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Corporate & Commercial Disputes



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Navigating the Boardroom: Removal of Director

Directors are vested with the powers of management in a company, and they alone can exercise those powers. Shareholders cannot usurp the powers conferred to the directors and intervene in the exercise of their managerial powers. Simply put, participation in the capital does not confer any right to interfere in the management of the company.¹

That said, shareholders can control and curtail the powers conferred to the board of directors by altering the company's constitution or, if need be, removing the directors whose actions they disapprove of.

The power to remove a director in either a public or private company before expiration of the director's tenure of office is statutorily enshrined.²

Removal: How it is done

For a public company, a director may be removed by an ordinary resolution at a general meeting notwithstanding anything that is provided in the company's constitution or any agreement between the company and the director.³

¹ *Tengku Dato' Ibrahim Petra Bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177 (FC)

² Companies Act 2016, s 206

³ Companies Act 2016, s 206(2)

That is, however, subjected to the following:

- (i) A special notice is required of a resolution to remove the director at least 28 days before the meeting.⁴ Upon receipt of the special notice, the company shall forthwith send to the director a copy of the special notice.⁵
- (ii) The director shall be given the right to make an oral or written representation not exceeding a reasonable length on the resolution to remove the director.⁶
- (iii) If the director was appointed to represent the interests of a particular class of shareholders or debenture holders, the resolution to remove the director shall not take effect until a successor has been appointed.⁷

For a private company, a director may be removed either by:

- (i) The company's constitution; or
- (ii) An ordinary resolution at a general meeting, where such removal cannot be made via a shareholders' written resolution.⁸ Likewise, a special notice is required at least 28 days before the meeting.⁹

In *Low Thiam Hoe*,¹⁰ the High Court held that there is no blanket requirement for a special notice in removing a director in a private company. It was remarked that the statute affords primacy to the company's constitution, and accordingly a director may be removed pursuant to the specific procedures set out in the company's constitution. In this regard, a special notice is only mandatory when a director is removed under the mechanism as provided for in the statute.

Grounds for removal

In rejecting the notion that the removal of directors was premised on an alleged "improper motive" and thus amounted to a misuse of corporate powers, the High Court in *Low Thiam Hoe*¹¹ referred to the Hong Kong Court of Appeal findings in *Mount Oscar*,¹²

⁴ Companies Act 2016, s 206(3) read together with s 322(1)

⁵ Companies Act 2016, s 207(1)

⁶ Companies Act 2016, s 207(2)

⁷ Companies Act 2016, s 206(4)

⁸ Companies Act, s 206(1)(a) read together with s 297(2)(a)

⁹ Companies Act 2016, s 206(3) read together with s 322(1)

¹⁰ *Low Thiam Hoe v Sri Serdang Sdn Bhd & Ors* [2020] 10 MLJ 137 (HC)

¹¹ *Ibid*

¹² *Yeung Bing Kwong Kenneth v Mount Oscar Ltd* [2019] HKCU 2413

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and reiterated the cardinal principles that:

- (i) Shareholders' power in removing a director is unfettered. There is no requirement that the power conferred on shareholders must be exercised for cause.
- (ii) This closely relates to the elementary principle that the court will not interfere with the internal management of a company acting within its powers, more so when the irregularity complained of could be cured by going through the proper processes.

This general proposition stands to be scrutinised and challenged as shown in the following instances where the courts found that there was a collateral or improper purpose:

- (i) Where the circular resolution for removal of a director was backdated, tainted with *mala fides* and provided without an effective notice.¹³
- (ii) Where the removal of directors was to stifle or discontinue a civil suit.¹⁴

Authors' comments

While shareholders are generally clothed with the requisite powers to steer the directions of the management of a company, the courts will nonetheless intervene and "right the wrongs" if the corporate powers are misused to achieve a collateral or improper purpose.

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¹³ *Dato' Raja Aswane Bin Raja Ariff v Dato' Man Bin Mat & Ors* [2011] 9 MLJ 467 (HC)

¹⁴ *Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang & Ors* [2009] 8 MLJ 818 (HC)