In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2023 No: 352

IN THE MATTER OF NAN HAI CORPORATION LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1981

BETWEEN:

(1) HO KWOK LEUNG GLEN
(2) HAU KAI LING
(3) GE JUN

Plaintiffs

And

NAN HAI CORPORATION LIMITED

Defendant

RULING

Dates of Hearing:	Wednesday 22 November 2023
Date of Ruling:	Wednesday 31 January 2024
Counsel for the Plaintiff:	Mr. Steven White and Devon A. Luca (Walkers Bermuda Limited)
Counsel for the First Defendant:	Mr. Ben Adamson (Conyers Dill & Pearman Limited)

Construction of Company Bye-Laws

RULING of Shade Subair Williams J

Introduction:

1. This is an originating summons application seeking urgent declaratory relief in relation to the unfolding of a 29 September 2023 Special General Meeting (the "SGM") of the Defendant ompany Nan Hai Corporation Limited (the “Company”) and its Board of Directors (the “Board”).

2. There are two principal issues to be decided by this Court: firstly, whether the SGM was lawfully adjourned and secondly whether the resolution(s) passed at the SGM to appoint seven new Directors were valid in accordance with the Company’s bye-laws.

3. Both questions were argued before me. Having received oral and written submissions from Counsel for both sides, I reserved my decision and stated that I would provide these written reasons.

Background:

4. In this case, the key facts relevant to the issues for determination are broadly non-contentious. What the Court is asked to resolve primarily comes down to a question of construction of the applicable bye-laws.

5. The Company was incorporated in Bermuda on 7 November 1990 under its former name, “Team Concepts Holdings Limited”. The business of the Company involves the provision of culture and media services, property development and enterprise cloud services.

6. Between 2017 and 2020 45.82% of the issued shares in the Company were charged in favour of CCB International Overseas Limited, who in turn appointed the Plaintiffs to act as receivers (collectively the “Receivers” or the “Plaintiffs”) over the said shares on 22 May 2023. Approximately 10% of the issued shares are registered in the joint names of the Receivers.

7. Trading of the Company’s shares on the main board of the Hong Kong Stock Exchange (the “HKEx”) was effectively suspended on 1 April 2022 after its failure to file audited accounts. On 16 November 2023 the Company was formally delisted from the HKEx.

8. In the 7 November 1990 Minutes of the First Annual General Meeting of the Company it was resolved that the maximum number of directors would be seven. This preceded a special general meeting whereby a resolution was passed on 14 January 1991 that the number of directors would be a total of nine. Another resolution is said to have been passed thereafter and most recently in 2012. According to the Defendant, this 2012 resolution prescribed that the maximum number of directors would be reduced to eight in total. (Up until the date of the hearing, the said 2012 resolution had not been produced, thereby giving rise to some degree of factual discord between the parties.)

9. Pursuant to a requisition notice issued by the Receivers on 24 July 2023, the SGM was convened on 25 August 2023 and held on 29 September 2023, being chaired by Mr. Lam Bing Kwan ("Mr. Lam"), one of the Company’s non-executive directors. The purpose of the requisition notice was to procure a vote in favour of appointing seven new directors. During this period, there were at least two existing vacancies (arguably three) as the total number of appointed directors was six.

10. On the evidence filed by the Plaintiffs, they, the Receivers, had reason to be concerned about the performance of the pre-SGM Board which comprised two executive directors, (Mr. Yu Pun Hoi and Ms. Lui Rong), one non-executive director, (Mr. Lam) and three independent non-executive directors (Mr. Lau Yip Leung, Mr. Xiao Sui Ning, and Mr. Ho Yeung Nang).

11. Ms. Hau, as one of the three Receivers, provided affidavit evidence about the Company’s failure to (i) publish its annual and interim results for the preceding two years; (ii) hold Annual General Meetings ("AGM") during that period; (iii) satisfactorily address audit issues and (iv) take appropriate action to achieve a resumption of public trading of the Company’s shares. Ms. Hau also outlined in her evidence the unfruitful efforts of the Receivers to secure further information from the pre-SGM Board about these delinquencies and the way forward. Ms. Hau

provided these examples to explain the Receivers' apprehension about the pre-SGM Board's ability to properly function in the best interests of the Company.

