Michaelmas Term

[2017] UKPC 43

Privy Council Appeal No 0031 of 2015

JUDGMENT

Staray Capital Limited and another (Appellants) vCha, Yang (also known as Stanley) (Respondent) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Mance

Lord Sumption

Lord Carnwath

Lord Hodge

Lord Briggs

JUDGMENT GIVEN ON

18 December 2017

Heard on 9 November 2017

Appellants	Respondent
Stephen Atherton QC	Matthew Collings QC
Oliver Clifton	Jayesh Chatlani
Matthew Neal	
(Instructed by Walkers and Blake Morgan LLP)	(Instructed by Harney Westwood & Riegels and Harcus Sinclair LLP)

LORD MANCE AND LORD CARNWATH:

Introduction

1.
On 20 March 2010 the second appellant, Mr Chen, met the respondent, Mr Cha, with a view to inviting his participation in a project to mine coking coal in Canada. Mr Cha made various representations to Mr Chen, and they agreed to go ahead together. On 22 March 2010, the first appellant company, Staray Capital Ltd ("Staray"), was incorporated to give effect to the project. Mr

Chen was allocated 80% of the shares and Mr Cha 20%. Both were appointed directors. In June 2011 the company acquired a 5% interest in the corporate vehicle for the project, HD Mining International Ltd ("HD Mining").

2.
From May 2011 Mr Chen began to express interest in buying some or all of Mr Cha's shares. By about July 2011, their relationship had broken down. Mr Chen claimed that he had been misled by the representations made by Mr Cha. On 8 September 2011, Mr Chen caused Mr Cha to be removed as a director. On 26 October 2011 Mr Chen passed a shareholders' resolution amending Staray's memorandum and articles ("MOA") as follows:

"The following be inserted as sub-regulation 3.8 of the Articles of Association:

'3.8 If a shareholder is found to have:

a) Made material misrepresentations (whether fraudulent or negligent) in the course of acquiring its Shares; or

b) Committed an act that may result in the Company incurring or suffering any pecuniary, legal, regulatory or administrative disadvantage or liability or negative publicity which the Company might not otherwise have incurred or suffered,

(such Shareholder being a 'Defaulting Shareholder');

the Company may compulsorily redeem any or all Shares held by the Defaulting Shareholder, by giving 15 days' notice to the Defaulting Shareholder (the 'Compulsory Redemption Notice Period').

Under expiry of the Compulsory Redemption Notice Period and such compulsory redemption under this sub-regulation 3.8 being exercised by the Company, such Defaulting Shareholder will be entitled to receive the fair market value (without discount for any minority stake) as determined by a recognised international third party business valuer (the 'Valuation') in respect of the shares so redeemed.'"

3.
Also on 26 October 2011 Staray gave a 15-day notice purporting compulsorily to redeem the 20% shares held by Mr Cha. Staray claimed to be entitled to do so under both sub-clauses, (a) and (b), of clause 3.8.

4.
At issue in the proceedings are two points: first, the validity of the resolution of 26 October 2011 amending clause 3.8 of the articles; and, second, the validity of the notice of the same date given under the amended clause (sub-clause (b) is no longer relied on).

The preliminary issue

5.
Before turning to the substance of those issues, it is necessary to address an objection by Mr Atherton QC (for the appellants) to the first point being taken by the respondent at this level in the absence of permission to cross-appeal. Rule 25 of the Judicial Committee (Appellate Jurisdiction) Rules 2009, as amended by the Judicial Committee (Appellate Jurisdiction) Rules (Amendment) Order 2013, reads:

“(1) A respondent who wishes to argue that the order appealed from should be upheld on grounds different from those relied on by the court below, must state that clearly in the respondent’s written case (but need not cross-appeal).

(2) A respondent who wishes to argue that the order appealed from should be varied must obtain permission to cross-appeal either from the court below or from the Judicial Committee.”

