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TEO KIM HUI & ORS v. GOLDEN PLUS HOLDINGS BHD & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD FAIRUZ ZAINOL ABIDIN J
[CIVIL SUIT NOS: WA-24NCC-131-03-2020 &
B WA-24NCC-153-04-2020]
26 FEBRUARY 2021

COMPANY LAW: *Meetings – Adjournment – Chairman – Conduct of chairman – Chairman adjourned meetings – Whether chairman's actions impartial and*
C *neutral – Whether chairman discharged responsibilities and executed duties – Whether adjournment tainted by conduct of chairman – Whether chairman's conduct disregarded will of shareholders at meeting*

COMPANY LAW: *Meetings – Special notice – Removal of directors – Extraordinary general meeting adjourned – Whether fresh special notice required to*
D *be issued upon reconvening of adjourned extraordinary general meeting – Companies Act 2016, s. 322(1)*

COMPANY LAW: *Meetings – Extraordinary general meeting – Auditor – Notice of meeting not issued to auditor – Whether irregularity – Whether curable –*
E *Companies Act 2016, ss. 321(1) & 582*

The shareholders ('conveners') of Golden Plus Holdings Bhd ('company'), issued a special notice to remove the directors of the company ('special notice') and a notice for an extraordinary general meeting ('EGM') ('EGM notice'), proposing to remove the entire Board of the company and to appoint
F three persons as directors. The EGM ('original EGM') was held but adjourned by the chairman, Tan Yen Siang ('TYS'), to obtain legal advice as to whether the EGM notice may be validly issued by more than one member under s. 310(b) of the Companies Act 2016 ('Act'). As a result of the adjournment, the company and the conveners each filed originating
G summons ('OS') at the High Court. The High Court, upon hearing both OS together, held that: (i) the EGM notice was validly issued by the conveners and did not contravene s. 310(b) of the Act; (ii) the original EGM was validly adjourned by the chairman; and (iii) any decision made by the shareholders after the adjournment was null and void. Following this ruling, a notice to
H convene the adjourned general meeting ('notice of adjourned EGM') was issued. The proposed resolutions were the same as contained in the notice of EGM; to remove the current Board of the company and to appoint three persons as directors. The adjourned meeting proceeded as scheduled and was chaired by TYS again but objections were raised as to the appropriateness of TYS chairing the adjourned meeting as he had previously chaired the original
I EGM. TYS then adjourned the meeting and left ('first adjournment'). Tan

Say Han ('TSH') subsequently acted as the chairman but the adjourned meeting was again adjourned for need of legal advice as to whether the adjourned meeting was invalidly convened due to lack of a fresh special notice of 28 days under s. 322 of the Act ('fresh special notice') ('second adjournment'). TSH too left the meeting. After it was raised that the adjourned meeting was invalidly adjourned and that the meeting should continue, the meeting was reconvened with one Yau acting as the chairman. The proposed resolutions were passed. Hence, the two OS which raised the issues on (i) whether the adjourned EGM and the adjournment itself were valid; (ii) whether a fresh special notice, under s. 322(1) of the Act, was required to be issued upon the reconvening of the adjourned EGM; and (iii) whether a notice of the EGM ought to be issued to the auditor.

Held (allowing OS 131; dismissing OS 153):

(1) TYS no longer had the authority to chair the adjourned EGM following his removal after the shareholders overwhelmingly voted against him acting as the chairman. The conduct of TYS in adjourning the meeting was highly irregular. Not only did he insist he had the authority, despite being overwhelmingly removed from the chair, his actions were an abject disrespect of the shareholders' will. He took it upon himself to adjourn the meeting and subsequently left the meeting without regard to the shareholders' original intention of assembling on the said day. This fueled the presumption that he was not partial and failed to act as a neutral party. The only conclusion that could be made was that he had a preconceived intention to adjourn the meeting. In his haste of adjourning the meeting, the formalities of calling the meeting to order were not carried out. Such an immoderate conduct of a chairman could not be approved. The person chairing a meeting must be free from any doubt as to his impartiality and the ability to act fairly and without bias. If there was a reasonable and sensible possibility that a chairperson would advance his personal interest, then he should vacate the chair. (paras 17 & 19-23)

(2) TSH took over as the chairman upon being told he was the only director left at the meeting; he was not chosen, as required under art. 64 of the company's constitution. TSH adjourned the meeting on the same basis as TYS, namely 'complicated question of law' and 'requires time to seek legal advice'. Legal advisors were present at the meeting but TSH chose not to consult on the matter. The first and second adjournments were made based on unilateral decisions to refer the purported question of law without seeking views from the floor. Due to wanton disregard of the shareholders present at the meeting, they could be described as having the single-minded objective to adjourn the meeting, in breach of their role as chairman. (paras 24-27, 30 & 31)

(3) TYS and TSH did not discharge their responsibilities as chairman. They were not in any manner facilitating the meeting and failed to execute their duties reasonably consistent with the powers they held being the chair of the meeting. It was also clear that the shareholders, in exercising their rights according to art. 64, did not choose any of the directors to be the chairman of the meeting. That right given to the shareholders by majority to exercise their inherent right at a general meeting is a proprietary right given to the shareholders. As such, neither TYS nor TSH could have assumed chairmanship or continued as chairman of the meeting and any purported adjournment of the adjourned EGM by them would be rendered invalid. It followed that the remaining shareholders were entitled to proceed with the adjourned EGM. The meeting, which was reconvened after the departure of TSY was competent to transact business. The resolutions passed in accordance with the agenda were accordingly valid. (paras 40-42, 44, 46 & 49)

(4) Section 322 of the Act provides the requisite 28 days' notice to be given to the company before a meeting could be held to remove the directors. The resolution requiring special notice, pursuant to s. 206 of the Act, was already given to the company. A fresh special notice was not required to be issued by the conveners to the company for purposes of the adjourned EGM for the following reasons: (i) the meeting was a continuation of the original EGM; (ii) the agenda for the meeting remained the same, *ie,* to remove the existing directors; (iii) there was a clear intention, on the part of the conveners, to rely on the special notice; and (iv) the purpose of a special notice, *ie,* to enable directors to make representation. (paras 52, 54, 58, 63 & 66)

(5) An auditor has a defined role to play. If invited to a meeting of the company, his role must relate to the business to which he is entrusted on, namely the financial statements. In the present case, the failure to issue a notice to the auditor did not invalidate the adjourned EGM for the following reasons: (i) there was nothing in the agenda that required the presence of an auditor as the proposed resolutions, *ie,* the removal of directors, had nothing to do with any duties that required the presence of an auditor. No reference to any financial statements was made in the notice of meeting. Even if an auditor was invited, he would have no role to play; (ii) there was no demonstration of a genuine need for the presence of the auditors, it must be made at the earliest possible opportunity and the failure to do so would inevitably invite a suggestion that the need for an auditor at the meeting was an afterthought; and (iii) there were no objections taken by any shareholders at the meeting. Furthermore, a failure to issue a notice of meeting under s. 321(1) of the Act is an irregularity which is curable under s. 582 of the Act. (paras 89, 93, 94, 101 & 102)

Case(s) referred to:

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

Byng v. London Life Association Ltd [1989] BCLC 400 ***(refd)***

Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors [1989] 1 CLJ 157; [1989] 1 CLJ (Rep) 386 HC ***(dist)***

Dato' Low Tuck Choy & Anor v. Chong Kok Weng & Ors [2009] 1 LNS 964 HC ***(dist)***

First Nominee (Pte) Ltd v. New Kok Ann Realty Sdn Bhd & Anor [1982] 1 LNS 108 ***(refd)***

Fomento (Sterling Area) Ltd v. Selsdon Fountain Pen Co Ltd [1958] 1 All ER 11 ***(refd)***