12. On 29 September 2023 the SGM was held in Hong Kong. Mr. Lam, having satisfied himself that the SGM was quorate, sought to adjourn the SGM without taking a vote from the attending members. The adjournment of the SGM is the first limb of complaint by the Plaintiffs who contend that it fell short of the requirements for consent of the members at the SGM.

13. So, on the one hand, the Receivers say that Mr. Lam's attempt to adjourn the SGM failed under the relevant bye-laws, rendering the adjournment invalid as a matter of law. The Defendant's position, on the other hand, is that the adjournment was indeed effected in accordance with the bye-laws. Having taken legal advice from Mr. Victor Joffe KC as to the validity of the Receivers' proposed appointment for new directors, Mr. Lam adjourned the SGM on the basis that the directorship appointments would offend the maximum number prescribed. On the strength of that advice, Mr. Lam invited the Receivers to deposit a revised requisition for a separate resolution to increase the cap of the Board.

14. Notwithstanding, the SGM was overtaken by the Receivers who secured a vote of no confidence in Mr. Lam and elected Ms. Hau as the new chairperson. What then immediately followed was the passing of seven resolutions for the appointment of seven new directors.

15. However, the pre-SGM Board of Directors has since refused to recognize the new directorship appointments and maintains its claim that the 29 September SGM had been properly adjourned and that the said appointments were legally ineffective.

Analysis and Decision

<u>The Impugned Adjournment:</u>

16. The question as to whether the adjournment was lawfully valid comes down to the proper construction of bye-law 69 which provides:

"*The Chairman may, with the consent of any general meeting at which a quorum is present, and shall, if so directed by the meeting, adjourn any meeting from time to time and from place to place as the meeting shall determine. Whenever a meeting is adjourned for fourteen days or more, at least seven clear days' notice, specifying the place, the day and the hour of the adjourned meeting shall be given in the same manner as in the case of an original meeting but it shall not be necessary to specify in such notice the nature of the business to be transacted at the adjourned meeting. Save as aforesaid, no member shall be entitled to any notice of an adjournment or of the business to be transacted at any adjourned meeting. No business shall be transacted at any adjourned meeting other than the business which might have been transacted at the meeting from which the adjournment took place.*"

17. Mr. White submitted that only a plain and literal construction of the above wording should be applied.

18. The material portion of the provision is as follows: "*The Chairman may, with the consent of any general meeting at which a quorum is present, and shall, if so directed by the meeting, adjourn any meeting from time to time and from place to place as the meeting shall determine…*".

19. On its face, bye-law 69 allows the Chairman to adjourn if he or she so chooses, so long as he or she has the consent of the voting members of the quorate meeting. Taking it a step further, under bye-law 69 the Chairman is; however, obliged to adjourn if the voting members of the quorate meeting, direct an adjournment.

20. The question as to when the meeting would resume after an adjournment is also addressed under bye-law 69. The parties agree on the facts that Mr. Lam adjourned the SGM *sine die* without seeking the input or approval of the members. The evidence is that Mr. Ho communicated his objection to Mr. Lam's adjournment. However, Mr. Ho was seemingly ignored.

21. Mr. White argued that this outcome offended bye-law 69 where it reads: "*…and shall, if so directed by the meeting, adjourn any meeting <u>from time to time and from place to place as the meeting shall determine</u>…*" The effect of bye-law 69 is that the voting attendees are empowered to direct the Chairman on the time and the place at which the adjourned meeting is to resume. However, this provision does not compel the members of the meeting to make any such direction.

