RIGHTS, DUTIES AND THE VALIDATION OF IRREGULARITIES

The substance-procedure divide determines the presumptive validity of corporate acts when there is defective compliance with the prescribed steps for doing those acts. This article examines the current approaches to discerning the difference and argues that a deeper inquiry into legislative intent and the parties' intentions is necessary to more meaningfully negotiate the substance-procedure divide. Apart from providing a better explanation for why an irregularity is a matter of substance (or procedure), the suggested inquiry illuminates when it is correct to apply the judicial power to validate irregularities.

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I. Irregularities and the validity of corporate action

1 Where a corporate act is predicated on certain prescribed steps being taken but there is non-compliance with those prescribed steps, is the act a valid or invalid one? Under the company laws of Australia and Singapore, the matter is partially addressed through an inquiry into whether the irregularity is a procedural one. If the matter is a procedural irregularity, the action is presumptively valid under s 392(2) of the Companies Act[1] ("CA"). The presumptive validity is displaced only if the irregularity causes substantial injustice which cannot be remedied by an order of court. Where the irregularity is a non-procedural one, there is no presumptive validity; however, the court is, under s 392(4)(*a*), conferred the power to validate the act infected by such an irregularity.

2 On its express terms, CA s 392 does not address the validity or invalidity of non-procedural irregularities. In the case of an irregularity which arises from non-compliance with statutorily prescribed conditions, this article argues that the question is largely one of statutory interpretation. Does the statute predicate invalidity of the act

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1 Cap 50, 2006 Rev Ed. The Australian equivalent is s 1322(2) of the Corporations Act 2001 (Cth).

should there be a failure to comply with the conditions set out for carrying out the act in question? If it does, the ancillary question arises – does the statutory provision preclude the application of s 392(4)(*a*)?

3 Where the irregularity involves non-compliance with conditions found in the articles or memorandum of association, CA s 392 would not, at first sight, appear to address the validity of non-procedural irregularities. The matter, it would appear, is one to be addressed at common law. With s 392, however, the common law is trivial for two distinct and alternative reasons. The first pertains to practical insignificance. The validation power under s 392(4)(*a*) allows the court to side-step the thorny issue of whether the action is valid by proceeding directly to whether it would exercise its power of validation. The second is that of conceptual insignificance. This article argues that s 392 creates a procedure-substance dichotomy which implicitly posits the invalidity of substantive irregularity, a premise which undergirds the Singapore Court of Appeal decision in *Thio Keng Poon v Thio Syn Pyn*[2] ("*Thio*"). This underscores the importance of formulating the correct principle by which to discern which side of the procedure-substance line an irregularity falls.

4 The procedure versus substance dichotomy is, as we shall see, a nuanced one. This article examines the more nuanced approaches propounded more recently in Australia and Singapore, and argues why these are legal developments in the right direction. It builds on these approaches to suggest a deeper inquiry that goes into the essential substance and validity linkage.

II. The structure of s 392 and why the substantive irregularity versus procedural irregularity distinction matters

5 Under CA s 392(2), an action affected by a procedural irregularity is presumptively valid unless it can be shown that the irregularity has occasioned substantial injustice that cannot be addressed by an order of court. In contrast, a matter sought to be validated under s 392(4)(*a*) has to satisfy a number of conditions found in s 392(6):

> (6) The Court shall not make an order under [s 392] unless it is satisfied –
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> (*a*) in the case of an order referred to in subsection (4)(*a*) –
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> (i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;

2 [2010] 3 SLR 143.

> (ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or
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> (iii) that it is in the public interest that the order be made;
>
> … and
>
> (*c*) in every case, that no substantial injustice has been or is likely to be caused to any person.

6 The first difference between the two provisions relates to the burden of proof. Under CA s 392(4)(*a*), the person seeking validation of the action has the burden of proving that "no substantial injustice has been or is likely to be caused to any person".[3] 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:
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> (*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 …[4]

7 This is to be contrasted with CA s 392(2) where the burden of proving the "substantial injustice" requirement is on the person seeking the *invalidation* of the action.

8 Related to the presumption of validity in CA s 392(2) is the causation requirement embedded in s 392(2), *ie*, the need to show the nexus between the irregularity and the injustice alleged. The proof of the nexus – that the procedural irregularity has caused or may have caused a substantial injustice – requires a consideration of the counterfactual. What if the procedure had been duly followed? Is it likely that there would have been a different result? In the context of a

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3 *Australian Hydrocarbons NL v Green* (1985) 10 ACLR 72 at 83.

4 There must, of course, first be "an act, matter or thing purporting to have been done". In *Onefone Australia Pty Ltd v One Tel Ltd* (2010) 80 ACSR 11, the Supreme Court of New South Wales held that this condition was not satisfied. The irregularity sought to be validated was an "irregular meeting" to approve certain payments to the special liquidator. In so far as the validation was sought of the purported resolution which passed the resolution in question, Barrett J held that there was no meeting but only a number of unilateral e-mails between the various committee members and the liquidator. There was nothing that "purported" to be a resolution agreed to by a majority of the committee members present at a meeting on the relevant date. As such, Corporations Act 2001 (Cth) (Australia) s 1322(4)(a) was found to be unavailable: at [17]–[19].

contested resolution passed at an irregular meeting, this causation inquiry often engages the court in an examination of the *nature of the resolution* as it considers whether it would have been passed if the procedural provisions had been complied with. In *City Pacific Ltd v Bacon (No 2)*,[5] the irregularity consisted of a failure to pass two separate resolutions for the removal and replacement of the responsible entity under s 601M of the Corporations Act 2001 (Cth) (Australia). The plaintiff was the responsible entity for managing the mortgage fund that the irregular resolution sought to remove. Analysing the nature of the resolution and noting the general dissatisfaction with the plaintiff's performance as the responsible entity for managing the mortgage fund, Dowsett J found that the members would not have voted differently.[6] Dowsett J applied the test propounded by Hodgson J in *Mamouney v Soliman*:[7] "[T]he plaintiff must show that there may have been a different result, if the proper notice had been given." As due compliance with the prescribed procedure would not have changed the outcome, Dowset J ruled that the plaintiffs had failed to prove injustice for the purpose of s 1322(2),[8] the Australian equivalent of CA s 392(2).

9 The proof of the causative link between the irregularity and the injustice alleged by considering the counterfactual similarly stumbled the complainants in *Re Pembury*.[9] Here, the majority faction held 75% of the shares while the other faction (E) held 25% of the shares. The majority purported to convene a members' general meeting, which was irregular due to the short notice for the meeting and the absence of a quorum for the meeting. The resolution resulted in the removal of C, an ally of the minority faction. Additional directors were also appointed at this meeting. Byrne J accepted that the minority faction suffered prejudice. It was in this context that Byrne J said:[10]

> It is, therefore, necessary to decide whether either of the irregularities has caused or may cause 'substantial injustice'. The burden Creevey and East bear is to show that one or other of the irregularities occasions a 'substantial injustice'; not that the 'proceeding' (the meeting and its resolutions) caused or may yet cause substantial injustice.

