

LESSONS AND INSIGHTS FROM REAL CASE STUDIES

- The Role of a Company Secretary: *Through Fire and Water*

BY OOI SUAN KIM

Barrister, Advocate & Solicitor

Notary Public, Commissioner for Oaths

Company Secretary (SSM)

RICS Mediator, Certified Compliance Professional

O S KIM & ASSOCIATES



Annual Conference 2024
23rd October 2024



Back in 1887....



Barnett, Hoares & Co v South London Tramways Co (1887) 18 QBD 815 (Court of Appeal)

At The High Court: Judge held that the Secretary had no authority to make representations, which were not binding on the company; hence defendants were not liable beyond the amount of the balance actually due from them to the contractors.

At the Court of Appeal: Whether the company secretary has authority to make representations and statements in the absence of evidence of express authority or of any course of business from which authority might be inferred?

Held: *“A secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all; nor can any one assume that statements made by him are necessarily to be accepted as trustworthy without further inquiry, any more than in the case of a merchant it can be assumed that one who is only a clerk has authority to make representations to induce persons to enter into contracts”* as per Lord Esher, M.R.

*“Those words in **Barnett** were approved by Lord Macnaghten in **George Whitechurch Ltd v Cavanagh [1902] A.C. 117, 124**. They are supported by the decision in **Ruben v Great Fingall Consolidated [1906] A.C. 439**. There are referred to in some of the textbooks as authoritative”* as per Lord Denning M.R. in *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd. 1971 2 Q.B. 716.* **BUT TIMES HAVE CHANGED.**

Fast forward to 1971.....



Panaroma Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd (1971) 2 QB 711

[A test case on the ostensible authority of a company secretary]

At the High Court: Judge held that the Company Secretary's conduct, correspondences, and entering into contracts with a luxury car rental company (the Plaintiff) as the Company Secretary for hiring of luxury cars with the Plaintiff binds the Defendant.

At the Court of Appeal: Whether the Defendant is liable for the acts of its Company Secretary acting without authority from the Company? Whether the Company Secretary had ostensible authority to enter into contracts for the hire of these cars?

Held: *"A company secretary is a much more important person nowadays than he was in 1887. He is an officer of the company with extensive duties and responsibilities. This appears not only in the modern Companies Acts, but also by the role which he plays in the day-to-day business of companies. He is no longer a mere clerk. He regularly makes representations on behalf of the company and enters into contracts on its behalf which come within the day-to-day running of the company's business...All such matters now come within the ostensible authority of a company's secretary" as per Lord Denning M.R.*

"... The Secretary is the Chief Administrative Officer of the company. As regards matters concerned with administration, in my judgment, the secretary has ostensible authority to sign contracts on behalf of the company." as per Lord Salmon L.J.



BACK TO MALAYSIAN JURISPRUDENCE
What does Our Courts in Malaysia say?

1. GLOBAL GLOBE PROPERTY (MELAWATI) SDN BHD v JANGKA PRESTASI SDN BHD [2020] 5 MLRA 140 (Court of Appeal)

At the High Court:

- There were two “SPAs”. First SPA was (supposedly) an unlicensed moneylending transaction for a loan of RM1.2 million. The “deposit” paid was stated in the First SPA as RM1.6 million. Later it was discovered by the Defendant there was a “second SPA” (with same date as First SPA) for the same transaction, but with a different “deposit” of RM780,000.00. Defendant’s defence was that the signatures of its two directors were forged in the Second SPA.

1. GLOBAL GLOBE PROPERTY (MELAWATI) SDN BHD v JANGKA PRESTASI SDN BHD [2020] 5 MLRA 140 (Court of Appeal)

At the High Court:

- Judge found that the Defendant had failed to prove that the Second SPA was a forgery and proceeded to grant the Plaintiff's claim.
- Judge allowed Plaintiff's claim for specific performance and for removal of Defendant's caveat and damages to be assessed for wrongful entry of the private caveat by the defendant to prevent transfer of two pieces of land.

