Tong Keng Meng v Inno-Pacific Holdings Ltd and Another
[2001] SGHC 294

Case Number : OS 601135/2001

Decision Date : 03 October 2001

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Desmond Ong and Prakash Mulani (J Koh & Co) for the plaintiff; Chan Kok Chye (Infinitus Law Corp) for the first defendant; Thio Ying Ying (Kelvin Chia Partnership) for the second defendant

Parties : Tong Keng Meng — Inno-Pacific Holdings Ltd; Another

Companies – Oppression – Conduct amounting to oppression – Voting – Extraordinary general meeting – Proxy casting votes on behalf of member of company contrary to member's directions – Garnering support through proxy forms to advance one's intention – Whether proxy exercising dominant power – Whether proxy acting oppressively – Whether proxy owes contractual obligation or fiduciary duty to member – s 216(1) Companies Act (Cap 50, 1994 Ed)

Companies – Members – Proxy – Voting – Extraordinary general meeting – Proxy casting votes on behalf of member contrary to member's directions – Effect of such vote

Companies – Members – Member appointing proxy to vote on his behalf – Whether member can change instructions to proxy – Whether member can change proxy – Member's recourse in such situation

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Background

The plaintiff Tong Keng Meng @ Melvin Tong is a shareholder of Inno-Pacific Holdings Ltd (`Inno-Pacific`), a company listed on the Singapore Stock Exchange. He holds 7,281,000 shares in Inno-Pacific. He was also a director and the chairman of Inno-Pacific.

At an extraordinary general meeting (`EOGM`) of Inno-Pacific held on 7 August 2001, he was purportedly removed as a director of Inno-Pacific. He did not attend the EOGM as he had other pressing matters to attend to.

Two other persons, Mr Phua Teck Chew and Mr Chew Kok Liang were also purportedly removed as directors at the EOGM. Mr Chew was also the Managing Director of Inno-Pacific.

Two others, namely, Mr Abdul Khader Mohamad Ismail and Mr Lee Lee King were elected as directors at the EOGM in place of Mr Tong and Mr Phua respectively. No one was elected as a director in place of Mr Chew.

I will refer to the five resolutions which removed the three persons as directors and elected the other two as directors as `the disputed resolutions`.

The EOGM was sought at the behest of the second defendant Ms Quah Su-Ling and like-minded supporters.

In para 3 of her first affidavit, Ms Quah alleged that some shareholders, including herself, wanted a turnaround of Inno-Pacific`s fortunes in view of its losses while Mr Tong was at the helm of Inno-

Pacific. Mr Tong does not accept that Ms Quah`s motives were as simple as that. However, it is unnecessary for me to decide what Ms Quah`s motives were.

At the EOGM, a dispute arose because of a proxy given by a member Ms Teo Bee Lay to Ms Quah. Ms Teo holds 2,987,000 shares in Inno-Pacific.

Mr Tong alleged that in the proxy form Ms Teo had specified that Ms Quah was to vote against all the resolutions including the disputed resolutions.

However, contrary to such instructions, Ms Quah cast the votes from Ms Teo for the disputed resolutions.

for against not The permutations were:

(1) If the votes cast on behalf of Ms Teo were treated as spoilt votes, the disputed resolutions would have been carried anyway, although by a smaller majority.

(2) A fortiori, if the votes cast on behalf of Ms Teo were taken into account as being the disputed resolutions, then the disputed resolutions would have been carried.

(3) However, if the votes cast on behalf of Ms Teo were taken into account as being the disputed resolutions, then the disputed resolutions would have been carried.

At the EOGM, after arguments had been presented, the Chairman of the EOGM decided to take into account the votes cast for Ms Teo as being for the disputed resolutions, ie he took the position that it is the vote of the proxy holder at the meeting which counted even if a proxy holder voted against the wishes of the member as indicated on the proxy form.

Consequently, Mr Tong filed this action on 9 August 2001 to challenge the carrying of the disputed resolutions.

