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HCA 1211/2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

ACTION NO. 1211 OF 2010

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BETWEEN

UNITED TECHNOLOGIES FAR EAST LIMITED	Plaintiff
and	
GST INTERNATIONAL MANAGEMENT LIMITED	1st Defendant
SONG JIACHENG	2nd Defendant
CAO YU	3rd Defendant
ZENG JUN	4th Defendant
PENG KAICHEN	5th Defendant

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Before: Hon Reyes J in Court
Date of Hearing: 30 January 2012
Date of Judgment: 30 January 2012

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J U D G M E N T

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I. INTRODUCTION

1. The 1st Defendant (GST) is a BVI company.

2. The issue is whether GST properly instructed Alvan Liu & Partners (ALP) or D S Cheung & Co (DSC) to appear on GST's behalf in this action. ALP and DSC are solicitors' firms. It is possible that one or either or neither firm has been properly instructed by GST.

3. My determination of the issue will likely affect whether GST is liable to pay some or all fees and disbursements incurred by either firm for purportedly acting on behalf of GST. Further, if GST is not liable for any or some part of ALP's or DSC's fees, my decision may have an impact on whether any persons who wrongly purported to act on GST's behalf in instructing ALP or DSC should be liable for such fees. Thus, for instance, the 2nd and 3rd Defendants (Song and Cao) played a role in instructing ALP, while the 4th and 5th Defendants (Zeng and Peng) have been behind the instruction of DSC. If not instructed by GST, ALP or DSC may have to claim against the individuals who personally instructed them.

4. The trial of the identified issue is an ancillary proceeding. The irony is that the main litigation among the Plaintiff (UT) and all the Defendants has now been settled by consent. The dispute over which firm of solicitors GST actually instructed is essentially the continuation of a boardroom struggle between one faction of GST shareholders led by Song and Cao and another faction of GST shareholders led by Zeng and Peng.

5. Each faction claims that its representatives lawfully constituted GST's board of directors at the times when ALP or DSC was instructed. Each faction denies that the representatives of the other were lawfully appointed as directors at the times when ALP or DSC was instructed.

6. Neither faction hesitates to employ any technicality available under BVI law or GST's articles in support of its contentions that the other side's representatives were not duly appointed as directors. On the other hand, where BVI laws or GST's articles have not been observed in relation to the appointment of a faction's directors, neither side hesitates to argue that the Court should not apply the law or articles strictly, but should instead look at the substance of the matter. Finally, each side supports its contentions by reference to resolutions passed by EGMs. The latter meetings were typically convened hurriedly by one or other faction claiming to act for GST's board. In the course of such EGMs, acts done by a faction's representatives were supposedly ratified and amendments were supposedly made to GST's articles to entrench the faction's control of the board.

7. In brief, by any yardstick, GST's affairs are in a muddle. This Judgment will not clear up that mess. Indeed, all parties accept that it is not the primary function of the present proceedings to resolve any dispute between the two warring factions as to the proper constitution of GST's board. However, inevitably, my Judgment may have an indirect bearing on that larger question. What precisely that bearing (if any) will be can only be a matter for argument on some other day in an appropriate forum (not necessarily Hong Kong). I understand, in this connection, that there may be forthcoming proceedings in the BVI to determine which faction controls GST, including whether 3 million GST shares were validly allotted to GST's present largest shareholder.

8. At this juncture, I would merely observe that, in practical terms, the mess can only really be cleared up when all factions cooperate

with each other in an open and transparent manner, without recourse to technicality, to agree who precisely are supposed to act as GST's directors. That would be the most expeditious and cost-effective manner of dealing with GST's problems

9. For now, I shall focus on the issue before me. With that in mind, I shall endeavour to determine no more than what I consider necessary to resolve that narrow issue.

II. BACKGROUND

10. On 10 August 2010 UT commenced the main action against the Defendants. UT obtained an ex parte Mareva on the same day. That prevented the Defendants from dealing with an Escrow Fund held at Citibank.

