IN THE FEDERAL COURT OF MALAYSIA
[APPELLATE JURISDICTION]
CIVIL APPEAL NO: 02(f)-42-08/2023(Q)

BETWEEN

WTK REALTY SDN. BHD. **… APPELLANT**
(COMPANY NO. 74536-H)

AND

1. KATHRYN MA WAI FONG

2. SOUTHWIND PLANTATION SDN. BHD. **… RESPONDENTS**

IN THE FEDERAL COURT OF MALAYSIA
[APPELLATE JURISDICTION]
CIVIL APPEAL NO: 02(f)-43-08/2023(Q)

BETWEEN

WONG KIE CHIE **…APPELLANT**

AND

1. KATHRYN MA WAI FONG

2. DATUK WONG KIE YIK

3. OCARINA DEVELOPMENT SDN. BHD.
(CO. NO. 159432-K) **… RESPONDENTS**

IN THE FEDERAL COURT OF MALAYSIA
[APPELLATE JURISDICTION]
CIVIL APPEAL NO: 02(f)-44-08/2023(Q)

BETWEEN

1. DATUK WONG KIE YIK

2. WONG KIE CHIE

3. PATRICK WONG HAW YEONG

4. ANNIE WONG HAW BING

5. HAPPY WONG FEI FEI … APPELLANTS

AND

1. KATHRYN MA WAI FONG

2. SOUTHWIND PLANTATION SDN. BHD. … RESPONDENTS

IN THE FEDERAL COURT OF MALAYSIA
[APPELLATE JURISDICTION]
CIVIL APPEAL NO: 02(f)-45-08/2023(Q)

BETWEEN

1. DATUK WONG KIE YIK

2. WONG KIE CHIE

3. PATRICK WONG HAW YEONG

4. PIERRE WONG HO ZHEN

5. ANNIE WONG HAW BING

6. HAPPY WONG FEI FEI … APPELLANTS

AND

1. KATHRYN MA WAI FONG

2. WTK REALTY SDN. BHD.
(CO. NO. 74536-H) … RESPONDENTS

IN THE FEDERAL COURT OF MALAYSIA
[APPELLATE JURISDICTION]
CIVIL APPEAL NO: 02(f)-46-08/2023(Q)

BETWEEN

1. DATUK WONG KIE YIK

2. WONG KIE CHIE

3. PATRICK WONG HAW YEONG

4. ANNIE WONG HAW BING

5. HAPPY WONG FEI FEI … APPELLANTS

AND

1. KATHRYN MA WAI FONG

2. OCARINA DEVELOPMENT SDN. BHD.
(CO. NO. 159432-K) … RESPONDENTS

IN THE FEDERAL COURT OF MALAYSIA
[APPELLATE JURISDICTION]
CIVIL APPEAL NO: 02(f)-47-08/2023(Q)

BETWEEN

1. WONG KIE CHIE … APPELLANT

AND

1. KATHRYN MA WAI FONG

2. WTK REALTY SDN. BHD.
(CO. NO. 74536-H) … RESPONDENTS

[IN THE COURT OF APPEAL OF MALAYSIA
(APPELLANT JURISDICTION)
CIVIL APPEAL NO. Q-02(W)-44-01/2020

BETWEEN

KATHRYN MA WAI FONG … APPELLANT

AND

1. WTK REALTY SDN. BHD.
(COMPANY NO. 74536-H) … 1ST RESPONDENT

2. SOUTHWIND PLANTATION SDN. BHD.
(COMPANY NO: 197239-W) … 2ND RESPONDENT]

[INT THE COURT OF APPEAL OF MALAYSIA
(APPELLANT JURISDICTION)
CIVIL APPEAL NO. Q-02(W)-43-01/2020

BETWEEN

KATHRYN MA WAI FONG … APPELLANT

AND

1. WONG KIE CHIE

2. DATUK WONG KIE YIK

3. OCARINA DEVELOPMENT SDN. BHD.
(CO. NO. 159432-K) … RESPONDENTS

[IN THE COURT OF APPEAL OF MALAYSIA
(APPELLANT JURISDICTION)
CIVIL APPEAL NO. Q-02(W)-39-01/2020

BETWEEN

KATHRYN MA WAI FONG … APPELLANT

AND

1. SOUTHWIND PLANTATION SDN. BHD.
(COMPANY NO: 197239-W)

2. DATUK WONG KIE YIK

3. WONG KIE CHIE

4. PATRICK WONG HAW YEONG

5. ANNIE WONG HAW BING

6. HAPPY WONG FEI FEI … RESPONDENTS

[IN THE COURT OF APPEAL OF MALAYSIA
(APPELLANT JURISDICTION)
CIVIL APPEAL NO. Q-02(W)-38-01/2020

BETWEEN

KATHRYN MA WAI FONG … APPELLANT

AND

1. WTK REALTY SDN. BHD.
(COMPANY NO: 74536-H)

2. DATUK WONG KIE YIK

3. WONG KIE CHIE

4. PATRICK WONG HAW YEONG

5. PIERRE WONG HO ZHEN

6. ANNIE WONG HAW BING

7. HAPPY WONG FEI FEI … RESPONDENTS

[IN THE COURT OF APPEAL OF MALAYSIA
(APPELLANT JURISDICTION)
CIVIL APPEAL NO. Q-02(W)-41-01/2020

BETWEEN

KATHRYN MA WAI FONG … APPELLANT

AND

1. OCARINA DEVELOPMENT SDN. BHD.
(COMPANY NO: 159432-K)

2. DATUK WONG KIE YIK

3. WONG KIE CHIE

4. PATRICK WONG HAW YEONG

5. PIERRE WONG HO ZHEN

6. HAPPY WONG FEI FEI … RESPONDENTS

[IN THE COURT OF APPEAL OF MALAYSIA
(APPELLANT JURISDICTION)
CIVIL APPEAL NO. Q-02(W)-42-01/2020

BETWEEN

KATHRYN MA WAI FONG … APPELLANT

AND

1. WONG KIE CHIE

2. WTK REALTY SDN. BHD.
(COMPANY NO: 74536-H) … RESPONDENTS

CORAM:

ABDUL RAHMAN SEBLI, CJSS
ABU BAKAR JAIS, FCJ
VAZEER ALAM MYDIN MEERA, FCJ

GROUNDS OF JUDGEMENT

INTRODUCTION

[1] The six appeals before us are in relation to dispute arising from share issues in three family owned companies, namely WTK Realty Sdn Bhd ('WTK Realty'), Southwind Plantation Sdn Bhd ('Southwind') and

Ocarina Development Sdn Bhd (‘Ocarina’). WTK Realty, Southwind and Ocarina were part of the WTK Realty conglomerate founded by the family patriarch the late Wong Tuong Kwong (‘Wong’). The late Wong had three sons, Wong Kie Nai (‘WKN’), Wong Kie Yik (‘WKY’) and Wong Kie Chie (‘WKC’). Upon Wong’s death in 2004, the affairs of WTK Realty and its related companies were managed by the three sons. At that time, WKN, WKY and WKC held equal shares in WTK Realty, Southwind and Ocarina.

[2] WKC moved to Australia in the 80s to manage the siblings' businesses there, while WKN and WKY remained in Malaysia to manage WTK Realty and its related companies.

[3] In 2005 and 2007, new shares were allotted and issued to WKN in WTK Realty, Southwind and Ocarina as follows:

Company	**No. Shares Issued**	**Date Issued**
Ocarina	1,500,000	31 May 2005
Southwind	3,000,000	5 July 2005
WTK Realty	4,000,000	28 September 2007

[4] The were no objections or issues raised by WKY and WKC when these shares were allotted and issued to WKN, until after WKN’s death.

WKN passed away in March 2013, leaving behind his widow, Kathryn Ma ('Kathryn'), a son and a daughter. Kathryn was appointed the personal representative, executrix and trustee of WKN's estate.

[5] Kathryn had requested that the shares issued to WKN in these companies (set out in the table above) be registered in her name as the executrix of WKN's estate. WKC and WKY refused that request and instead commenced three suits in the High Court seeking declarations to nullify the issued shares on grounds that their issuance were in breach of s 132D(1) Companies Act 1965 ('CA 1965') as they were carried out without the shareholders' prior approval. In addition, WKC and WKY also alleged that some of the requirements under the Articles of Association ('AA') of the respective companies were not complied with.

[6] Kathryn, the executrix and trustee of the estate of WKN, opposed the nullification suits and reciprocated by filing 3 suits in 2014 to validate the impugned shares issuance under s 63 and/or s 355 of the CA 1965, in the event that the court found that the formalities in s 132D (1) of CA 1965 and the AA had not been complied with ("validation suits"). Therefore, the flipside to the 3 suits commenced against her, were her 3 suits for validation.

[7] There are 6 appeals before this Court, and for convenience, these appeals shall be referred to as follows:

Appeal number	Referred to as	Company
Q-02(W)-42-01/2020	Appeal 42	WTK Realty
Q-02(NCvC)(W)-38-01/2020	Appeal 38	WTK Realty
Q-02(NCvC)(W)-39-01/2020	Appeal 39	Ocarina
Q-02(W)-44-01/2020	Appeal 44	Ocarina
Q-02(W)-43-01/2020	Appeal 43	Southwind
Q-02(NCvC)(W)-41-01/2020	Appeal 41	Southwind

[8] The primary reliefs sought at the High Court in respect of the respective appeals were as follows:

Appeal 42: WKC sought to nullify the issuance of 4,000,000 ordinary shares of WTK Realty allotted to WKN on 28 September 2007.

Appeal 38: Kathryn's sought to validate the issuance of the 4,000,000 shares of WTK Realty to WKN under section 63 and/or section 355 CA 1965 and WKN's AA.

Appeal 39: WKC and WKY sought to nullify the issuance of 3,000,000 ordinary shares of Southwind allotted to WKN on 5 July 2007. Appeal 44: Kathryn's application to validate the issuance of the 3,000,000 ordinary shares in Southwind under section 63 and/or section 355 CA 1965 and WKN's AA.

Appeal 43: WKC and WKY sought to nullify the issuance of 1,500,000 ordinary shares in Ocarina allotted to WKN on 5 July 2007.

Appeal 41: Kathryn's sought to validate the issuance of the 1,500,000 ordinary shares of Ocarina allotted to WKN under section 63 and/or section 355 CA 1965 and Ocarina's AA.

[9] All six suits were tried jointly at the High Court. As these suits were commenced via Originating Summonses, some deponents testified orally and were subjected to cross-examination. The High Court had ruled against Kathryn and allowed the declaratory reliefs sought by WKC and WKY. The High Court then ordered the nullification of the shares issued to WKN, namely the 4,000,000 in WTK Realty; 3,000,000 in Southwind;

and 1,500,000 in Ocarina. Consequently, the High Court dismissed the 3 validation suits by Kathryn. She appealed.

[10] The Court of Appeal allowed Kathryn's appeal and set aside the order of the High Court.

[11] Dissatisfied, the appellants herein filed application for leave to appeal to the Federal Court. They were granted leave to appeal on the following 4 questions of law:

Questions of Law

Question 1:

Does the principle of "informal assent" in In re Duomatic Ltd [1969] 2 Ch 365 create any exception to the mandatory statutory requirement of obtaining prior shareholders' approval before the directors can issue/ allot any shares?