1. GLOBAL GLOBE PROPERTY (MELAWATI) SDN BHD v JANGKA PRESTASI SDN BHD [2020] 5 MLRA 140 (Court of Appeal)

At the Court of Appeal:

- Whether the sale and purchase agreement is a genuine transaction or a sham designed to bypass the mandatory and strict requirements of the Moneylenders Act 1951? Of which non-compliance would make the agreement unenforceable in being null and void for breach of statutory prohibitions.
- Burden of proving the genuineness of document: on the party who alleged that the documents were forged? Or on the party who produced it and asserting its validity ?

1. GLOBAL GLOBE PROPERTY (MELAWATI) SDN BHD v JANGKA PRESTASI SDN BHD [2020] 5 MLRA 140 (Court of Appeal)

Held:

- Burden of proving that the document was genuine was on the party who produced it, and asserted its validity, regardless of the fact that it was the other party who alleged that the documents were forged.
- The dissonance between the terms of the First and Second SPA, the conduct of the parties and the overall circumstances of the case, more than supported, on the balance of probabilities, the defendant's contention that the First and Second SPAs and the related documents were a cloak to conceal the real substance of an illegal moneylending transaction charging exorbitant interest.

1. GLOBAL GLOBE PROPERTY (MELAWATI) SDN BHD v JANGKA PRESTASI SDN BHD [2020] 5 MLRA 140 (Court of Appeal)

Held:

- The SPAs were a sham because undergirding it was the real transaction of illegal moneylending business where the plaintiff was more than secured, both in the collateral and legal position, to act leisurely and “legally” as it might be pleased. Therefore, SPAs were unenforceable especially when the remedy of specific performance prayed for was an equitable remedy.
- The First SPA signed was not an acceptable security under Schedule K of the Act for under the NLC, the security transactions recognised were charges and statutory liens. Whilst the Courts had recognised a jual janji transaction as enforceable under contract law, this was an outright sale, instead of a jual janji transaction. But the Plaintiff did not assert this as such. Hence, the transaction was illegal as it was forbidden by the Act and would be against public policy. Accordingly, the transaction was caught by S24(a), (b) and (e) of the Contracts Act 1950.

1. GLOBAL GLOBE PROPERTY (MELAWATI) SDN BHD v JANGKA PRESTASI SDN BHD [2020] 5 MLRA 140 (Court of Appeal)

Section 24 of the Contracts Act 1950:

24 What considerations and objects are lawful, and what not

- The consideration or object of an agreement is lawful, **unless:**
- *(a)* it is **forbidden by a law;**
- *(b)* it is of such a nature that, **if permitted, it would defeat any law;**
- *(c)* it is fraudulent;
- *(d)* it involves or implies injury to the person or property of another; or
- *(e)* the court regards it as immoral, or **opposed to public policy.**

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

1. GLOBAL GLOBE PROPERTY (MELAWATI) SDN BHD v JANGKA PRESTASI SDN BHD [2020] 5 MLRA 140 (Court of Appeal)

How does the Company secretary fit into all of this?

- “[11] *It was later discovered by the defendant during the stage when the plaintiff applied for summary judgment in encl 6 under O 81 of the Rules of Court 2012, that there was another different Sale and Purchase Agreement ("SPA") exhibited, previously unbeknown to the defendant, with the same date and purportedly the same signatures and also a second Directors' Resolution which the company secretary DW5, subpoenaed to give evidence, testified was not found in her Minutes Book. See pp 494-495 of the Record of Appeal. The difference with the first Directors' Resolution at pp 491-493 of the Record of Appeal was that the second one had stated the shop office to be "4½ storey".*

1. GLOBAL GLOBE PROPERTY (MELAWATI) SDN BHD v JANGKA PRESTASI SDN BHD [2020] 5 MLRA 140 (Court of Appeal)

How does the Company secretary fit into all of this?

[13] We do not have any good reason not to believe her as she was merely discharging her duty as a professional company secretary who has no interest in the outcome of the transaction."

1. GLOBAL GLOBE PROPERTY (MELAWATI) SDN BHD v JANGKA PRESTASI SDN BHD [2020] 5 MLRA 140 (Court of Appeal)

LESSONS LEARNT:

The impact of *Global Globe* emphasizes the critical importance of the company secretary's work in meticulous record-keeping and ensuring the accuracy of corporate documents.

The company secretary is key to the outcome of a case and the future of the organisations.

The neutrality, objectivity and impartiality of the company secretary is crucial as not having an interest in the outcome of a case, vis-à-vis self-serving statements from witnesses directly interested in their own case.

