Dato’ Sri Andrew Kam Tai Yeow v Grandfoods Sdn Bhd & Anor and other appeals [2025] MLJU 819

Malayan Law Journal Unreported

COURT OF APPEAL (PUTRAJAYA)

RAVINTHRAN N PARAMAGURU, MOHD NAZLAN MOHD GHAZALI and CHOO KAH SING JJCA

CIVIL APPEAL NOS W-02(NCC)(A)-602-04 OF 2022, W-02(NCC)(A)-604-04 OF 2022 AND W-02(NCC)(A)-605-04 OF 2022

14 March 2025

Chan Kean Li (with Lim Poh Leong, Ooi Xi Fang and Siti Syahaneem bt Sajali) (Xi Fang & Lau) for the appellant.
Michael Chow Keat Thye (with Wong Yee Chue, Hannah Yeoh Yi Han, Elisa Oyenz Jeson and Neoh Kai Sheng) (Y C Wong) for the respondents.

Mohd Nazlan Mohd Ghazali JCA:

JUDGMENT OF THE COURT

Introduction

[1] These appeals concern the narrow issue of whether a company director who is due to retire under the articles of association of the company in an impending general meeting of the shareholders can be deemed to have retired upon the completion of the period the meeting ought to have been convened if the meeting could not be held for some reason.

[2] Three appeals were heard together before us as they raised the aforesaid same issue where the facts are similar. In order to follow the submissions made at and the judgment delivered by the High Court, focus however was on Appeal W-02(NCC)(A)-605-04/2022 (“Appeal 605”) in respect of the action at the High Court in WA-24NCC-574- 10/2019 (“OS 574”), although counsel at the hearing before us also agreed to refer to the articles of association of the first respondent in Appeal W-02(NCC)(A)-602-04/2022 (“Appeal 602”) in respect of the action at the High Court in WA-24NCC-642-11/2019 (“OS 642”), as representative for the articles for all the respondent companies.

[3] Having examined the appeal records and deliberated on the submissions of counsel for parties before us, we found that there are merits in the Appeal 602, Appeal 605 and Appeal W-02(NCC)(A)-604- 04/2022 (“Appeal 604”) in respect of the action at the High Court in WA-24NCC-609-11/2019 (“OS 609”), and unanimously decided to allow the same.

[4] These are our reasons.

Key Background Facts

[5] In this appeal, the first respondent company which operates an oil palm plantation wholly owns the second respondent company which runs a palm oil mill. These operations are in Pahang.

[6] The appellant was a director of the two respondents, each of which also has other four directors on their respective board of directors at the material time in September 2017.

[7] A month earlier, on 7 August 2017, each of the respondents issued a notice to convene their respective extraordinary general meetings, stated to be held on 6 September 2017. Relevant to this appeal, these EGMs were called to consider and vote on, among others, a motion to remove the appellant as their director.

[8] In response, the appellant filed a writ vide Kuala Lumpur High Court Civil Suit No. WA-22NCC-352-09/2017 ("Suit 352") against, inter alia, both the respondents. This was swiftly followed by an injunction application to, inter alia, restrain the respondents from removing him as a director and from holding any general meeting. The appellant secured an ad interim injunction to such effect on 6 September 2017, which was later affirmed on 29 March 2018.

[9] Whilst the injunction was still in force (and we understand it no longer is given subsequent developments), on 14 May 2019, the appellant served two letters, both of which dated 10 May 2019 on each of the respondents, requesting for their financial statements, ledgers and certain contractual documents. These were refused by the respondents who explained in their respective replies dated 28 May 2019 that the appellant was no longer a director in the respective respondent companies and therefore had no locus to make such demands. They also claimed that the appellant made the request for an ulterior motive which was detrimental to the companies. The appellant disagreed as he took the position that the injunction has the effect of preserving his status as a director in both companies.

[10] This then witnessed the filing of five originating summons. The appellant instituted two which sought access to the said documents as a director of the relevant respondent companies. In OS 574, OS 609 and OS 642 however, the respondents and other related respondents asked for a declaration that the appellant had retired as a director of the relevant respondent companies pursuant to the respective articles of association of these companies.

The Decision of the High Court

[11] All five were heard together in that arguments were made only in respect of OS 574, where parties had agreed the decision on the Court in OS 574 will apply and bind OS 609 and OS 642, and that which decision (on the appellant's status as director) would also determine the outcome of the other two originating summons (on the appellant's right to access to company documents).