Question 2:

If answered in the affirmative, what would in law amount to valid approval of the company for issuance / allotment of shares by the directors?

Question 3:

Can the court depart/derogate from the mandatory statutory requirement of prior shareholders' approval to allow subsequent approval of the shareholders for the issuance/allotment of shares?

Question 4:

Whether the Duomatic principle can still apply where an issuance/allotment of shares was not made under an offer to the members of the company in proportion to the members' shareholdings, and results in prejudice to one or more of the members?

At the High Court

[12] In nullifying the capital increase of the 3 companies and in declaring null and void the shares issued to WKN in the three companies, the High Court reasoned that:

(a) there was breach of s 132D of CA 1965 on the requisite shareholder approval because there was:

(i) no notice of requisition by either the director or shareholders for the EGM;

(ii) no notice issued to shareholders to convene the purported EGM;

(iii) no board of directors' resolution of WTK Realty appointing WKN and Neil, the son of WKN, as its corporate representative with authorization to attend the purported EGM to approve the impugned share issuances and allotment to WKN (in case of Southwind and Ocarina – the meeting was held inquorate);

(iv) no minutes of WTK Realty's board meeting approving the purported appointment of WKN/Neil as its corporate representative to give the requisite approval for the impugned share issuance and allotment to WKN;

(v) no minutes of any shareholders' meeting approving the impugned shares issuance to WKN; and no minutes of any board of directors meeting which may be taken as the informal unanimous assent of the shareholders (in case of WTK Realty);

(b) Knowledge of the impugned share issuances and acquiesce to the absence of shareholder approval for such issuance.

(i) In this regard, the High Court considered the fact that WKC was residing in Australia and had been there since 1984 and was not involved in the day-to-day management of Ocarina

and Southwind or any of the companies within the WTK group in Sibu.

(ii) In any case, the High Court held that subsequent knowledge or consent inferred from the statutory reports and accounts of the companies are not to be equated with "prior approval" of the company in general meeting as required by s 132D (1) of CA 1965 (reference was also made to In re Duomatic (1969) 2 Ch 365 on the required prior informal assent/approval).

(iii) Knowledge, acquiesce and assent of the shareholders ought not to be inferred from the documents – such as the 2005 notice of resolution; minutes of EGM 2005; directors' report from 2005 to 2012; forms of annual return; audited accounts, etc – as relied on by Kathryn for such inference.

(c) The issuance of the impugned shares at par value prejudiced the other brothers/shareholders and which may be taken as prima facie breach of a director's fiduciary duty.

[13] As regard the validation claim by Kathryn, the High Court held the validation orders for the three impugned share issues ought not to be granted because:

(a) it would cause injustice to the companies and the surviving brothers whose shares have been diluted by WKN;

(b) Kathryn's stance of non-contravention of the CA 1965 and the AA is inconsistent with her prayers for validation; and

(c) Kathryn omits to state the defect, irregularity or deficiency which ought to be validated.

At The Court Of Appeal

[14] The Court of Appeal reversed the decision of the High Court based on the following main reasons (as stated in the broad grounds):

(a) Misdirection in the application of the Duomatic principles.

(i) The Court of Appeal held that the core issue of these appeals is whether the High Court erred in holding that the Duomatic principle applies only if the assent was obtained prior to the shares being issued. The Court of Appeal viewed that the said principle applies whether the approval was given in advance or after the event which may be in the form of an agreement, ratification, waiver or estoppel. Whether the members of the group give their consent in different ways at different times does not matter. In this regard, the Court of Appeal referred to several case authorities and held as follows:

> "The core issue of these appeals is whether the High Court erred in holding that the Duomatic principle applies only if the assent was obtained prior to the shares being issued.
>
> ... ...
>
> The fulcrum of the respondents' argument is premised on section 132D(1) and (6) CA 1965, in that shares issued without the company's prior approval in a general meeting shall be void. Learned counsel for the respondents with candour submitted that the approval does not need to be obtained in a general meeting, as held by numerous authorities. This court in *Khaw Tiew Chai v Lee Chai Seng* [2018] 1 LNS 1516, in affirming the High Court's decision, held that the issuance of the new shares did not have to be approved by the general meeting because all the existing shareholders are also directors and were present at the board of directors meeting when approving the issuance of the new shares. Singapore's Court of Appeal had similarly held the same in *Jimat bin Awang and others v Lai Wee Ngen* [1995] 3 SLR(R) 496 when construing section 161(1) of the Singapore Companies Act, the equivalent of our section 132D. The court there held that "...the unanimous and informal assent by all the members of the company in some other manner is as effective as a resolution passed at a general meeting, even if the assent is given at different times...". The respondents' concession, however, ends there. They contended that they had no knowledge of the issued shares and never assented to them."

(ii) Further, the Court of Appeal was of the view that the Duomatic principle applies whether the approval was given in advance or prior to the event. This view was formed particularly by reference to the English case of *EIC Services Ltd v Phipps* [2004] 2 BCLC 589 where Neuberger J said:

> "The essence of the Duomatic principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether the members of the group give their consent in different ways at different times does not matter."

Thus, the Court of Appeal concluded that the High Court had misdirected itself when holding that the shareholders' approval must be obtained prior to the shares being issued.

(b) The weight of documentary evidence

(i) The various documentary evidence since 2005 pointed to the fact that there was knowledge of the issued shares which were duly reported, audited, and acknowledged by the shareholders. Such knowledge and acquiesce amounts to approval of the issuance of the shares and that the High Court had failed to give proper weight to these crucial evidence.

