Chang Benety and others *v* Tang Kin Fei and others
[2011] SGCA 59

Case Number	: Civil Appeal No 148 of 2010
Decision Date	: 04 November 2011
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Lim Teong Jin George SC and Foo Say Tun (Wee, Tay & Lim LLP) for the appellants; Thio Shen Yi SC and Karen Teo (TSMP Law Corporation) for the respondents.
Parties	: Chang Benety and others — Tang Kin Fei and others

Companies

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2011] 1 SLR 568.]

4 November 2011

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

1 This is an appeal against the decision of the trial judge ("the Judge") in *Tang Kin Fei and others v Chang Benety and others* [2011] 1 SLR 568 ("the Judgment"), where the Judge validated certain resolutions passed at several inquorate directors' meetings of a company, PPL Shipyard Pte Ltd ("the Company"), under s 392 of the Companies Act (Cap 50, 2006 Rev Ed). We allowed the appeal and now give the detailed grounds for our decision.

Facts

Parties to the dispute

2 The Company was incorporated in 1997 and is in the business of designing and constructing offshore drilling rigs. According to the Appellants, its business was largely built up by the efforts of first Appellant, Benety Chang ("Chang") as well as and the second Appellant, Anthony Aurol ("Aurol").

3 Prior to 2001, the majority shareholders of the Company were PPL Holdings Pte Ltd ("PPLH"), a wholly-owned subsidiary of Baker Technology Ltd ("Baker"), a public listed company which held 97% of the shares. The remaining 3% of the shares in the Company were held by E-Interface Holdings Ltd ("E-Interface").

4 On 29 March 2001, 50% of the shares of the Company were sold by PPLH to Sembcorp Marine Ltd ("SCM").

5 On 13 November 2001, E-Interface became a wholly-owned subsidiary of PPLH.

6 In 2003, SCM increased its shareholding in the Company to 85%. As the majority shareholder, SCM nominated six of the nine directors of the Company.

7 The Appellants and Respondents are all directors of the Company. The three Appellants were

PPLH's nominees while the six Respondents were SCM's nominees. Two of the Appellants, Chang and Aurol, are also directors of PPLH.

8 Aurol was removed as a director of the Company on 8 June 2010 on the ground that he had allegedly passed on the Company's confidential information to Yangzijiang Shipbuilding (Holdings) Ltd ("Yangzijiang"), a company which subsequently took over Baker. The other two Appellants, Chang and Douglas Tan, are still directors of the Company.

Background

9 For a better picture of the dispute between the parties, reference must first be made to the shareholders' agreement entered into between PPHL and SCM on 9 April 2001 ("the Shareholders' Agreement") [note: 1]. It provided for the appointment of six directors, with PPLH and SCM appointing three directors each. Clause 5.3 of this agreement [note: 2] provided that the quorum for a director's meeting is two, *provided that at least one director from PPLH and SCM are present*. Following the Shareholder's Agreement, Art 98 of the Company's articles of association [note: 3] was amended to take into account the agreed arrangement that for there to be a quorum, at least one director from each side must be present at a meeting of the board of directors.

10 The arrangements in the Shareholders' Agreement and articles of association regarding the quorum for a meeting of the board of directors were not changed after SCM became the majority shareholder of the Company by amassing 85% of the Company's shares in 2003, although (as already noted) the number of directors was increased to nine, with six appointed by SCM.

11 The chain of events leading to the passing of the resolutions in dispute began on 16 April 2010, when Yangzijiang issued a binding letter of offer to Baker to acquire all its shares in PPLH for US$155m ("the Offer"). A term of the Offer was that Chang and Aurol were to give undertakings to Yangzijiang that they would not voluntarily resign from their executive positions with the Company for a period of two years with effect from 1 January 2011.

12 On 17 April 2010, Baker disclosed the Offer to the market, and stated that the consideration for the purchase was arrived at by taking into account, *inter alia*, a certain net book value of the Company for the financial year 2009. Subsequently, Baker accepted the offer.

13 PPLH argued that SCM wanted to scuttle the deal for the sale of its shares to Yangzijiang. SCM tendered a cheque for $59,433,522 as payment for the 15% shareholding of PPLH in the Company but PPLH rebuffed this attempt to purchase its stake in the Company.

