that the allegations of wrongdoing being the basis of the plaintiffs' suspension as directors of the first defendant are true which then means that the first defendant's decision to suspend the plaintiffs was justified. Therefore, it cannot be said that the said decision was done in bad faith.

[100] In both *Fong Poh Yoke* (*supra*) and *Kwan Teck Hian* (*supra*) the suspension of the directors there was on the basis the board of directors of the respective companies found that the said directors who were suspended had either breached their fiduciary or statutory duty or otherwise acted against the interest of the said companies. The board acted to protect the company.

[101] Also, in *Kwan Teck Hian* (*supra*), the High Court held that the suspension of the director could be an administrative arrangement only:

> [47] … *However, a suspension of directorship per se pending removal is at best only an administrative arrangement. In the absence of any legal basis for suspension in the articles,* the rights, duties and powers of a company director cannot be affected or whittled down, what more suspended altogether by the mere decision of the board to effect the 'suspension'.
>
> …
>
> [56] As such my answer to the question posed by the defendant is as follows. *The plaintiff could not legally and validly be suspended of his director's powers and responsibilities as a director of the defendant company. Thus, the fact that the plaintiff was suspended does not in any event have the effect of "suspending" the exercise of his rights and responsibilities as a director.*
>
> (emphasis added)

[102] It is arguable that the first defendant is aware that the suspension of the plaintiffs can only be an administrative act which is the reason why the first defendant invited the plaintiffs to the 25 February 2021 board meeting and later also circulated the DCR to the plaintiffs to ratify the decisions made at the said meeting for their approval.

[103] Fourthly, on the issue of the venue of the said 25 February 2021 board meeting, there was no change in the venue save that some of the directors were at the first defendant's office while the other directors were joining from outside including the plaintiffs. This does not mean the venue of the 25 February 2021 board meeting has changed or that it is tantamount to convening a meeting at venue A but holding it at venue B. This is because for all intents and purposes, the 25 February 2021 board meeting was held virtually, it makes no difference if some of the people attending the said meeting chose to be in the same room while others joined from outside that room. It was a virtual meeting, nonetheless.

[104] Fifthly, on the issue of the board papers not being circulated to the plaintiffs, the first defendant had not provided any explanation on affidavit on this, therefore, the question is whether it would mean the 25 February 2021 board meeting was not constituted properly or is unlawful. The answer to this question can be seen from the case of *Aik Ming* (*supra*) where the Court of Appeal held:

> Whilst particular cases may be distinguished upon their special facts, I take the proposition to be **well settled** that, unless the articles of a company provide to the contrary, **no meeting of a board is valid, unless reasonable notice of it and the relevant agenda that is to be discussed at it is given to the directors.** *Young v. Ladies Imperial Club Ltd* [1920] 2 KB 523; [1920] All ER Rep 223 is authority for that proposition. In that case, it was held that, 'where a special meeting of a committee or any other body has to be specially convened for a particular purpose; **every member of that body ought to have notice of and a summons to the meeting,** and accordingly the omission to summon one member of a committee and the fact that the notice did not state the object of the meeting with sufficient particularity vitiated the proceedings of that body' (per Abdoolcader J in *PP v. Datuk Hj Harun bin Hj Idris & Ors* [1977] 1 MLJ 180 at p 189).
>
> Although all three members of the English Court of Appeal (comprising Lord Stemdale MR, Warrington and Scrutton I .JJ) delivered separate judgments j I think it sufficient if I quote from the judgment of the *Master of the Rolls* [1920] 2 KB 523 at pp 527-528; [1920] All ER Rep 223 at pp 226-227. This is what he said:
>
> > I cannot entertain any doubt that, with certain very limited exceptions where a special meeting of a committee or any other body has to be specially convened for a particular purpose, **every member of that body ought to have notice of and a summons to the meeting.** It seems to me that is quite clearly laid down in *Smyth v. Darley* 2 HLC 789 at p 803, where Lord Campbell says:

> The election' [and you may read 'expulsion' for 'election'; exactly the same principle applies] 'being by a definite body on a day of which, **till summons**, the electors had no notice, **they were all entitled to be specially summoned,** and, if there was any omission to summon any of them, unless they all happened to be present, or unless those not summoned were beyond summoning distance – as, for instance, abroad – there could not be a good electoral assembly.

