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SHORTER ARTICLES AND NOTES

THE COMPANY IN THE GARDEN OF EDEN: NATURAL JUSTICE AND THE COMPANY

This article examines and evaluates the applicability of the principles of natural justice to companies incorporated in Singapore in the light of a recent Singapore High Court decision. The legal reasoning leading to the decision is also critically analysed. The article further discusses some of the legal and practical implications of the decision.

"But the LORD God called to the man, 'Where are you?' He answered, 7 heard you in the garden and I was afraid because I was naked; so I hid.' And He said, 'Who told you that you were naked? Have you eaten from the tree that I commanded you not to eat from?' The man said, 'The woman you put here with me — she gave me some fruit from the tree, and I ate it.' Then the LORD God said to the woman, 'What is this you have done?' The woman said, 'The serpent deceived me, and I ate.'"
Holy Bible, Genesis 3:9-13 (NIV)

I. INTRODUCTION

WHETHER one subscribes to the Christian faith or not, the proven antiquity of the original text from which the above quotation was derived, indicates that the idea of natural justice has been around for a very long time. The well known jurist, Sir Frederick Pollock, referred to natural justice as the "ultimate principle of fitness with regard to the nature of man as a rational and social being."[1] The term "natural justice" itself conjures a notion of some pre-existent form of fairness whose very existence is beyond debate. While legal recognition of the concept of natural justice may not be in dispute, there is considerable difficulty in delineating its exact boundaries and in enumerating the situations in which it applies. Like morality, the concept of natural justice is hard to deny but difficult to define. This has led one commentator to state that, "So wide is the class of cases when it will be presumed that the rules of natural justice apply that it is the exceptions which repay more careful attention and analysis."[2]

This state of uncertainty is compounded by the fact that courts have been known to take into account a host of considerations in determining whether the rules of natural justice are to apply in any particular case. Lord Tucker for instance once said that:

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1 *Jurisprudence and Legal Essays* (1961), p. 124.
2 De Smith, *Constitutional and Administrative Law*, Street and Brazier, eds. (5th ed., 1985), p. 590.

> There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.[3]

Of similar sentiment was Lord Evershed when he made the following statement in the landmark case of *Ridge* v. *Baldwin:*

> It has been said many times that the exact requirements in any case of the so-called principles of natural justice cannot be precisely defined; that they depend in each case upon the circumstances of that case.[4]

The judicial trend in determining whether the principles of natural justice are to apply in any particular case, is to balance the interest of the individual and the desirability of added procedural safeguards against the attendant administrative cost of introducing and implementing these procedures. Since this clearly entails value judgments, there is often no fail-safe way of predicting how a court would eventually decide.

The pervasive nature of the concept of natural justice has hitherto been most manifest in cases involving decisions made by administrative officers or bodies. Clear examples are decisions made by ministers, government and quasi-government bodies and self-regulatory bodies such as those regulating the conduct of professionals. However, there is nothing in the concept of natural justice which dictates that its application be restricted to such cases. In particular and on first impression, there would appear to be nothing in the concept that would make its application to decision making in the corporate setting inherently inconsistent with the legal status of the corporation. The concept's first overt attempt to invade the corporate realm occurred in the case of *Gaiman* v. *National Association of Mental Health,*[5] albeit with only very limited success. This decision has, nonetheless, become the springboard of the Singapore courts' limited acceptance of the principles of natural justice in corporate decision making.

In the recent Singapore High Court decision of *Constance Emily Peck* v. *Calvary Charismatic Centre Ltd.*[6] ("the *CCC* case"), the Honourable Justice Chan Sek Keong unequivocally held that some of the rules of natural justice were applicable to companies. This article seeks to examine the decision in the *CCC* case and its implications on corporate management

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3 *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109, 118.
4 [1964] A.C. 40, 85.
5 [1971] 1 Ch. 317.
6 Originating Summons No. 475 of 1988 (decided on 11 January, 1991 but unreported as at the time of writing).

in the light of the existing company legislation. In the process it also attempts to show that the introduction of common law principles of natural justice to the corporate setting is not only unnecessary but a step backward in the development of the law. To do this, however, one first needs to understand to some extent, even if only vaguely, what the rules of natural justice entail.

II. RULES OF NATURAL JUSTICE

It was once widely accepted that natural justice applied only to judicial or quasi-judicial decision making and had no application to administrative decisions. This judicial-administrative dichotomy has not received such widespread acceptance today.[7] Neither do similar distinctions which have existed in the past, such as one made between rights and privileges, carry much weight today. While the outer frontiers of the rules of natural justice are continually in a state of development and its exact boundaries are as yet not ascertainable with any degree of certainty, the concept of natural justice clearly encompasses the right to an adequate hearing. This in itself comprises two recognised rules of natural justice. First, the right to be heard and secondly, the right to have an impartial judge to hear and decide the matter in issue. As the latter can be dealt with more quickly for reasons which will later become obvious, it will be discussed first.

