

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(COMMERCIAL DIVISION)
ORIGINATING SUMMONS NO.: WA-24NCC-268-05/2019**

5 In the matter of the Notice of Extraordinary
General Meeting dated 30.4.2019 issued by
the Defendants in relation to a proposed
extraordinary general meeting on 29.5.2019
at 3.30pm (**Notice of EGM**);

10 And

15 In the matter of the Notice of Intention dated
30.4.2018 issued by the Defendants under
section 206(3) and 322 Companies Act
2016 in relation to intention to move
resolutions to remove 8 directors of the
Plaintiff and appoint new directors (**Notice
of Intention**);

20 And

In the matter of the Plaintiff's Constitution;

25 And

In the matter of section 351 Companies Act
2016 (**CA 2016**);

30 And

In the matter of sections 135, 136, 137, 138,
141 and 145 CA 2016;

35 And

40 In the matter of sections 353 and 360(1)(d)
Capital Markets and Services Act 2007
(**CMSA 2007**);

And

45 In the matter of Part K, Paragraph 9.19,
Main Market Listing Requirements, Bursa
Malaysia;

And

In the matter of Sections 4, 41, 50, 51, 52
and 53 Specific Relief Act 1950 (**SRA
2012**);

And

In the matter of Securities Industry (Central
Depository) Act 1991

And

In the matter of Orders 5, 7, 28 and 88
Rules of Court 2012 (**RC 2012**)

And

In the matter of the inherent jurisdiction of
this Honourable Court

BETWEEN

**SEACERA GROUP BERHAD
(COMPANY NO.: 163751-H)**

...PLAINTIFF

AND

**1. DATO' TAN WEI LIAN
(NRIC NO.: 681028-05-5561)**

**2. DATIN SEK CHIAN NEE
(NRIC NO.: 670809-07-5182)**

**3. JEANNIE OOI CHIN NEE
(NRIC NO.: 771127-07-5524)**

**4. DATO' CHAN CHEE HONG
(NRIC NO.: 611223-10-6359)**

**5. LOW SWEE FOONG
(NRIC NO.: 680825-05-5068)**

**6. LIU ZHEN
(NRIC NO.: 860131-71-5023)**

**7. ONG ENG TAIK
(NRIC NO.: 530531-03-5471)**

...DEFENDANTS

GROUNDS OF DECISION

Introduction

[1] The requirement that every notice convening general meetings shall be given to all members of the company is elementary. Section 321(1) of the Companies Act, 2012 (“**the CA**”) provides that the notice of a meeting of members shall be given to every member, director and auditor of the company.

[2] In respect of public companies, Section 147(1) of the CA deems a depositor whose name appears in the record of depositors maintained by the Central Depository as a member of the company.

[3] Section 147(4) of the CA further provides that a depositor shall not be regarded as a member of a company entitled to attend any general meeting and to speak and vote at the general meeting unless his name appears on the record of depositors which is dated not less than three market days before the general meeting.

[4] Yet it is not clear, who constitutes as ‘members’ of the company entitled to be given the notice of general meeting as the record of depositors is not static and subject to regular updating. Which is the relevant record of depositors for determining the members entitled to be given the notice? Can it be just any record of depositors?

[5] This decision deals with the determination of this question and the consequences, if any, to the validity of the general meeting if the notice

for the same is given to members appearing in a record of depositors otherwise than the relevant record of depositors.

Background

5 [6] The question arises from the Plaintiff's application under Order 29 Rule 1(1) of the Rules of Court 2012 ("**the Rules**") for an interim injunction to prohibit the Defendants *inter alia*, from taking any further actions and or to implement and or put into effect the Notice of Intention ("**the Notice of Intention**") and the Notice of Extraordinary General
10 Meeting both dated 30.4.2019 ("**Notice of EGM**") to convene an extraordinary general meeting of the Plaintiff on 29.5.2019 ("**the EGM**").

[7] As an adjunct to the application, the Plaintiff also seeks to restrain the 1st. Defendant from exercising any voting rights or other rights in
15 relation to any shares of the Plaintiff where the 1st. Defendant has interests whether directly or through third parties who act under his instructions or influence.

[8] After hearing submissions from learned counsel and perusal of the
20 relevant cause papers, I dismissed the Plaintiff's application with costs. The Plaintiff, being dissatisfied with my decision, has filed an appeal against the decision. I have given the parties the broad grounds for my decision. I now set out below my detailed grounds.

25 [9] In its application under Enclosure 5, the Plaintiff premised his application for the injunctive reliefs on the ground that the Defendants

had failed to comply with the requisite 14 days' notice period stipulated under section 316(2)(b) of the CA read together with Articles 105(a)(1),105(b), 104(a), 104(b) and 49(a) of the Plaintiff's Constitution for the EGM.

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[10] Section 316(2)(b) of the CA and the relevant Articles of the Plaintiff's Constitution state thus:

Section 316(2)(b)

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A meeting of members of a public company, other than a meeting for the passing of a special resolution shall be called by notice-

(b) in any other case, at least fourteen days or longer period specified in its constitution.

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Article 49 – Notice of Meetings

(a) Every notice convening meetings shall specify the place, the date and the hour of the meeting and shall be given to all members at least fourteen (14) days before the meeting.

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(b) The Company shall by a written request made in duplicate in the prescribed form, request the Central Depository in accordance with the Rules, to prepare and issue a Record of Depositors to whom notices of general meeting shall be given by the Company.

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5 (c) *The Company shall also by a written request made in duplicate in the prescribed form request the Central Depository in accordance with the Rules, to issue a Record of Depositors as at a date not less than three (3) market days before the general meeting (“the General Meeting Record of Depositors”).*

10 (d) *Subject to the Securities Industries (Central Depositories) (Foreign Ownership) Regulations 1996 (where applicable), a depositor shall not be regarded as a member entitled to attend any general meeting and to speak and vote thereat unless his name appears in the General Meeting Record of Depositors.*

15 Article 104 – Notices

20 (a) *A notice may be given by the Company to any member either by serving it on him personally or by sending it by post to him at his address as shown in the register of members and the Record of Depositors or the address (if any) in Malaysia supplied by him to the Company for the giving of notices to him.*

25 (b) *Any notice or document if served by post shall be deemed served on the day such notice or document is posted at any post office or post office letter box where the notice or documents has been stamped and properly addressed to the member at his address in Malaysia as appearing in the Register. In proving service by post, it shall be sufficient to prove that the letter containing the notice or document was*

properly addressed, stamped and put into a post office box or by a letter from the Company Secretary certifying that the notice or document has been posted.

