Heap Huat Rubber Company Sdn Bhd and Others v Kong Choot Sian and Others [2004] SGCA 12

Case Number : CA 64/2003/R

Decision Date : 30 March 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Lai Kew Chai J; Yong Pung How CJ

Counsel Name(s) : Philip Jeyaretnam SC and Jean Lim (Rodyk and Davidson) for appellants; Respondents in person

Parties : Heap Huat Rubber Company Sdn Bhd; HHR Properties Sdn Bhd; HHR Trading Sdn Bhd; HHR Construction and Supply Sdn Bhd — Kong Choot Sian; Kong Siew Seng; Ng Phuay Khoon

Companies – Directors – Shadow directors – Whether parties adjudged to be 'shadow directors' by the court must comply with provisions in the companyÂ's articles of association setting out formal requirements which 'directors' must comply with

Companies – Directors – Duties – Whether there was distinct obligation for directors to demand breakdown of expenditure from parties claiming reimbursement for fees paid and services rendered – Whether failure to obtain such a breakdown of expenditure constituted breach of directorÂ's duties

Companies – Directors – Remuneration – Distinction between ordinary and special remuneration – Whether directors' fees and salaries constituted special remuneration or ordinary remuneration

Companies – Directors – Remuneration – Whether directors' remuneration authorised by companyÂ's articles of association

Evidence – Weight of evidence – Valuation report – Whether valuation report provided accurate indication of appropriate sale price in respect of two land parcels

30 March
2004
Judgment reserved.

Lai Kew Chai J (delivering the judgment of the court):

1 This appeal relates to alleged breaches of fiduciary duties by the directors of the appellants, Heap Huat Rubber Company Sdn Bhd ("HHR"), HHR Properties Sdn Bhd ("HHR Properties"), HHR Trading Sdn Bhd ("HHR Trading") and HHR Construction and Supply Sdn Bhd ("HHR Construction") (collectively "the HHR companies"). HHR Properties, HHR Trading and HHR Construction are wholly-owned subsidiaries of HHR.

2 In 1960, HHR was incorporated in Malaysia by one Ng Quee Lam ("Ng") and his family. HHR owned property in Singapore and Malaysia and its assets were later used to secure the debts of related companies. Among HHR's most valuable assets were two land parcels ("the Johor land") comprising seven lots of land in Tebrau, Johor ("the Tebrau land"), and a lot of land in Pulai, Johor ("the Pulai land").

3 In 1988, Ng became bankrupt. Following this, Ng took steps to ensure that the control of HHR – which remained potentially valuable in light of its property holdings – was transferred to his children and their spouses. In particular, on 17 September 1992, the shares held by the Official Assignee of the estate of one Ng Eng Kiat ("the NEK shares") were transferred by HHR to three of Ng's family members in purported exercise of a lien and power of sale under HHR's articles of

association.

The sale of the Johor land

4 In 1995, the Tebrau land was sold to Timepac Industries Sdn Bhd for RM6.8m and the Pulai land was sold to Panfield Sdn Bhd ("Panfield") for RM13.2m. HHR did not get a valuation report in respect of the Pulai land or the Tebrau land prior to their sale.

5 Each parcel of land was sold subject to a caveat lodged by United Overseas Bank Ltd ("the UOB caveats"). Individual sale and purchase agreements, both dated 28 December 1995, were executed for the sale of each parcel of land. Both agreements stipulated that the sales were conditional upon the purchasers procuring from UOB its consent to the sale of the land. Another condition of sale was that UOB agree with the purchaser a "settlement sum" to waive and discharge HHR from its liabilities in relation to the caveats. The settlement sum was to be paid by the purchaser. Each sale was further subject to a condition that the purchaser would be at liberty to apply, in the name of the vendor, to convert the land from agricultural use to building and/or industrial use. The purchaser was to bear the costs of such an application.

6 A settlement sum of $34m (approximately RM60.095m) in respect of the Pulai land was eventually agreed upon between UOB and Panfield on 14 January 1997.

7 HHR received the proceeds from the two sales in January 1998. The proceeds were transferred to HHR Properties, HHR Trading and HHR Construction which were incorporated in early 1998.