Rule against bias: This rule is sometimes presented in the form of the latin maxim *nemo judex in causa sua* which leads to the common saying that a man must not be a judge in his own cause. While a decision made by a person who is interested in the matter in question may not *per se* be biased, the old adage that justice must not only be done but must also be seen to be done is respected here. The rationale of the rule is basically aimed at preserving confidence in the decision making process.

There has been judicial debate as to whether the test for bias is one requiring a "real likelihood of bias" or simply a "reasonable suspicion of bias". As it is not the aim of this paper to enter into a jurisprudential discourse on natural justice, it suffices here to say that bias in this context clearly encompasses cases where the judge has a pecuniary interest in the matter to be decided upon, regardless of the extent of that interest. Similarly, a person would be disqualified from being a judge in a matter where he is the person who brought the matter up in the first place, that is, where he has played the role of the accuser.

The rule, however, has no application in several instances. For a start, it would clearly not apply where the party invoking the rule had waived his right to object to his matter being heard by an apparently biased

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[7] *Ridge v. Baldwin* [1964] A.C. 40; *R.* v. *Liverpool Corporation, Ex pane Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299, 310 per Lord Roskill.

judge, in cases where he could have done so. It would also not apply where the judge, although apparently interested in the matter, is appointed by some statutory provision. The rule may also be disregarded where every qualified judge is interested to some degree in the matter so that an "unbiased" judge is not available. Decisions arrived at under any of the above conditions could, however, still be invalidated if it is proved that the judge in the case was in fact biased in the course of arriving at his decision.

Right to an adequate hearing: This rule stems from the notion that a man should not be condemned before he is given a chance to explain his actions and is sometimes presented in the form of the latin maxim *audi alteram partem.* This rule by necessity also includes a requirement that the person be given fair notice of the charge made against him in order that he may be able to prepare an answer to it. He must also be given a reasonable amount of time to prepare his case.[8]

This rule, however, is not of universal application. It is commonly accepted that a servant would, in the ordinary case, not be entitled to a hearing prior to his dismissal by his master. His remedy, if he has been wrongly dismissed, is to sue for damages in a court of law for breach of contract. What is unclear is when a servant would have such a right. A clear case where such a right would exist is one involving the dismissal of a person occupying an office in which the public has an interest. Apart from such cases, the ambit of the rule is unclear. It has been suggested that at its widest formulation, the rule may accord a right of hearing where a decision by one private citizen affects another, if the interest of the latter in the decision is sufficiently great.[9]

The rule, however, generally has no application in preliminary inquiries where nothing is to be decided conclusively to the detriment of the person under inquiry. This again is not an absolute rule and the rules of natural justice may still apply if there is expected to be sufficient nexus between the preliminary inquiry and the final decision. The rule is sometimes also dispensed with where the exigencies of the situation, such as contraints of time, would not allow a hearing in the light of a wider public interest.[10]

Frontiers of natural justice: It is less clear, as the law presently stands, whether a person against whom a decision has been made is entitled to have the reasons upon which the decision is based. At present, he is also accorded no definite right under the rules of natural justice to be represented (by legal counsel or otherwise) at any hearing of the

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8 *R.* v. *Thames Magistrates' Court, ex pane Polemis* [1974] 1 W.L.R. 1371.
9 Cane, *An Introduction to Administrative Law* (1986), p.107.
10 *Lewis* v. *Heffer* [1978] 3 All E.R. 354.

case against him or to cross-examine any witnesses testifying against him. Neither do the rules of natural justice secure him a definite right of access to all materials relevant to his case.

The courts have been content thus far to decide each case according to what justice would entail in the light of the facts of any particular case. Hence, the nature of the interest which the person seeks to protect and the gravity of the consequences that could befall him would be taken into account by the court in determining what form of procedural rights he should be entitled to in the interest of justice. On this approach, the English courts have made distinctions among cases involving applications for an interest, cases involving renewals of an interest and cases involving forfeitures of an existing interest.[11] Forfeiture cases have been held to require a higher degree of scrutiny before any decision of forfeiture is sanctioned by the court since it is an act to deprive a person of an existing interest. The reverse holds true in cases where a person is merely applying to hold an interest which he does not already possess. Renewal cases lie somewhere in between these two categories in that a person renewing an interest may have some form of "equity" entitling him to have his interest renewed. The courts have labelled this "equity" a "legitimate expectation".[12] Lord Eraser has described the concept of legitimate expectation very widely as being "capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis."[13] This concept of legitimate expectation has, however, not been confined to cases involving renewal of existing interests and has been used by the courts as a malleable tool to be shaped according to what they deem the justice of a case would require.[14] It has certainly obliterated to a large extent, the distinction that is sometimes still made between rights and privileges.

