

A Cheah Ngun Ying v Low Cheong & Sons Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D1-22-1161 OF
1993

B MOHD HISHAMUDIN J
30 SEPTEMBER 2009

C *Companies and Corporations — Directors — Breach of fiduciary duties — Improper issuance and allotment of shares causing plaintiff's shareholding in company to be reduced or diluted — Power of directors to issue shares to be exercised bona fide in interest of company — Breach of fiduciary duty in issuing shares for collateral purpose*

D *Companies and Corporations — Shares — Claim for rectification of register consequent upon improper issuance and allotment of shares — Breach of fiduciary duty by directors in issuing shares for collateral purpose*

E *Equity — Defences — Laches and acquiescence — Delay by personal representative of deceased shareholder in commencing claim for breach of fiduciary duties — Whether third party rights affected by relief sought — Whether principle of laches applicable*

F The plaintiff was the executrix of the estate of her late husband, Low Lai Kui ('Low'). Low, while he was alive, was a director and shareholder of the first defendant company. The first defendant was a family company established by Low's father, one Low Cheong, who had also deceased. The other defendants

G were the brothers and sisters of Low or persons holding in trust for them or their children. At all material times Low was the majority shareholder in the company. He held 52% of the shareholding in the company. However, on 15 October 1987 the second defendant and her father, Low Cheong, as directors of the company, allotted 157,579 shares of RM1 par. As a result of this issuance

H of the additional 157,579 shares and allotment, Low's shareholding in the company was reduced to about 42%. Thus, he no longer had majority control in the company. The plaintiff alleged that the purpose of the issuance and allotment of the shares was to dilute Low's majority control over the company. The plaintiff therefore sought a declaration that the allotment of the 157,579

I shares were in breach of the directors' fiduciary duties and therefore were unlawful; and that the said allotment should be declared null and void. She sought an order that the share register be rectified accordingly. The defence alleged that the plaintiff had agreed to set off Low's share of the net profits of the company which were available for distribution against a debt of RM230,000

owed by Low to the company. It was also claimed that the plaintiff, in commencing the action in 1993, was guilty of laches. A

Held, allowing the plaintiff's claim with costs:

- (1) The board of directors of the first defendant was in breach of their fiduciary duties when they made the issuance and allotment of the shares, in particular, the issuance and allotment of the shares of the late Low due to the following grounds: (a) firstly, the loan given by the company to Low was not yet payable to the company. The second defendant failed to show that the plaintiff had been asked to pay and that she had agreed to make the repayment of the loan; and that the plaintiff had agreed to the issuance and allotment of the shares in settlement of her late husband's debt to the first defendant; (b) secondly, the plaintiff never agreed to set off the alleged debt against the allotted shares; (c) thirdly, the second defendant's evidence of what transpired on 15 October 1987 was contrary to normal practice of companies. It is the normal practice of companies that the board will hold its meeting first and decide on the business to be transacted at the EGM, and thereafter the EGM would be held. It is not the other way around, as narrated by the second defendant; (d) fourthly, the minutes of both the meetings (the board meeting and the EGM) were suspect. Based on the evidence, it was highly probable that there was no EGM held and that the minutes of the EGM was a mere fabrication; and (e) fifthly, the company was financially strong in 1987 and there was no reason for the company to demand the repayment of the loans taken by the directors (see paras 22, 36, 42, 45–46 & 48). B C D E F
- (2) The second defendant did not give a straight answer to many of the questions posed by counsel for the plaintiff. Her answers were usually qualified. She attributed a lot of the actions taken on Low Cheong who had died and therefore was not available for cross-examination. She contradicted herself in several material aspects of her evidence (see para 49). G
- (3) When the board of directors decided to allot and issue shares to the other shareholders by capitalising the dividends, and in the case of Low, to use his dividends to set off against the loan taken by him, the board did not act bona fide. The board knew that by so doing Low's shareholding in the company would be reduced or diluted (see para 50). H
- (4) The power of the directors to issue shares is a fiduciary power and must be exercised bona fide for the interest of the company. The power to allot and issue shares under article 5 of the articles of association of the company must be used for a proper and bona fide purpose. In the present case that power was used for a collateral purpose. That power was not applied equally but selectively where shares were allotted and issued to all I

- A the other shareholders in proportion to their respective shareholding, but no shares were allotted or issued to Low or his estate (see paras 51–52).
- (5) The plaintiff obtained the grant of probate on 27 March 1990 and the action was commenced on 14 October 1993. The cause of action arose in October 1987 and so there was a delay in commencing the action by the estate of Low. However, there was no impediment to the remedies sought by the plaintiff which included a rectification of the register of members of the company. The shares were still registered in the name of the respective shareholders and no third party would be affected by the relief sought by the plaintiff. Hence the principle of laches was not applicable (see para 61).

