IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
ORIGINATING SUMMONS NO.: WA-24NCC-225-04/2018

In the matter of Med-Bumikar MARA Sdn Bhd (No. Syarikat: 8321-V);

And

In the matter of Section 33, 211, 212, 213, 214, 312 and 313 Companies Act 2016 (Act 777);

And

In the matter of Section 38, 41 & 42 Specific Relief Act 1950 (Act 137)

And

In the matter of Order 7, 28 & 88 of the Rules of Court 2012.

BETWEEN

MAJLIS AMANAH RAKYAT (MARA) … PLAINTIFF

AND

1. DATO' ABD RAHIM BIN ABD HALIM
(NRIC No.: 490209-08-5469)

2. NG SENG KONG
(NRIC No.: 540512-10-5867)

3. AQIL BIN TAN SRI DATO' DR HAJI AHMAD AZIZUDDIN
(NRIC No.: 590424-08-5611)

4. YAP SIEW CHIN
(NRIC No.: 610327-08-6116)
5. DATO' MOHD RIDZUAN BIN ABDUL HALIM
(NRIC No.: 430422-02-5313)
6. SHARIFUDDIN BIN SHOIB
(NRIC No.: 470920-08-6289)
7. MED-BUMIKAR MARA SDN BHD
(Company No.: 8321-V)
8. LOOI KOK LOON
(NRIC No.: 670120-10-6241)
9. WONG WEI KHIN
(NRIC No.: 680820-08-5495) … DEFENDANTS

PURSUANT TO ORIGINATING SUMMONS DATED 30.4.2018)

AND BETWEEN

MED-BUMIKAR MARA SDN BHD … PLAINTIFF
(Company No.: 8321-V)

AND

1. MAJLIS AMANAH RAKYAT (MARA)
2. LOOI KOK LOON
(NRIC No.: 670120-10-6241)
3. WONG WEI KHIN
(NRIC No.: 680820-08-5495) … DEFENDANTS

GROUNDS OF JUDGMENT

1. The Originating Summons ("**OS**") herein is filed by the Plaintiff Majlis Amanah Rakyat ("**MARA**"). There is a Counterclaim filed by the 7th Defendant Med-Bumikar Mara Sdn Bhd ("**Med-Bumikar**"). I have allowed the OS and substantially dismissed the Counterclaim. These are the full reasons for my decision.

Introduction

2. The following is the relief sought by MARA in the OS:

(a) a declaration that the appointment of the 5th and 6th Defendant as directors for the 7th Defendant is null and void;

(b) a declaration that the Directors' Circular Resolution dated 9.4.2018 which appointed the 5th and 6th Defendant as additional directors of the 7th Defendant is null and void;

(c) a declaration that all board of directors' meetings attended by the 5th and 6th Defendant and all resolutions passed by the

votes and/or involvement of the 5th and 6th Defendant are null and void;

(d) a copy of the order is presented to the Companies Commission of Malaysia in order to record the annulment of the appointment of the 5th and 6th Defendant as the directors of the 7th Defendant;

(e) 1st to 4th Defendants be ordered to present to the Companies Commission of Malaysia, a notice to amend the register to directors within 14 days from the date of this Order;

(f) the Registrar of Companies and/or Companies Commission of Malaysia is ordered to update the register of directors by cancelling the names Dato' Mohd Ridzuan bin Abdul Halim (NRIC No.: 430422-02-5313) and Encik Sharifuddin bin Shoib (NRIC No.: 470920-08-6289);

(g) costs; and

(h) any further or other reliefs as this Honourable Court deems fit and proper.

3. The following is the relief sought by Med-Bumikar in the Counterclaim:

(a) a declaration that pursuant to section 211 of the Companies Act 2016 and Article 118 of Med-Bumikar MARA Sdn Bhd's Articles of Association, the management and control of the business and affairs of Med-Bumikar MARA Sdn Bhd lies within the exclusive purview of its Board of Directors and therefore the said Board has unfettered discretion to reject the offer dated 7.3.2018 by UMW Holdings Berhad;

(b) a declaration that the 5th and 6th Defendants were validly appointed to the Board of Directors of Med-Bumikar MARA Sdn Bhd;

(c) a declaration that the 2 resolutions passed at the extraordinary general meeting on 30.4.2018 are null and void and/or ultra vires section 211 of the Companies Act 2016 and/or the Articles of Association of Med-Bumikar MARA Sdn Bhd;

(d) costs on a solicitor-client basis or on an indemnity basis to be paid forthwith; and

(e) such further and/or other relief as this Honourable Court deems fit and proper.

Salient Background Facts

4. Med-Bumikar is a private company which holds 193,504,349 ordinary shares, equivalent to 49.5% interest in MBM Resources Berhad, a public company ("**MBMR**"). Med-Bumikar's wholly owned subsidiary company, Central Shore Sdn Bhd ("**Central Shore**"), holds 2,213,402 MBMR shares, equivalent to 0.57% interest in MBMR.

