

## **Parties:**

**Plaintiff:** Afandi Bin Hussain, Technical director of Global Advanced( 1<sup>st</sup> Defendant)

## **Defendants:**

1. **Global Advanced** Broadband Solution (M) Sdn Bhd
2. **Rabih** Daher, director and shareholder of the 1st Defendant from the date of its incorporation.
3. **Ahmad Faridz** Bin Abdullah, current director and shareholder of the 1st Defendant.
4. Suruhanjaya Syarikat Malaysia, a statutory body which is responsible for, inter alia, the registration of corporations and regulating their compliance to the Companies Act 2016.

## **Chronology**

### **Background:**

The Plaintiff, Afandi bin Hussain (Afandi), was one of two directors of the company, Global Advanced Broadband Solutions (M) Sdn Bhd (1st Defendant). Afandi held the position of Technical Director. The other director was the 2nd Defendant, Rabih Daher (Rabih).

The 2nd Defendant and Afandi executed a Trust Deed which essentially stipulates that Afandi holds the 550,000 Shares as a trustee for the 2nd Defendant who is the beneficiary. Afandi also executed a blank Transfer of Shares, Form 32A of the Companies Act 1965, in respect of the 550,000 Shares.

In July 2016, Afandi issued a covering email attaching a resignation letter.

In October 2016, Afandi carried out a company search and discovered he was no longer listed as a director of Global Advanced and that another individual, the 3rd Defendant was appointed as director effective 4 July 2016.

Afandi disputed that he had resigned as a director and disputed that there was a proper appointment of the new director.

Eventually, he filed an action to seek various declaratory orders to essentially declare that he is still a director of Global Advanced.

\*Article 4 of the 1st Defendant's Articles of Association adopted Table A of the Fourth Schedule CA 1965

### **Plaintiff's claims/issues:**

1. The Plaintiff did not resign as a director of the 1st Defendant and the Resignation Letter was wrongly construed and used by the 1st Defendant to remove the Plaintiff.
2. Even if the Resignation Letter is accepted as a valid notice of resignation as a director, the removal of the Plaintiff as director of the 1st Defendant is invalid and contravenes Sections 122(1) and 122(6) of the Companies Act 1965
3. The 3rd Defendant's appointment as a director of the 1st Defendant is in contravention of Sections 122(1) and 122(6) CA 1965 and Article 67 of the 1st Defendant's AOA.

4. The 2nd Defendant cannot unilaterally enforce the Trust Deed to transfer 550,000 Shares to the 2nd Defendant.

### **1<sup>st</sup> issue- the effect of the resignation letter**

He did not resign as a **director** of the 1st Defendant and only as a “staff” for the position of a Technical Director and other additional positions such as Office, Warehouse and Finance Manager vide the Resignation Letter.

He supported his argument with the Cover Email sent on 25.7.2016 which states,

*“Attached my resignation letter as **staff**”*

#### **Defendant’s argument:**

1. The **literal and ordinary meaning** of the words, “***all current holding position***” in the Resignation Letter
2. The ending of the Resignation Letter: “Thank you very much for the **opportunity to be in the company**”
3. The Plaintiff’s **2 months delay in making his complaint** to the 4th Defendant after he discovered his removal as director.
4. The Plaintiff delay of about **3 years in initiating this Originating Summons** after finding out he was removed as a director and after the above events have occurred
5. The fact that no demand was made against the 1st or the 2nd Defendant after the Plaintiff discovered he was removed as a director of the 1st Defendant
6. The **circumstances surrounding** the Plaintiff resignation in particular the setting up of his company GABS, the Police Report, the Criminal Proceedings and the Shah Alam Civil Suit

#### **Held:**

- although “staff” was used in the cover email, the document referred to, which is the Resignation Letter takes priority
- considering the facts and surrounding circumstances, the word “staff” is more likely to mean his position as a director as well as an employee of the 1<sup>st</sup> Defendant.
- In conclusion, the Plaintiff had voluntarily resigned as a director of the 1st Defendant when he issued the Resignation Letter, and there was no misinterpretation on the part of the 1<sup>ST</sup> Defendant.

### **2<sup>ND</sup> issue- validity of the removal of the Plaintiff as Director of the 1<sup>st</sup> Defendant**

**Sub issue:** whether CA1965 or 2016 should be applied in this case

Held: After referring to Section 619(3) CA 2016, the Fourth Schedule of **CA 1965 shall continue to apply** to the 1st Defendant’s AOA unless otherwise resolved by the 1st Defendant.