5 Article 105 – Notice of General Meeting

(a) *Notice of every general meeting must be given in the manner authorised by regulation 104 to:*

10 (1) *Every member;*

(b) *No other person is entitled to receive notices of general meeting.*

15 [11] The EGM was convened by the Defendants under Section 310(b) of the CA which provides that:

Section 310

20 *A meeting of members may be convened by –*

(a) *The Board; or*

(b) *Any member holding at least ten per centum of the issued share capital of a company or a lower percentage as specified in the constitution or if the company has no share capital, by*
25 *at least five per centum in the number of the members.*

[12] Following the Notice of Intention and the Notice of EGM issued on 30.4.2019 and in accordance with the relevant Sections of the CA and the relevant Articles of the Plaintiff's Constitution, the Defendants requested from the Plaintiff's Company Secretary the record of depository as at 30.4.2019 ("**the ROD of 30.4.2019**") on Wednesday, 8.5.2019.

[13] The ROD of 30.4.2019 was instructed to be given to the Defendants after 4:00 pm on 14.5.2019. More specifically, the Defendants were only able to collect the same at 5:10 pm that day.

[14] As alluded to above, Article 49 of the Plaintiff's Constitution requires the notice to be given '*at least fourteen (14) days before the meeting*'. To meet this requirement, the Defendants would have to post the notice to the members latest by end of business on 14.5.4019. Thus, it was legally impossible for the Defendants to satisfy the notice requirement if they were to use the ROD of 30.4.2019 to post the notices.

[15] The Plaintiff contended that it had carried out its obligations dutifully and in a fair manner to the Defendants. After it allegedly obtained the ROD of 30.4.2019 from the Central Depository on 13.5.2019, the Plaintiff had on 14.5.2019 and upon the receipt of the relevant payments from the Defendants, handed over the ROD of 30.4.2019 at 5:10 pm the same day to the Defendants.

[16] Learned counsel of the Plaintiff referred to Section 55(2) of the CA and contended that the Plaintiff had 21 days from the day on which the request is received to furnish the ROD.

5 [17] Section 55(2) of the CA provides:

Section 55 – Inspection and closing of register of members and index

10 (2) Any member or other person may request the company to furnish him a copy of the register or of any part of the register, but only so far as it relates to names, addresses, number of shares held and amounts paid on shares, on payment in advance of ten ringgit or such lesser sum as the company requires for every hundred words or fractional part of the register required to be copies and the company shall cause
15 any copy requested by any person to be sent to that person within a period of twenty-one days or within such period as the Registrar considers reasonable from the day on which the request is received by the company.

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[18] Notwithstanding that the Plaintiff had 21 days to provide the Defendants with the ROD of 30.4.2019, learned counsel of the Plaintiff submitted that the Plaintiff had made available the ROD of 30.4.2019 to the Defendants on 14.5.2019 which was well within the 21 days
25 stipulated.

[19] Learned counsel of the Plaintiff then referred to the cases of Extreme System Sdn Bhd v. Ho Hup Construction Company Bhd

[2010] 13 MLRH 192 and **In re Railway Sleepers Supply Company** (1885) 29 Ch 204 as settled authorities on the calculation of the 14 days' notice. Based on these cases, in computing the notice period, both the day the notice is served or deemed served *and* the day of the general meeting itself must be excluded.

[20] Accordingly, to meet the 14 days' notice requirement for the EGM fixed on 29.5.2019, there must be a minimum of 14 *clear* days between the EGM date and the date of posting. This means that the Defendants would have to serve the notice no later than the end of business on 14.5.2019 as illustrated in the table below.

Days	Dates in May 2019	Particulars
	14	Last Date of Posting
(1)	15	14 clear days' notice
(2)	16	
(3)	17	
(4)	18	
(5)	19	
(6)	20	
(7)	21	
(8)	22	
(9)	23	
(10)	24	
(11)	25	
(12)	26	
(13)	27	
(14)	28	
	29	Scheduled EGM date on 29.5.2019

[21] Since the ROD of 30.4.2019 was only received by the Defendants at 5:10 pm on 14.5.2019, any circulation or posting of the notices based on the ROD of 30.4.2019, if at all, could only be on the next day i.e. 15.4.2019, which would be short notice, thereby rendering the EGM
5 invalid.

[22] Learned counsel of the Plaintiff referred me to a series of cases holding that a meeting is null, void, irregular and invalid if there is short notice or lack of proper notice. (See: **Granasia Corporation Bhd v. Choong Wye Lin** [2008] 4 CLJ 893, **First Nominee v. New Kok Ann Realty** [1983] 2 MLJ 76, **HLB Nominees (Tempatan) v. SJA Bhd** [2005] 1 CLJ 23, **Dr Mahesan v. Ponnusamy & Ors** [1994] 3 MLJ 312 and **Solaiappan v. Lim Yoke Fan** [1967] 2 MLJ 7).

[23] Learned counsel of the Plaintiff contended that the Defendant had only themselves to blame for their inability to secure the ROD of 30.4.2019 in time. The Defendants could have fixed the EGM at a much later date to permit more time for them to obtain the ROD of 30.4.2019. Instead they decided to fix the EGM on 29.5.2019 giving themselves
15 only 30 days from the Notice of EGM to prepare for the EGM. Also, the Defendants ought to have requested for the ROD of 30.4.2019 much earlier. They could have done so on 30.4.2019 together with the
20 issuance of the Notices. Instead, for reasons best known to the Defendants, a request was only made for the ROD of 30.4.2019 on
25 8.5.2019.

[24] Notwithstanding the aforesaid, the Plaintiff had cooperated and managed to have the ROD of 30.4.2019 provided to the Defendants by 14.5.2019. The Plaintiff cannot be blamed if by the time the ROD of 30.4.2019 was given, the Defendants had insufficient time to meet the 5 14 days' notice required under the Plaintiff's Constitution.