The issue, in short, is whether by raising the first point the respondent is arguing in effect that the order appealed from should be varied, or seeking simply to uphold it on different grounds. The Board would preface its consideration of this issue by noting that the Rules record that appeals are against orders, not judgments. In the ordinary course, the outcome of any claim or counter-claim addressed by a judgment should be recorded in an order. When no order at all is drawn up, or an order is drawn up which does not fully or accurately record the outcome, problems may arise in relation to an appeal, as the present issue illustrates. To set the scene for the Board’s further consideration of the appellants’ objection, reference must be made to the relevant steps in the proceedings before the lower courts.

The proceedings below

6.
Mr Cha commenced the present proceedings by claim form dated 11 November 2011. He relied on section 184I of the BVI Business Companies Act 2004. That section applies where a member of a company considers that:

“… the affairs of a company have been, are being or are likely to be conducted in a manner that is, or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory or unfairly prejudicial to him or her in that capacity …”

The relief claimed was: (1) an order amending the MOA to remove the additions and amendments made on 26 October 2011, (2) an order that Staray take no further steps to redeem his shares without his consent, and (3) an order that the Company does not issue any further shares without the consent of the claimant. The accompanying statement of claim focused on the alleged invalidity of the resolution. In its original form, its penultimate paragraph (para 29) also read: “Further, the claimant does not accept that he does fall within the new sub-regulation 3.8. …”

7.
The relief claimed pursuant to section 184I and listed in paras (1) to (3) in the prayer at the end of the statement of claim repeated the relief prayed in the claim form. On 9 November 2011 Mr Cha obtained from Bannister J an ex parte injunction restraining further steps to redeem his shares, which was later extended until trial following an inter partes hearing.

8.
The defence, served on 3 February 2012, asserted both that the resolution was validly passed and (in paras 27 and 35) that the redemption notice was validly given under it. Although there was no formal counterclaim, the pleading also averred that there had been misrepresentation and conduct allegedly satisfying sub-clauses (a) and (b) of clause 3.8. The reply, served on 2 March 2012, joined issue on all these matters. There were later amendments to all these pleadings. One amendment deleted the sentence quoted in para 6 above from para 29 of the original statement of claim. However, allegations about the validity of the resolution and the redemption notice remained in the amended defence, and the amended reply took reinforced issue with such allegations. Among these many allegations was

included one to the effect that the redemption notice itself was “not bona fide or in the best interests of the Company” or “not for a proper corporate purpose”.

9.
The trial took place in January 2013 before Bannister J, leading to a judgment dated 13 February 2013, in which he upheld the validity of the resolution, but held that no event had occurred falling within sub-clause (a) or (b) of clause 3.8. His conclusion, stated in para 90 of his judgment, was:

“For the reasons given above, Mr Cha is entitled to an injunction restraining Staray from proceeding upon the redemption notice of 26 October 2011. Mr Cha has not demonstrated any entitlement to any of the other relief set out in paras (1) to (3) of the prayer.”

10.
After receiving further submissions on the form of order and costs in writing and at a hearing on 17 April 2013, Bannister J accepted Mr Atherton’s submission that an injunction was unnecessary given the finding that the redemption notice was invalid. He concluded a further judgment issued 25 April 2013 with the words -

“The order will not, therefore, contain any injunction against the defendants.”

11.
An order was drawn up dated 25 April 2013 and entered on 29 April 2013. It recited that the hearing on 17 April 2013 had been listed -

“in order to determine (i) the appropriate relief which the Court should grant as a result of its judgment handed down on 13 February 2013; and (ii) any outstanding issues relating to costs …”

and that the Court had handed down its judgment of 25 April 2013. Its dispositive part read simply:

“This Court does not see fit to make any order in respect of this claim except as follows.”

There followed the Court’s orders as to costs, and the discharge of the interim injunction.

12.
The substantive effect of Bannister J’s judgment and order was that Mr Cha’s claim under section 184I failed, and the amendment of Staray’s MOA stood therefore as valid. At the same time, however, Bannister J had decided that Staray’s and Mr Chen’s redemption notice under the amended MOA was invalid. This is the basis on which (in para 90 of his first judgment) he originally proposed to grant the injunction, which in his second judgment he concluded was “unnecessary”. The extent to which that point had been in issue was canvassed in the submissions made before the second judgment. While suggesting that it was a minor point, Staray and Mr Chen expressly accepted that it was an issue on which it was open to the Court of its own motion to make a finding (para 13 of written submissions dated 12 April 2013). Bannister J reached a stronger conclusion in his judgment dated 25 April 2013, holding, with reference to the passages in the pleadings which the Board has recited in para 6 above:

“… I do not think that it is right to say that the inherent validity of the notice was not in issue in these proceedings. … Mr Cha succeeded on the notice point only because the Court found no evidence that a material misrepresentation had induced the allotment of his 20% holding or that any of the facts which Staray did prove were likely to cause the consequences which were a condition precedent to the service of a valid notice.” (para 4)

13.