Granasia Corporation Bhd & Ors v. Choong Wye Lin & Ors And Another Case [2008] 4 CLJ 893 HC ***(dist)***

HLB Nominees (Tempatan) Sdn Bhd v. SJA Bhd & Anor And Another Appeal [2005] 1 CLJ 23 CA ***(dist)***

Indian Corridor Sdn Bhd & Anor v. Golden Plus Holdings Bhd [2008] 5 CLJ 774 CA ***(refd)***

John v. Rees & Others [1969] 2 All ER 274 ***(refd)***

Kok Hoong v. Leong Cheong Kweng Mines Ltd [1963] 1 LNS 61 PC ***(refd)***

Lew Siew Moi, Datin v. Ann Loong Holdings Sdn Bhd & Ors [2010] 1 LNS 1430 HC ***(dist)***

McKerlie & Another v. Drillsearch Energy Ltd & Others [2009] 72 ASCR 288 ***(refd)***

National Dwellings Society v. Sykes [1894] 3 Ch 159 ***(refd)***

Re Australian Continental Resources Ltd (1975) 1 ACLR 405 ***(refd)***

Scalding v. Lovant [1951] 3 HLC 418 ***(refd)***

Tan Kah Wich & Ors v. Datuk Phua Cheng Leong & Ors [1979] 1 LNS 133 FC ***(refd)***

Tan Than Kau & Anor v. RB Nominees (Asing) Sdn Bhd & Ors [2019] 1 LNS 1271 HC ***(dist)***

Teoh Peng Phe v. Wan & Co [2001] 5 CLJ 222 HC ***(refd)***

The Oriental Insurance Company Ltd v. Reliance National Asia Re Pte Ltd [2008] SLR 121 ***(refd)***

Legislation referred to:

Companies Act 1965 (repealed), ss. 128, 355

Companies Act 2016, ss. 206(3), 207, 266(1), (2), (3), (4), (5), (6), (7), 310(b), 318, 321(1), 322(1), 582

Companies Act [Sing], s. 392(2)

Companies Ordinance 1962 [Aus], s. 366

Other source(s) referred to:

Davies, Briggs, Impey, Evans and Ellis, *The Modern Law of Meetings,* 2nd edn, p 173

For the plaintiffs - Michael KT Chow & Wendy Yeong; M/s Michael Chow

For the defendants - K Shanmuga & Kee Hui Yee; M/s Kanesalingam & Co

Reported by Najib Tamby

JUDGMENT

Ahmad Fairuz Zainol Abidin J:

Abstract

[1] This decision explains the reason why:

(i) an adjournment made by a Chairman of a meeting cannot be tainted by conduct that disregards the will of the shareholders at a meeting;

(ii) a fresh special notice under s. 322(1) of the Companies Act 2016 ("the Act") is not required to be issued upon the reconvening of an adjourned extraordinary general meeting; and

(iii) a failure to issue a notice of meeting under s. 321(1) of the Act to an auditor is an irregularity which is curable under s. 582 of the Act.

Background Facts

The Original Extraordinary General Meeting ("Original EGM")

[2] The plaintiffs in OS No. WA-24NCC-131-03-2020 ("OS 131")/the second to the fourth defendants in OS No. WA-24NCC-153-04-2020 ("OS 153") (hereinafter referred to as "the conveners") who are the shareholders of Golden Plus Holdings Bhd ("the company") issued a special notice to remove directors of Golden Plus ("special notice") and a notice for an extraordinary general meeting ("EGM") dated 12 September 2019 ("notice of EGM") proposing to remove the entire board of the company and to appoint the fifth to the seventh defendants in OS 153 as the directors. The original EGM was scheduled to be held on 16 October 2019 at Melia Seasons Restaurant, Kajang.

[3] The original EGM was held on 16 October 2019. However, it was adjourned by the Chairman to obtain legal advice as to whether the notice of EGM may be validly issued by more than one member under s. 310(b) of the Act.

[4] As a result of the adjournment, the company filed Kuala Lumpur High Court Originating Summons No. WA-24NCC-569-10-2019 ("OS 569") while the conveners commenced Kuala Lumpur High Court Originating Summons No. WA-24NCC-583-10-2019 ("OS 583") respectively. Both OS 569 and OS 583 were heard together by this court. On 22 January 2020, this court held, *inter alia*, that:

(i) the notice of EGM was validly issued by the conveners and does not contravene s. 310(b) of the Act;

(ii) the original EGM convened on 16 October 2019 was validly adjourned by the Chairman; and

(iii) any decision made by the shareholders after the adjournment was null and void.

[5] The effect of the order is that the adjournment of the original EGM was proper. The conveners could therefore revive the EGM and continue with the unfinished business of the original EGM.

The Adjourned Extraordinary General Meeting ("Adjourned EGM")

[6] Upon obtaining the ruling of this court that a meeting requisitioned under s. 310(b) of the Act can be made by the conveners, a notice to convene the adjourned general meeting dated 19 February 2020 ("notice of the adjourned EGM") was issued. The adjourned EGM was scheduled to be held on 6 March 2020 at Melia Seasons Restaurant, Kajang. (It is observed that the conveners signed the requisition on the 14 February 2020. The said requisition was served on the board of directors on 19 February 2020. This court will use 19 February 2020 as the date the meeting was requisitioned by the conveners).

[7] The proposed resolutions to be passed at the adjourned EGM were the same as contained in the notice of EGM dated 12 September 2019. The resolutions sought to remove the current board and replaced by the fifth to the seventh defendants in OS 153.

[8] On 6 March 2020, the adjourned EGM proceeded as scheduled. It was initially chaired by Tan Yen Siang, who was the Chairman of the original EGM. Due to objections raised from the floor as to the appropriateness of Tan Yen Siang chairing the meeting, the third plaintiff ("Tan Say Han") was subsequently acted as the Chairman. Taking cognisance of the point raised by Abigail Shobana Nimbalker ("Abigail"), the proxy of the first plaintiff ("Andrew Teh") that the adjourned EGM was invalidly convened due to lack of a fresh special notice of 28 days under s. 322 of the Act, Tan Say Han announced the adjournment of the adjourned EGM in order to seek legal advice on the validity of the meeting.

[9] N Sivagurunathan a/l V Narayanasamy ("Siva"), a proxy holder for Chang Chun-Pei (the daughter of the third and fourth defendants) raised the issue that the adjourned EGM was invalidly adjourned and that the meeting should be continued.

[10] Yau Ming Teck, a member, then volunteered and proposed himself to be elected as the Chairman of the meeting. Thereafter, the proposed resolutions were all passed.

OS 131 And OS 153

[11] OS 131 was filed on 11 March 2020 by the conveners and OS 153 was filed on 6 April 2020 by Andrew Teh, his mother and Tan Say Han. Both sought for this court's ruling on the validity of the adjourned EGM and the adjournment thereof.

[12] In OS 131, the reliefs sought by the conveners are reproduced below:

(i) a declaration that the adjournments of the Adjourned Extraordinary General Meeting of the Defendant on 6.3.2020 by Tan Yen Siang and/or Tan Say Han were null, void, ineffective and not valid;

(ii) a declaration that the continuation of the Adjourned Extraordinary General Meeting of the Defendant on 6.3.2020 following the said invalid adjournments together with all resolutions passed thereat on 6.3.2020 was valid and binding;

(iii) a declaration that all acts of the board of directors and/or directors of the Defendant, as comprised prior to the passing of the resolutions on 6.3.2020, and taken subsequent to the passing of the resolutions on 6.3.2020, are null, void, and invalid;

(iv) a declaration that Chiew Keong On, Yapp Kiam Yen and Wong Koon Wai are the directors of the Defendant;

(v) an order that all records, books and properties of whatsoever nature belonging or which appear to belong to the Defendant be delivered up by the Defendant, its directors, officers, employees, agents and/or servants to Chiew Keong On, Yapp Kiam Yen and/or Wong Koon Wai within seven (7) days from the date of service of the order to be made herein;

(vi) that the Defendant, its direction, officers, employees, agents and/or servants be ordered to take all necessary action to give effect to the resolutions passed at the Adjourned Extraordinary General Meeting of the Defendant on 6.3.2020;

(vii) such other and/or additional relief and/or orders and/or directions that this Honourable Court deems just and appropriate including but not limited to an order under Section 582 of the Companies Act 2016 to validate the defects, if any in the calling and convening of the Adjourned Extraordinary General Meeting of the Defendant on 6.3.2020.