5. MBMR, in turn, holds 22.58% interest in Perodua Berhad, a public company ("**Perodua**").

6. Med-Bumikar's shareholders and their respective shareholding is as follows:

No.	Name of Shareholders	Parties/Relationship with Parties to this Action	Shareholding (%)
1.	Majlis Amanah Rakyat	Plaintiff/MARA	29.18
2.	Prestige Automobiles Services Sdn Bhd	D1 is a director and the majority shareholder	11.74
3.	Ng Seng Kong	D2	0.64
4.	NGT Holdings Sdn Bhd	D2 is a director and shareholder	3.8
5.	Harmony Parade Sdn Bhd	D2 is a director and NGT Holdings Sdn Bhd is a shareholder	6.41
6.	Aqil Bin Tan Sri Dato' Dr Haji Ahmad Azizuddin	D3	1.87
7.	Azizuddin Sdn Bhd	D3 is a director and shareholder	11.60
8.	Rosen Sdn Bhd	D4 is a director and shareholder	11.75
9.	Looi Kok Loon	D8	1.42
10.	Wong Wei Khin	D9	1.71
11.	K P Looi Holdings Sdn Bhd	D8 is a director and shareholder	10.29
12.	L.T. Wong (Holdings) Sdn Bhd	D9 is a director and shareholder	9.28
13.	Wong Fay Ling	-	0.18
14.	Turisaina Binti Hussin	-	0.13

7. In early March 2018 and before the relevant events leading to MARA's Originating Summons, the Board of Directors of Med-Bumikar comprised of 7 directors and 3 alternate directors as follows:

No.	Name of Directors	Parties	Position
1.	Dato' Abd Rahim bin Abd Halim	D1	Director
2.	Ng Seng Kong	D2	Director
3.	Aqil Bin Tan Sri Dato' Dr Haji Ahmad Azizuddin	D3	Director
4.	Yap Siew Chin	D4	Director
5.	Datin Junaidah binti Abdul Majid	Representative director of MARA	Director
6.	Looi Kok Loon	D8	Director
7.	Wong Wei Khin	D9	Director
8.	Muhamad Zaki bin Jali	-	Alternate Director to Datin Junaidah binti Abdul Majid
9.	Wong Fay Lee	-	Alternate Director to D9
10.	Nazli binti Abd Rahim	-	Alternate Director to D1

8. On 7.3.2018, UMW Holding Berhad issued an offer letter to Med-Bumikar to purchase Med-Bumikar's 49.5% stake in MBMR, for a purchase consideration of RM2.56 per share ("**UMW Offer**").

9. The Board of Directors of Med-Bumikar held a Board meeting on 8.3.2018 to, among other things, consider the UMW Offer. The Board of Directors resolved to appoint an independent financial advisor to advise the Board of Directors on the UMW Offer.

10. On 12.3.2018, MARA issued a requisition notice ("**Requisition Notice**") to Med-Bumikar's Board of Directors to convene an Extraordinary General Meeting ("EGM") for the purpose of passing 2 ordinary resolutions, which in brief, are as follows:

i) Ordinary Resolution to accept the UMW Offer at a purchase consideration of RM2.56 per share ("**Resolution 1**"); and

ii) Ordinary Resolution to appoint En. Muhamad Zaki bin Jali and Ms. Wong Fay Lee to Med-Bumikar's Board of Directors ("**Resolution 2**").

11. Another Board of Directors' Meeting was held on 26.3.2018 where the appointed independent financial advisor, RHB Investment Bank Berhad ("**RHB**") gave its evaluation and opinion on the UMW Offer. Essentially, RHB was of the view that the purchase consideration of the UMW Offer of RM2.56 per share was fair but not reasonable. RHB did not advise that the UMW Offer should be rejected; it made no recommendation as to acceptance or rejection.

12. It was resolved by majority of directors, the 1st to 4th Defendants, during the Board of Directors' Meeting on 26.3.2018, to:

(i) decline the UMW Offer. It should be noted that it was specifically stated that this did not mean an end to negotiations; and

(ii) reject MARA's Requisition Notice.

13. Soon after, the company secretary of Med-Bumikar circulated a Directors' Circular Resolution ("DCR") to appoint the 5th and 6th Defendants to Med-Bumikar's Board of Directors. The DCR was signed by the 1st to 4th Defendants (and therefore passed by majority) on or before 9.4.2018, prior to the circulation of the DCR to other directors on the Board. The 8th Defendant received the signed DCR on 11.4.2018 while MARA received the signed DCR on 12.4.2018.

14. Subsequent to the rejection of its Requisition Notice by the Board of Directors on 26.3.2018, MARA issued the notice of EGM on 12.4.2018 to convene an EGM on 30.4.2018 to table Resolution 1 and Resolution 2 ("**EGM Notice**").

15. On 23.4.2018, a faction of shareholders opposed to the UMW Offer (who called themselves "**the Opponents' Faction**") filed an

Originating Summons against MARA, MARA's representative director, the 8th and 9th Defendants and Med-Bumikar alleging, amongst others, that they had been oppressed as minority shareholders of Med-Bumikar ("**Oppression Suit**"). An interim injunction was also sought by the Opponents' Faction to restrain the EGM scheduled on 30.4.2018. The interim injunction application was dismissed by the Court on 25.4.2018, paving the way for the EGM to be held on 30.4.2018. The Oppression Suit itself was eventually discontinued on 15.5.2018.

16. On 30.4.2018, MARA convened an EGM pursuant to the EGM Notice and the shareholders present and voting unanimously passed Resolution 1 and Resolution 2. Pursuant to Resolution 1, it was resolved inter alia that approval be given to the company to accept the UMW Offer. In addition to the above resolution, the members requested the Board to reconsider the offer from UMW and form a Board Task Force Committee comprising at least 2 members from MARA to negotiate with UMWH for better/higher price, acting in the best interest of the company.