The supplementary agreement dated 1 March 1996

8 In a supplementary agreement dated 1 March 1996, HHR agreed to reimburse the sum of RM3.2m to Panfield in full settlement of:

(a) all payments made by Panfield on behalf of HHR in litigation proceedings in connection with the Pulai land; and

(b) all payments made by Panfield for the management, protection and preservation of the Pulai land.

The institution of the present action

9 Between 1992 and 1999, HHR was controlled by the family of the first respondent, Kong Choot Sian ("Kong"), which held 65% of HHR's total issued capital. Kong, who is Ng's son-in-law, was a director of HHR from 1987 until he (Kong) was made bankrupt in 1988. The remaining 35% of HHR's shares were held by the Official Assignee of Ng Kwee Teng, the Official Receiver of Ng Quee Hock Pte Ltd and Excelux Pte Ltd.

10 In 1999, the Official Assignee of Ng Eng Kiat recovered the NEK shares. Thus, the balance of shareholding changed. Kong's family lost majority control of HHR and the Official Assignee of the estate of Ng Eng Kiat, the Official Receiver of Ng Quee Hock Pte Ltd and Excelux Pte Ltd gained majority control of HHR. In January 2001, new directors were appointed and the present action was instituted by them, in the name of the HHR companies. The seven defendants proceeded against were Kong and six others who were alleged to have been directors or shadow directors of HHR.

The HHR companies' claims below

11 The HHR companies claimed that, while HHR was under Kong's control, the defendants had acted in breach of their fiduciary duties as directors or shadow directors.

12 Specifically, it was alleged that the defendants, in breach of their fiduciary duties, caused HHR to sell the Johor land at an undervalue. The HHR companies relied on a valuation report ("the valuation report") which valued the Pulai land at RM91.886m and the Tebrau land at RM50.052m. The case put forward by the HHR companies was that even after the settlement sum was taken into account, the Johor land had been sold at an undervalue of approximately RM60m.

13 The defendants were further alleged to have made the payment of RM3.2m to Panfield for no valid consideration. Finally, the HHR companies also claimed that the defendants had caused HHR Properties, HHR Trading and HHR Construction to pay excessive remuneration to the defendants.

The decision below

14 The judge hearing the case below dismissed the action. The judge held that the HHR companies had not proved that the Johor land had been sold at an undervalue as the valuation report did not take into account that the lands were sold subject to the UOB caveats.

15 The judge was of the view that the payment to Panfield was not made without consideration as the HHR companies had not disputed that Panfield had rendered services and expended moneys on behalf of HHR. The judge accepted the fifth defendant's evidence that there was an oral agreement to pay Panfield for these services.

16 In respect of the allegation that HHR Properties, HHR Trading and HHR Construction had paid excessive remuneration, the judge noted that the articles of association of these companies stipulated that directors' remuneration was to be approved by the company in general meeting. The judge further noted that the HHR companies had led no evidence to support their allegation and to counter the defendants' denial that the remuneration had been excessive. The judge's view was that it was insufficient to point to the low income earned by these companies as "the rate of return is not a proven and accepted basis for determining whether directors and employees remuneration paid are excessive". The judge was of the view that a proper determination should take into account the works and services done and rendered by the defendants as the defendants "may render sterling services without achieving good returns for the company". The judge also found that the failure on the part of the HHR companies to state the extent of the alleged overpayment undermined their claim in this regard.

17 Finally, the judge rejected the claim that the payments made by HHR to the defendants were unauthorised as he was of the view that Art 73 of HHR's articles of association provided that directors' remuneration was to be determined by the company in general meeting.

The appeal

18 On appeal, the HHR companies chose to proceed against Kong and two other directors, Kong Siew Seng ("Siew") and Ng Phuay Khoon ("Phuay") (collectively "the respondents"), only.

19 Four issues were raised for our consideration:

(a) whether the respondents, in breach of their fiduciary duty and/or their duty of care,

caused HHR to sell the Johor land at an undervalue;

(b) whether the respondents, in breach of their fiduciary duty and/or their duty of care, caused or permitted HHR to make the payment of RM3.2m to Panfield;

(c) whether the payment of salaries to the respondents by HHR were authorised payments; and

(d) whether the payments by HHR Properties, HHR Trading and HHR Construction to the respondents were authorised payments.