[13] Meanwhile, in OS 153, the orders prayed for are, *inter alia*:

(i) A declaration that the Notice of Adjourned EGM is defective, invalid, null and/or void;

(ii) A declaration that the Adjourned EGM was wrongfully convened, defective, invalid, null and/or void;

(iii) A declaration that Tan Yen Siang is the Chairman of the Adjourned EGM;

(iv) A declaration that the Adjourned EGM was validly adjourned by Tan Yen Siang in accordance with Article 65 of the Company's Constitution;

(v) In the alternative to prayers (iii) and (iv) above, a declaration that the appointment of Tan Say Han as the Chairman of the Adjourned EGM is valid and/or in accordance with Article 64 of the Company's Constitution;

(vi) In the alternative to prayers (iii) and (iv) above, a declaration that the Adjourned EGM was validly adjourned by Tan Say Han in accordance with Article 65 of the Company's Constitution;

(vii) A declaration that the purported appointment of Yau Ming Teck as the Chairman of the Adjourned EGM is defective, invalid, null and/or void;

(viii) A declaration that the continuation of the Adjourned EGM is defective, invalid, null and/or void;

(ix) A declaration that all resolutions purportedly passed by the members present at the Adjourned EGM, subsequent to the proper and valid adjournment of the Adjourned EGM by Tan Yen Siang and/or Tan Say Han, are invalid, null and/or void

The Issues

[14] This grounds will discuss the three main issues raised during arguments by parties. The determination of the issues ultimately disposed of both applications before this court. The court directed parties to submit as if there was only one single application. Counsel for the plaintiffs in OS 131 appropriately termed OS 153 as the counterclaim to OS 131. The issues will be discussed *seriatim*.

Issue 1: Adjournment Of The Adjourned EGM

Conduct Of Tan Yen Siang And Tan Say Han

[15] From the minutes of the meeting, Tan Yen Siang and Tan Say Han both claimed to have had the authority to act as Chairman. However, claim as they may, ultimately, the duty of this court is to examine whether they both were exercising their duty of becoming a Chairman. Foremost, whether they were acting as an impartial referee to the meeting which was convened by shareholders.

[16] It is trite that until a Chairman is elected and quorum is met, there is no properly constituted meeting. As opined by Loh Siew Cheang, *Corporate Powers Accountability*, 3rd edn., "the right to preside as chairperson must be distinguished from the duties that must be discharged by a chairperson once the right to preside as chairperson has been exercised".

[17] The person chairing the meeting must be free from any doubt as to his impartiality and the ability to act fairly and without bias. If there is a reasonable and sensible possibility that a chairperson will advance his personal interest, then he should vacate the chair. This would be especially so when the resolutions to be passed and the results thereof affect the chairperson personally. Tan Yen Siang was one of the directors facing removal as was Tan Say Han.

[18] Tan Yen Siang was entitled to declare himself as the Chairman as he was previously the Chairman at the original EGM and that the adjourned EGM was a continuation of the original EGM. This is consistent with the principles in *Scalding v. Lovant* [1951] 3 HLC 418. Nevertheless, a Chairman elected for a meeting can be superseded and removed by the will of the meeting (*The Law of Meetings – Their Conduct and Procedure* by Shaw & Smith).

[19] However, it was documented in the minutes that Tan Yen Siang was removed as the Chairman of the meeting when the shareholders overwhelmingly voted against him acting as Chairman. This can be seen in paras. 2.26 and 2.27 of the adjourned EGM minutes. It reads as follows:

> 2.26 On that proposal, the chief administrator of attendance list of the adjourned EGM was invited to do the counting of votes (by way of show of hands) to gauge whether TYS or any director had the support of the shareholders to be the chairperson for the adjourned EGM.
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> 2.27 After counting, there were 71 votes against TYS and any director present at the meeting to chair the adjourned EGM and none in favour of any director to chair.

[20] From that point onwards, it is the view of this court that Tan Yen Siang no longer had the authority to preside over the adjourned EGM. However, from the minutes of the meeting, notwithstanding his removal, Tan Yen Siang proceeded to inform the shareholders that he received two letters each from Mohd Salleh bin Lamsin, a director of the company and another shareholder, Kwa Kim Leong (whose proxy then denied such a notice was given by Kwa) informing that the 28 days special notice had not been complied with. Apart from Abigail who argued that a fresh special notice was required, no other shareholders argued that the adjourned EGM had to be adjourned for that reason. Tan Yen Siang then initiated the adjournment on the basis that he wanted to seek legal advice on the 28 days special notice issue. He then left the meeting ("the first adjournment").

[21] The conduct of Tan Yen Siang in adjourning the meeting was highly irregular. Not only did he insist he had authority despite being overwhelmingly removed from the chair, his actions were an abject disrespect of the shareholders' will. He took it upon himself to adjourn the meeting and subsequently left the meeting, without regard to the shareholders' original intention of assembling on the said day.

[22] This fuels the presumption that he was not partial and failed to act as a neutral party. The only conclusion that can be made is that he had a preconceived intention to adjourn the said meeting, in his haste of adjourning the meeting, the formalities of calling the meeting to order were not carried out. Such an immoderate conduct of a Chairman cannot be approved by any court.

[23] Being the only director of the company at the meeting, Tan Say Han then foisted himself as Chairman. What then transpired is best evaluated from the minutes of the adjourned EGM at paras. 2.38 to 3.1. The minutes read as follows:

2.38 In view of the adjourned EGM could not be put in order without the chairperson for the meeting to conduct the meeting, and the meeting was notably left with one director for the shareholders to choose to chair the meeting, the Secretary put it to the shareholders to decide on the matter.

2.39 Abigail highlighted Clause 64 on the appointment of chairman for the meeting as follows:

> ... if there is no chairman of the Board or if he shall not be present at any general meeting within fifteen (15) minutes after the time appointed for holding the same or shall be unwilling to act as chairman of any general meeting, the Members present shall choose any other Director, or if no Director is present or if all the Directors present decline to act as the chairman of the general meeting, the Members present shall elect one (1) of their number to be chairman of the general meeting.

Pursuant to that and in this circumstance, Abigail highlighted that TSH was the only director left standing to be chosen to conduct the meeting subject to he is willing to do so, the meeting had no choice, but to choose TSH to chair the meeting.

2.40 in view of TYS, the previous EGM chairperson, had excused himself and left the meeting, and in accordance with Clause 64, TSH willingly accepted to preside over the adjourned EGM as he was the only director left to conduct the meeting.

2.41 Without ado, the chairperson called the meeting to order.

2.42 The chairperson took cognizance of the views rendered by Abigail, and his fellow director on the defective notice served on the shareholders and the board of directors.

2.43 In view that, TSH as the chairperson for the adjourned EGM adjourned the meeting in accordance with Clause 65 of the Company's Constitution for the purpose of obtaining and consulting legal opinions on the issues of defective notice served by the conveners of the adjourned EGM.

3 CONCLUSION OF MEETING

3.1 The meeting was adjourned *sine die* at 9.55a.m.

[24] It can be seen from the above minutes that Tan Say Han took over as Chairman upon being told that he was the only director left at the meeting. He was not chosen as required under art. 64 of the company's constitution.

