

BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2003/0121

BETWEEN

ZHU JIANG FINANCE LTD

Claimant

-and-

AMERICAN DREAM IN GUANGZHOU LTD
TONY HON PONG CHU
PAK TAO FUNG

Defendants

Appearances:

Mr. Paul Dennis and Mr. Malcolm Arthurs of O'Neal Webster for the Claimant
Mr. Richard Evans of Conyers Dill & Pearman for the Defendants

2006: July 07, 10
2006: November 13

JUDGMENT

[1] **HARIPRASHAD-CHARLES J:** The preliminary issue for determination is whether the Directors' Meeting of the First Defendant held on 10 February 2003 was valid?¹ In order to answer this question, it is necessary to set out the background facts. Some of what I now outline reflects uncontradicted and unchallenged evidence of the parties. To the extent that there is a departure from any agreed facts, then what is expressed must be taken as positive findings of fact made by me.

¹ See Orders of the Court dated 25 January 2006 and 22 February 2006 respectively.

Background Facts

- [2] The Claimant ("Zhu Jiang") is an International Business Company ("IBC") registered in the British Virgin Islands ("BVI") on 28 January 2000. At all material times, the issued shares in Zhu Jiang were equally owned by Ms. Charlotte Chou ("Ms. Chou") and Mr. Lin Yong Ping ("Mr. Lin"). They were the only directors.
- [3] The First Defendant ("The Company") is also an IBC incorporated in the BVI on 21 June 1995. In May 1996, it merged with another BVI IBC. The surviving entity of the merger was the Company. Its share capital is and was at all material times \$50,000.00, divided into 50,000 shares of par value \$1.00 each.
- [4] The Company was originally formed for a Chinese joint venture project in Guangzhou, the People's Republic of China. Its then sole shareholder was American Dream Parks and Entertainment Ltd, also a BVI IBC. The Chinese joint venture project was aborted and in or about March 2000, Zhu Jiang acquired the 1,000 issued shares of the Company and thus became its sole shareholder.
- [5] In or about June 2001, the Company commenced another project which involved the establishment of a University in Guangzhou ("the University Project"). The University Project was to be divided into different phases. It was estimated that the first phase would cost approximately 80 million Renminbi (RMB).
- [6] Zhu Jiang through its principals Mr. Lin and Ms. Chou agreed with the Second Defendant ("Mr. Chu") and the Third Defendant ("Mr. Fung"), that in consideration of the said Defendants contributing 10% of the estimated cost of the project, Zhu Jiang would transfer to each of them 10% of its shares in the Company. On 8th February 2002, Zhu Jiang transferred 100 of the 1,000 issued shares of the Company to Mr. Chu and 100 shares to Mr. Fung through their respective companies Cumena Ltd and DDK (BVI) Ltd. As such, the shares in the Company were, after 8 February 2002, held as to 80% by Zhu Jiang, as to 10% by Cumena Ltd and as to 10% by DDK (BVI) Ltd.

- [7] By virtue of their ownership and control of Zhu Jiang, Mr. Lin and Ms. Chou owned 80% of the Company's shares while through Cumena Ltd and DDK (BVI) Limited, Mr. Chu and Mr. Fung controlled 20%. After the transfer of the shares to Messrs. Chu and Fung, the duly appointed directors of the Company were Mr. Lin, Ms. Chou, Mr. Chu and Mr. Fung.
- [8] The first phase of the University Project was completed and the University opened its doors to the first batch of students in September 2002. By this time the total cost of the first phase of the project had escalated to RMB 92 million. Zhu Jiang made arrangements to cover the difference.
- [9] On 11 June 2003, some 9 months after the University Project commenced its operation, Messrs. Chu and Fung with the assistance of private security guards entered the administration building of the University and purported to take control claiming to be majority shareholders of the Company and asserting that Mr. Lin and Ms. Chou were no longer directors. Relevant books, records and company's documents were taken away. At the time, Ms. Chou was in Australia on university business and Mr. Lin was at the University as both were involved in actively running the institution.
- [10] For some time prior to the aforesaid incident, the relationship between Mr. Lin and Ms. Chou on the one hand and Mr. Chu and Mr. Fung on the other hand had deteriorated. So much so, that, on 10 February 2003, unknown to Ms. Chou and Mr. Lin, Messrs. Chu and Mr. Fung purportedly held a Directors' Meeting ("the Directors' Meeting") where they passed a resolution by which the Company's 49,000 un-issued shares were issued. Mr. Chu's company Cumena Ltd. received 9,000, Mr. Fung's company DDK (BVI) Ltd. received 8,000 and the remaining 32,000 were issued to individuals who were either employees or personal friends of Mr. Chu as follows: Ling Jeffrey - 8,000, Lam Sau Kwok - 8,000, Tong Pui Chi Lucia - 8,000 and Chan Yuet Yi - 8,000. At the said Director's Meeting, Messrs. Chu and Fung also purportedly procured the appointment of Jeffrey Ling, Sau Kwok Lam, Pui Chi Lucia Tong and Yuet Yi Chan as new directors of the Company.