#### **Plaintiff’s claim**

1. Pursuant to section 122(1) and (6) CA 1965, the 1st Defendant ought to have only allowed the Plaintiff to resign after the 1st Defendant had appointed an additional director.
2. The 1st and 2nd Defendants had breached Article 67 of the AOA and section 145(2) CA 1965 for not providing a notice of not less than 14 days to call for a general meeting to resign the Plaintiff and appoint the 3rd Defendant.

#### **Defendants’ Arguments:**

1. The 1st Defendant did not at any time reduce its directorship below the minimum of 2 directors because the resignation of the Plaintiff and re-appointment of the 3rd Defendant took place simultaneously.
2. According to Article 68 of the 1<sup>st</sup> Defendant's AOA, there is no requirement for a resolution to be passed for the resignation and appointment of a new director. (the other director can do)
3. Therefore, there was no breach of Sections 122(1) and (6) CA 1965 and Section 145(2) CA 1965.

**Held:**

- article 67 not applicable because there wasn't a "removal", but a "resignation" by Afandi himself through article 72 of the AOA
- The logical inference for the word "directors" in Article 68 is that the power is given to both the directors and is **exercisable by either** of them, hence the 2nd Defendant as a Director can appoint another director to replace the "casual vacancy" arising from the Plaintiff's resignation on 4.7.2016. (Need not to call for a company meeting)
- Based on the 2 corporate information reports issued by the 3rd Defendant, **both the removal of the Plaintiff and the appointment of the 3rd Defendant took place on 4.7.2016 simultaneously.** there was no impropriety in doing so and that it is like "swapping" directors.
- the resignation of the Plaintiff and the appointment of the 3rd Defendant are valid.

**3<sup>rd</sup> issue: Whether the 3rd Defendant's Appointment as a Director of the 1st Defendant is in Contravention of Article 67 of the 1st Defendant's AOA**

No notice to convene a general meeting was made, **no general meeting** nor ordinary resolution was held pursuant to Article 67 of the 1st Defendant's AOA was presented to the Plaintiff for the appointment of the 3rd Defendant as the director of the 1st Defendant

**Held:**

- the 2nd Defendant is empowered to appoint the 3<sup>rd</sup> Defendant pursuant to Article 68 of the 1st Defendant's AOA, hence **the Plaintiff's consent is also not required.** the 3rd Defendant was validly appointed as a director of the 1st Defendant on 4.7.2016.

**4<sup>th</sup> issue: Whether the 2nd Defendant Can Unilaterally Enforce the Trust Deed to Transfer the 550,000 Shares to the 2nd Defendant**

**Plaintiff's claim:**

1) the company cannot recognize the trust deed

no person shall be recognised to hold shares under a trust for other persons in pursuant to Article 7 of the 1st Defendant's AOA

Lim Chew Yin v Dato Suhaimi Ibrahim & Ors [2011] 5 CLJ 906:

"companies have nothing whatever to do with the relation between trustees and their cestuis que trust in respect of the shares of the company."

2) the transfer of the 550,000 Shares required the Plaintiff's approval pursuant to Article 20 of the 1st Defendant's AOA

## Defendant's argument:

the 2nd Defendant **affected the transfer of the 550,000 Shares by executing the Form 32A** based on Clause 9 of the Trust Deed (the company need not recognize the trust, but the transfer of shares)

## Held:

### 1) The **1st Defendant is not asked to recognise the Trust Deed**

The 1st Defendant only has to **recognise the transfer** of the 550,000 Shares which was done using the Form 32A.

Therefore, this case is different from the case of Liew Chew Sin which was relied by the Plaintiff. In that case, the High Court was asked to give effect to the trust existing between the 1st defendant therein and the plaintiff, but in this case, the **transfer of the 550,000 Shares had already been affected by way of the Form 32A** which was signed by Plaintiff. (validity of the trust deed vs validity of the transfer)

### 2) the transfer is recognized by the company

Article 20 of the 1st Defendant's AOA clearly states that the transfer of shares of the 1st Defendant can be affected "***by instrument in writing in any usual or common form***".

Form 32A is a specific instrument provided by s103(1) of the CA 1965 and is commonly accepted as the usual method of transfer. It shall apply to effect the transfer of shares, the plaintiff's participation is not required.

# END

## Link of the original case report:

<https://drive.google.com/file/d/1Up104KAhRYzNZMTTsuoifsBthy2DoBIn/view?usp=sharing>

## Additional Input from 20201123 Meeting with Li Chen:

Xuan Chi to double check all typo, fix typo & pronunciation error

- find MARA case ???? Li Chen to help find
- <https://themalaysianlawyer.com/2019/12/16/case-update-resignation-directors/>
- <https://www.learnabee.com/courses/747906/lectures/14347732>

Xue Er need to triple check on Xuan Chi's double check

Li Chen to give Xuan Chi slides if any on

## Questions:

### 1. When was this judgement?

23.9.2020

### 2. Was there a DCR to approve the appointment of new Director?

no, nothing about DCR was mentioned in the entire case report (he did ask SSM for it but was asked by SSM to request himself from the company)

### 3. S202 under CA2016 if Company is without Constitution appointment is either by Board (conditional) or outright by members

### 4. New case of Wong Kok Meng where resolution is not required for resignation of a Director

<https://themalaysianlawyer.com/2019/12/16/case-update-resignation-directors/>

### 5. Judge was right to refer to Art 68 not Art 67 for the appointment of new Director and Art 72 for casual vacancy of resigned Director

### 6. Why were there 2 separate times the letter of resignation was submitted.

the actual reason wasn't stated in the case, but according to Afandi's argument, he intended emphasize his intention to resign only as a staff of Global Advanced, but not a director

the second resignation letter was attached in a covering email, stating that "Attached my resignation letter as staff"

21 days auditors resignation letter

### 7. What's the procedure for resignation of Director under CA2016 post Wong Kok Meng?

### 8. MARA's case appointment of Director under s202.

**Case Examination:** Critically analyse the reasoning of the court judgement

**Risk Analysis:** Highlighting the Risk Involved from the court case

**Practical Implications:** Explaining how the legal decision impacts professional practice, business & corporate world

**Proposed Solutions:** Suggestions to mitigate risk for practitioners, directors & management

**Actual Live Webinar Session:**

**(Fri) 11 Dec 11am**

**RM 29**

**Price Increase to RM 49 1 Jan 11pm**

**(Free Session) 11am - 12pm: Description Phase**

Introduction & Court Case Description

**12 - 1pm:** Lunch Break

**(Paid Session) 1 - 2:30pm: Critical Thinking & Analysis Phase**

**Case Examination:** Critically analyse the reasoning of the court judgement

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**Proposed Solutions:** Suggestions to mitigate risk for practitioners, directors & management

**Quiz question:**

1. What is the reason Afandi ceased to be director of Global Advanced?
  - a. Removal
  - b. Resignation
2. Consent of the Board is required for the Resignation of a Director to take effect
  - a. True
  - b. False
3. The power to appoint a new director is exercisable by any director when a vacancy is created
  - a. True
  - b. False
4. Company Secretary does not need to entertain any request to inspect Company's Records from a Former Company Director
  - a. True
  - b. False

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**Li Chen's part**

**Case Examination:** Critically analyse the reasoning of the court judgement

1. **Article 84** - why Court didn't use this instead of Art 67 and Art 68? Defendants' Lawyers failed or missed out?
2. **Good Judge** - didn't throw out the case
3. **Directors or Director ?** -read interchangeably as Director in the singular form

4. **No Gap in Between** - simultaneous appointment and resignation meaning no gap in between (any time within the same day)
5. **Consent Not Required** - Consent of the Resigning Director (Afandi) is not required for the appointment of new Director (Ahmad Faridz)

Practical solutions and pitfalls to avoid or prevent

### Ahmad Faridz

- Nominee director and shareholder of Rabih?
- D&O insurance and indemnity?
- Rope in and sued in the case

### Rabih

1. Have 3 Directors instead of 2 which could have situation of an equality of votes and absence of quorum. Get a third director who is neutral or from his side
2. Alternatively, Change Company to a sole Director Company as it is now allowed for private company
3. 85% shareholding therefore Board composition should be reflective of and commensurate with the proportion of shareholding
4. Made himself Chairman as he is the largest shareholder and has casting vote
5. Transfer share to someone other than a Director so in case of any fallout at the Board he can count on this person to make up quorum to remove director
6. Alternatively is to seek a court order to buy up Afandi's shares and transfer Ahmad Faridz's shares to himself to make it a single member company since this is now allowed under CA2016 = OPC
7. must avail himself the avenue to remove Director and to amend the Constitution the Article as s128 CA1965 no longer is available i.e. whether special notice is required or not. See **Golden Plus** case on removal where the Courts give primacy of the Constitution.
8. Cannot change quorum to one (1) as long as this is not a OPC must still maintain as 2 so long as it has more than 1 Director or Shareholder (general rule of Meeting in the case of **Sharp v Dawes (1876)** 2 to constitute a meeting)
9. Restraint of trade on Afandi being the Technical Director? Can work if reasonable under the circumstances
10. Rabih is a foreigner because of his Passport therefore another issue is on his residency status to meet s122(1) CA1965 and now s196(4)(a) CA2016
11. Amend Constitution to allow for Company to be OPC or just drop Constitution as an OPC
12. Technical person for the business can issue "Non-voting" shares to "tie him down" but to share the profits
13. To petition for members' voluntary winding up? Question is "Will he want to break up the Company?" If not, can he continue to "live" with Afandi after what have happened, the suit, the police report, disharmony between them?

### Company Secretary

- Was not sued - cooperative and people skills

"24.10 Through a Whatsapp communication on 25.10.2016 between the Plaintiff and the 1st Defendant's Company Secretary, En Saharudin bin Mohd Basar ("En Saharudin"), En

Saharudin extended to the Plaintiff documents pertaining to the Plaintiff's resignation as a director of the 1st Defendant." (Note: admissibility of WhatsApp message as evidence in court)

- Access to records by a former Director (Must know rights of Director iro access to documents of the company)

### Afandi

- Clear wordings for letter of resignation
- See the case of **Tan Kin Veī (2019) and Wong Kok Meng (2019)** where it is now clear that no board resolution or consent of the Board is required for the resignation of a Director just his resignation letter suffice.
- S58 filed and ask for a copy for his own record and information that he has properly resigned and effective date clearly set (cut off from duties and liabilities if a Director)
- Should not set up Company with competing business before his resignation DOI 1 July 2016 and resignation wef 4 July 2016 - not to harm the Company
- Name too similar GABS v GABSSB to probe what single letters mean when do name search (GABS Network Solutions Sdn Bhd)

### From DNH's Article:- "The effect of resignation"

- As mentioned, a director is not absolved from all liabilities by virtue of his/her resignation, if such liabilities were incurred as a result of his/her breach of director's duties to the company, prior to the date of resignation. For example, in CTI Leather Sdn Bhd v Hoe Joo @ Khoo Hock Tat & Ors [2011] 8 MLJ 521, the court scrutinized the date of the directors' resignation and found that their breach of fiduciary duties had occurred before their resignation and were therefore liable for the losses suffered by the company. In addition, the court also went further and considered whether the conduct of the defendant fell within the definition of "director" under the Act notwithstanding his resignation in determining whether he is still liable as a director post resignation. Among the factors considered which led the court to reach the finding that the defendant remained in control of the company and was therefore still a director notwithstanding his resignation were:
- the defendant remained as a cheque signatory of the company, thereby having control of the finances of the company
- the defendant's continued role in the company
- the defendant continued to receive benefits from the company.

### MARA's case

#### 2 ways of appointment of Director under CA2016

##### S202(2) codified the inherent powers of members at GM (Barron v Potter (1914))

Appoint director by ordinary resolution (note not at GM as in Art 67 and Barron v Potter (1914)) therefore Private Company if not restricted or prohibited by its Constitution can appoint by MCR)

##### S202(3)

Appoint director by the Board (Art 68) but is conditional to terms of appointment, if any, or if public company, subject to re-election at AGM and subject to Constitution.



DCR passed to frustrate the appointment of Directors at EGM upon removal of Directors NOT VALID (*Mala fide*)

Although 4 of MARA's Directors signed DCR out of no choice (*fait accompli* - a thing that has already happened or been decided before those affected hear about it, leaving them with no option but to accept it.)

### **S196(3) is conditional**

Extended s122(6) CA1965 by adding the word "unless a person is appointed in his place"

### **SSM**

What was SSM's stand in this case?

NFA and reply to Plaintiff below

24.15 By letter dated 4.3.2019, the 4th Defendant replied to the Plaintiff's solicitors' letter of 12.8.2018 where the 4th Defendant maintained their stand and further, inter alia, stated as follows: "Lain-lain sebab. Tiada maklumat palsu yang diserahkan di SSM berkaitan perletakan jawatan Afandi Hussain sebagai pengarah syarikat GABSSB. Pihak tuan boleh mengambil tindakan sivil di bawah seksyen 602 AS 2016 bagi pembetulan daftar pengarah dan pemegang saham GABSSB"

### **Article 84**

84. The continuing directors may act notwithstanding any vacancy in their body, but if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing director may act for the purpose of increasing the number of directors to that number or of summoning a general meeting of the company, but for no other purpose.