Thio Keng Poon *v* Thio Syn Pyn and others and another appeal
[2010] SGCA 16

Case Number : Civil Appeals No. 64 and 71 of 2009

Decision Date : 08 April 2010

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Chelva Retnam Rajah SC and Muthu Arusu (Tan Rajah & Cheah) for the appellant; Davinder Singh SC and Adrian Tan (Drew & Napier LLC) for the respondents.

Parties : Thio Keng Poon — Thio Syn Pyn and others

Companies

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2009] SGHC 135.]

8 April 2010 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This is an appeal (Civil Appeal No 64 of 2009) by one Thio Keng Poon (the plaintiff in both Suit No. 734 of 2008/S ("Suit 734") and Suit No. 10 of 2008/T ("Suit 10") below and is hereinafter referred to as "the Appellant") against the decisions (in respect of both suits) made by the High Court judge ("the Judge") in *Thio Keng Poon v Thio Syn Pyn and Others and Another Suit* [2009] SGHC 135.

2 In Suit 734, the Appellant alleged that he was "surreptitiously" [note: 1] removed from his offices of Chairman, Managing Director and Director in both Malaysia Dairy Industries Pte Ltd ("Malaysia Dairy") and Modern Dairy International Pte Ltd ("Modern Dairy") in a manner which did not accord with the Articles of Association ("AA") of the aforementioned companies ("the breach of AA issue"). In Suit 10, the plaintiff's case was premised on minority oppression, breach of contract, and breach of an understanding and assurance ("the Minority Oppression issue"). The Judge dismissed the Appellant's claims in both suits upon a "no case to answer" submission at the trial below. Separately, the Appellant has also filed an appeal (in Civil Appeal No. 71 of 2009/Q) against an Order of Court made by the Judge, disallowing the amendments proposed by the Appellant in relation to the 3rd paragraph of the draft Judgment put forward by the Respondents and relating to their counterclaim in Suit 10.

Factual background

3 The *dramatis personae* in this appeal comprise the Appellant, his wife, Kwik Poh Leng ("Madam Kwik"), and their six children. In order of birth, the children are:

Name	Seniority in Family	Year of Birth
Thio Syn Luan Vicki, ("Vicki")	1st daughter	1957

Thio Syn Pyn ("Pyn")	1st son	1958
Thio Syn Kym, Wendy ("Wendy")	2nd daughter	1960
Thio Syn Ghee ("Ghee")	2nd son	1962
Thio Syn San, Serene ("Serene")	3rd daughter	1963
Thio Syn Wee ("Wee")	3rd son	1965

4 The Appellant is the founder and was the Managing Director of Malaysia Dairy, a company incorporated in Singapore in 1963 pursuant to a joint venture between the Appellant and the Australian Dairy Produce Board (the "ADPB"). In 1968, the Appellant bought out ADPB, and became both the Chairman and the Managing Director of Malaysia Dairy.

5 The year 1969 saw two developments. First, Malaysia Milk Sdn Bhd ("Malaysia Milk") was incorporated in Malaysia as a wholly owned subsidiary of Malaysia Dairy. Its operations, which began in 1977, were based in Malaysia. Secondly, Thio Holdings (Private) Limited ("Thio Holdings") was set up as an investment holding company for the various business ventures entered into by the members of the Thio family. Currently, Thio Holdings holds 30% of the issued share capital of Malaysia Dairy. Since then, the business of the Appellant's companies has expanded exponentially and additional companies have been set up beyond Singapore and Malaysia. Indeed, the Thio family currently owns and manages the following group of companies ("the Thio Group") [note: 2] :

In Singapore

a. Thio Holdings;

b. Malaysia Dairy;

c. Modern Dairy (which is wholly owned by Malaysia Diary);

d. United Realty (Singapore) Private Limited ("United Realty"); and

e. Cotra Enterprises Pte Ltd.

In Malaysia

a. Malaysia Milk; and

b. Cotra Enterprises Sdn Bhd ("Cotra Sdn").

In Hong Kong

a. Premier Enterprise Limited; and

b. Pertama Investment Limited.

In Myanmar

a. Myanmar Dairy International Pte Ltd.

In Brunei

a. Modern Dairy Industries (B) Sdn Bhd.

In so far as the above companies are concerned, we note that the ones in Hong Kong, Myanmar and Brunei do not feature in this appeal.

6 Over the years, the Appellant transferred his shares in the various companies in the Thio Group, as well as to cause these companies to issue bonus shares, to the other members of the family for "no consideration". However, it will soon be seen that the Appellant himself had also benefitted from his well-calculated moves to transfer a certain portion of ownership in these companies to the rest of his family.

7 As is common in many family-run companies, from 1983, Pyn, being the eldest son, began assisting the Appellant in the running of the business of the Thio Group and was thereafter in 1995 appointed Deputy Managing Director. Based on the sterling financial results of the companies and the supporting evidence from Serene, it cannot be disputed that Pyn successfully took the reins of the Thio Group and steered the Group's business to even greater heights. The Appellant, however, became dissatisfied because his previously unchecked powers of control over the business were progressively being reined in by his family members. The Appellant appeared to be labouring under the belief that, as the founder of Malaysia Dairy and the patriarch of the family, he was entitled to retain the various offices in the Thio Group on a permanent basis until such time as he chose to retire, or until he passes away, whichever first occurs.

8 There were various disputes [note: 3] in the Thio family, one of which arose as a result of the Appellant's proposal in 1995 to restructure the respective shareholdings of his children so as to provide for his grandsons (Ghee's twin sons who happen to be the Appellant's only grandsons). These disputes involved various share restructuring exercises which were proposed by the Appellant. In an attempt to resolve these disputes once and for all, the Appellant and the rest of the Thio family eventually entered into a Deed of Settlement on 23 December 2005 ("Deed of Settlement") [note: 4], which bound the Appellant and the 1st to 9th Respondents (the 1st to 6th Respondents – the children, the 7th Respondent – the wife, the 8th Respondent – Thio Holdings and the 9th Respondent – Malaysia Dairy). For ease of reference, the more pivotal clauses of the Deed of Settlement are reproduced hereunder:

Clause 10

Each of the Parties to this Deed hereby confirms and accepts that upon Completion, each of the Parties' full legal, registered and beneficial shareholdings in the Companies shall be as set out in Columns 5 and 6 of the Schedules, and: -

(a) none of them shall have any further right or claim to any other shareholding or equity interest in the Companies, save for interests in shares arising from subscriptions or investments or rights arising after the date of this Deed; and

(b) *their respective shareholdings stated in Column 5 and 6 of the Schedules represent their respective full legal and beneficial interests and none of them: -*

(*i*) *is holding any shares in the Companies on trust or on behalf of any other person; or*

(*ii*) *has any claim to or beneficial interest in any shares in the Companies that are registered in the name of any other person*.

…

Clause 13

The Parties agree that the Companies will be managed and operated for profit and *in accordance with best corporate practices to return to shareholders maximum returns*.

Clause 15

This Deed sets forth the entire agreement and understanding of the Parties with respect to the subject matter contained herein and *supersedes all prior discussions and agreement*, whether written or oral, relating to the subject matter herein.

[emphasis added]

9 It is apparent that the Deed of Settlement conclusively settled the distribution of the shares in the Thio Group ("save for interests in shares arising from subscriptions or investments or rights arising after the date of the Deed of Settlement" [note: 5]). Indeed, pursuant to the Deed of Settlement, the Appellant received shares (which had a total net tangible asset value in excess of $24 million as at 31 December 2005) from Pyn, Wee and Thio Holdings. Nevertheless, Pyn and Wee still jointly retained majority control over Thio Holdings and Malaysia Dairy.

10 As it turned out, however, the Deed of Settlement did not, contrary to expectations, precipitate harmony within the family. Indeed, disputes unfortunately continued to plague the Thio family which remained a cauldron of animosity. Among the disputes were a demand by the Appellant for a $10 million birthday gift [note: 6] and a proposal by the Appellant to re-assert control over the Thio Group. But he did not succeed in either [note: 7] . Other altercations appeared to be petty ones which were invariably "resolved" after one party gave in (reluctantly or otherwise) to the other. However, a significant event occurred in 2007 which became the genesis for the removal of the Appellant from his various positions in the Thio Group.

11 On 22 October 2007, Malaysia Dairy decided to engage an audit and assurance firm, Ernst & Young ("E&Y"), to conduct an independent review of the travel expenses incurred by the Appellant for the period 1 January 2005 to 30 September 2007 as recorded in the accounting books and records of Malaysia Dairy, Malaysia Milk and Cotra Sdn. [note: 8]

12 After E&Y reported their findings on the review, the Appellant was shortly thereafter removed from his positions as Chairman, Managing Director and Director of Malaysia Dairy and Modern Dairy on or around 20 November 2007 and 21 November 2007 respectively. The impetus for the Appellant's removal was the discovery by E&Y that there had been 9 occasions where the Appellant had claimed for reimbursement of *air ticket* expenses for the same trip from both Malaysia Dairy and Cotra Sdn ("the Double Claims"). In essence, what the Appellant did was to claim the cost of the same trips *twice*, once from Malaysia Dairy (for the sum of S$ 45,529.64) and again from Cotra Sdn (for the sum of S$ 48,713.67). In his defence, the Appellant insisted that the monetary value of the Double Claims which he had made against Malaysia Dairy and Cotra Sdn was in fact less than what he would have

been entitled to claim for the air-tickets (for one person) plus the *hotel* expenses which he had incurred on those trips. [note: 9]

13 In the light of the above findings by E&Y, Pyn called for a meeting of the Board of Directors of Malaysia Dairy to be held on 20 November 2007 ("the 20 November meeting"). Notice [note: 10] was given to all the directors of Malaysia Dairy save for the Appellant who was then overseas (*ie*, not in Singapore or West Malaysia). According to the notice, the 20 November meeting was convened to discuss the E&Y report as well as the removal of the Appellant as "Director, Managing Director and/ or Chairman".

14 Although notice in respect of the 20 November meeting was not given to the Appellant, Serene informed the Appellant's secretary, Teo Beng Koon ("Teo"), that the Board of Malaysia Dairy would be meeting on 20 November 2007 to discuss the removal of the Appellant from the positions he held in the company. [note: 11] Teo then telephoned the Appellant (who was then overseas) in an attempt to relay the information which Serene provided. When the Appellant did not answer Teo's telephone call, he sent the Appellant text messages. [note: 12] Furthermore, the Appellant's solicitors (Messrs Shook Lin & Bok LLP) were informed of the 20 November meeting and duly sent an e-mail to the Respondents' solicitors stating that the Appellant "objects to the convening of a Board meeting of [Malaysia Dairy] at such short notice on such a serious matter, especially when [Malaysia Dairy] knows full well that [the Appellant] is out of the country for a medical procedure". [note: 13]

15 Having reviewed the E&Y report, the Board of Directors of Malaysia Dairy (seven directors, being the Appellant's three sons, Lim Choo Peng ("Lim"), Madam Kwik, Wendy and Serene, were present) at the 20 November meeting unanimously approved the removal of the Appellant as Director, Managing Director and Chairman of Malaysia Dairy in accordance with Article 88(c) of Malaysia Dairy's Articles of Association ("AA"), as well as an authorised signatory of Malaysia Dairy's bank accounts. [note: 14]

16 A members' resolution at the 44th Annual General Meeting ("AGM") of Malaysia Dairy held on 21 November 2007 "approve[d], confirm[ed] and ratifi[ed]" the Board's removal of the Appellant from his positions as Director, Managing Director and Chairman in Malaysia Dairy. At this AGM, the Appellant was represented by his proxy, Wendy Lee, who opposed the ratification of the Board's removal of the Appellant. It should be noted that all the members of the Thio family were present (either in person or by proxy) at the AGM on 21 November 2007.

17 Turning to Modern Dairy, the Appellant also suffered the same fate there. By a resolution in writing dated 7 November 2007, the Board of Modern Dairy resolved to hold its AGM on 21 November 2007. Pyn was the appointed representative of Malaysia Dairy at Modern Dairy's AGM. [note: 15] Consequently, the Appellant was removed as Director, Managing Director and Chairman of Modern Dairy and as its authorised bank signatory after Modern Dairy resolved that the Appellant be requested to vacate and by reason thereof was deemed to have vacated his offices. [note: 16] We should add that the Appellant was also removed as a director of Thio Holding and United Realty. However, he is not challenging his removal as a director of these two companies.

18 Following the Appellant's removal from the various offices, the Boards of Directors of the companies in the Thio Group in Singapore consisted of his five children (except for the 1st daughter, Vicki) and Madam Kwik. Pyn and Wee, who collectively own 51% of the shares in Thio Holdings, now have effective control over the entire Thio Group. The Appellant, on the other hand, is currently a

minority shareholder in the Thio Group, holding only 4.75% in Thio Holdings, 11.5% in Malaysia Dairy and 10% in United Realty.

19 For the sake of clarity, we now set out in the table below the shareholdings of the various parties at the time of the trial:

Name of Shareholder	**Thio Holdings (%)**	**MDI (%)**	**United Realty (%)**
Pyn	25.50	10.50	8.75
Wee	25.50	10.50	8.75
Madam Kwik	21.75	12.50	10.00
Ghee	9.00	10.00	8.75
Vicki	4.50	5.00	2.50
Wendy	4.50	5.00	2.50
Serene	4.50	5.00	2.50
Thio Holdings	-	30.00	26.25
Malaysia Dairy	-	-	20.00
Appellant	4.75	11.50	10.00

To complete the factual matrix, we should add that prior to the trial below, the Appellant had on two separate occasions sought an interim injunction to restrain the Respondents from carrying out their decisions to remove him from the offices he held in those companies. On both occasions, he failed. [note: 17] The Appellant then brought the present two actions, the details of which are set out below.

The trial below

20 In addition to seeking reinstatement to the offices at Malaysia Dairy and Modern Dairy to which he was deemed to have vacated, the Appellant also sought payment by Malaysia Dairy of arrears of his monthly salary of $70,000 from 21 November 2007, which was the date of his removal. On the other hand, Malaysia Dairy counter-claimed that the Appellant had breached his fiduciary duties owed to it by making the Double Claims.

21 The first issue which the Judge addressed (as a "preliminary observation") was the effect and significance of a submission of "no case to answer" by the Respondents at the close of the Appellant's case. The Judge was of the view that the Appellant had failed to discharge his burden of proof in relation to both Suit 10 (dealing with the Minority Oppression issue) and Suit 734 (involving the Breach of AA issue). Consequently, she found that there was, indeed, no case to answer and the Appellant's claims for both suits were dismissed. The Judge further granted interlocutory judgment to Malaysia Diary on its counterclaim against the Appellant in Suit 10.

Suit 10 ("Minority Oppression")

22 We will now turn to briefly analyse the case which was presented to the Judge in both of the two suits. In the Minority Oppression suit, the Appellant alleged that the Respondents had conducted

the affairs of Malaysia Dairy and Modern Dairy and exercised their powers as directors of those companies [note: 18] :-

(a) in a manner *oppressive* to the Appellant;

(b) in *disregard of his interests* as a member and shareholder of both companies; and

(c) in a manner which *unfairly discriminated* against him, or was otherwise unfairly prejudicial to him.

To support his contention of oppression, the Appellant alleged that the following circumstances existed:

(a) There was an understanding (see next paragraph for what was alleged to be the contents of that understanding) between the Appellant on the one hand and his wife (the 7th Respondent) and children (1st to 6th Respondents) on the other pursuant to which he had, over the years, transferred his shares in the Thio Group to his wife and children and thus reduced his holdings in the Thio Group to that of a minority ("the Understanding"); and

(b) An assurance was made by Pyn and Wee to Wendy, Serene and Vicki that they would not seek to remove the Appellant from his various positions in the Thio Group ("the Assurance").

The Appellant therefore contended that he was removed from his positions in the Thio Group in breach of the Understanding and the Assurance.

The Understanding

23 It appeared from the evidence that the alleged Understanding was really a unilateral assumption or belief on the part of the Appellant as the same was never uttered by the Appellant to his wife or children. His family members were not privy to what he was thinking. In essence, the Understanding was solely based on the implicit trust which the Appellant had in his wife and children. The Appellant *expected* that in return for his gift of shares to his family members, they would concur to him retaining sole overall control over the entire Thio Group. [note: 19] The Appellant further elaborated on *the terms* of the Understanding as follows [note: 20] :

(a) The Appellant would be entitled to *participate in the management* of the Thio Group to the extent that the Appellant desired until the Appellant decided to relinquish his right to participate;

(b) the Appellant would *retain his position as Director, Managing Director and Chairman* of the companies in the Thio Group and would continue to lead the companies until he decided to relinquish these positions; and

(c) The Appellant would have the *final decision in respect of any salaries and fees* payable to, or other benefits accruing to, the directors, including himself, of the companies in the Thio Group.

24 At this juncture, in order to better appreciate why the Understanding arose in the Appellant's mind, it is necessary that we allude to the Appellant's evidence. The Appellant said that he began to transfer his shares, and issue bonus shares, to his children and wife (*ie*, the 1st to 7th Respondents) when Pyn and Wee were aged 12 and 5 years old respectively. According to him, his intention behind the provision of shares for his family was three-fold. [note: 21] First, he wanted to give his family a certain degree of ownership in his business. Second, he wanted to make provision for their well-being after his death. Finally, he wanted to minimise estate duty for his family. Furthermore, the Appellant gradually relinquished the overall management of the business in the Thio Group after he handed the reins over Malaysia Dairy to Pyn by appointing him as its Deputy Managing Director in 1995. In that same year, the Appellant also retired from his positions as Managing Director of Malaysia Milk and Cotra Sdn and these positions were handed over to Lim. The Appellant averred that all these moves were executed by him on the basis that the Understanding existed and operated among all the members of the Thio family.

The Assurance

25 Turning next to the question as to how the Assurance arose, the Appellant alleged that prior to the execution of the Deed of Settlement, and pursuant to and consistent with the Understanding, both Pyn and Wee assured the Appellant's daughters that the Appellant would not be removed from his positions in the various companies in the Thio Group ("the Assurance"). Vicki then communicated the Assurance to the Appellant via the company secretary of Thio Holdings before the Appellant signed the Deed of Settlement. In this connection, the Appellant argued that he signed the Deed of Settlement in reliance on the Assurance.

26 We note, however, that for the purposes of the present appeal, the Appellant has abandoned his case based on the existence of the Assurance. [note: 22] Indeed, in his written submissions to this court, the Appellant conceded that he "was unable to establish the existence of the Assurance at trial, and (will) not persist on that at the hearing of this appeal". [note: 23] He, however, submits that the non-existence of the Assurance "does not detract from the existence of the Understanding".

The Double Claims

27 The Appellant did not deny making the Double Claims. His explanation, however, was that he had travelled with a female companion and had he submitted a claim for hotel expenses, his family would come to know of his extramarital affair, which he wanted to keep under wraps so as to maintain family harmony. According to the Appellant, the cost of the airline ticket was always less than that of the hotel accommodation. Hence, by claiming for two airline tickets for each trip instead of a single airline ticket plus the cost of hotel accommodation, he was effectively out of pocket. [note: 24] The point he underscored was that he had not claimed more than what he was entitled to claim as reimbursements from the companies. However, the Judge noted that the Appellant was not able to substantiate his assertion that the hotel expenses were in fact more than the cost of the second ticket.

Counterclaim by the Respondents

28 As regards the counterclaim by the Respondents, the latter have, in essence, relied on the findings of E&Y to aver that the Appellant had acted in breach of his fiduciary duties owed to Malaysia Dairy. [note: 25]

Suit 734 ("Breach of AA")

29 In this action, the Appellant contended that he had been removed from his offices as Director, Managing Director and Chairman of both Malaysia Dairy and Modern Dairy in breach of the AA of both companies. In so far as Malaysia Dairy was concerned, the underlying basis for his contention was that Article 88(c) of Malaysia Dairy's AA was not complied with and that therefore Malaysia Diary's attempt to remove the Appellant was wholly invalid because no request was made to him to resign as a director as required under that article. Article 88(c) of Malaysia Diary's AA reads as follows:

> The office of director shall, *ipso facto*, be vacated:-
>
> …
>
> (c) If he shall be requested to vacate office by all the other Directors, they pass a resolution that he has been so requested and by reason thereof has vacated his office.

30 The Appellant further argued that since the Directors' resolution passed on 20 November 2007 was ineffective, it followed that the resolution passed at the AGM of 21 November 2007 was consequently also of no effect because it merely "approve[d], confirm[ed] and ratifi[ed]" the Board's purported removal of the Appellant on 20 November 2007.

31 A similar argument to the above was made in relation to the resolution passed at the AGM of Modern Dairy on 21 November 2007 which was worded in the following terms:

> Mr Thio Keng Poon be requested to vacate, and by reason thereof is deemed to have vacated, the office as a Director, Managing Director and Chairman of the Company with immediate effect.

The Appellant averred that the Resolution of 21 November 2007 was again not effective in removing him as the Chairman, Managing Director and Director of Modern Dairy because it was passed in contravention of Article 82(g) of the Modern Dairy AA, as no request was made to him to vacate his office on or before 21 November 2007. Article 82(g) of the Modern Dairy AA reads as follows:

> The office of director shall become vacant if the director –
>
> …
>
> be *requested in writing* by all his Co-Directors to resign.
>
> [emphasis added]

32 At this juncture, we should explain that in the course of the trial, as well as for the present appeal, the Appellant accepted that Article 82(g) was in fact *not* part of the Modern Dairy AA (although the Judge had specifically considered Article 82(g) of the Modern Dairy AA in her findings). The correct position is that Article 82(g) was in fact part of a *proposed* set of Articles that was not passed eventually. However, notwithstanding the non-existence of Article 82(g), the Appellant argued in the alternative that there was absent a valid resolution to remove him pursuant to the only relevant article, Article 71, the material portion of which reads as follows: "The company may by

ordinary resolution remove any director before the expiration of his period of office…". The Appellant, therefore, contended that he had not been effectively removed and that he continued to hold those offices because the resolution of 21 November 2007 was *prima facie* invalid (since it stated that a request be made to the Appellant to resign and, as it turned out, *no* prior request had in fact been made to the Appellant to vacate his office). [note: 26]

The findings by the Judge

33 The Judge dismissed both actions brought by the Appellant and allowed the Respondents' counterclaim.

(i) Suit 10

34 In relation to Suit 10 (the Minority Oppression issue), the Judge held that the Understanding did not in fact exist. It was purely something that existed in the Appellant's own mind. Indeed, the Appellant's evidence was that he never discussed the Understanding with any of his children, although he alleged that he had discussed it with his wife. In essence, the Understanding was unspoken and therefore, there was no way his family members could have known about it or of what he had in mind.

35 The Judge noted that the Appellant was unable to specify precisely the terms of the Understanding. Moreover, the Appellant had also failed to mention the Understanding to the Respondents when on numerous occasions it would have been appropriate and advantageous to have brought it up.

36 Another important point which the Judge commented on was that as clause 15 of the Deed of Settlement expressly provided that the Deed superseded all prior discussions and agreements relating to the shares, this would necessarily mean that whatever previous understandings or agreement which might have existed between the parties prior to the execution of the Deed will no longer have any effect.

37 As regards the Assurance, the Judge found that the evidence adduced by the Appellant was "troubling". [note: 27] First, Serene who was one of the parties to the Assurance, testified that she was not aware of any such Assurance. Secondly, Teo revealed in court that Vicki had informed him that there was such an Assurance on the day of the signing of the Deed of Settlement. Yet, Vicki did not inform the Appellant directly when the Appellant was also present on the occasion. Thirdly, the terms of the Assurance were contrary to the spirit and letter of both clauses 13 and 15 of the Deed of Settlement.

38 In any event, the Judge also held that the Appellant was represented at the AGM of Malaysia Dairy on 21 November 2007 by a proxy who was given ample opportunity to question the E&Y report and or make representations but had failed to do either. As for the AGM of Modern Dairy held on 21 November 2007, she found that the Appellant did not have any standing to sue under s 216 of the Companies Act (Cap 50, 2006 Rev Ed)("the Companies Act") because he was not a member of Modern Dairy.

(ii) Suit 734

39 In so far as Suit 734 (the Breach of AA issue) was concerned, the Judge also found in favour of the Respondents. She held that as regards the meeting of 20 November 2007 of Malaysia Dairy, there was no requirement to notify the Appellant, who was then overseas, of it because Article 112 of

Malaysia Dairy's AA provided that:

> [i]t shall not be necessary to give notice of a meeting of the Board to any Director for the time being absent from Singapore and West Malaysia [note: 28].

40 Further, the Judge invoked s 392(2) of the Companies Act to find that the resolution of the Board of Malaysia Dairy and the resolution of the AGM of the company the next day were valid as no "substantial injustice" was shown to have been caused to the Appellant. Consequently, she held at [81] as follows:

> Granted, the [Appellant] was not requested to vacate office by all the other directors pursuant to Article 88(c) of the [Malaysia Dairy] Articles and the notice in relation to [Malaysia Dairy]'s 44th AGM did not contain sufficient information to enable a prudent member to decide whether or not to attend the meeting. However, a defect in the notice would not invalidate a meeting unless, as provided by s 392(2) of the [Companies] Act, substantial injustice was caused to the [Appellant] which cannot be remedied by any order of the Court.

Preliminary Issues of "No case to answer" & "Introduction of new points in this appeal"

41 Before moving on to discuss the main issues of this appeal, it is necessary to dispose of two preliminary issues. The first relates to the Appellant's contention that an adverse inference *ought to* [note: 29] have been drawn against the Respondents for having made a submission of no case to answer. The essence of the Appellant's point is that "[a] party who is in control of material evidence on an issue in an action who fails to produce that evidence to the court is vulnerable to an adverse inference being drawn against him under section 116(g) of the Evidence Act". [note: 30]

42 We see no merit in this averment. It is settled principle that the legal burden to prove a case always rests with the plaintiff. It is only when a *prima facie* case has been established by the plaintiff that the burden shifts to the defendant. A plaintiff cannot simply rely on s 116(g) to discharge his primary burden of proof of establishing a case against the defendant. But once some *prima facie* case is established and the defendant chooses to submit a no case to answer, then that failure to offer evidence could be fatal to the defendant's case.

43 In the English Court of Appeal decision of *Wisniewski v Central Manchester Health Authority* [1998] 5 PIQR 324 at 340, Brooke LJ made the following pertinent observations:

> (1) *In certain circumstances* a court *may* be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: *in other words, there must be a case to answer on that issue*.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it

not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

[emphasis added]

44 These principles as distilled by Brooke LJ were alluded to and endorsed by the High Court in *Cheong Ghim Fah & Anor v Murtigian s/o Rangasamy* [2004] 1 SLR 628 at [42] - [43]. The law on this was also recently applied by the High Court in *Lim Eng Hock Peter v Lin Jian Wei* [2009] SGHC 31 where the judge stated as follows at [209]:

I agree with the defendants that the test of whether there is no case to answer is whether the plaintiff's evidence at face value establishes no case in law or whether the evidence led by the plaintiff is so unsatisfactory or unreliable that its burden of proof has not been discharged (*Bansal Hermant Govindprasad; Lim Swee Khiang and Sukhpreet Kaur*). However, *this does not mean that an adverse inference will be drawn immediately against the defendants simply because they chose to submit on a "no case to answer"*.

[emphasis added]

45 Accordingly, in the present case, as the Judge had held that, on the basis of the evidence presented to her by the Appellant, there was no case for the Respondents to answer, no adverse inference should be drawn against the Respondents for deciding not to call any evidence. The Appellant had not satisfied the threshold requirement which would necessitate the Respondents to answer.

46 The second preliminary issue is whether the Appellant ought to be granted leave to raise a number of new issues in this appeal. Here we note that the Respondents have strenuously contended that the "Appellant has impermissibly sought to raise new issues on appeal". [note: 31] The new issues are these:

(a) That clause 7 of the Memorandum of Association ("the MA") of Thio Holdings ("clause 7") [note: 32] is consistent with the existence of the Understanding ("the clause 7 point");

(b) That the rules of natural justice apply and were not complied with in respect of the 20 November meeting ("the Natural Justice point"); and

(c) In addition to the procedural safeguards embodied in Malaysia Dairy's AA, the Appellant had an equitable right to be notified of the 20 November meeting and this right had been infringed ("the Equitable Right point").

47 In our view, the clause 7 point is a new argument which is different (especially in substance) from the original argument that there was an Understanding (bearing in mind that the Understanding was indisputably both *unspoken and unwritten*). The "classic statement of principle" relating to the admission of a new point at the appeal stage was alluded to by this court in *Panwah Steel Pte Ltd v Koh Brothers Buildin & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR(R) 571 ("*Panwah Steel*") at [15] as follows:

> The classic statement of principle is, of course, that of Lord Herschell in the House of Lords decision of *The Owners of the Ship "Tasmania" and the Owners of the Freight v Smith and others, The Owners of the Ship "City of Corinth" (The "Tasmania")* (1890) 15 App Cas 223, as follows (at 225):
>
> My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
>
> *It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box*.
>
> [emphasis in original]

48 Apart from the above passage from *The "Tasmania"* which has been cited and applied by our courts on numerous occasions, it would be apposite for us to also allude to *North Staffordshire Railway Company v Edge* [1920] AC 254 at 263-264, where Lord Birkenhead LC emphasised that any attempt to introduce a new point on appeal ought to be subjected to strict scrutiny and rarely allowed. Lord Birkenhead LC's central concern, which we share, pivoted around the fulcrum of the respective functions of the trial and appellate courts. An indulgent approach in allowing new points to be brought up on appeal would certainly undermine the efficiency and authority of an appellate court which would be deprived of the benefit of the views of the trial court (see further *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 ("*Susilawati*")at [48] and [49]).

49 Unlike the new point raised in *Panwah Steel* which involved a "pure question of construction" which was an argument "primarily of law" (see [17] of *Panwah Steel*), the clause 7 point sought to be introduced is closely linked with the question of the Understanding, whether it existed and the precise terms thereof. What the Appellant is seeking to do is to point to clause 7 to support his contention that the Understanding did in fact exist. It seems to us that any suggestion that the MA of Thio Holdings (in particular Clause 7) supported a finding that the Understanding existed should therefore have been canvassed at the trial below, so that the Respondents would be able to explain why the clause does not support the alleged Understanding. In short, the clause 7 issue is not one involving a pure construction of a document or a pure point of law; evidence from the parties would be relevant and necessary to assist the court to better appreciate the purport of clause 7, and its inter-relation with the alleged Understanding, bearing in mind that the alleged Understanding was not in writing and the exact terms of that understanding are far from precise or clear. In the words expressed in *The "Tasmania"*,this court does not have **"**before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial". In the circumstances, it is our view that it is not appropriate for us to consider the clause 7 point.

50 We turn now to the Natural Justice point (for which the Appellant conceded that he will have to seek leave to raise at this appeal [note: 33]), which consists of both a question of law and a question of fact. The question of law is whether the principles of natural justice apply to the present case, bearing in mind that the requirements of natural justice would depend on the factual circumstances of the case. If the question of law is answered in the affirmative (*ie*, in favour of the Appellant), then

the next question (of fact) is whether the Respondents' behaviour or actions in this particular case (especially in relation to the various AGMs and Board meetings which were conducted with a view to removing the Appellant from his various positions) had the effect of breaching any of the relevant principles of natural justice. Once again, this is a point which, in our view, should have been raised at the trial below. That said, we think that the essential facts relating to the events leading to the dismissal of the Appellant from the offices were already adequately presented before the court and there was hardly any real dispute between the parties on those facts. Ultimately, it is a question of what the law should imply based on those facts. This can be addressed by way of submission. Thus, we do not think that allowing this point to be canvassed at this appeal stage would cause any real prejudice to the Respondents. This is unlike the situation in *Susilawati* where there was an attempt by the appellant to fashion an entirely new cause of action on appeal.

51 Next, turning to the Equitable Right point, in his written submissions to this court, the Appellant contended that "[w]here the majority of directors intend to remove a minority director from the board, they have an equitable duty to notify the minority director, even if the minority director is overseas: they cannot act surreptitiously." [note: 34] Putting it in another way, the Appellant is arguing that over and above his rights under the Malaysia Dairy AA, he has, *inter alia*, an equitable right to be adequately notified of any board meeting or board resolution proposing to remove him as a director of Malaysia Dairy. Here, when the Board of Malaysia Dairy chose a day, on which it knew the Appellant was out of the country, to hold its meeting, the Board and its members had acted in breach of their fiduciary duties and in disregard of his equitable right. [note: 35]

52 As we view it, this point essentially raises questions of law. The first question is whether the Appellant has an equitable right to be adequately notified of any Board meeting or Board resolution proposing to remove him from his positions in Malaysia Dairy. The second question is whether, on the facts, even as presented by the Respondents, the Appellant's right had been infringed by the Respondents. In the circumstances, we think it is in order to allow the issue to be raised at this appeal stage. We would also add that there might be a certain degree of overlap between the second new issue (*ie*, Natural Justice point) and the third new issue (*ie*, Equitable Right point). Indeed, both will involve arguments based substantially on considerations of fairness.

The issues on appeal

Issue 1: Whether there were procedural breaches of the AA of Malaysia Dairy and Modern Dairy

53 We have at [29] above set out the relevant clause of the Malaysia Dairy AA. The Judge held that (see [40] above), even if there was in the strict sense a non-compliance with Art 88 of the Malaysia Dairy AA, no substantial injustice was caused to the Appellant, relying in this regard on section 392(2). As section 392 is central to this appeal, we shall set it out in full (of which only subsections (1) to (4) are of direct relevance):

> **Irregularities**
>
> **392**. —(1) In this section, unless the contrary intention appears, a reference to a procedural irregularity includes a reference to —
>
> (a) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation or at a joint meeting of creditors and members of a corporation; and
>
> (b) a defect, irregularity or deficiency of notice or time.

(2) A proceeding under this Act is not invalidated by reason of any procedural irregularity unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.

(3) A meeting held for the purposes of this Act, or a meeting notice of which is required to be given in accordance with the provisions of this Act, or any proceeding at such a meeting, is not invalidated by reason only of the accidental omission to give notice of the meeting or the non-receipt by any person of notice of the meeting, unless the Court, on the application of the person concerned, a person entitled to attend the meeting or the Registrar, declares proceedings at the meeting to be void.

(4) Subject to the following provisions of this section and without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:

(a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of, or failure to comply with, a provision of this Act or a provision of any of the constituent documents of a corporation;

(b) an order directing the rectification of any register kept by the Registrar under this Act;

(c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (*a*);

(d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned expired before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding,

and may make such consequential or ancillary orders as the Court thinks fit.

(5) An order may be made under subsection (4) (*a*) or (*b*) notwithstanding that the contravention or failure referred to in the paragraph concerned resulted in the commission of an offence.

(6) The Court shall not make an order under this section unless it is satisfied —

(a) in the case of an order referred to in subsection (4) (*a*) —

(i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;

(ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or

(iii) that it is in the public interest that the order be made;

(b) in the case of an order referred to in subsection (4) (*c*), that the person subject to the

civil liability concerned acted honestly; and

(c) in every case, that no substantial injustice has been or is likely to be caused to any person.

On the basis of s 392(2), it is clear that where there is a "procedural irregularity", in the proceeding of a company, the proceeding in question will *not* be invalidated unless substantial injustice (that cannot be remedied by any order of the Court) has been caused. Before we venture forward into a discussion of the relevant case authorities as regards s 392, we should make a few observations at the outset. First, the section was not pleaded by both the Appellant and the Respondents. Secondly, the section was expressly raised and discussed by the Respondents in their opening and closing statements. It would appear that the Appellant, however, did not expressly discuss the (non) applicability of s 392, save for their averment in his opening statement that "[t]he removal of the [Appellant] from his offices in Malaysia Dairy and Modern Dairy constitutes a substantive breach of the articles of those companies and cannot be regarded as a mere irregularity". [note: 36] In this regard, we are somewhat surprised that the Appellant did not, at the trial below, raise the further argument that, even if the breach was a mere irregularity, s 392(2) would still not apply because he had been substantially prejudiced by it. In any case, this is clearly, in the context of the present case, a pure point of law.

54 Case law from Australia (eg, *Re Waldcourt Investment Company Pty Ltd* [1988] WAR 1 and *Australian Hydrocarbons NL v Green* (1985) 10 ACLR 72) would suggest that the onus of satisfying the court that a procedural irregularity has caused or is likely to cause substantial and irremediable injustice rests upon the person challenging the validity of the proceeding (see further *Ford: Principles of Corporations Law* (Butterworths, 2000) at para 7.581) . But the threshold burden of showing that the irregularity in question is of a procedural nature rests on the party seeking to uphold the proceeding. Unless this threshold requirement is met, s 392(2) can have no application.

55 It is trite law that a meeting of the board of directors and an annual general meeting both fall within the meaning of the term "proceeding" in s 392(2) (see *Golden Harvest Films Distribution (Pte) Ltd v Golden Village Multiplex Pte Ltd* [2007] 1 SLR 940("*Golden Harvest*")) and *Welch v Britannia Industries Pte Ltd* [1993] 1 SLR 673). More specifically, it should also be noted that section 1322(2) of the Australian Corporations Act ("the Australian Act") (from which our s 392(2) was adapted from) was held to be applicable to proceedings relating to the removal of a director (see Supreme Court of Queensland decision of *Re Pembury Pty Ltd* [1991] 4 ACSR 759 ("*Re Pembury*")).

56 The next question to consider is whether s 392 could apply if the irregularity was not brought about by inadvertence but by *deliberate choice*. The authorities on this point are not consistent. The Respondents relied on *Re Pembury* as support for the proposition that section 1322(2) of the Australian Act (the equivalent of our s 392(2)) is *not* restricted to instances where the non-compliance is inadvertent or accidental. In this regard, the Respondents pointed out, relying on the judgment of Byrne J in *Re Pembury* at 761, that "[u]nlike section 1322 (3) (which is the equivalent of our s 392(3)) which uses the word "accidental", section1322(2) (the equivalent of our s 392(2)) is not expressly limited to accidental non-compliance. In the circumstances, the legislative intent is for section 1322(2) to be extended to deliberate non-compliance as well." [note: 37] *Re Pembury* was followed in subsequent cases, eg *Greig & Anor as Liquidators of Australian Building Industries Pty Ltd (in liquidation) v Australian Building Industries Pty Ltd* [2002] QSC 138.

57 In contrast, in *Re P W Saddington & Sons Pty Ltd* (1990) 2 ASCR 158 ("*Saddington*"), Young J held that a deliberate choice to convene an invalid meeting was not a "procedural irregularity" within

the meaning of the New South Wales equivalent of our s 392(2) . The views of Young J in *Saddington* were later endorsed by Olsson J in *Electro Research International Pty Ltd and Ors v Stec and Anor* (1996) 20 ACSR 320 at 351. Interestingly, in the later case of *National Australia Bank Ltd v Market Holdings Pty Ltd* [2000] NSWSC 1009 ("*National Australia Bank*"), Young J noted at [24] that there had "not been wholesale acceptance of that decision (*ie, Saddington*")" and did not expressly reaffirm *Saddington*. However, for the purposes of deciding *National Australia Bank*, Young J did not have to decide the issue or to comment further on *Saddington*.

58 Turning to the local decisions, we note that *Re Pembury* was followed in *Golden Village Multiplex Pte Ltd v Golden Harvest Films Distribution (Pte) Ltd* [2006] 3 SLR(R) 599 ("*Golden Village Multiplex*") where the High Court observed (in *obiter*) as follows at [44]:

> Although the first defendant described the irregularity as a "blatant contravention" of Art 118 of the Articles of Association, it did not contend that s 392 was inapplicable. In any case, in my view, to invoke s 392(2) it is not necessary that the irregularity arose from inadvertence: see *Re Pembury Pty Ltd* (1991) 9 ACLC 937 in which the court considered the Australian equivalent of our s 392.

The decision of *Golden Village Multiplex* was upheld by this court on appeal although this court did not expressly in its grounds of decision in *Golden Harvest* address the point whether in order to invoke s 392(2), the irregularity must be due to inadvertence. It seems to us that, apart from the reason given by Byrne J in *Re Pembury* arising from a comparison of the literal wording between s 392(2) and s 392(3), to hold s 392(2) to be inapplicable whenever the non-compliance is not due to inadvertence would deprive the provision of much of its efficacy. It must be borne in mind that the nature and object of the requirement, which is the subject of the irregularity, would naturally vary from case to case. Some requirements which are not complied with may be so trivial that the parties have deliberately decided to overlook it and if in such a case the court is compelled to hold the proceeding to be invalid because the non-compliance was not due to inadvertence, that would seriously undermine the utility of the statutory provision. Ultimately it is the significance and the materiality of the non- compliance which should be decisive. This is where the proviso of "substantial injustice" in the provision will come into play. In our view, that is where the focus should be, and not whether the non-compliance was accidental or otherwise. *Only if it is shown that the non-compliance has caused substantial injustice or prejudice to an interested party, should the proceeding be held to be invalid by the court*.

The Appellant's Case

59 The Appellant contended that the irregularities in the present case constituted *substantive* breaches, as opposed to *procedural* breaches. [note: 38] He argued that the Judge had failed to analyse whether the non-compliance was of a procedural or substantive nature; instead she assumed that the breach was procedural and proceeded on that basis. We note that the argument that the non-compliance was a substantive one was in fact raised and ventilated by the Appellant in his opening statement at the trial below. According to the Appellant, if the irregularity is not merely procedural but substantive, the proceeding is invalid unless the Court is persuaded to make an order under section 392(4) to validate it (see for example *Re Goodwealth Trading Pte Ltd* [1990] SLR 1239 at 1245). In this connection, the Appellant pointed out that the Respondents had *not* made any such application pursuant to section 392(4).

60 The primary irregularity in connection with the Malaysia Dairy Board meeting was the failure to make a request to the Appellant to vacate office pursuant to Article 88(c) which, to repeat, is as follows:

The office of director shall, *ipso facto*, be vacated:-

…

(c) If he shall be *requested to vacate office* by all the other Directors, they pass a resolution that he has been so requested and by reason thereof has vacated his office.

[Emphasis added]

It is not disputed that there are two requirements to be fulfilled before a director can be deemed to have vacated office pursuant to Article 88(c). First, there must be a request for him to vacate office and this request must come from the other directors. Second, there must be a resolution passed stating that the director in question has been so requested and that he is thereby deemed to have vacated office. It is also not disputed that the first step was not complied with in the present case. The question that must be asked is whether this omission or irregularity was procedural or substantive in nature?

61 Turning to Modern Dairy and the resolution passed at its AGM on 21 November 2007, the Appellant advanced the same argument as above to the effect that the irregularity concerned was a substantive one. The relevant resolution purportedly passed at the deemed AGM of Modem Dairy on 21 November 2007 was in the following terms:

(a) Mr Thio Keng Poon be requested to vacate, and by reason thereof is deemed to have vacated, the office as a Director, Managing Director and Chairman of the Company with immediate effect.

The resolution appears to have resolved that a request for the Appellant to resign would be addressed to him and that by reason of such a request, he would be deemed to have vacated his office. The irregularity which the Appellant has pointed out, and which he is taking issue on, relates to the fact that there was in fact no written request made by his co-directors to him asking him to resign and that this omission therefore resulted in the resolution becoming wholly invalid..

The Respondents' Case

62 The Respondents strenuously contended that concepts such as good faith and natural justice or due process should *not* be implied into Article 88(c). In this connection, the Respondent vigorously made the following propositions. First, the Respondent argued that there is nothing express in the language of Article 88(c) which requires the incorporation of the concepts of natural justice or due process in the construction of that article. In any event, the Appellant did not plead that natural justice and or due process are to be implied. Second, Article 88(c) states that the office of director is "*ipso facto*" vacated when the request is made and the resolution is passed. Speed is therefore of the essence, and it militates against the implication of natural justice or due process, which would entail delay. Third, Article 88(c) confers on the requesting directors a wholly unrestricted power. Their power to remove the requested director is not confined to cases of misconduct. Finally, the Appellant did not even have a right to be given notice (let alone reasonable notice) of the resolution to remove him. In this regard, Article 112 of the Malaysia Dairy AA specifically provides that "It shall not be necessary to give notice of a meeting of the Board to any Director for the time being absent from Singapore and West Malaysia", and it is undisputed that the Appellant was away from Singapore and West Malaysia at the material time.

63 Much reliance was placed by the Respondent on the case of *Gaiman v National Association for*

Mental Health [1971] 1 Ch 317 ("*Gaiman*") which discussed an article similar to Article 88(c). There the article in question ("Article 7B") provided that a member shall forthwith cease to be such if requested by resolution of the council to resign, but that the member could appeal against that resolution to the association in general meeting. Indeed, Article 7B provided that:

> "A member of the association shall forthwith cease to be a member: - … (B) If he is requested by resolution of the council to resign, but so that a member so requested to resign may within seven days after notice of the resolution shall have been given to him by notice in writing to the secretary of the association appeal against such resolution to the association in general meeting…"

64 In *Gaiman*, a meeting of the council resolved that 302 members known or suspected to be scientologists be requested to resign. Notice of the resolution was served on all the members concerned on the same day as the meeting. Indeed, there were no indications that any procedural breaches (in so far as the express requirements of Article 7B were concerned) had occurred: there was in fact a resolution requesting the members to resign. Thus Article 7B was observed. What the plaintiff in *Gaiman* complained of was that, *inter alia*, the members affected were not accorded a hearing, and therefore, principles of natural justice were not complied with. In this regard, Megarry J rejected that proposition, holding at p 336 that the Court would not imply a term that natural justice or due process was to be observed "in the teeth of sufficient indications that the principles of natural justice are not to apply".

Procedural or substantive

65 For the purposes of this appeal, the critical question, in relation to s 392(2), is whether the irregularity, *ie*, the failure to give a notice to the Appellant asking him to resign, is procedural or substantive in nature. Unless we rule that the irregularity is a procedural one, then s 392(2) can have no application and this would mean that the purported removal of the Appellant from the various positions he held in Malaysia Dairy will be of no effect.

66 We would be stating the obvious if we say that the question of whether a particular irregularity is procedural or substantive can often be a strikingly difficult issue to determine: see *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Ltd* [2005] NSWSC 1005 ("*Cordiant*"). Palmer J in *Cordiant* enunciated the following principles in addressing that question (at [102] to [104]):

> What, then, is the substantive irregularity as distinct from a procedural irregularity? In my view, the cases concerning the distinction between a substantive law or rule and a procedural law or rule provide some guidance. In *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ said (at 543-544):
>
> > matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are maters that, on their face, appear to be concerned with issues of substance, not with issues of procedure. Or to adopt the formulation put forward by Mason CJ in McKain "rules which are directed to governing or regulating the mode or conduct of court proceedings" are procedural and all other provisions or rules are to be classified as substantive.
>
> In the light of this observation and of the decisions in *Industrial Equity, ANZ Nominees, Scullion* and *Link Agricultural*, I think that the following general proposition may be formulated for the purposes of the application of the Corporations Act, s 1322:

- what is a "procedural irregularity" will be ascertained by first determining what is "the thing to be done" which the procedure is to regulate;

- if there is an irregularity which changes the substance of "the thing to be done", the irregularity will be substantive;

- if the irregularity merely departs from the prescribed manner in which the thing is to be done without changing the substance of the thing, the irregularity is procedural.

The application of such a proposition in any particular case will depend upon the starting point, *ie*, defining "the thing to be done". Different answers to the question will be found depending on how broadly or narrowly one defines "the thing to be done".

67 In *Wagner v International Health Promotions* 15 ACSR 419, as in the present case, two requirements had to be fulfilled before an administrator to the company could validly be appointed: first, the directors had to resolve that the company was or was likely to become unable to pay its debts; secondly, the directors had to resolve upon the appointment of a particular individual as administrator. Although the insolvency of the company was discussed at the board meeting that was held, there was no formal resolution on that aspect. The directors simply voted upon the appointment of an administrator. This was held to be a substantive as opposed to a procedural irregularity which could not be cured by the Australian equivalent of section 392(2).

68 Such an irregularity may be contrasted to that in *Re Caysand No 64 Pty Ltd* (1993) 11 ACLR 1197, relied upon by the Respondents, where the court considered that a failure to comply with a statutory time limit was a procedural irregularity.

69 It appears to us that to determine whether a non-compliance is of a procedural or substantive nature, one must assiduously examine the aim or object of the requirement which was not complied with. The failure to serve upon the Appellant a notice to resign, as required by Article 88(c), is certainly not of the same genre as those irregularities listed in s 392(1). As we see it, the requirement of such a notice would serve two complementary purposes. First, it gives notice to the director in question that his services on the Board are no longer appreciated by his co-directors. He will then have to consider his available options. He may well decide to leave voluntarily and resign, thus preserving his dignity. Second, and in the alternative, he may wish to bring it up and appeal to his co-directors and convince them that his remaining on the Board would be in the best interests of the company. The failure to serve the Appellant with such a notice would deny him these choices. This, to our minds, can hardly be considered to be a matter of procedure. It is also apparent to us that the giving of choices to the director in question, must have been the obvious intention behind the provision; otherwise the provision could have simply provided that a director shall cease to be a director upon a resolution being passed by the Board or upon the request to resign being made to him by his co-directors and nothing else (see the Hong Kong decision of *Samuel Tak Lee v Chou Wen Hsien* [1984] 1 WLR 1202 ("*Samuel Lee*")at [71]). Here, we are reminded of the Malaysian Court of Appeal decision in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors* [1995] 2 MLJ 770, where Justice Gopal Sri Ram pertinently asked (at 804), in relation to a *pari materia* Malaysian provision, "How can it ever be said that a Director's removal at a meeting of which notice to him is withheld is a mere irregularity?"

70 The factual matrix of the present case is quite different from that of *Gaiman*. In *Gaiman*, notice was in fact given to the members concerned requesting them to resign. Moreover, the rules there provided for an appeal process to the affected members. In the case at hand, it is not disputed that the procedural requirement of Article 88(c) itself (as regards the requirement for the Appellant to be

formally requested to step down) was breached.

71 At this juncture, we will refer to the case of *Samuel Lee*, a decision from Hong Kong which went all the way to the Privy Council and on which the Respondents relied. There, the relevant provision (Article 73(d)) read "The office of [a director] shall be vacated: …. (d) if he is requested in writing by all his co-directors to resign." The plaintiff, a shareholder and director of the company in question, was embroiled in some dispute with his co-directors over the accounts. He asked for a Board meeting whereupon his co-directors gave him notice, pursuant to Article 73(d), requesting his immediate resignation. The plaintiff instituted proceedings and pleaded bad faith on the part of the directors and sought, *inter alia*, for a declaration that the notice requesting his resignation was invalid. Essentially, the Privy Council held that, in the interest of business efficacy (at 1207), "it is necessary to construe the articles strictly in accordance with its terms without any qualification".

72 Quite clearly, *Samuel Lee* can be distinguished from the present case in two respects. First, the terms of Article 73(d) are different from those of Article 88(c) of our case here. Under Article 73(d), upon service of the notice to resign, the director in question would *automatically* lose his directorship. No further actions were required to be taken by the board of directors. But under Article 88(c) of our case, the Board of Directors must pass a resolution to *confirm* the decision requiring the Appellant to leave the Board. Second, unlike the position in *Samuel Lee*, the Appellant's co-directors did not serve on him the notice to resign as required under Article 88(c). The Privy Council in *Samuel Lee* remarked that such a provision should be construed according to its terms. Taking that approach and as the Respondents have not complied with the terms of Article 88(c) by serving on the Appellant a notice to resign, the subsequent resolution by the Board of Directors to deem him as having vacated his positions could not have any effect because the pre-condition has not been satisfied.

73 Accordingly, we are of the opinion that the non-compliance in question was *not* of a procedural nature and, therefore, s 392(2) cannot apply to validate the resolution of the Board of Malaysia Dairy taken on 20 November 2007 to remove the Appellant from the offices he held in the company.

Substantial injustice

74 We now turn to consider the alternative argument of the Appellant that the resolution of the Board of Malaysia Dairy was invalid because the irregularity (*ie*, non-compliance with the issue of a notice to the Appellant to resign) had caused substantial injustice or prejudice to him. In view of our decision that the irregularity was not of a procedural nature, s 392(2) cannot apply and there is therefore no real necessity for us to consider this alternative argument. However, for very much the same reasons which we have alluded to above (at [69]), we think it must also follow that the non-compliance has caused substantial injustice to the Appellant.

75 The meaning of substantial injustice has been discussed by the courts in various jurisdictions on numerous occasions, and in this regard, the following principles can be distilled. First, it is axiomatic that there must be a direct link between the procedural irregularity in question and the injustice suffered (see *Golden Harvest* at 955-956, *Mamouney v Soliman and Others* (1992) 9 ASCR 63 at 71 ("*Mamouney*")). Secondly, the injustice must be of a "substantial" nature. In essence, what this means is that the injustice must be real, rather than theoretical or fanciful (see *Bell Resources Ltd v Turnbridge Pty Ltd & Others (No 2)* (1988) 13 ACLR 762 at 766). There must, therefore, be some basis or indication on the face of the evidence before the court that the aggrieved party had suffered injustice or would suffer injustice as a result of the procedural irregularity occurring. Thirdly, the aggrieved party must show that there *may* or could have been a different result, if not for the occurrence of the procedural irregularity (see *Mamouney* at 71 where Hodgson J made a general reference to the cases of *Re Pembury* and *Poliwka v Heven Holdings Pty Ltd* (1992) 7 ACSR 85). This

is a fundamentally important point. In this regard, the aggrieved party does *not* need to show that there would certainly have been a different result if not for the irregularity. All he has to show is that there *may* or *could* have been a different result. This possibility, however, should not be a theoretical or fanciful one. One must bear in mind the importance of operating in the realm of reality. Here, we observe that the evidence before us raised a distinct possibility that the Appellant may not have been removed as a director had he been able to present his case to all the directors of Malaysia Dairy (see below at [77]), but we will not venture further than this. As we have emphasised below at [77], it is certainly not for this court to speculate on what the actual outcome of the Board meeting of Malaysia Diary would have been had the proper process been followed. This, in essence, was the substantial injustice or prejudice that the Appellant has suffered as a direct result of the procedural irregularity occurring.

76 In a sense, it is apposite to note that the substantial injustice proviso in s 392(2) reflects the common law position. In this regard, it may be useful to refer to the following observations made by Lord Wilberforce in *Malloch v Aberdeen Corp* [1971] 1 WLR 1578 ("*Malloch*"), at 1595:

> A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain.

In the same vein, Lord Wilberforce also remarked as follows:

> The appellant has first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make. A breach of procedure whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure.

While the principles enunciated aforesaid by Lord Wilberforce are not in doubt, the decision in *Malloch*, where the court refused relief, rested on special facts. There, a teacher was dismissed without being heard. There, new regulations made by the Secretary of State, which had the force of law, required all certified teachers to be registered. The regulations also required all education authorities to dismiss from employment all certified teachers who did not register. The plaintiff was one of a number of certified teachers who objected to applying for registration. The education authority had no choice but to dismiss him. In any event, even if the authority had formally complied with the rules of natural justice, the result would still have been the same as the education authority would have had no option in the matter. Thus, the views of Lord Wilberforce quoted above should be viewed in that light. The court was not saying that it was not necessary to accord the plaintiff a right to be heard but that on account of the new regulations it would not have served any purpose whatsoever. That was why Lord Wilberforce observed that "the court does not act in vain".

77 In the present case, by not giving the notice to resign to the Appellant, the latter was denied his opportunity to exercise his choice, and if he should decide to stay and present his case before the full Board (and here we would add that his subsequent conduct, particularly the institution of Suit 734 and Suit 10 clearly demonstrated such intention), he had indeed been seriously prejudiced. The Judge said at [82] that "there was nothing to stop the [Respondents] from removing the [Appellant] from his positions in [Malaysia Dairy] and Modern Dairy by complying with the requisite procedural requirements even if he was reinstated". But we would hasten to caution that it is not for this court, or any court, to speculate whether, if he had made his case to the full Board, he would or would not be allowed to retain the offices which he had been stripped off. This would not necessarily be a

foregone conclusion, unlike the position in *Malloch* (see [76] above). All we need observe is that there is evidence to suggest that not all his daughters (who are also directors) were hostile towards him. Furthermore, the fact that Malaysia Dairy and Modern Dairy are family owned and operated companies was not lost on us. The fact that Png and Wee had to wait until the Appellant was away from Singapore for a medical reason before they made their move to strip him of his offices summarily speaks volumes. In the premises, it is our view that the non-compliance with Article 88(c) in this case has caused him substantial injustice or prejudice.

78 Turning to Modern Dairy and the resolution passed at the AGM on 21 November 2007 (see above at [31]), the Appellant accepted that Article 82(g) of Modern Dairy was *not* part of the Modern Dairy AA at the time. [note: 39] However, he contended that the resolution itself (see above at [31]) was defective in nature because there was in fact *no* request made to the Appellant to step down as a director. [note: 40] The exact wording of Resolution 6 stated unambiguously that the Appellant had been "requested to vacate, and by reason thereof is deemed to have vacated, the office as a Director, Managing Director and Chairman of the Company with immediate effect." [note: 41] On the facts and evidence, it is indubitable that no such request was issued to the Appellant. The entire premise upon which the resolution was based was therefore patently wrong. Accordingly, we agree with the Appellant that the purported removal of him from the offices he held in Modern Dairy is of no effect.

79 Furthermore (and this is a point, which although not specifically raised by the Appellant, is entirely in line with his complaint of not being treated fairly or in accordance with the rules of natural justice), we are of the view that the Appellant should have been informed that it was proposed at the AGM of 21 November 2007 to remove him as a director before the expiry of his term. This is wholly consistent with fundamental principles of justice and fairness. He had legitimate expectations to serve out his term. If it was proposed to remove him before his term expired, he should have been informed of the proposal so that he would have the option of voluntarily resigning rather than suffering the odium or indignity of being removed. Here, surreptitiously, and with no notice given to the Appellant, h e was summarily removed as Director, Managing Director and Chairman of Modern Dairy by a resolution adopted at the AGM on 21 November 2007 (where Pyn was the appointed representative of Malaysia Dairy at Modern Dairy's AGM) [note: 42] . We recognise that as the Appellant is not a shareholder of Modern Dairy, he would have no *locus standi* (not being a member) to argue that he should have been served 14 days notice pursuant to Article 55 of Modern Dairy. But this should certainly not in any way dilute the Appellant's *equitable* right to be given timely notice of a proposal to remove him as a director (see *Chan Choon Ming v Low Poh Choon* (1994) CSLR VI [254] followed by GP Selvam J in *Polybuilding (S) Pte Ltd v Lim Heng Lee & Ors* [2001] 3 SLR 184 at [11]) so that he would be in a position to decide his options. In light of this, we therefore find the submission by the Respondents, that notice of an intended resolution to remove the Appellant as a director need not be given to him, astonishing.

Issue 2: Whether the Appellant ought to have succeeded in his claim for minority oppression pursuant to s 216 of the Companies Act

80 Section 216 of the Companies Act reads as follows:

> Personal remedies in cases of oppression or injustice
>
> 216. —(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister may apply to the Court for an order under this section on the ground —

(*a*) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner *oppressive* to one or more of the members or holders of debentures including himself or in *disregard of* his or their *interests* as members, shareholders or holders of debentures of the company; or

(*b*) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which *unfairly discriminates* against or is *otherwise prejudicial* to one or more of the members or holders of debentures (including himself).

[emphasis added]

81 A central plank in the Appellant's argument here is that the Understanding existed and operated to regulate the business affairs of the Thio Group (the Appellant has since abandoned his contention that the Assurance existed). The Appellant's complaint is that the rest of the Thio family (his sons, daughters and wife) wilfully disregarded the Understanding by attempting to remove him from the various executive positions which he held in the Thio Group. [note: 43] The Appellant alleged that the majority of directors in Malaysia Dairy had abused their voting powers by voting without good faith and for ulterior reasons and not for the good of the company. In this regard, the Appellant argued that the wrong which he suffered ought to be remedied under s 216 of the Companies Act.

82 The Appellant conceded that he never "[spoke] or [discussed] the Understanding with his children". [note: 44] He, however, insisted that an express agreement is *not* required to give effect to the Understanding. [note: 45] Furthermore, the Appellant pointed to a lengthy list of the various "practices and conventions" and the manner he conducted the affairs of the Thio group in support of his contention that the Understanding in fact existed. After a careful examination of the evidence the Judge held that the Appellant had failed to prove, on a balance of probabilities, that there was such an Understanding. There is hardly any basis for us to disagree with such a finding of fact by the Judge.

83 That, however, is not the end of the matter. The Appellant argued that, as a member, he has legitimate expectations which are enforceable. [note: 46] Such legitimate expectations may emanate from outside the Corporate Constitution comprising of the MA and the AA. The Appellant cited the House of Lords decision of *Ebruhimi v Westbourne Galleries Limited* [1973] AC 360 ("*Ebruhimi*") in support of his proposition.

84 The Appellant was quick to point out that the Thio Group was akin to a family company set up by a patriarch and resembled that of a partnership built on mutual trust and confidence. In such an instance, the Appellant submitted that the court will look beyond the MA and the AA when determining the rights that the members of the companies are entitled to. In support, he cited this court's decision in *Chow Kwok Chuen v Chow Kwok Chi & Ors* [2008] 4 SLR 362 ("*Chow Kwok Chuen*").

85 We have absolutely no quarrel with the principle which the Appellant quoted [note: 47] from *Chow Kwok Chuen* at [31]:

… [A] person who joins a company should accept and work within the framework set out in its memorandum and articles of association. The reason an incorporated partnership is treated somewhat differently is because of the express or implicit understanding among the partners before incorporation as to how the new company is to be run or managed and equity will not allow a person who is a party to that understanding to renege on that understanding.

> Compare that situation with that of a company formed by a patriarch for the family: it would be clearly the expectation of the patriarch that the children would co-operate, work the company and make it grow for the common good of themselves and their descendants. When a child receives shares in such a company from the patriarch, either during the latter's lifetime or under his will, the child is not really entering into the company of his or her own free will. So the rationale alluded to at [19] above does not apply to such a scenario. Quite naturally he or she should aim to work harmoniously with his or her siblings in managing the company and in fulfilling the hopes of the patriarch, and in turn to prosper the company. Co-operation and mutual trust among sibling shareholders or directors are central to such a family company and their absence is as critical as in a quasi-partnership…

Having said that, it seems to us clear that caution must be exercised before one applies the principles enunciated in *Chow Kwok Chuen* and *Ebruhimi*. Both those cases were concerned with an application to wind up a company under the "just and equitable ground", a subject matter which stands in stark contrast from the present case where the Appellant is seeking not to wind up any of the companies, [note: 48] but an order that he be reinstated as Director, Managing Director and Chairman of Malaysia Dairy and Modern Dairy. [note: 49]

86 We do not see any merit in the Appellant's arguments that he had "legitimate expectations arising from the terms of the Understanding" [note: 50] . On the evidence before the court, the Understanding was simply not proved to have existed. If the Understanding was proved on a balance of probabilities to have existed, then there would have been a basis for the Appellant to argue that he had legitimate expectations arising out of it. Indeed, the main plank in the Appellant's case was that "[i]n breach of the Appellant's legitimate expectations *arising from the Understanding*, the Respondents had conducted the affairs of both Malaysia Dairy and Modern Dairy in a manner oppressive to the Appellant [emphasis added]". [note: 51] Unfortunately for the Appellant, his failure to prove the existence of the Understanding must necessarily mean that his s 216 claim would also fail. Indeed, the Appellant accepted under cross-examination that if the Understanding did not exist, "the rest of [his] family members can get together at any time and remove [him]". [note: 52]

87 Moreover, we would reiterate that even if the Appellant had proven the existence of the Understanding, he cannot rely on it to obtain his reinstatement as Chairman, Managing Director and Director of Malaysia Dairy for two reasons. First, clause 15 of the Deed of Settlement provides that it is the entire agreement between the parties and supersedes all prior agreements or understandings between them. Therefore, the Understanding cannot stand in the face of clause 15. Second, as clause 13 of the Deed of Settlement (see [8] above) provides that the companies within the group are to be "managed and operated for profit and in accordance with best corporate practices to return to shareholders maximum returns" the Understanding must be applied consistently, and in harmony with clause 13. Any legitimate expectation that the Appellant harboured pursuant to the Understanding must be subject to clause 13. In the result, the Appellant's claim based on oppression must fail.

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88 Having dealt with the main appeal, it only remains for us to address briefly the Appellant's appeal against an Order of Court made by the Judge, disallowing the amendments proposed by the Appellant in relation to the 3rd paragraph of the draft Judgment which related to the Counterclaim put forward by the Respondents in Suit 10.

> IT IS FURTHER ADJUDGED that in respect of [Malaysia Dairy's] Counterclaim in [Suit 10] there be

> interlocutory judgment for [Malaysia Dairy] against the [Appellant] for an inquiry to be taken for all sums claimed by [Malaysia Dairy] from the [Appellant] in breach of the [Appellant's] fiduciary duties with the costs of the inquiry to be reserved to the Registrar having conduct of the inquiry.

The Appellant contended that the above portion of the judgment should be amended in the following manner:

> IT IS FURTHER ADJUDGED that in respect of [Malaysia Dairy's] Counterclaim in [Suit 10] there be interlocutory judgment for [Malaysia Dairy] against the [Appellant] for an inquiry to be taken for **the sum of S$45,529.64 and/or all sums** claimed by [Malaysia Dairy] from the [Appellant] **for the period of 1 January 2005 to 30 September 2007** in breach of the [Appellant's] fiduciary duties with the costs of the inquiry to be reserved to the Registrar having conduct of the inquiry.
>
> [Suggested amendments by the Appellant in bold]

89 In our view, the Appellant's appeal against the decision of the Judge *not* to limit the scope of the inquiry to the sum of $45,529.64 and to the period stated in the E&Y report should be dismissed for two reasons. First, the Appellant's proposed amendment to include the above limitation is not consistent with the Respondent's counterclaim where no such restriction is stated. Secondly, the Judge's reasoning for not including the above limitation was practical and reasonable. Indeed, in the event that it is discovered that the Appellant had made double claims on occasions outside the period covered by the E&Y report, the Respondents would need to initiate a fresh action if the scope of the inquiry was restricted in the manner suggested by the Appellant. This would only serve to incur further costs and cause a waste of time, which will certainly not benefit any party. We would, in this connection, only add one caveat. The sum which the inquiry will determine to be due from the Appellant to Malaysia Dairy would, of course, be subject to the law on limitation.

Conclusion

90 In the result, we would declare that the purported removal of the Appellant from the various offices he held in Malaysia Dairy and Modern Dairy is of no effect, and accordingly, his appeal as regards Suit 734 is allowed. However, his appeal as regards Suit 10 for oppression is dismissed. As to the question of costs for the action below and these appeals, we would like to hear the parties on it and they are requested to make their submission to us within ten days hereof.

[note: 1] Appellant's Case ("AC"), para 3

[note: 2] Corporate structure of Thio Group reproduced in Appellant's Core Bundle ("ACB"), Vol IV, p. 476

[note: 3] Respondents' Case (RC), para 14; Various Share Restructuring exercises: AC, paras 67-71

[note: 4] ACB, Vol 4, pgs 477 to 493

[note: 5] See Clause 10(a) of the Deed of Settlement, referred to in the previous paragraph of the BM.

[note: 6] RC, paras 21 to 23

[note: 7] RC, paras 24 to 26

[note: 8] ACB, Vol 3, pgs 341 to 368

[note: 9] AC, para 35

[note: 10] ACB, Vol 4, p. 394

[note: 11] Respondents' Core Bundle ("RCB"), p. 94 (lines 15 to 25) & p. 95 (lines 1 to 2)

[note: 12] RCB, p. 83 (lines 8 to 24)

[note: 13] ACB, Vol 4, p. 418

[note: 14] ACB, Vol 3, pgs 205 to 206; Vol 4, p. 395

[note: 15] ACB, Vol 4, pgs 390 to 392

[note: 16] ACB, Vol 4, pgs 401 to 402

[note: 17] Judgment, para 20; RC, paras 41 to 51

[note: 18] ACB, Vol 2, Statement of Claim, para 2.2.1(a), (b) and (c)

[note: 19] ACB, Vol 3, p. 170, Appellant's AEIC, para 5.4.6

[note: 20] ACB, Vol 2, p. 58, Statement of Claim, para 1.4.2

[note: 21] AC, para 61

[note: 22] Ac, para 168

[note: 23] AC, para 168

[note: 24] ACB, Vol 3, p. 212, Appellant's AEIC, para 7.8.6

[note: 25] Judgment, paras 39 to 41

[note: 26] Appellant's Supp Subs, dated 21 Oct 09, p. 2, para 9

[note: 27] [53] of Judgment

[note: 28] ACB, Vol 3, p. 290

[note: 29] AC, para 174

[note: 30] AC, para 175

[note: 31] RC, para 89

[note: 32] ACB, Vol 4, p. 311

[note: 33] AC, para 103

[note: 34] AC, para 94

[note: 35] AC, para 97

[note: 36] Para 9.1.5 of Plaintiff's Opening Statement dated 20/3/2009

[note: 37] Respondents' Submissions In Response to the 3 Questions Posed by the CA (RS3), dated 8 Oct 09, p. 27, para 50(c)

[note: 38] Appellant's Supplementary Submissions (ASS), dated 8 Oct 09, p. 16, para 16(j); p. 20, para 22

[note: 39] Appellant's submissions dated 21 Oct 2009, para 8

[note: 40] Appellant's submissions dated 21 Oct 2009, para 8

[note: 41] ACB, vol IV, p. 402

[note: 42] ACB, Vol 4, pgs 390 to 392

[note: 43] AC, para 144(i)

[note: 44] AC, para 149

[note: 45] AC, para 146

[note: 46] AC, para 155

[note: 47] AC, para 157

[note: 48] ACB, Vol 2, p. 71

[note: 49] ACB, Vol 2, p. 71

[note: 50] AC, para 161

[note: 51] AC, para 180; See further AC, para 185

[note: 52] RCB, p. 5, lines 19-22