[Bahasa Malaysia summary

- D Plaintiff merupakan wasi harta pusaka mendiang suaminya, Low Lai Kui ('Low'). Low semasa hayatnya, merupakan pengarah dan pemegang saham syarikat defendan pertama. Defendan pertama adalah syarikat keluarga yang ditubuhkan oleh bapa Low, iaitu Low Cheong, yang juga telah meninggal dunia. Defendan-defendan lain merupakan adik-beradik lelaki dan perempuan Low atau individu-individu yang memegang amanah untuk mereka atau anak-anak mereka. Pada masa matan Low merupakan pemegang saham majoriti dalam syarikat itu. Dia memegang 52% daripada pegangan saham syarikat. Walau bagaimanapun, pada 15 Oktober 1987 defendan kedua dan bapanya, Low Cheong, sebagai pengarah-pengarah syarikat itu, telah mengumpukan 157,579 saham para tara RM1. Akibat daripada terbitan 157,579 saham dan perumpukan tambahan ini, pegangan saham Low dalam syarikat telah dikurangkan kepada lebih kurang 42%. Oleh itu, dia tidak lagi mempunyai kawalan majoriti dalam syarikat itu. Plaintiff mengatakan bahawa tujuan terbitan dan perumpukan saham adalah untuk melemahkan kawalan majoriti Low ke atas syarikat. Plaintiff dengan itu memohon deklarasi bahawa perumpukan 157,579 saham telah melanggar kewajipan fidusiari pengarah-pengarah dan oleh demikian menyalahi undang-undang; dan bahawa perumpukan tersebut patut diisytiharkan terbatal dan tidak sah. Dia memohon perintah agar buku daftar saham diperbetulkan sewajarnya. Pembelaan mengatakan bahawa plaintiff telah bersetuju untuk menolak saham Low daripada keuntungan bersih syarikat yang sedia ada untuk pengagihan terhadap hutang RM230,000 yang Low berhutang kepada syarikat itu. Ia juga mendakwa bahawa plaintiff, apabila memulakan tindakan pada tahun 1993, adalah bersalah kerana kelewatan.

- I **Diputuskan**, membenarkan tuntutan plaintiff dengan kos:

- (1) Lembaga pengarah defendan pertama telah melanggar kewajipan fidusiari mereka apabila mereka membuat terbitan dan perumpukan saham, terutamanya, terbitan dan perumpukan saham mendiang Low disebabkan alasan-alasan berikut: (a) pertama, pinjaman yang diberikan

- oleh syarikat itu kepada Low belum lagi boleh dibayar kepada syarikat itu. Defendan kedua telah gagal untuk menunjukkan bahawa plaintif telah diminta membayar dan bahawa dia telah bersetuju membuat pembayaran balik; dan bahawa plaintif telah bersetuju dengan terbitan dan perumpukan saham sebagai penyelesaian hutang mendiang suaminya kepada defendan pertama; (b) kedua, plaintif tidak pernah bersetuju untuk menolak hutang yang dikatakan daripada perumpukan saham itu; (c) ketiga, keterangan defendan kedua tentang apa yang berlaku pada 15 Oktober 1987 adalah bertentangan dengan amalan biasa syarikat. Ianya amalan biasa syarikat-syarikat di mana lembaga akan mengadakan mesyuaratnya dahulu dan membuat keputusan tentang perniagaan yang akan dibuat semasa EGM, dan selepas itu EGM akan diadakan. Ia bukan sebaliknya, seperti yang diceritakan oleh defendan kedua; (d) keempat, minit kedua-dua mesyuarat (lembaga mesyuarat dan EGM) telah dicurigai. Berdasarkan keterangan, kemungkinan besar EGM tidak pernah diadakan dan bahawa minit EGM hanyalah rekaan; dan (e) kelima, syarikat itu kukuh dari segi kewangan dalam tahun 1987 dan tidak ada alasan untuk syarikat itu menuntut pembayaran balik pinjaman-pinjaman yang diambil oleh pengarah-pengarah tersebut (lihat perenggan 22, 36, 42, 45–46 & 48).
- (2) Defendan kedua tidak memberikan jawapan tepat untuk kebanyakan soalan yang dikemukakan oleh peguam bagi pihak plaintif. Jawapan-jawapannya biasanya terbatas. Dia menganggap kebanyakan tindakan yang diambil berpunca daripada Low Cheong yang telah meninggal dunia dan oleh itu tidak dapat diperiksa balas. Dia menyanggah dirinya sendiri dalam beberapa aspek penting keterangannya (lihat perenggan 49).
- (3) Apabila lembaga pengarah memutuskan untuk mengumpukkan dan menerbitkan saham kepada pemegang saham lain dengan memodali dividen, dan dalam kes Low, untuk menggunakan dividennya untuk ditolak daripada pinjaman yang telah diambilnya, lembaga tidak bertindak secara bona fide. Lembaga mengetahui bahawa dengan berbuat demikian pegangan saham dalam syarikat itu akan dikurangkan atau dicairkan (lihat perenggan 50).
- (4) Kuasa pengarah untuk menerbitkan saham adalah kuasa fidusiari dan hendaklah digunakan secara bona fide demi kepentingan syarikat. Kuasa untuk mengumpukkan dan menerbitkan saham di bawah artikel 5 kepada artikel persatuan syarikat hendaklah digunakan untuk tujuan yang betul dan bona fide. Dalam kes ini kuasa tersebut telah digunakan untuk tujuan kolateral. Kuasa tersebut tidak terpakai sama rata tetapi secara selektif di mana saham-saham diagih dan diberikan kepada semua pemegang saham lain mengikut bahagian pegangan saham