22. Counsel referred me to Kawaley CJ's decision in *Oung Shih Hua James v Paladin Limited* [2014] Bda LR 80. In that case, the Court was concerned with the question as to whether a special general meeting had been validly held and whether, as a matter of Bermuda law, the meeting continued following the departure of the former Chairman. The facts are summarized in the judgment. The relevant portion of that summary reads [4]:

"*4. …the Chairman opened the meeting and, without inviting the shareholders present and entitled to vote to approve this course, purported to adjourn the Meeting on the grounds of a Notice circulated earlier that day raising concerns about the fitness of two of the nominee directors. The remaining shareholders, after the Chairman and scrutineers left, proceeded to 'elect' a new Chairman who, after offering the shareholders to adjourn the Meeting (an offer which was not taken up) proceeded to pass the resolutions that were tabled. Thereafter, the former team….appear to have refused to accept the outcome of the Meeting and insisted that in fact the Meeting had been validly adjourned and that they were still the proper Board of the Company*."

23. Against that background, Kawaley CJ found that the special general meeting was validly continued as were the resolutions subsequently passed. In doing so, he had regard to the relevant bye-law, which mirrors bye-law 69 in this case, in not only wording but also numbering. Kawaley CJ said [15 - 16]:

    "*That brings me to the merits of the question of whether or not resolutions purportedly passed at the Meeting were in fact validly passed. The starting point is to look at Bye-law 69 of the Company's Bye-laws, which explains the voting rules. I only need to refer to the first sentence of that Bye-law:*

69. The Chairman may, with the consent of any general meeting at which a quorum is present, <u>and shall if so directed by the meeting</u>, adjourn the meeting from time to time and from place to place <u>as the meeting shall determine</u>…" [emphasis added]

That Bye-law, in my judgment, gives the power to adjourn a meeting not, fundamentally, to the Chairman, but rather to the meeting itself. What happened in this case it seems clear, even by the account of the Chairman himself…, is that he took the view that he was entitled of his motion as it were, to adjourn the meeting. In my judgment it is quite clear that this does not reflect the Bermudian legal position. There were various authorities cited in support of this proposition, but at the end of the day it seems to me, it is a question of construction of the Bye-laws [footnote 6][1] *And in this case the relevant Bye-law is quite clear* [footnote 7]. [2]

24. In my judgment, bye-law 69 gives way to a clear exercise of construction in the plain and literal sense. While it is only appropriate to engage an interpretation of the provision by regard to the wording provided, I would also remark that the literal meaning of the bye-law does not produce a result which is commercially nonsensical or troublesome in principle. Bye-law 69 ultimately renders the question of an adjournment a matter to be decided by the members of the meeting. So, an adjournment can only result from one of the following events: (i) either the meeting will consent to an adjournment proposed by the chairman; or (ii) the meeting will adjourn at the direction of the voting members.

25. I wholly agree with Kawaley CJ's reasoning in *Oung Shih Hua James v Paladin Limited.* There is no scenario in which the SGM could have validly adjourned without the voted agreement of the membership of the meeting. Otherwise put, it was not open to the chairman of the SGM to unilaterally decide or impose his choice for an adjournment on the members of the SGM

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[1] Footnote 6: *"In National Dwelling Society v Sykes [1894] 3 Ch 159 at 162, Chitty J stated: "The meeting by itself…can resolve to go on with the business for which it had been convened, and appoint a chairman to conduct the business which the other chairman, forget of his duty or violating his duty, has tried to stop because the proceedings have taken a turn which he does not like.""*

[2] Footnote 7: "*Even where, unlike here, the Bye-laws empowered the chairman of a meeting to have the last word on an adjournment and merely gave the shareholders a "controlling voice", the Judicial Committee of the Privy Council held that "[h]e cannot, it is true, adjourn it of his motion": Salisbury Gold Mining Company v Hathorn [1897] AC 268 at 275.*"

against their wishes. For these reasons, I find that Mr. Lam's attempt to adjourn the SGM was not only legally flawed but also ineffective and invalid in the eyes of Bermuda law.

The Impugned Appointments of Additional Directors:

26. I must now resolve the second issue before me: whether the resolutions were lawfully passed, notwithstanding the provisions of the bye-laws which prescribe a maximum number of persons who may simultaneously serve as directors.