2. Sik Hong Photo Sdn Bhd v Ch'ng Beng Choo [2010] 1 MLRA 410 (Court of Appeal)

At the High Court:

- After full trial, the High Court gave judgment for the Plaintiff, declaring that the SPA executed between the Plaintiff and the Defendant, a company incorporated under CA 1965 on 31.10.1980 was null and void. Consequential orders were also ordered for the return of property to the Plaintiff and an account for rentals commencing 31.12.1980.
- Plaintiff entered into SPA with the Defendant to sell the land together with the premises, at a consideration of RM43,000.00, which was to be settled by a transfer to the Plaintiff of the shares in the Defendant at RM100 per share on or before 31.12.1980. Defendant did not transfer the consideration to Plaintiff. Defendant took vacant possession of the property before completion date. Defendant passed 2 resolutions for purpose of transferring the shares. Defendant prepared and executed transfer forms, but never sent to Plaintiff for execution. Plaintiff alleged breach of SPA and demanded that vacant possession of the property be re-delivered and an account for rentals. Plaintiff passed away but suit continued by daughter.

2. Sik Hong Photo Sdn Bhd v Ch'ng Beng Choo [2010] 1 MLRA 410 (Court of Appeal)

At the Court of Appeal:

- Whether the Plaintiff consented to and/or by acquiescence, had agreed that the transfer of fully paid 430 shares was to be deferred to an unspecified date?

2. Sik Hong Photo Sdn Bhd v Ch'ng Beng Choo [2010] 1 MLRA 410 (Court of Appeal)

At the Court of Appeal:

- **Held:** Affirming the High Court, the Court of Appeal held that time is of the essence as parties have agreed on the completion date in the SPA as on or before 31.12.1980, breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract. See Section 56(1) Contracts Act 1950

2. Sik Hong Photo Sdn Bhd v Ch'ng Beng Choo [2010] 1 MLRA 410 (Court of Appeal)

At the Court of Appeal:

- **Held:** Consideration was to be fulfilled by way of transfer of the shares. As this was not done, no acquiescence or waiver could be attributed to the Plaintiff.

2. Sik Hong Photo Sdn Bhd v Ch'ng Beng Choo [2010] 1 MLRA 410 (Court of Appeal)

How does the Company Secretary fit into all of this?

[18] *In our view, this issue of acquiescence and waiver is to be determined by reference to the evidence adduced at the trial. The finding of facts by the High Court revealed that in relation to the defendant's failure to transfer the shares to Madam Ng on or before the completion date, Ch'ng Beng Leong (SD1) has given several contradictory versions viz :*

... ..

(3) *that the company's secretary, one Mr Kong Sin Heng, had not carried out his duties to effect the transfer at the material time; and*

2. Sik Hong Photo Sdn Bhd v Ch'ng Beng Choo [2010] 1 MLRA 410 (Court of Appeal)

How does the Company Secretary fit into all of this?

[19] To extricate himself from the melee of these contradictory versions, SD1 had created what he considered was the "correct reason" ie, the company secretary's dereliction of duties. As SD1 was obviously a witness who had a purpose of his own to serve, his contradictory versions had not been viewed favourably by the trial court."

2. Sik Hong Photo Sdn Bhd v Ch'ng Beng Choo [2010] 1 MLRA 410 (Court of Appeal)

LESSONS LEARNT:

Keep all records, minutes, reminders and correspondences in writing to protect oneself. The importance of responsibility for managing the administrative aspects of share transfers is crucial.

At trial, where there are contradictory explanations / statements by Directors finger pointing back to the actions / inactions / conduct by the company secretary, contemporaneous documentary evidence will be relied upon to vindicate / exonerate oneself.

The action or inaction of the company secretary may be articulated differently in differing version of events by different witnesses especially when there are deaths of witnesses or the original litigants throughout the course of trial.

3. Tan Ban Uu & Anor v Ong Ghin Leong [2017] MLJU 244 (High Court)

A case where the Defendant (company secretary's) contradictory statements, statutory declarations and affidavits gave rise to detrimental consequences in law

3. Tan Ban Uu & Anor v Ong Ghin Leong [2017] MLJU 244 (High Court)

In addition, the outcome was that as a result of statements made by the Defendant, the Plaintiffs ended up losing shareholding, directorships as well as their investments made by the company as a result of the sale of the lands.