- [11] In a subsequent meeting, the newly constituted board of directors purportedly passed a resolution removing Ms. Chou and Mr. Lin as directors of the Company. The end result of these two meetings was the dilution of the shareholding in Zhu Jiang from 80% to 1.5% and the removal of Mr. Lin and Ms. Chou from the control of the Company.
- [12] Subsequently, Mr. Lin and Ms. Chou became conscious of what happened. They realised that Sau Kwok Lam ("Mr. Lam"), a recipient of 8,000 shares in the Company, had purported (on Mr. Chu's instructions) on behalf of Edmundwick, to send notice of the Directors' Meeting to be held on 10 February 2003 to Mr. Lin and Ms. Chou in a letter dated 30 January 2003 to an address which was listed on the Register of Directors of the Company as the address of Mr. Lin and was also Mr. Fung's address.
- [13] The address for Ms. Chou listed on the register was not the same to that of Mr. Lin and Mr. Fung's address but the cover letter enclosing the notice of the Directors' Meeting was never sent to her address.
- [14] Neither Mr. Lin nor Ms. Chou (notwithstanding the majority shareholder's interest that they controlled through Zhu Jiang) attended the Directors' Meeting of the Company. After realising that the shareholding of Zhu Jiang had been diluted and that its representatives on the Board of Directors of the Company had been purportedly dismissed, Zhu Jiang, through Mr. Lin and Ms. Chou brought this action seeking a number of relief as particularised in the Statement of Claim.

The evidence

- [15] Four witnesses testified at this hearing. They could not be physically present in the BVI because of purportedly visa complications. As a consequence, their evidence was taken by way of video-conference satellite link from China. The Court wishes to place on record its gratitude to (i) Maples & Calder for allowing the parties to utilize their conference room at very short notice and (ii) Mr. Li, the interpreter from a University in China who was summoned at about midnight (Chinese time) to rescue another interpreter who was confronted with translation difficulties.

[16] The first witness to give evidence on behalf of Zhu Jiang was Ms. Charlotte Chou, a shareholder and director of Zhu Jiang. Essentially, she deposed that problems arose between Mr. Lin and her on the one hand and Messrs. Chu and Fung on the other hand in respect of the University Project whereby Messrs. Chu and Fung were to have invested 10% each in consideration for the transfer of the shares to them for the first phase of the project. The project was completed in September 2002 and on seeing its success, Mr. Fung persuaded Mr. Lin to increase his shareholding in the Company but Mr. Lin refused. By this time, the estimated cost of the project had moved to RMB 92 million. Ms. Chou said that the difference was subsidized by Mr. Lin and herself. Subsequently, an agreement was reached between Mr. Lin and herself of the one part and Messrs. Chu and Fung of the other part to round off the figure to RMB 100 million and that they (Messrs. Chu and Fung) should contribute RMB 2 million each by way of investment capital to correspond to their 10% shareholding in the Company. However, after their (Lin and Chou's) refusal to increase their shareholding, the attitude of Messrs. Chu and Fung changed. They then began to accuse Mr. Lin and Ms. Chou of being disrespectful. They also alleged that Mr. Lin and Ms. Chou had misappropriated their monies as they had no idea where the investment had gone. The relationship between the two groups of directors deteriorated even further. On 11 June 2003, Messrs. Chu and Fung with the assistance of private security guards took control of the University whilst Ms. Chou was abroad.

[17] The critical aspect of Ms. Chou's evidence which forms the bedrock of the preliminary issue relates to the notice of the meeting of 10 February 2003. She indicated that the address at Room B-812, 8th floor, Block B, Sea View Estate, 2-8 Watson Road, North Point Hong Kong ("the said address") to which the notices were sent is in reality Mr. Fung's office address, which both Messrs. Chu and Fung knew was used purely by Mr. Lin and her as a matter of formality and convenience. Mr. Chu's assistant, Mr. Lam had previously intimated that they should use Mr. Fung's address and they agreed. Mr. Lam was instructed by Mr. Chu to do the paper work for the acquisition of the shares in Zhu Jiang by Mr. Lin and herself as well as the investment in the company. Mr. Lam advised them that in order to finalize the relevant papers, they needed to provide him with Hong Kong addresses. Mr. Lin did not have an Hong Kong identification and no local Hong Kong

- address. She had a Hong Kong residential address but no business address. Accordingly, it was in that context that Mr. Lam hinted that they used either Mr. Chu's or Mr. Fung's office address; simply as a matter of convenience for settling the papers.
- [18] Ms. Chou asserted that the arrangement was based on trust and was feasible so long as the parties dealt with each other in good faith. She alleged that the arrangement was exploited by Messrs. Chu and Fung to make it appear as if proper notice was given to them when they knew that neither Mr. Lin nor her were in Hong Kong at the material time as they were both based in China at the University. The address to which the letters of service of notice were sent was Mr. Fung's office address and was being used by Zhu Jiang purely as a matter of formality and convenience. It was not an address at which either Mr. Lin or herself could really be contacted. The actual contact with Mr. Lin and herself would have to be made in Guangzhou, China by telephone, fax, courier, post or email, details of which Messrs Chu, Fung and Lam were provided.
- [19] She further stated that documents which were said to have been previously sent to them at Mr. Fung's address and which they received were not in fact sent to that address. They were hand delivered by Mr. Chu as part of a bundle of documents which were prepared for them regarding the acquisition of Zhu Jiang and their investment in the Company at a café in a Chinese hotel in Guangzhou. They both signed that they received them.
- [20] Ms. Chou was thoroughly cross-examined by Mr. Richard Evans, Counsel for Mr. Chu. She testified that Mr. Chu's account of the Chinese Agreement does not accurately set out the details of it. According to her, there are a number of incorrect points. She stated that there was a second agreement which she subsequently signed. She was shown the Chinese Agreement and she categorically stated that it was not the Chinese Agreement signed by both parties.
- [21] When Ms. Chou was questioned about the availability of the financial information in respect of the Company, she declared that that information was open to both Messrs. Chu and Fung. According to her, the Accounts Department had the financial information and

the information was freely available to management. Both Messrs. Chu and Fung are part of management. She indicated that she did not have custody of the Accounts.