27. Mr. Adamson cited the Court of Appeal's judgment in *HG (Bermuda) Limited v Kuczkiewicz* [2018] CA Bda 33 Civ for approval of the following test stated by Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 in respect of the construction of company bye-laws: "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*".

28. The relevant background knowledge, as Mr. Adamson put it in his submissions is:

(a) The status of the Company as a listed company; and
(b) The legislative context.

29. Pointing to the legislative context, Mr. Adamson referred to section 91 of the Companies Act 1981 (the "Companies Act") which provides:

"***Election of directors***

91(1) The affairs of the company shall be managed by at least one director who shall be a person elected in the first place at the statutory meeting and thereafter elected or appointed by the members at each annual general meeting of the company or in such other manner and for such term as may be provided in the bye-laws.

91(1A) A maximum number of directors may be determined by the members at a general meeting of the company or in such other manner as may be provided in the bye-laws."

30. Mr. Adamson also pulled up the judgment of Ward CJ in S*inocan Holdings v JHY International* [2002] Bda LR 12 where the facts concerned the effect of a shareholders' requisition to appoint additional directors at a special general meeting of a publicly listed Hong Kong company comprising some 62 shareholders. The Plaintiff company in that case sought a declaration from this jurisdiction of Court that the proposed election of addition directors at a special general meeting would be contrary to both the bye-laws and the Companies Act.

31. In S*inocan Holdings v JHY International* [2002] Bda LR 12, one of the plaintiff's arguments was that the bye-laws were void of any provision allowing for the election of additional directors at a special general meeting. The defendants on the other hand, citing *Worcester Corsetry Limited v Witting* (1936) 1 Ch 640, highlighted that the bye-laws did not restrict the company from so doing and that the company had an inherent power to proceed with such an election.

32. Ward CJ, on his assessment of sections 91(1) and 91(1A), said [98]:

"*No provision is made under either section for the election of directors by the shareholders at a special general meeting. This was a power which the members had under the 1984 Amendment to the Companies Act 1981, but the provision was not included in the 1999 Amendment. I am compelled to the conclusion that the provision was deliberately excluded.*"

33. The relevant bye-laws in S*inocan Holdings v JHY International* were recited in Ward CJ's judgment as follows [99]:

"*(1) Unless otherwise determined by the Company in general, the number of Directors shall not be less than two (2). There shall be no maximum number of Directors. The Directors shall be elected or appointed in the first place at the statutory meeting of Members and thereafter in accordance with Bye-law 87 and shall hold office until the next appointment of Directors or*

until their successors are elected or appointed. Any general meeting may authorise the Board to fill any vacancy in their number left unfilled at a general meeting."

(6) The Company may from time to time in general meeting by ordinary resolution increase or reduce the number of Directors but so that the number of Directors shall never be less than two (2)."

34. Ward CJ construed bye-law 86(6) as a provision which seemingly empowered the company to increase or decrease the number of directors in a special general meeting convened for that purpose. However, bye-law 86(1) mandated the election of additional directors to be done in accordance with bye-law 87. While bye-law 87 is not recited in Ward CJ's judgment, it is explained that bye-law 87 applies to the rotation and re-election of retiring directors. The bye-laws were otherwise silent on the procedural requirements for the members electing additional directors. So, the pivotal analysis hinged on the construction of section 91 of the Companies Act. Ward CJ concluded [99]:

"*…When these Bye-laws are read in conjunction with section 91 of the Companies Act 1981 it is clear that the legislature did not empower the shareholders to elect additional directors at a special general meeting*."

35. In his written submissions, Mr. Adamson recognised a juxtaposition arising from members being permitted to fix a maximum cap for the number of directors in a special general meeting but then being barred from appointing additional directors in a special general meeting. Mr. Adamson described it as an oddity that the members would have to wait for the convening of an AGM before it could vote on the appointment of additional directors. That said, Counsel for both sides appeared to accept that section 91 gives way to any bye-laws which empower members to vote for the appointment of additional directors at a special general meeting. This means that the task for the Court very much lands on the construction of the relevant bye-laws.