20 We will deal with each issue in turn.

Whether the respondents caused HHR to sell the Johor land at an undervalue

21 The HHR companies maintained that the respondents caused the Johor land to be sold at an undervalue and submitted that the judge erred in holding that the HHR companies had not discharged their burden of proof in this regard. The key bone of contention centred on whether the valuation report provided an accurate indication of an appropriate sale price in respect of the Johor land as of the date it was sold.

22 We note that the judge below had found that the valuation report was of very limited value as the valuation had not taken into account the UOB caveats. The judge noted that the HHR companies had provided no evidence of the interest UOB claimed over the land, or of the sum UOB would have demanded (as at the date on which the sale and purchase agreements were signed) to withdraw the caveats.

23 While the judge accepted that a settlement sum of $34m had eventually been agreed upon between UOB and Panfield in 1997, the judge made the following findings:

> The fact that [UOB] agreed to $34m on 14 January 1997 does not mean that it would have accepted the same figure on 28 December 1995. The debt (if the caveats arose from debts) may be reduced over the period, or the bank may have lowered its demand in 1997.
>
> Without knowing the sum required to remove the encumbrances at the time of sales it is not possible to derive the proper sale prices from the valuation reports.

24 The HHR companies submitted before us that the judge had overlooked the fact that the respondents had pleaded in their defence that the value of the encumbrance was $34m.

25 We are unable to agree with the HHR companies on this point. The relevant portion of the defence is set out below:

> 48 Sometime in 1995, an agreement was reached between the 1st Plaintiffs, UOB and 2 companies (… known as Panfield Sdn Bhd and Timepac Industries Sdn Bhd) under which:-
>
> (i) the 8 Properties would be sold to Panfield Sdn Bhd and Timepac Industries Sdn Bhd ("the Purchasers") for an aggregate net sum of RM20,000,000/-; and
>
> (ii) the Purchasers would pay all monies owing to UOB under the Judgment Debt (which amounted to S$34,000,000 or about RM70,000,000).

49 The sale of the 8 Properties (by way of 2 Sale and Purchase Agreements dated 28 December 1995) was therefore:-

(i) not for undervalue;

(ii) for the primary purpose of satisfying a Judgment Debt of S$34,000,000/- (about RM70,000,000/-) obtained by UOB against the 1st Plaintiff; and

(iii) for the benefit and in the best interests of the 1st Plaintiff.

26 We are of the view that a plain reading of the defence would not suggest that the respondents had pleaded that the value of the *encumbrance* was $34m. Instead, the defence merely states that the *judgment debt* amounted to $34m.

27 In our view, the fallacy in the HHR companies' contention lies in their failure to distinguish between the judgment debt (owed by HHR to UOB after UOB obtained judgment against HHR in litigation which concluded in November 1992) and the settlement sum, which was the amount UOB would have demanded from the purchasers of the Johor land in order to withdraw the caveats over the land.

28 If the settlement sum was to be equivalent to the judgment debt, one would have expected that this would have been expressed in the sale and purchase agreements. Instead, the agreements envisaged that the settlement sum would have to be negotiated between the purchaser of the land and UOB. For example, we note that, in cl 1.1 of both agreements, the sale is said to be conditional upon "UOB agreeing with the Purchaser a settlement sum". In cl 1.2, it is provided that the vendor is to execute a power of attorney in favour of the purchaser so that the purchaser can "negotiate and secure the said settlement sum so as to lead UOB giving its consent to the sale and transfer of the said Land".

29 In light of this, it is not at all clear what the settlement sum would have been as at 28 December 1995 and we therefore take the view that the judge did not err in holding that it was not possible to derive an appropriate sale price from the valuation report.

30 Further, it must be remembered that the Johor land was sold on the basis that it was agricultural land. In contrast, the valuation report was prepared on the basis that approval for the land to be used for industrial development had already been granted. This is evident from para 29.0 of the valuation report which states:

BASIS OF VALUATION:

> The subject plot is valued as at 28 December 1995. Our valuation therefore takes into account of [*sic*] the approval which was granted to the subject property for industrial development conditional upon the provision of 40% lowcost [*sic*] dwelling as required by the State Authority.

31 It is therefore our view that the judge rightly dismissed the HHR companies' claim that the Johor land was sold at an undervalue.