Bannister J's decision on costs underlines this point. Despite Mr Cha's failure on the section 184I issue, Bannister J saw Mr Cha, in the light of his success on the redemption notice issue, as being overall the successful party in the litigation. Staray and Mr Chen had wanted Mr Cha out of Staray, and had failed. On this basis, Bannister J awarded Mr Cha 40% of his costs of the proceedings (other than those covered by previous costs orders).

14.
Staray's entitlement to serve a redemption notice was therefore in issue and decided in the proceedings. This would no doubt have appeared from the order, had Bannister J stood by his original view that there should be an injunction. The Board considers that it should still have been made expressly clear, by an additional paragraph granting a form of declaration, once Bannister J had decided that an injunction was unnecessary. But the failure to include such a declaration in the order cannot alter the reality that Bannister J had reached two separate but equally binding decisions: first, that there was no basis for any relief under section 184I and that the amendment of the articles was accordingly valid; but, secondly, that the redemption notice purportedly served under such amended articles was invalid. He must be taken implicitly to have determined and declared that there had been no material misrepresentation or other event within the terms of clause 3.8 as amended, and that the redemption notice was accordingly invalid.

15.
By notice of appeal dated 4 June 2013, Staray and Mr Chen appealed solely in relation to those parts of the first judgment relating to the validity of the redemption notice as well as against the judge's costs order. By counter-notice of appeal dated 18 June 2013, Mr Cha made in summary three points: first, he revived his claim under section 184I; secondly, he claimed that the judge, having held that the redemption notice was invalid, should have granted the injunction which he had originally been minded to grant; and, thirdly, he claimed that the judge was wrong to award him only 40% of his costs.

16.
The Court of Appeal heard the appeal and counter appeal in January 2014, and in para 85 of its judgment dated 14 July 2014 concluded that it should, for the reasons which it had given in earlier paragraphs, "dismiss the appeal and counter appeal", with Staray and Mr Chen paying Mr Cha's costs. The Chief Registrar issued a "Certificate of Result of Appeal" dated 30 September 2014. This relates exclusively to certain textual corrections to the written judgment and to costs. However, the Court's disposition of the issues before it is clear from para 85 of its judgment.

The dispute over the scope of the appeal

17.
Staray and Mr Chen obtained leave to appeal, as of right, to the Judicial Committee of the Privy Council, and by notice of appeal dated 6 February 2015 took issue with the Court of Appeal's dismissal of its appeal to that court. In the course of attempts to agree a Statement of Facts and Issues ("SFI"), from late 2016 onwards, disagreement emerged between the parties as to whether it was open to Mr Cha, without seeking and obtaining the Board's permission to cross-appeal, to raise before the Board the issues arising under section 184I which had been the main subject of Mr Cha's counter notice before the Court of Appeal. Mr Cha's legal representatives sought, but Mr Chen's representatives rejected, the inclusion in the SFI of a statement that "the appeal also raises the following prior issues", namely, whether, in substance, the Court of Appeal erred in concurring with

Bannister J that the amendment of the MOA and/or the exercise of the power conferred thereby did not give rise to a right to any relief under section 184I.

18.
By letter dated 19 June 2017 Staray's and Mr Chen's legal representatives wrote to Mr Cha's representatives stating that the latter's version of the SFI attempted "to introduce issues which are not issues on the current appeal", that the "Court of Appeal found against the respondent on these points and the respondent did not appeal the Court's findings" and finally:

"If, as the respondent states in his letter of 13 March 2017, he intends to argue that the judgment of the Court of Appeal be upheld on different grounds, the appellants respectfully suggest that the appropriate place for him to do this is in his Written Case. As matters stand however, the SFI and Précis precisely set out the issues before the Court, as stated in the Notice of Appeal."