11. On 13 August 2010 Stone J continued the Mareva.

12. On 2 March 2011 UT, Zeng and Peng applied for a variation of the Mareva to permit a settlement agreement reached among those 3 parties. The variation would allow Zeng and Peng to withdraw a portion of the Escrow Fund as set out in the Order. Stone J allowed the variation. He continued the Mareva in respect of that part of the Escrow Fund not affected by the variation.

13. On 28 March 2011 ALP filed a notice to act on GST's behalf in place of GST's then solicitors (Yung, Yu, Yuen & Co.). ALP also applied for leave to appeal against Stone J's order varying the Mareva.

14. On 27 April 2011 I dismissed ALP's application for leave to appeal on substantive grounds.

15. At that hearing, DSC appeared (through counsel) claiming that DSC had authority to act for GST and ALP did not. DSC applied to have the leave application withdrawn on the ground that GST no longer wished to pursue the same. GST as represented by ALP, in contrast, adamantly insisted that GST still wished to pursue the leave application. I therefore directed that an issue be tried on the question of ALP's and DSC's authority to act. I noted that my finding on the question of authority could have a bearing on the ultimate incidence of GST's costs in relation to the leave application.

16. On 4 May 2011 Tang VP granted an interim stay of the Order varying the Mareva pending an application by GST (represented by ALP) to the Court of Appeal for leave to appeal. But, eventually, the leave application was discharged by consent on the application of UT, GST, Song and Cao.

17. On 24 May 2011 I gave directions for the filling of pleadings and affidavit evidence on the issue of authority to act for GST.

18. On 7 July 2011 UT's claims against Peng and Zeng were dismissed by consent with no order as to costs.

19. On 22 July 2011 UT's claims against GST, Song and Cao were dismissed by consent with no order as to costs.

20. On 21 November 2011 ALP applied to dismiss the present proceedings on the ground of a lack of jurisdiction. Alternatively, ALP sought a stay on the ground of *forum non conveniens*.

III. DISCUSSION

A. Preliminary matters

21. At the start of the present hearing, I dismissed ALP's application to strike out or stay the proceedings.

22. I did not think that a stay for *forum non conveniens* was justified. Plainly, the Hong Kong Court has jurisdiction to determine whether Hong Kong solicitors, officers of the Hong Kong Court, have been properly instructed. I do not accept that a derivative action or some other form of proceeding is the only way of dealing with the issue as Ms. Cheng submitted. I certainly doubt that a derivative action is the best way in terms of saving time and cost.

23. No court of any other jurisdiction has been suggested as an alternative forum where the issue might be more appropriately tried in the interests of justice and for the saving of time and cost. No evidence has been adduced as to the existence of any more appropriate forum.

24. In any event, it was too late in November 2011 to apply for a stay. If jurisdiction was genuinely to be challenged, it ought to have been done before pleadings on the issue of authority were filed. Many steps had already been taken in the proceedings on the issue before the stay application was mounted.

25. As for strike-out, Ms. Teresa Cheng SC (appearing for the ALP faction) contended that the present proceedings are an abuse of process.

26. First, she said that the question of authority was raised by the Zeng and Peng faction to prevent GST from pursuing its application for leave to appeal against the Stone J's variation order. She asserted that it was in GST's interest to pursue that application for leave. Ms. Cheng accused Zeng and Peng of secretly negotiating with UT to get their hands on a share of the Escrow Fund to the detriment of GST.

27. I was not persuaded by the argument.

28. I refused leave to appeal not because DSC was appointed and sought to withdraw the leave application. It would have been wrong to dismiss the leave application merely on DSC's application to withdraw, given the outstanding dispute over the propriety of DSC's authority.

29. I refused leave to appeal on much more substantive grounds. I refused leave because it seemed to me that Stone J's reasoning in varying the Mareva was impeccable. I believed (and still do) that any appeal by GST had zero prospects of success.

30. I do not see what relevance Zeng and Peng's motive in appointing DSC (whether or not bona fide) could have had on my decision to order that an issue be tried on authority. I ordered the issue because a determination on the question of authority would at least affect whether DSC or ALP might ultimately have to foot the costs of the unsuccessful

leave application. I could not finally decide the incidence of costs without trying the authority issue.