36. In this case the bye-laws which confer and define the power of a general meeting to increase or reduce numbers of Directors provide as follows:

101. The Company in general meeting shall from time to time fix and may from time to time by Ordinary Resolution, increase or reduce the maximum and minimum number of Directors but so that the number of Directors shall never be less than two.

102. (A) The Company may from time to time in general meeting by Ordinary Resolution elect any person to be a Director either to fill a casual vacancy or as an addition to the Board. Any Director appointed to fill a casual vacancy shall hold office only until the next general meeting of the Company and any Director appointed as an addition to the Board shall hold office only until the next annual general meeting of the Company, and in each case shall then be eligible for re-election.

(B) The Board shall have power from time to time and at any time to appoint any as a Director either to fill a casual vacancy or as an addition to the Board but so that the maximum number of directors so appointed shall not exceed the number determined from time to time by the members in general meeting. Any Director appointed shall not exceed the number determined from time to time by the members in general meeting of the Company and any Director appointed as an addition to the Board shall hold office only until the next annual general meeting of the Company, and in each case shall then be eligible for re-election.

37. Bye-law 101 imposes an obligation on the Company (as opposed to a discretionary power) to fix a maximum number of directors who may be appointed in a general meeting. The importance of a maximum cap is implicit by the mandatory nature of the provision. It is evident from this mandatory wording that the intention behind the bye-law is that the members are bound by any maximum cap set.

38. The Company is also empowered under bye-law 101 to increase or decrease the maximum cap by way of Ordinary Resolution at a general meeting, so long as no less than two directors are appointed at any given time. So, under bye-law 101, the members may increase the maximum number of directors at a special general meeting. The question is; however, whether they may

also go on to appoint additional directors at a special general meeting. Bye-law 101 does not go this far.

39. Bye-law 102(A) applies to the filling of casual vacancies and additions to the Board, similar to Ward CJ's description of bye-law 87 in *Sinocan Holdings v JHY International* which applied to the rotation and re-election of retiring directors. The expiry of the term in office where the appointment was made to fill a casual vacancy expressly occurs upon the convening of the next AGM. The filling of casual vacancies is blatantly distinct from the process of electing or re-electing directors at an AGM.

40. Mr. White hung his hat on the effect of bye-law 102(B). Under this provision, the Board is delegated with restricted powers allowing for appointments to fill casual vacancies and/or appointments of additional directors, so long as the total number of appointments do not exceed the maximum cap set by member in a general meeting. Again, as is this case under 102(A), the duration of the term of any appointment made under 102(B) shall continue only up until the holding of the next AGM.

41. So, what does this all really mean? As I see it, the members may vote on increasing or decreasing the maximum cap to a total number of at least two directors at a special general meeting. It then follows that they, the members, or the Board (exercising its limited delegated powers) may appoint an additional number directors (not exceeding the maximum cap) to hold office only until the next AGM when the members vote on the re-election or election of new directors.

42. Mr. Adamson argued that the appointments purportedly made at the SGM were null and void in the absence of a requisition notice to increase the number of directors to allow for the appointment of seven new directors. Indeed Mr. Lam propositioned the requisitionists to issue a revised notice to this effect. Mr. White, however, submitted that a quorate vote in favour of the appointment of seven new directors implied that the members wished to increase the maximum, as is within their power to do.

43. This brings me back to the wording of bye-law 101. The fixing of a maximum number of directors is a mandatory step. Why would the draftsman import mandatory wording into this provision if it is otherwise capable of being disregarded by implication? While it is within the power of the members to increase the maximum number of directors, they must do so formally by way of a requisition notice and a quorate vote. Logically, the purpose of a requisition notice is to alert all voting members to the proposed resolutions for voting. It would then be open to any member to decide whether to partake in any such vote. So, to call for a vote on a resolution which was not the subject-matter of a requisition notice would, in a general sense, amount to procedural unfairness and even perversity.