14 The SCM-appointed directors took steps to strengthen their control of the Company. At a scheduled meeting of the board of directors on 28 April 2010, which was attended by the Appellants, the Respondents introduced matters not specifically stated on the agenda and proceeded to appoint a new managing director to replace Douglas Tan, a new Chief Financial Officer and Joint Secretaries, all of whom were nominated by SCM. Despite the Appellants' objections to these appointments, which were not within the ambit of the present appeal, the appointments were approved by six votes to three.

15 On 10 May 2010, SCM lodged complaints ("the SCM complaints") with the Company that Chang and Aurol had allegedly breached their duty to the Company by disclosing confidential information to Yangzijiang about its book value for the financial year 2009 six days before the said accounts were lodged with the Accounting and Corporate Regulatory Authority. In view of these allegations, the

chairman of the board of directors, Tang Kin Fei ("Tang"), thought it was in the Company's best interests to deal with the allegations immediately. As a result, Don Lee Fook Kang, a SCM-nominated director, e-mailed all the directors on 10 May 2010 to convene a board meeting on 11 May 2010 ("the 11 May meeting") for the purpose of appointing a law firm to advise the Company on the SCM complaints.

16 The Appellants did not attend the 11 May meeting. Tang received a letter from Wee, Tay & Lim, acting for the Appellants, objecting to the meeting as inadequate notice was given and a list of possible lawyers who could be appointed to advise the company was not circulated before the meeting. He also received a letter from Straits Law Practice, acting for PPLH, stating that Aurol had not committed any breach of confidentiality, and even if there was such a breach, it was *de minimis.* The Respondents nevertheless proceeded with the meeting and resolved to appoint WongPartnership to advise and act for the Company in respect of the SCM complaint.

17 On 15 May 2010, SCM commenced Suit No 351 of 2010 against PPLH and E-interface ("the Suit"). In the Suit, SCM sought, *inter alia*, a declaration that when it became the owner of 85% of the issued and paid up capital of the Company on 9 July 2003, the provisions of the shareholders' agreement and the Company's articles of association, that were premised on an equal partnership with PPLH and E-Interface, ceased to apply. SCM also alleged that the sale of Baker's shares in PPLH was a breach of an implied term that neither party would, without offering its shares in the Company to the other, act in a manner which would cause the other to end up being a "partner" of a party owned or controlled by someone else other than the parties to the shareholders' agreement. SCM claimed various reliefs, including a right to acquire the remaining shares held by PPLH and E-Interface in the Company. PPLH and E-Interface counterclaimed against SCM for, *inter alia*, injunctive relief against the removal the Appellants as directors.

18 Subsequently, WongPartnership, on their own initiative, suggested to Wee, Tay & Lim that another board meeting be convened to discuss their appointment. On 27 May 2010, the Respondents called for another Board meeting to be convened on 3 June 2010 ("the 3 June Meeting"). On 31 May 2010, the Appellants sought confirmation that the meeting would be conducted in accordance with the terms of the Shareholders' Agreement and that each side's directors would therefore have three votes regardless of the number of directors present. The Respondents' solicitors replied on 1 June 2010 to the effect that Art 98 of the Company's articles of association did not restrict the six SCM-nominated directors from casting more than three votes. On 2 June 2010, the Appellants replied that they would not attend the 3 June Meeting. The Respondents proceeded with the 3 June Meeting in the Appellant's absence and passed the following resolutions:

(a) confirming the appointment of WongPartnership to act for and advise the Company;

(b) instructing WongPartnership to investigate the allegations raised in the 10 May letter and advise the Company on its response to the allegations; and

(c) instructing WongPartnership to provide general advice relating to the Suit and the continued operations of the Company.

19 Notwithstanding the resolutions passed at the 3 June Meeting, the Respondents thought it prudent to hold yet another directors' meeting to expressly appoint WongPartnership to represent the Company in the Suit. On 10 June 2010, notice was given that yet another board meeting would be held on 14 June 2010 ("the 14 June 2010 meeting"). Wee, Tay & Lim proposed a circular board resolution to limit WongPartnership's authority in respect of the Suit but the Respondents preferred to give WongPartnership wider authority in the resolution.

20 As there was no agreement, the Respondents passed a resolution at the 14 June 2010 meeting in the Appellant's absence to empower WongPartnership to enter an appearance on behalf of the Company and to accept all documents served in the Suit on the Company's behalf.