[22] She denied that Mr. Chu and Mr. Fung ever asked for financial information and that she refused to give it. She also denied that on numerous occasions, they had expressed that they (Mr. Lin and her) were not financially supporting the Company. According to her, if they (Mr. Lin and her) were not supporting the Company sufficiently, then the Company would have gone downhill.

[23] She stated with certitude that she did not receive the notice summoning her to the Directors' Meeting. She only heard of the meeting when Messrs. Chu and Fung stormed the administration building of the University and claimed that they were the major shareholders. The first time she knew that a shareholders' meeting was held was when she saw the supplemental statement that Messrs. Chu and Fung gave to the Court when they sued her and Mr. Lin. In her opinion, they kept secret from her that they had that meeting.

[24] The second witness to testify on behalf of Zhu Jiang was Mr. Lin. He and Ms. Chou equally owned the issued shares in Zhu Jiang. He substantially corroborated the testimony of Ms. Chou with regard to both Messrs. Chu and Fung's refusal to make any further contribution to the second phase of the project and that he did not receive notice of any meeting, be it Directors or Shareholders and was not present. As such, he was not a party to any of those meetings authorizing the issue of new shares and/or the appointment of new directors. Mr. Lin deposed that he does not know Mr. Lam except he knows that he works for Mr. Chu. Indeed, he did not have much of a business relationship with Mr. Chu or Mr. Lam. He pointed out that Ms. Chou had a closer business relationship with Mr. Chu.

[25] The Second Defendant, Mr. Chu testified and called Mr. Lam as his witness. He admitted that he was a director of the Company. He stated that on or about 28 March 2000, Mr. Chan, a friend and former business associate of his, through Zhu Jiang, which was solely owned by Mr. Chan acquired the project in Wuhan and Guangzhou. The transaction

involved Zhu Jiang purchasing all the shares in the subsidiary companies that owned the projects. As a result, it acquired 1,000 shares in the Company. Mr. Chan paid RMB 8 million for both companies.

[26] In or about October 2000, Mr. Chan agreed to sell Mr. Lin the project in Guangzhou. The contact was made through Ms. Chou who was a close friend of his on the one part and of Mr. Lin on the other part. The orally agreed price was RMB 48 million of which Mr. Lin paid RMB 0.5 million to Mr. Chan as a deposit.

[27] In the middle of 2001, Zhu Jiang and Mr. Lin were parties to the Chinese Agreement. The Chinese Agreement provided that Mr. Lin would purchase the "rights and interests" of Zhu Jiang in American Dream Park in Guangzhou. It was technically the sale to Mr. Lin of the entire shareholding in Zhu Jiang by the sole shareholder Mr. Chan; through such shareholding Mr. Lin would achieve ultimate ownership of the project in Guangzhou. Under the terms of the Chinese Agreement, the price for the sale of the shares in the company was RMB 40.5 million. Mr. Lin paid the RMB 0.5 million but has never paid the balance of RMB 48 million to Mr. Chan. A share in Zhu Jiang was allotted to Ms. Chou at the same time that a share was issued to Mr. Lin.

[28] Mr. Chu admitted that the project was to construct a university at the site of Guangzhou. He agreed that the estimated cost was RMB 80 million, that he and Mr. Fung each acquired 10% of the shares in the Company through their respective companies and in consideration, they each invested 10% of the estimated cost. Accordingly, Mr. Fung contributed RMB 5 million in cash and he agreed with Mr. Lin to pay Mr. Chan RMB 5 million as part payment for the purchase price due to Mr. Chan from Mr. Lin under the Chinese Agreement. This sum would be paid to Mr. Chan after Mr. Lin contributed the same amount as working capital in the project. Mr. Lin never made the contribution and as a consequence, he did not pay Mr. Chan.

[29] In February 2002, Ms. Chou told both him and Mr. Fung that the working capital had to be increased. At that stage, he did not know how much Ms. Chou and Mr. Lin had contributed

if any, and he did not know how they had spent their contributions. Mr. Lin and Ms. Chou never produced any accounts to them despite repeated requests. At Ms. Chou's request they both contributed an additional RMB 3 million.

[30] In September 2002, the college term commenced and the prospects appeared good. At that time Ms. Chou requested a loan of RMB 20 million. Mr. Chu refused but Mr. Fung said he would use that money to purchase more shares. Ms. Chou refused. In December 2002, Ms. Chou asked them to reduce their respective shareholding to 8.4% but they rejected it.