[25] From the minutes, Tan Say Han adjourned the meeting on the same basis as Tan Yen Siang ("the second adjournment").

[26] The common ground to adjourn the meeting can be seen in the respective affidavits of Tan Yen Siang and Tan Say Han where they relied on the basis that a "complicated question of law" in respect of which the board of the defendant "requires time to seek legal advice".

[27] It must be noted that legal advisors were present at the meeting but Tan Say Han chose not to consult on the matter. Even if the argument was put by counsel of the company, Mr K Shanmuga that Tan Say Han was prevented from doing so, there was nothing from the minutes to show that Tan Say Han attempted to reach out to the legal advisor of the company.

[28] Article 127 of the company's constitution provides that the minutes of the meeting shall be conclusive evidence without proof of the facts stated in thereof. However, during the course of submissions, a video recording of the meeting was played to this court.

[29] The recording was consistent with the minutes of the meeting. It provided this court with a perspective of how the meeting was carried out and how the two Chairmen conducted themselves before adjourning the meeting. It was helpful to enable this court to visualise the actual manner in which objections were raised by shareholders as to the suitability of Tan Yen Siang being the Chairmen right up to the swift manner in which Tan Say Han adjourned the meeting.

[30] It is the view of this court that the first adjournment and the second adjournment were made based on unilateral decisions to refer the purported question of law without seeking views from the floor.

[31] Due to the wanton disregard of shareholders present at the meeting, it would not be wrong to describe them as having the single-minded objective to adjourn the meeting, in breach of their role as Chairman of a meeting of shareholders.

[32] The Federal Court in *Tan Kah Wich & Ors v. Datuk Phua Cheng Leong & Ors* [1979] 1 LNS 133; [1979] 2 MLJ 259 held that a Chairman cannot adjourn a meeting on his own will and pleasure. The following was held:

> The position at common law is that there is a power to adjourn a meeting – *Kerr v. Wilkie* [1860] 1 LT 501. *This right is vested in the assembly itself unless there are particular regulations that vest this power in the chairman. In the present case, nothing in the constitution invests the President with the power to adjourn the meeting at his whim and fancy.* (emphasis added)

[33] Authority, duties and powers of a Chairman is clearly spelt out in *The Modern Law of Meetings* by Davies, Briggs, Impey, Evans and Ellis; 2nd edn. at p. 173. The duties are outlined as follows:

7.29 The chairman's authority is delegated to him by the company under its articles, or by that meeting by which he is appointed or by a combination of the two. Where a number of persons assemble and put a person in the chair they confer on that person by agreement the conduct of that assembled body.

7.30 The person presiding over a general meeting of members is, in the capacity as chairman of the meeting, acting as the representative of the members present at the meeting, not as the representative of the directors.

7.31 The fact that the chairman has an interest in the outcome of a decision does not, in itself, impugn the integrity of the process at a meeting. No company contemplates that the chairman will be totally disinterested in every matter, and he is presumed to act in good faith unless it is proven otherwise.

7.32 The chairman's authority, because it comes from the meeting, must be exercised to ascertain the opinion of the majority; to allow a proper discussion of the questions to be decided; and to ensure that the proceedings are conducted in accordance with the articles. He must act honestly and fairly towards all individual interests at the meeting, and his duty is directed generally towards the best interests of the company. This means he must allow all members who wish to speak to a motion to have a reasonable opportunity to do so, even if there is clearly a majority who have already made up their minds.

7.33 It follows that it is the chairman's duty to conduct the meeting in such a way that the business is facilitated and the results of that business clearly defined. He must control and organise meetings; to preserve order so they proceed effectively; conduct the proceedings in a proper manner; and take care that the sense of the meeting is properly ascertained on any question property before it. In the absence of express provisions in the articles, 'the details of the proceedings must be regulated by the persons present and by the chairman, and if his decision is quarrelled with it must be regulated by the majority of those present'. But where CA 2006 or the articles expressly provide for the conduct of meetings, they must be followed.

7.34 The chairman has no power to determine the matters or issues which a meeting takes into account when considering resolutions; those are matters for the whole meeting.

[34] It would be wrong for the Chairman to remove or postpone the right of the shareholders to replace the Chairman and proceed with the removal of the directors, being the inherent exercise of the shareholders' right. In *McKerlie & Another v. Drillsearch Energy Ltd & Others* [2009] 72 ASCR 288 it was held:

A It would be clear abuse of power if the chairman removes or postpones the right simply because he or she (alone or in consultation with others) thinks that it would somehow be more conducive to the interest of the company if members are not allowed to exercise their right to remove directors.

B **[35]** The role of a Chairman has been described in *Shackleton on the Law and Practice of Meetings* (8th edn.) as follows:

Responsibility for the conduct of a meeting rests particularly on the chairman. He will call the speakers, regulate the length of the speeches, deal with the points of order, and control the arrangement for any vote that may be taken.

C

[36] The sense of the meeting must be ascertained by the Chairman, apart from ensuring that proceedings are conducted properly. In *National Dwellings Society v. Sykes* [1894] 3 Ch 159, Chitty J held that the duty of the Chairman as:

D Unquestionably it is the duty of the chairman, and his functions, to preserve order, and to take care that the proceedings are conducted properly and that the **sense of the meeting is rightly ascertained** with regard to any question which is properly before the meeting.

(emphasis added)

E **[37]** In *Byng v. London Life Association Ltd* [1989] BCLC 400, the Court of Appeal in England held that in exercising powers of a chairman of a meeting of the shareholders of a public corporation, a Chairman erred in law if, among other things, he did not take a decision reasonably with a view to facilitating the purpose for which the powers had been conferred. The court F held that the Chairman in that case had erred in law in deciding to adjourn the meeting from morning to the afternoon because the venue to which the shareholders had first been summoned was unable to accommodate all those wishing to attend, in circumstances where many of the shareholders present in the morning were unable to re-arrange their affairs on short notice so as G to be present in the afternoon. Browne-Wilkinson VC had the following to say:

In my judgment the chairman's decision must also be taken reasonably **with a view to facilitating the purpose for which the power exists.**

(emphasis added)

H **[38]** The Vice Chancellor further added:

The starting point is to consider the nature of the residual power to adjourn which in my judgment remains vested in the chairman. It was a residual power exercisable only when the machinery provided by the articles had broken down. This residual common law power is itself tightly I circumscribed by reference to the objects for which it exists. I quote again

from the passages which I have emphasised above in the quotations from *R v. D'Oyly* ([1840] 113 ER 139) and *Mr Rogers's book ((Rogers A Practical Arrangement of Ecclesiastical Law* [1840]). *The power is to regulate proceedings 'so as to give all persons entitled a reasonable opportunity of voting'. The chairman must 'do the acts necessary for those purposes'. The power to adjourn is only validly exercised if 'no injurious effect were produced'. I would add that at a company meeting a member is entitled not only to vote but also to hear and be heard in the debate. Therefore it is the very purpose of the power to facilitate the presence of those entitled to debate and vote on a resolution at a meeting where such debate and voting is possible.* To my mind, this is inconsistent with the view that the exercise of the power can only be impugned on the grounds of lack of good faith. *In my judgment the chairman's decision must also be taken reasonably with a view to facilitating the purpose for which the power exists. Accordingly, the impact of the proposed adjournment on those seeking to attend the original meeting and the other members must be a central factor in considering the validity of the chairman's decision to adjourn.*

...

The chairman's decision will not be declared invalid unless on the facts which he knew or ought to have known he failed to take into account all the relevant factors, took into account irrelevant factors or reached a conclusion which no reasonable chairman, properly directing himself as to his duties, could have reached, ie the test is the same as that applicable on judicial review in accordance with the principles of Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223. This was the approach adopted by Uthwatt J in Second Consolidated Trust Ltd v. Ceylon Amalgamated Tea and Rubber Estates Ltd [1943] 2 All ER 567, where he held a chairman£ decision invalid on the grounds that he had failed to take into account a relevant factor.