(c) Family owned business

(i) The business of the family-owned companies may be conducted informally and would at time disregard formal requirements. There

were prior instances were shares were issued by these companies in breach of s 132D(1) without any objections. Under the Duomatic principle, formalities may be disregarded if shareholders had by conduct waived the requirements. This is particularly applicable to family run companies.

[15] In the Grounds of Judgment dated 12.9.2024, the Court of Appeal determined the following issues:

(a) whether there was informal assent to the issued shares; if there were, whether the assent must occur prior to the shares being issued; and

(b) whether the High Court erred in holding that the Duomatic principle applies only if the informal assent was obtained prior to the shares being issued.

[16] The Court of Appeal made the following findings:

(a) It is not disputed that there were no prior shareholders' approval for the issued shares.

(b) The Duomatic principle applies whether the assent was given before or after the impugned act in question.

(c) There is no dispute that Form 11 (Notice of Resolution regarding WTK Realty's Extraordinary General Meeting held on 28.9.2007 ('EGM 28.9.2007') where an ordinary resolution was passed regarding the issued shares in WTK Realty) was lodged with the Companies Commission of Malaysia ('CCM'), nor was the Form 11 alleged to be forged.

(d) Kathryn had produced the Form 11 evidencing that the EGM 28.9.2007 to approve the issuance of the 4,000,000 shares was held on 28.9.2007. The burden lies on WKC to prove that the resolution was not attached to Form 11 or that the EGM never took place. The High Court erred in accepting WKC's contention that the resolution was not attached to Form 11 when the burden lies on him to prove so.

(e) Assuming that there was no resolution attached to Form 11, this does not vitiate the resolution passed at the EGM 28.9.2007 or render the shares issued void (Singapore Court of Appeal's decision in *Jimat bin Awang and others v Lai Wee Ngen* [1995] 3 SLR(R) 496). Therefore, the High Court erred in disregarding Form 11 and failing to hold that WKN had failed to prove his assertion.

(f) It was not disputed that Form 24 dated 28.9.2007 on the allotment of 4,000,000 shares to WKN had been lodged with the Registrar of Companies.

(g) The High Court disregarded the fact that both WKN and WKY had signed the Form 24 on behalf of the board of directors. That WKC did not sign the Form 24 does not negate assent or knowledge on his part. Informal assent can be evidenced by conduct (*EIC Services Ltd v Phipps* [2004] 2 BCLC 589).

(h) The respondents had knowledge and acquiesced to the issued shares. The High Court had disregarded the evidence showing that the board had consistently approved the directors' reports and audited accounts from as early as 2005 to 2011.

(i) Even though WKC did not sign the audited accounts, he had, under cross-examination, agreed with the suggestion that the report had been signed on his behalf by WKY. Faced with this admission, the High Court erred in holding that WKC could not have known or assented to the issued shares.

(j) The High Court clearly failed to find that WKC and WKY had approbated and reprobated. The shareholders' resolution passed at WTK Realty's EGM held on 6.4.2013 ('EGM 6.4.2013'), where the

shareholders, which included WKC and WKY, voted to approve the conversion and capitalisation of the convertible preference shares, including the issued shares, must be treated as an affirmation or ratification.

(k) The High Court, in its findings, acknowledged that WKN and WKY had subsequent knowledge of the impugned issued shares but held that they do not amount to prior unanimous assent of the shareholders. The High Court failed to consider that the family-owned companies conducted their business informally and would sometimes disregard formal requirements. The High Court had disregarded WKC's admission in his affidavit that not all shares issued in the corporate history of WTK Realty had complied with the strict formalities under s 132D(1) CA 1965.

(l) Under the Duomatic principle, formalities may be disregarded if shareholders had, by conduct, waived the requirements (*Herman v Simon* [1990] 8 ACLC 1094). This is particularly applicable to family-run companies as it is a distinctive hallmark of family-run companies where the affairs are frequently conducted informally and often without adhering to the formal requirements of statutes or the company's AA.

(m) The delay by WKC and WKY in seeking declaratory reliefs, which were commenced almost six to seven years after the shares were issued to WKN connotes knowledge and acquiescence on their part. The court should be less inclined to grant them where the party seeking the reliefs is guilty of laches (*Lim Teow Yong & Sons Sdn Bhd v Infolity Sdn Bhd & Anor* [2015] MLJU 2312). A lengthy delay would amount to acquiescence (*Cheah Kim Tong & Anor v Taro Kaur* [1989] 3 MLJ 252 (HC)).

[17] The Court of Appeal was unanimous in finding that the High Court had misdirected itself on the applicable law and applied it erroneously to the facts; and did not give sufficient judicial appreciation of the evidence before it.

At the Federal Court

[18] Counsel for the respective parties submitted at length, both orally and in writing.

The Duomatic principle

[19] It is not disputed that the issuance of the impugned shares did not comply with the requirements of section 132D(1) CA 1965 nor the companies' AA. Kathryn however relied heavily on the principles enunciated in the English case of *In re Duomatic Ltd* [1969] 2 Ch 365

('Duomatic case') which laid down the proposition that matters which were to be done formally may be done informally, provided that it was assented to by the members of the company. Both sides were in agreement with this proposition. Kathryn's case in the High Court was that the informal assent of the shareholders occurred after the shares were issued, which would fall under the Duomatic principle. This is where WKC and WKY disagreed, as they contended that the informal assent must occur prior to the issuance. The High Court agreed with the proposition advanced by WKC and WKY. The Court of Appeal disagreed with the High Court on this and held that the informal assent can occur after the share issuance.