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- A masing-masing, tetapi tiada saham telah diagih atau diberikan kepada Low atau harta pusakanya (lihat perenggan 51–52).
- (5) Plaintiff telah mendapat kebenaran probet pada 27 Mac 1990 dan tindakan itu telah bermula pada 14 Oktober 1993. Kausa tindakan timbul dalam bulan Oktober 1987 dan oleh itu terdapat kelewatan memulakan tindakan itu oleh harta pusaka Low. Walau bagaimanapun, tiada penghalang terhadap remedi-remedi yang dipohon oleh plaintiff yang termasuk pembetulan buku daftar ahli-ahli syarikat. Saham-saham tersebut masih didaftarkan atas nama pemegang-pemegang saham berkaitan dan tiada pihak ketiga akan terjejas oleh relief yang dipohon oleh plaintiff. Justeru itu prinsip kelewatan tidak terpakai (lihat perenggan 61).]
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Notes

- D For cases on breach of fiduciary duties, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 187–195.
For cases on laches and acquiescence, see 6 *Mallal's Digest* (4th Ed, 2009 Reissue) paras 2683–2696.
For cases on shares in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 799–937.
- E

Cases referred to

- Howard Smith Ltd v Ampol Petroleum Ltd & Ors* [1974] AC 821, PC (refd)
Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221 (refd)
F *Lorenzi v Lorenzi Holdings Pty Ltd* (1993) 12 ACSR 398 (refd)
M Ratnavale v S Lourdenadin [1988] 2 MLJ 371, SC (refd)
Joseph Yeo (Joseph Yeo) for the plaintiff.
Joginder Singh (Joginder Singh & Co) for the first and second defendants.
The third, fourth and fifth defendants not present.
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Mohd Hishamudin J:

INTRODUCTION

- H [1] The plaintiff is the executrix and personal representative of the estate of her late husband, Low Lai Kui. The latter, while he was alive, was a director and shareholder of the first defendant company.
- I [2] The first defendant is a company incorporated in Malaysia. It is owned by a family — the family of one Low Cheong, who is now deceased.

[3] The second defendant, Low Seow Har, is a shareholder and director of the first defendant company. She is the daughter of Low Cheong and a sister of the late Low Lai Kui. In other words, she is the sister-in-law of the plaintiff. A

[4] The third defendant is a director and shareholder of the first defendant. He is one of the sons of Low Cheong and a brother of the late Low Lai Kui. In other words, he is the brother-in-law of the plaintiff. B

[5] The fourth defendant, one Woo Kam Nin, hold shares in the first defendant company as trustee for the benefit of three beneficiaries, namely, Low Chee Yeong, Low Chee Yew and Low Chee Kwong. These three beneficiaries are the children of the late Low Lee Hung, who is also one of the sons of Low Cheong and also one of the brothers of the late Low Lai Kui. C

[6] The fifth defendant is the same Woo Kam Nin but sued as the executrix of the estate of Low Cheong. Low Cheong at the material time was a director as well as one of the shareholders of the first defendant company. D

[7] The late Low Cheong was the founder of the first defendant company. He was, as just described above, the father of the late Low Lai Kui, of the second defendant, of the third defendant, and of the late Low Lee Hung. He was the father-in-law of the plaintiff. E

[8] From what have been stated above it will be appreciated that the late Low Lai Kui, Low Seow Har, Low Lee King and the late Low Lee Hung are siblings; and they all are the children of the late Low Cheong. F

THE TRIAL

[9] The plaintiff was present at the trial. So were the first and second defendants. The first defendant was represented by its director, Dato' Lim Teck Chong. He is the husband of the second defendant, Low Seow Har. G

[10] The other defendants, however, were absent. H

[11] The third defendant has been duly served with the writ of summons and statement of claim but has failed to enter an appearance. The certificate of non-appearance is at encl 46. I

[12] The fourth and fifth defendants are represented by solicitors, have entered appearance and have filed their joint statement of defence. In their joint statement of defence, the fourth and fifth defendants admit paras 1–11 of the statement of claim. However, there is an order of this court precluding

A them from taking part in this trial by reason of their counsel's failure to attend case management proceedings on 16 July 2008 and to comply with a direction of this court (but they may, however, be present at the trial and observe the proceedings). They did not appeal against that order.

B [13] The plaintiff gave evidence at the trial (PW1). She has one witness, namely, her son, Low Chee Hoong, who also testified (PW2).

C [14] For the first and second defendants, there was only one witness, namely, the second defendant herself. She gave evidence (DW1).

THE PLAINTIFF'S CLAIM

D [15] As earlier stated, the plaintiff is the widow and the executrix of the estate of her late husband, Low Lai Kui.