And in the same way in Portuguese Consolidated Copper Mines 42 Ch D 160 at p 167 Lord Esher says this:

> I will assume that every point taken by Mr Rigby and Mr Buckley ought to be decided in their favour except one. That one is this, that according to their own argument it is necessary that **all the directors should have had notice of-the meeting of the 24th.**
>
> (emphasis added)

[105] Therefore, based on the principles laid down in *Aik Ming* (*supra*) and the authorities stated therein, all that is required for the first defendant to do is to issue a notice of meeting and the agenda of the meeting which it has done. Thus, the non-dissemination of the board papers to the plaintiffs would not render the 25 February 2021 board meeting unlawful or improperly constituted. Further, the second plaintiff, in her email to the first defendant dated 25 February 2021, concluded that the plaintiffs would attend the meeting despite not being given the board papers (para. 4(b) of the plaintiffs' affidavit in reply (2) (encl. 27) and exh. P5 of the plaintiffs' affidavit in support (encl. 2)). The case of *Browne v. La Trinidad* (1888) 37 Ch D 1 referred to below is applicable.

[106] Further, for completeness, the issue of proper notice or the failure to give notice of a meeting of the board of directors was also dealt with in the following cases referred to in *Aik Ming* (*supra*):

(i) *Browne v. La Trinidad* (1888) 37 Ch D 1 where the notice was given less than ten minutes before the time of holding it. However, the plaintiff did not object to. "He took no notice of the matter. He did not say that it was inconvenient for him to attend, and he did not ask the directors to adjourn it. He does nothing at all until this notice convening the extraordinary meeting has been issued and circulated, nor until four days before the meeting." It was further held that:

> … It is competent for directors to call meetings, it is competent for shareholders to pass resolutions, and *the most that can be said here is that there is or may be some irregularity, but an irregularity (if such it be) which can be cured at any moment. In such cases the court never interferes.* I think it is most important that the court should hold fast to the rule upon which it has always acted, not to interfere for the

A purpose of forcing companies to conduct their business according to the strictest rules, *where the irregularity complained of can be set right at any moment.* (emphasis added)

(ii) *Bentley-Stevens v. Jones & Ors* [1974] 2 All ER 653; [1974] 1 WLR 638 where the plaintiff there was away from home for the weekend and did B not receive the notice of meeting until 9 o'clock on the following Monday when he got back. The plaintiff also did not receive a call made by the first defendant to him on Sunday as there was no one home. It was held that it was only an irregularity and could be cured.

(iii) In *Re Portuguese* (*supra*), "the directors had no notice of the meeting and C the court decided that the meeting was invalid."

(iv) In *La Compagnie de Mayville v. Whitley* [1896] 1 Ch 788, "the facts were that S received a notice that a board meeting would be held on 24 February. On 24 February, S did not attend. S then sought a declaration that the A resolutions of 24 February were void but the D Court of Appeal held that the resolutions of 24 February were valid."

[107] The burden is on the plaintiffs to prove that the first defendant deliberately or intentionally excluded them from the 25 February 2021 board meeting (*Aik Ming* (*supra*)) bearing in mind that an intentional act is E not something that can easily be proven *via* affidavit evidence. The case of *Aik Ming* (*supra*) itself was decided after trial.

[108] With all due respect, perhaps the plaintiffs' main flaw was to assume that this originating summons will be decided on questions of law when it is actually the opposite as can be seen from the above. This would explain F para. (2) of the consent order which refers to both the two questions in the consent order as "questions of law". Whilst question 1 is accurately phrased as a legal question, the answer to question 2 actually turns upon the facts.

[109] In *Aik Ming* (*supra*), the plaintiffs there had successfully shown that they did not receive the notice of meeting and agenda. In *Khoo Choon Yam* G (*supra*) the notice of resolution was not given to the plaintiff, therefore the resolution was held to be ineffective and void. The High Court in *Khoo Choon Yam* (*supra*) held:

It may be so on the facts of that case or even regarding matters said by Hannan LJ. But, here we are concerned with two things. First, the H appointment of two additional directors behind the back of the plaintiff **without even the notice of the resolution given to him.** Secondly, the "acceptance" of his purported resignation. (emphasis added)

[110] In the present case, there is no dispute the notice of the 25 February 2021 board meeting and its agenda were given to the plaintiffs, however, they I could not join the said meeting using the Microsoft team meeting link given.

[111] I am inclined to accept the first defendant's explanation that the plaintiffs were inadvertently excluded from joining the 25 February 2021 board meeting. The explanation given by the first defendant that it went on with the 25 February 2021 board meeting after the fourth audit meeting ended using the same Microsoft team meeting link used for the fourth audit meeting does not sound sinister or out of place, especially when the people in the fourth audit meeting were the same as those attending the 25 February 2021 board meeting. It appears to me to be a genuine mistake and neither did the first defendant's company secretary realise this mistake as the person who was administratively involved in the running of the said meeting. It is a plausible explanation when one also considers that the nature of these types of meetings can keep a person's attention away from other matters except for the work they are presently engrossed in.