[25] In the premises, learned counsel of the Plaintiff contended that the EGM is invalid for short notice and this formed the basis of the Plaintiff's application under Enclosure 5 for the injunctive reliefs to, *inter alia*, 10 prohibit the carrying on of the EGM.

[26] In response to the Plaintiff's application, the Defendants filed their affidavit under Enclosure 9. In the affidavit, the Defendants disclosed that they had in fact posted the notices for the EGM *before* noon on 15 14.5.2019. Documentary evidence proving posting of these notices were annexed to the affidavit.

[27] The Defendants could post the notices for the EGM by noon on 14.5.2019 even before they had received the ROD of 30.4.2019 20 because the Defendants had used the record of depositors dated 15.4.2019 ("**ROD of 15.4.2019**") which they had obtained in earlier proceedings against the Plaintiff in WA-24NCC-210-04/2019.

[28] This disclosure changes the substantive legal issue before this 25 Court. The Plaintiff's original contention that the EGM is invalid for short notice becomes no longer tenable. Indeed, learned counsel of the Plaintiff conceded that based on Article 104(b) of the Plaintiff's

Constitution, the posting of the notices on 14.5.2019 before noon would satisfy the 14 clear days' notice requirement.

5 [29] Nevertheless, learned counsel of the Plaintiff submitted that the EGM is still invalid as the members who are legally entitled to be given the notices ought to be the members as stated in the ROD of 30.4.2019 which is conterminous with the date of the Notice of EGM. In other words, the Defendants in using the ROD of 15.4.2019 instead of the ROD of 30.4.2019 had breached Section 321(1) of the CA and the
10 Articles 49, 104 and 105 of the Plaintiff's Constitution as there would be some members of the company entitled to be given notice of the EGM, by reason of the Defendants using the ROD of 15.4.2019, not be given the same. There will also be persons who are not entitled to be given the notices but are given.

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[30] Learned counsel of the Plaintiff submitted that since the Plaintiff's shares were being traded between the period from 15.4.2019 to 30.4.2019, the names appearing in the ROD of 15.4.2019 would invariably be different from that in the ROD of 30.4.2019.

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[31] Learned counsel of the Defendants contended that the Plaintiff had deliberately delayed providing the Defendants with the ROD of 30.4.2019 to subvert the EGM. He drew attention to the exchanges between the 1st. Defendant and the Plaintiff's Share Registrar between
25 8.5.2019 to 14.5.2019 which disclosed the following:

- (i) On 8.5.2019, the 1st. Defendant requested the Share Registrar for the ROD of 30.4.2019 to be provided by close of business on 9.5.2019;
- 5 (ii) On the same day, the Share Registrar confirmed that it had a copy of the ROD of 30.4.2019;
- (iii) Later at 4:45 pm on 8.5.2019, the Share Registrar wrote to inform the 1st. Defendant that his request for the ROD of 30.4.2019 had been forwarded to the Plaintiff for instructions;
- 10 (iv) On 9.5.2019, the 1st. Defendant sought from the Share Registrar an update on his request;
- 15 (v) On 10.5.2019 at 9:24 am, the Share Registrar informed the 1st. Defendant that they had followed up with the Plaintiff and was informed to wait for further instructions from the Plaintiff;
- 20 (vi) At 4:20 pm on 10.5.2019, the 1st. Defendant sought an update from the Share Registrar of the expected date to receive the ROD of 30.4.2019 and for the Share Registrar to inform by 13.5.2019 if the Plaintiff was not agreeable to provide the same;
- 25 (vii) On 13.5.2019 at 1:27 pm, the Share Registrar informed the 1st. Defendant that the ROD of 30.4.2019 would be given as per section 55(2) of the CA in hardcopy but subject to the 1st. Defendant making the
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requisite payments and the 1st. Defendant procuring a written confirmation from the other Defendants that he was authorised to request for the ROD of 30.4.2019 on their behalf;

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(viii) On 13.5.2019 at 2:49 pm, the 1st. Defendant informed the Share Registrar of his agreement to the conditions and that he would collect the ROD of 30.4.2019 at the Share Registrar's office on 14.5.2019 at about 12:00 noon;

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(ix) At 5:10 pm on 13.5.2019, the Share Registrar informed the 1st. Defendant that they had forwarded the ROD of 30.4.2019 to the Plaintiff for the counting of words and that the 1st Defendant would be updated on the total amount payable as well as the place and time to collect the ROD of 30.4.2019;

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(x) On 14.5.2019, 9:46 am, the Share Registrar informed the 1st. Defendant that the total fee payable was RM 18,468.80 and that the payment was to be made with the handover of the authorisation letters before collecting the ROD of 30.4.2019;

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(xi) Almost immediately at 10:31 am the 1st. Defendant informed the Share Registrar that the banker's cheque had been prepared and requested the Share Registrar to inform him of the place of collection for the ROD of 30.4.2019. The 1st. Defendant stated that he would

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like to collect the ROD of 30.4.2019 before 12 noon on the same day;

5 (xii) At 10:45 am, the Share Registrar promptly informed the 1st. Defendant to collect the ROD of 30.4.2019 at the Plaintiff's business address and that the person in charge was one Encik Zulkarnin. The Share Registrar informed the 1st. Defendant that the Plaintiff had collected the ROD of 30.4.2019 from the Share Registrar's office at 10:43 am;

10 (xiii) By 12:45 pm on 14.5.2019, the 1st. Defendant delivered the banker cheques and the authorisation letters to the Plaintiff. However, the ROD of 30.4.2019 was not given at that time and in the acknowledgment letter, there was a hand-written notation stating "*ROD to be given at 4:00 pm*";

15 (xiv) In a letter dated 14.5.2019, the Plaintiff acknowledged the receipt of the 1st. Defendant's Banker's Cheque No. 053246 for RM 18,468.80 at 12:40 pm that day. In the letter, the 1st. Defendant was informed to collect the ROD of 30.4.2019 '*from 4:00 pm onwards*';

20 (xv) In the event, the ROD of 30.4.2019 was only received by the 1st. Defendant on 14.5.2019 at 5:10 pm.

