¶2-100 General rule

The primary rule of construction is that words should be given its ordinary meaning. The ordinary meaning connotes a meeting as a meeting attended by more than one person. Although the departure in law from the ordinary meaning has developed conservatively, the ordinary meaning of meeting[1] is not necessarily synonymous with its legal meaning.

The general rule is that a plurality of persons is required to constitute a meeting.[2] The question whether one person constitutes a meeting was considered by the Court of Appeal in England *in Sharp v Dawes*, where *Lord Mellish* LJ said (at p 29):

> "According to the ordinary use of the English language, a meeting could no more be constituted by one person than a meeting could have been constituted if no shareholders at all had attended. No business could be done at such a meeting."

In *Sharp v Dawes*, a meeting convened for making a call was attended by one shareholder who held proxies for the other shareholders of the company. Therefore, the resolution at the meeting was passed by just one shareholder. It was held by the Court of Appeal that there was no meeting. Similarly in *Re Sanitary Carbon Co.*[3] (following the decision in *Sharp v Dawes*), a meeting convened to consider a resolution to wind up the company voluntarily, which was attended by one shareholder holding proxies for three other shareholders, was held to be an invalid meeting.

Whether the rule as laid down in *Sharp v Dawes*[4] is of general application is open to doubt. Although *Lord Coledrige* CJ, upon construction of the statute, found that there was nothing to displace the ordinary meaning, he did point to the possibility of a one-man meeting. At p 29, his Lordship stated as follows:

> "The word 'meeting' *prima facie* means a coming together of more than one person. It is, of course, possible to show that the word 'meeting' has a different meaning from the ordinary meaning, but there is nothing here to show this to be the case."

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1 *Oxford English Dictionary* (2nd Ed).

2 *Sharp v Dawes* (1876) 2 QBD 26.

3 (1877) WN 223.

4 (1876) 2 QBD 26.

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In essence, all the cases, which have upheld the validity of a one-man meeting, have done so by the construction of the relevant Articles of Association ("AA")[5] or the provisions of the statute[6] to show that a meaning different from the ordinary meaning was intended.

Validity of a one-person meeting

¶2-200 Creditors meeting

However, in the same year as *Re Sanitary Carbon Co*, the Court of Appeal of the Supreme Court of Victoria in *R v Cogdon, Exparte Hasker*[7] declined to follow *Sharp v Dawes* and held a one-man meeting by a person holding proxies for others to be valid.

The distinction between *Sharp v Dawes* and *R v Cogdon, ex parte Hasker* is that in the former case, the meeting was one of members of the company, whereas in the latter it was a meeting of creditors. The rationale was that since the statute allowed the appointment of proxies and that shareholders could instruct the proxy holder to vote in any way as he may direct, the law should regard it as if two persons were present even though only one person was physically present.

In another Australian case, *R v Leach, ex parte Tolstrup*,[8] *Stawell* CJ held:

> "It is true that it was held in *Sharp v Dawes* that one shareholder cannot constitute a meeting; but this court has already decided that one person holding proxies for two creditors, can constitute a meeting and even vote in a different way in respect of each proxy, as his instruction may direct. As the Act allows proxies, we must take it that two creditors were present at the meeting at which the appointment in question was made."

We must note that in these cases, there is one shareholder holding proxies for others with an agreement and instruction to vote in a particular way.

5 Note: Where the AA are silent on quorum or in absence of conflicting provision, subject to sec 74 and 75 CA, sec 179 CA provides that two members of the company personally present shall be a quorum.

6 Sections 182 and 395 CA enable the court to cure a lack of quorum.

7 (1877) 3 VLR 88.

8 (1877) 5 VLR 494.

¶2-210 Class meeting

Sharp v Dawes was distinguished in *East v Bennett Bros Ltd*.[9] In the *Bennett Bros Ltd* case, all preference shares were held by one shareholder and it was decided that the word "meeting" as used in the Memorandum of Association ("MA") was to be interpreted not in the strict sense in which it is usually used, but as that which includes the case where there is only one shareholder holding all the shares of a particular class.

In this case, since a single person held all the issued shares of a particular class, no other person was affected by this person's course of conduct. It is noted that in such a situation, the purposive approach used to construe the AA will not detriment any other person in that class. However, if there are two preference shareholders and only one attends a meeting, there would be no valid meeting if the AA provides for a plural quorum. Hence, it is apparent that the use of the purposive approach in the construction of the AA may lead to inconsistent results. The decision in the *Bennet Bros Ltd* case is peculiar to the facts of the case itself.

¶2-220 Meetings of a wholly-owned subsidiary

If the shares of a company are held in total by a holding company, a meeting of that wholly-owned subsidiary shall be a meeting of one person, with a quorum of one. Physical meetings are not necessary. The authorised representative of the holding company may, by a minute signed by him, state that any act, matter or thing, or any ordinary or special resolution, required under the *Companies Act* ("CA"), MA or AA of the subsidiary to be made, performed, or passed by at an ordinary general meeting or at an Extraordinary General Meeting ("EGM") of the subsidiary, has been made, performed or passed.

The resulting effect is that the act, matter, thing or resolution shall, for all purposes, be deemed to have been duly made, performed or passed by or at an ordinary general meeting, or as the case requires, by or at the EGM of the subsidiary. The wholly-owned subsidiary is required to lodge a copy of the resolution or other documents and the minutes of the meeting with ACRA within one month of the signing of the minutes by the corporate representative of the holding company.[10]

9 (1911) 1 Ch 163.

10 That is, forms and other corresponding relevant documents with respect to the resolutions.

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¶2-230 By statute

Power of the court to order a meeting — sec 182 CA

Under sec 182 CA, the court may, either of its own motion or on the application of any director or any member entitled to vote at the meeting or of the personal representative of any such member, order a meeting to be called, held and conducted in such manner as the court thinks fit.

The court may also give such ancillary or consequential directions as it thinks expedient, including a direction that one member present in person or by proxy shall be deemed to constitute a meeting, or that the personal representative of any deceased member may exercise all or any of the powers that the deceased member could have exercised as if the deceased member were present at the meeting.

The application made under sec 182 CA to call for a meeting could be made if it is impracticable for the applicant to call a meeting in any manner in which the meeting may be called or if it is impracticable to conduct the meeting in any manner prescribed by the AA or the CA.

The court will allow the application if the impracticability of calling for the meeting was due to a purported act by a party to frustrate a meeting by non-attendance, resulting in an inquorate meeting; resulting in the company being rendered helpless and its operation stultified by its non-ability to make decisions.[11] The word "impracticable" is not synonymous with "impossible".[12]

In *Foo Tong Eng v Po Gun Suan*,[13] the applicant, who was also the managing director of the company, held a majority of 5,000 shares while the respondent had 1,000 shares in the company. The respondent refused to attend the EGM called by the company on the grounds that it was for the purpose of oppressing the minority. However, the respondent failed to spell out the irreparable harm he would have suffered as a result of the EGM. The applicant submitted, *inter alia*, that the respondent had unlawfully retained valuable documents including account books of the company. *Arulanandom* J held (at pp 337–338):

> "But whatever his objection the court is aware that by the respondent's refusal to attend the duly constituted meeting of the company, in view of the provisions of the AA, he has literally paralysed the company and reduced it to a state of complete

11 *Foo Tong Eng v Po Gun Suan* (1950–1985) MSCLC 304.

12 *Leong Ah Hong v Hup Seng Co Ltd* (1950–1985) MSCLC 193.

13 *Foo Tong Eng v Po Gun Suan* (1950–1985) MSCLC 304.

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helplessness and also exposed the company to penalties for non-compliance with the *Companies Act 1965* [Malaysia] and other laws of the country eg income tax. Furthermore if the respondent who holds only 10% of the shares in the company considers himself an oppressed minority, his remedy would lie in his petitioning for dissolution of the company as an oppressed minority and not stultifying operations of the company and causing it irreparable damage. No court of law or equity could condone such conduct let alone buttress it with the sanction of the court. Common sense would require that the company should be allowed to function and any aggrieved party should obtain redresses through the remedies recognized by the law and open to him."

It must be noted that sec 182 CA is concerned only with a general meeting of the company and is not applicable to a meeting of the board of directors.[14] An application for an order under this section may be made to the High Court by way of originating summons.[15]

Irregularities — sec 392

Section 392 provides that in this section, unless the contrary intention appears, a reference to a procedural irregularity includes a reference to:

(a) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation or at a joint meeting of creditors and members of a corporation; and

(b) a defect, irregularity or deficiency of notice or time.

A proceeding under the CA 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.

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

14 *Tay Say Geok & Anor v Tay Ek Seng Co Sdn Bhd* (1950–1985) MSCLC 91.

15 Section 4 CA: "Court" means the High Court or a judge thereof. Order 88 r 2 *Rules of Court (R 5)*: If a validation order is prayed for under the CA, the application shall be made by originating motion.

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¶2-240 Purported wrongful act of other shareholders

If a quorum is present at the commencement of a meeting but is subsequently reduced to one, that is, being a one-man meeting, there will still be a valid meeting if the situation is brought about by a wrongful act.[16]

This stems from the principle that the quorum provision must not be construed in a way such as to give members an entitlement in the form of a veto against the quorum requirement of a meeting.

In *Tan Guan Eng @ Tan Guan Sooi v BH Low Holdings Sdn Bhd & Ors*,[17] a quorum was present at the commencement of the EGM. The EGM was called to appoint certain persons as directors and to remove others as directors. The plaintiff was the majority shareholder and he appointed two persons to be his proxies for a certain number of shares each. Unfortunately, one of his proxies was not a member and was also not a qualified person within the meaning of sec 149(1)(b) CA (Malaysia). Hence, this proxy was not qualified to attend and vote.

The chairman of the meeting sensing that the meeting, if continued would be adverse to him, wrongfully adjourned the meeting and left the meeting together with the other members who supported him. The proxies of the plaintiff remained behind and passed a resolution to appoint additional directors.

One of the issues before the court was whether there could be a meeting of one person in view of the fact that the other proxy, as the High Court held, was not qualified to attend and vote in view of sec 149(1)(b) CA (Malaysia). *Wan Adnan* J (as he then was) held:

"In my view in the circumstances of the case the continued EGM with the presence of only the valid proxy of Tan Guan Sooi @ Tan Guan Eng was a meeting. There was a quorum at the commencement of the meeting. Ng Kweng Hee must have sensed that the proceeding has taken a turn which he did not like and that the proposed resolutions were going to be passed when he, in

16 *Tan Guan Eng @ Tan Guan Sooi v BH Low Holdings Sdn Bhd & Ors* (1986–1997) MSCLC 90.

17 (1986–1997) MSCLC 90.

¶3-100 General meeting

A general meeting is a meeting of the members of a company.

> "There is no magic in the use of the word 'general'. If all the members meet, it seems to me that the meeting must be a general meeting, although, at the same time, it may also be an EGM or an Annual General Meeting ('AGM')."[1]

¶3-200 Annual general meeting

The principal statutory requirements, in respect of an annual general meeting ("AGM") are found in sec 175 CA:

(1) A general meeting of every company to be called the "annual general meeting" shall in addition to any other meeting be held once in every calendar year[2] and not more than 15 months after the holding of the last preceding AGM, but so long as a company holds its first AGM within 18 months of its incorporation[3], it need not hold it in the year of its incorporation or in the following year.

(2) Notwithstanding subsec (1), the Registrar, on the application of the company, may, if for any special reason he thinks fit to do so, extend the period of 15 months or 18 months referred to in that subsection, notwithstanding that such period is so extended beyond the calendar year.

(3) Subject to notice being given to all persons entitled to receive notice of the meeting, a general meeting may be held at any time and the company may resolve that any meeting held or summoned to be held shall be AGM of the company.

(4) If default is made in holding an AGM:

  (a) the company and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 and to a default penalty; and

  (b) the court may, on the application of any member, order a general meeting to be called.

1 *Harman v. Energy Research Group Australia Ltd*; *Davidson v Energy Research Group Australia Ltd* (1985) 3 ACLC 536 per *Brinsden* J.

2 Section 2 *Interpretation Act* (Cap 1).

3 *Gibson v Barton* (1875) LR 10 QB 329.

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A private company may dispense with annual general meetings

Section 175A sets out the provisions for dispensing with AGMs:

(1) A private company may dispense with the holding of AGMs by passing a resolution.

(2) Such a resolution shall only be treated as passed at a general meeting if it has been passed by all of such members as, being entitled to do so, vote in person or, where proxies are allowed, by proxy present at the meeting.

(3) A resolution for dispensing with the holding of general meetings has effect for the year in which it is made and subsequent years, but does not affect any liability already incurred by reason of default in holding an AGM.

(4) In any year in which an AGM would be required to be held but in which no such meeting has been held, any member of the company may, by notice to the company not later than three months before the end of the year, require the holding of an AGM in that year.

(5) The power of a member to require the holding of AGM is exercisable not only by the giving of a notice but also by the transmission to the company at such address as may for the time being be specified for the purpose by or on behalf of the company of an electronic communication containing the requirement.

(6) A resolution for dispensation with AGMs shall cease to be in force if the company is converted to a public company. If such a resolution ceases to be in force, the company shall not be obliged to hold an AGM in that year if, at the time the resolution ceases to have effect, less than three months of the year remains.

(7) Unless the contrary intention appears:

  (a) a reference in any provision of the *Companies Act* ("CA") to the doing of anything at an AGM shall, in the case of a company that has dispensed with holding an AGM be read as a reference to the doing of that thing by way of a resolution by written means under sec 184A; and

  (b) a reference in any provision of the CA to the date or conclusion of an AGM of a company that has dispensed with holding an AGM shall, unless the meeting is held, be read as a reference to the date of expiry of the period within which the meeting is required by law to be held.

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The Registrar of Companies has discretionary powers to approve or reject an application.[4]

It has been held that the obligation to hold an AGM every calendar year and the obligation to hold an AGM not more than 15 months after the preceding one, embody two distinct and separate legal obligations. Failure to comply with either requirement renders the company and every officer in default and liable to a fine under sec 175(4).[5]

Consequently, when one calls a meeting in the relevant calendar year for the purposes of resolving to adjourn that said meeting to a date in the next calendar year, it does not mean an AGM is held in that relevant calendar year unless one obtains an appropriate extension of time.[6] Therefore, a company is advised to apply for an extension of time in the event the company anticipates that it cannot hold an AGM in the relevant calendar year.

The penalty for failing to hold an AGM is not limited to a fine of $5,000 but includes a default penalty.[7] Hence, the AGM must be convened even after payment of the fine, failing which the default penalty will be imposed despite payment of the fine, until the obligation to hold the AGM is performed.

In the event an AGM has been called, the directors have no power to postpone it. In the event a company desires to grant the director the authority to postpone the AGM, such specific powers and authority must be expressly set out in the Articles of Association ("AA").[8]

4 The application must be supported by documentary evidence setting out substantial and material circumstances for the company that made it impossible for the company to hold the AGM. An illustration of what ACRA considers as substantial and material circumstances is, for example, where the company intends to carry out a restructuring exercise pursuant to sec 175 CA.

5 *Smedley v Registrar of Joint Stock Companies* [1919] 1 KB 97.

6 *Guss v Veenhuizen* (1975–1976) CLC ¶40-258; 50 ALJR 638.

7 Section 408(1) CA. Definition of "default penalty": Where in, or at the foot of, any section or part of a section of the CA there appears the expression "Default penalty", it shall indicate that any person who is convicted of an offence against the CA, if the offence continues after he is so convicted, he shall be liable to an additional penalty for each day during which the offence so continues of not more than the amount expressed in the section or part as the amount of the default penalty or, if an amount is not so expressed, of not more than $200.

8 *Smith v Paringa Mines Ltd* (1906) 2 Ch193, *Bell Resources Ltd v Turnbridge Pte Ltd & Ors* (1988) 6 ACLC 842.

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Guidelines on application

The CA requires that a company must hold its AGM on time. If an application is made for an extension of time, The Accounting and Corporate Regulatory Authority ("ACRA") will generally not grant more than three months' extension.

(1) Private limited and public unlisted companies can apply via BizFile for an extension of time of up to three months.

Step 1: At the BizFile homepage menu, select the transaction "Annual Filing" under the transaction group "Local Company".

Step 2: Select the transaction "Extension of time under section 175 (1 to 3 months) for private limited & unlisted public companies".

(2) Public-listed companies cannot apply for an extension of time online. The application should be made *in writing* to ACRA, stating clearly the reasons for the application and enclosing any supporting documents, together with the application fee. Comments from the Singapore Exchange ("SGX") have to be sought and a copy of the SGX's reply has to be submitted together with the application.

(3) If there is any change in the financial year, the company is required to file a "Notification for change of financial year" before lodging the application.

(4) The application fees range from $50 to $150 ($50 for one month, $100 for two months and $150 for three months), and they are non-refundable.

(5) An application for extension of time must be made before the due date for holding AGM under sec 175. Late applications will not be considered.

(6) As this is a one-time application for extension and if the application is approved, the company cannot again apply for an "Extension of Time under section 175" in the same calendar year.

(7) The reasons for requesting more time must be stated in the application for the extension of time.

(8) Company officers (ie directors or company secretaries), professional firms and service bureaus can apply for time extension on behalf of the company.

¶3-210 Nature of business at an annual general meeting

The AA of the company should specify what business may be transacted at the AGM. Article 46, Sch 4, CA, which incorporates Table A, lists the following business to be transacted at the AGM:

- the declaration of dividend;

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- the consideration of the accounts;
- balance sheets and the reports of directors and auditors;
- the election of directors in place of those retiring; and
- the appointment and the fixing of remuneration of the auditors.

Article 46 identifies these matters as the "ordinary business" of the company. As such, these matters need not be described in detail in the notice convening the meeting, although, it is usual for a notice to give certain additional information, for example, in relation to the dividend to be declared.

Declaration of dividends

Declaration of dividends must be made in accordance with the AA of the company. A company shall not make payment of dividends to its shareholders except out of profits.[9]

"Dividend" may include bonus and payment by way of bonus. Therefore, any bonus issues should be only made out of profits.

The CA, however, does not define "profits". The definition is judiciously and properly left to the commercial world.[10] Nevertheless, in practice and in accordance with judicial decisions, the determination of what is deemed "profits" is ascertained by reference to the normal standards of commercial prudence using acceptable accounting methods,[11] and the method of calculating the profits is for the determination of the accountant. However, the following principles have been adopted to ascertain the profits available for payment of dividends.

(1) A dividend cannot be paid if:

(a) it would result in the company's assets being insufficient to pay its debts;

(b) it is paid out of borrowed money unless the company has divisible profits available.

9 The use of share premium account to pay dividends is acceptable if such dividends are satisfied by the issue of shares to members of the company. "Share premium account" is the account containing the amount of premium received equivalent to the aggregate amount or value of the premiums whether received in cash or in the form of other valuable consideration by the company pursuant to an issuance of shares: *Smedley v Registrar of Joint Stock Companies* [1919] 1 KB 97.

10 Per *Lindley* LJ in *Lee v Neuchatel Asphalte Co* (1889) 41 ChD 1.

11 Note that listed companies must apply the Singapore Accounting Standards Council ("ASC") accounting standards and principles.

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(2) A dividend can be paid:

(a) out of profits of one year without making losses of previous years;[12]

(b) out of profits[13] arising from a *bona fide* revaluation of unrealised fixed assets.[14]

A company's AA may provide for the definition of profits and also impose restrictions on payment of dividends. If a company adopts Table A, the directors have the power to set aside part of the profits as reserves before recommending a dividend.[15] Directors are also empowered to deduct from any dividend payable to a member any money owed by that member to the company on account of calls or otherwise in relation to that company.[16]

In declaring a dividend or bonus a general meeting may direct payment wholly or in part by distribution of specific assets and in particular of paid up shares, debentures and the like.[17] A general meeting may, also upon a director's recommendation, resolve to capitalise any part of the amount outstanding to the credit of the profit and loss account, or otherwise available for distribution, on the condition that it be not paid in cash but in payment of amounts unpaid on shares, or in payment of unissued shares or debentures.[18]

Any dividend payable in cash is to be paid by cheque or warrant sent through the post to the registered address of the holder, or in the case of joint holders, to the holder who is first named in the register.[19]

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12 *Amonnia Soda Co Ltd v Chamberlain* (1918) 1 Ch 222.

13 If the reference in the AA is payment from "trading profits" (rather than just from "profits"), a profit represented by revaluation of capital assets cannot be utilised to pay dividends.

14 *Dimbula Valley (Ceylon) Tea Co v Laurie* (1961) 1 Ch 353, *Blackburn v Industrial Equity Ltd* (1977–1978) CLC ¶40-324.

15 Table A, Art. 101.

16 Table A, Art 103.

17 Table A, Art 104.

18 Table A, Art 106.

19 Table A, Art 105.

Preparation and laying of accounts

By virtue of sec 201(1) CA, the directors must at some date not later than 18 months after the incorporation of the company and subsequently once at least in every calendar year at intervals of not more than 15 months, lay before the company in its AGM, copies of the company's annual accounts,[20] and the directors' and auditors' reports on those accounts.[21]

Section 201(1) CA also requires the accounts to be laid before a general meeting within six months of the end of an accounting reference period, that is, the financial year end.

ACRA, on an application by the company may extend the period of 18 months or 15 months, for laying of the accounts. With respect to any financial year, ACRA may also extend the period of six months referred to above for any special reason[22] ACRA deems fit, notwithstanding the period so extended is beyond the calendar year. A company desirous of applying for an extension of time must make an application to ACRA before the due date for the AGM via BizFile. An application fee is payable for a one-month extension up to a maximum of three months' extension in accordance with sec 175(2) and 201(2).[23]

It must be noted that an AGM must be held within four months of the end of the financial year end for public companies listed on the SGX, and six months for all other companies.

20 Rule 1207(5)(d) SGX Listing Rules ("the Listing Rules") requires a listed company to ensure that the annual audited accounts are prepared in accordance with the approved accounting standards of the ASC.

21 Rule 702 in Chapter 7 of the Listing Rules requires a listed company to release all announcements via SGXNET unless specified otherwise.

22 The "special reasons" for granting an extension of time are construed very strictly by ACRA. Some of the special reasons that have been accepted by ACRA are where the books have been damaged or destroyed by fire, flood or any natural disaster or act of God, making it impossible to produce the book (supporting documentation must be produced, for example, police report, insurance claims, etc). Other reasons include confiscation of the book pursuant to the provisions of other binding legislation by other regulatory bodies (a copy of a letter from such regulator must be produced) or an order of court for the possession of the company's accounting records. Reasons such as "inability to obtain accounting books" or "delay in finalisation of accounts" are generally not acceptable especially if it is within the control of the company.

23 Such an application can only be made after the board has passed a resolution authorising the company to make an application to ACRA to extend the time. The date of the board meeting or resolution authorising the application shall have to be set out in the Application form.

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The accounts must generally comply[24] with sec 199 CA and Sch 9 CA in terms of form and content. Additionally, the balance sheet and the profit and loss account must be prepared in such manner so as to give a true and fair view of the financial affairs of the company.

According to sec 199:

(1) Every company and the directors and managers thereof shall cause to be kept such accounting and other records as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance-sheets and any documents required to be attached thereto to be prepared from time to time, and shall cause those records to be kept in such manner as to enable them to be conveniently and properly audited.

(2) The company shall retain the records referred to in subsec (1) for a period of not less than 5 years from the end of the financial year in which the transactions or operations to which those records relate are completed.

(2A) Every public company and every subsidiary of a public company shall devise and maintain a system of internal accounting controls sufficient to provide a reasonable assurance that:

(a) assets are safeguarded against loss from unauthorised use or disposition; and

(b) transactions are properly authorised and that they are recorded as necessary to permit the preparation of true and fair profit and loss accounts and balance-sheets and to maintain accountability of assets.

(3) The records referred to in subsec (1) shall be kept at the registered office of the company or at such other place as the directors think fit and shall at all times be open to inspection by the directors.

(4) If accounting and other records are kept by the company at a place outside Singapore there shall be sent to and kept at a place in Singapore and be at all times open to inspection by the directors such statements and returns with respect to the business dealt with in the records so kept as will enable to be prepared true and fair

24 Rule 1207(5)(d) Listing Rules requires a listed company to ensure that the annual audited accounts are prepared in accordance with approved accounting standards of ASC and sec 199 and 200 CA. Where there is a conflict or inconsistency with provisions of the CA and those of the ASC in their respective application to the annual audited accounts, the provisions of the ASC shall prevail.

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profit and loss accounts and balance-sheets and any documents required to be attached thereto.

(5) The court may in any particular case order that the accounting and other records of a company be open to inspection by a public accountant acting for a director, but only upon an undertaking in writing given to the court that information acquired by the public accountant during his inspection shall not be disclosed by him except to that director.

(6) If default is made in complying with this section, the company and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $2,000 or to imprisonment for a term not exceeding three months and also to a default penalty.

With regard to accounting periods of companies within the same group, sec 200 provides:

(1) Subject to subsec (11) and (12) of sec 200, the directors of every holding company that is not a foreign company must take such steps as are necessary to ensure that:

(a) within two years after 29 December 1967, the financial years of each of its subsidiaries coincide with the financial year of the holding company; and

(b) within two years after any corporation becomes a subsidiary of the holding company, the financial year of that corporation coincides with the financial year of the holding company.

(2) Where the financial year of a holding company that is not a foreign company and that of each of its subsidiaries coincide, the directors of the holding company shall at all times take such steps as are necessary to ensure that, without the consent of the Registrar, the financial year of the holding company or any of its subsidiaries is not altered so that all such financial years do not coincide.

(2A) Notwithstanding subsec (1) or (2), the financial year of a subsidiary which is a foreign company shall end on a date which is:

(a) not later than the financial year of its holding company; and

(b) not earlier than two months before the end of the financial year of its holding company, or such other earlier date as the Registrar may, on an application in writing by the directors of the holding company, approve.

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In other words, where there is a group of companies, the financial year of a holding company must coincide with the financial year of each of its subsidiaries.[25]

If the financial year does not coincide, the directors of the holding company must take the necessary steps to ensure that within two years after any corporation becomes a subsidiary of the holding company, the new subsidiary's financial year coincides with the financial year of the holding company.

Nevertheless, the directors of a holding company may apply to ACRA for an order authorising any subsidiary to continue to have a financial year which does not coincide with that of the holding company. The suspension applies only to the financial year of the subsidiary.[26]

If a company is an exempt private company, it is not required to lodge accounts with ACRA.[27]

There is no legal requirement in the CA that requires the accounts to be adopted by the company in the general meeting. The word used in sec 201(1), (3), (4) and (9) CA is that the duly audited accounts be "laid before the general meeting". The purpose for which the audited accounts are tabled or laid before the AGM is to enable the shareholders to seek the clarification of the board of directors on any question pertaining to the audited accounts.

Election of directors

Many AAs of the companies provide for the retirement and election[28] of directors on a rotational basis at the AGM.

Unless the AA of the company states otherwise, all the directors retire at the first AGM. Article 63, Table A provides that at the subsequent AGM one-third of the directors for the time being will retire from office,

25 Section 200(1)(a) and (b) CA.

26 Section 200(11) CA.

27 An exempt private company is a private company (with not more than 20 members) in which its shares are not beneficially or directly held by a corporate entity. Section 205C CA exempts such a company from lodgment of accounts.

28 Appendix 7.5.1 Listing Rules cross referenced from Rule 704(7) Listing Rules requires a person appointed as a director of a listed company to provide relevant information and disclosure of prior experience or details of any training undertaken in the roles and responsibilities of a director of a listed company. The form of Appendix 7.5.1 has to be lodged with the SGX not later than 14 days after his appointment. For contents of announcements to the SGX in relation to the appointment of a director and a chief executive officer, refer to Appendix 7.4 Listing Rules.

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and if the number is not three or multiples of three, then the number nearest to one-third will retire.

It must be noted that some AAs provide "that if the number is not three or multiples of three, then the number nearest to but not exceeding one-third will retire", that is, the inclusion of the word "number nearest to one-third but not exceeding one-third" in contrast with the word "number nearest to one-third".

The former provides a number nearest to one-third, that is, either less than one-third or more than one-third. For example, if there are 11 directors, the number nearest to one-third can be either three or four. The latter provides a number nearest to but not exceeding one-third, for example, if there are 11 directors, the number nearest to but not exceeding one-third will be 3.

If a company adopts Art 91, Table A provides that the managing director, while in office, shall not be subject to retirement by rotation and that his appointment shall be automatically terminated if he ceases to be a director for any reason.

In the case of a listed company, the SGX Listing Rules ("the Listing Rules") requires all directors of a listed company to retire from office at least once every three years. These retiring directors are, nevertheless, eligible for re-election.

In respect of the appointment of directors, the motion for the appointment of two or more persons as directors of a public company must be made by separate resolutions and not by a single resolution unless a resolution has first been unanimously passed to have the appointment made by a single resolution.[29]

If the appointment of two or more directors is made by a single resolution, without a resolution being passed to have the appointment made by a single resolution, such a single resolution is void.

However, the election of two or more directors by a ballot or poll is not affected by the provision or restriction of sec 150 CA.[30]

It must be noted that if a listed company is to elect a person as a director and this person is not a retiring director, the person shall not be eligible for election to the office of director at any general meeting unless the member who intends to propose him for election has, at least 11 clear days before the meeting, left at the registered office of the company

29 Section 150(1) CA.

30 Section 150(5) CA.

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a notice in writing duly signed by the person nominated giving his consent to the nomination. If, however the person nominated is a person recommended by the board of directors for election, nine clear days notice shall be necessary instead of 11 clear days. Notice of each and every candidature for election to the board of directors of a listed company must be served on the registered shareholders of the listed company at least seven clear days prior to the meeting at which the election is to take place.[31]

Appointment of auditors

The first auditors may be appointed by the directors at any time prior to the holding of the first AGM and these auditors are to hold office until the conclusion of the first AGM. If the directors fail to appoint the first auditors the appointment may be made by the company in the general meeting.

Where there is a casual vacancy[32] in the office of a company's auditor, the board of directors has the power to make such appointment to fill up the casual vacancy. Nevertheless, the directors cannot appoint a new auditor in replacement, unless the existing auditor has resigned and a letter of release has been given by the auditor in accordance with the auditor's professional practice. In conclusion, other than the appointment of auditors prior to the first AGM or to fill up a casual vacancy, the directors cannot appoint a new auditor.

The right to remove an auditor rests with the general meeting[33] and special notice must be given.[34] As to what constitutes "special notice" will be discussed in **Chapter 4**.

Other business

Although the matters set out above constitute the usual business transacted at an AGM, there is no reason why the business of the meeting should be so restricted. Members may quite properly be asked

31 Paragraph 1(9)(h) of Appendix 2.2 Listing Rules.

32 A casual vacancy arises when an auditor of the company relinquishes his position in the company before the expiry of the term of its office, which term expires at the subsequent AGM.

33 The auditor proposed to be removed shall be entitled to a written representation: sec 205(4), (5) and (6). Note that the Listing Rules oblige a listed company to forward to the SGX a copy of any written representations made by the external auditors at the same time as when copies of such representations are sent to members of the listed company under sec 205(4) unless an order is made by ACRA under sec 205(5) CA.

34 Section 205(4) CA.

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to pass resolutions on a whole range of other matters, although, of course, this will constitute special business and therefore will have to be separately itemised and described in the notice convening the meeting.

¶3-220 Deemed annual general meeting — section 184G CA

A meeting which is not called but is in the form of a resolution in writing signed by all persons for the time being entitled to receive notice of and to attend and vote at the general meeting, may be deemed to be an AGM.

This provision would be particularly useful for private companies and public companies which have a few shareholders. However, the provision is not practicable for public-listed companies and other public companies which have hundreds or thousands of shareholders.

Resolutions of one-member companies

Section 184G CA provides:

(1) Notwithstanding anything in this Act, a company that has only one member may pass a resolution by the member recording the resolution and signing the record.

(2) If this Act requires information or a document relating to the resolution to be lodged with the Registrar, that requirement is satisfied by lodging the information or document with the resolution that is passed.

¶3-230 Annual return

Each year, every company is required to deliver to ACRA an annual return which contains certain prescribed information about the company, its constitution and its affairs.[35] A listed company must also submit to the SGX quarterly returns, that is, returns as at 31 March, 30 June, 30 September and 31 December of each calendar year within two months from the said dates respectively.[36]

An annual return should be accompanied by copies of documents, certificates, financial statements and other particulars as specified in

35 Section 150 CA.

36 Listing Rules. Note that if the listed company provides a profit estimate or forecast and the said estimate or forecast is in respect of a financial year which has less than three months to run, the listed company must also provide the forecast for the next financial year.

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Sch 8 CA.[37] The prescribed form for the annual return is set out in Sch 8 CA.

If the company keeps a branch register outside the country, upon receipt of copies of entries from the branch register by the company, details of such entries must be included in the annual return.

Failure to make a return in accordance with the requirements of the CA shall cause the company, including each of its defaulting officers to be guilty of an offence under sec 197(7) CA. The company and every officer of the company shall be guilty of an offence and shall be liable to a fine not exceeding $5,000 and also to a default penalty.

Nevertheless, a private exempt company[38] need not file a copy of its final audited balance sheet and profit and loss account with its annual return. To exercise this right of waiver, the private exempt company's annual return must be accompanied by a statement regarding the company's accounts signed by the company's auditor, and a certificate signed by a director and a secretary of the company.

The statements to be made, confirmed and duly signed by the auditor are as follows:

- in the auditor's opinion, the company kept proper accounting records and other books during the period covered by the accounts;
- the accounts have been duly audited according to the requirements of the CA;
- if the auditor's report on the accounts is made subject to any qualification or comment, particulars of qualification of comments are to be set out.

The statements in the certificate signed by the director and secretary are as follows:

- the company has at all relevant times been an exempt private company;
- a duly audited profit and loss account and balance sheet which complies with the requirements of the CA have been laid before the company in the AGM;

37 Section 197 CA.

38 An exempt private company is a private company (with not more than 20 members) in which its shares are not beneficially or directly held by a corporate entity. Section 205C CA exempts such a company from lodgment of accounts.

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- as at the date wherein the profit and loss account has been made up, the company appeared to have been able to meet its liabilities as and when they would fall due.

The exempt private company and every officer of the company will be guilty of an offence under sec 197(7) CA if the required auditor's statement is not filed.

¶3-240 Annual report of a public-listed company

A listed company must set out separately in its annual report items in Part III of Chapter 12 of the Listing Rules. The information provided in the annual report must be made up to a date not earlier than six weeks from the date of the notice of the AGM in its annual report.

It must be noted also that other than the annual report, a listed company must provide a quarterly report to the SGX for public release as soon as the figures have been approved by its board of directors.[39] The quarterly report must be submitted not later than the prescribed period set out in Rule 705 in Chapter 7 of the Listing Rules:

(1) An issuer must announce the financial statements for the full financial year (as set out in Appendix 7.2) immediately after the figures are available, but in any event not later than 60 days after the relevant financial period.

(2) An issuer must announce the financial statements for each of the first three quarters of its financial year (as set out in Appendix 7.2) immediately after the figures are available, but in any event not later than 45 days after the quarter end if:

(a) its market capitalisation exceeded S$75 million as at 31 March 2003; or

(b) it was listed after 31 March 2003 and its market capitalisation exceeded S$75 million at the time of listing (based on the IPO issue price); or

39 Rule 705(2) Listing Rules.

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(c) its market capitalisation is S$75 million or higher on the last trading day of each calendar year commencing from 31 December 2006. An issuer whose obligation falls within this sub-section (c) will have a grace period of a year to prepare for quarterly reporting. As an illustration, an issuer whose market capitalisation is S$75 million or higher as at the end of the calendar year 31 December 2006 must announce its quarterly financial statements for any quarter of its financial year commencing in 2008. Notwithstanding the grace period, all issuers whose obligation falls under this subsection (c) are strongly encouraged to adopt quarterly reporting as soon as possible.

In tandem with the principles enunciated in the Singapore *Code of Corporate Governance 2005* ("the Code"), the Listing Rules have included in Chapter 7, provisions incorporating principles of the Code. Pursuant to these provisions, companies will now be required to include in their annual report a narrative statement of how they apply the relevant principles of the Code to their particular circumstances.[40] This is to secure sufficient disclosure so that investors and others can assess companies' performance and practices, and respond in an informed way.

The Code is divided into four main sections, comprising 15 principles:

(1) Board Matters

(2) Remuneration Matters

(3) Accountability an Audit; and

(4) Communication with Shareholders.

The 15 principles of corporate governance are as follows:

(1) The Board's Conduct of Affairs

(2) Board Composition and Guidance

(3) Chairman and Chief Executive Officer

(4) Board Membership

(5) Board Performance

(6) Access to Information

40 Rule 710 Listing Rules.

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¶11-000 Validation of proceedings

Validation of proceedings may be effected in the following manner:

- Unanimous consent
- Ratification
- By statute (automatic validation)
- By court (sec 392(2) and (4) CA).

Unanimous consent

¶11-100 Duomatic rule

If the consent of all the members of the company is obtained, a resolution adopted, otherwise than at a duly-convened meeting, is a valid resolution.[1]

The doctrine of unanimous consent is firmly entrenched in the law of company meetings including meetings of directors. The principle of unanimous consent is commonly referred to as the "Duomatic rule".[2]

Nevertheless, there are statutory provisions which raise doubts that unanimity amongst members dispose of all formalities.[3] In the following two circumstances, a meeting is necessary:

(a) if the company seeks to amend its Memorandum of Association ("MA"); or

(b) if a company desires to finance dealings in its shares.

Common law limitations to the application of the Duomatic rule is where substantial requirements of law for a valid decision are not complied with.[4]

It may be that the transaction was *ultra vires* the company, or that the power to make the decision was not exercised *bona fide* in the interest of the company or for a collateral purpose, or that the consent of one of the parties was not given freely.

1 *Re Express Engineering Works Ltd* (1920) 1 Ch 466; (1920) All ER 850.

2 *Re Duomatic Ltd* (1969) 2 ChD 365.

3 *Re U Drive Pty Ltd* (1987) 5 ACLC 117.

4 *Herman v Simon & Ors* (1990) 4 ACSR 81.

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The hypothesis that consent should include circumstances where the other parties could have agreed if they had been asked, or had applied their minds to the matter if their attention was drawn to it or alternatively may not have agreed if they had been asked, is not applicable in the Duomatic rule.[5]

Actual consent does not require active participation. So long as a party whose consent is required is acquainted with the facts, a decision will be regarded as having been obtained by unanimous determination even though that party whose consent is required does not raise any queries when informed of the decision made by the other parties.[6]

The assent of members who have no votes (eg the holders of non-voting preference shares) is unnecessary, unless there are provisions in the CA requiring disclosure to all members.

¶11-110 Consent of members at a meeting which is not a general meeting

In *Re Express Engineering Works Ltd*,[7] the company had five directors who were also its sole shareholders. A meeting described in the minutes as a "board meeting" was convened to enter into an agreement which the Articles of Association ("AA") of the company precluded the directors from doing, in that it prohibited the directors from voting in respect of any contract or arrangement in which they might be interested. The court held that since the five shareholders were present at the so-called board meeting, which they practically treated as a meeting of the shareholders, the transaction was within the powers of the company and could not be set aside.

The case of *Re George Newman & Co*[8] was distinguished on the basis that the transaction in this case was *ultra vires*, and secondly, that there had been no meeting of the members of the company. The *ratio decidendi* of the case has been said to be "that the unanimous agreement of all the members of the company, in a matter *intra vires* the company, bound the company".[9]

5 *Re ABC Plastic Pty Ltd* (1976) 1 ACLR 446.

6 *Runciman v Walter Runciman plc* (1992) BCLC 1084.

7 (1920) 1 Ch 466.

8 (1895) 1 Ch 674; (1895–1899) All ER 2160.

9 *The Commercial Bank of Australia Pty Ltd v Furey & Associates Ltd (in liq)* (1954) NZLR851, per *Hutchison* J.

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The assent of all members may not be given at the same time.[10] The members may agree to a course of action at different times and not simultaneously. Thus, it would be possible for decisions to be taken by providing the circular resolution to members under sec 184A CA.

In order to expedite the application of sec 184A CA, a private limited company incorporated in Singapore should amend its articles to:

- incorporate sec 184A CA; and
- allow any such resolution to be in several documents in like form, each signed by one or more of its members (as per the concept of Art 90, Table A for directors circular resolution).

This will facilitate a collation of the resolutions which are provided contemporaneously for obtaining signatures, especially in situations where expediency is paramount in obtaining approval from members who are abroad.

¶11-120 Consent of members where inadequate notice of a meeting is given

In *Re Oxted Motor Co Ltd*,[11] there were two shareholders of the company who met and passed a resolution that the company be wound up voluntarily. No notice was given before the shareholders met, intimating an intention to propose the resolution as an extraordinary resolution. It was held that the requirement for a notice was waived as all the members entitled to the notice were present in the meeting.[12]

Power to validate proceedings is confined to proceedings where there is a deemed waiver or inadequate notice but not in cases where:

- there is no notice;[13]
- the notice has been given to some directors but not a dissenting director; or
- the purported short notice is not in accordance with the AA of the company which results in the dissenting director being unable to attend the meeting.

10 *Parker & Cooper v Reading* [1926] Ch 975.

11 (1921) 3 KB 32; [1921] All ER Rep 646.

12 This case has been cited with approval in *Re Salvage Engineers Ltd* (1950–1985) MSCLC 190 and *David Lau Tai Bek v Lau Ek Ching Sdn Bhd* (1950–1985) MSCLC 249.

13 *Jerry Ngiam Swee Beng v Abdul Rahman Mohd Rashid & Anor* [2003] 3 CLJ 739.

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Therefore, the same principle should apply to notice to members because a member, who has been deprived of a notice to a meeting resulting in his absence, is a member who has been deprived of his statutory right to vote at the meeting.

The receipt of a notice is a legitimate expectation of a member. The right to vote is a member's fundamental right. The omission, defect or irregularity must be a case of an irregularity (or procedural irregularity) which does not result in a nullity of the meeting.

¶11-130 Consent of members where there has been no meeting

In the event that no company meeting is to be held, the assent of its members to a resolution may be given individually at different places and at different times. In *Parker & Cooper Ltd v Reading*,[14] no meeting was held. The directors, acting beyond their powers, granted a debenture. The granting of such debenture was within the powers of the company. The arrangement was from time to time discussed with the shareholders, of whom there were only four, and they all individually assented to it. *Astbury* J held that the company was bound.

Although no meeting is held, proceedings of a wholly-owned subsidiary company is validated by a minute signed by a representative of the holding company, holding all the shares.[15]

Under sec 179(6) CA, any act, matter, or thing, or any ordinary or special resolution, required by the CA or by the MA or AA of the subsidiary is valid as long as it is authorised by the representative of the holding company (ie by a minute signed by the representative).

Section 179(6) provides:

> "Where a holding company is beneficially entitled to the whole of the issued shares of a subsidiary and a minute is signed by a representative of the holding company authorised pursuant to subsection (3) stating that any act, matter, or thing, or any ordinary or special resolution, required by this Act or by the memorandum or articles of the subsidiary to be made, performed, or passed by or at an ordinary general meeting or an extraordinary general meeting of the subsidiary has been made, performed, or passed, that act, matter, thing, or resolution shall, for all purposes, be deemed to

14 (1926) Ch 975; [1926] All ER Rep 323.

15 Section 179(6) and (7) CA.

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have been duly made, performed, or passed by or at an ordinary general meeting, or as the case requires, by or at an extraordinary general meeting of the subsidiary."

Proceedings of a wholly-owned subsidiary which requires a general meeting approval or assent can only be validated by a minute signed by the representative of the holding company, holding all the shares.

Therefore in *Omega Securities Sdn Bhd v Yeo Lee Hoe*,[16] a transaction under sec 132E CA (Malaysia) (substantial property transaction by director or substantial shareholder), which requires a general meeting approval or assent but has been effected without a signed minute by the representative of the holding company, rendered the transaction voidable at the instance of the holding company.

The approval of the company is required for disposal by directors of the company's undertaking or property as provided in sec 160:

(1) Notwithstanding anything in a company's memorandum or of the whole or substantially the whole of the company's undertaking or articles, the directors shall not carry into effect any proposals for disposing property unless those proposals have been approved by the company in general meeting.

(2) The Court may, on the application of any member of the company, restrain the directors from entering into a transaction in contravention of subsec (1).

(3) A transaction entered into in contravention of subsec (1) shall, in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention, be as valid as if that subsection had been complied with.

(4) This section shall not apply to proposals for disposing of the whole or substantially the whole of the company's undertaking or property made by a receiver and manager of any part of the undertaking or property of the company appointed under a power contained in any instrument or a liquidator of a company appointed in a voluntary winding up.

¶11-140 Estoppel and acquiescence

A shareholder, who is present at a meeting of shareholders at which a resolution is passed and agrees to waive his right to due notice of the meeting as required by the AA, is estopped from raising the want of

16 [2003] 1 CLJ 276, per *Ramly Ali* J (HC Kuala Lumpur).

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notice as an objection to the validity of the resolution.[17] But the objection of one shareholder, or the failure to give notice to one shareholder even though he is not entitled to vote, will invalidate the meeting.

"Estoppel" is a legal doctrine in common law. It is a court order which prevents or stops a party from taking certain action or performing a certain act.

"Acquiescence" means passive assent, acceptance or agreement without protest.

If a resolution which alters the AA of a company was irregularly adopted, but the resolution has been acted upon over a period of 18 years, the said resolution shall be rendered valid by the acquiescence and agreement of the shareholders, as evidenced by their actions.[18]

In the case of *Fairview Schools Bhd v Indrani Rajaratnam & Ors*,[19] the contents in a board paper of a meeting convened by the promoters or founder members in the name of Fairview Schools Bhd, in order to obtain sanctions for the dealings of its assets, was held to show acquiescence by the founder members (who contended that they were the beneficiary of the assets of Fairview Schools in an order of winding-up) that the company was not only a trustee or agent of the assets but also the beneficiary of the assets.

¶11-200 Ratification

"Ratification" should be distinguished from "rectification" and they should not be confused or misused.

"Ratification" means confirmation and acceptance of a previous act by a certain person, while "rectification" means when an error or mistake occurs, a correction is made.

Ratification is the validation by the company of a prior action (or decision), purportedly made on its behalf, so as to render it valid *ab initio*. Its effect is retrospective. Its effect is also dual. It renders the arrangement valid as between the company and any third party and it displaces any breach of the agent's duty to the company that may have arisen as a result of the action.

17 *Re Neokratine Safety Explosive Co. of NSW Ltd* (1891) 12 LR (NSW) Eq 269.

18 *Atherton v Plane Creek Central Mill Co Ltd* (1914) QSR 73.

19 [1998] 1 CLJ 285.

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Summarily, ratification validates the original action as from the date when it was made. The consequence is that when a decision has been ratified, it is the original action that is operative and the act of ratification does not constitute a new decision.[20] Ratification does not amount to usurpation of the powers of the board by the general meeting.[21]

A compromise of an action or the waiver of a right or remedy or an election between remedies is not ratification. All these are forward approaches in contrast with the backward approach of ratification that leaves in place the original invalidity which ratification cures. It may be difficult in practice to distinguish and decide whether what the company has done amounts to ratification or one of the other processes.

In ratifying an action, the board or the general meeting may act as they would in ordinary business. Consequently, they may act informally without the need for a formal meeting provided that the normal conditions for the validity of so acting are satisfied.

In *Re Horsley & Weight Ltd*,[22] two directors who were the only shareholders took out an insurance policy in order to provide a pension for a retiring director. They did not have the authority of the board to do this, nor did the general meeting pass a resolution authorising it. However, since the two directors were the only shareholders and both had assented to the policy by initialing the proposal form and signing the cheques for the premiums, they had effectively ratified the invalid action which they had taken as directors. The directors in *Horsley* were not consciously "correcting as shareholders a decision taken as directors". The principle in *Horsley* is that in order for there to be an effective ratification, there is no need for those concerned to intend to ratify the act. The issue is the objective effect of their act and not of their subjective intention.

In order for a purported ratification to be valid, certain conditions must be satisfied:

- Ratification must be by the company. Since a company must act through a person or body of people, it is necessary to identify the appropriate organ through which the prior action or decision may be ratified.[23]

20 *Bamford v Bamford* (1970) Ch 212.

21 *Hogg v Cramphorn* (1967) Ch 254.

22 [1982] Ch 442.

23 *Alexander Ward and Co Ltd v Samyang Navigation Co Ltd* (1975) 1 WLR 673.

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- Ratification must take place within a reasonable time after the action.[24]
- There must be an informed consent by the appropriate organ that ratifies.
- The company must have either full knowledge of what has occurred or accept the risk that something has occurred of which it is unaware.[25]

As directors owe no fiduciary duty in casting their votes as shareholders, directors may use their votes as shareholders to effect the ratification.[26] Nevertheless, the minority shareholders may argue on the validity of the ratification, applying the exceptions in *Foss v Harbottle*.[27]

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¶11-300 By statute (automatic validation)

Section 392(1) CA provides automatic validation of procedural irregularities unless the court decides otherwise. Where there are procedural irregularities in the proceedings or a deficiency of notice or time, such irregularities enjoy automatic, but contingent, validation.[28]

It must be noted that where an application under sec 392(1) and (2) CA is made to the court, it is not an application for relief but for a declaration. It may only be resorted to in pending proceedings.

It has been argued that sec 392(2) CA itself militates against automatic validation. If validation is automatic, there appears to be no necessity for the power to validate in sec 392(2) CA.[29]

24 *Re Portuguese Consolidated Copper Mines Ltd* (1890) 40 ChD 16.

25 *Baillie v Oriental Telephone & Electric Co Ltd* (1915) 1 Ch 503.

26 *North-West Transportation Co Ltd v Beatty* (1887) 12 App Cas 589.

27 (1843) 2 Hare 461.

28 *Langton v Forsayth Mineral Exploration NL* (1975) 1 ACLR 227, *Re Compaction Systems Pty Ltd* (1976) 2 NSWLR 477.

29 Loh Siew Cheang, "Corporate Powers, Controls, Remedies and Decision-Making", *Malayan Law Journal*, 1996, at p 583.

By court

¶11-400 Section 392(1) and (2) CA

The court has the power to validate proceedings, which are invalidated by any defect, irregularity, or deficiency of notice or time. Section 392(3) CA allows for the validation of any omission, defect, error or irregularity in the management or administration resulting in a breach of the CA, or default in the observance of the MA or AA of the company.

The word "proceeding" in sec 392 CA is not confined solely to legal proceedings but also extends to all proceedings at company meetings provided that they are required to be held under the CA.[30] A procedure is also to be regarded as a "proceeding" so long as the act in question is required to be undertaken pursuant to the statute, for the completion of a transaction sought or in relation to the affairs of a company generally.[31]

"Defect" means the absence of something essential for completeness of the proceedings, and "irregularity" is an error or mistake not deliberately made.[32] With respect to the interpretation of sec 392(1) CA, the words "defect" and "irregularity" are to be interpreted disjunctively of the words "deficiency of notice or time".[33]

The burden of proving an irregularity lies on the party who alleges that the irregularity had caused or may cause substantial injustice.[34]

Procedural irregularities which fall within sec 392(1) CA include:

- non-compliance with the statute as regards to the form of advertisement;[35]
- short notice of a creditors' meeting pursuant to a scheme of arrangement;[36]
- defect in the appointment of a liquidator;[37]

30 *Lim Hean Pin v Thean Seng Co Sdn Bhd* (1986–1997) MSCLC 90,850.
31 *Re Broadway Motors Holdings Pty Ltd (in liq)* (1986) 11 ACLR 495.
32 *Re Clearwater Pty Ltd* (1981–1982) 6 ACLR 201 at p 208, per Master Lee QC.
33 *Re Testro Bros Consolidated Ltd* (1965) VR 18.
34 *Australian Hydrocarbons NL v Green & Ors* (1985) 3 ACLC 779.
35 *Langton v Forsayth Mineral Exploration NL* (1975) 1 ACLR 227.
36 *Re Newman Pastoral Co (No 2) Pty Ltd* (1981) 5 ACLR 741.
37 *Re Abel Equipment Pty Ltd (in liq)* (1978) 3 ACLR 741.

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- short notice of a shareholders meeting;[38]
- late lodgment of declaration of solvency;[39]
- deficiency in explanatory statements;[40] and
- inquorate meeting.[41]

The basis of the court's jurisdiction in making a declaration order is derived from sec 392.[42] The court has the power to grant a declaratory order irrespective of whether the applicant has a cause of action or not, or even where the cause of action does not exist at the time of filing the application.[43]

The effect of the rule is to give a general power to make a declaration whether there is a cause of action or not and at the instance of any party who is interested in the subject matter of the declaration. Further, the court is entitled to grant declaratory relief if that is the right thing to do even if the applicant did not ask for a declaration.[44]

¶11-410 Section 392(4) CA

Section 392(4) CA is wider than sec 392(1) and (2) CA. It is not limited to a proceeding under the CA. Nor is it limited to questions of notice or time.

The opening words in the section "Subject to the following provisions of this section and without limiting the generality of any other provision of this Act" means that the particularity of sec 392(4) CA should not be used to cut down the generality of subsec (2) and (3).[45]

38 *Re Clearwater Pty Ltd* (1981) 6 ACLR 201.
39 *Re Helen Investments Pty Ltd* (1982) 6 ACLR 736.
40 *Re Kallin Investments Ltd* (1981) ACLR 104.
41 *Re Eraville Pty Ltd* (1980) 5 ACLR 203.
42 *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1978] 1 LNS 44.
43 *Mahesan a/l Subramaniam, Dr & 2 Ors v Ponnusamy a/l P Rajoo & 3 Ors* [1994] 3 MLJ 312, *Guaranty Trust Company of New York v Hannay & Company* [1915] 2 KB 536.
44 *Harrison-Broadley and Ors v. Smith* [1964] 1 All ER 867.
45 *Re Compaction Systems Pty Ltd* (1976) 2 NSWLR 477.

The phrase "management or administration" includes all matters covered by the CA and the AA, and also generally all matters which may be dealt with by shareholders in the general meeting.[46]

Since sec 392(4) CA deals with the validation by the court where there has been a default in the observance of the MA and AA, it must be noted that this section does not authorise the court to override the AA of a company or to prescribe a procedure, which would have that effect.[47]

On a literal construction of the section, the power of the court is only to validate past acts and it is difficult to justify the making of an order which affects future conduct, and which would involve a breach of the provisions of the CA or the AA in the execution of any order made.

Thus, where the AA of a company had excluded Table A and had made no provision for the appointment of directors, the invalid appointment of directors could not be validated by an order under this section. The contravention had occurred as a result of a defect in the AA. The problem could be remedied by a meeting of members.[48]

The burden of proof in an application under sec 392 CA falls on the applicant to show the absence of injustice.[49]

¶11-420 No substantial Injustice

No substantial injustice

A prerequisite to all orders made under sec 392 CA is to satisfy the court that no "substantial injustice" has been or is likely to be caused to any person.

In *Re Australian Continental Resources Ltd*,[50] *Blackburn* J considered that the word "injustice" necessarily involved a consideration of the relative gains or losses of the parties involved. The fact that there was some prejudice to the company, its members, or creditors was not sufficient. Justice may require that the prejudice to one party, if the order was made, be balanced against the respective prejudice to other parties if the order was not made.

46 *Re U Drive Pty Ltd* (1987) 5 ACLC 117.

47 *Omega Estates Pty Ltd v Ganke* (1963) NSWR 1416, per *Else Mitchell* J.

48 *Re Australian Koyo Ltd* (1984) 2 ACLC 429.

49 *Herman v Simon & Ors* (1990) 4 ACSR 81.

50 (1975) 1 ACLR 405.

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As justice is the criterion, only prejudices that are substantial and not theoretical in nature, are taken into account in determining whether injustice would result in the making of a validation order.

The court in the recent case of *Jerry Ngiam Swee Beng v Abdul Rahman Mohd Rashid & Anor*[51] adopted the approach in *Re Australian Continental Resources Ltd*. Where the justice of the instant case lay and how discretion should be exercised is a matter within the province of the presiding judge.

If an appeal on the decision of the judge of first instance is made, an appellant must demonstrate that a judge has committed one or more of the errors which permits the Court of Appeal to exercise its discretion.

In *Re Compaction Systems Pty Ltd*,[52] *Bowen* J said:

> "In my view, the word 'injustice' in this provision requires the Court to consider any real, and not merely insubstantial or theoretical prejudice which will be suffered by, for example, a member by the making of an order, and to weigh this in the scales against the prejudice to the company, other members and creditors, if an order be not made. In other words, it is insufficient to show that there may be some prejudice to a member if, on a consideration of the whole matter, the overwhelming weight of justice, as it were, is in favour of making the order."

In *Re John Plunkett Consolidated Ltd (No 2)*,[53] there was a failure to advertise within the time frame the notice of a creditors' meeting, at which creditors may appoint a liquidator in preference to the company's appointee. An officer or a creditor of the company only learned of the meeting three days before the meeting was held. As a consequence, he could not obtain a proxy from the head office of his company to vote on the company's behalf at the meeting. The meeting nonetheless was well attended and it appeared that the failure to advertise the notice within the time frame had not in any way reduced the attendance. It was argued that the "injustice" was hypothetical, because another meeting would not have appointed another person as liquidator. The court rejected this argument on the ground that the deprivation of the right to vote is "substantial injustice".

51 [2003] 3 CLJ 739.

52 (1977–1978) CLC ¶40-313; (1976) 2 NSWLR 477.

53 (1977–1978) ACLC 29,959.

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Summarily, injustice must be real and not theoretical or insubstantial, and that the court must consider whether as a matter of procedural fairness or justice the deficiency should be overlooked.[54] In considering procedural fairness or justice, business or commercial elements should not be taken into consideration by the courts.[55]

The word "invalid" in sec 392 CA means irregular or voidable and sometimes void. The general rule seems to be that "invalid" will ordinarily be interpreted to mean irregular or voidable.[56] It is not intended to breathe life into something, which is a nullity by reason of another provision of the statute.

In essence, sec 392 CA is not applicable to a procedural irregularity which results in an act which is a nullity. If a proceeding is a nullity, there is nothing to validate. Moreover, if an act is done deliberately with the knowledge of invalidity, the act cannot be classified as a procedural irregularity.[57]

There must be a nexus between the irregularity and injustice complained of. Nevertheless, matters relevant in the determination of injustice must be limited.[58] There have been instances where an application for a validation order has been refused on the ground that if the order were made it would have the effect of precluding litigation on a serious issue in another case.[59]

¶11-500 Powers of court

It must be noted that pursuant to sec 392 CA, the court has the power to make orders, but has no power to validate proceedings which are invalid at the onset. Its powers are limited to making declarations that proceedings are invalid under sec 392(1) CA or void under sec 392(4) CA. Further the powers under sec 392(4) CA should not be resorted to, if it is within the means of a company to set right what is wrong.[60] Nevertheless this principle of validation of proceedings may only be

54 See *Nyuk Fung & Ors v Pan Global Equities Berhad* (1986–1997) MSCLC 90,640 (SC Malaysia).

55 *Re Castlereagh Securities Ltd (No 1)* (1971–1973) ACLC 27,497.

56 *Harman v Energy Research Group Ltd* (1985) 3 ACLC 536, per *Brindsden* J.

57 *Re PW Saddington & Sons Pty Ltd* (1990) 2 ACSR 158.

58 *Re Broadway Motors Holdings Pty Ltd (in liq)* (1986) 11 ACLR 495.

59 *Omega Estates Pty Ltd v Ganke* (1963) NSWR 1416.

60 *MacDougall v Gardiner* (1875) 1 ChD 13 at pp 25–26; (1874–1880) All ER Rep 2248 at p 2254.

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effected if it does not deprive a wronged shareholder of *locus standi* to initiate proceedings where an allotment of shares infringes the personal rights of shareholders.[61]

Pursuant to sec 392(4) CA, the court can, on the application of an interested person or on its own motion make a validating order, but orders have been refused where no substantive application has been made.[62]

Since the court might make the order sought of its own motion, the locus of the applicant is not vital to the validity of the proceedings under sec 392(4) CA.[63] *Blackburn* CJ in *Re Abel Equipment Pty Ltd (in liq)*,[64] held that a liquidator can be an interested person. His Lordship stated as follow:

> "I have little doubt that a creditor could be an 'interested person', and from there it is not a far cry to the situation of this applicant, who can be said to be a potential creditor. This way of putting the matter really means no more than that if a person such as a creditor who is not a member of the company and whose interest depends on a contract with the company, or at any rate on a right acquired by contract, can be an 'interested person' (as I assume he can) then I see no reason why a person in the position of this applicant cannot be an interested person since if he is appointed liquidator he may expect to be a creditor of the company for his remuneration."

Under sec 392(4), the court may extend or abridge the period for doing an act or instituting proceedings under the CA (even if the company is in the process of being wound up). An order may be made even though the period concerned has expired by the time the application is made.

Application under sec 392(4) CA can be made vide summons in chambers together with a certificate of urgency for enlargement of time to hold an extraordinary general meeting ("EGM") outside the time limit prescribed in sec 176(3) CA.

61 *Eromanga Hydrocarbonc NL v Australia Mining NL & Ors* (1988) 6 ACLC 906.

62 *Re Kyra Nominees Pty Ltd* (1980) CLC ¶40-659.

63 *Re Abel Equipment Pty Ltd* (in liq) (1979) CLC ¶40-508.

64 *Ibid.*

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this Act, or any proceeding at such a meeting, is not invalidated by reason only of the accidental omission to give notice of the meeting or the non-receipt by any person of notice of the meeting, unless the court, on the application of the person concerned, a person entitled to attend the meeting or the Registrar, declares proceedings at the meeting to be void.

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

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

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

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

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

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

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

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

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

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

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

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

(b) in the case of an order referred to in subsec (4)(c), that the person subject to the civil liability concerned acted honestly; and

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

The following are cases where the court has refused to validate irregularities:

- in disciplinary proceedings against a member;[76]
- where there was insufficient material before the court to enable it to make a determination;[77]
- where the appointment of a liquidator resulted in the liquidator being an independent liquidator or the creditors had not been given the opportunity of appointing their own liquidator;[78]
- where the company can rectify the irregularity by holding a meeting of members or of a body of the members affected;[79]
- where the circumstances do not warrant the exercise of the discretion of the court, for example, delay, no practical purpose would be achieved (the result of an election would be unchanged) or the irregularities are generally trivial;[80]
- where a notice convening a court-ordered meeting departed from the requirements of the order as to time, and the chairperson was not the person selected by the court;[81] and
- where a general meeting was postponed and resolutions were passed at the postponed meeting.[82]

76 *Ryan v Kings Cross RSL Club Ltd* (1971–1973) CLC ¶40-043.

77 *Re Australian Foundation Investment Co Ltd* (1971–1973) CLC ¶40-072.

78 *Re AJ & A Shewan Pty Ltd* (1977–1978) CLC ¶40-508.

79 *MacDougall v Gardiner* (1875) 1 ChD 13; (1874–1880) All ER Rep 2248, *Dominion Mining N v Hill & Anor (No 1)* (1971–1973) CLC ¶40-021.

80 *Rivers v Bondi Junction-Waverley RSL Sub-Branch Ltd* (1986) 5 NSWLR 362.

81 *Re High Spirits Cellars Pty Ltd* (1988) 6 ACLC 644.

82 *Bell Resources Ltd v Turnbridge Pty Ltd & Ors (No 2)* (1988) 6 ACLC 970.

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¶10-100 Defective or irregular proceedings

Acts evidenced therein in the proceedings and recorded in the minutes would bind the company. If an act attributed to a company was not in fact and in law an act of a company, it does not bind the company and would be ineffective.

In *Kelapa Sawit (Teluk Anson) Sdn Bhd v Dr Yeoh Kim Leng & Ors*,[1] a director's circular resolution, which was not in accordance with the Articles of Association ("AA") of the company, was held to be invalid.[2] The decision came from the distinction the court made between legal irregularity and procedural irregularity.[3]

The Supreme Court in Malaysia did not accept the rule of estoppel adopted by the High Court (which held that the approval had been granted on the allotment at an earlier alleged board meeting) as the crucial issue of the board's approval, found by the High Court to have been granted, was unsustainable due to the lack of cogent evidence. As the finding of facts did not support a procedural irregularity, the allotment of shares therein was held to be invalid.

If there are irregularities in the proceedings, the proceedings shall not be invalidated by any defect, irregularity or deficiency of notice or

1 (1991) 1 SCR 419–432.

2 Legal irregularity must be distinguished from procedural irregularity. Legal irregularity is not curable. The power under sec 392 CA cures an irregularity and not a nullity. Note that legal irregularities and incurable defects result in nullity of the proceedings.

3 Further analysis is to be made on the consequences and extent of the procedural irregularity. Substantive irregularity is often not considered procedural irregularity. One of the opinions is that there is a substantive procedural irregularity where the consequential effect and result is so substantive that it results in a legal irregularity or a substantial injustice to any member or creditor and even the company itself.

In *Hedges v NSW Harness Racing Club Ltd* [1991] 5 ACSR 291; 9 ACLC 1025, the court held that an irregularity in the election of directors, which had resulted in the wrong person being declared elected, could not be cured since it was a substantive and not a procedural irregularity. Failure of a company to notify a shareholder on a meeting was in the circumstances an irregularity causing substantial injustice: *Mamouney v Soliman* [1992] 9 ACR 63; 10 ACLC 398. Several misleading or potentially misleading statements in the explanatory note set out in the notice and the proxy form of a company were also held as irregularities causing substantial injustice: *Australian Innovation Ltd v Paul Alexandre Petrovsky* [1996] 21 ACSR 218; 14 ACLC 1357.

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time.[4] Such irregularity is curable by making an application under sec 392 CA either by making an application:

- for a declaratory order to validate the proceedings under sec 392(2) CA; or
- for a remedial order under sec 392(3) CA.

Section 392 CA is applicable to save proceedings at a meeting where the lack of a quorum is of little consequence, and no shareholders' interests are prejudiced by any decision taken at the meeting.

Before making an application, the applicant has to establish that there is no substantial injustice that would likely be caused or has been caused or caused to any member or creditor and even the company itself by making of the order. The onus in establishing that there is no substantial injustice is on the applicant seeking to have the directors meetings validated.[5]

Therefore, the application for the exercise of the court's powers under sec 392 to validate proceedings would not arise where the disputed meetings result in decisions that will disadvantage the rights of one of only two shareholder groups in a company to the exclusion and possible disadvantage of the remaining shareholders.[6]

This is more apparent in situations where the substratum of the company no longer exists and there are only two directors and shareholders. Further, both the directors who are also shareholders are not talking to each other.

In addition, facts of the case are important in an application made under sec 392 CA. Regardless of whether an application is to cure defective or irregular proceedings under sec 392(2) CA for a validation or under sec 392(3) CA for a remedial order, the exercise of the court's power is preliminarily subject to the following:

4 Sections 72 and 151 CA; Art 89, Table A. The meaning and ambit of the word "proceedings" is not restricted to legal proceedings but extends to both curial and non-curial proceedings. The opening words "No proceedings under this Act" are widely drawn and should not be confined solely to legal proceedings but should extend to all proceedings at company meetings provided they are required to be held under the CA. Therefore, the court has power to validate any irregular proceedings and any act which would otherwise be a contravention of the memorandum or articles of association.

5 *Jerry Ngiam Swee Beng v Abdul Rahman Mohd Rashid & Anor* [2003] 3 CLJ 739.

6 *Ibid*, *Re Goodwealth Trading Pte Ltd* [1991] 2 MLJ 314.

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- no substantial injustice has been caused or is likely to be caused to any person by the making of the order, including any member or creditor and even the company itself;
- the irregularity is essentially procedural (eg steps in the calling of a directors meeting is essentially procedural); and
- the order is in the interest of the company.

Having made a finding of facts, the exercise of the discretion of the court thereafter implies a consideration of the relative gains and losses of the parties involved. The criterion to the consideration is not prejudice but justice.

The court in the recent case of *Jerry Ngiam Swee Beng v Abdul Rahman Mohd Rashid & Anor*[7] adopted the approach in *Re Australain Continental Resources Ltd*[8] wherein it reiterated that prejudice is not the criterion, justice is, and that justice may require that prejudice to one party, if the order were made, be balanced against the respective prejudice to other parties if the order were not made. Where justice of the instant case lay and how discretion should be exercised is a matter eminently within the province of the presiding judge.

Therefore, if an appeal on the decision of the judge at the first instance court is made, an appellant must demonstrate that the judge has committed one or more of the errors which permits the Court of Appeal to exercise a discretion of its own.

The CA does not specify persons that are qualified to make an application for a declaratory order under sec 392(2) CA. In *Mahesan a/l Subramaniam, Dr & 2 Ors v Ponnusamy a/l P Rajoo & 3 Ors*,[9] the court stated that the jurisdiction of the court is unlimited and is subject only to its own discretion.

The basis of the Malaysian court's jurisdiction in making a declaration order in sec 355(2) (Malaysia) [sec 392(4)(a) CA (Singapore)] is derived from O 25 r 5 of Malaysia's *Rules of Supreme Court*.[10] The court has the power to grant a declaratory order irrespective of whether

7 *Jerry Ngiam Swee Beng v Abdul Rahman Mohd Rashid & Anor* [2003] 3 CLJ 739.

8 (1975) ACLR 405.

9 [1994] 3 MLJ 312.

10 *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1978] 1 LNS 44.

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the applicant has a cause of action or not, or even where the cause of action does not exist at the time of filing the application.[11]

The effect of the rule is to provide a general power to make a declaration whether there is a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration. Further, the court is entitled to grant declaratory relief if that is the right thing to do although an applicant did not request for a declaration.[12]

¶10-200 Summary of relevant provisions

Validity of acts of directors and officers

Section 151 CA provides that the acts of a director or manager or secretary shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.

Validation of shares improperly issued

In regard to validation of shares improperly issued, sec 72 provides:

> "Where a company has purported to issue or allot shares and the creation, issue or allotment of those shares was invalid by reason of any provision of this or any other written law or of the memorandum or articles of the company or otherwise or the terms of issue or allotment were inconsistent with or unauthorised by any such provision the Court may, upon application made by the company or by a holder or mortgagee of any of those shares or by a creditor of the company and upon being satisfied that in all the circumstances it is just and equitable to do so, make an order validating the issue or allotment of those shares or confirming the terms of issue or allotment thereof or both and upon a copy of the order being lodged with the Registrar those shares shall be deemed to have been validly issued or allotted upon the terms of the issue or allotment thereof."

Irregularities in proceedings

The provisions relating to irregularities in proceedings are contained in sec 392 CA as follows:

11 *Mahesan a/l Subramaniam, Dr & 2 Ors v Ponnusamy a/l P Rajoo & 3 Ors* [1994] 3 MLJ 312, *Guaranty Trust Company of New York v Hannay & Company* [1915] 2 KB 536.

12 *Harrison-Broadley & Ors v Smith* [1964] 1 All ER 867.

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(1) In this section, unless the contrary intention appears a reference to a procedural irregularity includes a reference to:

(a) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation or at a joint meeting of creditors and members of a corporation; and

(b) a defect, irregularity or deficiency of notice or time.

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

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

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

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

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

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

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

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

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

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

(a) in the case of an order referred to in subsec (4)(a):

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

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

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

(b) in the case of an order referred to in subsec (4)(c), that the person subject to the civil liability concerned acted honestly; and

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

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