17. Pursuant to Resolution 2, En. Mohamad Zaki bin Jali and Ms Wong Fay Lee were appointed as directors of the company.

Findings Of The Court

18. The following articles of the Articles of Association of Medi-Bumikar ("**AA**") are relevant:

(a) Article 68 of AA

> *"The Directors shall call an extraordinary General Meeting whenever a requisition in writing signed by members of the Company holding in the aggregate not less than one-tenth in amount of the issued capital of the Company, upon which all calls or other sums then due shall have been paid and stating fully the objects of the meeting shall be deposited at the office of the Company. Such requisition may consist of several documents in like form each signed by one or more of the requisitionists".*

(b) Article 69 of AA

> *"If the Directors do not, within twenty one days from the date of the requisition being so deposited, proceed to convene a meeting, the requisitionists or any of them representing more than one half of the voting rights of all of them may themselves convene the meeting, but*

any meeting so convened shall not be held after three months from the date of such deposit".

(c) Article 75 of AA

"All business transacted at an annual general meeting, other than business which, under these articles ought to be transacted at an annual general meeting and all business transacted at an extraordinary general meeting, shall be deemed special".

(d) Article 103 of AA

"Until otherwise determined by general meeting the number of Directors including the Managing Director shall not be less than six (6) nor more than nine (9), but in the event of any casual vacancy occurring and reducing the number of Directors below the aforesaid minimum the continuing Director may act for the purpose of filing up such vacancy or vacancies or of summoning a general meeting of the company".

(e) Article 104 of AA

"The Directors shall have power at any time and from time to time to appoint any other qualified person as Director, either to fill a casual

vacancy or as an addition to the Board, but so that the total number of Directors shall not at any time exceed the maximum number fixed by or pursuant to Article 103 but any Director so appointed shall hold office only until the next following annual general meeting of the company, and shall then be eligible for re-election".

(f) Article 126 of AA

"The Company may from time to time in General Meeting increase or reduce the number of Directors and determine in what rotation such increased or reduced number shall go out of office".

(g) Article 127 of AA

"Any casual vacancy occurring in the Board of Directors may be filled up by the Directors, but any person so chosen shall retain his office only until the next following annual general meeting of the Company, and shall then be eligible for re-election".

(h) Article 129 of AA

"The Directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings and proceedings as they think fit and may from time to time determine the quorum necessary for

the transaction of business. Unless otherwise determined, three directors shall form a quorum, if one of them is a MARA director".

(i) Article 137 of AA

"A resolution in writing signed by a majority of the directors for the time being present in Malaysia, shall be as valid and effectual as if it had been passed at a meeting of the directors duly convened and held. Any such resolution may consist of several documents in like form including facsimile, each signed by one or more directors".

19. Central to the OS and the defence of the Counterclaim is the contention by MARA and the 8th and 9th Defendants that, in appointing the 5th and 6th Defendants as directors of Med-Bumikar, the 1st to 4th Defendants as directors of Med-Bumikar who signed the DCR did not act in good faith and for a proper purpose.

20. In addition to that contention, MARA also submitted that in the light of Article 129 of the AA and other similar articles, reading the articles as a whole, it should be construed that unless MARA's representative signed the DCR, it is not valid. I cannot agree with that submission of MARA. Whether it is by an inadvertent omission to amend Article 137 or whatever, the wording of Article 137 merely says that the DCR has to be

signed by a majority of the directors of the company and does not stipulate that one of them must be the MARA representative.

21. MARA also contends that it was resolved in the DCR that the appointment of the 5th and 6th Defendants shall be with effect from the date of their date of execution of the Statutory Declaration made pursuant to Section 201 of the Companies Act 2016 and there was no such Statutory Declaration signed. Section 201 does not require the execution of a Statutory Declaration, only of a Declaration and the Declaration that was signed by the 5th and 6th Defendants is undated. I accept the submission of Learned Counsel for the 1st to 7th Defendants that the reference to a Statutory Declaration is merely a typographical error as the predecessor to Section 201 required the execution of a Statutory Declaration but only a declaration is required in section 201 of the Companies Act 2016. I also find that the fact that the Declaration signed by the 5th and 6th Defendants is not dated does not affect the validity of their appointment as directors, only the date of their appointment coming into effect because it is not in dispute that they have signed the undated Declaration.

22. As regards the contention that the appointment of the 5th and 6th Defendants was not made by the 1st to 4th Defendants in good faith and

for a proper purpose, the proposition that a director of a company shall at all times exercise his powers in accordance with the Companies Act, for a proper purpose and in good faith in the best interest of the company is trite and is set out in section 231(1) of the Companies Act 2016.

23. In the case of ***Howard Smith Ltd v Ampol Petroleum Ltd*** [1974] AC 821 at p 835, the Privy Council held that the test to determine whether directors had acted with proper purpose is primarily an objective one, as follows:

> *"In their Lordships' opinion it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of its is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls".*

24. In the case of ***Extrasure Travel Insurances Ltd and another v Scattergood and Another*** [2003] 1 BLCL 598 at p 619 referred to by Learned Counsel for the 8th and 9th Defendants, the English High Court set out a four stage approach in determining whether directors have acted for a proper purpose as follows:

> *"[92] The law relating to proper purposes is clear, and was not in issue. It is unnecessary for a claimant to prove that a director was dishonest, or that he knew he was pursuing a collateral purpose. In that sense, the test is an objective one. It was suggested by the parties that the court must apply a three-part test, but it may be more convenient to add a fourth stage. The court must:*
>
> *92.1 Identify the power whose exercise is in question;*
> *92.2 Identify the proper purpose for which that power was delegated to the directors;*
> *92.3 Identify the substantial purpose for which the power was in fact exercised; and*
> *92.4 Decide whether that purpose was proper".*
>
> *[93] Finally, it is worth noting that the third stage involves a question of fact. It turns on the actual motives of the directors at the time: Re a company, ex p Glossop [1988] BCLC 570 at 577".*