Natural justice, therefore, as this discourse has so far revealed, is like a sea teeming with ideas, few of which have settled to the groundbed of certainty.

III. DECISION IN THE *CCC* CASE

Since the decision in the *CCC* case remained unreported at the time of writing, it is with regret that in order to understand the implications of the decision, the facts and the legal reasoning that led to it would have to be set out below in considerable detail.

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[11] *Mclnnes v. Onslow-Fane* [1978] 1 W.L.R. 1520.

[12] *Schmidt* v. *Secretary of State for Home Affairs* [1969] 2 Ch. 149, 170 *per* Lord Denning M.R.

[13] *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 A.C. 629, 636.

[14] *Attorney-General of Hong Kong* v. *Ng Yuen Shiu* [1983] 2 A.C. 629; *R.* v. *Secretary of State for the Home Department, Ex pane Asif Mahmood Khan* [1984] 1 W.L.R. 1337; *Council of Civil Service Unions* v. *Minister for the Civil Service* [1984] 3 W.L.R. 1174; *O'Reilly* v. *Mackman* [1983] 2 A.C. 237, 275 *per* Lord Diplock (with whom the rest of the judges agreed).

The defendant, Calvary Charismatic Centre Ltd, was a church in which the plaintiff was a member. The defendant was incorporated as a company limited by guarantee under the Companies Act.[15] It was managed by a Church Board ("the Board") comprising the chairman, the treasurer and two other elected members. The Senior Pastor of the defendant was at all material times, the chairman of the Board. Article 9 of the defendant's articles of association provided, *inter alia*, that the Board could remove a person from the membership of the defendant if he or she had acted in a manner unbecoming of a member or had wilfully caused discord within the church, provided that before such action was taken, patient and persistent efforts had been taken to win such person back to the standard of faith and conduct required of a member.

The plaintiff found herself in disagreement with the way the defendant was being managed by the Board and openly voiced her dissatisfaction to several of the defendant's members. It became evident to many of the defendant's members that the plaintiff's relationship with the defendant's leadership, and in particular with the Senior Pastor, had become severely strained. This hostility between the plaintiff and the defendant culminated at one of the Board's meetings, where it was decided that an extraordinary general meeting of the defendant ("the EGM") be called to propose a resolution for the removal of the plaintiff from the defendant's membership.

Notice of the EGM, which stated that one of the purposes of the meeting was to remove members who were sowing discord within the organisation, was duly sent to the members of the defendant, including the plaintiff. It, however, did not specifically name the plaintiff as being one of the members to be removed.

The EGM was chaired by the Senior Pastor. He outlined the Board's charges against the plaintiff and proposed the motion to expel the plaintiff on the grounds that she was acting in a manner unbecoming of a member of the defendant and was sowing discord within the church. A key issue raised at the EGM was the plaintiff's absence from the meeting. The Senior Pastor pointed out that the plaintiff had been given notice of the EGM but had chosen not to attend it. The plaintiff's husband, who was present at the meeting, then proffered a reason for her absence. He said that the plaintiff could not be present at the EGM as she was then with their son who had been given a few hours leave from army training and who had wanted very much to spend the time with her.

Several views of the defendant's members on the motion to remove the plaintiff from the defendant's membership were expressed at the EGM, after which a vote was taken. The resolution was carried by a vote of 101 in favour, 15 against and 5 abstentions.

Two days after the EGM, the Board had a meeting ("the Board Meeting") at which it ratified the resolution passed at the EGM purporting to

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[15] Cap. 50, 1985 Rev. Ed.

remove the plaintiff from the defendant's membership. The Board also passed its own resolution to remove the plaintiff from the defendant's membership. The plaintiff was then informed in writing of her removal from the defendant's membership.

The plaintiff subsequently applied to court for a declaration that she was still a member of the defendant. She contended that her removal from the defendant's membership was invalid on the grounds, *inter alia*, that:

(a) the resolution passed at the EGM for the purpose was not legally effective;

(b) the Board Meeting did not take place;

(c) the Board Meeting was in breach of Article 9 of the defendant's articles of association; and

(d) the Board Meeting contravened the rules of natural justice.

It was conceded by the defendant during the course of the court proceedings that the resolution passed at the EGM purporting to remove the plaintiff from the defendant's membership was of no legal effect. It is not clear from the judgment why this was so but one could surmise that this was due to a construction of Article 9 which vested the power to remove a member in the Board and not in the company at a general meeting. In view of this concession by the defendant, the court found it unnecessary to consider whether the notice of the EGM had been properly served or effected on the plaintiff, and if not, whether the irregularity could be cured under section 392(2) of the Companies Act.