3. Tan Ban Uu & Anor v Ong Ghin Leong [2017] MLJU 244 (High Court)

At the High Court:

- Plaintiffs brought an action against the Defendant for negligence, breach of fiduciary duty, breach of trust and malicious falsehood or injurious falsehood. These causes of action were pleaded in the alternative.
- The Defendant, who was the company secretary of 3Q, affirmed a statutory declaration (“SD”) dated 17.10.2005 to confirm amongst others that Khaw Tiew Chai had informed him that the entire consideration stated in the Forms 32A had been paid in full by the Plaintiffs and the said 2 persons to Khaw Tiew Chai and Chen Mun Heng before the Defendant transferred the 80,000 shares pursuant to Form 32A to the Plaintiffs and the said 2 persons.
- The Defendant also stated that he had, in accordance with Khaw Tiew Chai’s instructions, transferred the said shares and issued the original share certificates signed by Khaw Tiew Chai to the Plaintiffs and the said 2 persons. By doing so, the Defendant had confirmed that the Plaintiffs and the said 2 persons had paid the share purchase consideration.

Tan Ban Uu (Cont.)

- In short, the Defendant had by way of his 17.10.2005 (SD) confirmed that the Plaintiffs and the two said persons had paid the share purchase consideration.
- The Penang High Court on 27.1.2006 dismissed Khaw Tiew Chai's OS with costs. The learned Judge in his grounds of judgment relied on various grounds in dismissing the OS, amongst others, the Defendant's 17.10.2005 (SD). Khaw Tiew Chai appealed to the Court of Appeal in Civil Appeal No. P-02-149-2006 against the High Court's decision dated 27.1.2006. Court of Appeal dismissed the appeal on 14.1.2009. Federal Court dismissed the application for leave to appeal on 11.5.2009.

Tan Ban Uu (Cont.)

- The Defendant affirmed 3 affidavits dated 8.5.2007, 21.5.2007 and 16.7.2007 on behalf of Khaw Tiew Chai in the said Civil Appeal, making multiple adverse allegations against the Plaintiffs and the said 2 persons.
- The Defendant's said 3 affidavits had exhibited his various (SDs) and police reports which contained inconsistent and contradictory statements, including and particularly with regard to the fact as to whether the Plaintiffs and the said 2 persons had settled the share purchase consideration to Khaw Tiew Chai.
- In some of these documents, the Defendant alleged that the Plaintiffs and the said 2 persons had not paid the share purchase consideration to Khaw Tiew Chai, whereas in other documents the Defendant alleged otherwise, although prior to that the Defendant in his 17.10.2005 (SD) had confirmed that the 4 of them had fully settled the share purchase consideration to Khaw Tiew Chai.

Tan Ban Uu (Cont.)

- Meanwhile, sometime in July 2008, the Defendant entered a plea of guilty at the Sungai Petani Magistrate's Court to a charge under Section 199 of the Penal Code for giving false evidence in his 17.10.2005 (SD). The Defendant was sentenced to a day's imprisonment and imposed a fine of RM4,000.00.

Tan Ban Uu: Cause of action (Negligence)

- The Plaintiffs therefore contended that the Defendant, in holding the position of **company secretary had breached his duty of care in negligence toward them, had breached his fiduciary duty to them, committed breach of trust against them and/or had committed malicious falsehood against them.**

Tan Ban Uu: The duties and role of the company secretary

*[47] It is therefore clear that **his duties are primarily to the board of directors.** In the case of *Lai Ban Guan v Chan Phaik Boi & Ors* [2012] 4 CLJ 255, it was held that **the company secretary only follows the instructions of the Board of Directors (BOD).** They are not obliged to act on the instructions of individuals but in accordance with resolutions passed by the Company.”*

Court decision: Negligence (dismissed)

- In Lai Ban Guan's case, it was also held that the Code of Ethics for the Company Secretary developed by the Company Commission of Malaysia (CCM) had to be read in the context of the administrative role of the Company Secretary. It is thus neither fair, just or reasonable to impose such a duty upon the company secretary. I therefore find that the Defendant did **not** owe a duty of care in negligence to the Plaintiffs. The Plaintiffs' claim for negligence is therefore dismissed.