44. There is another danger of systematic injury here, as Mr. Adamson highlighted. Without a requisition notice clarifying an intention to increase the number of directors, the members' approval of the proposed new appointments might be made without the necessary awareness of a resulting effect of an increase on the maximum cap. For these reasons, I agree that the bye-laws, as read with the relevant legislation, requires the members to be given proper notice that an increase in the maximum number of directors is afoot. This is particularly so for a publicly listed company where the need for certainty in this regard is undoubtedly required.

45. To my mind, this draws an end to the matter. The appointment of seven new members during the SGM is contrary to what is permitted by law. However, I will also consider an alternative position (of which I am unconvinced) that both the attending and absent voting pool of shareholders understood and intended the vote to resolve the question of an increase on the maximum cap. This would then raise the question as to whether the SGM continued to be quorate after Mr. Lam's departure and that of other members.

46. Mr. Ho, the independent non-executor director of the Company's pre-SGM Board, stated in his First Affirmation on behalf of that original Board of Directors [21(b)]:

"*It would therefore appear that after Mr. Lam had declared the SGM adjourned, many of the members left the SGM, and did not cast their votes in respect of the Proposed Resolutions. As stated in paragraph 4.4 of the Purported SGM Minutes, "a number of shareholders…left the*

meeting"... There is a serious concern that the members of the Company did not have a reasonable opportunity to express their view on the Proposed Resolutions."

47. From the First Affirmation of Ms. Hau Kai Ling one may reasonably infer that the number of attending shareholders at the SGM is known or ascertainable to the Company. She stated [54-55 and 58(l)]:

"*54. The SGM was attended by, among others, Mr. Lam Bing Kwan ("Mr. Lam"), Mr. Ho Yeung Nang and certain individual shareholders. Before the SGM commenced, and before any of the shareholder participants were allowed access to the meeting room, they each had their identities individually checked and verified at the door to the meeting room by representatives of Tricor Abacus Limited ("Tricor"), the Hong Kong based share registrar of the Company and the scrutineer initially appointed for the SGM.*

55. After verifying the identities of the attendees, representatives of Tricor provided each shareholder and proxy with a voting paper with the details of the shareholder name, proxy name and number of shares pre-printed on it. Thereafter, before all shareholders were permitted access to the meeting room, they had to produce their voting papers which were individually checked and verified.

…

58(l). *Proxies given in favour of the chairman of the meeting by the Receivers (the "Chairman Proxies") were not counted in the voting undertaken in respect of the No Confidence Resolution (and also in respect of the New Chairman Resolution referred to below). All other shareholders present in person or by proxy and voting, holding 6,893,907,262 shares in the Company, voted in favour of this resolution and no holders of shares in the Company who voted cast votes being against the resolution the No Confidence Resolution was passed.*"

48. On this evidence, I would have favoured Mr. White's contention that the meeting must be taken to have been quorate when the resolution for the appointment of seven new directors was voted upon. After all, the Company would be well-placed to file evidence of a lack of quorum if the meeting was indeed inquorate. That said, ultimately, it matters not, in my judgment,

whether the SGM remained quorate. The absence of a proper requisition notice for a resolution to increase the maximum cap nullifies any vote for the appointment of additional directors if that total number of additional appointments exceeded the current maximum. In this case, the appointments did go beyond that which was permitted by the maximum cap, whether the maximum was eight (pursuant to the Defendant's reliance on a 2012 resolution) or nine (pursuant to the 1991 resolution).

Conclusion

49. I have found that Mr. Lam's adjournment of the SGM meeting was invalid as a matter of Bermuda law. However, I also found the appointment of seven new directors was also legally ineffective. For the avoidance of doubt, it is open to the parties to treat at least two of those seven appointments as a filling of casual vacancies, so not to exceed the current maximum cap.

50. Notwithstanding, it is open to the requsitionists to issue a revised notice proposing the increase on the maximum cap of directors in addition to further requisition notices appointing the proposed new directors in the event that an earlier resolution is passed to permit the proposed increase. Should the resolution to increase the maximum cap be properly passed at an SGM, it would then be open to either the directors or the members to appoint new directors to fill the vacancies until those matters are settled by a vote at the next AGM.

Dated this 31st day of January 2024

THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT