

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 13

OS 809/1992

Between

Credit Development Pte Ltd

... Plaintiff

And

IMO Pte Ltd

... Defendant

GROUND OF DECISION

Companies — Directors — Powers; Companies — Members — Meetings;
Companies — Members — Meetings; Words and Phrases

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Credit Development Pte Ltd v IMO Pte Ltd

[1993] SGHC 13

OS 809/1992
Lim Teong Qwee JC
18 January 1993

1 Credit Development Pte Ltd (‘the company’) is a private company incorporated in Singapore. According to information from documents filed in the Registry of Companies disclosed in the instant information printout dated 11 September 1992, its issued capital was \$29,437,500 in fully paid shares of \$1 each. About 53% of the issued capital was held by or beneficially owned by companies controlled by Overseas Trust Bank Ltd (‘OTB’) of Hongkong which collapsed in 1985. Another 33% was held by Richman Associates Ltd (‘RAL’), a company incorporated in the British Virgin Islands. Since 7 May 1991, the date of the last annual return filed, about 43% of the shares have been transferred by the OTB-controlled companies to RAL giving RAL more than 76% control of the company. There was a new issue and RAL further increased its holdings and at the date of hearing of this originating summons RAL probably had more than 80% control of the company. RAL is also controlled by OTB. At least two of the former directors of the company were employees of OTB. As disclosed in the instant information printout the directors are Mr Tong and Mr Pei of Hongkong and Mr Woo of Singapore who is an advocate and solicitor. All were appointed on 20 August 1991.

2 IMO Pte Ltd (`IMO`) holds about 7% of the issued capital of the company. It had good reason to be dissatisfied with the way the business of the company was managed. In 1987 the company in general meeting resolved to authorize the directors to create a legal mortgage in favour of OTB to secure liabilities of some of its customers but without any apparent benefit or advantage to the company. OTB-controlled shareholders voted their shares over the legitimate objections of IMO and it was only after IMO had petitioned the court for relief under s 216 of the Companies Act (Cap 50, 1990 Ed)(`the Act`) that the mortgage was discharged. In 1991 Barrow Investments Ltd (`Barrow`), a Hongkong company in liquidation, claimed \$7.5m against the company and the claim was settled for \$7m. OTB was the major creditor of Barrow and one of its employees who was then a director of the company was concerned in the settlement. The settlement was approved by the company in general meeting when OTB-controlled shareholders voted their majority shares again over the objections of IMO. There were other reasons for dissatisfaction given in the affidavit of a director of IMO.

3 On 20 April 1992, IMO sent this written requisition to the directors of the company:

Ordinary resolutions

We, the undersigned, being members of the company representing not less than 5% of the total voting rights of all members having a right to vote, in pursuance to s 183 of the Companies Act (Cap 50) hereby require you to give members of the company entitled to receive notice of the next annual general meeting, notice of the following ordinary resolutions which may properly be moved and are intended to be moved at that meeting:
...

4 There were five resolutions of which notice was given. The first was to appoint a firm of certified public accountants (one of the `big` firms in Singapore) to carry out 17 assignments of investigating and reporting or

investigating, reporting and recommending or investigating, reporting and advising substantially in relation to loans and movement of funds involving OTB and its related companies and the conduct of the company's directors. The second resolution was to appoint a firm of solicitors (one of the larger firms in Singapore) to carry out ten assignments. These were to investigate, report and advise on actions against former directors in relation to their conduct in the management of the business of the company and against OTB and other parties in relation to property comprised in the mortgage which was subsequently discharged and also to report on the status of the action by Barrow against the company. The third resolution required the former and present directors to give reasons for their refusal to allow minutes of directors' meetings and resolutions of directors to be inspected by members of the company. The fourth resolution required the former and present directors to give reasons for approving the transfer of shares in the company to RAL. The fifth resolution required the former and present directors to disclose their relationships with OTB and its related companies, majority shareholders and their liquidators. On 21 May 1992 IMO sent another written requisition in the same terms and giving notice of two resolutions to be moved at the next annual general meeting. The first was for full disclosure of the terms of settlement with Barrow to be laid before the members and the second resolution was for an unsigned loan agreement dated 28 December 1984 between the company and Barrow to be laid before the members. The Barrow claim and settlement are included in the assignments to be carried out by the accountants and solicitors proposed to be appointed in the resolutions of which notice was given in the earlier requisition.

5 On 17 July 1992, the company by its director Mr Tong replied to the requisitions. He said the directors had considered the requisitions carefully and declined to include the resolutions in the agenda of the next annual general

meeting. The main reason given was that these matters came within the purview of the directors and a general meeting was not the proper forum to deliberate on these matters. Other reasons were also given in the letter. Having decided not to include any of the resolutions in the agenda of the next annual general meeting, the directors took out this originating summons in the name of the company to ask whether the company was bound to give its members notice of the resolutions and to table these resolutions at the next annual general meeting or any other general meeting and for further or other relief. An order for costs of the application to be taxed and paid by IMO to the company was also sought. I decided that the answer to the question asked was `Yes` in respect of the first and second resolutions in the requisition dated 20 April 1992 and `No` to the other resolutions and ordered the company to pay costs. The company now appeals against this decision.

6 Section 183 of the Act provides:

(1) Subject to this section, a company shall on the requisition in writing of such number of members of the company as is specified in subsection (2) and, unless the company otherwise resolves, at the expense of the requisitionists -

(a) give to members of the company entitled to receive notice of the next annual general meeting notice of any resolution which may properly be moved and is intended to be moved at that meeting; and

(b) ...

(2) The number of members necessary for a requisition under subsection (1) shall be -

(a) any number of members representing not less than 5% of the total voting rights of all the members having at the date of the requisition a right to vote at the meeting to which the requisition relates; or

(b) ...

...

(6) Notwithstanding anything in the company's articles, the business which may be dealt with at an annual general meeting shall include any resolution of which notice is given in accordance with this section, and for the purposes of this subsection notice shall be deemed to have been so given notwithstanding the accidental omission, in giving it, of one or more members.

7 Article 88 of the articles of association of the company provides:

(1) The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not, by the statutes or by these articles, required to be exercised by the company in general meeting, subject nevertheless to the provisions of the statutes, these articles and to such regulations, being not inconsistent with the said provisions and articles, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

8 Article 88(1) is in terms almost identical with reg 73 of Table A in the Fourth Schedule to the Act.

9 Article 1 provides:

The regulations in Table 'A' in the First Schedule to the Companies Ordinance

(Cap 174), shall not apply to the company except so far as the same are repeated or contained in these articles.

10 By art 2 the expression 'the statutes' means 'every Ordinance or Act of Parliament for the time being in force concerning banking and joint stock companies and affecting the company' and 'these articles' means 'these articles of association or other regulations of the company, for the time being in force'.

11 **Division of powers and s 183**

12 Section 183(1) requires the company to give notice of `any resolution which may properly be moved`. Unlike s 183(6) it is not expressed to be `notwithstanding anything in the company`s articles`. What resolution may properly be moved? It is not in dispute that all the other requirements of s 183 are satisfied. The Act gives no definition and there are no authorities on the question. Mr Jeyaretnam referred to a note in Magnus and Estrin on **Companies Law and Practice** (5th Ed) at p 154n on a similar provision in the English legislation:

Resolution which may properly be moved. As to different types of resolution see

ss 141, 142. A resolution is not valid and is therefore not one which may properly be moved (i) if it is ultra vires; or (ii) if it is in respect of a matter which requires a particular type of resolution and the resolution is not of that type, eg where a special resolution is required, an ordinary or extraordinary resolution will not be valid; or (iii) if it is contrary to public policy.

13 He said there was a fourth category. He said that a resolution which trespassed into the domain of the directors and was not valid and which when passed the directors would not have to obey was not one that may properly be moved. I am not sure that this is really a fourth category. It seems to me to be an example of a resolution that is ultra vires the members in general meeting. Mr Chua said that division of powers between the members and the directors was irrelevant. His argument was, as I understood it, that as long as what was contemplated by the resolution was not ultra vires the company and the resolution was proper in matters of procedure, eg as a special resolution where such a resolution was required, then the directors had no option but to include it in the agenda of the next annual general meeting.

14 Mr Chua referred to **Pedley v Inland Waterways Association Ltd** .1 Slade J said at p 212:

Section 140 of the [English] Act [s 183 of the Act] would plainly give [the plaintiff] this right if he could find members representing, with him, not less than one-twentieth of the total voting rights of all the voting members, to join with him in an appropriate written requisition to the company, complying with the conditions as to time and other matters set out in s 140(4) and (5). For in this event it would be the company's duty under

s 140(1), at the expense of the requisitionists unless the company otherwise resolved -

`(a) to give ... notice of any resolution which may properly be moved and is intended to be moved at that meeting; ...`

In this event the company would be bound to give notice of the resolution ... and there could be no doubt as to the rights of the requisitionists to have the matter dealt with at the relevant annual general meeting.

15 This is not helpful because in that case there was no question as to division of powers between the directors and the members of the company or as to whether the resolution intended to be moved was ultra vires the members in general meeting. The resolution was to remove the directors and it was clearly within the powers of the members. In ***Isle of Wight Railway Co v Tahourdin***,² a sufficient number of shareholders required the directors to convene a general meeting of the company under statutory provisions similar to s 176 of the Act. The objects of the meeting were (1) to appoint a committee to inquire into the working and general management of the company, and the means of reducing the working expenses, to empower such committee to consolidate offices, to remove any of the officers and appoint others, and to authorize and require the directors to carry out the recommendations of the committee; (2) to remove, if deemed necessary or expedient, any of the present directors, and to elect directors to fill any vacancy in the board. The directors issued a notice for a meeting `for the purpose of considering and determining upon a demand of the requisitionists for the appointment of a committee to inquire into the working and general management of the company and the means of reducing the working expenses`. The requisitionists gave notice that they would not

attend the meeting as the notice did not provide for all their objects and they then themselves issued a notice calling a meeting for the purposes mentioned in their requisition under provisions similar to s 176(3) of the Act. Kay J granted an injunction to prevent the meeting being held. The defendants appealed and the injunction was discharged. Cotton LJ said at pp 330-331:

Now I am of opinion that if the object for which it is proposed to call a meeting is one which can be carried out in a legal way, then, although the notice may be so expressed that resolutions following its precise terms would be illegal, it is not right for the directors to limit the notice so as to prevent the meeting from entering into the question simply because the terms of the notice would justify a resolution which would be ultra vires. Directors have great powers, and the court refuses to interfere with their management of the company's affairs if they keep within their powers, and if a shareholder complains of the conduct of the directors while they keep within their powers, the court says to him, 'If you want to alter the management of the affairs of the company go to a general meeting, and if they agree with you they will pass a resolution obliging the directors to alter their course of proceeding.'

16 Lindley LJ said at pp 333-334:

It appears to me that it must be a very strong case indeed which would justify this court in restraining a meeting of shareholders. I do not mean to say of course that there could not be a case in which it would be necessary and proper to exercise such a power. I can conceive a case in which a meeting might be called under such a notice that nothing legal could be done under it. Possibly in that case an injunction to restrain the meeting might be granted. I do not say that it would, that case may be dealt with when it arises. In the present case it must be observed that the notice is not a notice of particular resolutions - it is a notice stating objects which the requisitionists wish to accomplish by any legal means.

17 Fry LJ said at p 334:

If the object of a requisition to call a meeting were such, that in no manner and by no machinery could it be legally carried into effect, the directors would be justified in refusing to act upon it. But if the object stated in the requisition be such that by any form of resolution or by any machinery sanctioned by the Act, it can

be carried into effect, then it is the bounden duty of the directors to call the meeting.

18 In **Turner v Berner**,³ the plaintiff, a shareholder of the company, sent a requisition signed by a sufficient number of shareholders to require the directors to convene an extraordinary general meeting under provisions similar to s 176 of the Act for the purpose of considering and, if thought fit, passing certain resolutions. The first was to the effect that the chairman had committed breaches of provisions similar to s 157(1) of the Act and the remaining resolutions were substantially to have him and another director removed. The directors gave notice of the meeting but excluded from it the reference to the first resolution. Needham J said at p 277:

*The next question then is whether the directors correctly excluded from the notice of meeting reference to the proposed resolution. As I have said, the directors in their correspondence and circulars did not rely upon lack of power in the company or in the general meeting to make the proposed determination, but I think that their acts need to be considered in the light of the conclusion to which I have come. It seems to me, as submitted on behalf of the defendants, that the decision of the Court of Appeal in **Isle of Wight Railway Co v Tahourdin** (1884) 25 Ch D 320 ... establishes the proposition that if an object of the requisition cannot be lawfully effectuated at the meeting then the directors are at least entitled to omit that object from the notice of meeting.*

19 I agree. If the object of the meeting is to do that which cannot legally be carried into effect or to pass a resolution which is ultra vires the meeting, then the directors ought not to be required to convene the meeting. If such a meeting is in fact held and a resolution passed, the directors are not bound to comply with it. The resolution is void and of no effect. There is nothing in the Act to suggest that the directors must act on a requisition for a meeting having as an object that which is not within the powers of the meeting. I think the directors are well entitled on receipt of such a requisition to decline to call a meeting. Mr Chua said that these were cases on the equivalent of s 176 and it was another

thing altogether to say that the directors could decline to include in the agenda of an annual general meeting a resolution of which notice was given under s 183 by reason only that the resolution was ultra vires the meeting. Under s 176 an extraordinary general meeting would have to be called and there would be an extra burden on the company. Under s 183 no further meeting was required and it was only the agenda that had to be added to. I am unable to agree. But there is an important difference between s 176 and s 183. In s 183 the resolution to be included in the agenda has to be one `which may properly be moved`. It seems to me that if the directors cannot be required to call an extraordinary general meeting to pass a resolution that was ultra vires the members in general meeting, then they and the company cannot be required to include such a resolution in the agenda of an annual general meeting - all the more so because of the qualifying words in s 183. Such a resolution is not one which may properly be moved.

20 Division of powers and art 88(1)

21 Article 88(1) of the articles of association of the company is in four parts.

I `The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not, by the statutes or by these articles, required to be exercised by the company in general meeting`

22 The resolutions for the appointment of accountants and solicitors are clearly matters which have been entrusted to the directors under the first part of this article. The appointment is incidental to the management of the company's business and the power to make the appointment is not required by `the statutes` or `these articles` to be exercised by the company in general meeting. There is

no doubt that if the management of the company's business is vested in its directors without any conditions, then the resolutions for the appointment of accountants and solicitors would be ultra vires the members in general meeting and the company would not be bound to include them in the agenda of the next annual general meeting under s 183.