19.
The undesirable result of the parties' exchanges was and is that rival versions of the SFI exist. Staray's and Mr Chen's written case dated 28 September 2017 focused exclusively on the issues raised by their appeal. Mr Cha's case dated 19 October 2017 focused in the main on "the following prior issues" which Mr Cha had sought to have included in an agreed SFI (see para 15 above), and averred that Staray and Mr Chen had, in the passage in their letter quoted in para 16 above, accepted that such further issues could be so raised and argued. (The Board mentions in passing, that, in support of its position on these issues, Mr Cha's case relied on new points about improper purpose said to derive from the United Kingdom Supreme Court's recent judgment in Eclairs Group Ltd v JKX Oil and Gas plc[2015] UKSC 71; [2016] 1 BCLC 1. However, during the oral hearing before the Board, Mr Matthew Collings QC realistically confined himself to reliance on points raised below.)

20.
By letter dated 1 November 2017 Staray and Mr Chen took strong issue with the suggestion that the suggested "prior issues" were open to Mr Cha, maintaining that Mr Cha needed to seek and obtain permission to cross appeal. However, without prejudice to that position, the letter also enclosed a supplemental written case containing Staray's and Mr Chen's response to all aspects of Mr Cha's written case.

21.
The appeal came before the Board for oral hearing on 9 November 2017, and the Board heard oral submissions on the unresolved question about the extent to which the issues arising under section 184I were open to Mr Cha. The Board indicated that it would reserve its decision upon that question, and heard submissions both on the issues arising on Staray's and Mr Chen's case, and, de bene esse, on the issues arising under section 184I. This judgment contains the Board's conclusions on all these matters.

The Board's view on the Scope of the Appeal

22.
The Board considers that, by challenging the validity of Staray's resolution and its amendment of its MOA under section 184I, Mr Cha was seeking to vary, or in reality reverse, Bannister J's order, as upheld by the Court of Appeal. As set out in para 9 above, the actual order made was that there should be no order in respect of Mr Cha's claim for relief under section 184I. Mr Cha wishes to contend that this was wrong and that the resolution and amendments should have been set aside under section 184I, with the necessary consequence that the redemption notice would have been

without any possible foundation. Mr Collings argued that all that Mr Cha was seeking to do was uphold Bannister J's and the Court of Appeal's decision that no valid redemption notice existed.

23.
However, in the Board's view, a route to that conclusion, relying on section 184I to invalidate the resolution and amendment, is an entirely different route from one relying on the absence of any factual basis for service of a redemption notice under clause 3.8 of the amended MOA. The route relying on section 184I would have led to relief being granted by Bannister J along the lines of para 1 of the prayer to the amended statement of claim. That is a route, the basis for which (by making no order in respect of Mr Cha's claim) the judge expressly rejected. Accordingly, to pursue any such challenge under section 184I before the Board, either Mr Cha needed permission from the Court of Appeal under The Virgin Islands (Appeals to Privy Council) Order 1967, or he needed to seek and obtain permission from the Board, as contemplated by rule 25(2).

24.
For completeness the Board notes that Mr Cha's amended reply includes a plea (on which Mr Collings in the Board's view, rightly, did not focus) that, even if the amendment was valid, the giving of a redemption notice was still invalid under section 184I. If Bannister J implicitly determined as stated in the last sentence of para 12 above, reliance on section 184I in this context would involve an attempt to vary his order. Even if that were not so, a plea that the amendment was valid, but the notice invalid under section 184I would appear unlikely to have any real traction, and the substance of Mr Cha's case on section 184I would on any view still constitute an attempt to vary Bannister J's order.

25.
On the basis, therefore, that Mr Cha needed to seek and should have sought and obtained permission to cross-appeal, the question is what attitude the Board should adopt in the present circumstances. Mr Cha has for a very substantial period, nearly a year it appears, made clear his intention to include, among the issues to be decided by the Board, the section 184I issues which were fully argued before Bannister J and the Court of Appeal. There has, the Board accepts, been a genuine difference of view about the effect and operation of the Rules. The position has to a degree also been complicated by the absence of any express order relating to one aspect of the judge's judgment. Finally, the issues proposed to be argued were fully argued below, all the material is available to enable them to be determined and Staray and Mr Chen have been able to respond to them by their supplementary case. The Board has also been able to hear full argument on them within the time allotted for the hearing.

26.
In these circumstances, the Board considers that permission should be given to Mr Cha to raise and argue the "prior issues" arising under section 184I on which he wishes to rely, excluding that aspect of those issues which Mr Collings did not in the event pursue at the oral hearing (see para 19 above). The Board will humbly advise Her Majesty that permission to cross-appeal should be given accordingly. It turns on that basis to address the substance of the respective cases.

The substantive issues

Factual background

27.
As already noted, at the heart of the defence of Staray and Mr Chen were alleged misrepresentations made to Mr Chen by Mr Cha at the initial meeting of 20 March 2010. The judge found (para 8) that Mr Cha had made in effect three representations about his legal credentials: that he was "a partner"

of the well-known Chinese law firm King & Wood; that he was “qualified to practise” in China; and that he was also “qualified to practise” in the United States, specifically New York.

28.
The relevance of these representations needs to be seen in the context of the judge’s findings as to Mr Chen’s thinking at the time about Mr Cha’s potential contribution to the venture:

“Mr Chen explained that the reason why he turned to Mr Cha was because of Mr Cha’s no doubt well-earned reputation as an expert in capital markets and IPO’s and because Mr Chen thought that his New York qualification would be useful in relation to the project. Mr Chen also thought that Mr Cha’s fluency in English would be valuable. Mr Chen says that his own English is not fluent and indeed he gave evidence through an interpreter at trial.

Mr Chen says that Mr Cha was keen to participate and that he agreed to procure investors to contribute the security deposit; to provide legal advice; to begin preliminary work on listing on the Hong Kong or some other exchange; and to act as an interpreter. I find that Mr Cha did tell Mr Chen that he would provide legal advice and help in the search for investment. Mr Chen said that Mr Cha mentioned various investment banks, including JP Morgan. I have no reason to reject that evidence …” (paras 8-9)

29.
It was common ground that by May 2011, the prospects of the venture began to look firmer and success seemed to be a real possibility. It was also about that time that Mr Chen began to discuss with Mr Cha the possibility of acquiring some of his shares. This, as the judge found, was the “precursor” to a series of events involving “two strands”:

“The first strand consisted of unsuccessful attempts by Mr Chen to persuade Mr Cha to part with some of his shares. The second strand consisted of alarm, real or pretended, on the part of Mr Chen about Mr Cha’s nationality status (and, as a derivative of that), about his ability to practise as a lawyer in the PRC.” (para 28)

30.
The first strand culminated in the resolution of 26 October 2011, amending the articles to provide a legal mechanism for acquisition of such shares; the second provided the purported justification for the exercise of that power. The judge decided, in favour of Mr Chen, that the amendment was effective; but, against him, that the conditions for its exercise were not satisfied. On the basis that permission has been granted for the cross-appeal on the validity of the amendment, it will be logical to take that issue first, since if it succeeds the issues relating to the representations will not arise.

Amendment of the MOA

31.
The judge’s conclusions on this issue came at paras 68-69 of the judgment, after his discussion of the authorities. He noted Mr Chen’s admission that the resolution of 26 October 2011 was directed at Mr Cha, and that his actions were motivated by the aim of “cleaning up” Staray, by which he meant “ending any association of Mr Cha with it”. On the authorities the fact that the amendment was directed at a particular shareholder was insufficient on its own to invalidate it. He found it unnecessary to decide whether, as alleged by Mr Cha, Mr Chen had made a threat that, if Mr Cha did not transfer shares voluntarily, he would use his majority votes to compel the same result. Again on the authorities (in particular, Sidebottom v Kershaw Leese and Co Ltd[1920] 1 Ch 154, 161), such a

threat would not amount to “fraud or malice”, such as would be necessary to invalidate a resolution which was otherwise unimpeachable.

32.
Accordingly, the issue turned on the question whether the resolution could be attacked as not being bona fide in the interests of Staray. As to that he said:

“69. Applying these principles to the resolution of 26 October 2011, it seems to me that it is not possible for me to say that a company in general meeting cannot reasonably take the view that shareholders who have acquired their holdings as a result of misstatements, whether fraudulent or negligent, or who have committed acts which may result in the company incurring or suffering disadvantage or negative publicity, should have their shares redeemed at a valuation. By itself the amendment is not so oppressive or extravagant as to cast doubts upon the bona fides of Mr Chen in professing the view that it was in the best interests of Staray that Mr Cha should cease to be associated with it. The charge of malice falls away accordingly. Once that point is reached, the fact that Mr Cha was, when it was passed, the only person capable of being affected by the amendment is, in my judgment, irrelevant.”

33.
The Court of Appeal upheld this reasoning. In the leading judgment (with which the other members of the court agreed) Thom JA (para 42) held that the judge had correctly applied the principles as stated by the Board in Citco Banking Corp NV v Pusser’s Ltd [2007] UKPC 13; [2007] 2 BCLC 483. He had found that it was reasonable for a company to take the view that “members who had acquired their shares by misrepresentation or who had committed acts which may result in the company suffering detriment” should have their shares redeemed. On the authorities, the fact that Mr Chen wanted Mr Cha out of Staray did not in itself mean that the resolution was passed mala fide. It had also been open to the judge to find that the resolution was “not so oppressive as to cast suspicion on the honesty of those responsible for it or so extravagant that no reasonable men could really consider it for the benefit of the company”.

34.
For the purpose of the cross-appeal, there is no dispute as to the relevant principles of law. The Court of Appeal took them from the judgment of the Board in Citco Banking Corp NV v Pusser’s Ltd [2007] UKPC 13; [2007] 2 BCLC 483. More recently (since the Court of Appeal judgment) the principles have been conveniently summarised by Sir Terence Etherton C (as he then was): In re Charterhouse Capital Ltd [2015] EWCA Civ 536; [2015] 2 BCLC 627, para 90. It is sufficient to note the following extracts (omitting the Chancellor’s references to supporting authorities):

“(2) A power to amend will be validly exercised if it is exercised in good faith in the interests of the company: …

(3) It is for the shareholders, and not the court, to say whether an alteration of the articles is for the benefit of the company but it will not be for the benefit of the company if no reasonable person would consider it to be such: …

(5) The mere fact that the amendment adversely affects, and even if it is intended adversely to affect, one or more minority shareholders and benefit others does not, of itself, invalidate the amendment if the amendment is made in good faith in the interests of the company: …

(7) The burden is on the person impugning the validity of the amendment of the articles to satisfy the court that there are grounds for doing so."

35.
Mr Collings submits in short that, on the facts as found by the judge, the exercise of the power by Mr Chen as majority shareholder could not properly be regarded as bona fide in the interests of the company. The only purpose was to enable Mr Chen to expropriate Mr Cha's shares. He had started trying to get Mr Cha's shares once the company's prospects looked rosy, and before he learnt anything about Mr Cha's nationality or ability to practise. In any event, there was no evidence that these complaints (even if substantiated) could have been expected to cause any detriment to the company, particularly given that it was "a virtually dormant BVI holding company" whose sole purpose was to hold the valuable 5% shareholding in HD Mining.

36.
As Mr Collings recognises, in so far as the conclusions of the courts below turned on concurrent findings of primary fact, the Board's practice is not to interfere save in very limited circumstances (see Central Bank of Ecuador v Conticorp SA[2015] UKPC 11; [2016] 1 BCLC 26, para 4 per Lord Mance). However, he submits, his challenge is directed not to the primary findings of fact, but to their evaluation, and in particular to the failure of the courts to identify any conceivable benefit to the company itself from the amendment.

37.
The Board is not persuaded that there is any justification for interference with the conclusions of the courts below. While the issue may be said to be one of secondary rather primary fact, the experienced judge had the advantage of assessing the evidence, having heard the witnesses, and, in the absence of any identifiable error of law, his careful evaluation should be respected. The conclusion already quoted needs to be read against the background of his account of Mr Chen's cross-examination (para 49), where he explained why in his view it was needed to protect the company:

"… it was directed at Mr Cha because he had made false statements. He said that a person to whom the law applies must accept the legal punishment. He maintained that a person becoming a director of a company is bound to disclose his complete information, both good and bad, to all shareholders. He said that he did not wish to continue in business with Mr Cha. He also said that he did not wish Mr Cha to be able to transfer his shares to any person with whom he was unfamiliar."