[12] The High Court allowed OS 574, OS 609 and OS 642, and declared the appellant had retired from the board of directors of the relevant respondent companies and consequently dismissed the appellant's other two OS. Hence, the instant appeals by the appellant in respect of all three OS 574, OS 609 and OS 642.

[13] The High Court accepted the submissions of the respondents, and held that a director due for retirement at the AGM of a certain year will retire automatically despite no AGM being held in that year because a director on his appointment does not ordinarily step into an office perpetually. This means that unless terminated by an earlier act, a director's office is limited by the terms of the articles of association of the company concerned. As such, the office of a director can be automatically vacated through retirement by rotation or can be deemed retired even in the absence of an AGM in line with the articles of association.

The Rival Contentions of Parties

[14] Before us, the respondents repeated their stance taken at the court below that on a true construction of Articles 70 and 71 of the articles of association ("the articles") of the first respondent, and Articles 95 and 96 of the articles of the second respondent, the appellant is deemed to have automatically retired from his office as a director of these companies on 31 December 2018, and on 31 December 2017 respectively. These were the dates said to have been the last day of the relevant years where the AGM of these companies ought to have been held and where the appellant was due for retirement. This is because based on the respective board's retirement by rotation (but for the injunction) the appellant was supposed to have retired in the first respondent's AGM in 2018 and in the second respondent's AGM in 2017.

[15] The first respondent mainly relied on the following provisions of its articles:

> Article 36
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> A general meeting shall be held once at least in every calendar year at such time not being more than fifteen months after the holding of the last preceding general meeting, and at such place as the Directors may appoint.
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> Article 37
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> General meetings shall be called ordinary meetings; all meetings of the Company other than ordinary meetings shall be called extraordinary meetings.
>
> Article 70
>
> At the first ordinary meeting of the Company the whole of the Directors and in every subsequent year one third of the Directors for the time being or if their number is not a multiple of three then the number nearest to one third shall retire from office.
>
> Article 71
>
> (a) The Directors to retire in every year shall be those who have been longest in office since their last election but as between persons who became Directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.
>
> (b) A retiring Director shall be eligible for re-election.
>
> Article 85
>
> The Directors may from time to time appoint one or more of their body to be a Managing Director or Managing Directors of the Company... The Managing Director, while he continues to hold that office shall not be subject to retirement but if he ceases to hold the office of director from any causes he shall ipso facto and immediately cease to be Managing Director.

[16] The relevant provisions in the articles of the second respondent are as follows:

> Article 61
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> An ordinary meeting shall be held once at least in every calendar year for the purpose of receiving and considering the profit and loss account, the balance sheet and the reports of the directors and auditors, to elect directors in the place of those retiring by rotation, and auditors, and to declare dividends, at such time, not being more than fifteen months after the holding of the last preceding ordinary general meeting, and at such place as may be determined by the directors. Such general meetings shall be called 'ordinary meetings' and all other meetings of the Company shall be called 'extraordinary meetings'.
>
> Article 95

> At every ordinary general meeting one of the elected Directors shall retire from office and shall be eligible for re-election.
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> Article 96
>
> The one director to retire as aforesaid at the first ordinary meeting shall, unless the directors agree among themselves, be determined by lot; but in every subsequent year the one who has been longest in office shall retire. As between two or more who have been in office an equal length of time the director or directors to retire shall in default of agreement between them be determined by lot. The length of time a director has been in office shall be computed from his last election or appointment where he has previously vacated office. A retiring director shall be eligible for re-election and shall act as a director throughout the meeting at which he retires.

[17] The appellant too maintained his position that Articles 70 and 71 (first respondent) as well as Articles 95 and 96 (second respondent) do not expressly or even impliedly provide for any automatic vacation of office by way of retirement in the absence of the convening of an AGM.

[18] In addition, it was highlighted that Article 68 of the first respondent's articles and Article 93 of the second respondent's also set out an exhaustive list of circumstances that would trigger an automatic vacation of office, whereby retirement by rotation in the absence of an AGM is not included in that list. As such, since the articles of the two respondent companies only provide for the retirement of directors at an AGM, and given that no AGM has been convened, the question of retirement of directors does not arise.

Analysis & Findings in these Appeals

Clear language of the articles on retirement at general meeting

[19] In the first place, whilst it is trite that interpretation of contractual documents, of which articles of association are an example, is a question of law (see, for example, as held by this Court in *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96) the language of the relevant provisions of the articles could not have been clearer in stating that the retirement of the directors happens at the general meetings. The appellant is therefore correct in asserting that articles 70 and 71 (first respondent) as well as articles 95 and 96 (second respondent) do not expressly or even impliedly provide for any automatic vacation of office by way of retirement in the absence of the convening of an AGM.