10 The irregularity consisted of the short notice calling the meeting. In examining whether the irregularity caused or may have caused a substantial injustice, Bryne J examined whether due notice would have made a difference. The inquiry explored the breakdown in

5 [2009] FCA 772.
6 *City Pacific Ltd v Bacon (No 2)* [2009] FCA 772 at [12] and [56].
7 (1992) 9 ACSR 63 at 71.
8 *City Pacific Ltd v Bacon (No 2)* [2009] FCA 772 at [56].
9 (1991) 4 ACSR 759 (Supreme Court of Queensland).
10 *Re Pembury* (1991) 4 ACSR 759 at 762.

the relationship between the majority shareholder on the one side and the minority shareholder and his ally C on the other. The mistrust that had developed was such that even if the minority had the chance to present evidence of the debt the company allegedly owed to C, it would not have made a difference to the majority's resolve to remove C. In so far as the minority had argued that the short notice deprived them of the opportunity to put certain information before the meeting, Byrne J held that it would not have made any difference to the outcome. There was thus a failure to demonstrate a nexus between the procedural irregularity and the prejudice the minority suffered.

11 The requirement to prove the nexus between the irregularity and the injustice is thus a material burden for the aggrieved party seeking invalidation of the action. This is to be contrasted with CA s 394(4)(*a*) where, by reason of s 392(6)(*c*), the burden of proving the absence of substantial injustice is placed on the person seeking validation of the matter.

12 The second set of differences lies in the nature of the conditions.

13 The wording of the substantial injustice condition in CA s 392(6)(*c*) is framed differently from that found in s 392(2). Whereas s 392(2) posits that the court should declare invalid a procedural irregularity if it "has caused or may cause substantial injustice that cannot be remedied by any order of the Court", the court in exercising its validation power under s 392(4)(*a*) is required by s 392(6)(*c*) to be satisfied that "no substantial injustice has been or is likely to be caused to *any person*" [emphasis added]. An interesting issue arises when substantial injustice is occasioned both when action is validated and when it is invalidated, albeit to different persons. *Quare*: whether the "substantial injustice" condition in s 392(2) and s 392(6)(*c*) work out differently?

14 There are three channels by which the validation power under CA s 394(4)(*a*) may be accessed. Whereas s 392(2) is predicated on a procedural irregularity, s 392(6)(*a*) conditions the access to the validation power under s 392(4)(*a*) through three alternative channels which are not necessarily premised on procedural irregularity. The subparagraphs in s 392(6)(*a*) are disjunctive and not cumulative;[11] that is, the fulfilment of any one of the three subparagraphs in the sub-provision is sufficient to cross the threshold posed by s 392(6)(*a*).[12]

11 *Re Charter Hall Ltd* [2007] FCA 1316 at [7].

12 *Re MLC Ltd* (2006) 60 ACSR 187, [2006] FCA 1357; *Primelife Corp Ltd v Aevum Ltd* (2005) 53 ACSR 283, [2005] NSWSC 269 at [8]; *Re Westpac Banking Corp*

(*cont'd on the next page*)

15 The second channel – honesty – should preclude intentional contravention of the stipulated conditions for effectuating the act. Honesty refers to truthfulness in abiding by the norm in question. While inadvertence might not be inconsistent with honesty, an intentional disregard of the norm even for the purpose of regulatory compliance should not pass muster as an "honest" contravention. Even if such may be characterised as "necessary" contravention, it would not possess the character of an "honest" contravention. Such a case would more properly fall for consideration under the third channel, that of "public interest" in CA s 392(6)(*a*)(iii).

16 It is noteworthy that the third channel in the Australian provision does not adopt the "public interest" formulation used in the Singapore provision; instead, the threshold posed in the third channel of the equivalent Australian provision is that "it is fair and equitable that the order be made".[13] While there might be an overlap in scope between "public interest" and "fair and equitable", the two are conceptually distinct.

17 The first channel – that the irregularity is one "essentially of a procedural nature" – looks similar to the "procedural irregularity" found in CA s 392(2). However, the two have different spheres of operation. Whereas "procedural irregularity" in s 392(2) is a threshold condition to the operation of presumptive validity, "essentially of a procedural nature" operates in the context of an irregularity that is substantive in nature. Given the substantive policy concerns which undergird the requirement to be fulfilled, the exemption which it creates posits a way out of invalidity if the substantive policy concerns have not been compromised by the irregularity.[14]

III. Divining the substance-procedure divide in corporate law

A. When is "procedural" properly to be characterised as "substantive"?

18 Section 392(1) of the CA defines and sets out what are to be regarded as procedural irregularities:

(2004) 53 ACSR 288, [2004] FCA 1792 at [27]; *Jordan v Avram* (1997) 25 ACSR 153 at 158, 141 FLR 275 at 281.

13 Corporations Act 2001 (Cth) (Australia) s 1322(6)(a)(iii).

14 See, *eg*, *Bovis Lend Lease Pty Ltd v Wily* [2003] NSWSC 467; *CGU Workers Compensation (NSW) Ltd v Ascom Service Automation Australia) Pty Ltd* [2005] NSWSC 747; *Cribb, in the matter of Shields Contracting Pty Ltd (ACN 059 029 506)* [2008] FCA 1116.

> … a reference to a procedural irregularity includes a reference to –
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> (*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.

19 A plain meaning interpretation of the word "includes" preceding CA ss 392(1)(*a*) and 392(1)(*b*) points to treating all deficiencies of notice as procedural irregularities.

20 However, as the Singapore Court of Appeal demonstrates in *Thio Keng Poon v Thio Syn Pyn*[15] ("*Thio*"), the matter is more nuanced than it would appear at first sight. The issue in *Thio* arose out of a deficiency in notice to be given, which would *ex facie* fall within CA s 392(1)(*b*). By Art 88(c) of the articles of association:

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

21 The appellant was the patriarch of the Thio family, whose extensive holdings included Malaysia Dairy and Modern Dairy (a wholly owned subsidiary of the former). Through the family holding company, Thio Holdings ("TH"), the family had effective control over the entire Thio Group of companies. While the appellant was the founder of the family business and held the positions of director, managing director and chairman of Malaysia Dairy and Modern Dairy, he held only 4.75% in TH. The individuals who held the reins of power in TH were Pyn and Wee, the appellant's eldest son and third son. The breakdown in relationship between the appellant and the other members of the family came to a head when the auditors reported irregular claims made by the appellant. Pyn called a directors' meeting, notice of which was given to all the directors of Malaysia Dairy except the appellant who was then overseas. At the directors' meeting, the directors unanimously approved the resolution to remove the appellant as director, managing director and chairman of Malaysia Dairy. At the AGM held the next day, the shareholders passed a resolution to "approve, confirm and ratify" the decision of the board.