[20] Kathryn's counsel argued that this principle is well established and has been accepted by the courts to the extent that the strict statutory requirement of prior shareholders' approval in general meeting as in s 132D (1) of CA 1965 may be dispensed with. Counsel further contended that there is no judicial disagreement so far about the applicability and scope of the Duomatic principle. Thus, the argument was that shareholders' informal assent can be before or after the issuance of the impugned shares.

[21] Kathryn's counsel also submitted that the appellants had accepted in the courts below that this principle could apply to share issuance that breached s 132D of CA, and that the appellants' argument that the

informal consent must be obtained prior to the share issuance is, according to Kathryn's counsel, a change of stance, which must be taken into consideration.

[22] Further, Kathryn argued that the Duomatic principle is not about creating any exception to the statutory requirement in s132D of CA as suggested in Leave Question No. 1. But to the contrary, the principle means that an informal unanimous assent of all shareholders of a company would satisfy the statutory requirements such that it is as effective and binding as a formal resolution passed at a general meeting. Counsel for Kathryn submitted that the Court of Appeal had correctly applied the said principle in this case as there was compelling evidence showing the appellants' knowledge, acquiescence and conduct which amounted to them consenting to the share issuances.

[23] In any event, Kathryn submitted that even if the Duomatic or informal assent principle does not apply to s 132D of CA, it is just and equitable, under the circumstances of this case, that the issuance of the impugned shares be rectified or validated under s 63 and/or s 355 of CA, as was done by the Court of Appeal in *Khaw Tiew Chai (supra)*. Thus, counsel for Kathryn argued that in any event, leaving aside the Duomatic principle, any technical non-compliance of the formalities in the CA or AA is an irregularity curable under s 63 and/or s 355 of CA.

[24] In response, the appellants submitted that there was no legal basis and/or justification provided in the Court of Appeal's broad grounds for disregarding the express language of statute provided in s 132D (1) of CA. Therefore, the Court of Appeal simply applied the Duomatic principle and disagreed with the High Court's interpretation and application of the same. There was no discussion or analysis as to how the Duomatic principle sits or is to be reconciled with the strict mandatory provisions of s 132D(1) of CA, which provides that the directors shall not, without the prior approval of the company in a general meeting, exercise any power of the company to issue shares, else it is void.

[25] Counsel for the appellants pointed out that is was most pertinent to note that the Duomatic case itself was not a case on share issuance nor did it involve a mandatory statutory requirement. Additionally, counsel argued that in the land of its origin, the Duomatic principle has been codified and preserved in s 281(4) of the English Companies Act 2006 that generally allows for "informal assent" in shareholders' decision-making and that there is no equivalent provision in our Companies Act 1965 or the present Companies Act 2016 in relation to share issuances/ allotments.

[26] As for the arguments on the curability of irregularity in respect of share issuance by applying the provisions of s 63 and/or s 355 of CA,

counsel for the appellants submitted that the Court of Appeal did not deal with the question of curability of any of breach of the AA. In any event, it was argued that the impugned share issuances has caused substantial prejudice and injustice to WTK Realty and has diluted WKY and WKC's shareholdings – substantial injustice is a matter to be considered under s 355 of the CA 1965.

[27] In short, the appellants contended that if Leave Question No. 1 is answered in the negative, in that the Duomatic principle does not or should not create any exception to the mandatory statutory provisions, there is no necessity for the Court to consider Leave Questions No. 2, 3 and 4, which are on the scope and parameters of the application of the Duomatic principle. In other words, Leave Question No. 1 shall be determinative of the appeals.

Analysis of the issues

[28] Now, the common and central issue in these six appeals is whether there has been a contravention of s 132D(1) of CA, and the issuances of the impugned shares in the three companies are null and void; and if so, whether the court ought to validate the issuance and allotment of the impugned shares to WKN under s 63 and/or s 355 of CA.

[29] I find that the approach taken by both the High Court and Court of Appeal in dealing with these issues is rather wanting. Having ascertained that all three impugned issuance of shares breached s 132D(1) of the CA for lack of prior consent of the shareholders, the next question to ask is whether such a breach renders the issuance a nullity, as contended by the appellants, or whether it is curable as contended by Kathryn. The clear answer to this is that it is not a nullity for there are provisions in the CA, particularly, s 63 and s 355 that allow for the court to validate such share issuance.

[30] As there are statutory mechanisms available to cure the breach of s 132D(1) of CA , the validation of the issuance must be done in accordance to these statutory provisions, and not by reference to the common law Duomatic principle. This is particularly so by virtue of the provisions of s 5(1) of the Civil Law Act 1956 on the application of English common law. To this extent, I am of the view that both the High Court and Court of Appeal had erred in their application of the Duomatic principle. The proper approach would have been the application of the specific statutory provision in the Companies Act 1965 that deals with validation by the courts, i.e. s 63 and/or 355 CA.

[31] Section 63 of the CA 1965 reads:

Where a company has purported to issue or allot shares and the creation, issue or allotment of those shares was invalid by reason of any provision of this or any other written law or of the memorandum or articles of the company or otherwise or the terms of issue or allotment were inconsistent with or unauthorized by any such provision the Court may, upon application made by the company or by a holder or mortgagee of any of those shares or by a creditor of the company and upon being satisfied that in all the circumstances it is just and equitable so to do, make an order validating the issue or allotment of those shares or confirming the terms of issue or allotment thereof or both and upon an office copy of the order being lodged with the Registrar those shares shall be deemed to have been validly issued or allotted upon the terms of the issue or allotment thereof.

And s 355 of the CA 1965 reads:

(1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any order of the Court.

(2) The Court may if it thinks fit make an order declaring that the proceeding is valid notwithstanding any such defect, irregularity or deficiency.