Cause of action (Fiduciary Duty)

- Did the Defendant owe a fiduciary duty to the Plaintiffs?

[51] While it is clear that directors stand in a fiduciary relationship to the company, the same cannot be necessarily said of company secretaries. It has been earlier indicated that the duties of the company secretary are confined mainly to the board of directors and the Code of Ethics for the Company Secretary developed by the Company Commission of Malaysia (CCM) has to be read in the context of the administrative role of the Company Secretary.

[52] If a fiduciary relationship to individual shareholders or directors were to be imposed upon a company secretary, it would result in tremendous and onerous duties which are not in line with those expected from someone in that position. If the company secretary acts only in accordance with directions from the board of directors then it is neither fair nor reasonable to impose a fiduciary relationship on him or her vis a vis the shareholders and directors individually. For this reason, policy considerations would also militate against the Defendant owing such duties.

Court decision: Fiduciary Duty (dismissed)

- Did the Defendant owe a fiduciary duty to the Plaintiffs?

[53] In *Goh Kim Ewe & Anor v Cheng Ah Ching & 3 Ors* [2016] AMEJ 1714, it was held that a Company Secretary does not owe fiduciary duties to the company, much less to individual directors. I therefore find the Defendant did not owe a fiduciary duty to the Plaintiff's for the reasons given above. For similar reasons, and although they overlap, I also find that the Defendant did **not** stand in a position of trust to the Plaintiff's and therefore cannot be liable for breach of trust. The Plaintiffs' claim for breach of fiduciary duty and breach of trust is therefore dismissed.

Cause of action (Malicious Falsehood)

- Several contradictory statements were made in SDs, police reports and affidavits.
- **Did the Plaintiff prove the tort of malicious falsehood ?**

Court decision: Malicious falsehood (proven)

- Is the tort of malicious falsehood proven against the Defendant?

[67] The above statements made by the Defendant had constituted brazen and reckless contradictions that could not be rationally explained away by him. They showed that the Defendant displayed scant regard for the truth. I therefore find that from the very nature of the statements made by the Defendant, the Plaintiff's have **proved the ingredient of falsehood.**

Court decision: Statements concern the claimants or their property (proven)

[68] The statements made must also concern the claimant or his property. See *White v Mellin* [1895] A.C 154. Besides being false, the statements must also be calculated to cause actual economic harm. See *Kaye v Robertson* [1991] F.S.R 62 per Glidewell L.J. The statements made by the Defendant was made concerning the property of the Plaintiff's namely, their proprietary rights to the shares. The falsity of these statements further had the effect of causing the Plaintiff's to forfeit and lose their shareholdings and directorships in the said company.

Cause of action (Malice)

- Several contradictory statements were made in SDs, police reports and affidavits.
- **In the making of these statements, had the Defendant acted maliciously?**

Court decision: Malice (proven)

[75] Given the numerous contradictions in the statements made by the Defendant as outlined above, the Defendant's actions clearly amount to a blatant disregard as to whether his statements were true or false. He could not possibly have entertained the belief that what he said in all the statements he made were true. His actions displayed a **reckless abandon for the sanctity of the truth**. I therefore find that the Plaintiffs have proven malice on the part of the Defendant.

Defendant's Defence: Duress and coercion (not proven)

[92] From the overall conduct of the Defendant as alluded to above, it is evident that the plea by the Defendant that he was subject to duress and coercion in making these statements in his (SD's), police reports and affidavits cannot hold true. The Defendant was a company secretary and an educated man. He came across as no "country bumpkin" who would meekly succumb to whatever pressures placed upon him by others. There was therefore nothing that operated to negative malice on the part of the Defendant.

Tan Ban Uu:

Court Decision: Consequences of the
Defendant's malicious falsehood

[98] Under all the circumstances of the case therefore, I find that the Plaintiff has successfully proven their claim on a balance of probabilities against the Defendant for **malicious falsehood**. I therefore allowed the Plaintiff's claim.