21 The Appellants called for a meeting of the board of directors on 21 June 2010 ("the 21 June 2010 meeting"). The agenda included giving wider authority to WongPartnership in relation to the Suit and giving the chairman or any other person nominated by him the authority to give instructions to WongPartnership in relation to the Suit as well as to receive advice from that law firm.

22 On 18 June 2010, Straits Law Practice, acting for PPLH, sent a telefax to the Respondents' solicitors stating that they had no issue with WongPartnership advising and representing the Company in the suit. They suggested that instructions to WongPartnership should be on the basis of unanimous instructions, but were unable to propose a resolution acceptable to all parties. The Respondents then suggested that Douglas Tan, a PPLH-nominated director, be allowed to comment on or add to the instructions given by the chairman or his nominee as an interim measure but this suggestion was not accepted by the Appellants. The 21 June 2010 meeting proceeded without the attendance of the Appellants. The resolutions set out in prayer 5 of the amended application were passed at this meeting.

23 It is noteworthy that there was subsequent progress on the issue of WongPartnership's appointment. On 29 June 2010, WongPartnership wrote to Wee, Tay & Lim to propose that their scope of appointment be to advise and represent the Company in relation to the Suit and to do all things necessary for the conduct of the Suit ("the 29 June Letter"). [note: 4] As an initial step, WongPartnership was to advise the Company on the role and approach which it should adopt in the Suit. Wee, Tay & Lim confirmed that this was acceptable on 1 July 2010 ("the 1 July Agreement").

The decision below

24 The Respondents' prayers in its application (in Originating Summons No 590 of 2010) in the court below were as follows:

> 1. A declaration that the resolution at the board meeting held on 11 May 2010 appointing WongPartnership to advise and act for [the Company] is valid.
>
> 2. Further or in the alternative, a declaration that the resolution at the board meeting held on 3 June 2010 confirming the appointment of WongPartnership to advise and act for [the Company] is valid.
>
> 3. A declaration that the resolutions at the board meeting held on 3 June 2010 that [the Company] instruct WongPartnership to:
>
> (a) investigate the allegations made by [SCM] in a letter dated 10 May 2010 and addressed to the board of directors of [the Company] ("Allegations");
>
> (b) advise [the Company] how it should respond to the Allegations;
>
> (c) provide general advice on any issue relating to the dispute between its shareholders; and
>
> (d) provide general advice on any issue relating to the continued operations of [the Company] –

are valid.

4. A declaration that the resolution at the board meeting held on 14 June 2010 appointing WongPartnership to enter an appearance on behalf of [the Company] and accept service on behalf of [the Company] of any documents served in the action in Suit No 351 of 2010/H ("the Suit") in the High Court of the Republic of Singapore is valid.

5. A declaration that the resolutions at the board meeting held on 21 June 2010 are valid, namely:

(a) That WongPartnership's appointment be expanded such that they may:

i. do all such things arising from or related to the Suit to protect the interests of [the Company]; and

ii. provide advice to [the Company] on how it should respond to the allegations made against it in the Suit.

(b) That, as an interim measure and pending contrary suggestions from WongPartnership, the Chairman of [the Company] or any other person nominated by the Chairman of [the Company] is hereby authorised by [the Company] to provide instructions to and receive advice from WongPartnership on the Suit. Douglas Tan may comment on or add to the instructions provided to WongPartnership. However, where the instructions of Douglas Tan conflict with those of the Chairman of [the Company] or the Chairman of [the Company's] nominee, the instructions of the Chairman of [the Company] or the Chairman of [the Company's] nominee will prevail.

25 The Respondents' position in the court below was that the above resolutions should be declared valid despite the lack of a quorum as they did not result in substantial injustice to the Appellants. [note: 5] They argued that the resolutions had to be validated in order to allow WongPartnership to advise the company on the SCM Complaints as well as the Suit. [note: 6]

26 The Appellants' position, on the other hand, was that the Respondents had breached both the Shareholders' Agreement as well as the Company's articles of association in proceeding with the meetings without a quorum and failing to adjourn them.

27 Clause 5.3 of the Shareholders' Agreement states as follows:

The quorum for the meeting of the Board of Directors shall be (2) directors present in person or by the duly appointed alternatives provided that at any such meeting at least one director nominated by each of the Party shall be present as otherwise there shall be no quorum. At any meeting of the Board of Directors, provided a quorum is present, each party will have three (3) votes irrespective of the number of directors present. If within half an hour of the time appointed for the holding of a Director's meeting, the quorum specified above is not present, the meeting shall stand adjourned to the 7th working day thereafter at the same time and same place. At such adjourned meeting, the required quorum shall be stated as above.