Seven affidavits were filed by various church leaders to show that the plaintiff had acted in a manner unbecoming of a member of the defendant and had been sowing discord among the other members of the defendant. This evidence was not rebutted and was accepted by the court. The court further found that the conditions laid down under Article 9 for the removal of a member from the defendant's membership had been complied with. The court also rejected the plaintiff's submission that the Board Meeting never took place in the light of unrebutted evidence to the contrary.

One of the key issues before the court was whether the Board Meeting contravened the rules of natural justice. Counsel for the defendant, relying on the English High Court decision of *Gaiman* v. *National Association of Mental Health*,[16] submitted that the rules of natural justice had no application to a company incorporated under the Companies Act. In particular reliance was placed on Megarry J.'s statement that:

[16] [1971] 1 Ch. 317.

> Where there is corporate personality, the directors or others exercising the powers in question are bound not merely by their duties towards other members, but also by their duties towards the corporation. These duties may be inconsistent with the observance of natural justice, and accordingly the implication of any term that natural justice should be observed may be excluded. Furthermore, Parliament has provided a generous set of statutory rules governing companies and the rights of members, as contrasted with the exiguous statutory provisions governing trade unions and even more exiguous provisions governing clubs. Yet again, the authorities cited by Mr Neill, though not establishing his proposition, do indicate the extent to which the courts will go in enforcing the provisions of the articles, even where those provisions appear to operate harshly or unjustly. These considerations seem to me to militate against the application of the principles of natural justice in this field.[17]

Justice Chan Sek Keong, however, held that the *Caiman* case did not have the effect which the defendant contended. While acknowledging his agreement with Megarry J.'s view that some of the rules of natural justice may be incompatible with the status of companies as a distinct and separate legal entity from its officers and members, he saw no reason why rules of natural justice which did not suffer from such incompatibility ought not to apply with full force to companies. There was, according to Chan J., nothing in Megarry J.'s judgment that was inconsistent with this view. Instead, he found support for his view in Megarry J.'s statement that the tendency of the courts was to apply the principles of natural justice to all powers of decision unless the circumstances suffice to exclude them and to expand the scope of natural justice rather than to constrict it.[18] Chan J. went on to hold that:

> Incorporation is an important factor to be taken into account, primarily because the directors owe a duty to act in the interest of the company which may be, in certain circumstances, incompatible with the application of the rules of natural justice. *But it is not the only or decisive factor.* Equally important is the *nature of the decision* to be made. [Emphasis mine.]

Chan J. held that the correct approach in determining whether the rules of natural justice were to apply in any particular case was not to look primarily at the status of the defendant, although this was relevant. Instead, greater weight ought, in his opinion, to be given to: (a) the form and nature of the power exercisable; (b) the consequences to the

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[17] *Ibid,* at p.335.
[18] *Ibid,* at p.333.

affected member upon the exercise of such power; and (c) the express words of the power.

On the form and nature of the power, his Honour held that a power of expulsion based on misconduct was readily subject to the rules of natural justice, as even Megarry J. expressly agreed in his judgment in the *Caiman* case.[19] There was, according to him, nothing inconsistent with the incorporated status of the defendant or its status as a church in the application of the rules of natural justice to the exercise of such a power. In so far as the express words of Article 9 were concerned, the power in the *Gaiman* case was further distinguished on two grounds. First, unlike the power in that case, the power conferred by Article 9 was not expressed in unrestricted terms. Secondly, again unlike the power in the *Gaiman* case, the power conferred by Article 9 could not be exercised speedily since the Board was required to make patient and persistent efforts to win back a wayward member. The court also found in this last precondition to the exercise of the power under Article 9, further support for the application of the rules of natural justice.

The court's view, therefore, was that the rules of natural justice were to apply to a company incorporated under the Companies Act except in so far as they would be incompatible with its status of incorporation. On this reasoning, Chan J. dismissed the plaintiff's allegation that the Board Meeting contravened the rule of natural justice against bias on the ground that the Senior Pastor, whose relationship with the plaintiff was severely strained and who had been the victim of some of the plaintiff's complaints, had chaired the meeting and moved the resolution to remove the plaintiff from the defendant's membership. Chan J. held that the rule of natural justice against bias had no application to meetings of companies incorporated under the Companies Act or the meetings of its board of directors, as this was an instance where its application would be incompatible with the company's incorporated status. He reasoned that under established company law, members were in general, allowed to vote in their own selfish interests and could disregard the interests of the company or that of any other member of the company. Similarly, directors were only required to vote in the interest of the company and the members as a whole and to exercise their powers in good faith. The fact that a director had a personal animosity against another director or member, therefore, did not necessarily mean that he could not, in the interest of the company, vote against that director's or member's interest. In any event, he held that any allegation of bias against the Senior Pastor could not stand in view of the fact that the Board's own resolution to remove the plaintiff from the defendant's membership was made only after and in confirmation of a resolution of the defendant company to the same effect, obtained without the votes of the Board's members, at the EGM.

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[19] [1971] 1 Ch. 317, 336.