25. The Court also held that directors should not use their powers for the purpose of influencing the outcome of a general meeting. In ***Eclairs Group Ltd And Another v JKX Oil and Gas Plc*** [2016] 3 All E R 641 at p 649 the Supreme Court held as follows:

> *"The important point for present purposes is that the proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason. It follows that the test is necessarily subjective. 'Where the question is one of abuse of powers,' said Viscount Finlay in Hindle v John Cotton Ltd 1919 56 SLR 625 at 630, 'the state of mind of those who acted, and the motive on which they acted, are all important".*
>
> *[16] A company director differs from an express trustee in having no title to the company's assets. But he is unquestionably a fiduciary and has always been treated as a trustee for the company of his powers. Their exercise is limited to the purpose for which they were conferred. One of the commonest applications of the principle in company law is to prevent the use of the directors' powers for the purpose of influencing the outcome of a general meeting. This is not only an abuse of a power for a collateral purpose. It also offends the constitutional distribution of powers between the different organs of the company, because it involves the use of the board's powers to control*

or influence a decision which the company's constitution assigns to the general body of shareholders".

26. In ***Regentcrest plc (in liquidation) v Cohen & Anor*** [2001] 2 BCLC 80, the Court held that the Court had to consider whether the director honestly believed that the action taken by him was in the interests of the company. Parker J stated, at page 105, as follows:

"[120] The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see Palmer's Company Law para 8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test".

27. Both ***Regentcrest plc (in liquidation) v Cohen & Anor*** and ***Charterbridge Corp Ltd v Llyods Bank Ltd*** were cited with approval by the Federal Court in the recent case of ***Tengku Dato' Ibrahim Petra***

bin Tengku Indera Petra v Petra Perdana Bhd and another appeal [2018] 2 MLJ 177. The Federal Court stated, at page 231, that the test for duty of good faith and in the best interest of the company has both subjective and objective elements.

> *"[166] In our judgment, the correct test combines both subjective and objective tests. The test is subjective in the sense that the breach of the duty is determined on an assessment of the state of mind of the director; the issue is whether the director (not the court) considers that the exercise of discretion is in the best interest of the company....*
>
> *[167] The test is objective in the sense that the director's assessment of the company's best interest is subject to an objective review or examination by the courts...".*

28. The Court of Appeal in ***Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals*** [2012] 3 MLJ 616 considered the duty of directors to act in good faith and for a proper purpose. It was held that if directors exercised their powers for some ulterior purpose or its exercise were to be carried out in an improper manner, even where it is substantially altruistic, such an exercise of powers could be set aside. The Court held at page 657:

"[262] The scope of the duty to act bona fide in the best interests of the company is best propounded in the judgment of Kirby P in Darvall v North Sydney Brick and Tile Co (1989) 16 NSWLR 260 at pp 281-282, where His Lordship puts across in clear terms the exercise of the director's powers. His Lordship, inter alia, said that:

> *"...In considering whether the actions of directors were bona fide in the best interests of the company as a whole, the court is not obliged to look at the company as in some way disembodied from its members. The phrase 'bona fide for the benefit of a company as a whole' is derived from Lord Lindley's comments in Allen v Gold Reefs of West Africa Ltd [1900] 1 Ch 656 at p 671. It tends, by overuse without fresh reflection to become a 'cant expression (see Brennan J in New South Wales Rugby League Ltd v Wade). In the present as in other contexts, the best interest certainly included the interest of the shareholders as the corporators with a direct state in take-over offer.*
>
> *Honest behaviour on the part of directors is expected. However, it is not in itself enough to sustain their conduct if their conducts is otherwise determined to have been carried out for an improper of collateral purpose: Howard Smith Ltd v Ampol Petroleum.*
>
> *Similarly, statements by directors about their subjective intentions, or beliefs, are not conclusive of their bona fides or for the purposes for*

which they acted as they did (Advance Bank Australia Ltd v FAI Insurance Ltd at p 485). Even though the motives for exercising a fiduciary power are substantially altruistic, if those altruistic motives were actuated by an ulterior or impermissible purpose or were carried out in an improper manner, they will be set aside. This is so in order to ensure the integrity of the actions of the fiduciary and to require that the fiduciary's decisions are made bona fide and for proper and relevant purposes.

Nevertheless, although not conclusive, the court can look at the deterred intentions, of directors in order to test their assertions (which will often be self-protective) against the assessment by the court of what, objectively, was in the best interest of the company at the relevant time..."

29. By their own admission, the 1st to 4th Defendants represent shareholders who hold minority control but constitute the majority at the board of directors' level and who are opposed to the acceptance of the UMW Offer. They call themselves the Opponents' Faction. The shareholders aligned to MARA and the 8th and 9th Defendants who are in favour of the UMW Offer are referred to by the 1st to 7th Defendants as the Proponents' Faction. The Proponents' Faction hold majority control as shareholders but they are a minority on the board of directors.

30. The UMW Offer was made by letter dated 7.3.2018 and considered for the first time at the Board of Directors meeting of Med-Bumikar on 8.3.2018.

31. It is not disputed that on 12.3.2018, MARA issued the Requisition Notice to the Board of Directors of Med-Bumikar, which included notice of Resolution 2, a resolution to appoint 2 additional directors to the Board.