The relevant part of Art 98 provides as follows:

Until otherwise determined by the Board, two Directors shall constitute a quorum *provided that at any such meeting at least one PPLH Director and one SembCorp Director shall be present*

otherwise there shall be no quorum. At any meeting of the Board, provided a quorum is present, every director shall be entitled to one vote save that (a) if less than three PPLH Directors are present, all the PPLH Directors present at the meeting of the Board shall collectively be entitled to an aggregate of three votes irrespective of the number of PPLH Directors present, and (b) if less than three SembCorp Directors are present, all the SembCorp Directors present at the meeting of the Board shall collectively be entitled to an aggregate of three votes irrespective of the number of PPLH Directors present, and (b) if less than three SembCorp Directors are present at the meeting of the Board shall collectively be entitled to an aggregate of three votes irrespective of the number of SembCorp Directors present. If within half an hour of the time appointed for the holding of a Board meeting the quorum specified above is not present, the *meeting shall stand adjourned to the seventh working day thereafter at the same time and same place.* At such adjourned meeting, the required quorum shall be as stated above. Questions arising at any meeting shall be decided by a majority of votes ... [emphasis added]

28 The parties' arguments centred on the application of s 392, which reads as follows:

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.

29 The Appellants argued that lack of quorum was a substantive irregularity incapable of being validated under s 392. [note: 7] Further, they added that even if the lack of quorum was a procedural irregularity, it could not be cured under s 392 as this would lead to substantial injustice. [note: 8] In particular, they contended that the irregularities in question deprived them of their right to a quorum, exposed Aurol and Chang to investigation, and was part of the consistent course of conduct by the Respondents to scuttle the deal between Yangzijiang and Baker for the acquisition by the former of all the latter's shares in PPLH. They also argued that there was no need for to proceed with the application as they had already agreed to WongPartnership's appointment.

30 The Judge held as follows:

(a) The absence of a quorum was, by statute, only a *procedural* irregularity. Both the procedural irregularity and the substance of the resolutions must be considered as part of the holistic approach mentioned in *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] 3 SLR(R) 121 ("*Oriental Insurance*");

(b) Where there is a deadlock in the sense that no quorum can be formed for a board meeting, to allow one party to push ahead with its agenda in the absence of the other party was *prima facie* a *substantial injustice*. It would be for the proposing party to persuade the court why the resolutions should nevertheless be validated;

(c) Prayer 1 was in respect of a resolution passed at a board meeting convened at very short notice and its substance was, in any event, covered by prayer 2. As such no order on prayer 1 was made;

(d) The resolutions in prayers 2, 3(c) and (d), 4 and 5(a) were neutral and in the Company's interests as it had to be represented in the Suit. As for prayer 5(b), it was practical to identify someone from whom WongPartnership could receive instructions. As such, these prayers were validated; and

(e) Prayers 3(a) and (b) were not neutral. They appeared one-sided because they assumed that the proposed investigation regarding the SCM complaints was truly in the Company's best interests. However, the true motive for the investigation had not been established. Hence, these prayers were not validated.

The appeal

31 The Appellants' case [note: 9] before this court was that that the Respondents had breached both the Shareholders Agreement and the Company's articles of association in:

(a) proceeding with the meetings when no director from PPLH was present ("the Quorum irregularity"); and

(b) not adjourning the meetings when there was no quorum ("the Adjournment irregularity").

32 The Appellants reiterated their arguments made in the court below, namely, that the Respondents' actions, as outlined in the above paragraph, involved substantive (and not merely procedural) irregularities that were therefore incapable of being validated under s 392, and that, even if they were procedural irregularities, substantial injustice would be caused to them if the resolutions were validated. In so far as the Respondents were concerned, they also relied on the same arguments advanced in the court below, namely, that the irregularities in question were clearly procedural and may therefore be validated pursuant to s 392, and that no substantial injustice would be caused if there was such validation.

Whether the irregularities are procedural or substantive

33 Section 392(1)(*a*); also reproduced above at [28]), which makes it clear that a lack of a quorum is *prima facie* at least a *procedural* irregularity (*cf* the words "unless the contrary intention appears"), provides as follows:

(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 ...