Chan J. was, however, unequivocal in his statement that the rule of natural justice requiring adequate hearing to be extended to a complainant was applicable to the case before the court. He, however, dismissed the plaintiff's submission that no adequate notice was given to her of the resolution passed at the EGM in that the notice of the EGM made no specific mention that she was the member sought to be removed from the defendant's membership at the meeting. His Honour instead found that there was every indication from the evidence, that the plaintiff knew that the proposed resolution was directed at her. He took into account the fact that the defendant's membership was small and met on a regular basis; the history of the plaintiff's numerous accusations of the Senior Pastor and other church leaders on several occasions to other members of the defendant; the plaintiff's continued refusal to meet with the Board to resolve the problem; an unpleasant incident between the church leadership and the plaintiff at the plaintiff's house; a prior warning by the Senior Pastor to the plaintiff's husband that action would be taken against the plaintiff if she did not meet with the Board and a letter written by several persons including the plaintiff and her husband to the Executive Committee of the Assemblies of God, Singapore (an organisation governing churches of the denomination to which the defendant belonged), expressing concern over the resolution to be proposed at the EGM and requesting that the organisation investigate and intervene in the matter urgently.

In so far as the rule of natural justice conferring on the plaintiff a right to be heard was concerned, Chan J. found that the plaintiff could have attended the EGM had she wanted to but had instead chosen to absent herself from the meeting to avoid a confrontation with the church leadership and the inevitable demand that would have been made on her to substantiate her accusations against the Senior Pastor and the church leadership before the general body of the defendant's members. This rule of natural justice was therefore held to be satisfied since an opportunity had been given to her at the EGM to state her case, albeit the opportunity was not taken. There was, in the court's opinion, no requirement under Article 9 to grant her a second opportunity to be heard at the Board Meeting.

The plaintiff's submissions based on natural justice therefore failed and the plaintiff's application was dismissed with costs.

IV. CRITIQUE OF THE *CCC* CASE AND ITS LEGAL IMPLICATIONS

There are several legal problems and implications from the *CCC* case which deserve mention. On the whole, the decision is certainly consistent with the trend of the courts to extend the application of the rules of natural justice. There has, thus far, been no comprehensive judicial pronouncement as to when principles of natural justice would apply. Megarry J. in the *Gaiman* case, however, suggests that relevant

considerations would include the person or body making the decision, the nature of the decision to be made, the gravity of the matter in issue and the terms of any contract or other provision governing the power to decide. Chan J. in holding in the *CCC* case that what ought to be considered included the fact of *incorporation,* the *nature* of the power being exercised and the *effect* it would have on the individual concerned having due regard to the *express words* of the power, was basically following the path of judicial reasoning charted by Megarry J.

The key question, however, must still be whether there is any need at all to extend the rules of natural justice to the exercise of corporate powers of decision making. In cases of decisions made by governmental bodies, quasi-governmental organisations or non-governmental regulatory bodies, the application of natural justice is more easily justifiable since there is often a severe disparity in bargaining strength between the parties concerned so that there is no real consensual element in any bargain struck between them. On the other hand, there is no reason why a person who joins a company incorporated on the basis of the provisions in its articles of association should not be strictly held to his acceptance of these articles at the time of his admission as a member of the company. Unless there is something highly exceptional about a particular company, there is nothing to prevent a person who does not agree to its articles of association from joining another company whose articles he finds less objectionable. The courts should be slow to read extra conditions into a company's articles in the guise of natural justice. Such an attitude would be more consistent with the courts' traditional stance that an employee who is dismissed is not entitled to a right of hearing where he is not occupying any office of public interest. The rules of contract should be sufficient protection in such cases.

As the court rightly pointed out, the rule of natural justice against bias has no application to companies. More importantly, it is submitted that the rule against bias is not even necessary in the realm of company law for various reasons. First, in so far as directors are concerned, the Companies Act requires that they act "honestly" and with "reasonable diligence".[20] This has been interpreted in another jurisdiction with an identical statutory provision to mean that directors must act *bona fide* in the interest of the company in the performance of the functions attaching to the office of director.[21] Such a duty in law on the part of the directors is now firmly established.[22] Directors occupy a fiduciary relationship to the company and are therefore required to place the interests of the company ahead of their own personal interests. Hence, in their actions as directors involving any third party (such as a member of the company), they are not allowed to advance their personal interests

[20] Companies Act (Cap. 50, 1985 Rev. Ed.), s. 157.
[21] *Marchesi* v. *Barnes & Keogh* [1970] V.R. 434, 438 *per* Gowans J.
[22] *Re Smith & Fawcett Ltd.* [1942] Ch. 304, 306 *per* Lord Greene.

against those of the third party if this is not also in the interest of the company which they represent. In this sense, therefore, they are already required by law to be impartial in their actions where their personal interests may be involved. Viewed from another perspective, as far as the interests of the company are concerned, directors are required to be uncompromising in their quest to act in furtherance of those interests even if this would be to the detriment of any third party. To this extent, the rule against bias is incompatible with prevailing company law and should therefore have no application to companies.