(emphasis added)

[39] Lord Justice Woolf went on further to state as follows:

... the approach of the court is no different from that which it regularly adopts when reviewing the exercise of discretion by a public body under a statutory power. *This is the position even though when acting as chairman of the meeting (the chairman) is not performing a public function and derives his powers either expressly or by implication from the articles of (the company). While the source of his power is different from that of a person performing a public function, the well established principles which determine whether there has been a proper exercise of discretion by a public body apply to the exercise by (the chairman) of his powers, in particular he must have regard to the nature of the power which he is exercising and use the power for the purpose for which it was given.* (emphasis added)

[40] From the minutes of the meeting, none of the above described responsibilities were discharged by Tan Yen Siang and Tan Say Han. They were not in any manner facilitating the meeting. They failed to execute their duties reasonably consistent with the powers they held being the chair of the meeting.

[41] It is clear from the meeting too that the shareholders in exercising their rights according to art. 64 did not choose any of the directors to be the Chairman of the meeting (see para 2.26 of the minutes).

[42] That right given to the shareholders by majority to exercise their inherent right at a general meeting a proprietary right given to the shareholders. They can do so in what they perceived in their best interest and no intervention would be justified simply on the premise that the commercial judgment of the majority was wrong or that they had a personal interest.

[43] As such, neither Tan Yen Siang nor Tan Say Han could have assumed chairmanship or continued as Chairman of the meeting and any purported adjournment of the adjourned EGM by them would be rendered invalid. In so far as Tan Say Han was concerned, the sense of the meeting was that he could not assume chairmanship as he was in "the same boat" as Tan Yen Siang. Neither could Tan Say Han proceed to adjourn the adjourned EGM. The shareholders had already unanimously voted against any director assuming chairmanship.

[44] Clearly, the adjournment had an injurious effect. The impact of the adjournment on those seeking to attend the original meeting and the other shareholders must be a central factor in considering the validity of the chairman's decision to adjourn (see *Byng*). The adjournment had frustrated the intention of the conveners as well as the shareholders present who wanted to exercise their right as shareholders.

[45] The prayers for declarations in encl. 1 of OS 153 in relation to chairmanship and adjournment, namely prayers (iii), (iv), (v) and (vi) cannot stand.

[46] In the circumstances, this court rules that the adjournments by Tan Yen Siang and Tan Say Han were invalid. It follows that the remaining shareholders were entitled to proceed with the adjourned EGM.

The Resolutions Carried Out After The Adjourned EGM Continued

[47] From the minutes of the meeting recorded, it was clear that the meeting proceeded after both Tan Yen Sian and Tan Say Han left. The resolutions were then voted on and were carried through. The position in law when a meeting is reconvened is spelt out in the English Chancery Division case of *National Dwellings Society v. Sykes* [1894] 3 Ch 159, where the court held as follows:

> In my opinion, he cannot, after that business has been opened, 'I will have no more to do with it; I will not let this meeting proceed; I will stop it; I declare the meeting dissolved, and I leave the chair'. In my opinion, that is not within his power. *The meeting by itself (and these articles certainly apply to what I have said) can resolve to go on with the business for which it has been*

convened, and appoint a chairman to conduct the business which the other chairman, forgetful of his duty or violating his duty, has tried to stop because the proceedings have taken a turn which he himself does not like. (emphasis added)

[48] In *John v. Rees & Others* [1969] 2 All ER 274, the plaintiff had adjourned the meeting due to noise, disorder and some minor violence, and the court held as follows:

On the footing that there was no valid adjournment, it follows that, as the cases establish (National Dwellings Society v. Sykes [1894] 3 Ch 15) and as counsel for the Plaintiff concedes, the meeting remained in being competent to transact business. The elections conducted after the departure of the Plaintiff were accordingly valid. (emphasis added)

[49] The meeting which was reconvened after the departure of Tan Say Han was competent to transact business. The resolutions passed in accordance with the agenda were accordingly valid. The minutes of the said meeting officially recorded the decision of the shareholders at the meeting.

Issue 2: Whether A Fresh Notice Under s. 322 Of The Act Was Required

[50] The second issue before this court is whether there was a need to issue a fresh 28 days' special notice given that the conveners were seeking to remove the directors of the company under s. 206 of the Act. Section 206 reads as follows:

206 Removal of directors

(3) Special notice is required of a resolution to remove a director under this section or to appoint another person instead of the director at the same meeting.

[51] Section 322(1) on the other hand reads as follows:

322 Resolution requiring special notice

(1) Where special notice is required of a resolution under any provision of this Act, the resolution shall not be effective unless notice of the intention to move it has been given to the company at **least twenty-eight days before the meeting at which it is moved.** (emphasis added)

[52] This court is of the view that a fresh 28 days' special notice is not required to be issued by the conveners to the company for purposes of the adjourned EGM due to the following reasons:

(i) The Meeting Was A Continuation Of The Original EGM

[53] Given that the adjourned EGM was a continuation of the original EGM, the special notice given to the company on 12 September 2019 was still applicable and can be used for the adjourned EGM. This is consistent with the provision of art. 65 of the company's constitution which

categorically states that only business which should have been transacted at the meeting from which the adjournment took place is to be transacted. For ease of reference, art. 65 is reproduced as follows:

> 65. The chairman of a general meeting may, with the consent of the Members at such general meeting at which a quorum is present (and shall if so directed by the Members as such general meeting), or in the event of disorder making the ascertainment of the wishes of the meeting impossible or for the purpose of ascertaining or resolving any point of law bearing on the validity of the meeting itself or the legality of any business of the meeting, in his discretion, adjourn such general meeting to such day and place as the Members at such general meeting or the chairman of the general meeting (as the case may be) shall determine. Whenever a meeting is adjourned for thirty (30) days or more, notice of the adjourned meeting shall be given in the same manner as in the case of any original general meeting. Save as aforesaid, no Member shall be entitled to any notice of any adjournment or of the business to be transacted at an adjourned meeting. *Except as otherwise provided by the Act, no business shall be transacted at any adjourned meeting other than the business which should have been transacted at the meeting from which the adjournment took place.* (emphasis added)

[54] Section 322 provides the requisite 28 days' notice to be given to the company before a meeting can be held to remove the directors. To the mind of this court, it is clear that the resolution requiring special notice made under s. 206 was given to the company on 12 September 2019.

[55] The resolution to remove the directors of the company was meant to be moved on the original EGM scheduled on 16 October 2019 but the resolutions could not be carried out as the meeting was adjourned before the business of the meeting could commence.

[56] It is the finding of this court that the 12 September 2019 special notice was for all intents and purposes, the requisite notice given to the company and directors for the removal of the named directors.

[57] It is the view of this court that as at the date of the adjourned EGM, notice to carry out the resolutions to remove the directors was in excess of 100 days. There is no requirement to issue a fresh special notice under s. 322 as it had been previously given to the company on 12 September 2019.

(ii) The Agenda For The Meeting Remained The Same

[58] The resolutions to be passed at the adjourned EGM as seen in the notice of the adjourned EGM dated 19 February 2020 was exactly the same as the resolutions in the notice for the original EGM. It was solely to remove the existing directors.

[59] It is therefore obvious that the adjourned EGM sought to remove the existing directors just as how the resolutions at the original EGM were. The directors would certainly be in the know of the agenda of the adjourned EGM as they are after all, officers of the company.

[60] What can be seen from the minutes of the original EGM was that four directors sought to be removed attended the meeting per the list of attendees. They were as follows:

(i) Tan Yen Siang;

(ii) Mohd Salleh bin Lamsin;

(iii) Tan Say Han; and

(iv) Adey bin Liun.