Whether the respondents caused or permitted HHR to make the payment of RM3.2m to Panfield

32 This issue concerns the supplementary agreement dated 1 March 1996 in which HHR agreed

to reimburse to Panfield the sum of RM3.2m in full settlement of:

(a) all payments made by Panfield on behalf of HHR in litigation proceedings in connection with the Pulai land; and

(b) all payments made by Panfield for the management, protection and preservation of the Pulai land.

33 On appeal, the HHR companies took issue with the failure on the part of the respondents to seek directors' or shareholders' approval in respect of this payment. The HHR companies also asserted that the respondents should have taken more care in ascertaining the exact amount of Panfield's expenditure before agreeing to pay Panfield. In particular, Phuay failed to receive any account of how the RM3.2m was made up, thus acting in breach of his duty as director of HHR. The HHR companies also urged us to find that Kong and Siew, by permitting Phuay to enter into the written agreement on behalf of HHR, had similarly acted in breach of their duties as directors.

34 The judge's findings on this point were that Panfield had rendered services or expended moneys on behalf of HHR and that there was an oral agreement that Panfield would be paid for this. Thus, the supplementary agreement could not be said to have been without consideration.

35 On appeal, the HHR companies stressed that they had not accepted at the trial below that Panfield had rendered services or expended moneys. For the purposes of their appeal, however, the HHR companies chose to focus on Phuay's failure to obtain statements of payments or expenditure from Panfield. The HHR companies took the position that they did not have to go further than this, since their claim was against Phuay, who was a director obliged to account for payments made by him out of the company's funds.

36 In light of the way the issue was framed, the key issue before us was whether a director is obliged to account for payments made by him out of company's funds to the extent of demanding a detailed breakdown of the expenditure from parties who claim reimbursement for fees paid and services rendered.

37 We were not surprised that the HHR companies were unable to cite any authorities in support of their position. We are of the view that there is no such general obligation and that the failure to demand a breakdown of expenditure in such circumstances, in itself, should not amount to a breach of a director's duties.

38 While a director is clearly under a duty to account for payments made by him out of the company's funds, this is part of the broader general fiduciary duty to act *bona fide* in what the director considers to be the interests of the company. In our view, if it can be shown that the directors acted in what they considered to be the interests of the company, there is no distinct obligation for them to have obtained a breakdown of Panfield's expenditure.

39 A further chink in the HHR companies' armour was the fact that the respondent's pleaded defence was that the sum of RM3.2m was reimbursement for moneys paid by Panfield on behalf of HHR for legal costs and expenses incurred by HHR in respect of seven suits in Malaysia over a period of approximately six years. These suits were in fact listed in the supplementary agreement. The respondents' position is that RM3.2m was an estimated projection which they felt to be not an unreasonable sum in light of the numerous suits and creditors HHR were up against in litigation.

40 The onus clearly lay on the HHR companies to show that the respondents acted in disregard

of the interests of HHR by entering into the written agreement. However, the HHR companies adduced no evidence in this regard. The relevant test is that applied by the Court of Appeal in *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1995] 1 SLR 313 at 325, [30]:

> [Whether] an honest and intelligent man in the position of the directors, taking an objective view, could reasonably have concluded that the transactions were in the interests of the [company].

41 Taking into account that Panfield paid the legal costs of seven suits on behalf of HHR and that the payment was also meant to reimburse Panfield for expenses incurred in the management, protection and preservation of the land, it cannot be said that the respondents could not reasonably have concluded that the payment was in the interests of HHR. Further, there is nothing to suggest that the respondents had any personal interests in Panfield or that the respondents benefited in some way from the transaction. We were therefore unable to rule in favour of the HHR companies on this point.

42 We should also add, at this juncture, that we find the HHR companies' contention, that the respondents failed to obtain board approval before entering into the supplementary agreement, to be wholly without merit. The directors' resolution dated 28 January 1993 which authorised the sale of Johor land provided that "any of the two (2) directors are empowered to execute … other relevant documents pertaining to the sale of the above properties". The ambit of this resolution is clearly wide enough to include the written supplementary agreement.