As far as members are concerned, save in limited situations, the general rule is that they are entitled to vote in their own selfish interests.[23] This is therefore incompatible with the application of the rule of natural justice against bias. Members subject to oppression or unfair prejudice by those in control of the company may also apply for relief under sections 216 and 227R of the Companies Act. The court therefore rightly rejected the rule of natural justice against bias from application to companies.

It is further submitted that the scheme of the Companies Act also renders the application of the rule of natural justice requiring adequate hearing unnecessary. As far as this rule is concerned, the Act clearly sets out both substantive and procedural requirements which would already take into account to some extent the principles of natural justice. A few examples should suffice to illustrate this point. Under the Companies Act, every member is given the right to attend and to speak and vote at general meetings of the company so long as he has paid all his dues to the company.[24] Even in the case of preference shareholders, whose voting rights may be restricted by the articles of association of the company, the Act mandates that they be given the right to attend and vote at general meetings when the meeting would substantially affect their interests. Three specific situations are addressed, namely, when their preferential dividends are in arrears, when there is a resolution proposed at the meeting which would vary their rights or when there is a proposal to wind up the company.[25]

To safeguard the value of the members' right to vote and speak at any meeting of a company, the Companies Act further prescribes a minimum period of notice to be given to all members entitled to attend and vote thereat, with the period varying according to the importance of the business to be transacted at the meeting.[26] To further ensure that this right of members to speak and vote is not stifled, members who

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[23] An exception is where a seperate class vote is involved. In such cases, members of the class may be under an obligation to subordinate their own selfish interests to that of the class as a whole. See in this context, *Re Holders Investment Trust Ltd.* [1971] 2 All E.R. 289.

[24] Companies Act, s.180 (1).

[25] Companies Act, s.180 (2).

[26] See, for example, ss.!77(4), 177(2), 184(1) and 185.

are able to garner the requisite support may call a meeting of the company[27] or requisition for one to be called.[28] In cases, where it is technically impracticable for any member to call or hold a meeting of the company, any member may apply to court for an order that a meeting be called, held and conducted on terms set by the court.[29]

If a member is not able to attend any general meeting of the company, section 181 of the Companies Act further protects his right to have his views represented at the meeting by giving him the right to appoint a proxy to attend the meeting and vote on his behalf. The section goes on to provide that the proxy "shall also have the same right as the member to speak at the meeting."

Section 183 of the Companies Act allows members with sufficient support to require the company to send to the other members notice of any resolution to be proposed in any forthcoming meeting. In addition, they may require that their written statement on the subject matter of the proposed resolution (if they choose to prepare one) be sent together with the notice.

In short, members do generally have a right and the opportunity to be heard provided they can garner the requisite support from the other members. The threshold of support required by the Companies Act is to sieve out the frivolous from the genuine concerns and dissatisfactions of members.

On a more specific level, certain provisions of the Companies Act do provide for the right to be heard and the right to make written representations in specific situations. One clear example is section 149 of the Companies Act. Section 149 empowers the court to disqualify a person from being a director or being concerned in or taking part in the management of a company for a period not exceeding 5 years if certain conditions are met. Section 149(2)(a) requires that before such a disqualification order is made by the court against any person, he must have been given at least 14 days' notice of the application to the court for such an order. In addition, section 149(9)(b)(ii) provides that the person against whom the order is sought is entitled to appear and give evidence himself or to call witnesses at the hearing of the application for the disqualification order.

Even outside the court setting, where there is a proposed resolution to remove a director of a public company, the company must send a copy of the notice proposing the resolution to the director concerned, forthwith upon the company's receipt of it. Section 152(2) of the Companies Act expressly goes on to state that such a director is entitled to be heard on the resolution at the meeting at which it is proposed regardless of

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[27] Companies Act, s.177.
[28] Companies Act, s.176.
[29] Companies Act, s.182.

whether he is a member of the company. In addition, section 152(3) further allows the director concerned to make written representations to the members of the company and to have these representations sent by the company to its members.

Similarly, when there is notice of a proposal of a resolution to remove an auditor, under section 205(5) of the Companies Act, the company must forthwith send a copy of such notice to the auditor concerned and to the Registrar of Companies. The auditor is then allowed to make written representations to the company and to require that copies of the representations be sent to the members of the company. His right to be heard orally at the meeting to resolve for his removal is also implicitly recognised in section 205(6).