Although the action was based on s 216(1)(a) and (b) of the Companies Act (Cap 50, 1994 Ed), Mr Desmond Ong, one of the counsel for Mr Tong, submitted that there was only one issue before me, ie what effect should be given to the votes purportedly cast by Ms Quah on behalf of Ms Teo.

Mr Chan Kok Chye, counsel for Inno-Pacific, and Mrs Thio Ying Ying, counsel for Ms Quah, did not dispute that this was the only issue.

However, notwithstanding that that was supposed to be the only issue before me, Mr Mulani, who was also counsel for Mr Tong, made submissions on what constituted oppression or unfair discrimination under s 216(1)(a) and (b).

Section 216(1)(a) and (b) of the Companies Act

Section 216(1)(a) and (b) states:

> *(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister may apply to the Court for an order under this section on the ground -*

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner ***oppressive*** *to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or*

(b) that ***some act of the company*** *has been done or is threatened* ***or that some resolution*** *of the members, holders of debentures or any class of them* ***has been passed or is proposed*** *which* ***unfairly discriminates*** *against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself). [Emphasis is added.]*

Mr Mulani cited the following passages from Walter Woon on ***Company Law*** (2nd Ed) from p 160 onwards:

OPPRESSION, DISREGARD OF MEMBERS` INTEREST AND PREJUDICE

Section 216 may be invoked where there is `oppression` of a member or where a member`s interests are `disregarded`. It may also be invoked where there is a resolution or act that `unfairly discriminates` against or is `otherwise prejudicial` to a member.

The term `oppression` has been variously defined. In ***Scottish Co-operative Wholesale Society Ltd v Meyer****, Viscount Simonds defined the term as `burdensome, harsh and wrongful`, taking the dictionary meaning of the word. Buckley LJ`s definition of oppression in* ***Re Jermyn Street Turkish Baths Ltd****is as follows:*

`In our judgment, oppression occurs when shareholders, having a dominant power in a company, either (1) exercise that power to procure that something is done or not done in the conduct of the company`s affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company`s affairs; and when such conduct is unfair ... to the other members of the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the company`s affairs.`

At the very least, there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every member is entitled to rely.

`Disregard` of a member`s interests `involves something more than a failure to take account of the minority`s interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure`: ***Re Kong Thai Sawmill (Miri) Sdn Bhd****. The use of the word `disregard` in conjunction with `oppression` in s 216 suggests that they are not synonymous. There is a certain amount of overlap. However, it is clear that the test is wider than in those cases considering statutory provisions dealing solely with oppression. In* ***Re Kong Thai Sawmill (Miri) Sdn Bhd****, Lord Wilberforce explained the way s 216 operates:*

`The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked; there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made ... their Lordships would place the emphasis on `visible` ... Neither `oppression` nor `disregard` need be shown by a use of the majority`s voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at some identifiable point in time, can be held to have crossed the line.`

...

The approach of the English courts to their equivalent section has been set out by Peter Gibson J in ***Re A Company (No 005134 of 1986), ex p Harris****:*

`(1) The test of unfair prejudice is objective. (2) It is not necessary for the petitioner to show bad faith. (3) It is not necessary for the petitioner to show a conscious intention to prejudice the petitioner. (4) The test is one of unfairness, not unlawfulness. Counsel for the respondents, however, has submitted that because the test is objective it was irrelevant that the respondent may have acted for an improper purpose or with an improper motive. I do not doubt that if the objective bystander observes unfairly prejudicial conduct by a respondent the fact that the respondent had a proper purpose and a proper motive will not prevent that conduct from falling within the section. But if the objective bystander observes that the conduct of the respondent was for an improper purpose or with an improper motive, that may well be a relevant consideration in determining whether the conduct is unfairly prejudicial.`

...