[31] By notice dated 30 January 2003, as director of the Company, Mr. Chu caused a board meeting to be held on 10 February 2003 for the purposes of appointing new directors and to allot the unissued shares of the Company. The notices were sent to DDK (BVI) Ltd. for the attention of Mr. Fung and to Zhu Jiang for the attention of Mr. Lin and Ms. Chou. The notices for Mr. Lin and Ms. Chou were enclosed in letters sent to room B-812, 8th floor, Block B, Sea View Estate, 2-8 Watson Road, North Point, Hong Kong. They were sent to that address because on 22 March 2002, Mr. Lin and Ms. Chou resolved that this was the correspondence address of Zhu Jiang. Prior to that, the address of Ms. Chou appearing on the Register of Directors of the Company was her office address but he did not send the letter there because he knew she was never present there. He noted that meetings that were previously held and attended by all the directors of the company had been informal, taking place over lunch or dinner.

[32] Mr. Chu detailed a litany of reasons why he called the Directors' Meeting namely:

- Mr. Lin did not intend to abide by the Chinese Agreement and he felt personally obligated to Mr. Chan;
- Ms. Chou and Mr. Lin did not intend to invest in the college in the manner agreed;

- From his suspicion and in light of subsequent events, it became clear that Ms. Chou and Mr. Lin's representation regarding the investment were apparently false and was made with the intention to induce him and Mr. Fung to provide cash to invest in the college;
- The persistent and consistent failure to produce accounts;
- If Ms. Chou and Mr. Lin were to continue to control and manage the college and relevant companies further detriment would result to them; and
- The meeting was called with the intention of changing the control and management of the Company.

[33] At the meeting held on 10 February 2003, a resolution was passed issuing the 49,000 of the company's unissued shares and appointing new directors. He asserted that for unknown reasons, Mr. Lin and Ms. Chou did not attend the meeting. In June 2003, the board of the Company passed a written resolution to remove Mr. Lin and Ms. Chou as directors and by resolution dated 23 July 2003 Mr. Lin and Ms. Chou were removed as signatory of the Company's account.

[34] On 2 June 2003, he reported the conduct of Mr. Lin and Ms. Chou to the police and on 11 June 2003, he, Mr. Fung, a number of policemen, security guards, their lawyer and five (5) auditors went to the University and took control of it.

[35] As anticipated, Mr. Chu was vigorously cross-examined by Mr. Paul Dennis, Learned Counsel for Mr. Lin and Ms. Chou.

[36] In cross examination, he denied that Mr. Lin or Ms. Chou gave him telephone or fax numbers, email addresses or other contact addresses for communication or service by post or courier. He agreed that he had met with Mr. Lin and Ms. Chou on occasions at a café but he never gave either of them the documents that were mentioned by Mr. Lin.

[37] Mr. Lam was the next witness to testify. He is employed by Edmundwick Enterprises Ltd. (“Edmundwick”) and his principal duties and functions are secretarial and managerial. According to him, Edmundwick is a company that carries on the business of trading and also rendering secretarial and managerial services to several companies including companies to which Mr. Chu is related.

[38] He agreed that Mr. Chu gave him instructions a few days before the end of January 2003 to prepare notices for the Directors’ Meeting of the Company as well as letters of service. Mr. Chu informed him orally of the contents of the notice. He made drafts notices and letters of service based on Mr. Chu’s instructions as well as information obtained from two files from the Company and Zhu Jiang. The draft notices and letters were given to Mr. Chu for his approval and finally for his signature. Mr. Chu signed the notices on 30 January 2003.

[39] The letter of service addressed to Mr. Fung was sent to DDK (BVI) Ltd., room B-812, 8th floor. Block B, Sea View Estate, 2-8 Watson Road, North Point, Hong Kong for the attention of Mr. Fung. He got the address from the official records of the Company. The letters of service sent to Mr. Lin and Ms. Chou were addressed to Zhu Jiang and not to them because according to him, it would, in any event, come to their attention. The address for Zhu Jiang was the same as that of Mr. Fung. He sent the letters of service to this address because of the following reasons:

- In 2002, Ms. Chou verbally informed him that that address was the address for service or delivery of correspondence for Mr. Lin and herself and she instructed him to formally record it as the correspondence address for Zhu Jiang.
- Other documents were previously sent to the same address for Mr. Lin, Ms. Chou and Zhu Jiang and were received by them.

- The address of Ms. Chou in the register of directors was the address of Edmundwick and also his (Mr. Lam's) office address. For that reason, he did not send the notice there because he had personal knowledge that she was never there.
- The letters of service were also faxed to the said address – (Mr. Fung's office address) and sent by a messenger. The messenger returned and gave him a copy of the letter of service and told him that a member of staff at the office there acknowledged receipt by signing them.

[40] Under cross-examination, Mr. Lam stated that he is an employee of Edmundwick and not Mr. Chu. He said that he had no idea that the correspondence address given by Ms. Chou was for registration purposes only and not for any other purpose including the service of documents or correspondence. Mr. Chu did not give him instruction as to where the documents were to be sent and how they were to be sent. These two matters were carried out in accordance with instructions from the client, Mr. Lin and Ms. Chou. He followed those instructions.

[41] On a balance of probabilities, I preferred the evidence adduced by Ms. Chou and Mr. Lin. I found them both to be candid and forthright witnesses. On the contrary, I found Mr. Chu to be very evasive and equivocal in his answers. His witness, Mr. Lam was undoubtedly a self-serving witness; he being the recipient of 8,000 shares and an employee of Edmundwick, a Company related to and/or controlled by Mr. Chu. I found as a fact that Mr. Lin and Ms. Chou were not aware of the said Directors' Meeting which Mr. Chu purported to call. It is clear that Mr. Lin and Ms. Chou (through Zhu Jiang) held or controlled a majority of the Company's shares. Observing their demeanour, they did not strike me as the kind of business persons who would have neglected to attend such an important meeting had they been notified of it.