[16] The first defendant company has an authorised capital of RM1m divided into 1 million shares of RM1 each.

E [17] The company was incorporated on 7 April 1975. The shareholdings then were as follows:

Table-1			
No	Shareholder	No of Shares	%
F	1	Low Cheong @ Low Yuen Cheong	53,461 18
	2	Low Lai Kui @ Low Lye Kooi	124,741 42
G	3	Low Seow Har @ Low Saw Har	14,581 5
	4	Low Lee Hung	44,551 15
H	5	Low Lai Kui @ Low Lye Kooi (as trustee for Low Chee Hoong)	14,850 5
	6	Low Lai Kui @ Low Lye Kooi (as trustee for Low Chee Hoe)	14,850 5
	7	Low Lee King	14,850 5
I	8	Low Lee Hung (as trustee for Low Chee Yeong)	14,850 5
		Total	296,734 100

[18] As at 25 July 1986, 643,646 shares of the company were issued and paid-up; and as at this date, the shareholdings of the company were as follows:

No	Shareholder	No of Shares	%
1	Low Cheong @ Low Yuen Cheong	115,873	18
2	Low Lai Kui @ Low Lye Kooi	270,353	42
3	Low Seow Har @ Low Saw Har	32,156	5
4	Low Lee Hung	96,642	15
5	Low Lai Kui @ Low Lye Kooi (as trustee for Low Chee Hoong)	32,156	5
6	Low Lai Kui @ Low Lye Kooi (as trustee for Low Chee Hoe)	32,156	5
7	Low Lee King	32,156	5
8	Low Lee Hung (as trustee for Low Chee Yeong)	32,156	5
	Total	296,734	100

[19] At all material times Low Lai Kui was the majority shareholder in the company. He held 52% of the shareholding in the company. He held 42% in his own right and 5% each, as trustee, for his two sons, namely, Low Chee Hoong and Low Chee Hoe.

[20] However, on 15 October 1987 the second defendant and her father, Low Cheong, as directors of the company, allotted 157,579 shares of RM1 par to the following shareholders:

No	Shareholder	No of Shares
1	Low Cheong @ Low Yuen Cheong	42,664
2	Low Seow Har @ Low Saw Har	32,827
3	Low Lee King	16,400

A	4	Woo Kam Nin (Joint Executrix with Low Seow Har @ Low Saw Har for the Estate of Low Lee Hung) (as trustee for Low Chee Yeong)	32,210
B	5	Woo Kam Nin (Joint Executrix with Low Seow Har @ Low Saw Har for the Estate of Low Lee Hung) (as trustee for Low Chee Yew)	16,575
C	6	Woo Kam Nin (Joint Executrix with Low Seow Har @ Low Saw Har for the Estate of Low Lee Hung) (as trustee for Low Chee Kwong)	16,903
D		Total	157,579

E [21] As a result of the above issuance of the additional 157,579 shares and allotment, Low Lai Kui's shareholding in the company was reduced to about 42%. Thus, he no longer has majority control in the company.

F [22] The plaintiff, being the widow of the late Low Lai Kui, alleges that the purpose of the issuance and allotment of the shares by the second defendant and her (the second defendant's) father, the late Low Cheong, was to dilute or destroy Low Lai Kui's majority control over the company; that the said issuance and allotment by the second defendant and Low Cheong was in breach of their fiduciary duties, and was not bona fide.

G [23] The plaintiff therefore seeks a declaration that the issuance and allotment of 157,579 shares at par value of RM1 per share by the company and in the manner as per Table 3 above were in breach of the directors' fiduciary duties and therefore were unlawful; and that the said allotment should be declared null and void. She also seeks an order that the share register be rectified accordingly by the first and second defendants.

H THE DEFENCE OF THE FIRST AND SECOND DEFENDANTS

I [24] Firstly, it is alleged by the defence that the plaintiff had agreed to set off Low Lai Kui's share of the net profits of the company which were available for distribution against the debt of RM230,000 owed by the said Low Lai Kui to the company. It is contended by the first and second defendants that, by reason of the debt and the agreement to set off, the plaintiff is now estopped from complaining that the allotment and issuance of the said shares were done to

dilute the majority shareholding of Low Lai Kui in the company; or that the second defendant and Low Cheong had acted contrary to their fiduciary duties. A

[25] Secondly, and in the alternative, the first and second defendants contend that, in any event, even without the agreement of the plaintiff, the company was entitled to set off the sum of RM230,000 in settlement of the debt owed by Low Lai Kui to the company as the first defendant company has a lien over the shares and dividends due to the late Low Lai Kui. B

[26] Thirdly, it is the submission of the defence that the plaintiff, in commencing the action in 1993, was guilty of laches. C

[27] At the conclusion of the trial, I found for the plaintiff. I made the orders as prayed, and I ordered costs. D

[28] My grounds are as follows.