In the transcript, Mr Chen is recorded as describing the removal of Mr Cha as both director and shareholder, as "cleaning-up" the company, an expression which also appears in the judge's conclusion.

38.
While the judge disagreed with Mr Chen's assessment of the truth or materiality of alleged misrepresentations (see below), he did not throw any doubt on Mr Chen's account of his own thinking at the time. In line with principle (3) above, it was his view of the company's benefit (as that of majority shareholder) which was determinative, unless it was a view which no reasonable person could have held. The judge addressed that issue at para 69 (see para 32 above), and answered it favour of Mr Chen for reasons which the Board finds compelling. Accordingly, in the Board's view, clause 3.8 was rightly upheld by the courts below. On that basis it turns to consider the validity of the notice.

The alleged misrepresentations

39.
As already noted, at the meeting of 20 March 2010 Mr Cha made three representations as to his legal credentials: that he was a partner in King & Wood, that he was qualified to practise in China, and that he was qualified to practise in New York. To support the notice under clause 3.8 Mr Chen had to establish that they were at that time both false and “material”.

40.
The judge held in summary:

i)
Mr Cha was at that time an employed lawyer, but never a partner, with King & Wood (paras 5, 53).

ii)
He was qualified and licensed as a lawyer in China, even if there were doubts as to whether as a US citizen he was entitled to that status. The judge declined to find that Mr Cha had obtained his licence by deception or fraud, that issue not having been put to him, and in the absence of “solid material” entitling him to do so (paras 85-86).

iii)
He was qualified to practise in New York, and although he was not currently licensed to do so, restoring his licence was “a mechanical matter of paying his back dues” (para 74).

41.
He concluded that only the first was a misrepresentation and that none was material:

“Quite apart from that, while I have found that Mr Cha told Mr Chen on 20 March 2010 that he was a partner in K & W (which he was not) and qualified to practice in both the PRC (which he was, although as will be seen there are questions whether he should have been) and the US (he was qualified, although then not licensed to practice there), Mr Chen’s stated reasons for agreeing to take Mr Cha into the project had nothing to do with whether or not Mr Cha was at the time a partner in, or merely employed by K & W. Mr Chen’s evidence was that he took Mr Cha in because of Mr Cha’s reputation as an expert in capital markets and IPO’s and because he thought, bizarrely, that Mr Cha’s New York qualification would be an advantage in dealing with Canadian mining concerns. He also valued Mr Cha’s linguistic skills. Mr Cha was correct to tell Mr Chen that he was qualified in New York. Restoring his right to practice was a mechanical matter of paying his back dues, something which Mr Cha did on 4 September 2012. Nor is there any evidence that at any time before he ceased to take part in Staray’s affairs Mr Chen/Staray needed or was even likely to need to call upon Mr Cha to appear in the courts of New York. In my judgment and on the assumption that Mr Chen is to be treated as the representee for these purposes, there is no evidence that Mr Cha made any material misrepresentations to Mr Chen on 20 March 2010.” (para 74)

42.
In the Court of Appeal Mr Chen was permitted to file further evidence relating to the right to practise law in China. That led the court to conclude that the judge had been wrong to find that Mr Cha was qualified to practise there at the material time. That view had been based on Mr Cha’s registration with the Beijing Bureau, and expert evidence (of a Mr Liu) that the register was conclusive. Thom JA said (para 55):

“The Court admitted the fresh evidence of Mr Chen/Staray being two opinions of the Shanghai Bureau in which the Bureau opined that if Mr Cha had lost his PRC nationality he would not have qualified to

obtain the PRC Lawyer's Qualification Certificate. The learned judge having found based on the expert evidence that Mr Cha would have ceased to have Chinese nationality on 11 September 2001, then having regard to the fresh evidence, Mr Cha would not have been validly qualified as a PRC lawyer. The representation by Mr Cha that he was so qualified was a misrepresentation."

