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O N A P P E A L

FROM THE COURT OF APPEAL OF SINGAPORE

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B E T W E E N :

COSMIC INSURANCE CORPORATION LIMITED

Appellants  
(Defendants)

- and -

KHOO CHIANG POH

Respondent  
(Plaintiff)

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CASE FOR THE APPELLANTS

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RECORD

1. This is an appeal from a judgment dated the 20th July 1977 of the Court of Appeal of Singapore (Chua, Singh and Rajah JJ) allowing an appeal from a judgment dated the 25th February 1976 of the High Court of the Republic of Singapore (Kulasekaram J) and declaring that the answers to two preliminary points of law were in the affirmative.

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2. The issue of this appeal depends upon the following provisions of the Companies Act 1967 as amended by the Act 10/74.

"35(1) Any contract or other transaction purporting to be entered into by a company prior to its formation or by any person on behalf of a company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it had been in existence at the date of the contract or other transaction

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RECORD

and had been a party thereto

(2) Prior to ratification by the company the person or persons who purported to act in the name or on behalf of the company shall in the absence of express agreement to the contrary be personally bound by the contract or other transaction and entitled to the benefit thereof.

128 (1) A public company may by ordinary resolution remove a director before the expiration of his period of office notwithstanding anything in its memorandum or articles or in any agreement between it and him .....

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(7) Nothing in the foregoing provisions of this section shall be taken as depriving a person removed thereunder of compensation or damages payable to him in respect of the termination of his appointment as a director or of any appointment terminating with that as director or as derogating from any power to remove a director which may exist apart from this section".

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3. By a letter dated the 15th August 1971 ("the August Letter") addressed to Messrs. H.T. Sam & Co., Advocates and Solicitors, and signed by the twelve promoters of the Appellants including the Respondent, the promoters confirmed their instructions to Messrs. H.T. Sam & Co. to incorporate the Appellants on their behalf. By the August Letter, the promoters agreed that the Respondent should be the Managing Director for life unless he resigned, died or committed an offence under the Companies Act or was prohibited to become a director under the Companies Act for any offences.

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4. The Appellants were incorporated on the 16th September 1971. Article 84 of the Articles of Association of the Appellants provided that the twelve promoters and two others should be the first directors and the executive directors of the Appellants. Article 96 provided that the Respondent should be the Managing Director for life of the Appellants until he ceased to hold the requisite share qualification or until he vacated office by death, resignation or otherwise under Article 101 or was removed from office under Section 128 of the Companies Act. Article 101 provided that

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- 10 the office of a director should be vacated  
(inter alia) if he had a receiving order made  
against him or compounded with his creditors  
generally or if he should be removed by the  
Appellants in General Meeting pursuant to  
Article 106 or under Section 128 of the Act.  
Article 106 provided that the Appellants might  
by Ordinary Resolution or Special Resolution  
remove any director before the expiration of  
his period of office, notwithstanding any  
provision of the Article, or any agreement  
between the Appellants and such director, but  
without prejudice to any claim he might have  
for damages for breach of any such agreement.
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5. A meeting of the Promoters took place on  
the 19th September 1971. The first meeting  
of the directors of the Appellants was held on  
the 26th September 1971. At this meeting it  
was resolved (by Resolution 2) that the  
Respondent be appointed Managing Director and  
hold office for life in accordance to the  
Articles and Memorandum of Association and be  
responsible to the Board of Directors. It was  
also resolved that the Appellants grant one per  
cent of the gross premium of the whole of the  
Appellants' business to the Managing Director.  
It was further resolved (by Resolution 15)  
that the minutes of the meeting held on the  
15th August 1971 and 19th September 1971 be  
confirmed after consideration and slight  
amendment.
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6. On the 10th June 1973, at the second  
extraordinary meeting of the Appellants, a  
meeting attended by the Respondent, in order  
to satisfy requirements of the Commissioner  
of Insurance of the Ministry of Finance, it  
was resolved that with effect from the 1st  
January 1973 the Respondent should not be  
entitled to any gross premium commission what-  
soever and that his salary be reduced to \$2,500  
per month from \$3,500 per month. On the 23rd  
July 1973, the Appellants suspended the  
Respondent. On the 30th November 1973, at an  
Extraordinary Meeting of the Appellants,  
resolutions were duly passed removing the  
Respondent from office as a director of the  
Appellants and deleting Article 96.
7. On the 22nd January 1974, the Respondent  
commenced proceedings against the Appellants