[112] Therefore, I find that the plaintiffs' exclusion from the 25 February 2021 board meeting is a mere irregularity and is capable of being ratifiable.

Ratification And The Directors' Circular Resolution (DCR)

[113] Having ruled that the exclusion of the plaintiffs from attending the 25 February 2021 board meeting is not deliberate or intentional, therefore it follows that the decisions made at the said meeting is ratifiable.

[114] There are several cases on this point cited by both learned counsel for the plaintiffs and first defendant and I have referred to some of them earlier in this judgment.

[115] The case of *MacDougall* (*supra*) is the leading English case on ratification and was followed by the courts in Malaysia. The following passage in *MacDougall* clearly lays out the general principle applicable for ratification:

> In my opinion, *if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly,* or if something *has been done illegally which the majority of the company are entitled to do legally,* there can be no use in having a litigation about it, the *ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes.* (emphasis added)

[116] The *MacDougall* (*supra*) doctrine was applied in the Federal Court in the case of *Lee Tak Suan & Anor v. Tunku Dato Seri Shahabudin bin Tunku Besar Burhanuddin & Ors* [2009] 4 CLJ 365; [2009] 4 MLJ 759 where it was held:

> … If that be so, there is no reason which would prevent the application of the doctrine laid down in *MacDougall v. Gardiner.* Its entity is to be controlled, and is controlled by action taken under its rules, with the result that in the present case, *if some irregularity has been committed, it would be quite*

A *possible for the legal entity, by means of further meeting, further notices, and the like to make regular what apparently, or what it is argued, is irregular, and reason and good sense would certainly dictate that the principle which applies to the entities of incorporated companies* should also apply to entities created by registration under the Trade Union Acts. (emphasis added)

B **[117]** The cases referred to earlier such as *La Trinidad* (*supra*), *Re Portuguese* (*supra*) and *Bentley-Stevens* (*supra*) are also authority for the proposition that an irregularity can be cured.

[118] Since the exclusion of the plaintiffs from joining the 25 February 2021 board meeting is an irregularity, therefore, it can be cured by a subsequent C meeting of the first defendant's board which, in this case, was done by way of the DCR or directors' circular resolution.

[119] The DCR sought to ratify, confirm, accept and/or approve all the decisions made at the 25 February 2021 board meeting.

D **[120]** It is not in dispute that the plaintiffs received the DCR but they did not sign or approve the DCR. Instead, the plaintiffs, through their solicitors' letter dated 17 March 2021, *inter alia*, raised a query to the first defendant and the other directors of the first defendant whether they had given any instructions to the first defendant's company secretary for the issuance of the DCR.

E

[121] The defendants, through their solicitors' letter dated 22 March 2021, replied to the plaintiff's solicitors' letter of 17 March 2021 and referred the plaintiffs to encl. 22 which was affirmed and filed on 19 March 2021 (encl. 22) which details the chronology leading to the issuance of the DCR F and approval of the DCR together with their supporting documents. Enclosure 22 shows that the DCR was validly issued.

[122] It is important to highlight that the plaintiffs did not object *per se* to the DCR or its issuance.

G **[123]** The DCR was approved by seven out of the nine directors of the first defendant and the resolutions contained therein were passed.

[124] Therefore, I find that the irregularity in the said 25 February 2021 board meeting was validly ratified by the DCR.

Inevitable Outcome

H

[125] It was argued on behalf of the first defendant that whether or not the plaintiffs participated in the 25 February 2021 board meeting, the outcome would, in law and in fact, be the same. That the decisions made at the 25 February 2021 board meeting and the DCR are both by the same majority of seven out of nine.

I

[126] In support of the first defendant's argument, the case of *Bentley-Stevens* (*supra*) was referred to me where it was held: A

> In my judgment, even assuming that the plaintiff's complaint of irregularities is correct, this is not a case in which an interlocutory injunction ought to be granted. I say that for the reason that the irregularities can all be cured by going through the proper **processes and the ultimate result would inevitably be the same.** (emphasis added) B

[127] I would agree that the "inevitable outcome" position is a valid consideration in particular when I have already ruled that the plaintiffs were not deliberately excluded from the 25 February 2021 board meeting and that it is an irregularity and not a nullity. C

The Shareholders' Notice Of Requisition

[128] The other point on this "inevitable outcome" argument is that the first defendant's board is duty-bound to summon a meeting under the provisions of both ss. 311 and 312 of the Companies Act 2016 as it is mandatory. D

