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IRREGULARITIES IN PROCEDURE— RECONSIDERING SECTION 392

Chang Benety v. Tang Kin Fei[1]

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I. INTRODUCTION

In corporate administration, procedures, and their due compliance, are often of as much significance as the outcomes of the proceedings they regulate. The consequence of a failure to comply with procedures, whether laid down statutorily or in the company's constitution, is often the invalidation of the subject proceeding.[2] Such invalidation may perhaps be justified on the basis that faithful compliance does much to foster a perception that the outcomes determined at the proceedings so held are fair, a perception that is vitally important to the acceptability of the outcome by all concerned. Nevertheless, it is also the case that corporate proceedings should not be invalidated only by reason of an over-concern for matters of *form*, and indeed, there are potentially many situations of procedural non-compliance, or irregularities, that might fall within this category. Section 392 of the *Companies Act*[3] is crafted to achieve some balance between the two extremes.[4]

In *Chang Benety v. Tang Kin Fei*,[5] the Court of Appeal had occasion to consider s. 392. The case is of interest because of a number of possible propositions emanating from it which have an impact on the operation of s. 392, and also because it provides the context for a reconsideration of the scheme of s. 392. But first, the facts should be briefly stated.

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1 [2012] 1 S.L.R. 274 (C.A.) [*Chang Benety*].

2 *Bin Hee Heng v. Management Corporation Strata Title Plan No 647* [1991] 1 S.L.R.(R.) 484 at para. 13 (H.C.). See also *Howbeach Coal Company (Ltd.) v. Teague* (1860) 5 H. & N. 151, 157 E.R. 1136; *Re Paul (H.R.) & Son* (1973) 118 S.J. 166; *Musselwhite v. C.H. Musselwhite & Son Ltd.* [1962] Ch. 964; Paul L. Davies, *Gower and Davies' Principles of Modern Company Law*, 8th ed. (London: Sweet & Maxwell, 2008) at paras. 15-31, 15-40.

3 Cap. 50, 2006 Rev. Ed. Sing. [*CA*].

4 For a recent scholarly consideration of s. 392, see Alexander F.H. Loke, "Rights, Duties and the Validation of Irregularities" (2011) 23 Sing. Ac. L.J. 838.

5 *Supra* note 1.

The irregularity complained of was the lack of a quorum at a board meeting of the company PPLS (the "Company"), whose only shareholders were SCM and PPLH. SCM had initially acquired 50% of the shares in the Company from PPLH pursuant to a joint venture deal in 2001, and a shareholders' agreement, entered into in conjunction thereto, provided for the appointment of six directors, with equal representation from SCM and PPLH. The agreement also provided that two shall form the quorum for directors' meetings, provided that at least one director from each side was present. This arrangement was duly incorporated into the Company's articles of association in the form of art. 98. Subsequently, SCM increased its stake in the Company to 85% but the relevant provisions of the articles remained unaltered. Some years on, a dispute arose between the shareholders, precipitated by the impending sale of the entire shareholding of PPLH shares to a third party. This, SCM alleged, amounted to a breach by PPLH of certain terms in the shareholders' agreement.[6] SCM further alleged that two of the PPLH-nominated directors, the appellants in the present appeal, were in breach of their duties to the Company in connection with the disclosure, to that third party, of certain confidential information relating to the Company. A number of board meetings were then convened by the SCM-nominated directors for the purposes of appointing solicitors, namely from WongPartnership, to advise and act for the Company, not only in relation to SCM's allegations and SCM's suit in respect thereof, but also to provide general advice on any issue in relation to "the dispute between [the Company's] shareholders" and to "the continued operations of [the Company]".[7] The PPLH-nominated directors did not attend the meetings. This seems hardly surprising since two of them were the very subjects of the SCM complaints.[8] Although the absence of the PPLH-nominated directors meant that the quorum requirement as stipulated in the Company's articles for the holding of directors' meetings was not met, the SCM-appointed directors nevertheless proceeded with the meetings and passed the resolutions. They then applied to court to validate the resolutions under s. 392. It is significant that the PPLH-nominated directors had in fact indicated agreement, via their own solicitors, to the appointment of WongPartnership to "advise and represent the Company in relation to [SCM's suit] and to do all things necessary for the conduct of the [suit]".[9]

In the High Court,[10] Woo Bih Li J. held that the resolutions to appoint solicitors to advise and act for the Company were valid as these were "neutral and in the interest of [the Company]".[11] The learned judge held, however, that those resolutions which instruct the solicitors to investigate SCM's allegations and to advise the Company on how to respond to these allegations appear "one-sided"[12] as they suggest an assumption that the proposed investigation was indeed in the Company's interest.

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6 This dispute is the subject of the High Court decision in *Sembcorp Marine Ltd v. PPL Holdings Pte Ltd* [2012] 3 S.L.R. 801 (H.C.) [*Sembcorp*].

7 *Chang Benety*, *supra* note 1 at para. 3.