22 The Court of Appeal held that CA s 392(2) was inapplicable because the breach in question was not a mere procedural breach but a substantive breach. The failure to give notice to the director appears, at

15 [2010] 3 SLR 143.

first sight, to be a deficiency in the notice falling within the terms of s 392(1)(*b*). Yet, the Court of Appeal did not regard the failure to provide notice to the appellant as a procedural irregularity falling within the ambit of s 392(2). Instead, it held that the failure was a substantive breach falling outside the ambit of s 392(2). Implicit in its determination was the premise that not all deficiencies of notice fall within the notion of procedural irregularity.

23 Significantly, this approach implicitly interprets "includes" found in s 392(1) as predicating only the core or typical instances falling within the description found in ss 392(1)(*a*) and 392(1)(*b*). There remain some types of irregularities which, though superficially meeting the description found in these subsections, are more properly to be characterised as substantive breaches falling outside the notion of procedural irregularity found in s 392(1).

24 While the characterisation of what is *ex facie* a procedural irregularity as a substantive irregularity is not evident on a plain reading of s 392(1), the distinction to be made between a substantive irregularity and a mere procedural irregularity finds precedent in Australia. In *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd*[16] ("*Cordiant*"), Palmer J framed the distinction as revolving around "the thing to be done":[17]

> I think that the following general proposition may be formulated for the purposes of the application of the Corporations Act, s 1322:
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> – what is a 'procedural irregularity' will be ascertained by first determining what is 'the thing to be done' which the procedure is to regulate;
>
> – if there is an irregularity which changes the substance of 'the thing to be done', the irregularity will be substantive;
>
> – if the irregularity merely departs from the prescribed manner in which the thing is to be done without changing the substance of the thing, the irregularity is procedural.

25 Citing *Cordiant*, the Singapore Court of Appeal in *Thio* sought to establish the distinction by examining the aim and objective of the requirement to be complied with. The Singapore Court of Appeal reframed the matter in the following terms:[18]

> It appears to us that to determine whether a non-compliance is of a procedural or substantive nature, one must assiduously examine the

16 (2005) 55 ACSR 185. Followed in *Carpathian Resources v Hendricks* (2011) 81 ACSR 542, [2011] FCA 41 at [67].

17 *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* (2005) 55 ACSR 185 at [103].

18 *Thio Keng Poon v Thio Syn Pyn* [2010] 3 SLR 143 at [69].

> aim or object of the requirement which was not complied with. The failure to serve upon the Appellant a notice to resign, as required by Art 88(c), is certainly not of the same genre as those irregularities listed in s 392(1). As we see it, the requirement of such a notice would serve two complementary purposes. First, it gives notice to the director in question that his services on the board are no longer appreciated by his co-directors. He will then have to consider his available options. He may well decide to leave voluntarily and resign, thus preserving his dignity. Second, and in the alternative, he may wish to bring it up and appeal to his co-directors and convince them that his remaining on the board would be in the best interests of the company. The failure to serve the Appellant with such a notice would deny him these choices. This, to our minds, can hardly be considered to be a matter of procedure. It is also apparent to us that the giving of choices to the director in question, must have been the obvious intention behind the provision; otherwise the provision could have simply provided that a director shall cease to be a director upon a resolution being passed by the board or upon the request to resign being made to him by his co-directors and nothing else (see the Hong Kong decision of *Samuel Tak Lee v Chou Wen Hsien* [1984] 1 WLR 1202 …

26 The analysis undertaken by the Court of Appeal of the notice requirement in Art 88(c) is instructive for how an ex facie procedural requirement was construed as a matter of "substance". The request requirement gave notice to the director that his removal was imminent. This afforded him a choice, either (a) to preserve his dignity and go quietly by submitting his resignation, or (b) to appeal to the directors. The appellant's summary removal without notice denied the appellant that choice, which the court regarded as the aim and objective of the procedure. The denial of that choice was thus a substantive breach, not a mere procedural irregularity. Accordingly, CA s 392(2) could not be applied to validate the breach.

27 The following dicta from *John Pfeiffer Pty Ltd v Rogerson*,[19] which was cited with approval in both *Cordiant* and *Thio*, points to what identifies a substantive irregularity:

> [M]atters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure. Or to adopt the formulation put forward by Mason CJ in *McKain* 'rules which are directed to governing or regulating the mode or conduct of court proceedings' are procedural and all other provisions or rules are to be classified as substantive.

19 (2000) 203 CLR 503 at [99].

28 This *dicta*, albeit delivered in a case dealing with choice of law rules, illuminates the critical features of the "thing to be done" inquiry posited in *Cordiant* and the "aim and purpose" inquiry posited in *Thio*. An identifying feature of "substance" is when a substantive entitlement is implicated. Thus, if "the thing to be done" is characterised as involving a legal entitlement or right, an irregularity which impairs the entitlement or right would be a substantive one. Similarly, if the "aim and purpose" is to confer a legal entitlement or right on a person, the deficiency that diminishes such entitlement or right would be substantive in nature, not merely a procedural matter relating to how a matter is to be effectuated.

B. Statutory norms and procedures

29 A clear case for the application of CA s 392(4)(*a*) rather than s 392(2) would be where the norm is demonstrably substantive in nature and the consequences of non-compliance clearly spelt out. In *Re MLC Ltd*,[20] for example, the problem arose from a controlling company (National Australia Bank) transferring its shares to entities it controlled. Section 259C(1) of the Corporations Act 2001 provides that such a transfer is void. National Australia Bank had obtained an exemption order from the Australian Securities and Investments Commission under s 259(C)(2) but had neglected to renew it. Consequently, there was a significant period of time during which the prohibited transactions were entered into without the cover of an exemption order. The statutory prohibition is clear in its purpose and effect. There is no question of the breach being a procedural irregularity. It was therefore little wonder that the court proceeded under the Australian equivalent of s 392(4)(*a*).

30 Where, however, the statute prescribes steps to be taken in order to achieve certain legal consequences, the question which arises is whether the steps are substantive or procedural in nature? In their very nature, the prescription of the process to be followed connotes a procedure. However, the step to be taken might serve substantive policy objectives. If this is the true construction of the prescribed step, the prescribed step might be taken to be a substantive matter, not merely a procedural one.

31 This proposition finds support in *Cribb, in the matter of Shields Contracting Pty Ltd (ACN 059 029 506)*[21] ("*Cribb*"). Under s 477(2B) of

20 (2006) 60 ACSR 187, [2006] FCA 1357. A similar problem concerning s 259C of the Corporations Act 2001 (Cth) (Australia) arose in *Re Commonwealth Bank of Australia* (2005) 57 ACSR 28, [2005] FCA 1940 and *Re Westpac Banking Corp* (2004) 53 ACSR 288, [2004] FCA 1792.

21 [2008] FCA 1116.

the Corporations Act 2001, court approval is required if the liquidator seeks to enter into an agreement which might end only three months after the entry into the contract. In entering into an agreement to dispose of certain mining interests which contained a term contemplating performance three months after the contract, the liquidator of a company neglected to obtain court approval. As the court does not rubber-stamp the liquidator's decisions but carries out a substantive review of the transactions entered into by the liquidator, examining it for imprudence and lack of good faith, the requirement serves important policy objectives. The irregularity was a substantive one because the missed step was intended to fulfil important policy objectives. There was therefore no question of s 1332(2) applying.

32 A similar investigation of the policy rationale for the prescribed step was taken in *CGU Workers Compensation (NSW) Ltd v Ascom Service Automation Australia) Pty Ltd*.[22] Here, the liquidator under a court-ordered winding up paid the creditors in full, after which the surplus was paid over to the sole contributory. In doing so, the liquidator failed to comply with s 488(2) of the Corporations Act 2001, which directs that "a liquidator may distribute a surplus only with the Court's special leave". The words of the statute admitted little room for arguing that this was merely a procedural matter. The interpretation that court approval was a substantive requirement was bolstered by an analysis of the policy goals, which consisted of "ensuring that there is in reality a surplus (in that the claims of creditors have been recognised and met in full) and of seeing that the correct relativities among the contributories have been observed, having regard to the possibility of differing rights".[23]

33 At other times, the statutory intent that the requirement must be strictly complied with emerges less from an examination of the policy objectives as from the consistent use of the particular statutory language to connote a mandatory requirement. In *Bovis Lend Lease Pty Ltd v Wily*,[24] a creditor of a company that sought to go into voluntary administration challenged the validity of a creditors' meeting which, under s 439B of the Corporations Act 2001, "the administrator [was] to preside". The administrator was not physically present at the meeting. The issue was whether the administrator's failure to personally preside over the meeting invalidated the meeting. A consideration of the legislative policy underlying s 439B(1) did not yield a clear answer as there were policy arguments both for and against requiring the administrator's personal presence.[25] The interpretation that personal

22 [2005] NSWSC 747.
23 [2005] NSWSC 747 at [4].
24 (2003) 45 ACSR 612, [2003] NSWSC 467.
25 (2003) 45 ACSR 612, [2003] NSWSC 467 at [241].

presence was mandatory turned, in the end, on the consistent manner the clause "preside at" was used in the Corporations Act and the Corporations Regulations. This was what convinced Austin J to hold that a true construction of the provision required the administrator to be *physically* present at the meeting as chairman. Although the statutory requirement involved a procedural matter, he held that the failure to comply with s 439B(1) cannot be a mere "(procedural) irregularity". As such, s 1332(2) was inapplicable; he then proceeded to consider validation under s 1332(4)(*a*) instead.

34 In the context of statutorily prescribed steps for the effectuation of a matter, it is submitted that the *Cordiant* test – inquiring into the "thing to be done" – adds a layer of unnecessary gloss which detracts from the key question – statutory intent concerning a departure from the prescribed steps. The "thing to be done" inquiry is, at its core, an inquiry into legislative intent. If the Legislature intends strict compliance with the prescribed steps, the "thing to be done" will consist of the prescribed steps. The problem with the "thing to be done" test, in the context of statutory conditions, is the imprecision of the test. The test does not provide guidance on how one is to correctly identify the "thing to be done". Worse, in couching the query as a characterisation exercise, it fails to exact the discipline of reasoning out *why* the compliance with the norm fundamentally affects the validity of the contemplated action.

35 The unsatisfactory nature of the test can be seen from *Onefone Australia Pty Ltd v OneTel Ltd*[26] ("*Onefone*"). The liquidator sought the validation of an "irregular meeting" which purportedly approved certain payments to him. The communications took place after the meeting of the committee of inspection was adjourned. They consisted of a number of unilateral e-mails between various committee members and the liquidator. Barrett J characterised the thing to be done as "a meeting of the committee of inspection". As there was no such meeting, the persons concerned were "doing something other than the 'thing to be done'".[27] Why was the "thing to be done" characterised as the meeting of the committee of inspection? Barrett J alluded to the materiality of the meeting under the legislative scheme:[28]

> The legislation made a meeting of the committee … the only legitimate forum and context for the passing of such a resolution. The legislation therefore proceeds on the clear footing that no resolution of the committee can be passed except at a time and place … of which all committee members had notice (and hence an opportunity to participate) and that all who chose to participate at that time and

26 (2010) 80 ACSR 11.
27 *Onefone Australia Pty Ltd v OneTel Ltd* (2010) 80 ACSR 11 at [8].
28 *Onefone Australia Pty Ltd v OneTel Ltd* (2010) 80 ACSR 11 at [9].

> place should be able to consult together, to debate the proposal, to consider one another's expressed opinions and, having done all these things, to indicate acceptance or rejection of the proposal.

36 The "thing to be done" could have been characterised as the exercise of fixing the liquidator's remuneration; following on such a characterisation, the inquiry would have been whether the committee members did arrive at a decision on the matter. The characterisation adopted – that the "thing to be done" consisted of a "meeting of the committee of inspection" – stemmed from the view that the Legislature requires a meeting of the committee of inspection as a mandatory step to be taken in order to achieve the legal result of fixing the liquidator's remuneration. The passage examining legislative intent does not, however, defend why a meeting of the committee is "the only legitimate forum and context" for passing the resolution relating to the liquidator's remuneration. This was more an assertion than a reasoned conclusion. Similarly incomplete is the argument that the meeting of the committee of inspection was important to consult, debate and consider the opinions of committee members. These are things which members of companies and their boards do as a matter of course. Yet, the *Duomatic* principle regularly applies to treat decisions reached informally as valid.[29] The reasoning in *Onefone* is incomplete. Does it, for example, preclude the operation of the *Duomatic* principle at common law wherein informal unanimous consent of the constituents of the corporate organ in question might count as a decision of the relevant corporate organ? A more direct inquiry into statutory intent regarding non-compliance with the prescribed steps would have elicited a more in-depth examination of the role of the committee of inspection and more substantive arguments regarding the fundamentality of a meeting of the committee of inspection.

37 In positing that the matter is one of characterising the "thing to be done", insufficient attention has been given to the policy rationale for the procedure, and why the statute regards the steps prescribed as fundamentally important. As *Cribb* and *CGU Workers Compensation (NSW) Ltd v Ascom Service Automation Australia) Pty Ltd* demonstrate, more satisfying reasoning is engendered by inquiring into policy rationale and statutory intent. The exercise of characterising the "thing to be done" is a distraction, one which obscures the correct inquiry that should be undertaken. Indeed, many cases concerning non-compliance

29 *Re Duomatic Ltd* [1969] 2 Ch 365. In *Ng Joo Soon v Dovechem Holdings Pte Ltd* [2011] 1 SLR 1155 at [45], the principle was succinctly stated by Phillip Pillai J: "Under the *Duomatic* principle … the courts have regarded informal unanimous director or shareholder assents to be binding on the company provided it was *intra vires*."

with statutory norms have proceeded without reference to the "thing to be done" test.[30]

38 To the present author, statutory intent and the policy rationale underlying the prescribed mode for achieving a legal consequence should form the touchstones of the inquiry. The inquiry needs to cut to the core issue: "Does the prescribed step serve an important policy objective such that one can predicate the failure of the legal consequence sought if the statutory prescription is not complied with?" There are two elements to the proposed test. First, whether the prescribed step is undergirded by substantive policy considerations. Second, whether those substantive policy consideration are sufficiently strong to predicate invalidity of the matter sought to be achieved in the event that the prescribed step is not undertaken.

39 The test proposed resonates with the aim and purpose test propounded by the Singapore Court of Appeal in *Thio*. Discerning statutory intent regarding the effect of non-compliance with the statutory requirements must surely involve analysing the aim and purpose of the same requirements. The proposed test, however, goes further. Even if the steps serve substantive policy goals, it does not necessarily follow that the matter infected by the irregularity would be invalid.[31] As such, the further question must be asked – does Parliament require compliance with the statutory requirements in order to achieve the result sought? In other words, does it follow that a failure to comply with the statutory requirement results in failure of the matter sought to be done?

40 The test proposed is consistent with the approach to be adopted for the important ancillary question – if the omission relates to a matter

30 See, *eg*, *Espasia v Barbarry* [2009] FCA 1559. (The fair value report failed to state its view that the acquirer had full beneficial ownership in at least 90% by value of all securities and the reasons for taking the view. The judge found that the failure was rectified in a subsequent supplemental report and that the omission did not deprive the minority of the opportunity of objecting to the omission and the acquisition.)

31 *Espasia v Barberry* [2009] FCA 1559 would be a good example of this except that the judge regarded the failure to include the statement on beneficial ownership as a procedural irregularity. This author finds it odd that the omission of a substantive matter which forms the threshold to the majority's power to acquire the minority's interest would be regarded as a matter of procedure rather than substance. In view of the fact that the irregularity was rectified by a subsequent supplemental statement and that no substantial injustice had been caused, the judge seemed to take the view that there was no real need to discern the applicable section, s 1322(2) or 1322(4) of the Corporations Act 2001 (Cth) (Australia). This author submits that this would be a case of substance – failure to state an essential condition for the exercise of the power of acquisition; however, while it is a matter of substance, one might not be able to predicate invalidity of the acquisition power on this.

of substance for which one might predicate invalidity of the matter sought to be done, does the statutory regime in question preclude the court's power to validate under CA s 392(4)? This is a matter of statutory intent, in like manner to the issue whether the statutory regime contemplates invalidity for non-compliance with its prescribed steps. It is necessarily context specific. It requires a detailed examination of the contours of the statutory framework, and importantly, the interrelation between the statutory requirement and the validation power under s 392.

41 *David Grant & Co v Westpac*[32] is illustrative of the kind of rigorous examination that should be undertaken in working out the ambit of the general validation power. Under s 459G of the Australian Corporations Law, a company which has been served with a statutory demand may apply to court for an order setting aside the statutory demand within 21 days of the demand being served. The issue in the Australian courts, and ultimately the High Court of Australia in *David Grant & Co v Westpac*, was whether s 1322(4)(*d*) giving to the court the power to extend the time for doing things could be applied to time for making an objection to the statutory demand. The High Court of Australia placed great weight on the statutory wording – "[a]n application *may only* be made within 21 days after the demand is so served" [emphasis added]: s 459(G)(2). In the words of Gummow J:[33]

> The force of the term 'may only' is to define the jurisdiction of the court by imposing a requirement as to time as an *essential* condition of the new right conferred by s 459G.

42 The High Court of Australia was also mindful that the power of the court to set aside the statutory demand was strictly delimited by the conditions set out in ss 459G(2) and 459G(3). The statutory scheme for winding up in which s 459G of the Corporations Law was located contained specific provisions conferring on the court the power to extend time. These support the conclusion that s 1322 was impliedly excluded from application. Moreover, the period for compliance with the statutory demand was intricately specified in s 459F(2), and these specifications carried implications for *when* the court must presume the company to be insolvent (s 459C(2)). An application of s 1322(4)(*d*) to s 459G would have disrupted the integrity of the statutory regime since s 1322 could not modify, first, the period for compliance with the statutory demand, and second, the presumption of insolvency upon the company failing to comply with the statutory period for compliance. Following an exhaustive examination of the statutory language and the

32 [1995] HCA 43, (1995) 13 ACLC 1572, (1995) 69 ALJR 778, (1995) 131 ALR 353, (1995) 184 CLR 265, (1995) 18 ACSR 225.

33 *David Grant & Co v Westpac* [1995] HCA 43, (1995) 13 ACLC 1572, (1995) 69 ALJR 778, (1995) 131 ALR 353, (1995) 184 CLR 265, (1995) 18 ACSR 225 at [28].

statutory scheme, the High Court of Australia concluded that s 1322(4)(*d*) could not be applied to extend the time for making an objection to the statutory demand.

43 Similar rigorous examination of the statutory framework and language can be observed in other cases where the applicability of s 1322 was in issue.[34] While the applicability or preclusion of s 1322 is a matter of great moment and explains the detailed examination of statutory intent in these cases, a similarly rigorous analysis of statutory intent should be applied to the question whether a statutorily prescribed step is a matter of substance or procedure.

C. Locating Cordiant – *Rights distorted by irregular procedure*

44 The argument that the *Cordiant* test is an unnecessary gloss when construing the significance of statutorily prescribed processes should not detract from the contribution it otherwise makes. *Cordiant* arose from a particular context. Appreciating that context helps one to know when the *Cordiant* test is most appropriately applied.

45 In *Cordiant*, the chairman at a general meeting was found to have been wrong in his ruling that a shareholder was not entitled to vote on account of it having earlier given to a nominee an irrevocable power of attorney in respect of the shares.[35] This had implications on how the votes were to be counted. The issue was whether the irregularity was a procedural or substantive one. This depended on how the irregularity was to be characterised. Characterising it as a wrongful ruling would have carried the conclusion that it was a procedural irregularity. Instead, Palmer J propounded the "thing to be done" inquiry. One first has to arrive at a correct characterisation of "the thing to be done", and then

34 See, for example, *BP Australia v Brown* [2003] NSWCA 216 where the New South Wales Court of Appeal carried out a detailed and rigorous examination before concluding that s 1322 could not be employed to extend the statutorily provided period within which a liquidator may seek a court order declaring voidable an insolvent transaction under s 588FE of the Corporations Act 2001: see [40]–[129]. See also *ST(2) Pty Ltd v Lockwood* (1998) 27 ACSR 667 for a carefully reasoned judgment on why s 1322 could not be employed to extend the statutorily prescribed time period for execution of a deed of company arrangement.