[61] It can be concluded that the directors were aware of the resolutions to remove them then. They had a preview of what was coming in the adjourned EGM. It would be wholly incredulous to argue that they were not aware of the resolutions that were to be passed at the adjourned EGM.

[62] To argue that they were entitled to a fresh 28 days' notice is a mere excuse to frustrate the meeting and a convenient reason to not make the representations which they could have made.

(iii) Clear Intention On The Part Of The Conveners To Rely On The 12 September 2019 Special Notice

[63] It can be seen that the notice issued to convene the adjourned EGM dated 19 February 2020 was drafted with a specific reference to the 12 September 2019 special notice. The said notice is reproduced as follows:

> NOTICE IS HEREBY GIVEN that the adjourned Extraordinary General Meeting of Golden Plus Holdings Berhad (the "Company") will be held at Mella Seasons Restaurant, 43, Jalan Ria 1, Kawasan Perindustrian Ria, 43000 Kajang, Selangor on Friday, 6 March 2020 at 9:00 am for the purpose of considering and if thought fit passing with or without modifications, the following resolutions, **special notice of which (to the extent required) having been given pursuant to Sections 206 and 322 of the Companies Act 2016 on 12 September 2019.** (emphasis added)

[64] This court is satisfied that there was no inadvertence on the part of the conveners when they did not issue a fresh 28 days' special notice to the company. It was a conscious and deliberate decision to do so. This court finds no fault on the part of the conveners for so doing. On the other hand, it was a recourse that they were entitled to carry out.

[65] What is patently clear to the mind of this court is the fact that the notice of the adjourned EGM referred to the special notice under s. 322 dated 12 September 2019. Thus, any person who was in possession of the notice will know that the special notice had been given previously.

(iv) The Purpose Of A Special Notice – To Enable Directors To Make Representation

[66] A special notice is a mechanism built into the Act to enable the impacted directors the opportunity to explain to the shareholders as to why they ought not be removed. It is a natural justice process accorded the impacted directors. It is therefore, a fundamental right bestowed under s. 207 of the Act. It reads as follows:

> 207 Right to be heard for directors of public company against removal
>
> (1) On receipt of special notice for a resolution to remove a director under subsection 206(3), the company shall forthwith send to the director a copy of the special notice.
>
> (2) The director shall be given the right to make oral representation or written representation not exceeding a reasonable length on the resolution to remove him.
>
> (3) Where the director makes written representation and requests the written representation be notified to the members, the company shall, unless the representation is received too late for the company to do so:
>
> (a) state the fact of the representation having been made in the notice of the resolution given to members of the company; and
>
> (b) send a copy of the representation to every member of the company to whom the notice of the meeting is sent.
>
> (4) If a copy of the representations is not sent as required under subsection (3) due to the representations received too late by the company or due to the default of the company, the director may, without prejudice to his right to be heard orally, require that the representations shall be read out at the meeting.
>
> (5) Copies of the representations need not be sent out and the representations need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Court is satisfied that the rights conferred by this section are being abused.
>
> (6) The Court may order the company's costs on an application under subsection (5) to be paid in whole or in part by the director, notwithstanding that he is not a party to the application.
>
> (7) The constitution of a private company may provide the rights accorded under this section to its directors.

[67] The Court of Appeal in *Indian Corridor Sdn Bhd & Anor v. Golden Plus Holdings Bhd* [2008] 5 CLJ 774 touched upon the duty of a director once he is given notice of his removal. The case was a discussion under s. 128 of the Companies Act 1965 (Act 125), the predecessor to s. 207 of the Act.

Although the case pertains to the issue of whether the notice to remove the directors must contain reasons for seeking the removal (which the court ruled to be not required), the principles on how a director reacts once notice is given to them was clearly explained. The Court of Appeal outlined the obligations of a director upon being given notice as follows:

> Section 128 is differently constructed. It confers no security of tenure upon directors of a public company. It merely entitles such a director to "be heard on the resolution at the meeting". *A director is also entitled to make "representations in writing to the company (not exceeding a reasonable length)". He or she may also and request that the company notify its members of the representations. If for any reason the company does not send out the representations to its members the director may require his or her representations to be read out at the meeting. In addition, he or she may also orally address the meeting.* In our judgment the pronouncement in *Kanda* applies in the domain of public law. It does not apply in the private law sphere, particularly to a resolution that seeks the removal of a director of a company in general meeting. To hold otherwise would be to equate s. 128 of the Act with art. 135(2) of the Federal Constitution and the proceedings of a company in general meeting to a hearing before a tribunal trying a member of the public service charged with a disciplinary offence. All that a resolution contemplated by s. 128 of the Act need do is to set out the proposal to remove one or directors of the company. *The notice requirement in s. 128 sufficiently meets the element of fairness as it makes the director concerned aware of the fact that there is a proposal to remove him or her. It is then up to the director concerned to prepare representations setting out the reasons why he or she should not be removed, e.g., because he or she has always acted in the best interests of the company. He or she may then attend the general meeting and make an oral address answering his or her critics, if any. This, then, is the content of the rules of natural justice in the context and circumstances encapsulated in s. 128 of the Act.* The setting out of the grounds for proposing the removal is not a requirement of s. 128. (emphasis added)

[68] From the minutes of the meeting, it was observed that the impacted directors did not make any formal representations in response to the resolution either at the original EGM or the adjourned EGM. At the adjourned EGM, the inaction was due to their overly naive contention that the unlawfully convened due to the failure of issuing a fresh special notice. It is the view of this court that the directors cannot be rewarded for their presumptuous belief. It was a risk that they took knowing fully well the grave ramifications.

[69] As a recap, Mohd Salleh bin Lamsin merely conveyed his views *via* Tan Yen Siang. Even then, it was not a representation but a mere letter claiming that he was entitled to the 28 days' notice period. Andrew Teh too did the same thing *via* his proxy, Abigail. Both contended that they were entitled to more time. They therefore, contended that the adjourned EGM was invalid for failure to adhere to the 28 days' special notice.

[70] It was obvious that the meeting was not informed of any representations by the named directors sought to be removed. Again, the logical deduction was that no such attempts were made by the impacted directors to address their removal. No reasons were given as the reason for needing the additional time. It can be summed up that they never intended to make any representations.

[71] The failure of the directors to make the representations is a breach of s. 207 of the Act. This simply means that the impacted directors had waived their right to challenge the resolution. They had technically waived their entitlement to be heard as why the resolutions should not be moved and carried out.

[72] If they were sincere in wanting to defend themselves, they would have attended the adjourned EGM. However, as directors, they chose not to attend. It boggles the mind of this court on why such a stand was taken. The proposed resolutions were to remove them from the company and yet they chose not to attend and offer their representation. Their actions reek malice in wanting to deny the will of the majority, an eventuality which they could not avoid if the resolutions were put to vote.

[73] It is the observation of this court that such brazen attitude was fuelled by their intent to frustrate the meeting. It was a synchronised decision taken by all the directors to send messages through their intermediaries to the meeting expressing their view that the meeting was invalidly convened due to a breach of s. 206 and s. 322 of the Act.

[74] A long list of cases were produced by counsel for the plaintiff in OS 153 to highlight the point that a failure to issue a 28 days' special notice was fatal to the removal of the directors. The cases included *Granasia Corporation Bhd & Ors v. Choong Wye Lin & Ors And Another Case* [2008] 4 CLJ 893; *HLB Nominees (Tempatan) Sdn Bhd v. SJA Bhd & Anor And Another Appeal* [2005] 1 CLJ 23; *Tan Than Kau & Anor v. RB Nominees (Asing) Sdn Bhd & Ors* [2019] 1 LNS 1271; *Lew Siew Moi, Datin v. Ann Loong Holdings Sdn Bhd & Ors* [2010] 1 LNS 1430; [2012] 10 MLJ 734; *Dato' Low Tuck Choy & Anor v. Chong Kok Weng & Ors* [2009] 1 LNS 964; *Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors* [1989] 1 CLJ 157; [1989] 1 CLJ (Rep) 386; [1989] 1 MLJ 426. With respect, the cases above among others, discuss failure to serve the statutory 28 days' special notice to either one or more of the relevant directors.