[20] It has been an established practice, following statutory requirements, as now found in section 340 of the Companies Act 2016 ("the CA 2016") which prescribe certain matters to be conducted at an AGM of a company, and these typically principally include, first, the laying before the meeting the audited financial statements and the reports of the directors and auditors thereon, to enable shareholders to seek clarification from directors on any questions regarding the performance and affairs of the company; secondly, the appointment of auditors and the fixing of their remuneration; thirdly, the election of directors in place of those retiring; and fourthly, the declaration of any final dividend as recommended by the directors.

Retirement by Rotation comes with Eligibility for Re-Election

[21] The retiring directors - either due to retirement by rotation or having been appointed to fill a casual vacancy - generally have the right to seek re-election. In that sense, the retirement and re-election are intertwined and are but a single process at the general meeting. This is where the directors concerned retire at the end of the meeting but whose re-election, if voted for at the meeting, takes effect upon the conclusion of the same meeting. This is an important aspect of shareholder democracy in modern company law which did not appear to feature in any substantive fashion in the submissions of counsel for parties before us.

[22] It must be highlighted that if the directorship of a director is merely deemed terminated by retirement (even if properly due, pursuant to the retirement by rotation provision) upon the expiry of a time period without a general meeting of the shareholders being convened, that director is deprived of his right to stand for re-election and the shareholders are likewise denied the opportunity to vote on the re-election proposal and the continued service of that individual as a director of the company.

[23] It bears emphasis that these relevant provisions, specifically article 71 (first respondent) and article 95 (second respondent) clearly speak of retirement and eligibility for re-election.

[24] In our view, a construction which reads into these provisions the deeming of the retirement of the relevant director despite the absence of a general meeting fails to deal with the matter of the director's eligibility for re-election which is plainly envisaged in the articles.

[25] This opens the possibility of abuse where, for example, a majority of directors deliberately decided not to convene the requisite AGM in order to ensure the removal of a director who is due to retire by rotation at the AGM by invoking this deeming interpretation without affording him the opportunity to offer himself to the general meeting for re- election because such a re-election requires a positive act on the part of the shareholders - which can only happen at an AGM, if one is convened - to vote in support of re-election.

Section 205 of the Companies Act 2016 and articles of association provide for eligibility for re-election of retiring directors at AGM

[26] This proposition finds ready support in section 205 of the CA 2016 which concerns the retirement of directors, which provisions read as follows:

> Retirement of directors
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> 205. (1) The provision under this section shall apply with regards to the retirement of directors unless there is specific provision in the company's constitution or the term of appointment regarding retirement of directors.
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> (2) Notwithstanding subsection (1), a private company may pass a written resolution in accordance with section 297 to determine the retirement of a director.
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> (3) The directors shall retire as follows:
>
> (a) at the first annual general meeting of a public company, all directors shall retire from office at the conclusion of the meeting; and
>
> (b) at the annual general meeting in every subsequent year, one third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest to one-third, shall retire from office at the conclusion of the meeting.
>
> (4) The directors to retire in every year shall be the directors who have been longest in office since the directors' last election, but as between persons who became directors on the same day, the directors to retire shall be determined by lot, unless they otherwise agreed among themselves.
>
> (5) A retiring director shall be eligible for re-election as if he is not disqualified under this Act.
>
> (6) Unless otherwise provided in the constitution, the company may appoint any person who is not disqualified under this Act to fill in the vacancy at the annual general meeting at which a director so retires, and if no appointment was made to fill the vacancy, the retiring director shall, if he offers himself for re- election, be deemed to have been re-elected, unless—
>
> (a) at that meeting the company expressly resolved not to fill the vacated office; or

(b) a resolution for the re-election of the director is put to the meeting and lost.

[27] This section 205 strictly does not apply here since the articles of the respondents before us like most companies already contain provisions on the retirement of directors. These statutory provisions are nevertheless generally consistent with those found in the articles of association of companies anyways. They are now legislated in the CA 2016 to provide greater uniformity and consistent standards in the governance of retirement of company directors. But section 205 does offer especially useful facet to the relationship between retirement and re- election of company directors in a number of points.

[28] First, section 205(2) clearly states that a private company, like all the respondents herein may pass a written resolution in accordance with section 297 which is proposed as a written resolution by the Board or any member of the company to determine the retirement of a director. There is none here from any of the respondents.