II `subject nevertheless to the provisions of the statutes, these articles and to ***such regulations ... as may be prescribed by the company in general meeting*** (Emphasis added.)`

23 These words of limitation come after the vesting of the management of the business in the directors and granting to them the powers and I think it means that both the management of the company's business and the exercise of the company's powers are subject to the condition. In the management of the business and the exercise of the powers the directors must comply with the statutes and the articles for the time being in force. They must also comply with such regulations as may be prescribed by the company in general meeting. This means that although the directors are to manage the company's business and may exercise all the company's powers yet the company in general meeting may at any time prescribe regulations which the directors must comply with. Such regulations can only be prescribed by passing resolutions which would include resolutions for the appointment of accountants and solicitors for the purposes set out in the requisition of IMO. When such resolutions are passed, what the company in general meeting is saying to the directors is `Appoint accountants and solicitors for these specific purposes. Subject to that you manage the company's business and exercise all the company's powers.`

III `being not inconsistent with the said provisions and articles`

24 The regulations which may be prescribed by the company in general meeting are not to be inconsistent with `the said provisions and articles`. `The said provisions and articles` are `the provisions of the statutes` and `these articles` referred to immediately before `and to such regulations` in the earlier part of this article. The management of the business and exercise of the powers are conferred upon the directors in the first part in wide and general terms. The business is to be managed by the directors and that must mean all the business. All the powers (with specific exceptions) are to be exercised by the directors. Any regulation prescribed by the company in general meeting to which the management of the business or the exercise of the powers is subject must necessarily be inconsistent with the first part of this article. If `the said provisions and articles` include this part of this article as well, then the condition as regards regulations contained in the second part of this article is rendered completely nugatory. The articles of association have all the appearance of being comprised in a carefully prepared formal document constituting the agreement binding upon the members and directors and I should be extremely slow to use the blue pencil over `such regulations, being not inconsistent with the said provisions and articles, as may be prescribed by the company in general meeting` and strike them out as just so many self-cancelling words. These are also in essence the words in reg 77 of Table `A`. There is an alternative construction. `Articles` in the expression `said provisions and articles` refers to all the articles other than the first part of art 88(1). The first part of this article is qualified by the second part and must be read together (and together also with the rest) and reading this article as a whole the regulation to which the management of the company`s business and the exercise of its powers are subject will not be inconsistent with this article. It will be perfectly consistent with it. No other articles have been referred to me which may have any bearing on this aspect of the construction of this article and I am not told that the

resolutions are inconsistent with any of the other articles. Resolutions for the appointment of accountants and solicitors for the purposes specified are not regulations inconsistent with the articles of association of the company and do not involve the prescribing of such regulations by the company.

IV `but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.`

25 This part provides for a saving of prior acts of directors which may otherwise be invalidated by regulations made. The draftsman clearly recognized that regulations made under this article could be inconsistent with the first part of the article and has provided for it in this part. It reinforces the view I take that this article contemplates the making of regulations by the company in general meeting which are inconsistent with the first part but which may be properly moved and if passed be binding on the company and its members and directors notwithstanding the words in the third part.

26 There are a number of authorities, some cited by Mr Jeyaretnam, the majority of which seem to suggest that the construction I have given to art 88(1) may be in error and I now consider these.

27 In *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame*,⁴ art 96 of the company's articles of association was in pari materia with art 88(1) except that the second and third parts contained these words:

subject nevertheless to the provisions of the statutes and of these presents, and to such regulations, not being inconsistent with these presents, as may from time to time be made by extraordinary resolution ... (Emphasis added.)

28 At a general meeting of the company a resolution was passed by a simple majority for the sale of the company's assets on certain terms. Collins MR said at p 42:

... the directors have absolute power to do all things other than those that are expressly required to be done by the company; and then comes the limitation on their general authority - 'subject to such regulations as may from time to time be made by extraordinary resolution'. Therefore, if it is desired to alter the powers of the directors that must be done, not by a resolution carried by a majority at an ordinary meeting of the company, but by an extraordinary resolution. In these circumstances it seems to me that it is not competent for the majority of the shareholders at an ordinary meeting to affect or alter the mandate originally given to the directors, by the articles of association.

29 Cozens-Hardy LJ who delivered the other judgment did not discuss art 96. If the resolution of the company in general meeting had been an extraordinary resolution as required by art 96 then, as appears from the passage of the judgment of the Master of the Rolls cited, it would have been effective to alter the powers of the directors. Would it also follow that if art 96 had referred to an ordinary resolution instead of an extraordinary resolution, then the resolution of the company in general meeting for the sale of the assets would have been valid and binding on the company? Surprisingly this case has often been cited as authority for the contrary proposition.

30 In ***Gramophone and Typewriter Ltd v Stanley***, 5 Buckley LJ said at pp 105-106:

*This court decided not long since, in **Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame** [1906] 2 Ch 34, that even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be*

dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals.