Whether the payment of salaries to the respondents by HHR were authorised payments

43 This issue relates to salaries and fees which were paid to the respondents by HHR.

44 It is established law that the mere holding of the office of director, in itself, does not entitle a director to remuneration. In light of this, the company's articles of association usually provide that directors are entitled to some form of remuneration and any remuneration received by a director must be in accordance with the articles of association. Thus, in *Guinness plc v Saunders* [1990] 2 AC 663, Lord Templeman stated at 692 that:

> Equity forbids a trustee to make a profit out of his trust. The articles of association of Guinness relax the strict rule of equity to the extent of enabling a director to make a profit provided that the board of directors contracts on behalf of Guinness for the payment of special remuneration or decides to award special remuneration. Mr Ward did not obtain a contract or a grant from the board of directors. Equity has no power to relax its own strict rule further than and inconsistently with the express relaxation contained in the articles of association. A shareholder is entitled to compliance with the articles.

45 The argument advanced by the HHR companies, both on appeal and below, was a simple one. Their view was that HHR's articles of association required that the *board* authorise such payments and that the payments were unauthorised as there were no valid board resolutions. Since a director is not entitled to remuneration except in accordance with the company's articles of association, the respondents are obliged to refund the sums paid to them.

46 The judge, however, took an altogether different view and held that Art 73 of HHR's articles of association provided for the remuneration of directors to be determined by the *company in general meeting*. The judge therefore disagreed with the HHR companies' position that a board resolution was necessary to authorise such payments.

47 On appeal, the HHR companies submitted before us that the judge's interpretation was flawed as he had failed to appreciate the distinction drawn in Art 73 between ordinary and special remuneration. The HHR companies maintained that only directors' *fees* (which are ordinary remuneration) are to be determined by the company in general meeting. Directors' *salaries* constitute special remuneration which must be determined and authorised by the board.

48 It would be helpful to set out, in full, the relevant provision, Art 73, and we now proceed to do so:

> *The remuneration of the Directors shall from time to time be determined by the Company in General Meeting.* The Directors shall also be paid such travelling hotel and other expenses as may reasonably be incurred by them in the execution of their duties including any such expenses incurred in connection with their attendance at Meetings of Directors. *If by arrangement with the other Directors any Director shall perform or render any special duties or services outside his ordinary duties as a Director, the Directors may pay him special remuneration, in addition to his ordinary remuneration*, and such special remuneration may be by way of salary, commission, participation in profits or otherwise as may be arranged.
>
> A Director may hold any other office or place of profit under the Company (except that of Auditor) in conjunction with his office of Director and on such terms as to remuneration and otherwise as the Directors shall arrange.
>
> [emphasis added]

49 We have considered the terms of Art 73 very carefully and we are of the view that the HHR companies' interpretation of Art 73 is flawed. The HHR companies have erroneously assumed that all payments which are labelled as "salary" or "salaries" would constitute special remuneration. All that Art 73 provides is that special remuneration may be paid out *by way of* salary, commission, profit-sharing or any other arrangement agreed to by the parties concerned. It does not provide that all "salary" is special remuneration and it is simply untenable to argue otherwise.

50 It is our view that Art 73 is reasonably clear on its terms – as a general rule, ordinary remuneration would include directors' fees and salaries that are paid to a director in respect of his office. Such payments are to be determined by the company in general meeting. In turn, special remuneration constitutes payments made to a director in respect of "special duties or services outside his ordinary duties as director". Such a situation might arise, for example, where a director who is also a qualified lawyer assists the company in his capacity as a lawyer; the remuneration he receives in respect of his professional legal services would be special remuneration.

51 Thus, the critical distinction is not between "salaries" and "fees", as the HHR companies have suggested, but is instead between the services for which the payments were made.

Payments by HHR to Siew and Phuay

52 The difficulty we faced was that it was not at all clear which payments to Siew and Phuay the HHR companies were contesting and it was therefore difficult to determine whether the payments constitute payments made to the respondents in respect of their office (ordinary remuneration) or whether they were in respect of other services rendered (special remuneration). Ordinary remuneration has to be determined by the company in general meeting but special remuneration may be arranged by the board of directors: see Art 73.

53 It would appear from the HHR companies' written submissions that their grouse was in respect of the moneys paid to Siew and Phuay in their "offices of … Executive Director". However, the HHR companies did not, at any time, allege that the moneys were paid to these respondents for any extra services rendered.