31. In any case, the proof of the pudding is in the eating. If the ALP faction truly thought that the leave application was worth pursuing, nothing prevented them from so acting. If I conclude that ALP properly represented GST and if the Court of Appeal granted leave to appeal, the ALP faction could pursue an appeal against the Mareva variation as it saw fit. Instead, that faction (including Song and Cao) withdrew the leave application.

32. Second, Ms. Cheng argued that, the main proceedings with UT having been compromised with no order as to costs, the present proceedings can serve no useful purpose.

33. But the present proceedings are not moot.

34. As mentioned earlier, my Judgment is likely to have a bearing on the ultimate incidence of costs. Here I do not merely refer to the costs of the hearing before me on 27 April 2011. I previously assessed those costs at $100,000. As between DSC or ALP as solicitors and GST as apparent client, costs and disbursements would have been incurred. Whether such costs and disbursements are payable would depend on which firm (if either) was properly instructed by GST.

35. Ms. Cheng says that the Court has no jurisdiction to deal with questions relating to the liability for costs as between a solicitor and its own client. But I do not see why not. Whom and what a solicitor charges

for matters directly or indirectly relating to ongoing litigation must be a proper subject of scrutiny for the Court.

36. Third, Ms. Cheng claimed that there would be injustice to shareholders who are not parties to these proceedings as my Judgment may have an impact on the constitution of GST's current board. Whether or not my Judgment acts as a *res judicata* in relation to others is not a question which I have to decide. That question may arise later in another forum. It will then be for the Court seised to decide whether an estoppel arises in relation to third parties. The mere possibility of an estoppel in respect of others cannot be a reason for dismissing the present proceedings in relation to those persons (including ALP and DSC) now subject to the Court.

37. Fourth, Ms. Cheng urged me to take into account the fact that Potential Might Group Ltd. (PMG) (a Samoan company) is now the largest holder of GST shares. That is the result of an allotment of 3 million shares by GST (acting through the Song and Cao faction) to PMG for US$3 million under a subscription agreement dated 10 September 2010.

38. On 6 May 2011 GST's shareholders and board passed resolutions confirming ALP's instructions. PMG (as holder of 72.46% of GST) voted in favour of the shareholders' resolution. Consequently, Ms. Cheng submits that, even if initially invalid, ALP's authority to act for GST has since been ratified by the board and an overwhelming majority of shareholders. It would be futile in the circumstances (Ms. Cheng reasons) for DSC to persist in its claim to represent GST.

39. In this connection, Ms. Cheng stresses that on 12 January 2012 PMG obtained a BVI judgment against GST. By that judgment the Court declared that the subscription agreement was binding on GST and PMG is the holder of 3 million GST shares.

40. I am unimpressed by the argument.

41. The BVI judgment was a default judgment. The declaration was made in default of GST filing a Defence. The declaration was unopposed because GST (as controlled by the Song and Cao faction) caused GST not to oppose PMG's application.

42. PMG initially applied for summary judgment. The Song and Cao faction also caused GST not to oppose that application.

43. Zeng and Peng sent representatives to the BVI Court to resist the summary judgment application. But the judge refused to hear them as they were not parties.

44. Nonetheless, the BVI judge was fully aware that there were competing factions seeking to control GST. He noted that the Zeng and Peng faction were claiming that the 3 million shares had been wrongly allotted to PMG. He held that, if it should later be found that the Song and Cao faction were not properly in control of GST's board and (say) the Zeng and Peng faction should be in control instead, then GST may have an arguable defence to PMG's claim. He therefore refused summary judgment.

45. Thus, the default judgment is merely another manifestation of the maneuverings between the two factions jockeying for control of GST's board and shareholder meetings. It would therefore be unsafe to place any weight whatsoever on the declaration by default.

46. Accordingly, the strike-out application failed.

47. Note that many facts and matters alleged by Ms. Cheng in support of her strike-out submissions have not been pleaded.

48. Nothing is said in the pleadings filed in respect of the authority issue about the alleged collateral purposes of Zeng and Peng. Nothing is pleaded about the allotment of 3 million shares to PMG and the alleged subsequent "ratification" of ALP's authority with PMG's authority. All this is new. All this is substantial and the DSC faction has not had a fair opportunity to adduce evidence to rebut the new case.