It will be noted that the trend seems to be to construe the provisions broadly and not quibble over particular words in the definition. This, it is suggested, is the correct way to apply the sections; look at the whole forest, not at the individual trees. Our s 216 is even wider than s 459 of the United Kingdom Companies Act 1985 and s 320 of the Australian Companies Act 1981. Parliament has recognized this by amending the marginal note. It is suggested that judges can take this cue to interpret s 216 more widely to give remedy to a shareholder who is treated unfairly.

Mr Mulani submitted that other members like Mr Tong were entitled to see that the wishes of the majority of the members were carried out. If Ms Quah did not cast the votes on behalf of Ms Teo in accordance with Ms Teo`s instructions, which would in turn affect the outcome of the disputed resolutions, then the wishes of the majority of the members were not being carried out. This would be unfair to them.

He submitted that Ms Quah was a key player. She had sought the disputed resolutions and had been soliciting votes.

He also submitted that Ms Quah had alleged in the EOGM that she had recollected that the proxy form signed by Ms Teo was blank but the proxy form was in fact not signed in blank. He suggested that she had given a false explanation. Her conduct in doing this and in voting against the instructions constituted a visible departure from the standards of fair dealing and could be said to have crossed the line.

On the other hand, Mrs Thio submitted that only Ms Teo could complain as she was the member who made Ms Quah her proxy. On this point, I would add that although Ms Teo had signed a statement confirming her instructions as indicated on the proxy form, she stopped short of signing an affidavit. Also, Mr Ong informed me that Ms Teo had said that she did not want to get involved in the dispute.

Mrs Thio also submitted that a complaint under s 216(1)(a) or (b) could arise only if Ms Quah was exercising a dominant power in Inno-Pacific. She referred to Buckley LJ`s definition of oppression in **Re Jermyn Street Turkish Baths** [1971] 3 All ER 184 which has already been cited above.

Mrs Thio submitted that Ms Quah was only a minority member. She had to solicit the support of other members, whether to attend the EOGM or to appoint her as their proxy.

Furthermore, Ms Quah honestly believed that all the proxy forms appointing her as proxy were either for the disputed resolutions or were blank. It was not disputed that she only learned of the proxy form from Ms Teo and others in the morning of the EOGM itself. They had been sent directly to Inno-Pacific. There was a total of 66 proxy forms appointing her as proxy including those sent directly to Inno-Pacific. She had to complete polling forms for each of the five disputed resolutions, ie over 300 forms and was obviously under a lot of pressure to complete them before the votes were cast.

Ms Quah also expected members to authorise her to vote in favour of the disputed resolutions as her stand was publicly known.

Her covering letter dated 23 July 2001 soliciting her appointment by members as their proxy had also made her position clear.

There was only one other member, one Ms Chua Hwee Meng, who holds 10,000 shares, whose votes were cast contrary to her instructions on the proxy form. However, her votes were cast by the alternate proxy, one Ms Cheah Swee Gim, and not by Ms Quah although Ms Quah was the first proxy named in the form. The votes from Ms Chua did not affect the disputed resolutions whichever way they were applied.

All other members who had appointed Ms Quah as their proxy had instructed her to vote in favour of the disputed resolutions or left the proxy form blank.

Mrs Thio also submitted that Mr Tong`s solicitor who was present at the EOGM did not even argue at the EOGM itself that the votes cast on behalf of Ms Teo should be taken into account as being against the disputed resolutions. This last allegation was disputed by Mr Ong.

As this last allegation was not specifically made in any affidavit and after considering Mr Chew`s first affidavit, at paras 62-64, I was of the view that no weight should be given to this last allegation.