[42] I also found as a fact that Mr. Chu knew fully well that both Mr. Lin and Ms. Chou spent a significant portion of their time in China (by virtue of their responsibility to the University Project) and as such, they would not ordinarily be in Hong Kong. As such, any notices sent

to them in Hong Kong would not have reached them. To my mind, this was exactly what Mr. Chu intended. Furthermore, if Mr. Chu was genuinely interested in notifying Mr. Lin and Ms. Chou, he was in a position to do so by contacting them in China.

The preliminary issue

[43] The preliminary issue to be tried is whether the Directors' Meeting held on 10 February 2003 was valid. I am in agreement with Mr. Evans that the preliminary issue gives rise to a number of subsidiary issues but I do not agree that this Court needs to examine all of those issues which Mr. Evans identified in his very comprehensive written submissions.

Purpose for calling Directors' Meeting

[44] Mr. Evans submitted that the purpose or reason for calling the Directors' Meeting is relevant because the motive was honourable. Mr. Dennis correctly pointed out that this is irrelevant. He forcefully argued that this Court need not decide the issue of whether Mr. Lin and Ms. Chou were starving the company of much needed funds or whether Messrs. Chu and Fung wanted to get investment into the Company. He next submitted that a meeting invalidly held could not be allowed to stand because the motive was honourable. He promptly indicated that the Claimant is not accepting that the motive was honourable. According to him, the motive for that meeting was to rob Mr. Lin and Ms. Chou of their interest in the Company. He stated also that if the Court accepted that Mr. Lin and Ms. Chou were starving the company of funds, the Court would still have to find that the meeting was properly convened. I agree entirely with this submission.

Did Mr. Chu instruct Mr. Lam to send the notices? And did Mr. Lam send them?

[45] These two issues can be dealt with together and briefly. Mr. Evans submitted that there is uncontroverted evidence that Mr. Chu instructed Mr. Lam to send the notices to Mr. Lin and Ms. Chou. He further stated that neither Mr. Chu nor Mr. Lam was cross-examined to the effect that Mr. Chu did not instruct Mr. Lam to send the notices. According to Mr. Evans, it follows that the defendants' evidence on this issue stands wholly uncontroverted and the Court is bound to accept it. I agree. In any event, these issues are undisputed.

Was the address appropriate?

- [46] Mr. Evans submitted that this is not a case where there can be one effective address for the service of the notice of each director; the reason being that the Articles of Association of the Company and the statutory scheme contained in section 49 of the International Business Companies Act (“the Act”) are silent as to where a notice convening a director’s meeting ought to be sent. Indeed, a notice of a director’s meeting does not even have to be in writing; *a fortiori*, there are no prescriptive conditions for the address of service if it is given in writing.
- [47] Learned Counsel submitted that the notice given to Mr. Lin could be considered more briefly perhaps than that in respect of Ms. Chou. The obvious answer is that the address that was used for service is precisely that which is quoted for Mr. Lin in the register of directors. He elegantly submitted that given that fact, it is preposterous to suggest that notice on a director of a company at an address contained in that company’s records can be regarded as ineffective unless there is cogent evidence that the address is plainly incorrect. He intimated that no such evidence exists and by contrast, Mr. Lam explained why the address was appropriate.
- [48] Learned Counsel submitted that criticism was made of the fact that the covering letter under which the notices were sent was addressed to Zhu Jiang and not to Mr. Lin and Ms. Chou. Again, he elegantly submitted that this point is not good for two reasons (i) although the first line of the address does state “Zhu Jiang Finance Limited”, below the address, and conspicuously, there appears the following: “*Attn: Mr. Lin Yong Ping/ Ms. Charlotte Chou Wan Ling...*” He contended that no reasonable recipient could have mistaken as to the addressee.
- [49] As for service on Ms. Chou, Mr. Evans submitted that service was not effected on the address given for her in the register of directors and the reason for that is very telling. That address was the same for Edmundwick Enterprises Limited, the Company that employs Mr. Lam and Mr. Lam testified that he knew that service at that address would have been an exercise in futility. Mr. Evans surmised that if (as the claimants case is) this entire set of

circumstance was some form of sham or deceit by Mr. Chu, one might imagine that they would have used this address, in order to be seen to adhering strictly to the letter of the available documentation, albeit, in the knowledge that service would in fact be fruitless.

[50] Mr. Evans next submitted that during cross-examination, much was made of the concept of "good faith" and whether Mr. Chu was honourable in his intentions to notify Mr. Lin and Ms. Chou of the Directors' Meeting. He argued that in any event, it was bound to fail for a number of reasons; one being that it was not pleaded. Mr. Dennis said that there was no need to plead "bad faith" as it is nothing more than a description of the conduct of Mr. Chu.