31 The case concerned a German company and there was no question of construction of any articles of association. Be that as it may the decision in ***Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame*** 4 was not, with due respect to Buckley LJ, that a resolution of a majority at a general meeting of the company could not impose its will on the directors but that where the articles required an extraordinary resolution to achieve that purpose an ordinary resolution or a resolution passed by a majority at an ordinary meeting simply would not do. An extraordinary resolution required a three-fourths majority passed at a general meeting convened for that purpose.

32 In ***Salmon v Quin & Axtens Ltd*** 6 arts 75 and 80 of the company provided:

(75) The business of the company shall be managed by the board ... The board may exercise all the powers of the company, subject, nevertheless, to the provisions of any Acts of Parliament or of these articles, and to such regulations (being not inconsistent with any such provisions of these articles) as may be prescribed by the company in general meeting, ...

(80) No resolution of a meeting of the directors having for its object ... the acquisition ... or the ... letting ... of any ... premises ... shall be valid or binding unless ... neither of them [Axtens and Salmon] shall have dissented therefrom ...

33 Resolutions were passed by the directors for the acquisition of certain premises and for the letting of certain other premises but Salmon dissented from them so that by virtue of art 80 they were invalid and not binding. At an extraordinary general meeting of the company resolutions in the same terms

were passed by a simple majority of the shareholders. Farwell LJ said at pp 318-319:

*It is said that those resolutions are of no effect, and I am of opinion that that contention is right. I base my opinion on the words of art 75, 'subject, nevertheless, to the provisions of any Acts of Parliament or of these articles', which I read to be 'subject, nevertheless, to art 80', 'and to such regulations (being not inconsistent with any such provisions of these articles) as may be prescribed by the company in general meeting'. That is to say, 'subject also to such regulations not inconsistent with art 80 as may be prescribed by the company in general meeting'. But these resolutions are absolutely inconsistent with art 80; in truth this is an attempt to alter the terms of the contract between the parties by a simple resolution instead of by a special resolution. ... The case is, in my view, entirely governed, if not by the decision, at any rate by the reasoning of the Lords Justices in **Automatic Self-Cleansing Filter Syndicate Co v Cuninghame** [1906] 2 Ch 34 and **Gramophone and Typewriter Ltd v Stanley** [1908] 2 KB 89.*

34 I am not sure how the case was entirely governed by the two cases cited but the actual decision was based on the reasoning in the earlier part of the passage cited. The regulations prescribed by the company under art 75 are inconsistent with art 80, not with part of art 75 itself.

35 On appeal to the House of Lords sub nom **Quin & Axtens Ltd v Salmon**,⁷ Lord Loreburn LC said at p 444:

Now it may be a question for argument, but for my own part I should require a great deal of argument to satisfy me that the word 'regulations' in this article does not mean the same thing as articles, having regard to the language of the first of these articles of association.

36 The first article referred to by Lord Loreburn LC provides:

The regulations contained in Table A of the First Schedule to the Companies Act 1862, shall not apply to this company, but the following shall be the regulations of the company.

37 He then continued:

But, whether that be so or not, it seems to me that the regulations or resolutions which have been passed are of themselves inconsistent with the provisions of these articles, and therefore this appeal fails, ...

38 As I have pointed out above, the regulations or resolutions are inconsistent with art 80 and are of no effect as they do not satisfy art 75 which requires that they be not inconsistent with the provisions of `these articles` which as Farwell LJ said he read as `art 80`. This is the ratio decidendi in this case but Lord Loreburn LC may have been understood to have gone further. If `regulations` in art 75 means `articles`, then such `regulations` can only be prescribed by resolutions having the effect of changing the articles and for this an ordinary resolution is not effective. If this is right, then I should be hard put to find a meaning for the words of limitation in art 75 or any need for them at all. In the case of the company, having regard to arts 1 and 2, I do not think `regulations` in art 88(1) means `articles` even apart from having to give some reasonable meaning to the limiting words in the second and third parts of this article.

39 In ***Marshall's Valve Gear Co Ltd v Manning, Wardle & Co Ltd***,⁸ three of the four directors of the company took out or became proprietors of a patent which the fourth director, Marshall, claimed was an infringement of the company's patent. The three directors refused on behalf of the company to oppose the grant of a patent to themselves and later refused to commence or allow to proceed any action by the company for infringement of its patent. Marshall commenced an action in the name of the company. Substantially all the shares in the company were held by the four directors and Marshall's shares gave him a bare majority of the votes at a general meeting of the company but not enough for a three-fourths majority. Article 55 provided:

The business of the company shall be managed by the directors, who ... may exercise all such powers of the company as are not by the foregoing Act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting ...