THE PLAINTIFF'S EVIDENCE E

[29] Her evidence is as follows:

- (a) that her late husband held 42% of the shares in the company, and that her two sons held 5% each. Together they held 52%; F
- (b) that her husband died suddenly from a heart attack on 25 June 1987;
- (c) that by reason of the sudden demise of her husband she was in no frame of mind to discuss company affairs;
- (d) that she did not discuss any company matter with Low Cheong, her father-in-law, as she was too upset with her husband's sudden death; G
- (e) that she had no knowledge that the profits of the company were distributed partly in cash and partly in shares; nor did she receive any cash payment from the company; H
- (f) that she knew about the loan of RM230,000 which her husband obtained from the company;
- (g) that the company did not ask for the repayment of the loan from her;
- (h) that she did not authorise her father-in-law, Low Cheong, to act on her behalf in matters pertaining to the company; I
- (i) that she did not agree that the dividends made by the company be paid in cash or set off against her husband's loan;

- A** (j) that, after her husband's death, her father-in-law, Low Cheong, never asked her for the repayment of the loan;
- (k) that she was not notified of the alleged emergency general meeting (EGM) of 15 October 1987; and
- B** (l) that she did not agree that the company had the right to use the money from the dividends which was due to her husband to settle the debt allegedly owed to the company.
- C** [30] Low Chee Hoong (PW2) is the son of the plaintiff. His evidence is that when his father, Low Lai Kui, died he was studying in Australia. He returned to take over his father's business in the wholesale market at Selayang. Low Cheong, his grandfather, did not discuss the affairs of the company with him. After his father's death the company was managed by the second defendant.
- D** His father, his brother and he held the majority share in the company. He did not receive any cash or cheque from the declaration of the dividends. Neither he nor his brother ever authorises their grandfather, Low Cheong, to act for them or to receive money or to make any payment on their behalf. He did not act on behalf of his mother, the plaintiff, at the meeting allegedly held on 15 October 1987. PW2 denied that he had attended the EGM of 15 October 1987, but had recalled that the second defendant did give him some documents to sign.
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THE DEFENDANTS' EVIDENCE

- F**
- [31] In her evidence the second defendant said:
- (a) that the 157,579 shares were lawfully allotted;
- G** (b) that the late Low Lai Kui owed the first defendant company RM230,000 and that the debt remained unpaid when he died;
- (c) that the company, through the late Low Cheong, demanded repayment of the debt from the plaintiff, the widow of the late Low Lai Kui;
- H** (d) that the plaintiff instructed Low Cheong in October 1987 that Low Lai Kui's share in the accumulated profits of the company be utilised to settle Low Lai Kui's debt instead of being capitalised;
- (e) that the company at its EGM of 15 October 1987 and in accordance with the board of directors meeting held (after the EGM) on the same day capitalised the dividends of shareholders who wanted shares and paid cash to those who wanted cash payments;
- I** (f) that the plaintiff and her family opted to have cash payments instead of shares; and

(g) that the plaintiff instructed Low Cheong to receive the money on her behalf. A

[32] Under cross-examination by the plaintiff's counsel, the second defendant said:

(a) that the shares in the company were only given to the children and grandchildren of Low Cheong; B

(b) that the original percentage of shareholding in the company was maintained in the subsequent distribution of the shares through the capitalisation of dividends; C

(c) that, until the death of Low Lai Kui, the dividends were all capitalised;

(d) that during the shareholders' meeting of 15 October 1987 (EGM) Low Chee Hoong (PW2) represented his whole family (meaning the plaintiff and her children), and had requested that the dividends allotted to his family be paid in cash so that they could repay the loan borrowed from the company; D

(e) that she prepared the letters at pp 120 (letter dated 4 January 1988 allegedly from Low Cheong acting on behalf of Low Lai Kui addressed to the first defendant company acknowledging receipt of dividend after deducting the outstanding loan amount of RM230,000), of bundle A as instructed by her father; E

(f) that all the directors took their loans from the company on 25 September 1986; F

(g) that the minutes of the board of directors' meeting held on 15 October 1987 at 2pm at No 97-B Jalan Ipoh, Kuala Lumpur, were based on information supplied by her to the company secretary, Joseph Lim of Paul Charles & Associates; G

(h) that the EGM was held at the same time and date and at the place stated therein; that she was the secretary for the EGM; that the notice of the EGM was given verbally to all the shareholders; that she informed the plaintiff verbally of the EGM; that after the EGM at Jalan Petaling, she accompanied her father to their residence at Jalan Ipoh; and that her father specifically instructed her to call a board of directors' meeting which consisted of herself and her father; and H

(i) that the company did not give any notice to the plaintiff to exercise a lien over the shares and dividends payable to Low Lai Kui. I

ANALYSIS OF THE EVIDENCE

[33] Upon an analysis of the evidence, the following facts are undisputed:

(a) The company was set up by the late Low Cheong;