8 It is noteworthy that the appellants, Chang and Aurol were respectively the Chief Executive Officer and Chief Operating Officer of Baker Technology Ltd., which owned the entire share capital of PPLH: *Sembcorp*, *supra* note 6 at paras. 7, 8.

9 *Chang Benety*, *supra* note 1 at para. 23.

10 *Tang Kin Fei v. Chang Benety* [2011] 1 S.L.R. 568 (H.C.) [*Tang Kin Fei*].

11 *Ibid.* at para. 42.

12 *Ibid.* at para. 45.

On appeal, the Court of Appeal, in a judgment delivered by Andrew Phang J.A., was of the view that, as the validated resolutions effectively overrode the agreement between the parties as to the scope of WongPartnership's role by giving the latter an enlarged role, this constituted substantial injustice to the appellants. The appeal was accordingly allowed.

II. The Scheme of Section 392

The present provision differs from the original version first included in the *Companies Act 1893* of Australia,[13] the legislative progenitor of s. 392.[14] That version, unlike its present Australian incarnation,[15] to which s. 392 is, for present purposes, essentially identical,[16] comprised only a single provision, undifferentiated in its potential application to proceedings[17] that were affected by "any defect, irregularity, or deficiency of notice or time". Although the section provided that such irregularities did not invalidate the proceedings, the court was nevertheless expressly empowered to make, if it thought fit, "an order declaring that any such proceeding is *valid*".[18] This suggests that the validity of a proceeding affected by the irregularity was not automatic as such, but was dependent on a validating order of court. In contrast, the manner in which the modern provision is crafted suggests two *differentiated and distinct* spheres of operation.[19] The first sphere deals with irregularities or miscarriages of procedure that are *automatically* validated without any need for a validating court order. Within this sphere are subsections (1) and (2), which apply to *procedural* irregularities; and subsection (3), which applies specifically to meetings in respect of which there was an *accidental* omission to give notice of the meeting, or which notice was not received by an intended recipient.[20] The second sphere of operation covers irregularities which do not otherwise fall within the first sphere. In respect of these irregularities, subsections (4), (5) and (6) operating together, give the court a *general* power to make validation and other stipulated orders, subject to certain conditions.

In the present case, the original applicants, the SCM-nominated directors, had sought to *validate* the resolutions that had been passed at the impugned meetings. Interestingly, instead of relying on s. 392(4), and in particular subsection (4)(a),

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[13] *Companies Act 1893* (Qld.), s. 3.

[14] *Chang Benety*, *supra* note 1 at para. 36.

[15] *Corporations Act 2001* (Cth.), s. 1322 [*Corporations Act*].

[16] The only material difference being that our *CA*, *supra* note 3, s. 392(6)(a)(iii) prescribes "public interest" as one of the conditions that the court must be satisfied as to before an order may be made, whilst the equivalent provision in the *Corporations Act*, *ibid*., s. 1322(5)(a)(iii) prescribes that the court must be satisfied that it is "just and equitable" for an order to be made.

[17] *I.e.* proceedings taken or to be taken under the Act itself.

[18] Emphasis added.

[19] See also *Re Caysand No 64 Pty Ltd* (1993) 12 A.C.S.R. 291 at 296 (Qld. S.C.), where Thomas J. referred to the equivalent Australian provision as having "two streams… [which] are not entirely separate, but [which] envisage two different types of application".

[20] It is unclear whether the *CA*, *supra* note 3, s. 392(6)(c) applies to qualify the court's discretion to "[declare] the proceedings at the meeting to be void". The editors of *Ford's Principles of Corporations Law* have assumed that it does: R.P. Austin & I.M. Ramsay, *Ford's Principles of Corporations Law*, 14th ed. (Australia: Lexis Nexis, 2009) at para. 7.581. See further *infra* note 72.

both parties appeared to have focused entirely on regarding *s. 392(2)* as the source of the court's power to validate or remedy the irregularities.[21] However, as we saw earlier, s. 392(2) regulates proceedings which are *presumptively valid.* The subsection provides as follows:[22]

> 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.*

Unlike the original Australian version, s. 392(2) apparently recognises a category of procedural irregularities which are legislatively deemed less likely to be of consequence.[23] Hence, to avoid the inconvenience and vexation that could be occasioned by the invalidation of the proceeding affected by such types of irregularities, the section provides for its presumptive validation. Such procedural irregularities are defined non-exhaustively in s. 392(1),[24] and the irregularity presently under consideration, the lack of quorum at the various board meetings, would appear, at first instance in any case, to fall squarely within s. 392(1). Indeed, this was what the respondents had asserted. Resort to s. 392(2) should therefore be to obtain an order to *invalidate* the proceedings on the ground that the irregularity "has caused or may cause substantial injustice that cannot be remedied by any order of the Court".[25] Logically then, the onus lay, not on the present respondents to establish the validity of the proceedings as such, but on the appellants to show cause why the proceedings ought to be invalidated.