25 (xvi) The next day, 15.5.2019, the Plaintiff wrote to the Defendants seeking an update on, *inter alia*, whether the EGM Notice and or the Notice of Intentions had

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been given, posted, despatched and or circulated to the Company's shareholders and if so, to enclose the necessary documentary proof.

5 [32] Learned counsel of the Defendants drew this Court to the following telling points:

a. The purpose of the EGM was to remove the Plaintiff's incumbent directors;

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b. There is incontrovertible evidence that the Plaintiff had in its possession the ROD of 30.4.2019 prior to 14.5.2019. This was given by the Share Registrar to the Plaintiff on 13.5.2019 to count the words to determine the sum payable;

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c. The Plaintiff's notation instructing that '*ROD to be given at 4:00 pm*';

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d. The knowledge that POS Malaysia closes at 5:00 pm during Ramadan; and

e. The Plaintiff's letter the following day, on 15.5.2019 asking specifically for proof of dispatch of the notice.

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[33] The above taken together, contended learned counsel of the Defendants, demonstrate the Plaintiff's brinkmanship conduct aimed to frustrate the ability of the Defendants to meet the 14 days' notice requirement to hold the EGM. The Plaintiff's said conduct meant that the

Plaintiff had not come with clean hands in seeking this court's equitable discretion to injunctive reliefs.

5 [34] Learned counsel of the Defendants further submitted that the Plaintiff's directors, in the exercise of their powers in accordance with the CA, must do so for a proper purpose and in good faith. This is expressly provided for in section 213 of the CA. Learned counsel of the Defendants submitted that in the exercise of the powers to provide the Defendants with the ROD of 30.4.2019, the directors must act in the
10 interest of the company. By this, the Plaintiff must act in a manner that serves to enable or facilitate the EGM to be convened rather than to impede or frustrate the same. The powers conferred on the directors is a fiduciary power and not a proprietary power.

15 [35] Reference was made to the case of **Tengku Dato' Ibrahim Petra bin Tengku Indera Petra v. Petra Perdana Bhd and another appeal** [2018] 2 MLJ 177 at 231 where the Federal Court held that the test for breach of duty as a director to act in good faith and in the 'best interest of the company' is both a subjective and an objective one.

20 [36] Learned counsel of the Defendants contended that in the present case, there is nothing to show that the Plaintiff honestly believed that they had acted in the interest of the company in delaying the provision of the ROD of 30.4.2019 till after 4:00 pm on 14.5.2019. On the contrary,
25 based on the objective evidence, the notation that the ROD of 30.4.2019 was only to be given at 4:00 pm knowing very well that this would effectively deprive the Defendants of meeting the 14 days' notice period

demonstrates that the Plaintiff did not act in good faith and in the interest of the company at all.

5 [37] In any case, the Defendants have satisfied the requisite 14 clear days' notice as conceded by learned counsel of the Plaintiff. The fact that the ROD of 15.4.2019 was relied upon instead of the ROD of 30.4.2019 did not invalidate the EGM at all, more so in the light of the unreasonable conduct of the Plaintiff.

10 [38] Because of the Plaintiff's conduct to frustrate the EGM, the Defendants had to rely on the ROD of 15.4.2019 to post the notices to the members. The ROD of 15.4.2019 was the most recent record of depositors that was available to the Defendants to use at that time to avoid short notice.

15 [39] If not for the Plaintiff's deliberate delay in providing the ROD of 30.4.2019, the Defendants would have been able to meet the 14 days' notice based on the ROD of 30.4.2019. The need to use the ROD of 15.4.2019 was caused by the Plaintiff and not due to any shortcomings
20 on the part of the Defendants.

[40] Learned counsel of the Defendants contended that the record of depositors used to sent out the notices for the EGM need not be conterminous with the Notice of EGM.

25 [41] Learned counsel of the Defendants submitted that the notice of the EGM has been duly advertised in the newspapers on 14.5.2019 to

inform the members of the EGM. An announcement has also been made of the EGM at Bursa Malaysia's website in compliance with relevant provisions of the Main Board Listing Requirements.

5 [42] Hence, any member of the company may present himself or herself at the EGM with the necessary identification documents and he or she will be entitled to attend and to speak and vote at the EGM once his or her membership is verified based on the General Meeting Record of Depositors ("**GMROD**") provided under Articles 49 (c) and (d) of the
10 Constitution and Section 147(4) of the CA.

[43] The Court was informed that the Plaintiff has delivered to the Defendants the GMROD as at 23.5.2019 as required under Section 147(4) of the CA for enabling and facilitating the orderly and due process
15 of the EGM. Section 147(4) states:

Section 147(4) of CA

(4) *Notwithstanding any other provision of this Act, a depositor shall not be regarded as a member of a company entitled to attend
20 any general meeting and to speak and vote at the general meeting unless his name appears on the record of depositors which is dated not less than three market days before the general meeting.*

25 [44] In fact, the GMROD of 23.5.2019 was provided by the Plaintiff only after an *ex parte* injunction was obtained against the Plaintiff by the Defendants from this Court in the High Court of Kuala Lumpur Originating Summons No. WA-24NCC-266-05/2019.

[45] The reference to '*at least 3 market days*' with respect to the GMROD is to take account of the fact that when one buys listed shares, the shares will only be credited into the buyer's CDS account 3 days after the transaction date i.e T + 3. Hence, a person who purchases the shares of the company 3 days or less before the appointed date of the general meeting, will not be included in the record of depositors of the company in respect of those shares on the day of the general meeting.

[46] Hence, the record of depositors that is dated nearest to the date that is '*not less than 3 market days before the general meeting*' which in this case is the GMROD dated 23.5.2019 represents the most updated record of the depositors of the Plaintiff for the purposes of determining whether a person is a member of the company who is entitled to attend and to speak and vote at the EGM.

[47] This is also reflected in Chapter 7, Part H, section 7.16 of Main Market Listing Requirements which provides:

7.16 Record of Depositors – Main Market Listing Requirements

(1) *The company shall request the Depository in accordance with the Rules of the Depository, to issue a Record of Depositors to whom notices of general meetings shall be given by the company.*

(2) *The company shall also request the Depository in accordance with the Rules of the Depository, to issue a Record of Depositors, as at the latest date which is*

reasonably practicable which shall in any event be not less than 3 market days before the general meeting (“General Meeting Record of Depositors”).