- A** (b) The shares of the company were distributed by Low Cheong to his children and grandchildren;
- (c) The original allotment of the shares is as set out in Table 1, being the agreement made between Low Cheong and the company;
- B** (d) Low Lai Kui held in his own name about 42% of the shares as in the original allotment by his father, Low Cheong. He also held in trust for his two sons another 5% each. Low Lai Kui's family therefore held 52% of the shares of the company giving his family majority control of the company;
- C** (e) Low Cheong was the governing director of the company;
- (f) The second defendant, as the daughter, was given 5% of the shares, the same as the amount of shares given to the grandchildren by Low Cheong;
- D** (g) This shareholding structure was maintained throughout; and any increase in the share capital of the company was through the capitalisation of dividends declared by the company;
- (h) All the directors of the company, except Low Cheong, took interest free loans from the company. The loans were repayable on demand by the company. The board of directors' resolution pertaining to the loans is at p 75 of bundle A.
- E** (i) Low Lai Kui died on 25 June 1987. Low Lee Hung died not long after that;
- F** (j) For the year ending 31 December 1986 the company declared dividends amounting to RM328,259;
- (k) The dividends payable to the shareholders were capitalised, except the dividends payable to Low Lai Kui amounting to RM170,680;
- G** (l) As a result of the non-capitalisation of the dividends, Low Lai Kui and his family's shareholdings in the company were reduced to about 42%, thereby he and his family lost majority control of the company;
- (m) The dividends which were capitalised were allotted in the manner set out in Table 3 of this judgment in proportion to the shareholding of the respective shareholders; and
- H** (n) The decision of the board of directors to capitalise the dividends and to pay out the dividends due to Low Lai Kui is said to be in the minutes of the board of directors' meeting at p 124 of bundle A. The second defendant and Low Cheong were the two directors at this meeting.

I AGREED ISSUES TO BE TRIED

[34] Three issues have been identified by the parties for trial:

- (a) whether the board of directors of the first defendant acted bona fide in

allotting shares on or about 16 October 1987, which affected the plaintiff's family shareholding in the first defendant company; or were the board of directors, in doing so, in breach of their fiduciary duties;

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(b) whether the plaintiff is estopped from claiming that the allotment and issuance of the shares in the first defendant to the shareholders of the first defendant was contrary to the fiduciary duties of the directors of the first defendant company; and

B

(c) whether the plaintiff's claim is barred by laches.

The first issue

C

[35] In my judgment, the board of directors of the first defendant was in breach of their fiduciary duties when they made the issuance and allotment of the shares, in particular, the issuance and allotment of the shares of the late Low Lai Kui. I so hold for the following reasons.

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[36] Firstly, the loan given by the company to the late Low Lai Kui was not yet payable to the company. It was not yet payable because there was no demand made either to the late Low Lai Kui when he was still alive, or (after his death) to his widow, the plaintiff. That there was no demand made to the late Low Lai Kui when he was still alive does not appear to be disputed. But the second defendant claims in her evidence that, after the death of Low Lai Kui, the plaintiff, being the widow, had been asked to pay the debt; and that she, on being so asked, had agreed to repay the alleged debt, and had also agreed to the issuance and allotment arrangement in settlement of the debt. The plaintiff, however, in her evidence, denies this allegation by the second defendant. The burden of proof thus lies on the second defendant to convince the court that the plaintiff had been asked to pay and that she had agreed to make the repayment; and that the plaintiff had agreed to the issuance and allotment of the shares in settlement of her late husband's debt to the first defendant. In my judgment, upon an evaluation of the evidence, the second defendant has failed to discharge that burden. The company resolution of 25 September 1986 states:

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THAT an interest free loan be given to the undermentioned members and that the Company reserves the right to call for repayment on demand.

[37] There is no credible evidence adduced by the defendants that the first defendant had made a demand for repayment of the loan to the plaintiff. If there was no demand for repayment made to the plaintiff then there was no 'call for repayment' by the company. If there was no such call for repayment, the estate of Low Lai Kui was under no legal obligation to repay the loan. And if there was no obligation to repay the loan, there was no debt owing. And if

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A there is no debt owing, the board of directors could not have made the issuance and allotment of the shares in the manner that they had done on 15 October 1987.

B [38] However, the second defendant in her evidence alleged:

20. Q: Did the 1st Defendant Company take any steps to recover the debt of RM230,000 owed by the deceased Low Lai Kui?

C A: Yes. The 1st Defendant Company through my father demanded repayment of the debt of RM230,000 from the widow of Low Lai Kui, namely, Cheah Ngun Ying, the Plaintiff herein.

D [39] In the first place there was no board resolution to demand repayment of the loan. This fact appears to be impliedly admitted by the second defendant. For, subsequently, during cross-examination, she said:

Q: Was there any demand from the company (whether oral or in writing) for Low Lai Kui to repay the loan of RM230,000.

E A: During dinner time, members of the family who were shareholders of the company, verbally gave instructions to demand all loans borrowed from the company to pay back to the company.

F [40] There is also no credible evidence that the late Low Cheong had demanded any repayment from the plaintiff. For this is what the second defendant said in her evidence during cross-examination:

Q: What did you do to carry out the instructions of your late father to demand the repayment of the loans?

G A: I telephoned all those shareholders who borrowed money from the company to pay back all the loans.