49. No application has been made to amend the pleadings filed for the authority issue. It is too late to amend the pleadings to introduce those new substantial issues.

50. Ms. Cheng asked for leave to adduce the BVI default judgment as evidence in these proceedings. For the reasons just stated, it was too late to allow that evidence. In any case, the evidence was of no real help in determining the issue before me. The application to adduce the default judgment in evidence was consequently refused.

B. The question of authority

51. Each faction relies on resolutions of GST's board or shareholders in support of the contention that one faction properly appointed solicitors to represent GST and the other did not. I will here run through the various resolutions propounded or challenged.

B.1 Zeng and Peng's appointment as directors

52. Zeng and Peng were appointed as directors by a shareholders' resolution passed at an EGM on 15 March 2008.

53. The ALP faction queries the appointment because Zeng and Peng did not sign a letter of consent to act as directors before 15 March 2008. In support, ALP relies on BVI Business Companies Act 2004 (BCA) s.112 which stipulates that a person "shall not be appointed as the director of a company, or nominated as a reserve director, unless he has consented in writing to be a director or to be nominated as a reserve director".

54. It will be noticed that BCA s.112 does not require a director's prior consent to be in any form. It does not require a consent letter to be given to the company. Nor does it require the consent document to be dated, although the evidence suggests that as a matter of practice the BVI Companies Registry will not accept a letter of consent unless it is dated. Nor does s.112 specify that consent must be given prior to a resolution appointing a person as director.

55. On its face, all that s.112 requires is that a person consent to becoming a director and furnish written evidence of that consent. Thus, it seems to me that, as a matter of construction, Mr. Anderson Chow SC (appearing for the DSC faction) is right in submitting that s.112 simply means that an appointment will not take effect until the appointee has consented in writing to act as director.

56. Here, by signing the EGM resolution appointing them as directors on 15 March 2008, Peng and Zeng must be taken to have signified their consent in writing to act as directors from 15 March 2008.

57. Opinion letters from BVI lawyers were furnished by both sides on numerous issues, including the effect of s.112. On the whole, I have not found the letters helpful. The letters are almost wholly argumentative. In many cases, the views expressed were little more than speculation, not being backed by any case law directly on the point.

58. What is clear from the BVI opinion letters is that the principles of construing a BVI statute are the same as those used everywhere in the common law world, including Hong Kong and England. In the process of construction, one can cite common law precedents, not just from the BVI, but also from elsewhere. The BVI lawyers were themselves prone to cite English authority, much in the same way that a Hong Kong Court can do when construing a Hong Kong statute.

59. Thus, although I have looked at the opinions of the BVI lawyers, I do not think that I am constrained by them. The letters do not prevent me from applying normal canons of common law statutory

construction. The fact that a particular conclusion has not been expressed in any BVI opinion letter does not preclude me from coming to that conclusion.

B.2 Yu Wanxi's appointment as director

60. Yu is within the DSC faction.

61. Yu was appointed as a director by a shareholders' resolution passed at an EGM on 18 January 2009. That EGM was convened by eight members of GST (including Zeng and Peng).

62. ALP first challenges Yu's appointment because the EGM was convened by shareholders, rather than GST's board.

63. Under Art.7 of GST's Articles, "[t]he directors of [GST] may convene meetings … at such time and in such manner as … the directors consider necessary" (Art.7.1). Upon the written request of members holding 10% or more of GST's shares, then "the directors shall convene a meeting of members" (Art.7.2).

64. At least 7 days' notice must be given to members of any EGM (Art.7.3).

65. A meeting held in contravention of the 7 days' notice requirement will be valid if members holding not less than 90% of GST's shares agree to the short notice of if all members waive the short notice (Art.7.4).

66. Inadvertent failure to give notice will not invalidate a meeting (Art.7.5).

67. BCA s.83(2) states that, subject to a company's articles, where there is defective notice of a shareholders' meeting, the meeting will still be valid if 90% of members "have waived notice of the meeting and, for this purposes, the presence of a member at the meeting shall be deemed to constitute a waiver".