32. MARA's Requisition Notice was rejected by the 1st to 4th Defendants during the Board of Directors' Meeting on 26.3.2018. The 3 other directors being MARA's representative, the 8th and 9th Defendants voted to accept the Requisition Notice; being in the minority, they were defeated.

33. The minutes of the Board Meeting on 26.3.2018 reveal that the 1st Defendant as Chairman of the meeting stated that the Requisition Notice was "defective" as Resolution 1 had to be passed by "special resolution" whereas the Requisition Notice had referred to ordinary resolutions. He relied on Article 75 of the AA which states:

"All business transacted at an annual general meeting, other than business which, under these articles ought to be transacted at an annual general meeting, and all business transacted at an extraordinary general meeting, shall be deemed special".

34. However, there is a distinction between "special business" and "special resolution."

35. Reference can be made to the case of ***Wong Pak Sum v Hong Kong Furniture & Decoration Trade Association Ltd*** [2013] HKCU 2774 where the plaintiff argued that a resolution was "special business" and therefore could only be passed by "special resolution". The Court held:

"[8] In my view, the plaintiff has confused the concepts of special business and business requiring special resolution. They are not the same. He may have been misled by the word "special" in the term "special business" to this that such business is required to be approved by special resolution". There is, in my opinion, no such requirement in law or in the articles of the defendant.

...

[10] Special business, on the other hand, is not a term defined by reference to the type of resolution required to transact it... The significance attached to an item of business being special business is in the contents of the notice that has to be given to members...

...

[13] The fact that an item of business is special business therefore has implications on the requirements relating to notice and form of proxy as explained above. There is no further provision in the Companies Ordinance requiring special business to be transacted by special resolution of the company. Nor is there any stipulation to that effect in the model articles in Table A or Table C or in the articles of association of the defendant in this case".

36. The minutes of the Board Meeting on 26.3.2018 also reveal the 1st Defendant expressing his view that it was "unfair for 50% + 1 shareholders" to "decide on the disposal of 95% of the assets of Med-Bumikar." I agree with Learned Counsel for the 8th and 9th Defendants that this is not a proper consideration for a director, whose concern should be what is permitted under the law.

37. MARA fulfilled the shareholding requirement under the AA and section 311 of the Companies Act 2016 (a shareholder holding at least 10% of the shareholding) to requisition for an EGM and yet its

Requisition Notice was rejected. I find that the rejection of the Requisition Notice was a breach by the 1st to 4th Defendants of their duties under the articles and section 311of the Companies Act 2016 (see ***Dato' Hamzah Abdul Majid & Anor v Wembley Industries Holdings Bhd*** [1998] 4 CLJ 471).

38. Having rejected MARA's Requisition Notice, the Board then made it clear that the rejection of Requisition Notice did not stop MARA from convening an EGM. In other words, the 1st to 4th Defendants knew it was likely that MARA would issue a notice for an EGM on its own, as it was entitled to do under the law. Specifically, Section 313(1) of the Companies Act 2016 allowed MARA to do so.

39. The 1st to 4th Defendants, having rejected MARA's Requisition Notice, and being aware that it was a matter of time before MARA convened an EGM through its own notice, caused the DCR to be passed. The 1st to 4th Defendants signed the DCR on or before 9.4.2018 before the same was then sent to the 8th and 9th Defendants and MARA.

40. Articles 103, 104 and 137 of the AA of Med-Bumikar provide as follows:

(a) Article 103 of AA

"Until otherwise determined by general meeting the number of Directors including the Managing Director shall not be less than six (6) nor more than nine (9), but in the event of any casual vacancy occurring and reducing the number of Directors below the aforesaid minimum the continuing Director may act for the purpose of filing up such vacancy or vacancies or of summoning a general meeting of the company".

(b) Article 104 of AA

"The Directors shall have power at any time and from time to time to appoint any other qualified person as Director, either to fill a casual vacancy or as an addition to the Board, but so that the total number of Directors shall not at any time exceed the maximum number fixed by or pursuant to Article 103 but any Director so appointed shall hold office only until the next following annual general meeting of the company, and shall then be eligible for re-election".

(i) Article 137 of AA

"A resolution in writing signed by a majority of the directors for the time being present in Malaysia, shall be as valid and effectual as if it had

been passed at a meeting of the directors duly convened and held. Any such resolution may consist of several documents in like form including facsimile, each signed by one or more directors".

41. As at 8.4.2018, Med-Bumikar's Board of Directors comprised 7 directors. Under Article 103, there were 2 seats available on the Board of Directors. MARA had, through its Requisition Notice, evinced a clear intention to call for an EGM to enable the shareholders to vote on Resolution 1 on the UMW Offer and Resolution 2 for the appointment of 2 directors.

42. It is obvious that the real or predominant reason the 1st to 4th Defendants appointed the 5th and 6th Defendants as additional directors was to prevent MARA from appointing 2 additional directors at the EGM. The 1st to 4th Defendants had not shown why there was a need to appoint 2 additional directors at that juncture and why the appointment could not have been tabled at a physical directors' meeting. It was obviously done by way of DCR in order to get around the requirement for a representative of MARA to be present to constitute a quorum at a directors' meeting.

