COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Yinghe Investment (Canada) Ltd. v. CCM Investment Group Ltd.,* 2024 BCCA 285

Date: 20240807
Docket: CA49604

Between:

Yinghe Investment (Canada) Ltd. and Jian Sheng Chen

Appellants/Respondents on Cross Appeal
(Petitioners)

And

CCM Investment Group Ltd.

Respondent/Appellant on Cross Appeal
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Abrioux
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated December 18, 2023 (*Yinghe Investment (Canada) Ltd. v. CCM Investment Group Ltd.*, Vancouver Docket S234638).

Counsel for the Appellant:	N.J. Muirhead I.B. Macdonald N. Wu (Articled Student)
Counsel for the Respondent:	C.E. Chisholm J. Epp
Place and Date of Hearing:	Vancouver, British Columbia June 21, 2024
Place and Date of Judgment:	Vancouver, British Columbia August 7, 2024

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Abrioux
The Honourable Justice Skolrood

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Summary:

Case arises in the context of a shareholders' dispute in the respondent company. At an annual general meeting, not called in accordance with company's articles, certain business was conducted that effectively negated the influence of the appellants — the company's largest shareholders and its representative on the board of directors. On application under the "mistake" provisions of the Business Corporations Act, chambers judge declared the AGM and a subsequent directors' meeting invalid and the business conducted thereat ineffective. Judge went on to order certain exceptions to his order that would remain valid in the interest of the company. Parties were ordered to bear their own costs. Appellants sought an order declaring these exceptions ineffective; respondents cross appealed seeking an order declaring all the business effective.

Held: Appeal and cross appeal dismissed. Court below did not err in exercising discretion, and in particular did not fail to consider the interests of the appellants in ordering the exceptions. The CA also dismissed a fresh evidence application brought by the appellants, and declined to vary the costs order made in the court below.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This appeal and corresponding cross appeal arise in the context of a shareholders' dispute in a closely-held real estate development company, the respondent CCM Investment Group Ltd. ("CCM" or the "company"). In March 2023, some of the shareholders purported to hold an annual general meeting ("AGM") that, it turned out, had not been called in accordance with the company's Articles. As a result, the AGM and a subsequent directors' meeting took place without a representative from the company's largest shareholder. Certain business was conducted at the meetings, including a reduction in the number of directors from four to three and a change in the composition of the board. The influence of the largest shareholder was effectively negated.

[2] On a petition brought pursuant to the corporate 'mistake' provisions of the *Business Corporations Act*, S.B.C. 2002, c. 57 (the "Act"), the chambers judge, Mr. Justice Stephens, declared the AGM and directors' meeting invalid and the business conducted at those meetings ineffective. At the same time, he declared that certain of the resolutions "remained effective" — the appointment of an auditor, the election of two directors, and the relocation of company's registered and records

offices. On appeal, the appellants challenge these three exceptions to the first declaration, asking this court to invalidate *all* the business conducted at the meetings. For its part, CCM cross appeals, seeking an order declaring both meetings to have been valid and all the business conducted thereat effective.

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Factual Background

[3] CCM was incorporated in September 2007 by Jiang Shen Chen and Mo Yeung Ching for the purpose of developing a mixed-use strata building in Richmond. Following incorporation, Mr. Chen's company, Yinghe Investment (Canada) Ltd. ("Yinghe Investment"), owned 80% of the outstanding shares of CCM, and Mo Yeung International Enterprise Ltd. owned the balance. The shareholdings of CCM fluctuated through its first five years of operations, but Yinghe Investment was always the largest shareholder, though not always the majority shareholder.

[4] Since November 26, 2013, CCM has had four shareholders, each of which is a corporate entity. The ownership structure is as follows:

- Yinghe Investment — 510,000 common shares (50%);
- Run Guo Holdings Ltd. ("Run Guo Holdings") — 357,000 common shares (35%) purchased from Yinghe Investment on October 1, 2012;
- Yi Teng Investment Inc. ("Yi Teng Investment") — 102,000 common shares (10%) purchased from Yinghe Investment on May 12, 2011;
- Dasmart International Consulting ("Dasmart International") — 51,000 common shares (5%) purchased from Yinghe Investment on January 10, 2008.

Until March 2023, it was the practice of CCM that each of the four shareholders would nominate a representative to serve on the board of directors of CCM. (However, no shareholders' agreement was alleged or in evidence.) At that time, Mr. Chen was the director nominated by Yinghe Investment and served as chairman of the board; Guo Qiang Liu was the director nominated by Run Guo Holdings; Zhi

Yi Fan was nominated by Yi Teng Investment; and Dapei Lu was nominated by Dasmart International.

[5] The parties do not dispute the ownership structure outlined above, but they disagree about who may properly exercise the voting rights in respect of 51,000 of Run Guo Holdings' shares (representing 5% of the outstanding shares of CCM). We were told that when Run Guo Holdings purchased its shares in 2012, it entered a proxy agreement authorizing Yinghe Investment to vote the 51,000 shares. Thus it would retain 55% of the voting power of CCM's outstanding shares and could pass an ordinary resolution of shareholders at a general meeting: see the definition of "ordinary resolution" in s. 1 of the Act. We were also told that the proxy agreement purported to be valid until certain "claims and debts" of CCM are paid — wording that is central to a separate proceeding underway in the Supreme Court of British Columbia. I emphasize that details of that proceeding or of the general relations among the shareholders and their representatives were not put in evidence below in this proceeding; nor was the proxy agreement before the Court. It is now the subject of a fresh evidence application brought by the appellants, a matter to which I will return below.

[6] It is against this background that the present dispute among the parties arose. On February 22, 2023, Mr. Lu, in his capacity as a director, purported to issue a notice of annual general meeting of CCM's shareholders to take place on March 20, 2023, at the offices of the law firm Lawson Lundell LLP. The notice listed the following purposes of the meeting:

> 1. To appoint an auditor of the Company for the ensuing year.
> 2. To deal with annual corporate matters in accordance with the *Business Corporations Act* (British Columbia) and to transact such other business as may be properly brought before the meeting.

The notice was sent to each shareholder and director via registered mail. However, the copy sent to Yinghe Investment's registered address went uncollected and was returned to Lawson Lundell on March 11, 2023. The copy sent to Mr. Chen

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personally also went uncollected and was returned to the law firm on March 15, 2023.

[7] On March 17, 2023, Run Guo Holdings appointed Xin Liu to act as its representative at the AGM. Xin Liu is the son of Guo Qiang Liu, who until this time had served as the director appointed by Run Guo Holdings and as its representative at shareholders' meetings. On March 18, 2023, Yi Teng Investment also appointed Xin Liu to act as its representative at the AGM.

[8] The AGM was convened on March 20, 2023, at the offices of Lawson Lundell. The minutes of the meeting list the shareholders Yi Teng Investment, Run Guo Holdings, and Dasmart International as in attendance, while Yinghe Investment was recorded as absent. Thus the holders of 50% of the shares of CCM were present and the quorum requirement set forth in the Articles was met. Mr. Lu chaired the meeting, and Xin Liu acted as the recording secretary. The minutes indicate that the following motions were made and passed:

- Motion by Mr. Lu as acting chair, to reduce the number of directors of CCM from four to three;
- Motion by Xin Liu as representative of Yi Teng Investment, to elect Xiao Tong Fan, the son of former director Zhi Yi Fan, as a director;
- Motion by Xin Liu as representative of Run Guo Holdings, to be elected as a director;
- Motion by Jack Yong, a lawyer at Lawson Lundell, as proxyholder for Dasmart International, to elect Mr. Lu as a director;
- Motion by Xin Liu as representative of Run Guo Holdings, to (re-)appoint MNP LLP as CCM's auditor until the next AGM.

In summary, Mr. Lu was re-elected as a director; Xin Liu and Xiao Tong Fan were elected directors in place of their fathers as the nominees of Run Guo Holdings and

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Yi Teng Investment, respectively; and most importantly, Mr. Chen was effectively dropped from the board. MNP LLP was re-appointed as CCM's auditor.

[9] Immediately following the AGM, the three directors purported to hold a board meeting. They passed a resolution changing CCM's registered and records offices to the address of Lawson Lundell, and appointing the law firm as CCM's agent to maintain its registered and records offices.

[10] On April 27, 2023, Yinghe Investment and Mr. Chen became aware of the general meeting and directors' meeting held a month earlier. On June 27, 2023, it filed a petition in the court below seeking an order that the meetings be declared invalid, and the business conducted thereat declared ineffective pursuant to s. 229 of the *Business Corporations Act*, S.B.C. 2002, c. 57. The relevant portions of that section provide:

> Remedying corporate mistakes
>
> 229 (1) In this section, "corporate mistake" means an omission, defect, error or irregularity that has occurred in the conduct of the business or affairs of a company as a result of which
>
> …
>
> (b) there has been default in compliance with the memorandum, notice of articles or articles of the company,
>
> …
>
> (2) Despite any other provision of this Act, the court, either on its own motion or on the application of any interested person, may make an order to correct or cause to be corrected, to negative or to modify or cause to be modified the consequences in law of a corporate mistake or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of the corporate mistake, and may give ancillary or consequential directions it considers necessary.
>
> (3) The court must, before making an order under this section, consider the effect that the order might have on the company and on its directors, officers, creditors and shareholders and on the beneficial owners of its shares.
>
> …

For certainty, the petitioners also sought an order reinstating Mr. Chen as a director of CCM and re-appointing him to serve as chairman of the board.

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The Chambers Judge's Reasons

[11] The petition was heard on November 18, 2023, and Stephens J. issued his oral reasons on that date. He began his analysis by referring to Art. 7.3 of CCM's Articles, which provides:

> Calling of shareholder meetings
>
> 7.3 The directors may, whenever they think fit, call a meeting of shareholders.

The petitioners argued that the plural "directors" in Art. 7.3 must be given effect, and that it had not been complied with when Mr. Lu, acting alone, had purported to call the general meeting. In response, CCM argued that the plural "directors" should be read to include the singular. This argument was based on s. 28(3) of the *Interpretation Act*, R.S.B.C. 1996, c. 238, which provides that "words in the singular include the plural, and words in the plural include the singular." (The *Interpretation Act* applies to the interpretation of CCM's Articles by operation of Art. 1.3.)

[12] The chambers judge rejected CCM's argument and found that Art. 7.3 had not been complied with. In his analysis:

> … I find that s. 28(3) of the *Interpretation Act* would have application in a context where there was only one director of the board: see s. 11.11 of the articles. In such a circumstance where there is only one director, then s. 7.3 could be read and would be read as permitting the one director to call a meeting of the shareholders. But in my view a proper interpretation of s. 7.3, having regard to the *Interpretation Act*, is that where there is more than one director, to call a meeting of shareholders, there must be a meeting of the directors, plural, where such a decision is made.
>
> Here there was no meeting of the directors, plural, which decided that the AGM would be called. Only one director called the meeting. Mr. Chen, the chairman at the time, had no knowledge of this. There was a breach of s. 7.3 of the articles in calling the AGM. [At paras. 10–11; emphasis added.]

[13] The judge turned next to the question of relief under s. 229. He noted *Phaneuf v. 0896459 B.C. Ltd.* 2022 BCSC 1706, where the Court observed that s. 229 is a "broad remedial provision" (at para. 34) and that in proceedings under s. 229, the petitioner bears the onus of showing that relief should be granted, and must do so on the balance of probabilities. (At para. 41; see also *Re Razzaq*

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Holdings Ltd. 2000 BCSC 1829; *Lau v. Canada (Attorney General)* 2014 BCSC 2384 at paras. 79–81.) With this in mind, Stephens J. reasoned:

> Having considered the evidence and the record that I have been taken to and submissions of counsel, I am persuaded the petitioners have established, on a balance of probabilities, that the relief should be granted invalidating the AGM, when weighed along with the relevant considerations.
>
> At the AGM, which Mr. Chen and Yinghe had no actual notice of, Mr. Chen was removed as chairman and Yinghe, which was the single largest shareholder, did not participate. Had a board meeting been called for the purposes of deciding to call an AGM, Mr. Chen, and by extension Yinghe, would have had notice of that and would more likely than not have attended the AGM. [At paras. 17–18; emphasis added.]

[14] Having found that the AGM was invalid, the judge declared the business conducted at the meetings ineffective. In his analysis, since the AGM had been held contrary to CCM's Articles, the directors' meeting held by the newly constituted board was also invalid. At the same time, there were some aspects of the meetings that he found should *not* be invalidated on a consideration of CCM's best interests. In his words:

> … I find that it would not be in the best interests of the company that the currently-appointed auditor be removed at this time. Secondly, there is no evidence that the two former directors, Mr. Fan and Mr. Liu senior, wish to be directors of the company; and instead that their sons Mr. Fan and Mr. Liu junior, who are representatives of two of the other shareholders of CCM, are now the directors. And thirdly, on the evidence before me, the former registered and records office of CCM was at an address where mail was not received at that registered and records office, and I find it would not be in the best interests of the company to have a registered and records office where there is a risk that the mail sent to the company at the registered and record office would not be received, and I am not satisfied it would be inappropriate in the circumstances for Lawson Lundell to continue to act as the registered and records office. [At para. 25.]

[15] He therefore made three exceptions to his order under s. 229, ruling that:

> 1) the decision to [re-]appoint MNP as the auditor for CCM should not be set aside;
> 2) the decision to appoint two new directors, [Xin Liu and Xiao Tong Fan], in place of their fathers as directors, should not be set aside; and
> 3) thirdly, that the appointment of Lawson Lundell as the registered and records office of CCM should not be set aside. [At para. 23.]

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I will refer to these collectively as the “Exceptions” Finally, the judge directed that, pursuant to s. 229(2) of the Act, CCM must hold a general meeting of shareholders by the end of March 2024.

[16] In summary, the judge granted some of the relief sought by the petitioners Yinghe Investment and Mr. Chen — namely, declarations that the AGM had not been called in accordance with CCM’s Articles, and that the general and directors’ meetings were invalid. The judge also recognized, however, that CCM had been partly successful in that the Exceptions to the declaration of invalidity had been decided in the interests of the company. Since this constituted “a measure of mixed success”, he ordered that the parties should bear their own costs.

On Appeal

[17] In this court, the appellants Yinghe Investment and Mr. Chen submit that the chambers judge erred:

> (a) in law by exercising his discretion to make an order under s. 229 of the [Act] without considering the statutory criteria for making such an order, or alternatively erred in principle in the exercise of his discretion;
>
> (b) by making an order on his own motion in the absence of extraordinary circumstances; and
>
> (c) in law by finding that success on the petition was divided.

I will start by dealing with the second ground before returning to the others.

[18] The appellants Yinghe Investment and Mr. Chen submit that the judge erred in acting on his own motion in ordering the three Exceptions to the declaration of invalidity, as no party had sought them. They say their petition was strategically framed so that it could be decided quickly, without regard to the oppression provisions of the Act, which would have required a much fuller evidentiary record. Further, they submit that litigants are in the best position to decide what remedies are appropriate, and that the court should act as an impartial referee to resolve only those issues raised by the parties.

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[19] In support of their position, the appellants relied principally on *Jensen v. Ross* 2014 BCCA 173, where Mr. Justice Goepel for the Court observed that "[a]bsent extraordinary circumstances … judges should not act on their own motion. To do so compromises their role of impartial arbitrator." (At para. 24.) As CCM points out, however, *Jensen* arose out of a situation quite different from the circumstances of this case. In *Jensen*, the chambers judge had on her own motion struck out the claims of a self-represented party pursuant to R. 9-5(1)(d) of the *Supreme Court Civil Rules* as an abuse of process. In her view, these claims had disregarded the *Limitation Act*, R.S.B.C. 1996, c. 266. On appeal, this court found that while it had been entirely appropriate for the judge to bring the limitations issue to the plaintiff's attention, she had erred in taking any further steps. (At para. 25.) Although the various defendants in *Jensen* had pleaded the *Limitation Act*, none had suggested that the claims were an abuse of process, and none had sought summary determination of those claims before the chambers judge. It followed that the judge had erred when she "took from the parties their right to control the proceedings and determine for themselves the battleground upon which they wanted the proceedings resolved." (At para. 27.)

[20] In my view, it cannot be said that chambers judge in the case at bar took from the parties their right to control the proceedings. The petition of Yinghe Investment and Mr. Chen raised questions about the validity of the AGM and directors' meeting. It raised squarely the validity of all or some of the resolutions passed at those meetings. In any event, the petition sought relief under s. 229 of the *Business Corporations Act*. The powers granted by s. 229(2) may be exercised by the court "either on its own motion or on the application of any interested person". (My emphasis.) Respectfully, the judge cannot be said to have erred by granting relief that was expressly contemplated by the wording of the Act.

[21] I would not accede to this ground of appeal.

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The Exceptions

[22] This brings us to the appellants' argument that the chambers judge erred in failing to consider the statutory criteria for making such an order under s. 229. Specifically, s. 229(3), which Stephens J. reproduced at para. 13 of his reasons, states:

> (3) The court must, before making an order under this section, consider the effect that the order might have on the company and on its directors, officers, creditors and shareholders and on the beneficial owners of its shares.

[23] Yinghe Investment and Mr. Chen submit that in making the Exceptions, the judge failed to consider the impact of his order on the shareholders, and in particular on Mr. Chen. In the alternative, they say the judge erred in principle in exercising his discretion, particularly in making the order to appoint Xin Liu and Xiao Tong Fan as directors. They say this was a significant departure from the *status quo* and that those appointments would not have occurred in the regular course. The appellants maintain that pursuant to the proxy granted to Yinghe Investment by Run Guo Holdings, Yinghe Investment could have voted 55% of CCM's shares to block the appointment of the new directors. Further, Art. 10.4 of the Articles provides that if the company fails to elect directors at an AGM, the previous directors remain in office. 'But for' the intervention of the chambers judge, the appellants contend, Xin Liu and Xiao Tong Fan would not be directors of CCM; instead their fathers would have remained as directors with Mr. Chen and Mr. Lu.

[24] In response, CCM contends, correctly, that the standard of review for a discretionary decision of this kind is deferential: the judge must be shown to have acted on a wrong principle of law, failed to have given any, or sufficient, consideration to relevant factors, or his decision must have resulted in a miscarriage of justice: *Penner v. Niagara (Regional Police Services Board)* 2013 SCC 19 at para. 27; *Friends of the Oldman River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3.

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[25] In CCM's submission, the chambers judge cannot be said to have erred in the way the appellants suggest, because the evidence regarding Yinghe Investment's purported 55% voting control (via the proxy said to have been granted by Run Guo Holdings) was not before the Court. Further, CCM says the appellants' position conflates the test under s. 229 with the oppression remedy and that it is only in the latter circumstance that a court may properly consider the impact of certain actions on the *status quo*.

[26] I agree with CCM to the extent that the error framed by the appellants relies on evidence that was not before the chambers judge. On the record before the Court, there was nothing to suggest that Yinghe Investment and/or Mr. Chen would have been able to control the result of matters decided at the AGM or directors' meeting. The validity and meaning of the alleged proxy are still unknown. In any event, it was not necessary for the judge to have concluded that the result of the meetings would *necessarily* have been different before he could exercise his discretion to make exceptions to his order. Section 229(3) requires only that, in granting relief, the court consider the interests of the company and its directors, creditors, shareholders. In doing so, it must "weigh the prejudice to the petitioner and to the company if the order … is made, as well as the prejudice to the petitioner and to the company if the order is not made." (*Phaneuf*, at para. 36.)

[27] Two of the three Exceptions — the appointment of MNP as CCM's auditor, and the change of CCM's registered and records offices to Lawson Lundell — seem to be reasonable, if not innocuous in the present context. MNP had been appointed in the past to prepare CCM's financial statements and there was no evidence suggesting that the firm had not done an adequate job. A change in CCM's registered and records offices would also seem reasonable, given the judge's finding that the former address was "at an address where mail was not received." (At para. 25.) I do note that it is unclear as to who instructed Lawson Lundell in connection with the meetings. I assume the law firm has satisfied itself that it is not in a position of conflict in purporting to act for CCM in this proceeding or in purporting to hold the registered and records offices at its address.

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[28] The remaining Exception — that the two 'new' directors would remain directors in place of their respective fathers — restored in a general sense the *status quo* existing before the invalidated meetings: each shareholder, regardless of the number of shares held by it had a 'representative' on the board; the number of directors remained at four; and Mr. Chen, having been invalidly dropped from the board, remained the fourth director in accordance with Art. 10.4 of CCM's Articles. It states:

> If the Company fails to hold an annual general meeting in accordance with the *Business Corporations Act* or fails, at an annual general meeting, to elect or appoint any directors, the directors then in office continue to hold office until the earlier of:
>
> (a) the date on which the failure is remedied; or
>
> (b) the date on which they otherwise cease to hold office under the [Act.]

[29] If the chambers judge had not made this Exception, the two "fathers", who (it may be inferred) wish to be represented in future by their respective sons in dealing with CCM's business matters, would have remained on the board as well as Mr. Chen and Mr. Lu. Since the fathers are unlikely to change their minds concerning membership on the board going forward, the state of affairs resulting from the chambers judge's order represents, in my respectful view, a fair approximation (and perhaps the only practical one) of the *status quo* pending resolution of the 'proxy' litigation. Four directors continue to comprise the board, including Mr. Chen. Accordingly, I am not persuaded that Stephens J. erred in the exercise of his discretion under s. 229 of the Act, or in particular that he erred in failing to consider the interests of the appellants, the other shareholders or the company itself.

[30] For these reasons, I would decline to allow the appeal to the extent of deleting the Exceptions from the order of the chambers judge.

CCM's Cross Appeal

[31] On cross appeal, CCM submits that the chambers judge erred in applying s. 229 by considering whether Yinghe Investment and Mr. Chen had received *actual*

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notice of the AGM as an element of prejudice militating in favour of the order invalidating the meetings. The company submits that having found that a corporate 'mistake' occurred when a single director called the AGM, the chambers judge erred by then relying on lack of *actual notice* to the appellants in invalidating the AGM. It says the relief of invalidating the meetings themselves was not "rationally connected" to the corporate 'mistake' made in calling the AGM and that whether Yinghe Investment or Mr. Chen received *actual notice* of the AGM is irrelevant, since the appellants received what the respondents referred to as "*legal notice"* of the AGM — i.e., that the notices were in fact mailed out to the appellants. Further, CCM says that if the judge had regarded Yinghe Investment and Mr. Chen as having received notice of the AGM, the s. 229 analysis would have favoured CCM — the company would face the greater harm by having important business matters invalidated by the appellants' failure to *attend* a meeting of which they had been properly notified.

[32] Respectfully, I do not agree with this framing of the issue by the respondents. In my view, the distinction between actual and legal notice of the AGM is simply not relevant in light of the chamber's judge's finding that the meeting was illegally called. Contrary to CCM's submission, the invalidation of the AGM and directors' meeting flowed directly from the *manner by which the AGM was called*, not from the lack of actual *notice*. It was open to the court below to rectify that mistake by invalidating the meetings and ordering that a proper AGM be held by the end of March 2024.

[33] Finally on this point, I note that in the court below, Yinghe Investment and Mr. Chen pleaded that the notice of AGM, sent only by registered mail, was contrary to a longstanding arrangement by which these kinds of notices would be delivered by email. This arrangement was adopted because many, if not all, of the parties split their time between China and Canada, and mail delivery had proven an ineffective means of notification. I reiterate that the chambers judge did not make "any finding that the delivery of the AGM notice by mail (not email) to Mr. Chen and Yinghe was a calculated move or done in bad faith by CCM or its agents." (At para. 27.)

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[34] I do not disagree with this conclusion. I simply raise this as an element of the record before the chambers judge. Reading the reasons as a whole, it is clear he was concerned about the manner in which the AGM and directors' meeting were called, and the prejudice that had befallen the appellants when those meetings took place without their having the opportunity to attend, speak to the proposed resolutions and vote thereon. The judge cannot be said to have erred in seeing the meetings as rationally connected to the manner in which they were called.

[35] For these reasons, I would dismiss the cross appeal.

Fresh Evidence and Trial Costs

[36] I turn next to two final matters — a fresh evidence application made by the appellants, and the trial costs.

Fresh Evidence Application

[37] As noted earlier, Yinghe Investment and Mr. Chen seek to have two affidavits admitted as additional evidence on appeal. I note at the outset that the application to adduce this additional evidence was filed on May 31, 2024, and served on June 3, 2024. Since the hearing was scheduled to take place on June 21, 2024, the application did not conform with R. 59 of the *Court of Appeal Rules*, B.C. Reg. 240/2023, which requires that the application be filed and served 30 days before the hearing date. The appellants offered no explanation for this delay. While this is sufficient to dismiss the application, I make the following additional observations.