35 The aggrieved shareholder, Cordiant, had under a shareholders' agreement given an irrevocable power of attorney to nominees of TCGH to vote its shares in TCGH. Cordiant sought to vote at the meeting but was prevented from doing so by the chairman, who ruled that it had no right to exercise its voting rights by reason of the irrevocable power of attorney. The ruling was incorrect as s 249Y(3) of the Corporations Act 2001 (Cth) (Australia) provides that, unless the company's constitution provides otherwise, the proxy's authority to speak and vote is suspended while the member is present at the meeting: *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* (2005) 55 ACSR 185 at [83].

ask whether the irregularity has changed "the thing to be done". As Palmer J himself admitted and illustrated, how "the thing to be done" is "defined" materially determines whether the irregularity is procedural or substantive:

> [105] For example, in the case of a shareholders meeting, if one defines 'the thing to be done' as 'the putting of a resolution to the vote of shareholders at a meeting' one could say that an irregularity which denies some shareholders an effective vote by invalidly excluding their proxies has not changed the substance of 'the thing to be done': a meeting has still been held and a resolution has still been put – what has occurred is merely an irregularity in the procedure for voting upon resolutions.
>
> [106] But if one defines 'the thing to be done' more narrowly, for example, 'putting a resolution to the vote of all shareholders present in person or by proxy at a meeting and entitled to vote', then to exclude some shareholders present at the meeting in person or by proxy and entitled to vote changes the substance of 'the thing to be done' so that the irregularity is substantive and not procedural.

46 Palmer J ruled that when the validity of the admission of votes is in issue, "the thing to be done" is the "admission of the votes of all shareholders present in person or by proxy who are entitled to vote".[36] Underlying the approach is the impulse to protect the right to vote, and ensure that it is not nullified by irregular exclusion. The touchstone of "substance" is whether a legal entitlement or right is denied. The following *dictum* in the judgment is key to discerning the substance-procedure divide:[37]

> A wrongful denial of a shareholder's statutory right to vote at a meeting is a denial of a substantive right and is not a 'procedural irregularity' within the scope of s 1322(2) at all.

47 The approach involves applying a purposive inquiry to the nature of the irregularity. Characterising "the thing to be done" as the putting of a resolution to the vote of shareholders at a meeting – with its implicit focus on the process – would have resulted in the irregularity being identified as a procedural one. The characterisation adopted emphasises the vote of all shareholders entitled to vote, the end which the process in question seeks. The touchstone of the *Cordiant* test – an inquiry into "the thing to be done" – directs a holistic consideration of the subject matter of the irregularity. In the context of voting, the subject matter of inquiry is not the voting process, even if the irregularity occurred there. The subject matter of inquiry is a more

36 *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* (2005) 55 ACSR 185 at [107].

37 *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* (2005) 55 ACSR 185 at [97].

penetrating one – whether one's right to vote has been denied or impaired.[38] This entails an inquiry into the end to be served by the process. It is a broader inquiry going beyond the form of the irregularity. It is a more penetrating inquiry which seeks to ascertain the nature of the irregularity against the background of the purpose to be served by the process.

48 The immediate context of *Cordiant* needs therefore to be kept in mind as one seeks to apply the test propounded by Palmer J. Voting is a process. It is shaped by the manner in which the chairman presides at the meeting and by how he rules on who is entitled to vote. An irregular ruling on the entitlement to vote is therefore an irregularity in procedure. Unlike the statutorily prescribed procedure explored earlier,[39] the conduct of the meeting and the voting process were matters largely specified by the company's constitution. There was therefore no question of examining statutory intention regarding the irregular process invalidating the vote. However, the process here was intricately tied in with statutory rules which shape and condition voting in person or by proxy. The irregularity was more than an irregularity in procedure. This is because it involved more than the conduct of the process of voting – for the process served the shareholder's *right to vote*. "The thing to be done" inquiry forged the link between the procedure governed by the company's constitution and the statutorily specified right of the shareholder to vote in the circumstance in question.[40]

49 More importantly, the "thing to be done" inquiry directs one to look beyond the fact that the irregularity occurred in the *process* of doing something. The key to the procedure-substantive dichotomy does not lie in whether the regularity occurred in a process. Rather it examines whether the "something" being done involves a right, and whether the irregularity in the process distorts that right. An impairment or nullification of that right signifies that a substantive irregularity has taken place. So formulated, the inquiry would not be confined to statutory rights but should be capable of application to rights created by private design. After all, although the right to vote in

38 The holding in *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* (2005) 55 ACSR 185 has been consistently upheld. In *Carpathian Resources Ltd v Hendriks* (2011) 81 ACSR 542, [2011] FCA 41, Gilmour J in the Federal Court of Australia agreed with *Cordiant* that the admission of votes is a substantive matter and not a procedural irregularity. In the circumstances of the case, however, there was no substantial irregularity as there was no counting of invalid votes. See also *MTQ Holdings Ltd v RCR Tomlinson* [2006] WASC 96.

39 See paras 29–43 of this article.

40 Corporations Act 2001 (Cth) (Australia) s 249Y(3).

Cordiant was specified in a statutory provision, the right was shaped both by the company's constitution and the Corporations Act 2001.[41]

IV. The case for a deeper "procedure *versus* substance" inquiry

50 The notion that an irregularity which impairs rights amounts to a substantive irregularity finds its inspiration in *John Pfeiffer Pty Ltd v Rogerson* and is an attractive one. Given the presumptive validity of a "procedural" irregularity, it is correct that whether or not the presumption applies should not rest on the simple notion that it does just because it involves an irregularity in the process of doing something. The steps being taken can be regarded as important by statute – or, for that matter, by the contracting parties forming a company. If that is indeed the case, to draw an equivalence between a step being taken in a process and a "procedural irregularity" (which triggers a statutory presumption of validity) would be overly simplistic. Indeed, it would be a wrong approach.

51 However, to infer "substance" requiring the validation power under CA s 392(4) merely because the irregularity affects rights or duties might also smack of over simplicity. The missing but necessary question which needs to be asked is: what kind of right is in issue? It cannot be that s 392(4) is called for as long as a right – *any* right – is affected. The point is an obvious one once one queries the correctness of the proposition from a duties perspective. Is it correct to say that the irregularity is one of substance if "affects a duty"? Such a proposition must surely be too broad.