[29] Section 205(3) and (4) set out the commonly found provisions on retirement by rotation in a company's articles of association or constitution, such as articles 70 and 71 for the first respondent, and articles 95 and 96 for the second respondent, as highlighted above.

[30] It is of significance to note that the statutory provision in section 205(3) is unmistakable in stating that the retirement is to happen at the conclusion of the relevant general meeting. The articles 70 and 71 in the articles of the first respondent, and articles 95 and 96 of the second respondent too, it must be stressed, provide to the same effect.

[31] Crucially, section 205(5) then states that a retiring director shall be eligible for re-election. Article 71 (first respondent) and article 95 (second respondent) too clearly provide for this. This again reinforces the view that the retirement of directors - particularly by way of rotation is inextricably intertwined with their eligibility for re-election. In fact, article 96 makes this plain in stating that a "retiring director shall be eligible for re-election and shall act as a director throughout the meeting at which he retires" - thus aptly encapsulating the essence of the two key factors - that the retirement takes place at the end of the general meeting and that the retirement is accompanied with the eligibility for re-election.

[32] The appellant in these appeals was supposed to have retired at the end of the AGM in the relevant year as determined by the rotation arrangement. He had the right to seek re-election under the articles of the relevant companies, which eligibility is also statutorily entrenched in section 205(5). Despite the absence of an AGM in light of the injunction, the respondents proceeded to take the position that the appellant's retirement had taken effect immediately upon the expiry of the relevant period, without affording him the opportunity to offer himself for re-election. The respondents could not have given the appellant that opportunity to exercise his right to seek re-election in any event because there could be no re-election in the absence of a general meeting for the shareholders to exercise their right to vote in the first place.

[33] Finally, section 205(6) deals with the re-election of the retiring directors which as mentioned earlier also occurs at the same AGM as their retirement. It provides for the appointment - at the same meeting - of a person as a director to fill in the vacancy of a director who so retires. In the event there is no such appointment made to fill the vacancy, the retiring director shall, if he offers himself for re-election, be deemed to have been re-elected, unless the meeting resolved not to fill the vacated office, or a resolution for the re-election of the retiring director is voted down by the shareholders. More on this below.

[34] Here before us, the appellant never had the opportunity to offer himself for re-election. In other words, even though the respondents proceeded to deem the retirement to have taken effect despite the absence of a general meeting, which is contrary to the requirements of the relevant articles and statutory provisions which so plainly prescribe the convening of an EGM for the purpose, the other part of that process vis-à-vis the retirement, which is to address the possible need to fill in the vacancy by the re-election of the retiring director, could not and did not happen, which tantamount to another departure from the governing provisions conferring on the retiring directors the right to seek re-election.

The authorities relied on by the respondents on deemed retirement may be distinguished

[35] The stance of the respondents, as well as the decision of the High Court in respect of the finding that the appellant was deemed to have retired at the end relevant year during which the director ought to have retired by rotation at the AGM was considerably predicated on the decision of this Court of Appeal in the case of *Tan Sri Dato' Wan Sidek bin Wan Abdul Rahman v. Rahman Hydraulic Tin Bhd* [2012] 6 MLJ 681.

[36] In that case, the appellant was appointed as a director on 3 June 1998 to fill a casual vacancy in the respondent company. Article 109 of the respondent's Articles of Association provided that the appellant would hold office only until the date when the next AGM would be held. But after the AGM for the financial year 1997, no AGM was convened until 15 June 2001, which was the appointment of the special administrators to administer the respondent. Before that, on 31 March 2000, pursuant to a service agreement, the appellant was even appointed as executive chairman cum managing director of the respondent company for a period of three years from 1 February 2000.

[37] On 18 January 2002, the appellant was informed by the Special Administrators that he had ceased to hold office as a director of the respondent upon the expiry of the last day for holding the AGM, which was on 31 December 1998.

[38] Having considered himself constructively dismissed, the appellant filed a claim in the Industrial Court whereby he applied for reinstatement of his position as executive chairman cum managing director which was dismissed on the grounds, among others, that the appellant did not have the capacity to enter into the said service agreement since he was not a director at the material time. The High Court agreed with this decision, which was further affirmed by the Court of Appeal.