Mr Mulani responded that it was not necessary for Ms Quah to exercise a dominant power. He cited Walter Woon on ***Company Law*** at p 164:

> *PRINCIPLES ON WHICH SECTION 216 IS TO BE APPLIED*

> *The following principles gleaned from English, Australian and local authorities and from the section itself are relevant in determining whether relief under s 216 is available.*
>
> *1.* ***Domination and control*** *. A remedy can be obtained against persons holding the `dominant power` in the company. A person may dominate a company even though he does not control the majority of the votes. For instance, hypothetically, a person may hold the dominant power in the company by reason of provisions in the articles giving him wide powers, or by reason of controlling the proxy voting machinery, or by holding a controlling block of shares in a company with a widely dispersed shareholding. It is submitted that dominance is not necessarily to be shown only on a consideration of how many shares a person owns. Extraneous factors such as his ability to control other votes or to dictate policy by some other means should also be taken into account ...*

In my view, the passage cited by Mr Mulani and the judgment of Buckley LJ in ***Re Jermyn Street Turkish Baths*** (supra) show that there must be an exercise of dominant power before oppression can be said to have occurred, leaving aside unfair discrimination for the moment.

What constitutes the exercise of dominant power is a separate matter. Hence, a member holding only one share could, in certain circumstances, be said to be in domination.

However, I was of the view that Ms Quah was not exercising dominant power. By being able to garner support in the sense of being appointed proxy for various members, she could not be said to be exercising dominant power.

In any event, Ms Quah could not be said to be acting in an oppressive manner. The very purpose of garnering support through proxy forms to advance one`s intention is a legitimate exercise carried out by many and, perhaps, by Mr Tong`s camp as well.

Likewise, such an exercise could not amount to unfair discrimination.

As regards Ms Quah`s explanation as to why she had cast the votes on behalf of Ms Teo contrary to Ms Teo`s instruction, it was immaterial whether the explanation was genuine or false.

The other members had been informed as to what Ms Teo had specified on the proxy form. After arguments, the Chairman of the EOGM had made a ruling to accept the votes as cast by Ms Quah.

There was some dispute as to whether this was based on advice from the solicitors who were then acting for Inno-Pacific. However, this was immaterial because it was not specifically alleged that the Chairman was acting improperly. There was also no specific allegation that he was in cahoots with Ms Quah. I would add that Mr Phua had proposed that Mr Izat, an existing director, be the Chairman of the EOGM and Mr Chew apparently had not objected. This motion was carried by a show of hands.

In my view, it was unnecessary for Mr Tong to pitch his case based on oppression or unfair discrimination.

The issue was how the votes cast by Ms Quah on behalf of Ms Teo should be applied.

If they were to be taken into account as being against the disputed resolutions, such resolutions would have been defeated.

If they were to be treated as spoilt votes or taken into account as being for the disputed resolutions, such resolutions would have been carried.

Whatever the result, no question of oppression or unfair discrimination could arise.

The proxy form from Ms Teo

The proxy form from Ms Teo was in a two-way form which allowed her to give specific directions to the proxy to vote in a certain specific direction by crossing on the relevant box below `For` or `Against` each proposed resolution.

It states:

Please refer to the pdf file or the hard copy to view the content of this page.

As is evident, Ms Teo did not have to give a specific direction to the proxy but it is accepted that she did do so.

Arguments on the votes cast on behalf of Ms Teo

There were various arguments.

ARGUMENTS FOR MR TONG

For Mr Tong, Mr Mulani submitted that Ms Quah was obliged to vote against the disputed resolutions as specified by Ms Teo. It was further submitted that even though Ms Quah voted for the disputed resolutions, such votes should not be taken into account as being for the disputed resolutions nor as being spoilt votes but as being against the disputed resolutions.

However, the authorities cited by Mr Mulani, which were mostly textbook authorities, do not go as far as that, as Mr Mulani accepted.

These authorities only suggest that a person who solicits proxies may be under an obligation to the shareholder to vote and to vote in accordance with the wishes of the shareholder. Even then, this is not clear.

Mr Mulani also submitted that if Ms Teo`s intention was not given effect to:

(1) the decision of the members (as a whole) would not be followed;

(2) two-way proxy forms would become redundant;

(3) instructions to a proxy would also be redundant;

(4) the proxy would have voting power beyond the scope of the instructions.