Tan Ban Uu: Damages

- **[101]** Actual damage is to be construed as actual and temporal loss which has in fact occurred. See **Clerk and Lindsell on Torts. Eighteenth Edition**, Sweet & Maxwell at paragraph 23-18.
- **[102]** On the facts of this case I find that the Plaintiff's had proven actual loss. The damages that the Plaintiff's have suffered as a result of the Defendant's actions is the actual loss of the consideration that they paid for their shares in the said company as well as the money they invested for the purchase of land by the company. These losses were directly attributable to the Defendant's statements and actions in particular, the plea of guilt under section 199 Penal Code for giving false evidence in his 17.10.2005 (SD) made on July 2008 at the Sungai Petani Magistrates court resulting in the decision in Penang High Court in Civil Suit No: 22-467-2009 on 27.1.2010. The Plaintiff's therefore had suffered special damage as a direct and natural result of the Defendant's actions.
- **[103]** I therefore award each Plaintiff the sum of RM10,000.00 which comprises the sum paid as consideration for the said shares. I also award the sum of RM294,628.00 to each Plaintiff being the amount paid and contributed for the purchase of the lands by the company.
- **[104]** In summary, the Defendant is to pay the sum of RM304,628.00 to the First Plaintiff and the sum of RM304,628.00 to the Second Plaintiff. I also award interests and costs of this action. I however dismiss the claim for exemplary and aggravated damages.
- **[105]** I also disallow the claim of the Plaintiff's for the profits made by the company for the sale of the said lands as being not reasonably foreseeable and too remote as there was no reasonable certainty that the lands could have been sold for a profit and thus speculative. This has also not been pleaded in the Statement of Claim.

LESSONS LEARNT

Stay consistent. Stick to the truthful and honest narrative. Perform company secretary duties professionally.

Ask the hard questions. There is always an answer to your questions. If the answers does not make sense, or if there are no answers forthcoming, do not attempt to fill in the gaps nor assume any gaps nor supplement with your own views. Seek legal advice.

The dots always connects.

4. Xin Fuyuan Ocean Sdn Bhd v Adrian Lau [2021] MLJU 1658

Facts:

- The plaintiff company was incorporated on 20 June 2017 and had an issued capital of 10,000 shares. There were 3 directors who were also shareholders:
- (i) the defendant (DW-1), a local who had 5,500 shares but who has since resigned as a director and divested himself of those shares;
- (ii) Zhang Hua Xin (PW-2) a Chinese national who then had 2,500 shares which were subsequently increased to 3,000 shares but who has since ceased to be a director; and
- (iii) Yan En De, who is also a Chinese national, and had 2,000 shares, but who has since ceased to be a director and shareholder.
- The defendant is also a director and shareholder in Fortune Fishery Enterprise Sdn Bhd (“Fortune Fishery”). The other directors and shareholders in that company are his wife Ting Siu Ling, and two sons, namely, Lau Lih Gong (DW-2) and Lau Lih Yang. The defendant bought over the shares in Fortune Fishery around 29 March 2017, upon which the board was reconstituted to comprise the defendant and the said members of his family.
- **Ng Soon Hong (DW-4) was and is the company secretary of the plaintiff and Fortune Fishery.**

Xin FuYuan (Cont.)

- The plaintiff was set up for the purpose of producing fish meal. In order to carry out the purpose of its business, it required a piece of land.
- The Chinese investors, at that time PW-2 and Yan En De, had entrusted to the defendant the task of finding seafront land suitable for the plaintiff's plant and operations for the production of fish meal as he was the only local director.

Xin FuYuan (Cont.)

- About 6 weeks after the plaintiff was incorporated, Fortune Fishery entered into a tripartite tenancy agreement on 5 August 2017 with Chua Yung Mui and Lucky Ocean for the said land, the TOL, the plant and equipment and licences. It was agreed that the monthly rental would be RM55,000.00, payable in advance on a quarterly basis. It was also agreed that a rental deposit of 6 months was to be paid upon execution of the agreement, that is, RM330,000.00. The tenancy would run from 1 September 2017 and end on 31 August 2032.
- A circular resolution of the plaintiff dated 31 January 2018 authorized it to execute a sub- tenancy agreement with Fortune Fishery for the said land, TOL, plant and equipment for the period 1 March 2018 to 31 August 2032 at a monthly rental of RM132,500.00, inclusive of GST. The circular resolution was signed by the defendant, PW-2 and Yan En De.