52 In *Espasia v Barbarry*,[42] the expert who was to file a report in support of a compulsory acquisition by a shareholder having 90% of the company's interest failed to state that the acquirer seeking to acquire the minority stake had full beneficial ownership of at least 90% by value of all securities. The omission carried with it a failure to state the reasons for the required statement. There is little question that a duty was involved. Yet the court classified the irregularity as a procedural one. *Espasia* prompts further consideration of the *nature* of the duty in issue

41 The rule that the shareholder might, by his presence, suspend the proxy's right to vote is a default rule applying in the absence of specification to the contrary in the company's constitution: Corporations Act 2001 (Cth) (Australia) s 249Y(3). The point that the right is an amalgam of contractually negotiated rights and statutory rights is illustrated by a company constitution stipulating additional conditions to the shareholder's presence before the proxy's right is suspended. Corporations Act 2001 s 249Y(3) is a statutory codification of the common law rule which in Singapore will be represented by *Cousins v International Brick Co Ltd* [1931] 2 Ch 90. See Tan Cheng Han, *Walter Woon on Company Law* (Singapore: Sweet & Maxwell, Rev 3rd Ed, 2009) at para 6.77.

42 [2009] FCA 1559.

when discerning whether the non-compliance with a duty amounts to a matter of substance for the purposes of s 392. In the view of this commentator, the more precise question is whether the statute predicates the invalidity of the act sought to be done should there be a failure to perform the duty in question. In other words, it must be a duty of particular importance, serving important goals implicating the validity of the matter, such that one might posit invalidity of the matter upon non-compliance with the duty.

53 It stands to reason that an irregularity in process that affects a right is not substantive in nature just because a right is affected in some way. It is necessary to query what kind of right is affected. The point can be illustrated by *MTQ Holdings Ltd v RCR Tomlinson*.[43] The complaint in *MTQ* was that the chairman had failed to allow an objection to the validity of certain votes. Le Miere J agreed with the rule in *Cordiant* that there is a substantive irregularity if something occurs which results in a denial of that right to a shareholder, or the admission of invalid votes. However, he distinguished *Cordiant* as the complaint involved an objection, confining the *Cordiant* rule to a case where a vote is wrongly admitted or excluded. As the complainant in *MTQ* did not seek to establish that there was an admission of invalid votes, the irregularity was a procedural one.[44] Yet, the objection was raised pursuant to a *right to object*; if there is no such right on the part of the member, there would have been no irregularity in the first place. Here, then, is a right nonetheless – though of a different kind. Implicitly, Le Miere J was attaching a lesser importance to the right to object. The result in MTQ is, therefore, consistent with differential treatment of different kinds of rights. The right to vote is a right so important that its mere denial to one or more members results in the invalidity of the vote taken. On the other hand, there are rights like the right to object on which invalidity of the vote taken cannot be predicated.

54 The argument that the procedure-substance divide has to be tested by a deeper inquiry applies similarly to the "aim and purpose" test propounded in *Thio*. As earlier argued, just because the statutorily prescribed steps serve substantive goals does not necessarily mean that they are invalid and therefore require validation. The statutory language or policy goals must be capable of predicating invalidity should there be a failure or an irregularity in the step to be taken. This similarly applies to contractually specified procedures and rights written into the memorandum and articles of a company. The right to require compliance with the procedures set out in the company's articles is

43 [2006] WASC 96.

44 *MTQ Holdings Ltd v RCR Tomlinson* [2006] WASC 96 at [101].

surely a right of every member.[45] Whether its breach has a material impact upon the validity of the matter sought to be achieved must surely depend on the weightiness of that right.

55 In *Thio*, it may indeed be correct to construe Art 88(c) of the articles of association as evincing an intention on the part of the corporators that the notification to be given to the subject director is to be a condition-precedent to the board's power to remove the director. The reasons proffered by the Court of Appeal – that the article gives the director the choice of retiring gracefully or trying to persuade the board – do support the utility of the article. To the present commentator, however, the material and more precise question that has to be asked is: is the notification to the director so important that the failure to provide notice prevents the board from removing the director? In other words, it must be possible to posit a link between breach and the invalidity of the matter sought to be done.

V. Reframing existing ways of characterising irregularities

56 *Cordiant* and *Thio* require us to revisit some issues taken as settled. One such issue is the quorum specification in the articles of association. A plain reading of CA s 392(1) would suggest that all defects in quorum should be treated as procedural irregularities. This indeed has been how cases in both Singapore and Australia have proceeded on this issue.

57 In *Re Goodwealth Trading Pte Ltd*,[46] the minority shareholder refused to attend the directors' meetings. This resulted in deadlock as under the articles of the company, a quorum of two was necessary to constitute a valid directors' meeting. In response to the minority shareholder's petition to wind up the company under s 254(1)(*i*) of the Companies Act,[47] the majority shareholder purported to hold a board meeting at which PK Wong & Advani were appointed solicitors to represent the company. One issue which arose was whether s 392(2) was applicable to cure the irregularity. Yong Pung How CJ said:[48]

> In my opinion, on a proper construction, s 392(2) is limited in scope. An irregularity is not cured if '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'. Thus, the provision is clearly applicable to save the proceedings at a meeting where the lack of a

45 An analogy may be drawn to administrative law, where a person is entitled to expect that the authorities comply with procedural norms like the *audi alteram partem* principle.

46 [1990] 2 SLR(R) 691.

47 Cap 50, 1988 Rev Ed.

48 *Re Goodwealth Trading Pte Ltd* [1990] 2 SLR(R) 691 at [12].

> quorum is of little or no consequence, and no shareholder's interests are prejudiced by any decision taken at the meeting. *But the provision equally cannot be applicable in a case such as this, in which it will result in disputed decisions being taken by one of only two shareholder groups in a company to the exclusion and possible disadvantage of the remaining shareholder*. In my judgment, therefore, the board meeting on 25 October 1989 and the proceedings of the meeting were invalid. Having come to this view, I ruled that the appointment of PK Wong & Advani was also invalid. The firm of solicitors had not been appointed by the company and therefore had no *locus standi* in the proceedings. [emphasis added]

58 It would appear that Yong CJ, in arriving at the conclusion that the appointment of the solicitors was invalid, was considering the question whether the irregularity had caused substantial injustice which could not be remedied by an order of the court. The reasoning is thus predicated on the absence of a quorum being a procedural irregularity within the terms of s 392(2), as otherwise the question whether there was substantial injustice would not arise. There was no discussion of the ambit of the threshold condition for the application of s 392(2), *viz*, whether the absence of a quorum at the directors' meeting constituted a procedural irregularity in the first place. As such, s 392(1)(*a*) was assumed to apply. The precedential value of the case lies in the decision that where there is a deadlock caused by the refusal of the director representing one faction to attend board meetings, a disputed decision taken at a directors' meeting without the necessary quorum would not be validated under s 392(2). The omission to discuss the ambit of s 392(1) is likely to be due to the question not having been argued. The case, nonetheless, implicitly endorses a plain reading of s 392(1) as it would appear that the absence of quorum was treated as a procedural irregularity.