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RECORD

- for damages for breach of an alleged contract of employment of the Respondent as Managing Director of the Appellants constituted by an agreement in writing contained in the August Letter and confirmed by the Resolution of the first meeting of the directors of the Appellants held on the 26th September 1971. By their Defence, the Appellants, whilst admitting the August Letter, denied the alleged agreement or that it was binding on the Appellants, who were only subsequently incorporated, or that it could be or was ratified. The Appellants admitted that the Respondent was employed by the Appellants as Managing Director (but not on the terms alleged) and contended that his employment had lawfully been terminated by the Resolution.
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- p.8 1.27
8. On the 23rd February 1976, on the hearing of the action in the High Court of the Republic of Singapore before Kulasekaram J., the parties by their Counsel agreed to invite the Court to determine two preliminary issues, as follows:-
- p.13 1.9 20
- "(1) whether upon its true construction a letter dated 15.8.71 signed by twelve (12) persons, including the Plaintiff, to H.T. Sam & Company, constituted a pre-incorporation contract between the Plaintiff, on the one part, and the other eleven (11) persons as agents for the Defendants, on the other part, the Defendants having been subsequently incorporated on the 16th September 1971; and
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- (2) whether if the said letter did constitute a pre-incorporation contract between the Plaintiff and the Defendants, the said contract was ratified by the Defendants by resolutions of the Defendants' Directors passed on the 26th September 1971".
- p.18 40
9. The learned Judge in his judgment given on the 25th February 1976 answered both questions in the negative. He held that the August Letter did not constitute a pre-incorporation contract but was no more than instructions by the Promoters to their solicitors authorising them to prepare and finalise the Memorandum and Articles of Association of the proposed company and to take the necessary steps to have the proposed company duly incorporated. He also held that even if the August letter did constitute
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a pre-incorporation contract, by resolution 2 at the meeting on the 26th September 1971 the Respondent was appointed Managing Director of the Appellants on the terms of Article 96, that these terms were different from and inconsistent with the terms of employment envisaged by the August Letter and accordingly resolution 2 did not ratify such contract. He also held that resolution No. 15 in merely confirming the minutes of the meeting of the 15th August 1971 merely declared that what took place at that meeting on that date was correctly stated in the minutes and did not take the matter further.

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10. By a notice of appeal dated the 22nd March 1976, the Respondent appealed to the Court of Appeal of Singapore. The appeal came before Chua, Choor Singh and A.P. Rajah JJ. on the 1st July 1977, who allowed the appeal.

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11. The judgment of the Court of Appeal was delivered by Chua Choor Singh and A.P. Rajah JJ. on the 20th July 1977. The learned judges first held that the August Letter clearly set out the agreement reached prior to formation of the Appellants between the Respondent and its eleven other promoters to the effect that the Respondent should be the Managing Director for life until he resigns, dies or commits an offence under the Companies Act or was prohibited to become a director under the Companies Act for any offences; that to hold otherwise would do violence to the language used; and that but for such agreement the Respondent would not have spent so much of his time and engery. The learned judges secondly held that though the words used in resolution No. 2 were not the same as those used in the August Letter the Appellants by resolution No 2 ratified the contract. Accordingly the August Letter clearly fell within the ambit of Section 35(1) of the Companies Act and was duly ratified by the said resolution.

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12. The Appellants respectfully submit that the judgment of Kulasekaram J. was correct and that the judgment of the Court of Appeal erred in their respective answers to the preliminary issues.

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(a) The letter dated the 15th August 1971 did not constitute a pre-incorporation contract within

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the meaning of Section 35(1) of the Companies Act. The letter was no more than instructions by the Promoters to their solicitors. If more than such instructions and constituting an agreement, the letter was merely a promoters' or shareholders' agreement binding on the parties thereto. For there to be a pre-incorporation contract within the Section, there must be a contract or transaction or by a person in the name or on behalf of the Company. In the case of the August Letter the Appellants were not purportedly a party nor did any person or persons purport to act in the name or on behalf of the Appellants.

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(b) Even if the August Letter might otherwise constitute a pre-incorporation contract within Section 35, resolution 15 did not purport to ratify the same but to authorise the entry into a fresh contract on the terms of Article 96.

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13. On the 13th October, 1977, the Court of Appeal of the Republic of Singapore made an order granting to the Appellants leave to appeal to her Majesty in Council.

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14. The Appellants respectfully submit that the judgment of the Court of Appeal of the Republic of Singapore was wrong and ought to be reversed, and this appeal ought to be allowed with costs, for the following (amongst other)

#### REASONS

1. BECAUSE the letter dated the 15th August 1971 does not constitute a pre-incorporation contract within Section 35(1) of the Companies Act.

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2. BECAUSE Resolution No. 15 did not constitute ratification of such contract.

Gavin Lightman

IN THE PRIVY COUNCIL      No. 13 of 1979

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Drew & Napier,  
P.O. Box 152,  
22nd Floor Clifford Centre,  
Raffles Place,  
SINGAPORE, 1.

by their agents:

Linklaters & Paines,  
Barrington House,  
59-67 Gresham Street,  
LONDON EC2V 7JA.