68. Mr. Chow accepts that, technically, there was a mistake in the way that the January 2009 EGM was convened. Only "the directors" of GST are entitled to convene EGMs by Arts. 7.1. and 7.2; shareholders are not so entitled. Nonetheless, given (as I have concluded) that Zeng and Peng were validly appointed directors as at 15 March 2008, Mr. Chow submits that the error was minor. Zeng and Peng (Mr. Chow contends) should simply have convened the meeting in their capacity of directors, instead of shareholders. In any event, 100% of the shareholders attended the meeting and so they must be treated as having waived the irregularity.

69. Ms. Cheng argues that Zeng and Peng were not directors. Even if they were, they did not first call a board meeting (which would have included Song and Cao) to vote on whether and when an EGM should be convened. In any event, there could be no ratification of the irregular convening of the EGM, because Art.7.4 and BCA s.83(2) only deal with waiver of short notice.

70. I think that Mr. Chow is right.

71. Art.7. empowers the directors of GST (not just some directors acting on their own) to convene shareholder meetings. There was thus a technical irregularity insofar as the entire board did not resolve to call the EGM.

72. I say "technical" because had Zeng and Peng called a directors meeting for the purpose of convening an EGM, it cannot be relevant that Song and Cao would have objected to the holding of an EGM. Under Art.7.2 where (as here) members holding 10% or more of GST's shares request a meeting, the directors "shall" convene such meeting. The board does not have an option.

73. Nonetheless, there is still irregularity. I accept Ms. Cheng's submission that the board should not be by-passed. The board would at least be entitled to determine how much notice needs to be given. Thus, for example, for complex or important resolutions, the board may feel that shareholders should be given more than the minimum 7 days' notice.

74. But it is hard to see why the attendance of 100% of the membership at the meeting (including Song and Cao) should not be taken as waiver of irregularities in relation to convocation of the EGM. No one objected to the meeting. That was even though it would have been apparent from the notice of the EGM that the meeting was being convoked by a group of shareholders, rather than by the board. The members must also be presumed to know their own company's articles. In the premises, the presence of 100% of the members at the EGM without objection amounted to a waiver of any irregularities in the convocation of the same.

75. The second objection to the validity of Yu's appointment is his failure to sign a letter of consent prior to being appointed.

76. But the evidence is that Yu signed a letter of consent (albeit backdated to 18 January 2009) on 7 May 2009. Thus, his appointment as director would have become effective by then.

B.3 Appointment of Kang Wenchang, Li Jihong, Zheng Fei and Song Rixin as directors

77. Kang, Li, Zheng and Song (the conditional directors) were appointed by a board resolution passed by Song and Cao on 10 March 2008. The resolution stated that the appointments were conditional upon the occurrence of one or other of certain specified events, including Zeng or Peng "proposing or attempting to change or appoint new additional directors or remove the current directors" and (alternatively) the expiry of a shareholders agreement dated 10 March 2008 among Song, Zeng, Peng and Cao. The shareholders agreement of 10 March 2008 expired on 10 March 2009.

78. The conditional directors signed letters of consent to act as directors on 17 January 2009.

79. ALP's argument is that Zeng and Peng violated the shareholders' agreement (and triggered a condition stipulated in the 10 March 2008 resolution) by requisitioning an EGM to appoint Yu as a director in early January 2009. Thus, the conditional directors became actual directors from 17 January 2009 when they signed letters of consent.

80. Mr. Chow first challenges the authenticity of the 10 March 2008 resolution. The DSC faction was apparently not aware of the same until ALP's Reply pleading was filed on 21 June 2011. But, in my view, there is insufficient evidence from which the Court can conclude that the 10 March 2008 resolution is other than what it states. It seems to me that I must take the resolution at face value.

81. Mr. Chow then submits that the shareholders agreement was an improper fetter on Song and Cao's fiduciary duty. When appointing additional directors, Song and Cao had a duty to consider what was in GST's best interest. They should not have had regard to what had been agreed between themselves and Zeng and Peng.