[51] It is suggested by Learned Counsel that Mr. Chu gave a compelling explanation as to why a formal notice was given: by reason of his deterioration of the relationship with Ms. Chou. I have already found that I did not consider Mr. Chu to be a credible witness. In my opinion, his motive for the meeting was dishonourable and he knew fully well that he did not wish the presence of Mr. Lin and Ms. Chou at that Directors' Meeting. For this reason, he caused the notices to be sent to the said address in Hong Kong which was Mr. Fung's address and which he knew was not the appropriate address to send notices of Directors' Meeting to either Mr. Lin or Ms. Chou for several reasons. He knew that Mr. Lin and Ms. Chou would more often than not, be spending a significant amount of time in China (by virtue of their responsibility to the University Project) and as such, they were not ordinarily resident in Hong Kong. He knew fully well that neither Mr. Lin nor Ms. Chou was present in Hong Kong at the material time.

[52] As Mr. Dennis correctly asserted, if Mr. Chu was genuinely interested in notifying Mr. Lin and Ms. Chou, he was in a position to do so by contacting them at the place where they spent most of their time which is China.

[53] Mr. Dennis stated that it must be noted that the relationship between Mr. Chu and Mr. Fung on the one hand, and Mr. Lin and Ms. Chou on the other hand had completely broken down when the notices were sent to Mr. Fung's address. Yet, the notices were sent

there. This, in my judgment, is tantamount to nothing else but dishonourable conduct on the part of Mr. Chu.

[54] In light of the above, I find that the address to which the notices were sent was not an appropriate one. I also find that neither Mr. Lin nor Ms. Chou received the notices which were purportedly sent to them.

Was the Directors' Meeting validly held?

[55] Not having received the notices, the mind-boggling question is: was the Directors' Meeting validly held?

[56] Mr. Evans submitted that actual receipt of the notice is most definitely not a pre-requisite to the validity of the Meeting. According to him, Article 73 of the Company's Articles of Association is clear on this. It states:

"The inadvertent failure to give notice of a meeting to a director, or the fact that a director has not received the notice, does not invalidate the meeting."

[57] He submitted that the article actually does no more than state the position that applies in this jurisdiction by virtue of Section 49 (3) of the Act. Article 73 imitates Section 49 (3) of the Act. Learned Counsel argued that these provisions are applicable in circumstances that are factually far weaker than those prevailing in the present case, namely, where no notice has been given (providing that the reason for this is inadvertence; deliberate failure to give notice does not benefit from the provision). He submitted that in the present case, there is before the Court uncontroverted evidence that instructions to give the notices were given, and that notice was in fact given.

[58] Mr. Evans further argued that Article 73 and even more importantly, section 49 (3) of the Act are determinative of the position in BVI. The approach adopted by the legislature in this jurisdiction is markedly different from the common law position in England. Accordingly, the views in the leading commentaries on English Company Law, Palmer's Company Law and indeed the decision of the English Court of Appeal in **Young v Ladies**

Imperial Club² have absolutely no application whatsoever to the determination of the law in this jurisdiction. Mr. Evans next argued that viewed in this context, the authorities cited by Zhu Jiang in its skeleton argument fall to be regarded as irrelevant: proper notice was sent, and irrespective of receipt, it follows that the Directors Meeting was validly convened.

[59] Mr. Dennis submitted that the meeting was not validly held because notice was not given to Mr. Lin and Ms. Chou. He opined that the circumstance in which the meeting was held is important. The resolution that was passed at the Meeting by the two directors effectively whittled down Zhu Jiang's interest in the Company from 80% to 1.5%. The notices were sent to Mr. Fung's address and both Mr. Fung and Mr. Chu were aware that Mr. Lin and Ms. Chou were not present in Hong Kong at the material time. According to him, sending the notice to an address which the directors know would not get to the other director's does not constitute proper service of that notice.

[60] Learned Counsel accepted that as a matter of records Mr. Fung's address was the address on record for the delivery of correspondence for Ms. Chou and the address in the register of directors for Mr. Lin. However, sending notices to this address would only make sense when the parties are on cordial terms. At the time that the notices were despatched, the relationship between Mr. Chu and Mr. Fung on the one hand and Mr. Lin and Ms. Chou on the other hand had broken down irretrievably. He accentuated the fact that Mr. Chu gave conflicting answer on this issue in cross-examination. He submitted further, that neither Mr. Chu nor Mr. Lam have given evidence as to how the notices would have gotten to Mr. Lin and Ms. Chou from Mr. Fung's office. He argued that it is entirely disingenuous for Mr. Chu to suggest that because notices of the Meeting were sent to that address, then that was proper notice. According to Mr. Dennis, this is a sham and a smokescreen.

[61] Mr. Dennis forcibly submitted that the quintessence of his argument is not that Mr. Lin and Ms. Chou did not receive the notices, but rather that they did not receive them because when they were sent, Mr. Lin and Ms. Chou were not meant to receive them. He asserted

² [1920] 2 K.B. 523

that the facts of the instant case are similar to the case of **Re Homer District Consolidated Gold Mines Ex parte Smith**.³ In **Re Homer**, the Court held that if a notice is sent based on bad faith, where it is clear that a director would not receive it or receive it in time, it is ineffective and irregular.

[62] Mr. Dennis argued that Article 73 of the Company's Articles of Association and Section 49 (3) of the Act are designed to take care of situations where through no real intent on the part of the convener of the meeting, through some accidental or inadvertent slip, the notices did not come to the attention of the directors. More succinctly put, the directors who convene the meeting could rely on Article 73 or Section 49 (3) if they sent the notices in good faith, and for some reason of which they had no control, the notices were not received. The provision could only avail Mr. Chu if notices were in fact properly sent and through some reason beyond their control, Mr. Lin and Ms. Chou did not receive the notices. He said that the position in the instant case is that the notices were sent in bad faith. Mr. Chu directed that the notices be sent to Mr. Fung's address knowing that Mr. Lin and Ms. Chou would not receive them. Therefore, notice of the Directors' Meeting was effectively not given. He inquired quizzically: "how could they in equity seek to rely on Article 73 and Section 49 (3)?"