[39] The Court of Appeal held thus:

> "[32] The effect of arts. 60(1), 109 and s. 143 of the Companies Act is clear and unambiguous, ie, the appellant would hold office of his directorship only until the next AGM of the respondent which was to be held in accordance with the Articles of Association within such period as extended by the registrar under s. 143 of the Companies Act 1965. In re Consolidated Nickel Mines, Limited [1914] 1 Ch 883, it was emphasized by Sargant J that:
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> > A director on his appointment does not ordinarily step into an office which is perpetual unless terminated by some act, but into an office the holding of which is limited by the terms of the articles.
>
> [33] In that case, the court held that the holding of the office of director was only to last until the end of 1906, which was the last day on which a general meeting for that year could have been held. The above decision was adopted and followed in other cases such as *Club Flotilla (Pacific Palms) Ltd v. Isherwood & Ors* [1987-1988] 12 ACLR 387; *Morris v. Kanssen* [1946] AC 459 (House of Lords); and *Re Zinotty Properties Ltd* [1984] 3 All ER 754 (Chancery Division).
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> [34] Notwithstanding art. 60(1), there was no AGM held within a year or even within 15 months after the 1997 AGM. This is not in dispute. On applications by the respondent, extension of time was granted twice, first to 31 October 1998 and

subsequently to 31 December 1998. It is also not in dispute that no AGM was held even until 31 December 1998. It was only in 2001 that the respondent convened its next AGM (after the 1997 AGM), after the Special Administrators were appointed.

[35] That being the case, we are of the same opinion with the learned chairman of the Industrial Court as well as the learned High Court judge that being a director appointed to fill a casual vacancy, the appellant therefore ceased to be a director on or after 31 December 1998. The appellant and all the other directors of the respondent during the period from 31 December 1998 to 15 June 2001 (when the next AGM was finally held after the appointment of the Special Administrators), were not de jure directors of the respondent. They were not duly appointed in accordance with the Articles of Association of the respondent company".

[40] In our view, the case of Tan Sri Dato' Wan Sidek (supra) does not provide the answer to the instant appeals now before us. We say so for a number of reasons.

[41] First, the director in Tan Sri Dato' Wan Sidek was not subject to the provisions of the articles of the relevant company on retirement by rotation. As stated above, he was appointed to fill a casual vacancy in the board of the respondent company. Article 109 of the respondent's articles of association provided that the appellant would hold office only until the date when the next AGM would be held. It reads:

109. The Directors shall have power at any time to appoint any person to be a Director either to fill a casual vacancy or as an addition to the existing Directors, but so that the total number of Directors shall not at any time exceed the maximum number fixed by or in accordance with these Articles. Any Director so appointed shall hold office only until the next following Annual General Meeting and shall then be eligible for re-election but shall not be taken into account in determining the retirement of Directors by rotation at such meeting.

[Emphasis added]

[42] As stated by the Court in that case, being appointed to fill in a casual vacancy under this article 109, the director concerned (the appellant in that case) "shall hold office of the directorship only until the next following AGM, nothing more. His eligibility is only for 're-election' as a director at the next AGM". Essentially, a director appointed to fill a casual vacancy is appointed by the board of directors, which renders appointment valid only until the next-scheduled AGM to ensure that if he wished to remain a director, the general rule that the members of the company elect their directors are adhered to. It is therefore imperative that his directorship be made subject to the clear limit at the next AGM so that shareholders' approval could be obtained.

[43] However, in contrast, a director retiring pursuant to the retirement by rotation like the appellant before us, is in a different category, in that his directorship must already have been endorsed by the general meeting. He does not need to retire every year but is instead subject to the process on a rotational arrangement requiring the retirement of those who have been longest in office since their last election. This is usually once in three years since the common requirement is for one third of the directors to retire each year, as found in article 70 of the first respondent company, as stated above.

[44] Secondly, Tan Sri Dato' Wan Sidek and the case of the respondents before us also relied on the English case of In re Consolidated Nickel Mines, Limited [1914] 1 Ch 883. The High Court in that case, in determining entitlement to directors' remuneration, decided that despite no general meetings were held in 1906 and 1907, two of the company directors who should have retired pursuant to article 101 of the articles of the company were held to have vacated office on 31 December 1906, which was the last day on which a meeting of the company for that year could have been held.

[45] This principle that directors vacate their office on the last day on which a meeting of the company for the particular year could or should have been held was later followed in a line of cases such as those submitted at the hearing before us, including *Kanssen v Rialto (West End), Limited & Ors* [1944] 1 Ch 346, *Morris v Kanssen* [1946] 1 AC 459, *Cane v Jones* [1980] 1 WLR 1451, In re Zinotty Properties ; [1984] 1 WLR 1249, Re New Cedos Engineering Co Ltd ; [1994] 1 BCLC 797, and *Gosford Christian School v Totonjian* (2006) 201 FLR 424.

