

COMPANY LAW

ARE ALL MATTERS REQUIRED TO BE PARTICULARISED IN A NOTICE/AGENDA OF A BOARD OF DIRECTOR'S MEETING? MUST THERE BE A FORMAL VOTING AND DELIBERATION PROCESS IN A BOARD OF DIRECTOR'S MEETING?...

Our Ms. Idza Hajar Ahmad Idzam assisted by Ms. Bailey Leong Pui Yee, Ms. Lee Sheen Yee and Mr. Yap Jia Cheng (acting on behalf of the Respondents i.e. Nationwide Express Holdings Berhad and 4 of its directors (at that material time)) had successfully resisted an appeal filed by the Appellant in the Court of Appeal and defended the learned High Court Judge's decision reported in the case of *Rozilawati Binti Haji Basir v Nationwide Express Holdings Berhad v 4 Others* [2020] MLJU 1198.

The Court of Appeal decision is the first appellate decision on the subject matter in Malaysia.

BRIEF FACTS By way of a notice dated 27.04.2018 ("Notice"), the Appellant, Rozilawati Binti Haji Basir and the directors of the 1st Respondent i.e. 2nd to 5th Respondents were informed of a board of directors' meeting scheduled to be held on 30.05.2018 ("Board Meeting") in accordance to the 1st Respondent's Articles of Association dated 27.04.2016 ("Constitution"). The Board Meeting's agenda dated 21.05.2018 ("Agenda") was circulated to the Appellant and listed a number of matters to be discussed and resolved during the Board Meeting which included *inter alia* "to receive matters arising and to transact on any other matters" of the 1st Respondent.

During the Board Meeting, the board of the 1st Respondent unanimously resolved to *inter alia* terminate the Appellant's contract of service as the Managing Director of the 1st Respondent with immediate effect ("Termination").

HIGH COURT PROCEEDINGS

The Appellant then commenced a suit against the Respondents in relation to the board of directors' decision to terminate her contract of service. The Appellant alleged *inter alia* that the 1st Respondent's failure to state and/or particularise the intended Termination in the Notice and/or Agenda of the Board Meeting rendered the Board Meeting and/or resolutions passed therein wrongful, ineffective, invalid, null and/or void.

The Respondents filed an application pursuant to Order 14A Rules of Court 2012 ("**Order 14A Application**") where *inter-alia* the following questions of law were posed:-

1. *Whether the Defendants (now the Respondents) were correct in that at the material time, there was no mandatory requirement under the 1st Defendant's Constitution and/or applicable laws to have all matters / particulars to be discussed (including but not limited to the Plaintiff's proposed termination as 1st Defendant's Managing Director) to be set out in the notice of meeting dated 27.04.2018 and/or meeting agenda dated 21.05.2018? ("1st Question")*
2. *Whether the 1st Defendant's Board Meeting was valid and properly convened in accordance with the 1st Defendant's Constitution? ("2nd Question")*
3. *Whether the resolutions passed in the Board Meeting which form the subject matter of this suit are valid? ("3rd Question")*

The High Court in its decision to dismiss the Appellant's claim with costs on 18.10.2020 ("**High Court Decision**")¹ answered the above questions of law as follows:-

1st Question and 2nd Question

The High Court answered both questions simultaneously in the affirmative. It was held that while it may be a matter of best practice in general for the meeting agenda to contain specifics of what will be discussed, it is not a necessity and/or requirement under the law, unless expressly required in the company's constitution. (*emphasis added*)²

¹ Please refer to Zul Rafique & Partners' [write-up](#) on 15.09.2020.

² Paragraph 34 of *Rozilawati Binti Haji Basir v Nationwide Express Holdings Berhad v 4 Others* [2020] MLJU 1198 ("**MLJU**")

The High Court further stated that due to the occasional urgency of meetings, “*it may not always be possible for an agenda to be prepared and circulated before such meetings.*”³ and that meeting agenda with incomplete particulars or notice will not invalidate the resolutions passed. The High Court was of the further view that if any of the directors of a company is taken off guard of the “*surprise*” during the meeting, they may adjourn the matters for further deliberation and any directors who is absent or ill-prepared to discuss the matters raised at a meeting would unfortunately have to accept the outcome of the discussions made by the majority of the directors at the meeting.⁴

In this regard, the High Court further remarked that that the 1st Respondent’s constitution is silent on the need to furnish all the particulars in a meeting agenda and the board meeting was held in accordance to the constitution of the 1st Respondent.

3rd Question

The High Court answered this question in the affirmative. The High Court held *inter alia* that **it is not necessary that there must be deliberation of a subject matter by the Board of Directors of the 1st Respondent before a resolution relating to the matter can be validly carried through** (*emphasis added*).