(3) Without affecting the generality of subsections (1) and (2) or of any other provision of this Act, where any omission, defect, error or irregularity (including the absence of a quorum at any meeting of the company or of the directors) has occurred in the management or administration of a company whereby any breach of this Act has occurred, or whereby there has been default in the observance of the memorandum or articles of the company or whereby any proceedings at or in connection with any meeting of the company or of the directors thereof or any assemblage purporting to be such a meeting have been rendered ineffective including the failure to make or lodge any declaration of solvency pursuant to section 257, the Court-

(a) may, either of its own motion or on the application of any interested person, make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any such omission, defect, error or irregularity, or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission, defect, error or irregularity;

(b) shall, before making any such order, satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof;

(c) where any such order is made, may give such ancillary or consequential directions as it thinks fit; and

(d) may determine what notice or summons is to be given to other persons of the intention to make any such application or of the intention to make such an order, and whether and how it should be given or served and whether it should be advertised in any newspaper.

(4) The Court (whether the company is in process of being wound up or not) may enlarge or abridge any time for doing any act or taking any proceeding allowed or limited by this Act upon such terms, if any, as the justice of the case may require and any such enlargement may be ordered although the application for the same is not made until after the time originally allowed or limited.

[32] In *Kelapa Sawit (Teluk Anson) Sdn Bhd v Yeoh Kim Leng & 15 Ors* (1991) 1 MLJ 301, the then Supreme Court had to deal with an almost identical issue as in our present case. In that case, a suit was filed on behalf of the company averring that the directors' resolution allotting 369 shares to the respondents was null and void as it contravened the company's Article of Association. The company prayed for:

(a) a declaration that the purported allotment of the 369 shares made to the defendants (respondents) was null and void; and

(b) an order that the defendants and each of them deliver to the company the said shares certificates for cancellation.

[33] In their defence the defendants (respondents) in that case claimed, inter alia, that the allotment of the shares was valid and that the directors of the company had already agreed to the allotment of the shares and therefore the directors' resolution was immaterial and irrelevant. They also counter-claimed, in the event the allotment of the shares was null and void, for an order validating their allegedly impugned shares on the basis of ss 63 and 355 of the Companies Act 1965, and also for an order to rectify the register of the members of the company under s 162 of CA.

[34] The learned trial judge dismissed the claim of the company but allowed the defendants-respondents' counterclaim and ordered the share issuance to them be validated pursuant to s 63 of CA under the just and equitable grounds and further ordered that the register of the members of the company be rectified accordingly.

[35] The Supreme Court, however, allowed the appeal and set aside the High Court's Order primarily on grounds that it was not established that the validation would be just and equitable. And in doing so, the Supreme

Court laid down the applicable principles in dealing with an application to validate under s 63 and/or s 355 of CA. The Supreme Court said:

> If an act attributed to the company is not in fact and in law an act of the company it does not bind the company and is ineffectual whereas an act of the company which is irregular offers room for its regularization or validation by application of the just and equitable principles embodied in s 63. See *Millheim v Barewa Oil & Mining* [1971] WAR 65. Burt J, at p 67, has this to say:
>
> > That then brings us back to a consideration of s 63 and in particular to the question as to whether, in all the circumstances, it is just and equitable to make an order validating the issue…
> >
> > It is in itself a difficult question, turning upon the distinction between an act which was purported to be done by the company but was done incorrectly, or in a way which is irregular and which produces an invalidity, on the one hand, and a case where an act is done which is not really an act of the company at all, on the other hand.
>
> We fully endorse the observation.
>
> In this case the allotment of shares to the applicant was on the face of it the act of the Barewa Company ...
>
> ... In *Re The Swan Brewery Co Ltd (No 2)* (1976) 3 ACLR 168, the Supreme Court of Victoria applied the just and equitable principles and ordered the validation of the shares which were issued to three subsidiaries of the company.
>
> In *Re The Swan Brewery Co Ltd's* case (1976) 3 ACLR 168, Gillard J exercised his discretion to validate the allotment of shares to protect the interest of the innocent shareholders, inspite of the fact that he had already declared invalid the allotment to the three subsidiary companies of the brewery company for an infraction of s 17 of the Companies Act.

[36] The Supreme Court then referred to *Millheim v Barewa Oil & Mining* [1971] WAR 65 where Burt J offered certain guidelines for applying the just and equitable principles in s 63. The learned judge said:

> We find in many statutes power being given to judges to do what is just and equitable in all the circumstances, but without otherwise providing the criteria of either justice or equity. It does not follow from that, that the judge can do exactly what he likes. Clearly he is given a very wide discretion, but it is a discretion which must be exercised in a judicial way, and hence, must in the end be controlled by certain criteria. If the criteria be not expressed within the section, then they must be derivative from a consideration of the policy of the section and the purpose which it is designed to achieve.
>
> For myself I think s 63 is designed to enable the court to make good what is really a defective title to shares in a company – using the words 'defective title' in the quite non-technical sense.
>
> It is directed to cases where the shares have been issued, which represent a bundle of rights proprietary in character and valuable in terms of money, and where it appears for some reason or other there has been an irregularity in the issue or the allotment which in strict law would result in the issue of the shares being, as the section says, 'invalid'.
>
> In those cases the section operates to enable a judge to make an order which validates the proprietary interest which is apparently represented by the share certificate.

The Supreme Court agreed with Burt J and held as follows:

> We agree with Burt J's observation and adopt it for the determination of this appeal. The two cases clearly show that the just and equitable principles may be applied differently from one case to another depending very much on the circumstances of each particular case. This approach is very familiar to

> everyone concerned with the administration of justice. We are left in no doubt the circumstances in both cases were different from each other and different rationales were applied to justify the validation in the *Re The Swan Brewery Co's* case (1976) 3 ACLR 168 and the refusal to do so in *Millheim's* case [1971] WAR 65.