[46] It must be highlighted however that the relevant term of the article 101 in In re Consolidated Nickel Mines is especially specific. It reads:

> 101. At the ordinary meeting in 1906 all the directors, and at the ordinary meeting in every subsequent year one-third of all the directors for the time being respectively, or if their number is not a multiple of three, then the number nearest to one-third, but not exceeding one-third, shall retire from office. A retiring director shall retain office until the dissolution of the meeting at which his successor is elected.
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> [Emphasis added]

[47] The company in question was incorporated in 1903 and that article 101 was specific in prescribing that all directors must retire at the meeting in 1906. There is no such specificity in the articles of the respondent companies in the appeals before us.

[48] And there is one other reason mentioned in In re Consolidated Nickel Mines for its decision, apart from that the holding of the office of a director is limited by the terms of the articles. It is that it was in the first place, the duty of the directors to call a meeting in 1906 and 1907, such that they could not take advantage of their own default in that respect and say that they still remained directors. Here, the AGM of the respondent companies was not possible due to the injunction filed by the appellant.

[49] Thirdly, Tan Sri Dato' Wan Sidek (as well as In re Consolidated Nickel Mines and the other cases which followed it) did not discuss the implication or application of the provision concerning the re- election of the retiring directors. Also, unlike the appeals before us, the relevant articles in In re Consolidated Nickel Mines do not seem to even contain any provision for the retiring directors being eligible to seek re- election.

[50] Fourthly, neither Tan Sri Dato' Wan Sidek nor In re Consolidated Nickel Mines touched on the provision concerning the deemed re-election of retiring directors. It is unclear from the judgment of this Court in the former whether the relevant articles contained such a provision but it is plainly mentioned in the judgment of the latter.

Deemed Re-Election of Retiring Directors is provided by the CA 2016 and the articles

[51] This provision on the deemed re-election of retiring directors embodies the clearest and firmest nexus between retirement and re- election of retiring directors.

[52] Article 106 in the case of In re Consolidated Nickel Mines itself stated this:

> 106. If at any meeting at which an election of directors ought to take place the places of the retiring directors, or some of them, are not filled up, the retiring directors, or such of them as have not had their places filled up, shall, if duly qualified, be deemed to have been re-elected, unless the meeting determine not to fill up such vacancies.

[53] This is not much different from the provisions found in the articles of the first respondent company (article 72), the second respondent company (article 99) and, to give another example, those of the respondents in Appeal 605 (article 66), as follows:

First Respondent

72. The Company at the general meeting at which a Director retires in manner aforesaid may fill up the vacated office by electing a person thereto and in default the retiring Director shall be deemed to have been re-elected unless at such meeting it is resolved not to fill up such vacated office.

Second Respondent

99. If at any general meeting at which an election of directors ought to take place, the place of any director retiring by rotation is not filled up, he shall, if willing, continue in office until the ordinary meeting in the next year, and so on from year to year until his place is filled up, unless it shall be determined at such meeting to reduce the number of directors in office.

Respondents in Appeal 605

66. The Company at the meeting at which a director so retires may fill the vacated office by electing a person thereto, and in default the retiring director shall if offering himself for re-election and no being disqualified under the Act from holding office as a director be deemed to have been re-elected, unless at that meeting it is expressly resolved not to fill the vacated office, or unless a resolution for the re-election of that director is put to the meeting and lost.

[54] And a similar provision is also found in section 205 (6) of the CA 2016 on retirement of directors, as set out above, which states that unless otherwise provided in the constitution (hence the statutory provision is irrelevant to the present appeals since the matter is provided in the articles), if no appointment was made to fill the vacancy at the annual general meeting at which a director retires, the retiring director shall, if he offers himself for re-election, be deemed to have been re- elected, unless the meeting resolved not to fill the vacated office or a resolution for the re-election of the director is put to the meeting but defeated.

[55] Essentially, this is the default automatic re-election procedure concerning the retiring directors. The appellant argued that this provision applied to his situation in the sense that if he is deemed to have retired, by default he would be automatically re-elected as a director in the absence of an AGM.

[56] However, the respondents took the stand that in order for such provisions to apply, there must be an actual AGM held. They argued that there must be a meeting at which its participants could deliberate and decisions could be taken. In other words, there must be an actual opportunity for the shareholders to vote and to decide whether or not to fill the vacancy left by the retiring director. They cannot apply where no meeting is held at all in breach of the articles and of the provisions of the CA 2016. Authorities were cited in support, such as the Hong Kong case of Re Boldwin Construction Co. Ltd. [2002] HKCFI 975, and the English Court of Appeal decision in *Grundt v Great Boulder Proprietary Mines Limited* [1948] 1 Ch. 145.