[75] It is the view of this court that the above cases are distinguishable on the facts. Foremost is that the adjourned EGM was a continuation of the original EGM. At the risk of repetition, art. 65 of the company's constitution provides "no business shall be transacted at any adjourned meeting other than the business which should have been transacted as the original meeting". By

way of emphasis, s. 207 provides that "On receipt of a special notice for a resolution to remove a director under s. 206(3), the company shall forthwith send to the director a copy of the special notice." Clearly, the current case is a continuation of an unfinished business which all formalities had been complied with at the original EGM.

[76] It cannot escape the observations of this court that there was no issues raised as to the compliance by the plaintiffs in respect of s. 206 at the original EGM. On the contrary, it was not disputed that such a notice was indeed given. In fact, at original EGM on 16 October 2019, none of the directors present namely Tan Yen Siang, Mohd Salleh bin Lamsin, Tan Say Han and Adey bin Liun wanted to make any representation. The test of eligibility should have been taken at the original EGM and not the adjourned EGM.

[77] Counsel for the eighth defendant in OS 153, Mr S Suhendran argued that the notice must be freshly served by virtue of s. 318 of the Act. It was contended that the notice of the business of the meeting ie, the removal of the directors must be given. The failure to give notice of the "business" of the meeting was therefore fatal to the conveners. Reference was also made to art. 65 of the company's constitution.

[78] This court does not disagree with the contention made by counsel. However, the special notice under s. 322 is not a notice of a meeting. Instead, it is purely a special notice to carry out a specific resolution where the said resolution (resolution for the removal of the directors) would require a 28 days' notice to be given. There is a reason for the requirement of such a notice. The primary reason being the need to provide the relevant notice to the impacted directors (see *Indian Corridor* (*supra*)). Section 207 is the right to be heard for directors against the proposed removal.

[79] A notice of meeting was issued by the conveners when they issued the notice of the adjourned EGM dated 19 February 2020. Therefore, a notice of meeting under s. 318 and a special notice under s. 322 are distinct provisions under the Act and is not dependant on one another.

[80] For the aforesaid reasons mentioned, this court finds the argument by the company and the plaintiffs in OS 153 to be without merit.

Issue 3: Notice To The Auditor

[81] It was contended fervently that the notice to the auditor was a statutory requirement under s. 321 and failure to issue such a notice invalidated the adjourned EGM. Mr Lee Shih in exhibiting his usual clarity, brought to the attention of this court the provisions under s. 266 of the Act. He explained at length the reasons why an auditor must be included in a meeting each time one is called for. This court takes no exception to the erudite submissions of counsel. In fact, it was a good overview of the role and powers of an auditor.

[82] The said submissions were consonant with the principles outlined in *Fomento (Sterling Area) Ltd v. Selsdon Fountain Pen Co Ltd* [1958] 1 All ER 11, where Lord Denning described the function of an auditor as follows:

> What is the proper function of an auditor? It is said that he is bound only to verify the sum, the arithmetical conclusion, by reference to the books and all necessary vouching material and oral explanations, and that it is no part of his function to inquire whether an article is covered by patents or not. I think this is too narrow a view. *An auditor is not to be confined to the mechanics of checking vouchers and making arithmetic computations. He is not to be written off as a professional 'adder-upper and subtractor'. His vital task is to take care to see that errors are not made, be they errors of computation, or errors of omission or commission, or downright untruths. To perform his task properly, he must come to it with an inquiring mind – not suspicious of dishonestly, I agree – but suspecting that someone may have made a mistake somewhere and that a check must be made to ensure that there has been none.* (emphasis added)

[83] In *Teoh Peng Phe v. Wan & Co* [2001] 5 CLJ 222, Kang Hwee Gee J (as he then was) had occasion to set out such duties in the following terms (at pp. 235-236):

> *The auditor is a compulsory fixture of the company. Under s. 172 of the Companies Act 1965 he must be appointed within three months of incorporation by the directors and thereafter has to be appointed at every AGM. He is the watchdog of the company and to quote Walter Woon the author of Company Law 2nd edn: "If he smells a rat, he must bark."* (emphasis added)

[84] It bears no iteration that the powers of an auditor are undisputedly vast. However, the scheme of s. 266 focuses on the function of an auditor *vis-a-vis* the financial statements of the company. This can be seen in s. 266(1) to s. 266(6) of the Act.

[85] The right to be invited to a meeting of the company is found under s. 321 of the Act where it reads as:

> (1) **Notice of a meeting of members shall be given to every member, director and auditor of the company.** (emphasis added)

[86] The entitlement of an auditor to attend a general meeting and the role he plays was further refined in s. 266(7) where it reads as follows:

> (7) An auditor of a company or his agent authorized by him in writing is entitled to attend any general meeting of the company and to receive all notices of, and other communications relating, to any general meeting which a member is entitled to receive, **and to be heard at any general meeting which he attends on any part of the business of the meeting which concerns the auditor in his capacity as auditor.**
>
> (emphasis added)

[87] It is clear that the presence of an auditor in a general meeting as stated in s. 266(7) concerns his capacity as an auditor.

[88] The auditor's role in meetings is also recognised in the company's articles of association in particular at art. 135. It reads as follows.

> The auditor or auditors of the Company shall be entitled to attend any general meeting of the Company and to receive all notices of and other communications relating to any general meeting of the Company which any Member is entitled to receive, and to **be heard at any general meeting on any part of the business of the meeting which concerns him as auditor.** (emphasis added)

[89] It is the view of this court that an auditor has a defined role to play. If invited to a meeting of the company, his role must relate to the business to which he is entrusted on namely the financial statements.

[90] In the context of the current case, the crucial question that needs to be answered by this court is whether the lack of an express notice to the auditors would nullify and invalidate the adjourned EGM of 6 March 2020.

[91] While counsel for the conveners, Mr Mrohael Chow with conviction, argued that there was sufficient notice given by the advertisement taken by the company in the newspapers, this court however finds that an advertisement cannot constitute sufficient notice given to the auditors. There is no fall back that can be relied on by the conveners in failing to send a meeting notice to the auditors. This is because, as seen in s. 321 of the Act, an auditor ranks in the same category as a member and director of a company.

[92] The issue is whether in the current case and the context of the proposed resolutions, the failure to do so invalidated the adjourned EGM.

[93] It is the view of this court that failure to issue a notice to the auditor in the context of the current case did not invalidate the adjourned EGM. This court reasons as follows:

(i) There Was Nothing In The Agenda That Required For The Presence Of An Auditor

[94] As seen from the notice of the adjournment EGM dated 19 February 2020, the resolutions proposed to be passed had nothing to do with any duties that require the presence of an auditor. It was purely a meeting called to pass the 12 resolutions namely for the removal of the directors. No reference to any financial statements was made in the said notice of meeting. On hindsight, even if an auditor was invited, he or she will have no role to play.

[95] It is for this reason that this court is persuaded by the arguments of counsel for the conveners that no objection was taken in the original EGM because the meeting did not relate to any duties of an auditor.

[96] In a highly charged confrontation between shareholders, it is the view of the court that the intention of shareholders must be carefully scrutinised. It is clear that the conveners were contending that they had the relevant number of shares to procure the ouster of the existing directors. This was demonstrated by virtue of the number of shares they collectively held which not only entitled them to convene a meeting under s. 310(b) of the Act but also to successfully pass the resolutions proposed on 6 March 2020.

[97] As a court sitting as an impartial arbitrator, it cannot allow a box-ticking exercise to overshadow the intent of shareholders. What more when the purported non-compliance was raised after the fact and not contemporaneously at either of the meetings. To allow such a perfunctory application of the law would defeat the overriding right of shareholders who were exercising their statutory rights.