[37] Thus, the Court's paramount consideration in validating an otherwise invalid share issuance pursuant to s 63 and/or s 355 of CA is whether under the circumstances of the facts of the case it would be just and equitable to do so and whether substantial injustice would be caused by any such validation. Having considered the grounds relied upon for the validation application in that case, the Supreme held that there was "nothing in these grounds to render it just and equitable for us to exercise our discretion under s 63 to validate the share certificates". Hence, the Supreme Court reversed the findings of the High Court and allowed the appeal. Thus, the exercise of discretion in ss 63 and 355 of CA would be facts centric, and may differ from case to case.

[38] In *Khaw Tiew Chai v Lee Chai Seng & Ors* (2018) 12 MLJ 69 the High Court had validated a share issuance by exercising their powers under s 355 CA despite non-compliance with s 132D(1) of CA. On appeal the Court of Appeal affirmed that decision and held:

> "Notwithstanding the non-compliance with s 132D of the CA 1965, the learned judge declared the issuance of the new shares as valid. His Lordship opined that it was unnecessary for the issuance of the new shares to be approved by

the general meeting because all the existing shareholders are also directors; they were all present at the board of directors' meeting on 3 May 2005 and that no existing shareholders were affected and prejudiced by the non-holding of the prior general meeting. In declaring that the issuance of the new shares is valid, His Lordship exercised the power available to him under s 355(2) of the CA 1965.

... In our judgment, the learned judge was correct in his application of s 355 of the CA 1965.

... The learned judge had arrived at his decision by assessing, weighing and for good reasons had accepted the evidence of the first to the fourth defendants over the plaintiff. There was no reason for us to disturb the findings of the learned judge."

[39] Hence, the power of validation under s 63 and s 355 of CA is well recognised by the courts. And in appropriate cases where it is just and equitable to do so, and where no substantial injustcie is caused, the courts can exercise their discretionary power under s 63 and/or s 355 of CA to validate any issuance of shares that would otherwise have infringed s 132D(1) of CA.

[40] Now, in the present case, the High Court had considered validation under ss 63 and/or 355 of CA, but rejected the same. This can be found in paragraphs 52 to 54 of the Grounds of Judgment.

52. In OS 8/5, Kathryn Ma seeks, inter alia, an order to validate the impugned share issuance on the basis that it would be just and equitable to do so under section 63 of the Companies Act 1965; and in the alternative, an order under section 355 of the Companies Act 1965 validating the proceeding in which there has been a defect, irregularity or deficiency.

... ...

54. In the instant case, no notice of the purported EGM having been given to WTK Realty, the resolution could not be said to be attributable to the company, more so as there was no evidence WKN had been appointed its corporate representative and even if he had been so appointed, there was no evidence he had been authorised to approve the impugned share issuance to himself. A validation order would cause injustice to WTK Realty and the surviving brothers whose shares have been diluted by WKN. As such, under section 355(3)(b) of the Companies Act 1965 a validation order pursuant to section 355(3)(a) ought not to be granted. Additionally, Kathryn Ma has taken rigid stance that there has been no contravention of the Companies Act or the Articles of Association of Southwind, a position which is not only inconsistent with her prayers for validation but also one which omits to state the defect, irregularity or deficiency which ought to be validated. See *Dinesh Kanawagi a/l Kanawagi & Anor v Virgin Properties Sdn Bhd & Anor* (2016) 2 MLJ 525. Also, Kathryn Ma has not asked for validation of the purported EGM.

[41] The learned High Court Judge had stated that a "validation order would cause injustice to WTK Realty and the surviving brothers whose shares have been diluted by WKN", and this was the primary reason for the learned judge not exercising his discretion under ss 63 and/or 355 of CA to validate the impugned share issuances. There were no other reasons given, when in fact Kathryn had raised many other issues to argue the just and equitable point in support of her application for. validation.

[42] In this regard, I have noted that the High Court had failed to take into consideration the following highly relevant factors raised by Kathryn:

(a) WKC's admission in his affidavit that not all shares issued in the corporate history of WTK Realty had complied with the strict formalities under section 132D(1) CA.

(b) The evidence showing that the board had consistently approved the directors' reports and audited accounts of the respective companies from as early as 2005 to 2011 which showed the issuance of these shares to WKN. Thus, indicating knowledge and acquiescence of the appellants to the impugned issued shares.

(c) The shareholders' resolution passed at WTK Realty's EGM held on 6.4.2013 ('EGM 6.4.2013'), where the shareholders, which included WKC and WKY, voted to approve the conversion and capitalisation of the convertible preference shares, including the issued shares. This must be treated as an affirmation or ratification.

(d) At an EGM on 6.4.2023 (well after WKN's death), the appellants, particularly WKC and WKY, acknowledged and acted on all the 4 million shares in WTK Realty issued to WKN by utilising the 4 million shares as part of the paid up capital when WTK Realty was required to increase its share capital to 19.15 million shares as a condition for AmBank granting a loan of RM19 million to WTK Realty. Hence, the appellants had recognised the issuance of these 4 million shares as valid and had derived benefit from them by using them as part of

the issued share capital in order to fulfil the conditions precedent for the disbursement of the banking facility from AmBank.

(e) All three companies have had use of the funds paid by WKN for the subscription for the share issuances since 2005 and 2007 respectively, till to date. In fact the companies have not offered to refund these monies amounting to several million Ringgit to Kathryn even after taking the stand that the share issuance is null and void and refusing Kathryn's request for the shares be transmitted to her as the Executrix of the estate of WKN. The companies are continuing to derive benefit by using of these funds as capital, and meeting the condition for the increased share capital imposed by AmBank.