Q: What about Low Lai Kui's loan? Who did you speak to?

H A: My father had informed me that he had spoken to my sister-in-law Cheah Ngun Ying regarding the loan to pay back to the company. The reason being I personally found it very difficult to contact her. So I explained to my father about the difficulty. And my father initiated to telephone my sis-in-law about this matter concerned.

I [41] The evidence as to what the late Low Cheong had 'informed' her (the second defendant) is mere hearsay evidence. In any case, what right had Low Cheong to make such a demand in the absence of any board resolution calling for the repayment of the loan. And I would add that I agree with the submission of Mr Joseph Yeo (learned counsel for the plaintiff) that it is highly unlikely that Low Cheong, being the patriarch of the family, would have been so

heartless as to make such a demand to his recently widowed daughter-in-law, particularly bearing in mind that the company at that time was not really in need of such money for its business. A

[42] Secondly, the plaintiff has consistently maintained in her evidence that she never agreed to set off the alleged debt against the allotted shares. The second defendant, however, maintains in her evidence that the plaintiff did agree to set off. But, again, this assertion by the second defendant is not supported by the evidence. In her examination-in-chief, the second defendant said: B

Q: How or in what manner did the Plaintiff pay and settle ... the debt of RM230,000 owed to the 1st Defendant Company? C

A: The Plaintiff instructed my father in October 1987 that Low Lai Kui's share in the accumulated profits of the 1st Defendant Company be utilized to pay part of Low Lai Kui's debt owed to the Company instead of being capitalized and shares issued. D

[43] Note that according to the second defendant the plaintiff instructed her (second defendant's) father, Low Cheong to utilise Low Lai Kui's shares to pay the debt. Again this evidence is suspect. It is not clear from the second defendant's evidence as to whether she (the second defendant) was present at the time of the alleged 'instruction' being given by the plaintiff to her father-in-law Low Cheong; or whether she heard about this alleged instruction either from Low Cheong or from someone else, in which case it would be hearsay evidence. In any event, she gave a different version about the manner of the alleged 'instruction' in her evidence during cross-examination. When cross-examined by Mr Yeo, the second defendant said: E

Q: After his death, the dividends due to Low Lai Kui were purportedly paid in cash to the plaintiff as his widow? F

A: Yes, but I wish to clarify. During the shareholders' meeting, Low Chee Hoong represented his whole family to request that these dividends allotted to his family to be in cash so that they were repaid to loan borrowed from the company, namely, Low Cheong & Sons Sdn Bhd. G

Q: Do you agree that these dividends actually belong to Low Lai Kui's estate? H

A: Yes. It belongs to the estate no doubt. But the executrix (the plaintiff) instructed his son, Low Chee Hoong, to utilize the dividends for the repayment of the outstanding loan of the company. I

[44] It will be noted from the above that the second defendant now in cross-examination says that the instruction was given by the plaintiff to her son, Low Chee Hoong (PW2 — who denied that his mother ever gave such an instruction).

A [45] Thirdly, the second defendant's evidence of what transpired on 15 October 1987 is contrary to normal practice of companies. It is the normal practice of companies that the board will hold its meeting first and decide on the business to be transacted at the EGM, and thereafter the EGM would be held. It is not the other way around, as narrated by the second defendant.

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C [46] Fourthly, the minutes of both the meetings (the board meeting and the EGM) are suspect. Both meetings were purportedly held on the same date (15 October 1987) and at the same time (2pm) but at different venue (No 48, Jalan Petaling, Kuala Lumpur for the EGM; and No 97-B, Jalan Ipoh, Kuala Lumpur, for the board meeting) by the same people (the second defendant and the late Low Cheong). The minutes, if they are to be believed, would place both the second defendant and Low Cheong at two places at the same time and on the same date. Then, added to this impossibility, there are other factors: Low D Chee Hoong has denied being present at the EGM; and that the plaintiff has maintained that no written notice of the EGM was ever given to her. The second defendant, having earlier said that she had difficulty in contacting the plaintiff now said that she gave verbal notice to the plaintiff. But the plaintiff has testified — and I am more inclined to believe the plaintiff rather than the E second defendant — that she had never spoken a word with the second defendant for years. To my mind, in the circumstances, an inference could fairly be made that it is highly probable that there was *no* EGM held and that the minutes of the EGM is a mere fabrication.

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G [47] And I must add that, even if verbal notice was given, this is not in compliance with articles 67 and 150 of the articles of association. Notice of meeting normally contains an agenda which gives notice of the business proposed to be transacted at the meeting. Article 150 prescribes the mode of service of the notice, which has to be either personally or by post. This would exclude a verbal notice, which is unheard of. In the premises, coupled with the suspected nature of the minutes, to repeat what has been said earlier, in all probability no such EGM was ever convened.

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[48] Fifthly, according to the second defendant's own evidence, the company was financially strong in 1987. The net profits available for distribution for the financial year ending 31 December 1986 was RM328,259. There was, therefore, no reason for the company to demand the repayment of the loans taken by the directors.

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[49] Finally, I must say something of the evidence and demeanour of the second defendant that I had observed throughout the trial. She does not give a straight answer to many of the questions posed by counsel for the plaintiff. Her answers were usually qualified. She attributed a lot of the actions taken on Low

Cheong who had died and therefore is not available for cross-examination. She contradicted herself in several material aspects of her evidence. A

[50] In conclusion, it is my judgment, when the board of directors decided to allot and issue shares to the other shareholders by capitalising the dividends, and in the case of Low Lai Kui, to use his dividends to set off against the loan taken by him, the board comprising of the second defendant and Low Cheong did not act bona fide. The board knew that by so doing Low Lai Kui's shareholding in the company would be reduced or diluted. It would render his majority control of 52% to about 42%. B
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[51] The law with regard to the exercise of the powers of the directors to issue shares is that such power is a fiduciary power and must be exercised bona fide for the interest of the company (see *Howard Smith Ltd v Ampol Petroleum Ltd & Ors* [1974] AC 821; and *Lorenzi v Lorenzi Holdings Pty Ltd* (1993) 12 ACSR 398). D

[52] In my judgment, the power to allot and issue shares under article 5 of the articles of association of the company must be used for a proper and bona fide purpose. In the present case that power was used for a collateral purpose. That power was not applied equally but selectively where shares were allotted and issued to all the other shareholders in proportion to their respective shareholding, but no shares were allotted or issued to Low Lai Kui or his estate. The direct effect of such an exercise of power by the directors is that Low Lai Kui's family lost their majority in, and control of, the company. E
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[53] It is, however, submitted by Encik Joginder Singh, learned counsel for the first and second defendants that, by reason of article 30 of the articles of association, the company has a lien over the dividends due to Low Lai Kui (or to his estate) by reason of the debt of the said Low Lai Kui; and by virtue of article 133 of the articles of association of the company may retain Low Lai Kui's dividends towards satisfaction of his debt. Article 30 provides: G

30. The company shall have a first and paramount lien upon all the shares registered in the name of each member (whether solely or jointly with others), and upon the proceeds of sale thereof, for his debts, liabilities and engagements, solely or jointly with any other person, to or with the company, whether the period for the repayment, fulfillment or discharge thereof shall have actually arrived or not, and no equitable interest in any share shall be created except upon the footing and condition that Article 10 hereof is to have full effect. And such lien shall extend to all dividends, from time to time declared in respect of such shares. Unless otherwise agreed, the registration of a transfer of shares shall operate as a waiver of the Company's lien, if any on such shares. H
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A [54] Article 133 provides:

133. The company may retain any dividends on which the Company has a lien, and may apply the same in or towards satisfaction of the debts, liabilities or engagements in respect of which the lien exists.

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[55] With respect, in view of my earlier finding that there was no debt of Low Lai Kui in existence (since there was no demand made by the company for repayment of the loan), the question of a lien over his shares and dividends does not arise. In any case, the company has never notified the plaintiff that they were exercising a right of lien over the shares or dividends due to the estate of Low Lai Kui.

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Second issue

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[56] The second issue is whether the plaintiff is estopped from claiming that the allotment and issuance of the shares in the first defendant to the estate of Low Lai Kui is contrary to the fiduciary duties of the directors. In the light of my findings above, the answer to this question posed clearly must be in the negative.

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Issue of laches

[57] The principle of laches is:

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It is established by the course of authorities that proceedings for specific performance will not fail merely because the plaintiff has been guilty of unreasonable delay. In order that relief be refused it is necessary that it should further appear that as a consequence of that delay, it would be unjust that the plaintiff should obtain an order for specific performance. (*Equitable Remedies* by ICF Fry LLD (4th Ed) 1990, Sweet & Maxwell, United Kingdom, p 227.)

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[58] The learned co-authors, Gareth Jones and William Goodhart in their work *Specific Performance* (2nd Ed) 1996 Butterworth, London state (at p 109):

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Delay alone is not the only element in laches. To amount to laches the delay must be sufficient to be evidence of the abandonment of the contract by the plaintiff, or it must be coupled with some other factor which makes it unjust to the defendant to order specific performance.

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[59] In 1874 the Judicial Committee of the Privy Council held in *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 at pp 239–240 that the doctrine of laches applies where, through the material delay, it would be:

practically unjust to give a remedy,

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and that:

Two circumstances, always important in such cases are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy.

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[60] The above principle has been adopted by our Supreme Court in *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371.

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[61] In the present case, the plaintiff obtained the grant of probate on 27 March 1990 and the action was commenced on 14 October 1993. The cause of action arose in October 1987 and so there was a delay in commencing the action by the estate of Low Lai Kui. However, there is no impediment to the remedies sought by the plaintiff which include a rectification of the register of members of the company. The shares are still registered in the name of the respective shareholders and no third party would be affected by the relief sought by the plaintiff. Hence the principle of laches is not applicable in the present case.

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Plaintiff's claim allowed with costs.

Reported by Kanesh Sundrum

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