[emphasis added]

34 The power of the Court to remedy such a procedural irregularity is provided for in s 392(2) (also reproduced above at [28]), as follows:

(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.* [emphasis added]

35 Section 392 is largely based on s 1322 of the Australian Corporations Act (No 50 of 2001). However, the proposition that procedural irregularities will not invalidate court proceedings was adopted from the law relating to insolvency proceedings and may be traced back to s 179 of the Insolvency Act of 1874 (38 Vic No 5) (Qld), which provided as follows:

> No proceeding in insolvency shall be invalidated by any formal defect or by any irregularity unless the court before which an objection is made to such proceeding is of opinion that substantial injustice has been caused by such defect or irregularity and that such injustice cannot be remedied by any order of such court
>
> The court may if it think fit make an order declaring that any such proceeding is valid notwithstanding any such defect or irregularity.

36 The said provision was first applied in the sphere of company law when s 3 of the Companies Act 1893 (57 Vic 3) (Qld) was enacted. The rationale for the provision, as explained during the Parliamentary Debates on the bill, was as follows (see Queensland, *Parliamentary Debates*, Legislative Assembly, 19 July 1893, 239 (*per* Thomas Joseph Byrnes)):

> There is every reason why such a power should be given to the court. It may happen that a meeting is ordered to be held in London at twenty-one days' notice, and that by reason of some defect in the cable only twenty days' notice is given. *It would be an unfortunate thing, knowing as we do that twenty days' notice would be ample to reach every creditor in Great Britain, that the whole of the proceedings should be rendered nugatory because the order could not be carried out in its entirety.* What we propose in this clause is... to assimilate the law to what it is in insolvency and to give the court power, if there is no substantial miscarriage of justice, to make an order declaring that any such proceeding is valid, notwithstanding any such defect or irregularity. It is hardly necessary for me to say more on the subject ... [emphasis added]

37 Considering its history, it appears that s 392 balances the twin considerations that proceedings are not invalidated for minor reasons, and that procedural irregularities do not result in unjust situations that cannot be remedied by the courts. Hence, once a court is satisfied that an irregularity is procedural, the only question is whether it results in substantial injustice that cannot be remedied by an order of court.

38 As noted above, the Appellants argued that the quorum requirement under Art 98 is an expressly negotiated right that gives them an unchallengeable right to create a deadlock. Thus, the lack of quorum in this instance is a substantive irregularity. They relied on this court's decision in *Thio Keng Poon v Thio Syn Pyn and others and another appeal* [2010] 3 SLR 143 ("*Thio Keng Poon*") and other Australian decisions to support their argument that some irregularities, while meeting the description in s 392(1), are nonetheless characterised as substantive breaches.

39 The Respondents countered that it was clear from s 392(1) that a lack of quorum is, without more, a procedural irregularity and there was no reason why s 392(1) should not be given its plain meaning. In addition, they stated that the Adjournment irregularity is covered by s 392(1)(b) and is a procedural step which deals with the process of calling meetings and not the substance of the resolutions passed. [note: 10]

40 In determining whether an irregularity is procedural or substantive, the following passage from the judgment of the court in *Thio Keng Poon* (at [66]) is instructive:

> 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 Pty Ltd* [2005] NSWSCC 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 matters 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: [the Australian equivalent of s 392]:
> >
> > - 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'.

Reference may also be made, in this regard, to R P Austin & I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis/Butterworths, Australia, 14th Ed, 2010) at para 7.582.

41 In *Thio Keng Poon*, where an attempt was made to remove a director, the irregularity concerned a failure by the other directors to first request the director in question to vacate his directorship before passing a resolution to remove him as director. This was a breach of Art 88(c) of the company's articles of association. The court held that this was a substantive breach, which was not an irregularity of the same genre as that contemplated in s 392(1) because it involved a breach of a specific requirement in the articles of association, which clearly specified the procedure for removing a director.

42 The irregularity in *Thio Keng Poon* must be viewed in the context of an irregularity regarding an

attempt to remove a director. This court stated that the failure to serve a notice to resign upon that director, as required by the company's articles of association, was certainly not of the same genre as the irregularities listed in s 392(1). In contrast, in relation to a lack of quorum *per se*, the Singapore courts have largely, in view of s 392(1)(*a*) (reproduced above at [28] and [33]), regarded this as a procedural irregularity (see, for example, *Sum Hong Kum v Li Pin Furniture Industries Pte Ltd* [1996] 1 SLR(R) 529 ("*Sum Hong Kum*") at [35], and *Kwa Ban Cheong v Kuan Boon Sek and others* [2003] 3 SLR(R) 644 at [22]). This is consistent with the approach in Australia (see, for example, *Re Pembury Pty Ltd* (1991) 4 ACSR 759 at 761 and *Whitehouse v Capital Radio Network Pty Ltd* [2004] TASSC 12 at [12]).