Xin FuYuan: Cause of action

- The plaintiff contended that the defendant had, in that position of conflict, acted in **breach of his fiduciary duty** as its director, and caused Fortune Fishery to reap a secret profit of RM70,000 each month from the difference in the monthly rental payable under the main tenancy and the sub-tenancy.

Xin FuYuan: Role of the company secretaries

- A director of a company who has an interest in a contract with the company shall declare the nature of his interest before the board of directors by way of a notice to the board which is deemed to be a sufficient declaration if it specifies the nature and extent of the director's interest.
- Sections 213, 218, 221, 228.
- **[12] The company secretary is bound to record such declaration in the minutes of the meeting at which the declaration was made.**

At trial

- [42] It bears noting that section 138(3) of the Evidence Act 1950 allows the court to grant leave for further cross-examination when evidence or facts have been introduced for the first time through re-examination. Here the new evidence in re-examination is that the defendant had mentioned to PW-2 and Yan En De the opportunity to rent direct from Chua and Lucky Ocean orally and “*in meeting.*” There was no application for leave to cross-examine on that new evidence, not that it was necessary since material evidence cropping up at such a belated stage would in the main carry little, if any weight.
- [43] Indeed, DW-4, **the company secretary of Fortune Fishery and the plaintiff, testified that he was not aware of any physical meeting among the directors in 2017 and the early part of 2018. See NOP, Q & A 344. In fact, the defendant agreed there are no minutes or any record “within Xin Fuyuan to show that you disclose(d) to (its) other directors that you could get Chua’s land to be rented for RM55,000 per month.” See NOP, Q & A 227.**

Court decision:

- **Orders**

- **[76]** The defendant is to pay the plaintiff the sums of RM910,000.00 and RM345,000.00 with interest on the decretal sums at the rate of 5% from 4 February 2020 (the date of the writ) to the date of judgment, and post-judgment till the date of satisfaction.
- **[77]** No aggravated or exemplary damages are awarded. The plaintiff did not pursue them in submissions, and the prayer for these damages is deemed abandoned. As for the defendant's counterclaim, to recapitulate, he sought to abandon it in submissions in reply. It is accordingly struck out.
- **[78]** The defendant is to pay the plaintiff costs of RM20,000.00 subject to payment of the allocatur fee.

Xin FuYuan

LESSONS LEARNT:

- Declaration of interests is mandatory under Companies Act 2016. It is prudent to get the Directors to declare, so as not to get caught in nasty litigations as witnesses.
- Stick to the truth and stay consistent. Stay focused and don't be distracted.
- Record declarations clearly on directors' nature and extent of his / her interests.
- Don't suffer in silence. In doubt, ask for independent views. Seek legal help.

5. Liew Then Song & Anor v. Percetakan Yelian Sdn Bhd & Anor [2019] 9 CLJ 141

Facts:

- Quasi partnership business between family members
- Business was good, at its height many employees employed.
- Relationship between shareholders soured and was bitter. Irretrievable breakdown in relationship amongst the shareholders.
- Winding up petition presented under Section 465 1 (f) and (h) 2016 under the grounds: (i) that the relationship between the parties had broken down irretrievably; and (ii) there was deadlock at the shareholders level
- Deadlock in shareholders' level: Collectively the Petitioners hold 50% and Respondent shareholders hold 50%
- Meetings were inquorate, directors' remuneration could not be approved, annual accounts could not be passed, AGMs and shareholders' meetings could not be held
- Pressure placed on the new company secretary as Respondents proceeded to finalise the minutes of the AGM and purported to pass various resolutions which were obviously void. (former company secretary: resigned / removed? dispute)