In addition, company auditors are also expressly given the right to appear and to be heard at meetings of the company's audit committee, where among other things, his audit report will be reviewed.[30] Where a general meeting of a company expressly deals with business concerning the company's auditor in his capacity as auditor, he is also entitled to receive notices and communications relating to such meetings and to be heard at the meeting.[31]

Under section 202 of the Companies Act, directors may apply to the Registrar of Companies for certain dispensations from accounts reporting requirements of the Act. Where such an order has been made, section 202(4) of the Act provides that the Registrar is not allowed to revoke or suspend the operation of the order on his own motion, unless the directors have first been given an opportunity to be heard.

The aforementioned provisions of the Companies Act, clearly indicate that the Act has taken into account principles of natural justice, at least to the same extent that the *CCC* case seeks to inject these principles into company law *via* the common law. It is therefore submitted that the application of common law notions of natural justice is not only inconsistent with the concept of a company in some cases, but is totally unnecessary in the light of existing legislation.

Even if natural justice should apply to companies, it is also questionable whether the concept of natural justice in relation to companies has as much room for development as the concept possesses at common law. The question is whether these specific provisions in the Companies Act which incorporate certain principles of natural justice were intended to preclude the application of common law rules of natural justice, with all its attendant ambiguity, to companies.

It is submitted that there are no compelling reasons for the application of the rules of natural justice to companies all and sundry. The introduction of natural justice into this realm of law would only inject added uncertainty

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[30] Companies Act, S.201B (6).
[31] Companies Act, s.207 (8).

in an area of law which thrives on certainty. Business decisions and policies could be slowed down by a pervasive application of the rules of natural justice to companies, especially when the exact scope of the requirements of natural justice is often unclear even to legal academics, let alone laymen untrained in the law, who comprise the management of most companies.

From a factual perspective, one problem with the decision in the *CCC* case could stem from the fact that no argument was heard on the sufficiency of service of the notice of the EGM on the plaintiff. It appears from the judgment that this was initially raised as a point of contention. However, Chan J. held that since the defendant had conceded that the resolution of the EGM was not legally effective to remove the plaintiff from the defendant's membership; "it was not necessary to consider whether or not the notice of the EGM had been properly served or effected on the plaintiff, and if not, whether the irregularity could be cured under section 392(2) of the Act." With due respect, the sufficiency of service of the notice of the EGM on the plaintiff was not necessarily a non-issue simply by the fact that the resolution passed at the EGM was legally ineffective in removing the plaintiff from the defendant's membership. While the resolution passed at the EGM was ineffective for this purpose, the EGM was still of substantial legal significance for at least two reasons, one of which was material to the decision of the case.

The first legal significance of the EGM lies in the court's ruling that the meeting constituted the opportunity given by the defendant to the plaintiff to be heard, thereby satisfying the requirements of natural justice. Unless the plaintiff had actual notice of the EGM, how could this be sufficient opportunity of hearing, if the notice of the EGM had not been properly served on the plaintiff? Nonetheless, it is unlikely that any appeal against the decision on this ground alone would succeed for reasons which will follow.

As pointed out earlier, every member like the plaintiff has a right to attend any general meeting of the company and to speak and vote on any resolution before the meeting, subject to any restrictions placed on the right of preference shareholders' voting rights and provided the plaintiff had paid all her dues to the company.[32] Under section 177(4) of the Companies Act, she is entitled also to receive notice of the EGM in the manner provided by Table A, in the Fourth Schedule of the Companies Act.[33] If Table A had not been excluded by and was not inconsistent with the articles of association of the defendant company,[34] then Article 111 of Table A would further reinforce the plaintiff's right to receive notice of the EGM.

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[32] Companies Act, s.180 (1).
[33] The relevent provision is Article 108 in Table A, Fourth Schedule of the Companies Act.
[34] This is implicitly allowed under the Companies Act, s.36 (2).

Section 392(2) of the Companies Act, however, provides that any "proceeding" under the 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. While section 392(2) was deemed by the court in the CCC case to be irrelevant in view of the defendant's concession that the resolution passed at the EGM was not legally effective in removing the plaintiff from the defendant's membership, it is submitted that regardless of the defendant's concession, section 392(2) would in any event still have been irrelevant to the problem before the court. If service of notice of the EGM had not been properly effected on the plaintiff, it is submitted that section 392(2) would not have been sufficient to cure the defect. Section 392(2), would be inapplicable as any challenge to the decision in the *CCC* case would be on the ground, not that the "proceeding", namely the EGM or any resolution passed during it, was invalid, but that the EGM did not amount to an opportunity to the plaintiff for an adequate hearing to satisfy the requirements of natural justice.