82. Mr. Chow may be right as to the unenforceability of the shareholders agreement insofar as it purported to fetter the discretion of Song and Cao as directors. But it is perfectly possible that Song and Cao passed the 10 March 2008 resolution because they genuinely believed that it was in the best interests of GST to counter attempts by Zeng and Peng through the appointment of other directors to out-number Song and Cao on the board. I, therefore, do not think that the fact that Song and Cao had regard to the terms of the shareholders agreement when passing the 10 March 2008 resolution, necessarily invalidates the appointment of the conditional directors.

83. Alternatively, Mr. Chow suggests that passing of the 10 March 2008 resolution was itself a breach of the shareholders agreement. It was an attempt by Song and Cao to appoint additional directors contrary to what they had promised not to do by the shareholders

agreement. Mr. Chow submits that as a result the 10 March 2008 resolution was invalid.

84. But, in my view, the status of the shareholders agreement is irrelevant to determining the validity of the conditional directors' appointment. What one or other party to the shareholders agreement did (or omitted to do) may have constituted a breach of the agreement. A breach of the agreement would not by itself invalidate a board resolution (even if the latter were predicated on the terms of the agreement).

85. Mr. Chow queries whether any trigger event specified in the 10 March 2008 board resolution has occurred. However, in seeking Yu's appointment as a director, Zeng and Peng attempted to change the composition of GST's board. That is plainly an event specified in the board resolution.

86. Mr. Chow finally suggests that Song and Cao could not impose terms as to when the conditional directors' appointment became effective. Terms of appointment (Mr. Chow says) can only be set by the company in general meeting. For this Mr. Chow relies on BCA s.113(2)(b) and Art.8.3 of the GST's Articles. He also relies on the opinion of a BVI lawyer.

87. I am not persuaded. Assume that directors' terms of appointment must be fixed by the shareholders. I do not think that this would invalidate the board's act in appointing extra directors and stipulating precisely when appointments of the latter are to become effective. The precise terms of the additional directors' appointments

(once effective) might then be specified by the company in general meeting.

88. Consequently, I conclude that the conditional directors' appointment was effective as from 17 January 2009.

89. Note that the resolution appointing the conditional directors preceded the latter signing letters of consent. In defending this aspect, Ms. Cheng appears to be contradicting her opposition to the appointments of Zeng, Peng and Yu and to be accepting that post-resolution letters of consent are sufficient without more to make an appointment effective.

B.4 Song's removal as director

90. Song was removed as director by a resolution passed at an EGM on 1 March 2009. The meeting was convened by Zeng, Peng and Yu (claiming to act for GST's board) on the requisition of 30% of GST's shareholders. Notice of the meeting was sent by email, rather than post as required by the Articles.

91. There were two irregularities.

92. First, on the basis of my previous conclusions, as at 21 February 2009 (when notice of the EGM was given), the board would have consisted of Zeng, Peng, Cao, Song and the conditional directors. It is true that the board would have had no option but to call a meeting given that 30% of the shareholders had requested the same. But it was

nonetheless wrong for Zeng, Peng and Yu to represent that GST's board was convening the meeting.

93. Second, notice was given by email, rather than by post. Once again, that may be a technical irregularity in the sense that many individuals currently use email. But it is far from obvious to me on the evidence that all shareholders of GST would have regularly checked their emails. Song and Cao, for instance, claim not to have received notice of the meeting.

94. Absent cogent evidence that members actually consulted their emails regularly and so would in all probability have seen the EGM notice, the contract contained in GST's articles must be given effect. Members would be entitled to receive (and expect to receive) notification in the manner agreed, that is, by post.

95. There is no direct evidence as to the percentage of GST shareholders who attended the EGM. It does not seem that Song and Cao attended, as they say that they received no notice. What is apparent is that there was nowhere near 90% or 100% attendance of GST's shareholders. It cannot be said that the irregularities in the convocation of the EGM were waived.

96. Accordingly, Song's removal was invalid.

B.5 Appointments of Niu Haiming and Liu Peng

97. Niu and Liu Peng were appointed by board resolution dated 10 August 2010. They could not have been validly appointed as the board on that date would have consisted of Song, Cao, Zeng, Peng, Yu and the conditional directors. Zeng, Peng and Yu were not treated as directors at the relevant meeting.