5 (3) *Subject to the Securities Industry (Central Depositories) (Foreign Ownership) Regulations 1996 (where applicable), a depositor shall not be regarded as a member entitled to attend any general meeting and to speak and vote thereat unless his name appears in the General Meeting Record of*
10 *Depositors.’*

[48] Learned counsel of the Defendants submitted further that in any case, if there are aggrieved members who were not given the notice of EGM because the ROD of 15.4.2019 was used instead of the ROD of
15 30.4.2016, it is not for the Plaintiff to complain but for such aggrieved members to do so.

[49] Learned counsel of the Defendants also pointed out that the Plaintiff has not shown any evidence before this Court that the ROD of
20 15.4.2019 is any different from the ROD of 30.4.2019.

[50] Finally, learned counsel of the Defendants submitted that the Plaintiff has not suffered any prejudice from the Defendants’ use of the ROD of 15.4.2019 to issue the notices for the EGM.

25 [51] As regard the Plaintiff’s point on the need for an injunction to restrain the 1st. Defendant from exercising any voting or other rights attached to any shares in the Plaintiff’s company in which the 1st.

Defendant as a substantial shareholder has or has had an interest, counsel of the Defendants simple answer to this point is that the Section 145(1) of the CA that is relied upon by the Plaintiff does not apply to the Plaintiff but is only applicable upon the application of the Registrar.

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Analysis of the relevant provisions

[52] Given that the Defendants had used the ROD of 15.4.2019 to despatch the notices and given that the notices were posted out before the end of business on 14.5.2019, the requirements under section 316(2) of the CA read together with Articles 105(a)(1), 104(a), 104(b) and 49(a) of the Plaintiff's Constitution requiring the 14 days' notice had been satisfied and is no longer a live issue before this Court.

[53] Instead, what calls for determination is whether the EGM was rendered invalid by reason of the Defendants posting the notices to members of the company based on the ROD of 15.4.2019 instead of the ROD of 30.4.2019.

[54] The objection to the use of the ROD of 15.4.2019 is that some members of the company who are entitled to be given the said notices would not be given the notices and would therefore not attend the EGM and at the same time that there may be some persons who are non-members of the company who would be given the notice, in breach of Article 105(b) of the Constitution.

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[55] Section 321(1) of the CA provides that:

Section 321(1) of CA

321(1). *Notice of a meeting of members shall be given to every member, director and auditor of the company*

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[56] Whilst Section 321(1) provides that notice of the general meeting shall be given to every member of the company, it is not clear who are the 'members' that are legally entitled to be given such notice, bearing in mind that in a public listed company where its' shares are being traded daily, the members whose names appear in the record of depositors are updated almost on a daily basis.

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[57] Section 34 of the Securities Industries (Central Depositories) Act, 1991 (Act 453) makes provisions on the obligation on the part of the central depository to issue the record of depositors to an issuer, which is the public listed company. The relevant sections state:

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'34. Record of depositors to be Issued to issuer on request

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(1) *An issuer of any deposited security may, in the manner prescribed by rules of a central depository, require the central depository to issue him a record of the depositors in whose securities accounts such securities stand in credit as at the date of the notice or such other date as may be specified in the notice.*

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(2) *The record of depositors required by an issuer under subsection (1) shall be issued by the central depository within the following period:*

(a) *In a case where the issuer requires the issuance of a record of depositors –*

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(i) *as at the date of the notice, no later than three market days from that date;*

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(ii) *as at a date later than the date of the notice (in this section referred to as “the later date”), no later than three market days after the later date;*

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(b) *in a case where the issuer requires the issuance of a record of depositors as at a date earlier than the date of such notice (not being a date earlier than one year), no later than one month after the date of the notice.”*

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[58] In my mind, the members who are entitled to be given the notice of general meeting would either be:

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(i) the members whose names appear in the GMROD under Section 147(4) of the CA who are the only persons entitled to attend and to speak and vote at the general meeting; or

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(ii) the members whose names appear in the record of depositors as at the date the notices are posted out to the members; or

(iii) the members whose name appear in the record of depositors as at the date the company give notice to the Central Depository requesting for the record of

depositors or such other date as may be specified in the notice by the company;

5 (iv) the members whose names appear in the record of depositors as at the date the proposed meeting is requisitioned, i.e the date when the Notice of EGM is deposited with the company; or

10 (v) the members whose names appear in any record of depositors dated other than (i) to (iv) above.

[59] It seems to me that if the members who are entitled to be given the notice are the members whose names are in the GMROD, this would impose on the convener of the general meeting an impossible task given
15 that the notice of the general meeting is required in law to be sent to the members entitled to attend even before the GMROD is issued, namely at least 14 clear days before the date of the general meeting or such longer period stipulated in the company's constitution. The convener of the general meeting cannot be expected to know in advance whose
20 names will appear in the GMROD. The law does not compel a man to do that which he cannot possibly perform – *Lex Non Cogit Ad Impossibilia*.

[60] Similarly, it would also be unreasonable and or impracticable if the members who are entitled to be given the notice of the general meeting
25 are those in the record of depositors as at the date of the posting of the notice. It is common for listed companies to have thousands of members. As such, it is not inconceivable that the posting of the notices for general meetings may require more than a single day. If the members entitled to be given the notice are determined based on the

date of posting of the notice, there will be chaos if more than one day is required to post the notices.

5 [61] If the members who are entitled to be given the notice of the general meeting are those in the record of depositors that is dated the date the company give notice to the Central Depository for the same or such other date as may be specified in the notice, this will put the determination of the members in the control of the company even when the convener of the meeting is the shareholders. There is also no direct
10 and logical nexus between the date of the notice or the date of the record of depositors as specified in the notice with the requisition date for the general meeting. Further, to permit the company to have the absolute discretion to determine the relevant date of the record of depositors may not be desirable where the shareholders are the
15 convener of the meeting.