40 The three other directors applied to strike out the name of the company as plaintiff and to dismiss the action on the ground that the name of the company had been used without authority. Neville J said at pp 272-273:

*Prior to the decision in **Automatic Self-Cleansing Filter Syndicate Co v Cuninghame** [1906] 2 Ch 34 the matter, I think, would have presented little difficulty, because I think in several cases, and certainly in **Pender v Lushington** 6 Ch D 70 and **Duckett v Gover** 6 Ch D 82, the principle has been acted upon that in the absence of any contract to the contrary the majority of the shareholders in a company have the ultimate control of its affairs, and are entitled to decide whether or not an action in the name of the company shall proceed. I think that that principle was recognized also by the Court of Appeal in the case of **Harben v Phillips** 23 Ch D 14, and I take it that prior to the decision in the case of **Automatic Self-Cleansing Filter Syndicate Co v Cuninghame** the law was established to the effect that the majority of the shareholders, in the absence of a contract to the contrary, had the ultimate control of the affairs of the company and could assert their rights in general meeting. Now the question arises whether the decision in the case of **Automatic Self-Cleansing Filter Syndicate Co v Cuninghame** is a decision to the contrary. To my mind it is quite clear that the decision itself in that case is not in the least inconsistent with any of the decisions that preceded it, because in the case of **Automatic Self-Cleansing Filter Syndicate Co v Cuninghame** the terms of the articles were that the directors should have the entire management of the affairs of the company subject to regulations `not being inconsistent with these presents as may from time to time be made by extraordinary resolution`.*

41 and later at p 274:

... I think that under art 55 the majority of the shareholders in the company at a general meeting have a right to control the action of the directors, so long as they do not affect to control it

in a direction contrary to any of the provisions of the articles which bind the company.

42 The application was dismissed with, it may be interesting to note, costs as between solicitor and client to be paid by the solicitors who had launched it.

43 In **Thomas Logan Ltd v Davis**, 9 art 99 provided:

Subject to the provisions of the last preceding clause the board may from time to time appoint one or more of their body to be managing director or managing directors of the company, ... and art 113 provided:

The business and objects of the company shall be managed and carried out by the board, who may act in relation thereto in such manner as in their judgment and discretion they may think most expedient, and may exercise in all respects all such powers and do all such acts and things as may be exercised or done by the company, and are not by the statutes or these articles directed or required to be exercised or done by the company in general meeting, subject nevertheless to the provisions of the statutes and of these articles, and subject also to such regulations as may be from time to time prescribed by the company in general meeting.

44 Warrington J said at p 916:

Art 99 runs: 'Subject to the provisions of the last preceding clause, the board may from time to time appoint one or more of their body to be managing director or managing directors of the company' - not subject to anything else, but an absolute discretion in the directors to appoint one of their number; it is limited because it must be one of their number to be managing director. Then when one comes to art 113, about which so much has been said, that relates not to matters which have been specially placed under the control of the directors, but to the general management of the business of the company; and it is in reference to that point - the general management and carrying out of the business and objects of the company - as to which the company have reserved to themselves the right in general meeting to direct the directors what to do by what are referred to in the articles as regulations made from time to time. I think there is no reason for reading art 99 in other than its perfectly natural way as meaning that the particular thing is to be done by the directors, who are the persons who may appoint the managing directors.

45 In regard specifically to the appointment of a managing director, power has been given to the directors and this is not subject to any right in the members in general meeting to regulate the exercise of this power or to direct them as to what to do. That right comes in a later article. Article 113 vests the management of the business of the company generally in the directors and this is subject to the right in the members in general meeting to prescribe regulations. This case appears to me to be consistent with the construction I have given to art 88(1) of the company's articles of association.

46 In **Dowse & Ors v Marks & Anor**,¹⁰ art 103 provided:

The management of the business of the company shall be vested in the board ... subject nevertheless to the provisions of the statutes and of these presents and to any regulations from time to time made by the company in general meeting; ...

47 Harvey J said at pp 340-341:

*Taking art 103 first, it appears to me that the interpretation which I ought to give to the words 'subject to any regulations from time to time made by the company in general meeting', is the interpretation put on an article in similar terms by Warrington J in **Thomas Logan Ltd v Davis** 104 LT 914, namely, that as to all powers delegated to the directors by force of this article, the company retains the power to control them by an ordinary majority at a general meeting. A similar interpretation was put by Neville J, upon the corresponding article in Table A in **Marshall's Valve Gear Co v Manning, Wardle & Co Ltd** [1909] 1 Ch 267.*

48 In the face of these cases I do not think I should be justified in confining the meaning of these words to a new article passed by special resolution, as required by the Companies Act, in spite of the indication of opinion of Lord Loreburn, in **Quin v Salmon** [1909] AC at p 444.

49 Harvey J took the view that the words of limitation of the directors' powers of management reserved to the members in general meeting the power

to control them by an ordinary resolution. Some 20 years later the same question came to be considered again. In **John Shaw and Sons (Salford) Ltd v Peter Shaw and John Shaw** [1935] 2 KB 113 arts 84, 87 and 95 provided:

(84) The directors of the company shall be eight in number of whom three shall hold office as permanent directors ... and five shall be ordinary directors.