5. Liew Then Song & Anor v. Percetakan Yelian Sdn Bhd & Anor [2019] 9 CLJ 141

465 Circumstances in which company may be wound up by Court

- (1) The Court may order the winding up if-
 - (a) the company has by special resolution resolved that the company is to be wound up by the Court;
 - (b) the company defaults in lodging the statutory declaration under subsection 190(3);
 - (c) the company does not commence business within a year from its incorporation or suspends its business for a whole year;
 - (d) the company has no member;
 - (e) the company is unable to pay its debts;
 - **(f) the directors have acted in the affairs of the company in the directors' own interests rather than in the interests of the members as a whole or acted in any other manner which appears to be unfair or unjust to members;**
 - (g) when the period, if any, fixed for the duration of the company by the constitution expires or the event, if any, occurs on the occurrence of which the constitution provide that the company is to be dissolved;
 - **(h) the Court is of the opinion that it is just and equitable that the company be wound up;**
 - (i) the company has held a licence under the Financial Services Act 2013 or the Islamic Financial Services Act 2013, and that the licence has been revoked or surrendered;
 - (j) the company has carried on a licensed business without being duly licensed or the company has accepted, received or taken deposits in Malaysia, in contravention of the Financial Services Act 2013 or the Islamic Financial Services Act 2013, as the case may be;
 - (k) the company is being used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public interest, public order, good order or morality in Malaysia; or
 - (l) the Minister has made a declaration under section 590.

5. Liew Then Song & Anor v. Percetakan Yelian Sdn Bhd & Anor [2019] 9 CLJ 141

Held:

- (1) In a quasi-partnership, a breakdown in the relationship between the shareholders would justify the court in ordering the winding up of the company and it is not necessary to show that there is a lack of probity on the part of the respondents. In this case, the company was a quasi-partnership because it was originally started as a partnership between the first petitioner and LTH before it was converted to a limited company. The shareholders were all family members and the company ran on the basis of *mutual trust and confidence* or was so run, before the relationship completely broke down, when the second and third respondents started suing the first petitioner.
- (2) The court has a discretion to refuse a winding up application made by a complainant whose behaviour had caused the breakdown in relations for 'to do otherwise might be tantamount to allowing a wrongdoer to take advantage of his own wrong.' In this case, however, the *blame* for the breakdown in relationship could not be attributed to either the first petitioner or the second and third respondents. Although, the first petitioner seemed more belligerent but he was not solely to blame for the breakdown in the relationship.

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Held:

(3) There was a deadlock at shareholders' level in that the petitioners had 50% of the shareholding of the company whereas the second respondent had the remaining 50% and the petitioners did not attend the AGM of the company, resulting in the meeting being inquorate.

Nevertheless, the respondents proceeded to finalise the minutes of the AGM and purported to pass various resolutions which were obviously void.

There was no deadlock at the management level because LTS had always voted in the same way as the second and third respondents so they formed the majority on the Board and the business of the company carried on. However, maintaining the unhappy status quo would not be a long term solution. Since the shareholders were deadlocked, directors' remuneration could not be approved, annual accounts could not be passed and annual meetings could not be held or any other shareholders' meetings. As the respondents had acknowledged that the relationship between the parties had irretrievably broken down, it was just and equitable that the company be wound up.

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Held:

(4) Although the company was a going concern, it was not a reason for not granting a winding up order. Further, the second and third respondents were prepared to buy out the petitioners' shares in the company and also the first petitioner's undivided half share in the properties where the company's premises were located. However, the first petitioner had never asked to be bought out and had never imposed any terms for the buying out of his shares. Accordingly, it was not the intention of the first petitioner to file the winding up petition to put pressure on the second and third respondents to agree to his terms for a buy-out. Hence, a winding up order could not be refused on this ground also. Based on the findings that the company was a quasi-partnership and there had admittedly been a complete and irretrievable breakdown in the relationship amongst the shareholders, it was **just and equitable to grant the winding up order prayed for by the petitioners.**

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LESSONS LEARNT:

- Companies can be wound up by Courts even though they are solvent and a healthy ongoing company on just and equitable grounds. There is another avenue besides based on insolvency and the company being unable to pay its debts.
- There are always solutions in every shareholders' dispute and deadlocked situations. No one needs to endure in an unhappy status quo relationship. Shareholders need not suffer in silence. Seek legal advice.
- Never succumb to pressure. Tension amongst shareholders will build up and turn nasty. Seek legal advice.
- Do it right - Legality of resolutions will be tested at trial.



Source: <https://www.tripsavvy.com/universal-orlando-s-roller-coasters-5186479>



Source: <https://www.tripsavvy.com/tallest-roller-coasters-in-the-world-3226411>

THANK YOU

OOI SUAN KIM (kim@oskim.com)

Barrister, Advocate & Solicitor

Notary Public, Commissioner for Oaths

Company Secretary (SSM)

RICs Mediator, Certified Compliance Professional

O S KIM & ASSOCIATES