In my view, what the decision of the members was would depend on whether Ms Teo`s votes must be taken into account as being against the disputed resolutions. Accordingly, the argument that the decision of the members would not be followed was putting the cart before the horse.

There are different scenarios:

(1) If a proxy does not cast the votes, the instructions in the proxy form have no effect on the resolution concerned.

(2) If a proxy attends and casts the votes in accordance with the instructions in the proxy form, the votes are valid.

(3) However, what happens if, as in the case before me, a proxy attends and casts the votes in a direction contrary to the instructions in the proxy form? Should the votes be treated as having been cast in accordance with the instructions in the proxy form? If so, that would mean that there is no difference in the result between the second and third scenarios. It would also ignore what the proxy in fact did.

Furthermore, it seemed to me that that would be tantamount to compelling the proxy to vote in accordance with the instructions in the proxy form.

In response to my question whether Inno-Pacific could have compelled Ms Quah to cast the votes from Ms Teo had she decided not to do so, Mr Mulani submitted that Inno-Pacific could have done so.

In the case before me, the proxy form stated, inter alia,

> ***If no specific direction as to voting is given**, the proxy will vote or abstain from voting at his/her discretion ... [Emphasis is added.]*

Mr Mulani relied on the words I have emphasised in [para]58 above to support his argument that Ms Quah was compellable by Inno-Pacific to cast Ms Teo`s votes against the disputed resolutions because specific directions to do so had been given by Ms Teo.

On the other hand, Ms Quah had made it clear in her covering letter dated 23 July 2001 to all members of Inno-Pacific, to which the proxy form was joined, that she was soliciting for votes in favour of the resolutions. The letter states:

> *To: All members of Inno-Pacific Holdings Ltd*
>
> *Date: 23rd July 2001*
>
> *Enclosed is a Notice of Extraordinary General Meeting ("EOGM") of the members of Inno-Pacific Holdings Ltd ("Company") to be held on Tuesday, the 7th day of August 2001 at the Copthorne Harbour View, Singapore, 81 Anson Road, Singapore 079908. This EOGM is called pursuant to Section 177 of the Companies Act (Cap. 50) by members of the Company holding not less than 10% of the issued share capital of the Company ("requisitionists"). You will note that the Notice of Extraordinary General Meeting enclosed has been signed by*

the requisitionists.

On 20th July 2001, an order was made by the Supreme Court of Singapore requiring the Company to provide members with notice of the resolutions set forth in the Notice of Extraordinary General Meeting enclosed. You can therefore expect the Company to give you notice of the resolutions shortly. The notice enclosed is the formal Notice of Extraordinary General Meeting issued by the requisitionists.

We urge you to attend the EOGM in person. Also enclosed (attached to the Notice of Extraordinary General Meeting) is a proxy form which you may use if you are not able to attend in person. Please read carefully the NOTE at the bottom of the Notice of Extraordinary General Meeting which explains how proxy forms should be completed and when and where they should be lodged.

Finally, you will find enclosed the curriculum vitae of Mr Lee Lee King and Mr Abdul Khader Mohamed Ismail who are the nominees standing for election as Directors of the Company to replace two of the three Directors whose removal are proposed pursuant to the resolutions.

***It is my intention to cast my vote for the removal of Mr Tong, Mr Phua and Mr Chew and to appoint Mr Lee Lee King and Mr Abdul Khader Mohamed Ismail**. If you are unable to attend the EOGM, and should you wish to appoint me as your proxy, I enclose herewith a proxy form marked "A" naming me or one of my nominees as proxy. If you are using this form, please:*

1. Fill in your name;

2. Fill in your address;

3. Date the proxy form;

4. State the number of shares you hold in the box at the bottom left hand corner;

5. Sign the proxy form; and

6. Return the signed proxy form to me at c/o Messrs Kelvin Chia Partnership, 6 Temasek Boulevard, Fourth Floor, Suntec Tower Four, Singapore 038986, on or before Wednesday, 1st August 2001.