43 It follows that the Appellants' contention that the lack of quorum in the present case must be a *substantive* irregularity merely because the parties had expressly negotiated for a deadlock right cannot be accepted. In *Sum Hong Kum*, where deadlock rights were also involved in the context of an inquorate meeting, Warren Khoo J ("Khoo J") correctly found that in view of s 392(1), the lack of a quorum was without more, a procedural irregularity. We respectfully agree with Khoo J and are of the view that the lack of a quorum in the present case is a procedural irregularity. Consequently, the Adjournment irregularity, which arises from the Quorum irregularity, is also procedural. However, this does not mean that the Appellants' contention was wholly without merit when viewed from the perspective of substance (as opposed merely to form) inasmuch as the court will *not* validate a *procedural* irregularity if to do so would be – or is likely – to cause *substantial injustice* to any person (see s 392(6)(*c*) reproduced above at [28]). Put simply, such an approach would achieve, in *substance*, the *same* result which the Appellants had sought in any event provided that they could demonstrate that substantial injustice had indeed been suffered by them. And that is an issue to which our attention now turns.

Substantial injustice

44 As just mentioned, as the Quorum and Adjournment irregularities involve procedural irregularities, a question arises as to whether the Judge erred in exercising his power under s 392(2) to validate the resolutions. This turns on whether the Appellants would suffer substantial injustice if the resolutions are validated.

45 As for what constitutes substantial injustice, this court explained in *Thio Keng Poon* as follows at [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* ([55] *supra*) at 955-956, *Mamouney v Soliman* (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 (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* ([55] *supra*) and *Poliwka v Heven Holdings Pty Ltd* (1992) 7 ACSR 85). This is a fundamentally important point. [emphasis in original]

46 In addition, in *Golden Harvest Films Distribution (Pte) Ltd v Golden Village Multiplex Pte Ltd*

[2007] 1 SLR(R) 940, this court held at [54] that that the determination of substantial injustice under s 392 involved "*a holistic weighing and balancing* of the *various interests* of *all* the relevant parties" [emphasis added]. This holding was endorsed in *Oriental Insurance* at [106].

47 In *Re Goodwealth* [1990] 2 SLR(R) 691 ("*Re Goodwealth Trading Pte Ltd*"), a minority shareholder petitioned to wind up the company. In response, the majority shareholder sought to hold a board meeting to appoint solicitors to represent the company in order to strike out the petition. The minority shareholder and director employed the defensive tactic of not attending the board meeting, which resulted in a deadlock. This court held the lack of quorum caused substantial injustice as it resulted in disputed decisions, namely the appointment of solicitors to represent the company, being taken by one of only two shareholder groups in a company to the exclusion and possible disadvantage of the other shareholder.

48 It bears noting that the quorum requirement in the present case was not merely an ordinary one specifying a minimum *number* as such but also one which related, in fact, to the issue of *representation* on the board of directors. This requirement was to ensure that parties would have their interests represented at board meetings and could thus prevent the Company from making any decision which would prejudice them. The importance of this requirement is evident as it was not only provided for in the articles of association but enshrined in the Shareholders' Agreement as well. In our view, where such a quorum requirement is breached, there will *prima facie* be substantial injustice to the side which exercised its deadlock rights.