59 In *Sum Hong Kum v Li Pin Furniture Pte Ltd* ("*Sum Hong Kum*"),[49] Warren Khoo J spoke more directly – if summarily – on the question posed. The business enterprise was engaged in the manufacture and sale of furniture. It was originally organised as a partnership. The company was incorporated in 1988 to take over the business of the partnership. The three original partners continued as directors and shareholders of the company. The plaintiff fell out with the other two shareholders. He was removed at an annual general meeting. At the directors' meeting immediately following on the annual general meeting, it was resolved that the plaintiff should no longer be paid remuneration and that his car privileges should be withdrawn. Article 51 of the articles of association provided: "No business at an annual general meeting shall be transacted unless a quorum is present …

49 [1996] 1 SLR(R) 529.

three members present in person or by proxy shall be a quorum." As the plaintiff left before the commencement of business of the annual general meeting, the quorum requirement was not satisfied. Article 87 of the articles of association provided: "The quorum necessary for the transaction of business of the directors shall be three, one of whom shall be a governing director." In light of how the company came to be formed from a partnership of equals, Khoo J interpreted the article, *inter alia*, to require all three founding director-shareholders to be present before a quorum is constituted.[50] As the plaintiff was not present, quorum was lacking and the meetings were irregular. Khoo J concluded that:[51]

> [T]he procedural irregularity in this case, *ie* in proceeding with the general meeting and the second directors' meeting in the absence of the plaintiff constituted a procedural irregularity as defined in s 392(1) and that this procedural irregularity resulted in substantial injustice to the plaintiff. The irregularity deprived him of his right under the deadlock provisions of the articles to prevent any decision from being taken by the company without his agreement. This defect is a substantial defect which cannot be cured by s 392. On the other hand, the plaintiff can come to the court to ask the court to declare invalid the meetings mentioned above which took place without his participation.

60 What is striking about *Sum Hong Kum* is how, despite Khoo J's characterisation of Art 51 as a deadlock provision conferring on shareholders a veto power, the lack of quorum was nonetheless characterised as a procedural irregularity. It was a small step to view the deadlock provision as a *right* of the founding shareholders, and thereon to the position that the irregularity was a substantive one falling outside the terms of s 392(1) – and consequently s 392(2). Yet, this approach was not the one taken. Inherent in the approach taken by Khoo J is a plain meaning interpretation of s 392(1), *ie*, that "includes", which is used to link procedural irregularity and the lack of a quorum, posits that all manner of lack of quorum count as procedural irregularities. Significantly, it covers quorum requirements used in deadlock provisions.

61 The Australian decisions on defects in quorum have consistently treated the irregularity as a procedural one.[52]

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50 *Sum Hong Kum v Li Pin Furniture Pte Ltd* [1996] 1 SLR(R) 529 at [27].

51 *Sum Hong Kum v Li Pin Furniture Pte Ltd* [1996] 1 SLR(R) 529 at [35].

52 *Re Pembury Pty Ltd* (1991) 4 ACSR 759 (Supreme Court of Queensland); *Poliwka v Heven Holdings Pty Ltd* (1992) 7 ACSR 85 (Supreme Court of Western Australia); *Brain v Judo Federation of Australia* (1994) 15 ACSR 708 at 709 (Supreme Court of Queensland); *Whitehouse v Capital Radio Network* [2002] TASSC 78 (Supreme Court of Tasmania). *Cf Re Wood Parsons Pty Ltd* (2002) 43 ACSR 257 (Supreme Court of NSW – Equity Div), where Austin J, in relying on the "just and equitable"

(*cont'd on the next page*)

62 *Cordiant*, but in particular *Thio*, prompt us to revisit such a straightforward treatment of a quorum provision. A plain reading of CA s 392(1)(*b*) would suggest that failure to give notice to the director in Thio was a deficiency in notice falling within the terms of s 392(1)(*b*). By the operating words of s 392(1), such a deficiency would be a procedural irregularity. However, the Singapore Court of Appeal quite clearly went beyond the plain words. A gloss in the form of the "aim and purpose" of the provision made for a more nuanced and sophisticated inquiry.

63 In a case where the quorum requirement was negotiated for the protection of the minority's interests – for example, a requirement that representatives of both the specified minority and majority shareholders must be present to constitute a quorum – the specification cannot be a mere matter of procedure. By the *Cordiant* test, the "thing to be done" would be to have the presence of the parties specified before a quorum can be constituted. By the *Thio* test, the aim and purpose is, *inter alia*, to protect the minority from being overridden by providing an effective veto power by which they may bargain with the majority. It is a matter of substance, important to both the parties. Indeed, they are matters of substance so important that the parties do intend the invalidity of the proceeding should the quorum specification not be complied with. If this be the intention of the parties, taking the non-compliance with the negotiated quorum requirement as a procedural irregularity carrying with it presumptive validity under CA s 392(2) would be a wrong determination. It is a matter of substance. More than that, it is a substantive matter which underpins the validity of the meeting and the resolutions passed under it. Returning to *Re Pembury*, if the majority had by an irregularly called meeting removed a director which the minority had a right to nominate, the matter would cross over to the substantive irregularity side of the procedure-substance divide.

VI. Conclusion

64 From a theoretical perspective, the nuanced approaches in *Cordiant* and *Thio* throw into relief the important precept that CA s 392 is not a mandatory statute acting above other statutes or one that acts over the intentions of the parties. It has necessarily to accommodate the more specific statutory provisions speaking on how the non-compliance with prescribed steps affect the validity of the action sought to be taken, and if it does, whether there is room for applying its general validation powers. It has also necessarily to respect the rights and obligations created privately by the parties forming a company. The nuanced

ground found in s 1322(6)(a)(iii), implicitly endorsed the notion that not all deficiencies in quorum are procedural irregularities.

approaches evidenced in *Thio* and *Cordiant* are steps in the right direction – for an unyieldingly plain reading of s 392(1) would yield wrong results, results which are at variance with privately negotiated rights or which undermine the policy objectives of more specific statutory regimes.

65 This article has argued that a deeper inquiry into legislative intent and parties' intentions is necessary to more meaningfully make sense of the procedure-substance divide. It is insufficient merely that the irregularity affects rights and duties. It is necessary to inquire into the importance and weightiness of these rights and duties. Further, it is necessary to explore what the statutory regime says about invalidity, just as it is necessary to inquire into the parties' intentions pertaining to invalidity in the event of non-compliance with the processes in question. Not only will we then have a better explanation of why the irregularity is a matter of substance (or procedure as the case may be), we will also have the reasons for *when* the validation power of the court is called for.