Quah Su-Ling

[Emphasis is added.]

In addition, Ms Quah was under no contractual obligation to nor did she owe any fiduciary duty to Ms Teo.

Accordingly, I did not think that even Ms Teo herself could reasonably expect Ms Quah to cast the votes against the disputed resolutions, let alone have a cause of action against Ms Quah for failure to comply with Ms Teo`s instructions.

I was also of the view that the words I have emphasised in [para]58 above highlight only that if Ms Quah cast the votes contrary to the specific instructions given, the votes would not be taken into account. However, the words did not mean that Ms Quah would have been compellable by Ms Teo or Inno-Pacific to vote in accordance with Ms Teo`s instructions or at all.

Neither did they mean that the votes cast by Ms Quah for Ms Teo must be taken into account as having been cast against the disputed resolutions as that would ignore the fact that such votes were in fact cast for, and not against, the disputed resolutions.

I was also not persuaded by the argument about redundancy and the proxy voting beyond his instructions.

If Ms Teo`s votes were treated as spoilt votes, it would mean that her instructions on the proxy form were in fact taken into account and Ms Quah would not have been allowed to vote beyond the instructions to her.

However, the spoilt votes would not achieve Mr Tong`s purpose.

ARGUMENTS FOR INNO-PACIFIC

As for Inno-Pacific`s position, Mr Chan submitted that the votes cast for Ms Teo should be taken into account as being for the disputed resolutions. Alternatively, they should be treated as spoilt votes.

He submitted that a two-way proxy form is merely to provide a company with an indication of the likely manner in which votes will be cast in the event of a poll being demanded. He cited ***Horsley`s Meetings, Procedure, Law and Practice*** (3rd Ed) at para 1310.

However, the passage he relied on does not say that. It states:

> *Where the proxy forms disclose the manner in which votes are to be cast (if the proxy is exercised), the favourable and unfavourable votes are separately tallied to provide the chairman with some indication of the weight of likely voting in the event of a poll being demanded.*

Even if this could be said to be the practice of Singapore companies, it was irrelevant.

I did not agree that the two-way proxy form is `merely` to provide the indication suggested.

Mr Chan also referred to Shackleton on the ***Law and Practice of Meetings*** (9th Ed) at para 14-26:

> *It is clear that, without following any particular formality, a shareholder is entitled to change his instructions to his proxy-holder at any time before the vote is cast. The situation often arises where a company sends out forms by which the chairman is appointed as the member`s proxy. Letters are then received at the office which change the instructions given on the previously lodged proxies (again, this may happen in a contested situation). The chairman would ignore such instructions at his peril.*

Mr Chan submitted that the proxy form in question did not state that the instructions given were irrevocable and that the instructions given therein could be revoked or varied at any time before the votes were cast.

In view of that, Inno-Pacific was obliged to accept the votes of Ms Teo as cast by Ms Quah.

I did not agree.

No case was cited to me as authority for the proposition mentioned in ***Shackleton*** .

In my view, if a member is allowed to change his instructions, then this would be as good as the member giving the proxy a discretion in the first place as to which way to vote.

Secondly, it was not disputed that in the case of the EOGM, the proxy form must be received at the designated address not less than 48 hours before the time of the EOGM. This is a common requirement of general meetings of companies.

If a member is allowed to change his instructions at any time before the vote is cast, then the deadline is easily circumvented.

Thirdly, if a member is entitled to change his instructions, then it should follow that he is also entitled to change the person whom he had selected as his proxy at any time before the vote is cast. Yet it was not suggested to me that a member is entitled to change the proxy at any time before the vote is cast. I was of the view that he cannot do so as that would be circumventing the deadline.

However, this does not mean that the member remains helpless.