[57] The High Court in the instant case too rejected this argument posited by the appellant, holding instead that as the retiring director, the appellant cannot be deemed to be automatically re-elected if no AGM is held in the relevant year. The High Court stated that the default automatic re-election provision envisages several contingencies which can happen or not happen only in an AGM actually held where the members could deliberate, vote and make decisions.

[58] In our view, the High Court and the respondents are absolutely correct on this point. And it is precisely for the same reason on the requirement for an AGM or EGM to be held that we have earlier stated, as above, that the deemed retirement of the appellant is fraught with difficulties because any retirement must, according to the articles, happen at the conclusion of the general meeting and afford the retiring director the right to offer himself for re-election at the same

general meeting, representing contingencies which can happen or not happen only in an AGM actually held, to be considered and voted on by the shareholders.

[59] And whilst there is no provision in the articles for automatic retirement, the presence of this deemed re-election provision instead further reinforces the requirement that the retirement by rotation provision must always be applied with the re-election process. But the respondents should not take a contradictory stand by arguing for deemed retirement in the absence of an AGM but insisted that deemed re-election cannot take place without an AGM. An AGM is necessary in both related situations.

[60] As such, even though the respondents submitted that the present position has been established since 1914 in Re Consolidated Nickel Mines and accepted by the long line of authorities in England and also in Malaysia, in our view, these cases, including Tan Sri Dato' Wan Sidek can and should be distinguished for the aforesaid reasons.

[61] It is to be emphasised too that neither do the relevant provisions in the CA 2016 or the articles limit the tenure of a director who is subject to the retirement by rotation by reference to a time period such as having to retire at the end of the calendar year or financial year the relevant AGM of the company could or ought to have been held. Instead the pertinent expiry point is the conclusion of the general meeting of the shareholders. It has not been shown to us whether there have been any amendments to the companies legislation here or elsewhere which had since incorporated the deemed retirement approach. This is notwithstanding the fact that the deemed retirement approach had first been accepted in In re Consolidated Nickel Mines, a decision which stems back to more than a century ago, and subsequently followed by a number of other cases, as stated above.

Three respondent companies were not injuncted to hold AGM where the appellant could retire and seek re-election

[62] As for the important matter of injunction, it is noted that the respondents submitted that the restraint was against any positive act of removal of director and not against retirement, and it was mentioned in the grounds of decision of the High Court when granting the injunction that it was intended to apply to restrain "shareholders meeting which concerns resolution for the removal" of the appellant as director "and/or dealing with the assets" of the respondent companies, and not designed to stop the companies from operating and carrying on their usual day to day business.

[63] This is crucially however only true for the respondent companies in Appeal 602 and Appeal 604, namely Grandfoods Sdn Bhd, Granny's Kitchen Sdn Bhd and Lead Enterprises Sdn Bhd. Not in respect of the first and second respondents herein.

[64] This is because, based on the terms of the injunction order of 29 March 2018, specifically paragraphs 1.1 to 1.3 therein, the respondents and other pertinent parties were essentially restrained from holding and convening any meeting of the shareholders of a number of companies, but relevant for present purposes, only had affected the first and second respondents herein (Raub Mining & Development Company Sdn Bhd and Raub Oil Mill Sdn Bhd).

[65] Importantly, paragraph 1.4 of the injunction order restrained the respondents from taking any steps to remove the appellant as a director of all the five respondent companies in the three appeals.

[66] In other words, all respondents in these appeals were injuncted from taking any steps to

remove the appellant from being a director in the respective five respondent companies. But that only the first and second respondents herein were restrained from holding an AGM or EGM.

[67] Now, if the respondents are taking the view that removal is different from retirement, which is probably correct, and that the injunction would not restrain the retirement of directors, which is also probably not inaccurate, one burning question must be asked.

[68] Which is this. Exactly, why did the respondents in Appeal 602 and Appeal 604, namely Grandfoods Sdn Bhd, Granny's Kitchen Sdn Bhd and Lead Enterprises Sdn Bhd, who were not restrained from convening any shareholders meeting, not operate and carry on their usual business by convening the AGM to deal with the business that did not concern any removal of directors? Such as on the retirement of the directors by rotation and their re-election.

[69] This omission on the part of the boards of the relevant companies would be contrary to the requirement to hold a shareholders meeting every year. We should add that although under the CA 2016 it is now not mandatory for private companies to hold AGM unless required by their articles of association, the articles of these respondent companies in these appeals retain the requirement for an AGM. A pertinent example would be the very provision of retirement of directors by rotation which requires the retirement of one thirds of the directors by rotation to take place every successive year, as set out above.