[129] I pause here to highlight that it appears quite apparent that the plaintiffs' ultimate purpose for question 2 is to prevent the 30 March 2021 EGM from proceeding which EGM was fixed at the 25 February 2021 board meeting following the shareholders' notice of requisition dated 22 February 2021. This can be seen from para. 1(b) of the consent order itself. This in turn is also related to Suit 84 where the first plaintiff sought to restrain Dato' Lee Chin Hwa (one of the shareholders who requisitioned the EGM) from taking any further steps pursuant to the notice of requisition dated 22 February 2021. E

[130] Sections 311(3) and 312(1) of the Companies Act 2016 provide: F

> 311(3) The **directors shall call for a meeting of members** once the company has received requisition to do so from:
>
> (a) members representing at least ten per centum of the paid up capital of the company carrying the right of voting at meetings of members of the company, excluding any paid up capital held as treasury shares; or G
>
> (b) in the case of a company not having a share capital, members who represent at least five per centum of the total voting rights of all members having a right of voting at meetings of members.
>
> 312(1) In relation to section 311, **the directors shall:** H
>
> (a) **call for the meeting within fourteen days** from the date of the requisition; and
>
> (b) **hold the meeting on a date not more than twenty-eight days** after the date of the notice to convene the meeting. I
>
> (emphasis added)

[131] Under s. 588(1)(b) of the Companies Act 2016 it is an offence if the directors do not summon the meeting. The said section provides that, "A person commits an offence under this Act if he does not do that which by or under this Act he is required or directed to do."

[132] Thus, the outcome of the 21 February 2021 board meeting would inevitably be the same with regards to the fixing of the 30 March 2021 EGM as it is mandatory for the first defendant's board to do so. There is no discretion on the part of the first defendant's board to refuse to call for the EGM where the relevant provisions of s. 311 Companies Act 2016 are satisfied.

[133] The passage in *MacDougall* (*supra*) referred to earlier is instructive on this matter:

> … there can be no use in having a litigation about it, the **ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes.** (emphasis added)

[134] Further, the Court of Appeal in *Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551; [1995] 3 MLJ 417 at p. 558 (CLJ); p. 426 (MLJ) held:

> We begin with the rule in *Foss v. Harbottle* (1843) 67 ER 189. The rule has two limbs. The first limb of the rule – and the present appeal has nothing to do with its application – is that *a court will not interfere with the internal workings of a corporation upon a matter which is capable of being ratified by a majority of shareholders present and voting at a general meeting of the company.* The content of the first limb, although it derives C its name from the case just cited, in truth finds its origins in the earlier decision in *Mozley v. Alston* (1847) 41 ER 833. The modern restatement of the rule is to be found in the judgment of Harman LJ in *Bamford v. Bamford* [1970] Ch 212 [1969] 1 All ER 969; [1969J 2 WLR 1107. (emphasis added)

[135] As a conclusion to this issue, the words of Lindley LJ in *La Trinidad* (*supra*) is worth repeating:

> It is competent for directors to call meetings, it is competent for shareholders to pass resolutions, and *the most that can be said here is that there is or may be some irregularity, but an irregularity (if such it be) which can be cured at any moment.* In such cases *the court never interferes.* I think it is most important that *the court should hold fast to the rule* upon which it has always acted, *not to interfere for the purpose of forcing companies* to conduct their business according to the *strictest rules, where the irregularity complained of can be set right at any moment.* (emphasis added)

[136] Whilst the plaintiffs disagree with the decisions of the majority of the first defendant's board, but as long as the said majority are not abusing their powers and are not depriving the plaintiffs as minority of their rights there is no reason for the court to interfere with the said decisions of the majority (*Mac Dougall* (*supra*)).

[137] In the circumstances, in answer to question 2 in the consent order, I find that decisions made by the first defendant's board in particular the decisions made at the 25 February 2021 board meeting and including the decision to call for a meeting of members pursuant to the notice of requisition received from Dato' Lee Chin Hwa and Nicholas Pun Chee Cheang dated 22 February 2021 to be held on 30 March 2021, are valid and lawful.

[138] For brevity, I am not aware and neither have the parties referred the court to any other decisions made by the first defendant's board subsequent to the 25 February 2021 board meeting where the plaintiffs were not able to join save for the DCR which I have ruled to also be valid.

[139] For the above reasons, I allowed prayer 1 as prayed and prayer 5 of the originating summons for any damages that the plaintiffs may have suffered as a consequence of the suspension to be assessed against the first defendant, with no order as to costs. The order regarding costs was agreed by both parties in view of the fact that only part of the originating summons was allowed.