[63] Learned Counsel ably argued that in these circumstances, those provisions do not apply. He submitted that the common law position is therefore applicable: if some directors were not given notice of the Directors' Meeting, then business done at that meeting is invalid. He relied on the case of **Young v Ladies' Imperial Club and Smyth v Darley** ⁴ to substantiate that point.

The relevant Articles

[64] The Articles of Association and the Act under which the Company is incorporated are silent as to the place and manner of service of notices convening Directors' Meeting. The

³ [1883] Ch D 546.

⁴ [1849] H.H.L.C. 769.

Articles, however provides for the manner in which the Directors are expected to meet, the amount of notice to be given, waiver of notice and the effect of non-receipt of the notice.

[65] The relevant Articles are the following. Article 68 states:

“The meetings of the directors and any committee thereof shall be held at such place or places as the directors shall decide.”

[66] Article 70 provides that a director may at any time summon a meeting of the directors while Article 71 speaks to notice of the meeting of the directors to be not less than seven days.

[67] Article 72 states:

“Notwithstanding Regulation 71 above, a meeting of directors held in contravention of that regulation shall be valid if a majority of the directors entitled to vote at the meeting have waived the notice of the meeting.”

[68] Article 73 states:

“The inadvertent failure to give notice of a meeting to a director, or the fact that a director has not received the notice, does not invalidate the meeting.”

The Law

[69] Section 49 (3) of the Act states:

“The inadvertent failure to give notice of a meeting to a director, or the fact that a director has not received the notice, does not invalidate the meeting.”

[70] It is crystal clear that Section 49 (3) mirrors Article 73 of the Articles of Association of the Company.

[71] Notice of a director’s meeting “may be given verbally, and need not be given in writing unless the articles so require. This is clearly illustrated in the case of **Browne v La**

Trinidad.⁵ The case is good authority for the proposition that so long as the articles do not expressly prohibit it, notice of a directors' meeting may be given orally.

[72] The need to notify all directors of an upcoming directors' meeting is the foundation to statutory and common law principles of corporate law. The cases of **Smyth v Darley** and **Young v Ladies' Imperial Club** clearly point out that when certain acts are to be performed at a special meeting of the members of a corporation, all the persons entitled to be present thereat must be summoned. If this is not done, the actions taken at such meeting are invalid.

[73] In **Smyth v Darley**, the election of treasurer for the county of the city of Dublin was vested in the "board of magistrates of the county of the said city" and was directed to take place at the Sessions Court of the city, by vote of the magistrates present. No summons to attend the meeting of 21 February 1839 was issued to either of the Sheriffs, or the Recorder of the Court, though all were within summoning distance. The Sheriffs, however attended but their votes were rejected. The Recorder did not attend. It was held that the Recorder was a member of that board, and ought to have been summoned to the meeting of the magistrates summoned for that election, and that the omission to summon him rendered invalid the election that took place in his absence.

[74] In **Young v Ladies' Imperial Club**, Lord Sterndale MR. approved the decision in **Smyth v Darley**. He stated:

"I cannot entertain any doubt that, with certain very limited exceptions indeed, where there has to be a special meeting of a committee or any other body specially convened for the purpose, every member of that body ought to have notice of that meeting and a summons to it. It seems to me that that is clearly laid down in **Smyth v Darley** ..."

[75] He gave an example of the limited exceptions; where the absent member of the body is at such distance that it is physically impossible for him to attend in obedience to a summons.

⁵ (1877) 37 Ch. D 1.

[76] The principle is also succinctly enunciated in the case of **Re Homer District Consolidated Gold Mines. Ex Parte Smith**.⁶ In that case, the Court had to deal with the question of whether the allotment of shares had been properly done having regard to the notice which was purportedly given of a director's meeting. The notice which was sent out was very brief and was not in keeping with what the directors were used to. The Court however considered not only the notice itself but the intention of those responsible for sending it out. North J. stated at page 550:

"It seems to me that what was done was as irregular as possible. Without wishing to suggest any fraud on the part of the two directors present, the conclusion I come to as to their acts is that they did think it desirable that the shares should be allotted as soon as possible. They knew that *Witt* and *Simpson* had opposed the allotment of shares till a larger number were applied for. They proposed to do what they may have thought they could do; they thought they could get rid of the opposition of their co-directors, and pass a resolution that would bind the company.

With regard to the notice of the meeting, it was such as had never before been given in the history of the company. The shortest notice that had ever been given before was a notice for the next day. The notice was sent out in the most irregular way. What is more, it was expressed in such a way (I cannot help thinking intentionally so expressed) as not to give *Witt* and *Simpson* notice of what was to be done. On that notice at two o'clock, the two directors present knowing that one of the other two summoned could not be present till three, and not knowing whether the other would come, proceeded at once to rescind a resolution passed by the board two weeks before. In my opinion this was about as irregular as anything could be."