[62] In my mind, the most logical and indeed the legal position must be that the members who are entitled to be given notice of the general meeting are those whose names appear in the record of depositors as at
20 the date the notice issued for the general meeting to be convened is deposited with the company, i.e the requisition date.

[63] The identities of these members of the company can be determined with certainty and without any difficulty. Once the relevant record of
25 depositors is provided, the convener can then make the necessary arrangement to post the notice to these members at an appropriate date that would permit the notice to be given within the applicable notice period stipulated in the company's constitution. There is a direct nexus

between the date of record of depositors and the notice of the general meeting, both being coterminous. As a matter of good practice, the company should, as far as possible, make the request to the Central Depository on the same day the requisition by the shareholder is deposited. The convener can also request for the relevant record of depositors in advance of the requisition date to ensure that the relevant record of depositors is available by the time the requisition notice is deposited with the company.

10 [64] What about the record of depositors dated other than the categories in (i), (ii), (iii) and (iv) above? Quite apart from the fact that there is no sensible nexus between these records of depositors and the notice of general meeting, one is left with the problem of random selection of a record of depositors with no satisfactory response as to why another equally random selection of a different record of depositors will not do.

20 [65] Accordingly, I hold that for the purpose of Section 321(1) of the CA and the relevant articles of a company's constitution requiring notice of general meeting to be given to members that the 'members' who are entitled to be given the notice are members whose names appear in the record of depositors as at the date the notice of the general meeting issued is deposited with the company.

25 [66] This however is not the end of the matter.

[67] How does one reconcile Sections 321(1) with Section 147(4) of the CA together with Section 7.16 of the Main Market Listing Requirements?

[68] Based on Section 147(4) of the CA, any person whose name appears on the record of depositors dated not less than 3 market days before the meeting is entitled to attend the meeting and to speak and vote at the meeting. In fact, the Section suggests that *only* these members are entitled to attend and to speak and vote at the general meeting.

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[69] This must mean that a member's entitlement to attend the general meeting does not depend upon the giving and or the receipt of the notice of meeting. In fact, a member who receives the notice of the general meeting may not necessarily be entitled to attend and to speak and vote at the general meeting. Similarly, a member who is not given the notice may nevertheless be entitled to attend and to speak and vote at the general meeting.

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[70] The apparent incongruity vanishes when one understands that the requirement under Section 321(1) of the CA for the members to be given notice of the general meeting is a distinct and separate right of the members from the right of a member to attend and to speak and vote at the general meeting. Section 147(4) does not derogate the requirement of the notice period under Section 321(1) or the Articles of the company's Constitution at all.

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[71] Before considering the questions raised in this application, there is a further provision in the CA that must be highlighted. This is Section 316(6) which provides:

5 Section 316(6) of CA

316(6) Any accidental omission to give notice of meeting to, or the non-receipt of the notice of the meeting by, any member shall not invalidate proceedings at a meeting.

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[72] This provision relates to the obligation to give the notice of meeting. It serves to save the validity of proceedings at a meeting even where there is a breach of the obligation to give the notice of the meeting to any member entitled to be given the notice.

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[73] Based on my holding on Section 321(1) of the CA, the Defendants should have used the ROD of 30.4.2019 and not the ROD of 15.4.2019. Does this mean that the EGM is rendered invalid because the ROD of 15.4.2019 was used to give the notice of the EGM? Can the Defendants
20 rely on Section 316(6) to overcome the omissions, if any, in the giving of the notice to members entitled to the same under Section 321(1)? Have the Plaintiff established that there is a serious question to be tried bearing in mind that a higher threshold is needed where the granting of the injunction as prayed will effectively dispose of the Plaintiff's action
25 (See: **Datuk Johari Abdul Ghani & Ors v. QSR Brands Bhd & Ors** [2007] 1 CLJ 85; **Cayne & Anor v. Global Natural Resources plc** [1984] 1 ALL ER 225 where the courts required 'a strong prima facie case' or 'an unusually sharp and clear' case).

Court's Decision

A. Serious question to be tried

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(i) Validity of EGM

[74] Learned counsel of the Plaintiff's submission assumed that there is a difference between the members in the ROD of 15.4.2019 and ROD of 30.4.2019. On the assumption that there is in fact a difference, I am of the opinion that if this had resulted in omissions by the Defendants to give notice of the EGM to certain members of the Plaintiff because of the use of the ROD of 15.4.2019 instead of the ROD of 30.4.2019, such omissions qualify as 'accidental omissions' under Section 316(6) of the CA which shall not invalidate the proceedings of the EGM.

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[75] The unique facts and circumstances of this case, in my opinion, justify holding the omissions, if any, to come within the meaning of 'accidental omission' under Section 316(6) of the CA.

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[76] By reason of the Plaintiff's deliberate action in delaying the provision of the ROD of 30.4.2019, the Defendants were faced with the possibility of having to call off the EGM which would have resulted in wasted costs and time, not to mention the frustration of having their rights as shareholders under the CA being subverted. The Defendants then took the decision to post the notice of the EGM on the last possible

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date i.e 14.5.2019 based on the only record of depositors in their possession, namely the ROD of 15.4.2019.

5 [77] At the time the notices were posted, the Defendants had no knowledge at all as to whether there would in fact be any members entitled to be given the notice of EGM being omitted based on their decision to use the ROD of 15.4.2019. The omissions to the members, if any, under these circumstances cannot be said to be by design and or deliberate on the part of the Defendants. The decision to use the ROD of 10 15.4.2019 was made on the 11th hour with the intention to ensure that the 14 days' notice period is complied with. Any omissions to given members arising from the decision were never intended and would be accidental [See: **In Re Randall & Quilter Investment Holdings plc** [2013] All ER (D) 47]

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[78] In fact, there was *no* evidence placed before this Court that the ROD of 15.4.2019 is actually different from the ROD of 30.4.2019. When I asked learned counsel of the Plaintiff during submissions if this was in fact the case, learned counsel of the Plaintiff could not proffer any 20 supporting evidence save for an assertion from the Bar that trading of the Plaintiff's shares took place daily during the market days between 15.4.2019 and 30.4.2019.