B.6 Appointment of Liu Yingqing

98. Liu Yingqing was appointed at an EGM on 24 November 2010 to replace Song Rixin.

99. The EGM was purportedly convened under a board resolution passed on 13 November 2010. But the board at the time ought to have consisted of Song, Cao, Zeng, Peng, Yu and the conditional directors. Instead, the board acted through Song, Cao, the conditional directors, Niu and Liu Peng.

100. Song Rixin was replaced because he resigned. Thus, regardless of the EGM's validity, Song Rixin must be taken to have ceased to be director.

B.7 Cao's removal as director

101. Cao was removed by a shareholders resolution passed at an EGM dated 15 April 2011. The EGM was convened by notice dated 7 April 2011 from Zeng, Peng and Yu (claiming to act as GST's board) on the requisition of 30% of GST's shareholding.

102. Again there was a technical irregularity. The board at the time would have comprised Song, Cao, Zeng, Peng, Yu and three of the conditional directors (that is, excluding Song Rixin). There is no evidence that this irregularity was waived by a sufficient number of shareholders attending the meeting. The evidence is that significantly less than 90% of GST's members attended.

B.8 Appointment of Ding Xiaochuan and Hu Yuebing

103. Ding and Hu were appointed on 6 May 2011 at an EGM convened on the requisition of 83.42% of GST's shareholders. They replaced Song, Cao and the three remaining conditional directors, all of whom were removed. The EGM confirmed Liu Yingqing, Niu Haiming and Liu Peng as directors. The EGM was convened on the notice of Song, Cao, the three remaining conditional directors, Niu, Liu Peng, and Liu Yingqing (all claiming to act as GST's board).

104. Again, there was a technical irregularity. The board at the time would have consisted of Song, Cao, Zeng, Peng, Yu and the three remaining conditional directors. The EGM was therefore invalidly convened. Attendance of 83.42% of the shareholders would be insufficient to remedy the irregularity.

105. It is unclear on the evidence why Song, Cao and the three remaining conditional directors were removed from the board. It may have been that they were no longer prepared to act as directors and wished to step down. It may have been for some other reason. I should not therefore be taken as making any finding on the validity of their removal.

106. The 6 May 2011 EGM also resolved to amend GST's articles so that the maximum number of directors would be changed from ten to five directors. Given the technical irregularity which I have identified, the validity of the amendment is doubtful. But, for the purposes of the issue before me, it is unnecessary to decide the point definitively.

B.9 The resolutions authorizing the instruction of ALP

107. ALP relies on three board resolutions to justify its appointment as GST's solicitors.

108. The first resolution was passed on 13 November 2010 by Song, Cao, the conditional directors, Niu and Liu Peng as the board. That would have been invalid. The board at the time should have consisted of Song, Cao, Zeng, Peng, Yu and the conditional directors.

109. The second resolution was passed on 27 March 2011. That was passed by Song, Cao, the three remaining conditional directors, Liu Yingqing, Niu and Liu Peng. That was equally invalid. The board at the time would have consisted on Song, Cao, Zeng, Peng, Yu and the three remaining conditional directors.

110. The third resolution was passed on 6 May 2011 by Liu Yingqing, Niu, Ding and Hu. That would have been invalid as the four were not validly appointed.

B.10 The resolutions authorizing the instruction of DSC

111. DSC relies on two board resolutions to justify its appointment as GST's solicitors.

112. The first resolution is dated 16 April 2011. That is signed by Zeng, Peng and Yu as GST's board. Given my conclusions above, the resolution would be invalid. Zeng, Peng and Yu were not the only directors on the board at the time.

113. The second resolution is dated 23 April 2011. That is signed by Zeng, Peng and Yu as GST's board. For the reasons given above, the resolution is also invalid.

IV. CONCLUSION

114. Neither ALP nor DSC was validly appointed to represent GST.

115. I shall now hear counsel on costs and consequential orders.

(A. T. Reyes)
Judge of the Court of First Instance
High Court

Ms. Teresa Cheng, SC and Mr. Adrian Lai, instructed by Messrs Alvan Liu & Partners

Mr. Anderson Chow, SC and Mr. Richard Khaw, instructed by Messrs D.S. Cheung & Co.