If, on the other hand, the proceedings were not presumptively valid, and a validating order was necessary, the appropriate subsection to apply should have been *s. 392(4).*[26] This would mean establishing the significantly different parameters that s. 392(4) demands. A threshold question, for example, would be whether the respondents would have had *locus standi* as "interested person[s]" under s. 392(4)? The

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[21] See also *Chang Benety*, *supra* note 1 at para. 34 where the Court of Appeal stated that "[t]he power of the Court to remedy such a procedural irregularity *is provided for in s 392(2)*" [emphasis added].

[22] Emphasis added.

[23] See *Deputy Commissioner of Taxation v. Portinex Pty Ltd* (2000) 34 A.C.S.R. 391 at para. 53 (N.S.W.S.C.) [*Portinex*] where Austin J. described these irregularities as connoting "triviality".

[24] Section 392(1) provides, non-exhaustively, that a "procedural irregularity" includes the "absence of a quorum at a meeting", and "a defect, irregularity or deficiency of notice or time".

[25] *CA*, *supra* note 3, s. 392(2).

[26] Section 392(4) provides that an application may be made by "any interested person" for, *inter alia*, "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". Section 392(6)(a) stipulates the conditions that must first be satisfied before the court may make this order, and these are, disjunctively:

(i) that the matter sought to be validated 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 validating order be made.

Additionally, and in tandem with a similar condition in s. 392(2), the *applicant* must satisfy the court that "no *substantial injustice* has been or is likely to be caused to *any person*" (*CA*, *supra* note 3, s. 392(6)(c) [emphasis added]).

Australian decision of *Re Apprais Pty Ltd (in liquidation)*[27] is instructive as to who would qualify as "interested person[s]". Holmes J. had considered the phrase in connection with the Australian equivalent of s. 392(4).[28] The application for a validating order had been brought by a shareholder and former director of the company, which was in liquidation, for, *inter alia*, validation orders relating to resolutions for the winding up of the company that had been passed at meetings which were irregular as they contravened the *Corporations Act*. The applicant had been served by the Australian Taxation Office with a director's penalty notice in respect of unremitted withholdings, and would be liable for the penalty unless a winding up of the company commenced within 14 days of the notice. The applicant's liability therefore depended on the validity of the resolutions. The Deputy Commissioner of Taxation opposed the making of the declarations sought on the ground that the applicant had no standing to bring the application as she was not seeking to protect any rights which were held by her as a director or shareholder in the company. Holmes J. opined that as the section had a "remedial purpose", it was entirely "probable that the legislature intended the relief provided by it to be available to a wide class of applicants".[29] A "real financial interest in the result" therefore sufficed to confer standing as an "interested person".[30] The applicant was therefore an interested person within the meaning of s. 1322(4) as she clearly had a real financial interest in the validity of the meetings.

A similar view as to the width of the class of persons was expressed by McKerracher J. in *Re Golden Gate Petroleum Ltd* where his Honour stated:[31]

> The legislature intended that s 1322(4) be available to a wide class of applicants. It is wide enough to include an applicant whose *material legal rights or pecuniary or other economic interests* are or may be substantially affected by the matter in issue.[32]

Given the subject matter of the impugned resolutions, it would not be too far-fetched to surmise that a more than plausible "interested person" could be *WongPartnership*. The application was however made in the personal names of the SCM-nominated *directors*. Nevertheless, it could be argued that as the resolutions concerned affect the *authority* of the directors to instruct WongPartnership *vis-à-vis* the SCM suit, the applicant-directors could also conceivably be interested persons for the purposes of s. 392(4).

From the foregoing, it is clear that appreciating the scheme of s. 392 is of importance not only because the allocation of the burden of proof depends upon the applicable subsection, but also because the subsections require different conditions to be satisfied before any court order may be made. Be that as it may, it was clearly not the applicants' intention to bring the case within s. 392(4), their argument being

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[27] (2003) 47 A.C.S.R. 371 (Qld. S.C.) [*Re Apprais*].

[28] *Corporations Act*, *supra* note 15, s. 1322(4).

[29] *Re Apprais*, *supra* note 27 at para. 16.

[30] *Ibid.*

[31] (2010) 77 A.C.S.R. 17 at para. 44 (F.C.A) [emphasis added].

[32] See also *e.g.*, *Re Vouris; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (in liquidation)* (2003) 47 A.C.S.R. 155 at para. 53 (N.S.W.S.C), where an administrator was held to be an interested person by reason of "his having occupied the position of administrator, and also from his conduct in that position now being the subject of question".

that the irregularities were, in the first place, merely procedural so as to fall within s. 392(2). And in this regard, the parties accepted that in order to merit the benefit of putative validity under s. 392(2), the irregularity concerned must, as a threshold requirement, be classified as a "procedural irregularity". It is opportune that we turn now to consider the ambit of that phrase.

III. Procedural Irregularity

Section 392(1) provides a non-exhaustive definition of "procedural irregularity". This includes, unless a contrary intention appears,[33] the absence of a quorum at a meeting[34] of a company; and a defect, irregularity or deficiency of notice or time.[35] The appellants had argued that in proceeding with the meetings without a quorum, the respondents had breached the shareholders' agreement as well as the Company's articles of association. Their argument was that the quorum requirement was an expressly negotiated right which gave PPLH a right to create a deadlock.[36] In the circumstances, therefore, the lack of quorum cannot, despite falling within the letter of s. 392(1), be a mere "procedural irregularity". At first instance, the learned judge took the view that "the short answer"[37] to the appellants' contention was that the absence of a quorum *was* a procedural irregularity because it was specifically so provided in s. 392(1).[38] The Court of Appeal agreed, holding that the lack of quorum *without more*[39] could not be a substantive irregularity and the fact that the parties had expressly negotiated for a deadlock right was insufficient to displace that primary proposition.[40]

The appellants' contention raises an interesting point. It suggests that the word "includes" need not be read as *obliging* the inclusion of the stipulated examples, arguably the more obvious reading, so that "procedural irregularities" *means* the stipulated examples *and more*. Rather, the argument conceptualises the word "includes" in a *facultative* manner. This would mean that irregularities that are seemingly procedural, by virtue of the fact that they fall within the categories stipulated in s. 392(1), are nevertheless *not* necessarily so. Whether the irregularity is procedural, thus meeting the threshold for presumptive validity under s. 392(2), or substantive, and hence prima facie invalid unless validated under s. 392(4), would then depend on how the dividing line between the procedural and the substantive is drawn.

It is not entirely obvious that the Court of Appeal had rejected this particular *interpretation* of s. 392(1).[41] The court's rejection of the appellants' contention may

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[33] See *infra* note 41.

[34] Whether of shareholders, of directors or of creditors: *CA*, *supra* note 3, s. 392(1)(a).

[35] *CA*, *supra* note 3, s. 392(1)(b).

[36] *Chang Benety*, *supra* note 1 at para. 38.

[37] *Tang Kin Fei*, *supra* note 10 at para. 25.

[38] *Ibid*.

[39] *Chang Benety*, *supra* note 1 at para. 43. See also *Sum Hong Kum v. Li Pin Furniture Industries Pte Ltd* [1996] 1 S.L.R.(R.) 529 at para. 35 (H.C.) [*Sum Hong Kum*].

[40] *Chang Benety*, *ibid.* at para. 43.

[41] Section 392(1) defines "procedural irregularity" as including defects of quorum and of notice or time "unless the contrary intention appears". The Court of Appeal had emphasised this phrase, and had, by that emphasis, appeared to suggest that a lack of quorum, albeit *prima facie* a procedural irregularity, may nevertheless *not* be such, if a "contrary intention" suggests otherwise: *Chang Benety*, *ibid.* at para. 33.

be taken at its *narrowest* point of generalisation, which is a clear rejection of the appellants' specific contention that the lack of quorum was a substantive irregularity *in the circumstances of the present case*. This leaves open the possibility that a lack of quorum in *other* circumstances may nevertheless be substantive. Admittedly, it is difficult to envisage how any quorum requirement could have a greater impact on substantive rights than the present, which, as noted earlier, was specifically negotiated to provide the joint venture partners with the defensive tactic of creating a deadlock. Nevertheless, even if we take the court's rejection at its most *general*, and accept that "the absence of a quorum was, by statute, only a procedural irregularity",[42] there is still the other class of irregularities specifically stipulated as procedural by s. 392(1): the irregularities that relate to *notice or time*.

As support for their proposition, the appellants had relied on the earlier Court of Appeal decision in *Thio Keng Poon v. Thio Syn Pyn*.[43] In *Thio*, the plaintiff had been removed as director by a resolution passed at a board meeting, notice of which had not been given to him. However, it is not *this* deficiency of notice that was the linchpin of the plaintiff's complaint. The plaintiff's main complaint was that the proper procedure for his removal as stipulated in the company's articles of association had not been duly complied with.[44] The article in question provided for vacation of the office of director if the director concerned had been "requested to vacate office" by all the other directors, and a board resolution is passed confirming that he had been so requested.[45] No request had been made to the plaintiff. The Court of Appeal held that the miscarriage in question could "hardly be considered to be a matter of procedure", and s. 392(2) was accordingly held to be inapplicable.[46]

The Court of Appeal had then astutely observed that the irregularity in *Thio* was really "not of the *same genre* as the irregularities listed in s 392(1)".[47] The court's statement could be read as meaning one of two things—first, that the irregularity in question was *not* of the class of "notice" that fell within s. 392(1)(b); or, second, that the irregularity *did* fall within s. 392(1)(b), as it was a "notice", but was nevertheless not of the same genre as it was *not procedural*. The first reading is certainly probable, and is likely to have been the reading preferred by the present Court of Appeal.[48] It is, however, also not implausible that the Court of Appeal in *Thio* could have intended the second reading, which would support the appellants' contention.[49] There are a couple of signposts suggesting this. The court in that case had referred to the irregularity as a "failure to give a *notice* to the [plaintiff] asking him to resign".[50] This might lead one to draw the inference that the irregularity was one of "defect, irregularity or deficiency of notice", thus falling superficially within s. 392(1). Second, and more

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However, the more *natural* interpretation, with respect, is that the "contrary intention" refers to one that is expressed *internally within the section*.

[42] *Tang Kin Fei*, *supra* note 10 at para. 36.

[43] [2010] 3 S.L.R. 143 (C.A.) [*Thio*].

[44] *Ibid.* at para. 61.

[45] *Ibid.* at paras. 29, 60.

[46] *Ibid.* at paras. 69, 73.

[47] *Ibid.* at para. 42 [emphasis added].

[48] *Chang Benety*, *supra* note 1 at para. 41.

[49] See also Loke, *supra* note 4 at paras. 22, 62 where the learned author appears to have read *Thio* as supporting the second reading.

[50] *Thio*, *supra* note 43 at para. 65 [emphasis added].

importantly, the court had stated as follows:[51]

> Case law from Australia… would suggest that the onus of satisfying the court that a procedural irregularity has caused or is likely to cause substantial and irremediable injustice rests upon the person challenging the validity of the proceeding… *But the threshold burden of showing that the irregularity in question is of a procedural nature rests on the party seeking to uphold the proceeding. Unless this threshold requirement is met, s 392(2) can have no application.*

The court then proceeded to consider the principles applicable to distinguishing a miscarriage of process that was procedural from one that was substantive, and opined that this exercise required a meticulous examination of the aim or object of the requirement which was not complied with.[52] It is of significance that, in stating this critical threshold question in relation to the applicability of s. 392(2), the court did not expressly carve out an exemption for irregularities that did meet the description in s. 392(1), suggesting that even these irregularities would have to be subject to the "threshold requirement".

How then should the definition in s. 392(1) be interpreted? It is at least clear that any quorum requirement, even if "expressly negotiated"[53] for, is, by virtue of the simple fact that it falls within the letter of s. 392(1), procedural in nature, and therefore would not, by reason of its miscarriage, invalidate a proceeding which it affects, unless substantial injustice has been, or may be thereby caused. As the Court of Appeal observed in *Chang Benety*:[54]

> [T]he Appellants' contention was [not] 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… 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.

What then about defects with respect to *notices or time*? It is submitted that this *same* approach should be taken *vis-à-vis* requirements as to notice or time. This, however, will require that the phrase "notice or time", which is of much less specific application than the word "quorum", be given a more defined scope of application. We may be assisted in this exercise by considering the progenitor of the section and the rationale for its inclusion. It will be recalled that the first version of the

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[51] *Ibid.* at para. 54 [references omitted and emphasis added].

[52] *Ibid.* at para. 69.

[53] *Chang Benety*, *supra* note 1 at para. 38. The court, in treating an *expressly negotiated* quorum requirement as creating a deadlock "right" (see paras. 48, 49), may have *assumed* that such quorum provisions created "rights" in the nature of *substantive* rights. Whilst the impact of this on s. 392 is reasonably clear, the court may not have intended this assumption to be of *general* effect and application. In *Union Music Ltd v. Watson* [2003] 1 B.C.L.C. 453 (E.W.C.A. Civ.) [*Watson*], the English Court of Appeal held that a shareholders' agreement, which provided that no meeting of the company could be held unless duly authorised representatives for each of the two shareholders (one holding 49% and the other 51%) were present, did not create any substantive right sufficient to prevent the court from making an order under the English equivalent of the *CA*, *supra* note 3, s. 182 to break a deadlock in favour of a majority shareholder. See further *infra* note 76.

[54] *Chang Benety*, *supra* note 1 at para. 43 [emphasis in original].

regularising provision included in company law legislation[55] made reference *only* to irregularities that related to "notice or time". And the impetus for its inclusion was explained as follows:[56]

> 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.*

It is therefore not unlikely that the reference to "notice or time" was intended to apply *only* to *notices of corporate meetings*, with the "time" aspect being a reference to the *length* of the notice period, whether legislatively or constitutionally stipulated. The phrase "notice or time", as alluded to earlier, is clearly capable of a much wider reach than this. Indeed, the *CA* itself provides a number of situations requiring the giving of "notices" within a particular time frame that are quite unrelated to meetings as such.[57] Restricting the s. 392(1) definition to cover only defects and irregularities in connection with notices of meetings will allow us to apply the *Chang Benety* approach consistently to both limbs of s. 392(1). What then of the word "includes" in s. 392(1)? It is submitted that, as s. 392(2) validates proceedings which should otherwise be invalid, the word "includes" should not be given too sweeping an application. Instead, the definition in s. 392(1) should be narrowly circumscribed. This would require that the word "includes" draw into the definition only irregularities that relate to quorum, notice and time that are related to *corporate meetings*. These would extend the definition to cover *class meetings*, which are not listed in s. 392(1), and meetings of committees of inspection appointed in liquidation.

This approach, it is submitted, has its advantages. The section is read in a rationalised and simplified manner, with s. 392(2) validating only those irregularities falling squarely within the narrowly-circumscribed s. 392(1), leaving all other irregularities to be considered under s. 392(4). It might be argued that *even* such narrowly prescribed procedural irregularities would fall within the purview of s. 392(4) which applies, *inter alia*, to irregularities that are "essentially of a procedural nature". However, to accept this interpretive route would mean construing s. 392(2) as a *subset* of s. 392(4), which would, it is submitted, render the former subsection, and hence correspondingly s. 392(1), superfluous. One could then legitimately question why the legislature saw fit to provide for separate classes of irregularities, and did not instead simply, as the original provision did, confer on the court a general power to validate. The necessary conclusion then must be that s. 392(2) has a different sphere of operation from s. 392(4).[58]

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[55] See text accompanying *supra* notes 13, 18.

[56] Austl., Queensland, Legislative Assembly, *Parliamentary Debates* (19 July 1893) at 239 (Thomas Joseph Byrnes), quoted in *Chang Benety*, *supra* note 1 at para. 36 [emphasis in judgment].

[57] See *e.g.*, *CA*, ss. 76(9A), 78, 128A.

[58] This may also be what Kelly S.P.J. meant when he opined, in the Supreme Court of Queensland decision of *Donrob Enterprises Pty Ltd v. Queensland Petroleum Management Ltd* (1988) 14 A.C.L.R. 307 at 310 (Qld. S.C.), that the s. 392(4) equivalent in the *Companies (Queensland) Code* (Qld.) "must be read as being *complementary*" [emphasis added] to the Code's s. 392(2) equivalent.

With this approach, it would mean that the question of whether an irregularity is procedural or substantive, is relevant only in connection with *s. 392(6)(a)(i)*. This interpretation, it is submitted, clarifies the manner in which the section operates, and obviates the need, in the words of Palmer J. in *Cordiant Communications (Australia) Pty Ltd v. The Communications Group Holdings Pty Ltd*, to "try to find the means of a pragmatic solution solely within [s. 392(2)] by stretching the boundaries of 'procedural irregularity' ".[59]

A proceeding affected by an irregularity that falls within s. 392(2) is therefore valid until it is invalidated by an order of court on the ground that substantial injustice has thereby been caused. This brings us to the next issue—the concept of substantial injustice.

IV. Substantial Injustice

As a proceeding affected by a s. 392(2) irregularity is presumptively valid, the burden lies on the party seeking *invalidation* to establish that the irregularity has caused or may cause substantial injustice. The position under s. 392(4) is diametrically opposite—it is the party who is seeking *validation* that has to establish the *absence* of substantial injustice. How should substantial injustice be assessed?

The Court of Appeal referred to its earlier decisions in *Thio* and *Golden Harvest Films Distribution (Pte) Ltd v. Golden Village Multiplex Pte Ltd*,[60] and emphasised that the process of determining substantial injustice under s. 392 involved a "*holistic weighing and balancing* of *the various interests* of *all* the relevant parties".[61]

In the present case, the court took particular note of the fact that the quorum requirement was not merely an ordinary one that specified a minimum number for meetings, but was one that had been specifically included 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*".[62] Where such a quorum requirement is breached, it was the court's view that there would *prima facie* be substantial injustice "to the *side which exercised its deadlock rights*".[63] The court made reference to *Re Goodwealth Trading Pte Ltd*,[64] where a quorum requirement similarly provided the minority shareholder with the defensive mechanism of creating a deadlock by the simple expedient of not attending board meetings. There were only two shareholders in the company, both of whom were also its directors. The minority shareholder had petitioned to wind up the company. The majority shareholder then purported, at an inquorate board meeting, to appoint solicitors to

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[59] [2005] 55 A.C.S.R. 185 at para. 99 (N.S.W.S.C.) [*Cordiant*].

[60] [2007] 1 S.L.R.(R.) 940 (C.A.).

[61] *Ibid.* at para. 54, quoted in *Chang Benety*, *supra* note 1 at para. 46 [emphasis in original]. Specifically, the court held, at para. 45, that the following principles applied:

(1) there must be a direct link between the procedural irregularity in question and the injustice suffered;

(2) the injustice must be real, and not merely theoretical or fanciful; and

(3) the aggrieved party must show that there may or could have been a different result if not for the occurrence of the procedural irregularity.

[62] *Ibid.* at para. 48 [emphasis added].

[63] *Ibid.* [emphasis added].

[64] [1990] 2 S.L.R.(R.) 691 (H.C.) [*Re Goodwealth*].

represent the company in striking out the petition. The learned judge held there that the lack of quorum at the board meeting could not be cured by s. 392(2) as the minority shareholder's interests would be prejudiced by any disputed decision being taken, by one of only two shareholder groups, at the inquorate meeting.

Although the exercise of the deadlock right in *Re Goodwealth* was triggered by the minority shareholder's absence *as a director* at a *board meeting*, it cannot be doubted that the relevant substantial injustice, which might have resulted from regularising the meeting and the resolutions passed thereat, would have been suffered by the minority shareholder *qua shareholder*, and this must be so because the right to bring about a deadlock was one that was conferred on the shareholder.[65] The Court of Appeal in the present case appears to have adopted a somewhat different stance. In concluding that validating the impugned resolutions would cause substantial injustice *to the appellants*,[66] the court appeared to have been concerned, not so much with the interests of *PPLH*, the only other shareholder in the Company apart from SCM, but with the interests of the *appellants*, who were *PPLH's nominees on the Company's board of directors*. The court had stated:[67]

> [I]n 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… By instructing WongPartnership to investigate the SCM complaints, the Respondents placed *the Appellants*, *who were the subject of the allegations, in a disadvantageous position*.

Whilst it is true that the appellants in the present case did have a significant beneficial interest in the shares of PPLH, held indirectly through their interests in the listed parent of PPLH,[68] it is also trite that corporate entities and their shareholders are separate legal persons. It cannot, therefore, be assumed that any prejudice suffered by the appellants, as directors, is similarly prejudicial to the Company's shareholders. It may be, however, that the court was considering *s. 392(6)(c)*, which requires the court to be satisfied that "no substantial injustice has been or is likely to be caused to *any person*"[69] before it makes an order "under this section".[70] This reading would explain the relevance of any prejudice suffered by the appellants *qua directors*. This, however, raises a necessarily *antecedent* question, and that is whether s. 392(6)(c)

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[65] See also *Sum Hong Kum*, *supra* note 39. Warren Khoo J. had held, at para. 35, that the procedural irregularity there, similarly a lack of quorum in both the general meeting, as well as a board meeting, resulted in substantial injustice to the plaintiff shareholder as the "irregularity deprived him of his right under the deadlock provisions of the articles to prevent any decision from being taken by the company without his agreement". Clearly, Khoo J. was referring to the plaintiff's right *qua shareholder*.

[66] *Chang Benety*, *supra* note 1 at para. 53.

[67] *Ibid.* at para. 49 [emphasis added]. See further paras. 51, 52.

[68] The appellants together controlled more than 95% of the shares in Saberon Investments Pte Ltd, which in turn held approximately 67% of the issued and paid up share capital of Baker Technology Ltd. And Baker, a company listed on the Singapore Exchange, owned the entire issued share capital of PPLH: see *Sembcorp*, *supra* note 6 at paras. 5-8.

[69] *CA*, *supra* note 3, s. 392(6)(c) [emphasis added].

[70] See *Chang Benety*, *supra* note 1 at para. 43, where the court expressly referred to this subsection.

is itself of any *relevance* to *s. 392(2)*. It is submitted, with respect, that the answer should be in the negative. This is because s. 392(2) already has its own "substantial injustice" qualifier, one that is worded differently from that in s. 392(6)(c). The s. 392(6)(c) condition, therefore, should have no application to orders made under s. 392(2).[71]

This point is of significance. Whilst the concept of substantial injustice appears, superficially at least, common to both ss. 392(2) and 392(4), there are lexical differences in how it is expressed in each of the subsections. Unlike s. 392(6)(c), s. 392(2) does not have the phrase "to any person" appended to the "substantial injustice" qualifier. This difference strongly suggests that the concept is meant to be viewed from different perspectives in the respective subsections, and different considerations should therefore move the court. The deliberate omission of the phrase "to any person" in s. 392(2) appears to have been intended to *limit* the relevance of the potentially wide range of diverse interests, depending on the nature of the actions taken pursuant to the irregular proceeding, that might have been adversely affected by the irregularity, thus giving rise to the substantial injustice. It is submitted that this deliberate phrasing of s. 392(2) renders relevant, for this purpose, *only* those interests for which protection or benefit the affected procedure was imposed in the first place. Accordingly, whether substantial injustice is or may be present in any particular case will require a contextual assessment of the procedure in question, and the *raison d'état* for its inclusion. Where a procedure, like the quorum requirement in the present case for example, was included in a company's constitution pursuant to a joint venture agreement, the relevant interests, when considering if substantial injustice has been or may be caused, should be that of the joint-venturers, in other words, the *shareholders* of the Company. This is because the purpose of including the quorum requirement was to ensure continued participation by all the joint-venturers in decisions affecting the Company. Support for this contextual approach may be discerned in the Australian decision of *Cordiant*, where Palmer J. had observed, in connection with the Australian equivalent of s. 392(2),[72] that:[73]

> [A]n enquiry as to 'substantial injustice', *in the context of a shareholders meeting* is concerned with whether *a shareholder's rights* to attend and vote [thereat] have been materially affected, not with whether the result of the meeting would be in the best commercial interests of the company.