(f) The delay by WKC and WKY in seeking declaratory reliefs, which were commenced almost six to seven years after the shares were issued to WKN, on the back of knowledge and acquiescence on their part cannot be countenanced by the court. The court should be vigilant and less inclined to grant declaratory orders where the party seeking such equitable relief is guilty of laches.

(g) In 2007 all the three Wong brothers, who were acting in concert, applied to the Securities Commission ("SC") for exemption under the Takeover Code to avoid making a mandatory offer. Their

application to the SC included the impugned shares. This application for exemption was approved by the SC. Again in and application to the regulatory authority, the appellants had put forth their position acknowledging the validity of the share issuances. If the declaratory relief is granted invalidating the share issuances, this would amount to the appellants having knowingly made a false declaration to the SC.

(h) In 2009, in a proposed general mandate for recurrent related party transaction for a revenue or trading nature, the impugned shares were again reflected in a circular from WTK Holdings Bhd, a listed company where WKC and WKY were directors, to its shareholders. In the circular, it is stated that the directors had reviewed and approved and accepted full responsibility for the information contained within.

(i) In 2009, Southwind paid an interim tax-exempt dividend of 6.5%, amounting to RM1.5 million, to both its shareholders WTK Realty and WTN, at the material time.

(j) In 2011, Southwind paid an interim tax-exempt dividend of 14.99% amounting to RM3,449,862, to both its shareholders WTK Realty and WTN, at the material time. The tax voucher was signed by WKY.

(k) The return of allotment of shares (Form 24) for Southwind dated 5.7.2005 was signed by WKN and WKY, indicating they had knowledge of the share issuance from as early as July 2005.

[43] The learned High Court Judge had failed to take all these evidence when deciding whether to validate the impugned share issues. There was only the narrow focus on the impugned shares diluting the shareholding of WKY and WKC. These pieces of evidence are highly relevant and important to the determination of the issues at hand, particularly as to whether it would be just and equitable to order the validation under s 63 and/or s 355 of CA. There is clear and compelling evidence of WKC and WKY's knowledge and acquiescence of these share issuances. They did not raise any objections to these share issuances for so long and had in fact derived benefit over the years from the capital injection of WKN through these share issuances in the three companies. WKC and WKY had clearly approbated and reprobated. The failure of the High Court to consider these facts is a clear indication of a lack of judicial appreciation of the evidence, which is an appealable error that warrants appellate intervention.

[44] The Court of Appeal considered these facts but in the context of the Duomatic principle when allowing the appeal, and not in the context of a validation under s 63 and/or s 355 of the CA. This is unfortunate.

Nevertheless, if the Court of Appeal had applied the above facts in the context of the validation applications under s 63 and/or s 355 of CA the result would still be the same, in that a validation order would be issued as it would be just and equitable to do so, given the facts and circumstances of the case. If the High Court Order was left standing it would have caused substantial injustice to WKN and his estate, particularly when there is no order by the High Court for the refund of subscription monies paid by WKN for the share issuances.

Answers to the leave questions

[45] In the premise of the forgoing, leave question No. 3 is answered in the affirmative, provided the requirements of s 63 of the Companies Act 1965 are fulfilled. The other leave questions need not be answered.

Conclusion

[46] Wherefore, I would dismiss the appeal and affirm the Orders of the Court of Appeal, albeit for reasons entirely different from that of the Court of Appeal. Orders as prayed for by Kathryn in her 3 validation applications are granted.

[47] My learned brothers YAA Tan Sri Abdul Rahman Sebli CJSS and YA Dato Abu Bakar Jais FCJ have read the draft of this judgment and concur with the same.

[48] Costs to the 1st respondent, Kathryn Ma Wai Fong, in the sum of RM 40,000.00 for each appeal, subject to allocator.

Dated this 18th day of July 2025.

- sgd –

Vazeer Alam Mydin Meera
Judge
Federal Court Malaysia

Counsel:

Civil Appeal No: 02(F)-42-08/2023(Q)

For the Appellant:

Sim Hui Chuang

[Messrs Reddi & Co. Advocates]

For the First Respondent:

Alvin Yong, Shirleen Ong

[Messrs Alvin Yong Advocates]

For the Second Respondent:

Orlando Chua

[Messrs Wong, Orlando Chua & Kuok Advocates]

For the First Respondent:

Alvin Yong, Shirleen Ong

[Messrs Alvin Yong Advocates]

For the Second Respondent:

Orlando Chua

[Messrs Wong, Orlando Chua & Kuok Advocates]

For the Third Respondent:

Victor Lau Pik You

[Messrs P Y Lau & Lu Advocates]

Civil Appeal No: 02(F)-44-08/2023(Q)

For the Appellant:

George Lim, Stanley Eddy

[Messrs Battenberg & Talma Advocates]

For the First Respondent:

Alvin Yong, Shirleen Ong

[Messrs Alvin Yong Advocates]

For the Appellant:

George Lim, Stanley Eddy

[Messrs Battenberg & Talma Advocates]

For the First Respondent:

Alvin Yong, Shirleen Ong

[Messrs Alvin Yong Advocates]

For the Second Respondent:

Sim Hui Chuang

[Messrs Reddi & Co. Advocates]

Civil Appeal No: 02(F)-46-08/2023(Q)

For the Appellant:

George Lim, Stanley Eddy

[Messrs Battenberg & Talma Advocates]

For The First Respondent:

Alvin Yong, Shirleen Ong

[Messrs Alvin Yong Advocates]

For the Second Respondent:

Victor Lau Pik You

[Messrs P Y Lau & Lu Advocates]