[79] With respect, whilst it is true that there would have been trading 25 transacted of the Plaintiff's shares during the period from 15.4.2019 and 30.4.2019, there is no certainty that there would in fact be changes in the depositors as the trades transacted may be from among the existing

depositors/members. The lack of any evidence before this Court that the ROD of 15.4.2019 is different from the ROD of 30.4.2019 is significant.

5 [80] Learned counsel of the Plaintiff knowing this, attempted to refer to a fresh affidavit filed on the date fixed for the decision of this application which exhibited the ROD of 15.4.2019 and the ROD of 30.4.2019 to provide a comparison between the two records. This affidavit was filed after full submissions, without the leave of the Court and just before the
10 parties attended before me for decision. Not surprisingly, learned counsel of the Defendants objected strenuously to the admission of the affidavit.

[81] After hearing submission from learned counsel and in reliance on
15 the case of **Yian Sdn Bhd v. Datuk Bandar Kuala Lumpur & Anor** [1998] 1 CLJ 395 at 402, I disallowed the affidavit and proceeded to disregard the same in its entirety. The relevant passage from Abdul Kadir Sulaiman J (as he then was) on admission of affidavit filed post submission is germane and reproduced below:

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*'Now that the position of the law had been made clear by the Court of Appeal in that case in the High Court, which is Datuk Bandar Kuala Lumpur v. Zain Azahari bin Zainal Abidin, now reported in [1997] 2 CLJ 248 the 1st. respondent realised that there was
25 something lacking in their evidence opposing the application of the applicant in the substantive motion. Secondly, being fresh evidence proffered, the 1st respondent by filing it on 15 April 1997 did so without the leave of the court. I agreed with the submission*

of Dato' P G Lim of counsel for the applicant that to allow the introduction of this fresh evidence would tantamount to a reopening of case after the 1st respondent had completed their submission upon the evidence then before the court. In *Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors* [1989] 1 CLJ 157, Shankar J has this to say at p. 173,

Halfway through his submission Mr. Palasuntharam sought to file yet another affidavit on facts which as he himself admitted due diligence would have discovered. Mr. Too strenuously objected. He had already completed his submission and to allow this would be to permit the whole case to be reopened again. I disallowed the application quite simply because to do so would have been to permit an abuse of process. In the absence of specific rules on the matter I am of the view that in the interests of the effective administration of justice the rules as to the filing and service of pleadings should apply *mutatis mutandis* to affidavits. At the very least the parties should have adequate notice of each other's cases before the hearing and avoid a trial by ambush'.

[82] In any event, I hold that the Plaintiff is not the proper party to raise the issue on the omission of the notice of EGM given to members who are entitled to attend and to speak and vote at the EGM. The proper party to object, if at all, would be the members who are entitled to be given the notice but were not so given. This is not a case where the notice itself is said to be invalid.

[83] Yet, another reason why the EGM may not be invalid is that the Defendants can seek to rely on Section 582(1) of the CA by demonstrating to the Court that no substantial injustice has been or may be caused by the use of the ROD of 15.4.2019 which cannot be remedied by any order of the Court. It is premature at this stage to determine if there is in fact *real* substantial injustice. The Court ought not to act on mere theoretical injustice as a basis to grant an injunction to restrain a general meeting.

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[84] Hence, I hold that the Plaintiff has *not* shown that there is a serious question to be tried based on the higher threshold of ‘ a strong *prima facie* case’ or ‘ an unusually sharp and clear case’ test as regard the validity of the EGM by reason of the Defendants’ use of the ROD of 15.4.2019 instead of the ROD of 30.4.2019.

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(ii) Breach of obligations as substantial shareholder

[85] The Plaintiff alleged that the 1st. Defendant had breached his obligations under Sections 137 and 138 of the CA for failing to give notice in writing of his interest in the voting shares of the company and or on his change in his interests in such voting shares.

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[86] Learned counsel of the Plaintiff pointed out that after the 1st. Defendant had given the requisite notice under Section 137 of the CA on 14.2.2019 of his substantial shareholding to the company, the 1st. Defendant had during the period from 12.2.2019 to 29.4.2019 engaged

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in extraordinary trading of the Plaintiff's shares. However, the 1st. Defendant gave only limited notices of his purchases and of his disposals to the Plaintiff in breach of Sections 137 and 138.

5 [87] Based on the aforesaid breaches, the Plaintiff seeks under Section 145(5) of the CA read with Section 9.19 of the Main Marketing Listing Requirements for an order to restrain the exercise of any voting or other rights attached to any shares in the Plaintiff in which the 1st. Defendant has or has had an interest.

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[88] On this point, I accept learned counsel of the Defendants' submission that Section 145 of the CA does not apply to the Plaintiff. The said Section expressly provides for the Court to make such an order only on the application of the Registrar of Companies. Accordingly, the
15 Plaintiff has no *locus standi* to invoke Section 145 to restrain the 1st. Defendant from exercising his voting or any rights attached to share in the company in which the 1st. Defendant has or has had an interest.

[89] Moreover, the alleged breaches of Sections 137 and 138 of the CA
20 have not been proven and there is nothing to suggest that the breaches, if any, were so serious that it warrant a restrain in the exercise of the voting or other rights attached to shares in which the 1st. Defendant has or has had an interest. Such injunction is a serious interference to the 1st. Defendant's right to property in his shares.

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B. Balance of convenience

[90] The balance of convenience lies in favour of permitting the EGM to proceed as scheduled.

[91] It is significant to note that there is no dispute that the Defendants have met the numerical requirements of at least ten per centum of the issued share capital of the Plaintiff. Equally significant is the complete lack of any allegations on the part of the Plaintiff that the EGM is convened for any improper or *mala fide* purpose.

[92] Every shareholder of a company has a right, subject to the statutory prescribed procedures and requirements, to call for an extraordinary general meeting of a company under our CA. A shareholder's right to convene a general meeting under Section 310(b) of the CA is one of the key rights provided by law to shareholders to marshal all shareholders of a company together at an appointed date, place and time to provide the opportunity to the shareholders to deliberate and to resolve, if deem fit, on proposals properly tabled before them that may affect the directions of the company. It is an essential right to invoke the internal democratic process of the company.