[77] I agree with Mr. Dennis that the present application bears a close affinity to the case of **Re Homer**. It is plain from the judgment of North J. that the apparent knowledge of the directors responsible for the irregular actions played a significant part in the decision of the Court when determining whether effective notice has been given.

[78] The question of whether a meeting has been duly convened if notice has been dispatched to a director/ committee member but not received; where the articles are silent on the point has not been specifically decided. The matter arose as an ancillary issue in the case of

⁶ {1888} 39 h. D.

Leary v National Union of Vehicle Builders⁷ wherein it was submitted by Counsel for the union that if notice was sent but failed to arrive, the meeting would not be invalidated. No authority was cited for that contention. Megarry J. stated that he would say no more than that at present he prefer, on a whole, the view of *Sebag Shaw and Townsend's Law Meetings*⁸ that:

"*Prima facie*, where notice is not effectively served, i.e. is not received by the intended recipient, the position corresponds to that in which no notice is given, and the meeting will in consequence be invalidated."

[79] He then stated:

"The practical inconvenience of so strict a rule can be avoided, and often is, by inserting a provision modifying it in the rules. But I should require further argument before deciding the point."

[80] It seems to me that whilst there is no precise authority to deal with the question of how the Court treat a notice which has not reached the intended recipient, it follows from **Re Homer** that in dealing with such a case, the Court will have regard to the surrounding circumstances that influence the particular meeting and the parties responsible for calling and attending such meeting.

[81] However, I do not agree with Mr. Evans that the applicable provisions of the articles and the Act are determinative of the issue in this case. Mr. Evans admitted that the provisions are not applicable to situations where the notices were intentionally not sent. That makes good sense. It follows therefore, that the provisions can only be relied upon where the notices were sent in good faith but were not received. They do not apply to those circumstances where they were sent and the sender knew they would not be received. The latter would defeat the legislative intent. To my mind, any other proposition would be ludicrous because a director who wants to pass a resolution which he knows another director would oppose, can send the notice to Timbuktu knowing fully well that the director

⁷ [1970] 2 All ER 713 at 723,

⁸ 2nd Edn. 1950, p.53.

would not receive it and then rely on Section 49 (3) to say that despite the fact that the director did not receive the notice, the meeting was validly held.

[82] I have already found that Mr. Chu instructed Mr. Lam to send the notices and that Mr. Lam did in fact sent them to Mr. Fung's address. I accept Ms. Chou's evidence that Mr. Fung's address was given to Mr. Lam in the circumstances she outlined. I agree with Mr. Dennis that this was an address that could only sensibly be used when the relationship between Mr. Fung on the one hand and Ms. Chou and Mr. Lin on the other hand was cordial. The copy letters indicating receipt were signed by one of Mr. Fung's staff member. No indication was given as to how Mr. Lin and Ms. Chou would have received the notices from Mr. Fung's office. They would have had to rely on Mr. Fung or one of his staff members to notify Mr. Lin and Ms. Chou that the notices or correspondences for them were at the office.

[83] The purpose for the meeting was of paramount importance. The meeting was held, as admitted by Mr. Chu, to remove Mr. Lin and Ms. Chou from their majority position in the Company. In actuality, the meeting effectively whittled their interest in the Company from 80% to 1.6% and subsequently stripped them of their powers in the Company. I would imagine if such a resolution was going to be passed, every endeavour should have been made to contact the directors who would no doubt want to be present to oppose the resolution. Sending the notices to the address that is in the register of directors or that was given formally for correspondence knowing fully well that there is no way they will have come to the attention of Mr. Lin and Ms Chou is not sufficient in the circumstances that obtained at the material time. Mr. Lam stated that the notices were sent by fax to Mr. Fung's office as well as hand delivered. In like manner, the notices could have been faxed to the University where Mr. Lin was located. Mr. Chu admitted that if he really wanted to, it would not have been difficult to contact either Mr. Lin or Ms. Chou at the University. He could have telephoned them at the University and gave oral notice of the meeting: see **Browne v La Trinidad** [supra].

- [84] All things considered, I find that the notices of the Directors' Meeting held on 10 February 2003 were sent in bad faith. They were not meant to be received by Mr. Lin and Ms. Chou. As such, the notices were sent knowing that they would not be received and this equates to intentionally not sending notice. It follows therefore that Mr. Chu cannot rely on Article 73 or Section 49 (3) of IBC Act.
- [85] In my judgment, the principles enunciated in **Young v Ladies' Imperial Case** and **Re Homer** apply. Mr. Lin and Ms. Chou, directors of the Company did not get notice of the meeting. It was clear that both Mr. Chu and Mr. Fung knew that if Mr. Lin and Ms. Chou had had notice of the meeting, they would have been present and would have vehemently objected to the resolution taken. It follows therefore that what was done at that Meeting was not the act of the directors and did not bind the Company. The resolution passed is therefore invalid and of no effect.
- [86] Furthermore, the purported issue of the new shares and the appointment of new directors, as well as the subsequent purported removal of Mr. Lin and Ms. Chou are all invalid. Accordingly, Zhu Jiang is granted the relief sought in its statement of claim. I would also award costs assessed at \$72,247.27 to Zhu Jiang.
- [87] Last but not least, I am grateful to Mr. Dennis, Mr. Arthurs and Mr. Evans for their immeasurable assistance to the Court in the presentation of their submissions.

Indra Hariprashad-Charles
High Court Judge