Apart from holding that it is not necessary that there must be a deliberation of the subject matter by the board of directors before a resolution, the presiding further held that **there is also no necessity for a formal voting process to take place relating to the matter before a resolution is validly carried through** (*emphasis added*).⁵ In the instant case, the presiding further stated that the fact that none of the directors at the meeting had raised any objection to the Chairman of the Board of Directors’ announcement is a natural inference that the board of directors was in unanimity in the decision.⁶ In addition, when the minutes of the board of directors’ meeting was drawn up and resolution was recorded, there was no objection taken by any of the directors.⁷

Being dissatisfied with the High Court Decision, the Appellant filed an appeal against the entire High Court Decision on 15.09.2020.

MAIN GROUNDS OF APPEAL

The Appellant’s grounds of appeal were *inter-alia* as follows:-

1. The law requires all matters to be discussed during a board of directors’ meeting to be stated in the Notice and Agenda; and
2. The law also requires a formal voting and deliberation process of a matter by the board of directors before a resolution relating to such matter could be passed and validly carried through.

FINDINGS OF THE COURT OF APPEAL

The Court of Appeal findings on the grounds raised above are as follows:-

Particulars in Notice of Meeting and/or Agenda

The Court of Appeal were in agreement with the High Court Decision and agreed with the counsel for the Respondents in that there is no strict requirement in law for all matters to be discussed during a board of directors’ meeting to be included in a notice of meeting or an agenda unless required otherwise in a company’s constitution.

The Court of Appeal further held that operationally there will be occasions where a board of directors’ meeting would need to be held on an urgent basis to address any concern(s) or to attend to any urgent matter(s) which may be encountered by the company at any point in time. Imposing the obligation of requiring all matters that are to be discussed to set out in a notice of meeting or an agenda (which would have been circulated beforehand) would be rigid, impractical and may be detrimental to the ongoing operations of a company such as the 1st Respondent in this case.

Formal Voting and Deliberation Process

The Appellant submitted that there was no deliberation by the board of directors before the purported resolution to terminate the Appellant as the Managing Director of the 1st Respondent. Instead there was a mere announcement made by the Chairman to terminate the Appellant’s contract of

³ Paragraph 40 of MLJU.

⁴ Paragraph 43 of MLJU.

⁵ Paragraph 50 of MLJU.

⁶ Paragraph 50 of MLJU.

⁷ Ibid.

service. The Appellant further submitted that such an “announcement” could not possibly be carried through as a resolution that was passed given that a formal voting process was not carried out.

The Court of Appeal were of the view that the minutes of the board meeting held on 30.05.2018 adduced by the Respondents (and in the absence of any evidence to the contrary) were sufficient to prove that the resolutions have been validly passed and carried through. None of the directors who was present at the board meeting objected to the resolution or raised any concerns.

The Court of Appeal agreed with the High Court Decision in holding that a formal deliberation and voting of a matter by the board of directors of the 1st Respondent before a resolution relating to the same could be passed and validly carried through is not necessary.

COMMENTARY This is the first decision of the Court of Appeal in Malaysia on the requirement of particulars in a notice or agenda of a board of directors’ meeting. The only decision available in Malaysia on this issue was the decision of *Dr Mahesan & Ors v Pnonnusamy & Ors*⁸ that adopted the Australian approach in the case of *Eastern Resources of Australia Ltd v Glass Reinforced Products (GRP) Pty Ltd*.⁹

The decision serves as guidance to companies in Malaysia in drafting and preparing a notice or agenda of a board of directors’ meeting and the formalities to be adhered to therein in relation to voting and deliberation of a matter.

In the absence of anything to the contrary in a company’s constitution and the non-adoption of Third Schedule of the Companies Act 2016, it is unlikely for a meeting and/or a resolution passed therein to be challenged on the grounds that there was a lack of particulars in the notice or agenda of the said meeting or that there was no formal deliberation or voting process. A different outcome may have been reached in the event that the said Third Schedule of the Companies Act 2016 were adopted by the 1st Respondent in this case.

Following the decision of the Court of Appeal, the inclusion of all matters to be discussed in a notice or

agenda and the formal voting and deliberation process remain as best practices as opposed to a mandatory requirement to be complied with strictly.

The decision of the Court of Appeal also suggests that directors are at liberty to discuss and come to an agreement on proposed resolution(s) before the commencement of a board of directors’ meeting where the resolutions are to be passed, unless the constitution of a company requires otherwise.

Authors



Idza Hajar Ahmad Idzam
Partner

idza.hajar@zulrafique.com.my



Bailey Leong Pui Yee
Partner

bailey.leong@zulrafique.com.my



Lee Sheen Yee
Associate

sheenyee.lee@zulrafique.com.my



Yap Jia Cheng
Associate

jiacheng.yap@zulrafique.com.my

Disclaimer: The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such.

Zul Rafique & Partners
6 December 2021

⁸ [1994] 3 MLJ 312

⁹ [1986] 10 ACLR 496