54 Without further details, we must assume that Phuay and Siew were paid in respect of their offices; this would constitute ordinary remuneration which required the approval of the company in general meeting. Our view is supported by the terms of Siew's contract with HHR which provided for his appointment as "Executive Director" for a period of three years from 1 November 1999. In this contract, there is no mention of any services which extend beyond those normally provided by directors in respect of their office. Instead, cll 3 and 4 provide that:

> 3. The Director shall attend at the office of the Company or at any such other place or places as his duties may require and shall devote his whole time and attention diligently and to the best of his skill perform his duties as such Director.
>
> 4. During the continuance of this Agreement, the Director shall … devote such of his time, attention and abilities to the business of the Company as may be necessary for the proper exercise of his duties as Director.

55 Thus the critical question, in our view, was whether there was approval by the company in general meeting for the payments to Siew and Phuay.

56 The HHR companies argued that there were no shareholders' resolutions in respect of HHR's payments to the directors and asserted that this was admitted by Phuay. In support of this, the HHR companies relied on the following extract from Phuay's evidence in cross-examination:

> Q: For the 3 subsidiaries there were no shareholders' resolution approving the remuneration for the directors' fees and salaries?
>
> A: I don't think so.
>
> Q: There is one shareholders' resolution from 3rd plaintiff – NPK12, page 399 – the RM60,000 directors' fees for 1998. Other than this there is no shareholders' resolution for money paid to the directors?
>
> A: No.

57 We are of the view that this contention was without merit as we feel that Phuay's comments were clearly in relation to HHR Properties, HHR Trading and HHR Construction, and not HHR. We also note that the shareholders of HHR appeared to have approved the payments made to Phuay and Siew between 1995 and 1997, as evidenced in the minutes of the annual general meetings of HHR held on 16 September 1997 and 27 October 1998.

58 We therefore hold that any payments received by Phuay and Siew from HHR during the period from 1995 to 1997 are authorised payments, and the HHR companies' appeal in respect of those payments must fail. However, it appears to us that payments received by Phuay and Siew from 1 January 1998 were unauthorised by the company in general meeting and must be refunded to HHR.

Payments by HHR to Kong

59 Kong cased to be a director of HHR on 21 October 1988. Since Art 73 is only concerned with the remuneration of directors, any payments made to Kong after 21 October 1988 in his capacity as company consultant do not fall within the ambit of Art 73. The HHR companies' contention that the judge misread Art 73 is, in fact, irrelevant to the analysis of whether the payments received by Kong after 21 October 1988 were authorised.

60 It was our view that it fell to HHR's board of directors to approve these payments as Art 77 of HHR's articles of association vested the power of management in the board. Art 77 states, *inter alia*, that:

> The business of the Company shall be managed by the Directors, who may pay all such expenses of and preliminary and incidental to the promotion, formation, establishment and registration of the Company as they think fit, and may exercise all such powers of the Company, and do on behalf of the Company all such acts as may be exercised and done by the Company …

61 HHR's board would thus have the power to approve the payments to an employee, such as Kong, since these payments were made to Kong in his capacity as company consultant.

62 The HHR companies argued strenuously before us that while the payments were ostensibly made to Kong as a company consultant, Kong was in fact a "shadow director", as was held by the judge below. Thus, Kong should be considered a director for the purposes of compliance with Art 73 and all post-1988 payments received by him would be covered by that article.

63 While this submission was superficially attractive, we are of the view that it was untenable for reasons we will now set out.

64 The judge found that Kong was a "shadow director" and therefore owed the same fiduciary duties of care as the other directors. Related to this finding, the judge considered a number of English cases, including the following passage from the judgment of Millett J (as he then was) in *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 at 183:

> To establish that a defendant is a shadow director of a company it is necessary to allege and prove: (1) who are the directors of the company, whether de facto or de jure; (2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act.

65 In light of these authorities, the judge came to the conclusion that Kong was a "shadow director" since he had continued to be involved with the HHR companies even after he had resigned and never severed his connections with the company, only changing his designation from director to senior administration officer and consultant.