(87) The ordinary directors ... shall have no right at directors' meetings to vote in respect of, nor shall they have any control over, the financial affairs of the company ...

(95) The business of the company shall be managed by the directors who ... may exercise all such powers of the company, and do on behalf of the company all such acts as may be exercised and done by the company, and as are not ... required to be exercised or done by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the statutes, and to such regulations being not inconsistent with the aforesaid regulations or provisions as may be prescribed by the company in general meeting; ...

50 The permanent directors passed a resolution that instructions be given for writs to be issued against the defendants who were two of the ordinary directors to recover debts owing by them to the company. Subsequently the company in general meeting passed a resolution directing the chairman who was one of the permanent directors to discontinue the proceedings. Greer LJ said at pp 132-133:

The effect of this article [art 87] is the same as it would have been if it had provided that the power of control over the financial affairs of the company, and all powers of management of the affairs of the company ... should be vested in the three permanent directors alone.

51 And later he said at p 134:

If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their

articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.

52 I agree with this as a general proposition. However, this is not helpful as art 95 by which powers of management were vested in the directors and the words of limitation in that article have not been considered. Slessor LJ said at p 143:

*If the permanent directors had power under the articles to bring the action, I do not see how the shareholders could interfere with that power, otherwise than by altering the articles which they have not proposed to do. This would seem to be the effect of the decision of the House of Lords in **Quin & Axtens Ltd v Salmon** [1909] AC 442, though the decision of Neville J in **Marshall's Valve Gear Co's** case [1909] 1 Ch 267 is difficult to reconcile with that case. However, I do not think it necessary in the present circumstances to decide the point finally, but I incline to the view that art 95 in matters within the powers of the permanent directors would require an alteration of the regulations by special resolution to prevent this action continuing; that is to say, that Lord Loreburn's dictum in **Quin & Axtens's** case is correct that the words 'regulations' and 'articles' in the articles in that case, which were substantially similar to the present*

*art 95, mean the same thing: see also **Logan v Davis** (1911) 104 LT 914.*

53 Slessor LJ applied Lord Loreburn's dictum and concluded that the articles had to be altered and that the resolution of the company in general meeting was ineffective. Article 95 has been referred to but I do not see that the words of limitation in that article have been considered. Interestingly **Thomas Logan Ltd v Davis** 9 was referred to. Roche LJ [in **John Shaw's** case¹¹ at p 148] declined to express any view on the 'nicety of the matters of law and constructions involved' because with regard to matters of fact the necessary information was not before the court.

54 It seems to me that the actual decision in the case on this point is entirely consistent with the ratio decidendi in **Quin & Axtens Ltd v Salmon**.⁷ The resolution of the company in general meeting was invalid and of no effect as a regulation prescribed under art 95 as it was inconsistent with art 87.

55 In **Scott v Scott**,¹² the articles of the company consisted of the regulations contained in the English Companies Act of 1908 Schedule I Table A with certain variations and exclusions. Articles 71 and 96 provided:

(71) The business of the company shall be managed by the directors who may exercise all such powers of the company in general meeting, subject, nevertheless, to any regulation of these articles, to the provisions of the Act and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting ...

(96) The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

56 The company in general meeting passed three resolutions, the first of which was that a payment be made to each preference shareholder of a weekly sum calculated on the paid-up capital on the preference shares, by way of advance and without interest, until the payment of the dividend for the current year, the sums to be deducted from the dividend when declared and, if the dividend was insufficient, any deficiency was to be repaid to the company; and the second that AH & Co be instructed to investigate the financial affairs of the company for the last two financial years. On the first resolution Lord Clauson said at p 584:

I do not think it is suggested that, if this resolution is a resolution for the payment of an interim dividend, that it could possibly be held to be valid, it having been passed by the company in general meeting. If it was, then the annual general meeting impinged

upon the sphere of activity which, in the most express terms, is confined to the directors.

57 and later at pp 584-585:

It seems to me it is quite clear that this resolution, if it is not aimed at declaring an interim dividend, is aimed at interfering with the management of the business by the directors and, as such, it is in my view wholly inoperative, and the general meeting had no power to pass it.

58 After referring to art 71, he continued at p 585:

... the question is whether the company, by prescribing this important regulation, if it be a regulation, are prescribing something which is inconsistent with the aforesaid regulations or provisions. One of the aforesaid regulations or provisions is this provision about the business of the company being managed by the directors, and I find the greatest difficulty in seeing how any resolution of the company in general meeting, controlling the directors in the management of the business, can possibly be justified under the terms of this article.

59 I do not propose to refer to the authorities. This particular case seems to me to be an easy one, and for that reason it is not necessary to go with meticulous care through the authorities, which, I must admit, offer some difficulty of interpretation and some difficulty as to their scope; ...

60 On the second resolution Lord Clauson said at p 585:

How you can investigate the financial affairs of the company without interfering with the management of the company's financial affairs by the directors in the course of managing the business, I myself am quite unable to see, and it is on that ground that I think this resolution is inoperative.