[93] The Court should be slow in granting injunction preventing shareholders from holding general meetings, especially when such meetings are the only way in which the shareholders can put certain resolutions before the members which they think are for the benefit of the company, even if these resolutions involve the removal of the incumbent directors.

[94] The Defendants have satisfied the requirements stipulated under section 310(b) of the CA to convene such a meeting and they had made the necessary requests for the requisite records of depositors. They have also made the payments for the same. All logistical preparations for the EGM have been made. The venue has been booked and paid for and notices for the EGM have been posted to the members. Announcement of the EGM has also been duly made on the Bursa Malaysia website and advertisement published in the local newspapers as required under the Main Market Listing Requirements.

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[95] There is no dispute that the EGM had attracted wide publicity in the local newspapers and in the social media. As at the date of the hearing of Enclosure 5, there was no evidence that any member of the Plaintiff has objected to or challenged the validity of the EGM. In fact, there was some expectation for the EGM to proceed.

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[96] When the general meeting is convened, it will be for the members who are entitled to attend and to speak and vote at the general meeting to deliberate and to decide on the outcome of the various resolutions proposed thereat. The Defendants are merely seeking the company's internal democratic process to move their resolutions to remove some of the incumbent directors and to appoint new directors. It will be for the majority of the shareholders attending the EGM to make the decisions.

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[97] The Plaintiff has not shown that it will suffer any real prejudice if the EGM were to proceed as scheduled. It is not contended that the proposed resolutions cannot be validly passed. In fact, the Plaintiff has

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the obligations to ensure and to facilitate the convening of the EGM instead of acting to subvert the same and raising objection to the EGM based on reasons which the Plaintiff had created and or contributed.

5 [98] There is also nothing to prevent any member of the Plaintiff to present himself at the proposed EGM notwithstanding the non-receipt of the notice to attend and vote at the meeting subject of course to production of relevant identification document for verification of his membership.

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[99] Finally, the fact that the EGM is permitted to proceed does not mean that there cannot be a challenge to the validity of the meeting subsequently by parties who are properly aggrieved. To permit the EGM to proceed in the present case will also give confidence to the investors
15 at large that a shareholder's requisition right is allowed to work in the governance of public companies.

C. Plaintiff did not come with clean hands

20 [100] The Plaintiff did not come to this Court with clean hands. The conduct of the Plaintiff in intentionally delaying the provision of the ROD of 30.4.2019 until after 4:00 pm on 14.5.2019 is inexcusable. When the question was put to learned counsel of the Plaintiff whether it was the Plaintiff's case that between 12:45 pm to 4:00 pm on 14.5.2019, the
25 Plaintiff was in no position to hand over the ROD of 30.4.2019 to the Defendants, he very candidly stated that he had no answer to the same.

[101] Given the chronology of the events from 8.5.2019 to 14.5.2019 and applying the combined subjective and objective tests as propounded by the Federal Court in **Tengku Dato' Ibrahim Petra bin Tengku Indera Petra v. Petra Perdana Bhd and another appeal** [2018] 2 MLJ 5 177 at 231, I find that the directors of the Plaintiff had not acted in good faith and in a manner that served the best interest of the company. They had a fiduciary duty to act properly and they had acted in breach of that duty.

10 [102] The Plaintiff's reliance on Section 55(2) of the CA is misplaced. The said Section refers to the company's register of members which is different from the record of depositors.

15 [103] In any case, Section 55(2) of the CA stipulates that '*the company shall cause any copy requested by any person to be sent to that person within a period of twenty-one days ...*' (emphasis added). This does not mean that the company is entitled to take its own time or to dictate the time for collection of the record of depositors as long as the same is made available within 21 days.

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[104] What constitutes a reasonable time will of course depend on the facts and circumstances of each case bearing in mind the duty of the company to act in a manner that serves the best interest of the company. This must include the duty to facilitate the compliance of all 25 procedural requirements for the convening of a general meeting. Any acts taken that are contrary to this objective or for an improper reason will be an abuse of the power conferred on the company. This is the proper purpose rule held by the UK Supreme Court in **Eclairs Group**

Ltd and another v. JKX Oil and Gas plc [2015] UKSC 71. At page 9 of the report, Lord Sumption stated as follows:

5 *'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 an act which are within its scope but done for an improper reason. It follows that the test is necessarily subjective.*

10 *'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'.*

15 [105] A shareholder exercising his power under Section 310(b) of the CA is entitled to determine for himself the appropriate date and time for his proposed general meeting taking into consideration the reasonable time needed to meet all the necessary procedural requirements under the CA and the Constitution of the company. He is entitled to assume

20 that the company will not deliberately act in any way to frustrate and or defeat the convening of the general meeting.

[106] In our instant case, but for the Plaintiff's action to deliver the ROD of 30.4.2019 to the Defendants only after 4:00 pm on 14.5.2019, the

25 Defendants would not have had to rely on using the ROD of 15.4.2019 to post the notices of the EGM.

[107] Having acted in abuse of its power, it does not lie in the Plaintiff's mouth to now seek to prohibit the convening of the EGM on the ground that it is invalid because the Defendants had not used the ROD of 30.4.2019 to post the notices.

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[108] For the above reasons, I hold that the Plaintiff has not come to this Court with clean hands and the equitable jurisdiction of this court will not be invoked to lend aid to a party that had caused and or contributed to the Defendants having to resort to relying on the ROD of 14.5.2019 instead of the ROD of 30.4.2019 notwithstanding that payment of not an insubstantial amount had already been paid for the same.

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[109] Having dismissed the application under Enclosure 5, I asked the parties to submit on the issue of costs. With the benefit of submissions of learned counsel, I fixed costs at RM 25,000.00 to be paid by the Plaintiffs to the Defendants.

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Dated the 17th day of June 2019

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(ONG CHEE KWAN)

Judicial Commissioner

25 High Court of Malaya at Kuala Lumpur.user123

Parties :

Mr Wilson Lim and Ms Huam Wan Ying (PDK) for the Plaintiff
(Messrs. Wilson Lim)

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Dato' Loh Siew Cheang together with Mr Andrew Fernandez, Ms Goh
Ee Von and Ms Carine Cheong Kay Vei for the Defendants
(Messrs. Chooi & Company Cheang & Arif)