66 We do not feel that it is helpful to refer to Kong as a "shadow director". Instead, we prefer to regard Kong as a "director" under the definition provided in s 4 of the Singapore Companies Act (Cap 50, 1994 Rev Ed). Section 4 provides that a "director" includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director. On the undisputed facts, Kong clearly falls under this definition since the other directors were accustomed to act in accordance with his directions.

67 Be that as it may, the judge never expressly held that as a "shadow director", Kong had to

comply with Art 73 which dealt with directors' remuneration. Similarly, it is our view that the fact that a party is adjudged to be a "shadow director" does not mean that he is a "director" for the purposes of articles of association which stipulate or set out formal requirements, such as Art 73. It would simply make no sense for a party who is a "shadow director" to have his remuneration determined by the company in general meeting on the basis that he is a director. Indeed, if the HHR companies' argument is taken to its logical extreme, this would require all board resolutions passed during the period when the party was a "shadow director" to be signed by him.

68 Thus, we hold that approval for Kong's remuneration need not be in accordance with Art 73. Board approval was sufficient to authorise payments to Kong as a company consultant.

69 The critical question then was whether the board of HHR had in fact authorised the post-1988 payments to Kong.

70 On this point, we note that there was a board resolution dated 1 May 1998 authorising Kong's appointment as company consultant at a monthly salary of RM9,000 per month.

71 The HHR companies submitted before us that this resolution was invalid as it was not circulated beforehand to one director, Ng Eng Yeow. The HHR companies acknowledged that HHR's articles provided that a written board resolution which was signed by a majority of directors was a valid board resolution. However, they submitted that, on the basis of cases such as *Chan Choon Ming v Low Poh Choon* [1994] MLJU 351 (unreported), the resolution would only be valid if it was first circulated to all the directors.

72 However, we are of the view that this argument did not take the HHR companies very far since, unless the contrary is provided for in the articles of association, a board resolution is not strictly necessary for the payment of salaries to an employee.

73 Thus, we hold that Kong is entitled to keep the payments which were expressly authorised by the HHR board of directors. We note, however, that counsel for the HHR companies, Mr Jeyaretnam, pointed out at the hearing before us that the board never approved any bonus payments to Kong. Accordingly, we also hold that the bonuses that were paid out to Kong in 1998, 1999 and 2000, totalling $81,000 and RM106,300, are unauthorised payments which Kong must pay to HHR.

Whether the payments by HHR Properties, HHR Trading and HHR Construction to the respondents were authorised payments

74 This issue relates to payments by HHR Properties, HHR Trading and HHR Construction to the respondents, which the HHR companies claimed were in breach of the articles of association of these companies.

75 Article 70 of the articles of association of HHR Properties, HHR Trading and HHR Construction are identical and provide that the remuneration of directors is to be determined by the company in general meeting:

> The remuneration of the directors shall from time to time be determined by the company in general meeting. That remuneration shall be deemed to accrue from day to day. The directors may also be paid all travelling, hotel, and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings of the company or in connection with the business of the company.

76 The critical question in respect of payments by HHR Properties, HHR Trading and HHR Construction to Phuay and Siew is therefore whether shareholders' approval was obtained in respect of these payments.

Whether shareholders approval had been obtained in respect of the payments by HHR Properties, HHR Trading and HHR Construction to Phuay and Siew

77 The judge rejected the HHR companies' allegation that shareholders' approval had not been obtained in respect of the payments to the respondents. The appellants contend that the judge erred in this regard because Phuay had admitted in cross-examination that there were no shareholders' resolutions approving the remuneration. We have reproduced the relevant portion of Phuay's evidence in cross-examination earlier.

78 We are unable to agree with the HHR companies on this point. There are shareholders' resolutions for all three companies dated 1 December 1999 which authorise the employment of Phuay and Siew on such "terms and conditions [as] deemed fit by the Directors". The judge was thus entitled to disregard Phuay's testimony in light of the contradictory documentary evidence.

79 We also note that, in addition to the shareholders' resolutions, there were board resolutions for all three companies dated 1 December 1999 authorising the entry into of contracts of employment with Phuay and Siew "upon terms and considerations expressed in the written agreement".