43. The Hong Kong case of ***Tsang Wai Lun Wayland & Anor v Chu King Fai & Ors*** [2009] HCU 1195 is instructive. In that case, the Board of Directors refused to convene a special general meeting (equivalent to our EGM) pursuant to a shareholder's requisition notice. The shareholder had sought the convening of a meeting to appoint 9 directors. Instead, the Board of Directors proceeded to appoint 5 directors under the powers granted pursuant to Article 115 of the company's Bye-Laws. The Court held that while the Bye-Laws conferred power on the directors to appoint additional directors (as it also did in our case here), this power could not be used to defeat the right of shareholders. It can be seen that the facts of this case are very similar to the facts of the present case. The Court stated:

> *"[61] But suppose that the power under Art. 115 is exercised for the exclusive or predominant purpose of preventing Grand Field's shareholders in General Meeting from exercising their right to appoint additional directors under Art. 114. It seems to me that such exercise of the power under Art. 115 would constitute a unilateral interference with a constitutional right given by the Bye-Laws to Grand Field's shareholders. Such interference would therefore be impermissible. The power under Art 115 is being exercised solely or primarily to keep out such additional directors as the General Meeting (in the exercise*

of its rights) may appoint. That would be contrary to the covenant in Art 114 of the Bye-Laws.

[62] In Piercy v. Mills [1920] 1 Ch 77, Peterson J stated (at 85-5):

> *"Directors are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company, or merely for the purpose of defeating the wishes of the existing majority of shareholders. That is, however, exactly what has happened in the present case. With the merits of the dispute as between the directors and the plaintiff I have no concern whatever. The plaintiff and his friends held a majority of the shares of the company, and they were entitled, so long as that majority remained, to have their views prevail in accordance with the regulations of the company; and it was not, in my opinion, open to the directors, for the purpose of converting a minority into a majority, and solely for the purpose of defeating the wishes of the existing majority, to issue the shares which are in dispute in the present action".*

[63] Piercy concerned an issue of shares which was solely or predominantly motivated by a board's desire to prevent a majority shareholder plaintiff from nominating himself and his brothers as directors. The board sought to shut out the plaintiff by using the board's power to issue shares in such a way as to dilute the plaintiff's majority shareholding. Peterson J held that was an abuse

of the power entrusted to the board. The power to issue shares was to be used when the company needed additional capital. The company not requiring more capital, it was wrong to issue shares merely to entrench the board's control of the company. Such wrongful issue was a breach of the majority shareholder's right under the company articles to push through a resolution for the appointment of certain persons as directors in the course of an annual general meeting.

[64] The present situation is analogous.

[65] Of course, the Board could appoint additional directors to strengthen its expertise. But where the Board's predominant purpose was to keep out the appointment by an SGN of additional directors and thereby to entrench control of management by the Boards and the 5 Directors, the Board was acting in contravention of the contract contained in the Bye-Laws. The Board was attempting to stop Grand Field's shareholders from expressing their views in accordance with the Bye-Laws as to who should be on the Board.

…

[76] Art. 130 of Grand Field's Bye-Laws vests the function of management on the board of directors as opposed to the general meeting. The majority of shareholders accordingly cannot control the directors in the proper exercise of such function.

[77] Conversely, the directors cannot seek to use their powers to obstruct the proper exercise by shareholders in general meeting of a right vested in them

by the company's articles. In such case, the directors would be straying outside of the management function which is properly theirs and trespassing onto the constitutional rights of the shareholders in general meeting.

[78] Art 114 confer on shareholders a constitutional right to appoint additional directors by a majority in general meeting. It could not be a proper use of the directors' powers under Art 115 to attempt to prevent shareholders from exercising such constitutional right. Such would be the directors "interfere[ing] with that element of the company's constitution which is separate from and set against their powers". Such could not be within the permissible range of uses of the power under Art 115. On the contrary, such would be an abuse of the power under Art 115 which was presumably conferred to enable a board to enhance the range of ability, competence or expertise available to it for the better execution of the management function vested by Art 130".

44. There was previously a proposal made in late 2017 to appoint a single additional director (the 5th Defendant) but in any event, the credentials of the proposed director were never presented and it appeared that the appointment was in relation to the granting of share options to the 1st Defendant and one Poh Chee Kwan which will dilute the shareholdings of the other shareholders. That Board Meeting scheduled for 11.1.2018 was postponed due to "unforeseen circumstances" and the issue was never raised again until the DCR appointing the 5th and 6th Defendants as additional directors.

45. The reasons given by the 1st to 4th Defendants for the appointment of the 5th and 6th Defendants as additional directors are as follows:

(a) in late December 2017, an intention was already formed to appoint the 5th Defendant to the Board and but for the aborted meeting on 11.1.2018, the 5th Defendant would have been appointed.

(b) the intention to appoint the 5th Defendant was on the basis he was a former Director General of MARA, a former Chairman of Med-Bumikar and MBMR and currently a consultant to the latter.

(c) the intention to appoint the 6th Defendant was premised on his directorship in Rubberex Corporation (M) Berhad, a public listed company in which Med-Bumikar holds 21% in equity. The 6th Defendant has consistently discharged its duties as a director with impartiality and in the best interest of Rubberex.

(d) the 5th and 6th Defendants are not shareholders of Med-Bumikar and they hold impeccable credentials and records in their professional careers. Their vast experience in the corporate sectors would be an added advantage to the Board in the discharge of its duties.

46. However I do not give any weight to the reasons stated by the 1st to 4th Defendants. The timing of the appointment of the 5th and 6th Defendants, in light of the proposed resolution by MARA to appoint 2 additional directors at the EGM are determinative of the real intention behind the appointing of the 5th and 6th Defendants. It is to scuttle the attempt by MARA as a shareholder to appoint 2 directors of the company, to prevent MARA from exercising its right as a shareholder to appoint directors to the Board of the company.