61 I am unable to see how the management of the business of the company by the directors in whom such duty is vested by the first part of art 71 can be subject to regulations prescribed by the company in general meeting under the

same article if regulations cannot be prescribed which are inconsistent with the first part.

62 In **NRMA v Parker**, 13 art 25 provided:

The council shall have the control and management of the business and affairs of the association, and may exercise all such powers of the association as are not by the Companies Act or by these articles required to be exercised by the association in general meeting, subject nevertheless to the provisions of the Companies Act, the memorandum of association and of these articles, and to such regulations being not inconsistent with the aforesaid provisions as may be prescribed by the association in general meeting, ...

63 Article 34 provided for half the councillors to retire from office at each annual general meeting. Article 35 provided for the election of councillors by ballot and art 36 prescribed the procedure to be followed in the election. The council had a discretionary power to appoint the secretary or any other person as returning officer and the returning officer had a discretionary power in regard to certain matters in the conduct of the elections. A sufficient number of members signed a requisition for an extraordinary general meeting at which a resolution was to be moved giving directions to the council as to the procedure to be followed in the election of the council to appoint a specified person or failing him a partner in a named firm of chartered accountants as returning officer and for the returning officer to exercise his discretionary power in the conduct of the elections in a particular way. McLelland J said at p 5:

*It is clear that, in general, a power vested by the constitution of a company exclusively in the directors cannot be effectively exercised, nor can its exercise by the directors be effectively controlled or interfered with, by a resolution of members in general meeting, and that a power of control and management of the business and affairs of a company vested in directors in terms similar to those of art 25 in the present case is within this principle: ... **Salmon v Quin & Axtens Ltd** [1909] 1 Ch 311 was referred to. It is not clear whether the members in general meeting lacked power because control and management of the*

*business and affairs of the association and the exercise of its powers were vested in the council by art 25 or because the intended resolution was or would be a regulation inconsistent with art 36. The question was not considered and it appears from the report that it was conceded that the resolution could not be effectively passed by the general meeting. **NRMA v Parker** 13 was followed in **Queensland Press Ltd v Academy Investments No 3 Pty Ltd & Anor** 14 where art 89 of the company's articles of association was in pari materia with art 25 in the former case. Article 89 and in particular the words of limitation in it were again not considered.*

64 Mr Jeyaretnam submitted that I should follow **Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame** 4 but as I have pointed out above that case may not assist him and may even be against him. He also referred to **John Shaw and Sons (Salford) Ltd v Peter Shaw and John Shaw** .11 In that case Greer LJ did not consider the provisions of the relevant article and in particular the words of limitation in it. Slessor LJ referred to the relevant article but did not consider the words of limitation in it. He even referred to **Thomas Logan Ltd v Davis** 9 which is clearly authority for a contrary proposition. Finally I was referred to **NRMA v Parker** 13 and **Queensland Press Ltd v Academy Investments No 3 Pty Ltd & Anor** .14 In the first case the point was conceded and in the second the relevant article was not considered. Mr Chua submitted that I should follow **Marshall's Valve Gear Co Ltd v Manning, Wardle & Co Ltd** .8 In my judgment it is a question of construction and in every case the articles of association and all regulations in the form of resolutions or otherwise having binding effect as between the members in general meeting and the directors must be considered. In the view I have taken on the true construction of art 88(1) of the articles of association of the company and having regard to such other materials as have been referred to me, I hold that the first and second resolutions in the requisition dated 20 April 1992 may properly be moved within the meaning of s 183(1)(a) of the Act. The third resolution is inconsistent with the Act and in particular s 189. The fourth

resolution is inconsistent with arts 26, 29 and 30 of the company's articles of association. The fifth resolution is inconsistent with the Act and in particular s 156. These three resolutions are not resolutions which may properly be moved within the meaning of s 183(1)(a) of the Act. Both the resolutions in the requisition dated 21 May 1992 call for disclosure in relation to the Barrow claim and are adequately provided for in the first and second resolutions in the earlier dated requisition and if these two resolutions in the earlier dated requisition are passed such disclosure will be made. It is not urged on me that if I answer the question raised in this summons so as to allow the two resolutions in the earlier dated requisition to be included in the agenda that either of the resolutions in the later dated requisition should still be included.

65 **Division of powers and residual authority**

66 When he began his submission Mr Chua said he would rely on the proposition that where the directors are disqualified from voting by reason of conflict of interest and for this reason cannot or will not exercise the powers vested in them (to appoint accountants and solicitors for the purposes mentioned in the first and second resolutions in the requisition dated 20 April 1992), the members in general meeting may do so. However, the factual basis has not been established and not having heard any submissions I must resist the temptation of expressing any view on this point. In the result I answered the questions raised in the summons accordingly.

67 **Outcome:**

Lim Teong Qwee JC

Philip Jeyaretnam (Helen Yeo & Partners) for the plaintiff
Chua Lee Ming (Lee & Lee) for the defendant