80 Siew entered into written agreements dated 15 December 1999 with each of HHR Properties, HHR Trading and HHR Construction for the payment of a monthly fee for a period of three years with effect from 1 November 1999. Any moneys received by Siew pursuant to these agreements should be considered to be authorised payments, and the HHR companies' appeal must fail in respect to these payments.

81 Phuay's position is different. Having carefully perused the documentary evidence, we note that Phuay did not enter into any written agreements with HHR Properties, HHR Trading and HHR Construction. This was problematic as only payments provided for pursuant to a "written agreement" would be considered authorised payments, under the terms of the board resolutions dated 1 December 1999.

82 The necessity for a written agreement is supported by the shareholders' resolutions dated 1 December 1999. While Art 70 authorises the shareholders in general meeting to determine the remuneration of directors and the shareholders of HHR Properties, HHR Trading and HHR Construction resolved to employ Phuay and Siew, the shareholders also authorised the board of directors to lay down the terms and conditions of Phuay and Siew's employment. The shareholders' resolutions appear to contemplate that the board of directors would agree among themselves on the terms and conditions of Phuay and Siew's employment. In turn, the agreement between the directors is contained in the directors' resolutions which lay down the condition that the employment of Phuay and Siew will be based upon the terms expressed in "written agreement[s]".

83 Thus, in the absence of a written agreement entered into by Phuay, any payments received by Phuay from HHR Properties, HHR Trading and HHR Construction (even if these were made pursuant to an oral contract or agreement) are unauthorised payments. This is in line with the principle in cases such as *Guinness plc v Saunders* ([44] *supra*) that directors are not entitled to remuneration except in accordance with the company's articles of association. The total sums received by Phuay from HHR Properties, HHR Trading and HHR Construction is RM459,458. We will allow the appeal in respect of these payments and order that Phuay return these payments to HHR Properties, HHR

Trading and HHR Construction.

Whether payments by HHR Properties, HHR Trading and HHR Construction to Kong were authorised

84 Kong was not a director from 21 October 1988; hence any payments received by him after this time are not covered by Art 70, since this article only deals with the procedure for authorising directors' remuneration. This would be in line with our earlier observations in respect of Art 73. Thus, Kong's remuneration need only be authorised by the boards of directors of HHR Properties, HHR Trading and HHR Construction.

85 The terms of Kong's contracts for services are set out in the table below:

Company with which Kong concluded the contract for service	**Date of contract for service**	**Kong's remuneration as provided for in the contract for service**
HHR Properties	1 May 1998	RM6,000 per month with effect from 1 May 1998
HHR Trading	1 May 1998	RM9,000 per month with effect from 1 May 1998
HHR Construction	1 May 1998	RM9,000 per month with effect from 1 May 1998

86 These figures tally with three directors' resolutions from HHR Properties, HHR Trading and HHR Construction authorising the appointment of Kong as company consultant, as summarised in the following table:

Company	Date of directors' resolution	Terms on which the remuneration was approved in the directors' resolution
HHR Properties	1 January 1998	RM6,000 per month with effect from 1 January 1998
HHR Trading	29 December 1997	RM9,000 per month with effect from 1 January 1998
HHR Construction	7 May 1998	RM9,000 per month with effect from 1 May 1998

87 It is our view that any moneys received by Kong pursuant to the contracts for services should be considered to be authorised payments. However, if Kong received any "bonuses" or other payments on top of these authorised payments, he must refund these payments to HHR Properties, HHR Trading and HHR Construction.

Conclusion

88 In the circumstances, we would allow the appeal to the following extent only:

(a) any payments received by Phuay and Siew from HHR on or after 1 January 1998 are to be refunded by Phuay and Siew to the company;

(b) the bonuses that were paid by HHR to Kong in 1998, 1999 and 2000, totalling $81,000 and RM106,300, are to be refunded by Kong to the company;

(c) the payments received by Phuay from HHR Properties, HHR Trading and HHR Construction (totalling RM459,458) are to be returned by Phuay to these companies; and

(d) any "bonuses" or other moneys received by Kong from HHR Properties, HHR Trading and HHR Construction, which were not provided for in his contracts for services, are to be refunded to these companies.

89 The order for costs against the appellants below is set aside. As the appellants have failed in several arguments below and before us, we would order that the three respondents pay 25% of the appellants' costs here and below.

Appeal allowed in part.