However, even such a challenge is likely to fail on the facts of the case since even if formal service of the notice had been lacking, the evidence clearly showed that the plaintiff had actual notice of the meeting. Her husband alleged at the EGM that she was unable to attend the meeting but made no allegation that she was unaware of it. In addition, the plaintiff was a party to the letter sent to the Executive Committee of the Assemblies of God, Singapore, which was written before the EGM and which had enclosed a copy of the agenda for the EGM. Such actual notice of the EGM should suffice for the purposes of satisfying the requirements of natural justice. On the other hand, had the plaintiff not possessed actual notice of the EGM, inadequate service of the notice of the EGM on her would have been a fatal defect to the court's reasoning that the requirements of natural justice had been satisfied, since such defect would not be curable by section 392(2) of the Companies Act. Hence, although the court came to the correct conclusion, it is submitted that the reasoning which led to it was flawed.

In addition, while the court in the *CCC* case agreed that a relevant factor to be considered in determining whether principles of natural justice ought to apply in any particular case was the consequences to the affected member upon the exercise of the power in question, it appears that only lip service was given to the acceptance of this factor as a relevant consideration. The court did not weigh this factor in the light of the facts before it. By contrast, in the *Caiman* case (which also involved a challenge to a resolution to expel members of an association), Megarry J. took into account the fact that membership in the association in that case involved no real interest in property and no question of livelihood or reputation in coming to his decision that the rules of natural justice had no application to the case. In view of the fact that the

defendant in the *CCC* case was a company incorporated by guarantee and taking also into account the objects of the defendant as expressed in its memorandum of association, had this factor been taken into consideration, it was more likely to have weighed in favour of the plaintiff.

What then are the practical implications of the *CCC* case on corporate decision making as it presently stands? First, the CCC case clearly stated that the rule of natural justice against bias had no application to a company. It should, however, be noted that the CCC case is only a decision of the High Court of Singapore. Under pre-existing principles of *stare decisis,* the decision would not be binding on the High Court or any higher court. It is, therefore, theoretically possible for a subsequent court to hold that the rule of natural justice against bias is also applicable to companies.

At this juncture, it is pertinent to note the second legal significance of the EGM in the CCC case. Chan J.'s second ground for the dismissal of the plaintiff's argument that the rule of natural justice against bias had been infringed was based on the fact that the Board's resolution to remove the plaintiff from the defendant's membership was merely a confirmation of the earlier resolution passed at the EGM. Therefore, while the resolution passed at the EGM was not effective in removing the plaintiff from the defendant's membership, the court held that it was effective in removing any accusation of bias against the subsequent resolution passed by the Board. In this respect, the sufficiency of service of the notice of the EGM on the plaintiff was therefore still a material issue, despite the summary dismissal it received from the learned judge. In the meantime, while we await judicial ruling from a higher court on this issue, it would be prudent, in a case where the decision making body of the company, such as the board of directors, may be subject to any suspicion of bias, to have the company reaffirm the board's decision at a general meeting without the aid of any interested party's votes.

Secondly, it is also clear from the judgment that unless the power exercised is otherwise constrained, only one reasonable opportunity to be heard need by given to the person against whom it is to be exercised. In the CCC case, although the effective resolution removing the plaintiff from the defendant's membership was the one passed by the Board at the Board Meeting, the opportunity given to the plaintiff to be heard at the earlier EGM was according to the court, sufficient to satisfy the rules of natural justice.

Thirdly, if natural justice with all its vitality at common law is infused into corporate decision making, then there is no telling where it may lead us. While it is true that the CCC case involved the application of principles of natural justice to the expulsion of a member of a company limited by guarantee, and a similar scenario may not arise in the case of a company limited by shares, there is nothing in the decision to suggest that the court's endorsement of the applicability of such principles is to be confined to companies limited by guarantees or solely to situations

involving the expulsion of members. For instance, could a director who has continually enjoyed perks and non-cash benefits that are not contractually guaranteed to him claim that he may not be deprived of them on the ground that he has a legitimate expectation that they would be continued? As the law presently stands, there appears to be no clear answer to this question.

Finally, the trend in some judicial quarters has been a slow replacement of the concept of natural justice by a more general concept of "fairness". Some would argue that the two terms may be used interchangeably. Among those who still subscribe to the judicial-administrative dichotomy, there is judicial dicta to suggest that fairness may be to administrative decisions what natural justice is to judicial decisions.[35] The question then is whether this wider requirement of fairness may be grafted into corporate decision making as well. It is again submitted that this would be an undesirable grafting of uncertainty into the law. In addition, it would mean an undue usurpation of management powers in companies (even privately owned ones) by the courts in the guise of judicial review. This, it is submitted, would be a step backwards in the development of the law.

V. CONCLUSION

The fairly rigid statutory framework in which companies operate is an unnatural environment for the operation of the principles of natural justice. The company did not exist in the Garden of Eden. Perhaps that is the way it was meant to be.

LEE BENG TAT*

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[35] *Pearlbergv. Varty* [1972] 1 W.L.R. 534,547 *per* Lord *Petuson; B. Johnson & Co. (Builders) Ltd* v. *Minister of Health* [1947] 2 All E.R. 395, 398-401 *per* Lord Greene M.R.

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