47. Learned Counsel for the 1st to 7th Defendants failed to convincingly distinguish the ***Tsang Wai Lun*** case. He submitted that that case was decided on the basis that the shareholders were entitled or empowered to appoint directors whereas in the present case, the shareholders were not entitled in law to appoint directors at general meeting. I cannot agree with such submission. In the case of ***Worcester Corsetry,***

Limited v Witting [1936] 1 Ch 640, in respect of a company with articles of association which are in pari material with the AA of Med-Bumikar, the court held that the power of appointing additional directors had not been delegated to the directors so as to exclude the inherent power of the company in general meeting to appoint directors. Furthermore, section 202 (2) of the Companies Act 2016 provides that all subsequent directors (subsequent to the person named as director in an application for incorporation of a company) may be appointed by ordinary resolution. Learned Counsel for the 1st to 7th Defendants submitted that this power to appoint directors can only be exercised in an annual general meeting but not in an EGM. I do not agree. There is nothing stated in section 202(2) of the Companies Act 2016 to limit the appointment of directors by the general meeting by ordinary resolution.

48. In the Singapore High Court case of ***Lim Koei Ing v Pan Asia Shipyard & Engineering Co Pte Ltd*** [1995] 1 SLR (R) 15, it was held that as the Board of Directors failed to provide any credible explanation for the appointment of additional directors, the appointment was not in the best interests of the company. The Court stated, at page 29 that:

> *"Be that as it may, the effect after the appointment of the four new directors was that the board of the defendants did not fairly reflect the shareholders'*

interests in the defendants. The minority shareholders in fact had seven directors on the board whereas the majority shareholders only had two. At the trial there was no credible explanation as to why the services of these new directors were required by the defendants at the particular point of time. Accordingly, I accepted the defendants' submission that the directors were not appointed in the best interests of the defendants".

49. I accordingly am of the view that the directors of Med-Bumikar did not act in good faith and for a proper purpose in appointing D5 and D6 as additional directors of the company.

50. I agree with the submission of Learned Counsel for the 8th and 9th Defendants that the 1st Defendant's averment that the DCR had been purportedly ratified at a purported Board of Directors' Meeting on 25.4.2018 is ill-conceived. The purported Board of Directors' Meeting on 25.4.2018 was not properly constituted as there was a lack of quorum due to the absence of MARA's representative director. Any resolutions purportedly passed during this improperly constituted meeting are invalid.

51. Article 129 of the AA prescribes that: "Unless otherwise determined, three directors shall form a quorum, if one of them is a MARA director". Therefore, MARA's representative directors must be

present to form a quorum for the Board of Directors' Meeting. MARA's representative director, Datin Junaidah Binti Abdul Majid, was not present at the purported Board of Directors' Meeting on 25.4.2018 and had, on 24.4.2018, voiced her objections towards the convening of this purported Board of Directors' Meeting. The 8th and 9th Defendants also objected to this purported Board of Directors' Meeting.

52. I hold that the 1st Defendant's contention that MARA's representative need not be present to form a quorum if there were more than 3 directors present is not a proper construction of article 129.

53. In the High Court case of ***Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors*** [1991] 1 MLJ 211, there was a provision which required the presence of directors of a specified group to form quorum. The High Court held that due to the absence of the director from the specified group at the meeting, there was no quorum and accordingly any resolutions purportedly passed at the meeting were invalid.

54. In the circumstances, there was no valid ratification of the DCR. The fact that the 1st to 4th Defendants had seen fit to convene a directors' meeting to ratify the DCR is the recognition on their part that the DCR is

defective. Any such ratification would not, in any event, cure the lack of good faith and proper purpose on the part of the directors in appointing the 5th and 6th Defendants.

55. Since the appointment of the 5th and 6th Defendants as additional directors had not been made in good faith and for proper purpose, the appointment is invalid. I would accordingly grant orders in terms of MARA's OS.

56. As regards the Counterclaim of the 7th Defendant, insofar as the shareholders in the EGM had purported to bind the Board of Directors of the company to act in a particular manner, I am of the view that it is not open to the shareholders to do so. Pursuant to Section 211 of the Companies Act 2016, it is provided as follows:

> *"**Section 211. Functions of Board***
>
> *(1) The business and affairs of a company shall be managed by, or under the direction of the Board.*
>
> *(2) The Board has all the powers necessary for managing and for directing and supervising the management of the business and affairs of the company*

subject to any modification, exception or limitation contained in this Act or in the constitution of the company.

57. Article 118 of the AA of Med-Bumikar provides that the management and control of the business and affairs of the company shall be vested in the directors.

58. It is settled law that if powers of management are vested in the directors, only they alone can exercise these powers, which shareholders in general meeting cannot usurp.

59. ***Automatic Self-Cleansing Filer Syndicate Company, Limited v Cunninhame*** [1906] 1 CH 34, was a case where the directors of a company acting on the powers of management delegated to them under the article of association of the company, refused to sell the assets of the company resolved upon by the company in general meeting, as it was in their opinion, no in the interest of the company to do so. In refusing a motion brought against the directors for their refusal to carry out the sale transaction, the English Court of Appeal, after, inter alia, alluding to Articled 96 of the article of association of the company (at page 35), had stated thus (at page 38):

"...It seems to me that if a majority of the shareholders can, on a matter which is vested in the directors, overrule the discretion of the directors, there might just as well be no provision at all in the articles as to the removal of the directors by special resolution. Moreover, pressed to its logical conclusion, the result would be that when a majority of the shareholders disagree with the policy of the directors, though they cannot remove the directors except by special resolution, they might carry on the whole of the business of the company as they pleased, and thus, though not able to remove the directors, overrule every act which the board might otherwise do. It seems to me on the true construction of these articles that the management of the business and the control of the company are vested in the directors, and consequently that the control of the company as to any particular matter, or the management of any particular transaction or any particular part of the business of the company, can only be removed from the board by an alteration, of course, requiring a special resolution".