[38] The first affidavit was affirmed by a paralegal at the law offices of the appellants' counsel. It attaches as exhibits the petitioners' written arguments that were before Stephens J. With respect, none of these documents constitutes new or fresh *evidence*. Had counsel for Yinghe Investment and Mr. Chen wished to refer us to these documents, they should have included them in their appeal book, and could have done so without leave of the Court.

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[39] The second affidavit was affirmed by Mr. Chen; it contains new and fresh evidence. Notably, it attaches a translated copy of the proxy that Yinghe Investment and Mr. Chen say has the effect of authorizing Yinghe Investment to vote 51,000 of Run Guo Holdings' shares. It also attaches a transcript of the AGM that was ordered by the chambers judge and took place on March 28, 2024. It appears the latter document is tendered to show that Mr. Chen does not get along with Xin Lui and Xiao Tong Fan.

[40] The test to admit new and fresh evidence is well known and comes from *Palmer v. The Queen* [1980] 1 S.C.R. 759. That test consists of four factors, but only two are important here: evidence will generally not be admitted if, by due diligence, it could have been adduced at trial; and the applicant must show that the evidence, if believed, would be expected to have affected the result. In my view, the proxy fails on the former factor. Counsel was aware of the document at the time of the chambers hearing and chose not to adduce it, presumably for strategic reasons. We cannot intervene to reverse that decision (nor meddle in the other proceeding in the court below) simply because the appellants disagree with an outcome that may or may not have flowed from it. The transcript of the AGM, adduced to demonstrate the ill feelings of Mr. Chen toward Xin Lui and Xiao Tong Fan, fails on the latter factor. In the case at bar, nothing turns on the personal relationships between the board members of CCM. Put simply, a finding that Mr. Chen did not like Xin Lui and Xiao Tong Fan cannot be expected to have impacted the result. In any event, I suspect that the judge was aware of this fact, given the record that was before him and the context in which the petition was brought.

[41] For these reasons, I would dismiss the fresh evidence application.

Costs

[42] Finally, Yinghe Investment and Mr. Chen seek an order for *trial* costs on the basis that the chambers judge erred in finding mixed success as between the parties. Instead, the appellants say that they were the substantially successful party

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because the chambers judge found a corporate mistake and invalidated the meetings — essentially, the relief sought in their petition.

[43] As CCM noted in its response, cost awards are discretionary and attract a high degree of deference on appeal. Justice Dickson, in *Tanious v. The Empire Life Insurance Company* 2019 BCCA 329, explained as follows:

> … This Court will interfere with a costs award if, but only if, the judge misdirected himself or herself on the applicable law, made an error in principle, made a palpable error in assessing the facts or otherwise made an award that is so clearly wrong as to amount to an injustice: *Seminoff v. Seminoff*, 2007 BCCA 403 at paras. 2, 4; *Smithies Holdings* [*Inc. v. RCV Holdings Ltd.* 2017 BCCA 177] at para. 113. [At para. 33.]

(See also *Gichuru v. Purewal* 2021 BCCA 91 at para. 13; *Giles v. Westminster Savings and Credit Union* 2010 BCCA 282 at paras. 73, 88.)

[44] In ordering costs, the court focuses on the matters in dispute at the trial or hearing below, which may or may not include the issues explicitly raised by the parties: *Fotheringham v. Fotheringham* 2001 BCSC 1321 at para. 46. As I have mentioned, the questions before the chambers judge were whether the meetings should be declared invalid, and if so, whether some or all of the business conducted thereat should nonetheless be given effect. While it is true the chambers judge found the meetings to be invalid, to stop the analysis there — as the appellants suggest — betrays the ultimate result. The judge's order effectively looked past the invalidity of the meetings themselves, and inquired as to the propriety of the business that was conducted at the meetings. Looking at the matter this way, it is clear the judge found for the petitioners on some aspects, and against them on others. His conclusions that the result was one of mixed success and that the parties should bear their own costs were therefore not in error.

[45] I would not vary the judge's cost award.

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Disposition

[46] For all of these reasons, I would dismiss both the appeal and cross appeal. Nothing in these reasons should be taken as a comment on any of the substantive issues that remain before the Supreme Court of British Columbia.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Abrioux"

I agree:

"The Honourable Justice Skolrood"

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