49 Undoubtedly, the nature of the resolutions passed at the board meeting must be considered as well. If innocuous resolutions affecting no party's rights are passed, it is most unlikely that any party would apply to the court to invalidate them. As Margaret Chew aptly observed, "[i]n most cases ... where an applicant has sought to impugn an irregularity, the irregularity and the proceedings initiated to invalidate it ... *are likely to be symptoms of a greater struggle between shareholding factions, oftentimes between the minority and the majority*" (see Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 2nd Ed, 2007) at p 14) [emphasis added]. Indeed, in the present case, the deadlock rights were relied on by the Appellants to ensure that resolutions, which advanced the Respondents' complaints against some of the Appellants, were not passed by the board. The resolutions passed by the Respondents in the absence of the Appellants purported to appoint WongPartnership not only to represent and advise the Company in the Suit, but also to investigate the SCM complaints (see [24] prayers 3(a) and (b)). The Judge rightly found that the resolutions relating to the investigation of the SCM complaints were one-sided as they assumed that the proposed investigation regarding the SCM complaints was in the Company's best interests. By instructing WongPartnership to investigate the SCM complaints, the Respondents placed the Appellants, who were the subject of the allegations, in a disadvantageous position. Clearly, the Respondents were attempting thereby to gain a tactical advantage over the Appellants in the Suit. Although the resolutions relating to the SCM Complaints were not validated by the Judge, they shed light on the Respondents' intention to make use of the inquorate meetings to pass resolutions to the possible disadvantage of the Appellants. Following *Re Goodwealth*, it is evident that this cannot be permitted if the resolutions that are the subject of this appeal, whilst seemingly innocuous on their face, still relate to the tactical advantage just mentioned. This is a point to which we now turn.

50 Whether the validation of the said resolutions will cause substantial injustice must be seen in the context of the 29 June Letter. The Appellants had set out their position on the appointment of WongPartnership as follows: [note: 11]

1. We refer to the recent correspondence on this matter. We propose that the scope of our appointment be as follows:

a. to advise and represent the Company in relation to [the Suit] including the filing of pleadings and affidavits, discovery, attendance at court hearings, and to do all other things necessary for the conduct of the Suit on behalf of the Company; and

b. as an initial step, to provide advice to the Company on the role and approach which it should adopt in the Suit, including the immediate steps of filing a Defence to the Counterclaim and a reply affidavit(s) in Summons No. 2651 of 2010/E.

2. Any expansion or variation of our role as solicitors for the Company can be discussed at a later date.

As mentioned above, the Respondent's accepted this proposal on 1 July 2010 (resulting in the 1 July Agreement).

51 However, the resolutions validated by the Judge expanded WongPartnership's role to include the providing of general advice on any issue relating to the dispute between its shareholders and the continued operations of the Company. Furthermore, these resolutions provided that the Chairman of the Company would give and receive instructions from WongPartnership in relation to the Suit. This enlarged scope of WongPartnership's role gave the Respondents a significant advantage over the Appellants for, while the resolutions made provision for Douglas Tan to comment or add to the instructions provided to WongPartnership, the Chairman would have the final say if Douglas Tan's instructions conflicted with the Chairman's instructions. In these circumstances, there would be no check on the Respondents, who could instruct WongPartnership to act to the Appellants' detriment.

52 Essentially, the validation of the resolutions had the effect of overriding the 1 July Agreement on the appointment of Wong Partnership and widening its scope. This constituted, without more, a substantial injustice to the Appellants as they were deprived of the bargain which they had struck with the Respondents and WongPartnership. There was no indication that the 1 July Agreement was, as the Respondents contended, merely an interim agreement. As such, the parties should have abided by the terms of the said Agreement.

53 In the final analysis, after conducting "a holistic weighing and balancing of the various interests of all the relevant parties" (see also above at [46]), we found that validating the resolutions would cause substantial injustice which cannot be remedied by an order of court. As was the case in *Thio Keng Poon*, there was a link in the present case between the procedural irregularities and the substantial injustice suffered by the Appellants. The result might have been different if the Respondents had not proceeded with the inquorate board meetings.

Conclusion

54 For the reasons set out above, we allowed the appeal with costs and with the usual consequential orders.

[note: 1] Core Bundle Vol 2 ("2ACB"), p 27.

[note: 2] 2ACB, p 32.

[note: 3] 2ACB, p 69.

[note: 4] 2ACB, p 150.

[note: 5] Plaintiffs' submissions dated 2 August 2010, p 6, para 6 in Record of Appeal, vol III ("3ROA"), Pt D, p 1154.

[note: 6] Plaintiffs' submissions dated 2 August 2010, p 6, para 6 in 3ROA, Pt D, p 1185, para 88 and p 1186, para 89.

[note: 7] Defendants' (Respondents') skeletal submissions, p 15, paras 33–36 at 3ROA, Pt D, p 1067.

[note: 8] Benety Chang's 1st Affidavit of evidence-in-chief, para 29 at 3ROA, Pt C, p 847.

[note: 9] Appellants' case, p 45, para 92.

[note: 10] Respondent's Case p 35, para 63.

[note: 11] See 2ACB, p 145.