60. The above principle of law as expounded by these foreign courts, found acceptance by our apex court in the recent case of ***Tengku Dato' Ibrahim Petra Tengku Indra Petra v Petra Perdana Bhd & Another Appeal*** (supra). After making reference to various English authorities and speaking for the Federal Court, His Lordship Azahar Mohamed FCJ had this to say at 677:

"[110] The starting point is the important 1906 case of Automatic Self-Cleansing Filter Syndicate Co. v Cuninghame [1906] 2 Ch 34, CA, where the English Court of Appeal made the statement of principle that made it clear that the division of powers between the board of directors and the company in general meeting depended in the case of registered companies entirely on the construction of the articles of association and that, where powers had been vested in the Board, the general meeting could not interfere with their exercise. The directors ceased to be mere agents of the company. In that case, directors of a company refused to carry out a sale agreement to sell the assets of the company resolved upon by the company in general meeting because in their opinion it was not in the best interests of the company. The directors relied for support of their decision on the articles of association, which delegated to them all powers of management. The members argued that the articles were subject to the general rule that agents must obey the directions of their principles.

[111] The English Court of Appeal held that the resolution of the general meeting was a nullity and could be ignored; the articles constituted a contract between all the shareholders by which it was agreed that the directors alone should manage. It was further held that the shareholders could not compel the directors to sell the assets according to their wish:

> *The effect of this resolution, if acted upon, would be to compel the directors to sell the whole of the assets of the company, not on such*

terms and conditions as they think fit, but upon such terms and conditions as a simple majority of the shareholders think fit...It seems to me that if a majority of the shareholders can, on a matter which is vested in the directors, overrule the discretion of the directors, there might just as well be no provision at all in the articles as to the removal of the directors by special resolution. Moreover, pressed to its logical conclusion, the result would be that when a majority of the shareholders disagree with the policy of the directors, though they cannot remove the directors except by special resolution, they might carry on the whole of the business of the company as they pleased, and thus, though not be able to remove the directors, overrule every act which the board might otherwise do. It seems to me on the true construction of these articles that the management of the business and the control of the company are vested in the directors, and consequently that the control of the company as to any particular matter, or the management of any particular transaction or any particular part of the business of the company, can only be removed from the board by an alteration of the articles, such alteration of course, requiring a special resolution".

61. However, MARA and the 8th and 9th Defendants contend that the resolution 1 passed at the EGM was merely a recommendation to the Board of Directors by the shareholders. It is not meant to be binding on the Board. Section 195 of the Companies Act 2016 gives shareholders

the right to pass a resolution making recommendations to the Board on matters affecting the management of the company. Section 195 provides as follows:

> *"**Section 195. Members' rights for management review***
>
> *(1) The chairperson of a meeting of members of a company shall allow a reasonable opportunity for members at the meeting to question, discuss, comment or make recommendation on the management of the company.*
>
> *(2) A meeting of members may pass a resolution under this section which makes recommendations to the Board on matters affecting the management of the company.*
>
> *(3) Any recommendation made under subsection (2) shall not be binding on the Board, unless the recommendation is in the best interest of the company, provided that-*
>
> > *(a) the rights to make recommendations is provided for in the constitution; or*
> > *(b) passed as a special resolution."*

62. In this case, since the right to make recommendations is not provided for in the AA and the resolution is not a special resolution, the

recommendation of the shareholders will not be binding on the board but the board must still consider it and act in the best interest of the company.

63. Since it is settled law that a director had to exercise his powers in good faith and in the best interest of the company, it is not correct to say (as sought in the Counterclaim) that the directors have an unfettered discretion to reject the offer by UMWH. The Board can only reject the offer if that course of action is in the best interest of the company. Accordingly, I am unable to grant an order in terms of prayer (i) of the Counterclaim of the 7th Defendant.

64. Since I have held that the appointment of the 5th and 6th Defendants was invalid, I am unable to grant an order in terms of the remaining prayers in the Counterclaim. However, in order to make it clear that resolution 1 is only a recommendation to the Board of Directors and is not to compel the directors to act in a certain manner I make a declaration that resolution 1 is valid only insofar as it is a recommendation to the board and not a directive to the board. Otherwise, I dismiss the other prayers in the Counterclaim. I order costs of RM20,000.00 to MARA payable by the 1st to 6th Defendants jointly and severally and costs of RM10,000.00 each to the 8th Defendant and the

9th Defendant to be paid by Med-Bumikar. All costs are subject to allocator.

65. I was concerned about contentions made by the 1st to 7th Defendants to the effect that the acceptance of the UMW Offer will lead to Med-Bumikar being in breach of various agreements and would not be in the best interest of the company. However, as there is no resolution or recommendation of any binding nature made to the Board in relation to the UMW Offer, I am of the view that such concerns do not impact on the relief to be granted by me. The Board will have to deal with the UMW Offer in the best interest of the company under law.

Wong Chee Lin
Judicial Commissioner
Kuala Lumpur High Court
Dated: 12 July 2018

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