This reading of the section, it is respectfully submitted, is consistent with the apparent legislative scheme of s. 392. If the very *purpose* of subsection (2) is indeed to validate *narrowly-defined* irregularities that have been *legislatively deemed* procedural,[74] the concept of the injustice which counters this presumption should therefore be

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[71] Indeed, it is submitted that the *CA*, *supra* note 3, s. 392(6)(c) should apply *only* to qualify the court's exercise of discretion in making orders under *s. 392(4)*. This reading, it is submitted, would appear to flow from a plain reading of s. 392(6) itself as subsections (6)(a) and (6)(b) apply only to orders made under ss. 392(4)(a), 392(4)(c) respectively. It should therefore logically follow that subsection (6)(c), must, in keeping with the schematic context of the section, apply only to those orders that may possibly be made under s. 392(4). See also Austin & Ramsay, *supra* note 20 at para. 7.584. This would suggest also that s. 392(6)(c), in its full breadth, should not apply to orders made under s. 392(3).

[72] *Corporations Act*, *supra* note 15, s. 1322(2).

[73] *Cordiant*, *supra* note 59 at para. 86 [emphasis added].

[74] And hence *trivial*: *Portinex*, *supra* note 23 *per* Austin J.

contextually limited in order not to denude the subsection of its intended effect. The position *vis-à-vis* s. 392(6)(c), which, as we saw earlier, applies to orders made under s. 392(4), is, on the other hand, entirely different. Orders are sought under s. 392(4) in order to validate proceedings that are affected by some miscarriage of process. Unless the court makes a validating order, the affected act or proceeding is invalid. It has been observed repeatedly in Australian authorities that this provision is a *remedial* provision, and is therefore crafted in very wide terms so as to empower the courts to "prevent senseless results, mindless inefficiency, and in a word injustice".[75] It is therefore entirely appropriate that the court, in considering whether to make the validating order, should be moved by a commensurately broad class of interests that might potentially be adversely affected by the making of the order.

On this view then, the relevant injustice, on the facts of the present case, should therefore be that suffered by the *Company's shareholders* or their interests. On the facts of the case, the impugned proceedings were precipitated by allegations of breaches of directors' duties. As supporting the monitoring of the Company's directors should, as a general proposition, be in its shareholders' interests, it could fairly be said that the resolutions appointing WongPartnership to act for the company in relation to those allegations were, as Woo J. had opined, "neutral".[76] The resolutions which expanded the authority of WongPartnership to also provide advice on the operations of the Company, on the other hand, stood on a different platform. Regularising these resolutions could result in substantial injustice as the involvement of PPLH as shareholder in the operations of the Company could have been undermined.

V. Conclusion

The case of *Chang Benety* highlights the important place that s. 392 occupies in the statutory scheme that governs companies and their operations. It also throws up a number of issues *vis-à-vis* the section's intended application framework, and the ambit and reach of the section. These are interpretative questions, and the Court of Appeal has answered some of them, but has left others that will benefit from clarification open. Thus, whilst it is quite clear that a quorum requirement, even one that was specifically negotiated for, is always, by the simple fact that it falls neatly within s. 392(1), a procedural irregularity, it is less clear whether the same approach can be said to apply to requirements as to notice and time. It is submitted that the answer should be in the affirmative. In the same vein, the Court of Appeal was clear that in considering the question of "substantial injustice", a holistic approach must be adopted, and the different interests of all relevant parties weighed and balanced *inter se*. This approach is certainly consistent with that adopted in Australia.[77] However, s. 392 appears to posit that those who fall within the class of "relevant parties" may not be *homogeneous* across the different subsections. Accordingly, it is arguable

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[75] *Re Vanfox Pty Ltd* (1994) 13 A.C.S.R. 209 at 216 (Qld. S.C.) *per* Thomas J.

[76] *Tang Kin Fei*, *supra* note 10 at paras. 42, 43. It may also be relevant that the allegations were made by a shareholder holding 85% of the issued capital. To allow the meetings to be thwarted by a quorum requirement does effectively run counter to the normal company law principle of majority rule. Indeed, it may be that in such cases, the court may exercise its discretion under the *CA*, s. 182 to order a meeting: see *Watson*, *supra* note 53; *Smith v. Butler* [2012] 1 B.C.L.C. 444 (E.W.C.A. Civ.).

[77] See *e.g.*, *Re Compaction Systems Pty Ltd* (1976) 2 A.C.L.R. 135 at 150 (N.S.W.S.C.).

that the relevant interests that would move the court should vary depending on the nature of the irregularity, and whether this irregularity fell to be considered under s. 392(2) or s. 392(4). This is an issue of some import, as it will have an impact on the efficacy of the proceeding affected by the irregularity. Undoubtedly then, future judicial clarification will be helpful.