First, the member can turn up at the meeting and vote in accordance with his own wishes notwithstanding the proxy form or the attendance of the proxy: see **Cousins v International Brick Co** [1931] 2 Ch 90.

Secondly, the member has a more limited avenue. He can contact the proxy and instruct the proxy not to cast the member`s vote or he can inform the company in writing about the revocation of the authority given to the proxy. The latter would, in my view, suffice to determine the authority of the proxy although in ***Cousins*** (supra), the articles of association of the company specifically allowed for such a revocation.

Therefore:

(1) If a member wishes to retain the option of changing his instructions to his proxy, he should not specify in the proxy form which way the proxy is to vote.

(2) However, if he does not specify his instructions in the proxy form, he runs the risk that the proxy will vote contrary to his intentions, and, as far as the company is concerned, that will be a valid vote.

Accordingly, a member should elect either to have flexibility or specificity. He cannot have both.

ARGUMENTS FOR MS QUAH

Mrs Thio also submitted that the votes cast for Ms Teo should be taken into account as being for the disputed resolutions. Alternatively, they should be treated as spoilt votes.

On the first position, Mrs Thio submitted that if a proxy acts contrary to the instructions to him or her, that is a matter between the member and the proxy only.

At the EOGM, one of Ms Quah`s solicitors had apparently cited the following passage from ***Horsley*** at para 1308 for this proposition:

> *Apart from any statutory provisions about this matter, the general opinion regarding a possible obligation on the part of a proxy is that ... and (v) a proxy is under an obligation not to vote contrary to any instructions given by the principal as to which way to vote. However, the effects and repercussions if any, legal or otherwise, of such inaction or apparent breaches of obligation,* ***apart from the final one above*** *(ie* ***voting contrary to an instruction contained in a proxy document****), are of concern only to the principal and the proxy, and do not affect the result of the voting at the meeting in any way. [Emphasis is added.]*

In my view, the qualification in the passage shows that it does not go as far as the proposition advocated.

Furthermore, the passage is part of an entire paragraph which deals with the proxy`s obligation to the shareholder and not with the effect of the votes cast on the resolution concerned.

At the hearing before me, Mrs Thio relied on another textbook, HA Davidson in ***Company Meetings*** (2nd Ed) at pp 159 and 160:

> *[para]1323[ensp]Proxy may specify manner of voting.[emsp]Regulation 54(2) Table A provides:*
>
> *"(2) An instrument appointing a proxy may specify the manner in which the proxy is to vote in respect of a particular resolution and, where an instrument of proxy so provides, the proxy is not entitled to vote in the resolution except as specified in the instrument."*
>
> *[para]1324[ensp]Obligation by proxy holder to vote.[emsp]The question of the proxy holder`s obligation to vote has to be examined from two points of view, firstly as between the proxy holder and the company (see [para]1325) and secondly as between the proxy holder and the appointer (see [para]1326).*
>
> *[para]1325[ensp]Obligation to vote as between the proxy and the company. [emsp]* ***Generally speaking a proxy is in the same position as any member of the company, and is under no compulsion to exercise a vote at all, or, if he or she exercises it, to vote in any particular manner unless governed by an article such as reg 54 Table A****. Whether, as between the company and the proxy, there is any obligation upon the company to ensure that the proxy is obeying the principal`s instructions was discussed, but not decided, in* ***Oliver v Dalgleish****.*

Where proxies have been given to directors with instructions to vote, it seems that they must obey the instructions given. In ***Second Consolidated Trust Ltd v Ceylon Amalgamated Tea & Rubber Estates Ltd*** *there were 14 persons present in person who were unanimously in favour of a resolution, but they did not constitute a quorum unless the proxies were counted in. The proxies, which were held by the chairman, were such that, if a poll were demanded and the proxies used for the purpose of the vote, the resolution could not be passed. The resolution was passed by the stockholders present in person. The chairman, aware of all the facts and acting bona fide, did not demand a poll. It was held that the chairman was under a legal duty to exercise the right and ought to have demanded a poll and used the proxies. Uthwatt J said:*

"[I]n addition to having this duty to demand a poll or exercise his power to demand a poll, I think - and I think Fidler as a business man must take the same point of view - he would be under a duty in law to exercise all the proxies which he held as chairman in accordance with the instructions which they contained."