[98] Upon a careful balancing exercise undertaken by this court, the scale of fairness must tip in favour of the conveners.

(ii) Failure Of The Company/Plaintiffs In OS 153 To Demonstrate A Consistent Stand

[99] The law is clear that estoppel does not operate against a statutory provision/requirement. Reliance was placed by the company on the case of *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1963] 1 LNS 61; [1964] 1 MLJ 49. This court accepts this proposition. The company was therefore entitled to take the position that they cannot be estopped from raising non-compliance with s. 321 in this current suit despite failing to do so during the original EGM as well as in OS 569 and OS 583 (the "s. 310(b) challenge"), which litigation related to the same EGM.

[100] It is therefore accepted as a fact that in OS 569 and OS 583, no such objections were raised despite extensive arguments on the validity of calling the original EGM. It could very well be the case that the company did not think the issue was important then or they could reserve such an argument for another day. Such a stand baffles this court as in the current case, it is one of the main arguments put up to challenge the validity of the meeting. The law as it stood during the s. 310(b) challenge was the same as it is today. It is not a new provision recently introduced.

[101] It is for the above-mentioned reasons that this court is of the view that there must be a demonstration of a genuine need for the presence of the auditors. It must be made at the earliest possible opportunity. Failure to do so would inevitably invite a suggestion that the need for an auditor at the meeting was an afterthought. The inconsistent approach of the company/plaintiffs in OS 153 does not aid them in defending the argument that there was a genuine need for auditors to be present at the adjourned EGM.

(iii) There Were No Objections Taken By Any Shareholders At The Meeting

[102] From the minutes of the meeting, it was clear that the shareholders debated heavily on the issue of the special notice. If indeed the role of an auditor was crucial to the meeting, a mention of the lack of notice to the auditors would at least have been made. However, nothing about notice to the auditors was raised at the meeting.

[103] This fuels the suspicion that the presence of an auditor at the meeting was not necessary. Only upon preparing for the challenge before this court that the need for a notice to the auditors became important.

(iv) There Was Nothing Before This Court That Suggested The Presence Of Auditor Was Required. The Auditors Did Not File Any Formal Complaint Or Affidavit

[104] The affidavits of the company in OS 131 and the plaintiffs in OS 153 did not state any reason as to why an auditor was needed at the meeting. What was even more perplexing is the failure of the auditor of the company themselves to file any affidavits complaining about the non-service of the notice.

[105] Given that it was the plaintiffs in OS 153 who argued that the presence of an auditor was crucial, at the very least there must be some explanation as to what role the auditors would play at the said meeting and in which part of the business of the meeting concerns the auditor. This is consistent with art. 135 of the company's articles of association. Unfortunately, nothing was shown in the affidavits of the company or the plaintiffs in OS 153.

(v) The Failure Of Issuing A Notice To The Auditor Can Be Cured By The Application Of Section 582 Of The Act

[106] The curative provision for any defect, irregularity, or deficiency of notice is found in s. 582 of the Act. It reads as follows:

> (1) **No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of the opinion that substantial injustice has been or may be caused** which cannot be remedied by any order of the Court.
>
> (2) The Court may, if it thinks fit, make an order declaring that the proceeding is valid notwithstanding any such defect, irregularity or deficiency. (emphasis added)

[107] A read of the provision would suggest that there is a presumption of validity in that the default position in law is that no proceeding is invalid because of any defect, irregularity, or deficiency unless the court is satisfied that substantial injustice has been caused.

[108] The onus lies with the party complaining that the irregularity has caused substantial injustice and it cannot be cured by any other order of the court. It must be shown that there is a nexus between the procedural irregularity that has occurred and the matters of prejudice relied upon as constituting injustice.

[109] The Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770 held that the application of s. 355 of the Companies Act 1965 (the equipollent provision to s. 582 of the Act) is an exercise of discretion by the court.

[110] A similar provision to s. 582 can be found in s. 392 of the Singapore Companies Act. At s. 392(2) of the Singapore Companies Act, it reads:

> 392(2) A proceeding under this Act is not invalidated by reason of any procedural irregularity **unless the court is of the view that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the court** and by order declares the proceedings to be invalid. (emphasis added)

[111] It can be seen that there is a similar presumption of validity. Walter Woon in *Woon's Corporation; Law LexisNexis; 2019* was of the view that the burden lies with the party alleging substantial injustice to demonstrate why such an irregularity can invalidate a proceeding. It does not lie with the persons seeking to uphold the proceedings or meetings.

[112] The key consideration for the court, in the exercise of its discretion, is to ensure that any validation order would not result in injustice to the company or any of its shareholders or creditors. As to what constitutes injustice for the purposes of this section, reference is made to the case of *Re Australian Continental Resources Ltd* (1975) 1 ACLR 405. In explaining the application of s. 366 of the Australian Companies Ordinance 1962, which is in *pari materia* with s. 355 of the Companies Act 1965 and very similar to s. 582 of the Companies Act 2016, Blackburn J held:

> Some argument occurred on the connotation of the word "injustice" in this paragraph. In my opinion it necessarily implies a consideration of the relative gains or losses of the parties involved. Counsel for the respondents sought to persuade me that in effect the word "injustice" meant "loss". The word "prejudice" was the one he actually used in argument, and I use it here in the sense of "loss" or "harm". The gist of his argument was that if the order proposed would cause prejudice to the company, member, or creditor in question, that in itself was enough to preclude the making of the order, without regard to the effect of the order upon the rights of any other party. *I think this construction is incorrect, and that it would make the section far less useful. In my opinion the task of the Court, in complying with paragraph (e), will not be complete merely upon its satisfying itself that the order proposed would not cause prejudice (in the sense indicated) to any*

person of the classes mentioned. Such an order may well do so. Prejudice is not the criterion; justice is; and justice may require that the prejudice to one party if the order were made be balanced against the respective prejudice to other parties if the order were not made. (emphasis added)

[113] The *dicta* of Blackburn J in *Re Australian Continental Resources Ltd* has been consistently approved and adopted by the Malaysian and Singaporean courts. In *Aik Ming (M) Sdn Bhd & Ors*, the Court of Appeal held, in relation to s. 355 of the Companies Act 1965:

> Now it is clear that **the section looks to the justice of a particular** case: it is **not concerned with the question whether prejudice** would result in the making of a validation order. (See *Re Australian Continental Resources Ltd* (1975) 1 ACLR 405) (emphasis added)

[114] In *The Oriental Insurance Company Ltd v. Reliance National Asia Re Pte Ltd* [2008] SLR 121, CA) the Court of Appeal in Singapore held that it must refer to something greater than just ordinary prejudice. (See also *First Nominee (Pte) Ltd v. New Kok Ann Realty Sdn Bhd & Anor* [1982] 1 LNS 108; [1983] 2 MLJ 76).

[115] It follows therefore that a consideration of justice in this case cannot be limited to the defendant's claim that the auditors had been deprived of attending the meeting.

[116] Here, the resolutions in question were passed by a majority of the shareholders. The resolutions had nothing to do with the duties and auditor's business. Indeed, there is no complaint by the auditors that the resolutions would prejudice them let alone cause any injustice of any manner. The prejudice or injustice if at all, is not grounded on any basis.

[117] To invalidate the meeting on this sole point would severely cause injustice to the conveners. The scales of justice would therefore tilt towards this court exercising its discretion in ruling that the failure to issue the relevant notice to the auditors to be appropriately cured by the application of s. 582 of the Act.

Conclusion

[118] It is clear to the mind of this court that the conveners have followed the procedures outlined under the law. In the foregoing, this court rules that OS 131 is allowed and all the prayers therein are granted. It follows that OS 153 is dismissed.