The court however agreed with the judge that there had been no misrepresentation in respect of qualification in New York (para 56).

43.
Further the court found no basis to interfere with his findings on the immateriality of the misrepresentations. Thom JA (paras 58-59) referred in particular to Mr Chen's witness statement describing the forms of assistance which Mr Cha was to provide, none of which appeared to include formal legal practice in either China or New York; and also his cross-examination, in which he had explained what he wanted from Mr Cha as "legal advisor of the Project":

"He went on to explain that this was so because he had a lot of famous attorney friends in China but a lot of them do not speak English well and while they may specialise in litigation they are not specialised in capital money markets. He had also learnt from the King & Wood website which stated Mr Cha was not just an attorney but he was a specialist in capital market transactions …"

44.
Before the Board, Mr Atherton challenges these conclusions, while again recognising the high hurdle set by the Board for an appeal against concurrent findings of fact.

45.
On the legal position in China, he seeks to adduce further evidence in the form of decisions or proceedings of the Shanghai authorities and courts (between December 2014 and April 2017). These are said to have resulted in the annulment of Mr Cha's permit with the effect that it was treated as void ab initio. He submits that the evidence shows not only that Mr Cha was not in fact qualified in China at the relevant time, but also that he must have obtained his permit by deliberate concealment of his US citizenship.

46.
As to the position in New York, even if Mr Cha had a legal qualification, Mr Atherton points out that Mr Cha was at the relevant time suspended from practice; and he was subject to an order of the New York court (dated 12 October 2006), under which he was forbidden not only to appear as an attorney before any court, but also "to give another an opinion as to the law or its application, or any advice in relation thereto …". In these circumstances he could not reasonably be said to have been "qualified" in New York as he represented; the contrary conclusion of the courts below was "plainly wrong".

47.
Similarly on the issue of materiality Mr Atherton makes strong criticisms of the reasoning of the judge and the Court of Appeal. He submits that in law a representation is material when "its tendency, or its natural and probable result, is to induce the representee to act on the faith of it in the kind of way in which he is proved to have in fact acted" (Halsbury's Laws of England 5th ed, (2013) vol 76 para 773). The findings of the judge leave no doubt that Mr Chen did place reliance on the assurances given to him by Mr Cha about his legal credentials, whether or not he had in mind formal practice or more informal legal advice or assistance; and he was entitled to the full picture. The representation that he was legally qualified in China and New York clearly implied an ability to practise in both, not that his qualification was suspended in one and liable to annulment in the other.

48.
The Board finds it unnecessary to rule on the admissibility of the new evidence. It is not clear what if any weight should be given by the Board to the decisions of the Shanghai authorities or courts, at least in the absence of clearer evidence about the legal process by which they were made. But taken at their highest they do no more than reinforce the position as it appeared before the Court of Appeal: that is that Mr Cha was formally registered at the material time, but that his registration was liable to annulment because he was a US citizen. If anything it tends to confirm the judge's view, contrary to that of the Court of Appeal, that at the relevant time he remained on the register and therefore qualified. A later decision of annulment, even if expressed as having retrospective effect, cannot alter history.

49.
However, the critical issue is that of materiality. In the Board's view that is not to be judged by reference to abstract textbook definitions, but in its particular context in this clause and the circumstances of this company. In the Board's view clause 3.8 is looking at matters from the point of view of the company to which the remedy is given, rather than individual shareholders, as indeed is explicit in sub-clause (b). The judge was therefore right to regard the issue of materiality as turning, less on Mr Chen's subjective reactions to what he was told, than on its practical relevance to Mr Cha's expected role with the company. On that basis, the Board find no error in the approach in the judge's assessment. In short, the technical ability to carry on formal practice in China or New York at any particular time was of no practical significance to the company. Conversely, there was nothing to throw doubt on Mr Cha's ability to carry out the specific tasks which he was expected to perform.

50.
For these reasons the Board will humbly advise her Majesty that the appeal and cross-appeal should be dismissed, and that issues of costs (including those raised in the notice of appeal) should be dealt with by written submissions to be made within four weeks of this judgment.