[para]1326[ensp]Obligation to vote as between proxy and appointer.[emsp]A proxy is usually appointed gratuitously and there is no obligation upon the proxy to exercise his or her vote. If the proxy has no instruction on how to vote, and he or she does vote, the proxy may vote as he or she thinks fit. If the proxy has instructions on how to vote and does vote the proxy`s only obligation is not to vote contrary to his or her principal`s instructions.

If:

[bull] there is a contractual relationship between the principal and the proxy; or

[bull] the proxy has a fiduciary duty to the appointer; or

[bull] a director has been appointed proxy;

as between the appointer and the proxy there is a duty cast upon the proxy to vote in accordance with his or her principal`s instructions.

If the duty is merely a personal one and does not affect the validity of the meeting, the principal`s remedy is an action for damages against the proxy, or the duty may be enforced by a mandatory injunction ... *[Emphasis is added.]*

Mrs Thio relied on para 1326 of ***Davidson*** cited above to submit that Ms Quah`s duty is owed to Ms Teo only and therefore Mr Tong is not the proper plaintiff.

However, as Mr Tong is a shareholder and is one of the directors removed under one of the disputed resolutions, I was of the view that he had locus standi at least to seek a ruling on the effect of all the votes cast by Ms Quah on behalf of Ms Teo.

Mrs Thio also relied on para 1325 of ***Davidson*** cited above to argue that since the Inno-Pacific articles of association do not have the equivalent of reg 54(2) Table A, Ms Quah could, as between

herself and Inno-Pacific, vote in any direction she wished.

I did not agree for the reasons I have already mentioned. In my view, even without the equivalent of reg 54(2) Table A of the relevant Australian legislation, a vote cast by a proxy in a direction contrary to that specified in the proxy form is a spoilt vote.

As for the view expressed by Uthwatt J in **Second Consolidated Trust v Ceylon Amalgamated Tea & Rubber Estates** [1943] 2 All ER 567, cited in para 1325 of ***Davidson*** above, that was in the context of the chairman being appointed the proxy.

OLIVER V DALGLEISH

I was also referred by all the counsel to the case of **Oliver v Dalgleish** [1963] 3 All ER 330 but it was generally accepted that this case was not directly on point.

In that case, a proxy holder B had received proxy forms from different shareholders in respect of certain resolutions to remove two directors and to elect new directors in their stead. Some votes were directed to be cast in favour of the resolutions and others (a much smaller number) against. There were also others (a yet smaller number) which did not indicate how the votes were to be cast.

A poll was demanded. B voted in favour of the resolutions without specifying how many votes he had cast. The votes by B were disallowed by the chairman of the meeting.

If B`s votes for those shareholders who had instructed him to vote in favour of the resolutions were taken into account, the resolutions would have been carried, whether or not the votes of the other shareholders who had given contrary instructions were taken into account or not.

On the other hand, if all the votes cast by B were not taken into account, the resolutions would not have been carried.

Buckley J decided that the votes of those shareholders who had instructed B to vote in favour of the resolutions were validly cast. Hence, he concluded that the resolutions had been carried.

However, he did not decide how the votes of those shareholders who had instructed B to vote against the resolutions should be treated. This was because the outcome would be the same even if B had cast their votes in accordance with their instructions.

Summary

As the votes cast by Ms Quah for Ms Teo were spoilt votes, the disputed resolutions have been validly carried.

In the circumstances, I dismissed Mr Tong`s action on 14 September 2001 with costs and various consequential orders.

Outcome:

Claim dismissed.