[70] It goes without saying that if these three respondent companies had respectively convened the requisite AGM, the usual resolution in respect of retirement of directors by rotation – which would state that the appellant was retiring at the conclusion of the AGM and was offering himself for re-election, could have been proposed for the deliberation of the shareholders.

[71] Retirement of directors is obviously not a matter for the approval of the general meeting, but according to the above articles, it takes effect at the end of the general meeting (not the end of the calendar year or financial year). Shareholders' approval is however necessary for the re-election of the retiring directors. The two – retirement by rotation and re-election of the same retiring directors - at the risk of repetition, inextricably operate hand in hand.

[72] Yet these three respondents in Appeal 602 and Appeal 604, had in one fell swoop denied the possible re-election of the appellant and instead appointed a new director in place of the appellant whom they had deemed to have retired. The appellant as a director retiring by rotation was thus denied the opportunity to offer himself for re-election at an AGM, which although injuncted in respect of the first and second respondents herein, indisputably could have been convened for the three other respondent companies.

[73] Thus we find that the stance of the respondents in this litigation does not match their conduct on the matter.

[74] We find support for our views in the decision of the High Court of Ireland in the case of *Phoenix Shannon plc v Purkey* [1998] 4 IR 597 which had to consider the same issue of whether certain directors had automatically vacated office in the absence of a general meeting which was due to their failure to convene. In re Consolidated Nickel Mines and a number of subsequent decisions of the English courts were referred to, but the High Court in Phoenix Shannon plc v Purkey did not find them persuasive.

[75] The Court instead emphasised that the relevant article was silent as to what would happen if the directors failed in their duty to convene the meeting (as in fact is also the case with all the articles analysed in the many authorities cited by the respondents in the instant appeals before

us, starting with In re Consolidated Nickel Mines, including the articles in the instant appeals), and decided that the Court would not imply a provision in the relevant article to the effect that should the directors fail to convene an annual general meeting as required by the article, the relevant retiring directors would automatically vacate office on the last day on which the meeting should lawfully have been held.

[76] The Court gave two principal reasons for reaching this conclusion. The first is the availability of statutory provisions that not only provide a practical remedy should the directors fail to convene an annual general meeting but also a means by which the default can be legally rectified. The Court was referring to the country's Section 131 of the Companies Act 1963 which makes express provision as to what is to happen should the directors default in convening an annual general meeting.

[77] Section 131(1) of that statute empowers the responsible Minister on the application of any member of the company, to call or direct the calling of a general meeting of the company and give such ancillary or consequential directions as he thinks expedient, and that under section 131 (4), the meeting so held may be treated as the annual general meeting of the year that the directors failed to hold, and thus at which the retiring directors would be required to resign.

The Companies Act 2016 contains provisions to address non- holding of AGM

[78] It is of interest to note that there are provisions in the CA 2016 that could also be invoked to provide the remedy and rectify the default in a manner not dissimilar to that in Phoenix Shannon plc (supra). One of which is found in section 340 of the CA 2016 pertaining to annual general meetings.

[79] The section reads as follows:

> Annual general meeting
>
> 340. (1) Every public company shall hold an annual general meeting in every calendar year in addition to any other meetings held during that period, to transact the following business:
>
> (a) the laying of audited financial statements and the reports of the directors and auditors;
>
> (b) the election of directors in place of those retiring;
>
> (c) the appointment and the fixing of the remuneration of auditors; and
>
> (d) any resolution or other business of which notice is given in accordance with this Act or the constitution.
>
> (2) For the purposes of subsection (1), the annual general meeting shall be held—
>
> (a) within six months of the company's financial year end; and
>
> (b) not more than fifteen months after the last preceding annual general meeting.
>
> (4) The company may apply to the Registrar to extend the periods referred to in this section, and the Registrar may extend such periods as he considers appropriate, upon being satisfied with the reasons provided.
>
> (5) If a company fails to convene an annual general meeting under this section, the Court may, on the application of any member, order a general meeting to be called.
>
> (6) The company and every officer who contravene subsection (1), (2) or (3) commit an offence and shall, on conviction, be liable to a fine not exceeding twenty thousand ringgit.

[80] Strictly, this section has no application to private companies like the respondents in these appeals. This fundamentally changes the previous position as contained in section 143 of the now repealed Companies Act 1965 which applied to all companies, private as well as public.

[81] Nevertheless, as mentioned earlier, the articles of the respondents have not been amended to do away with general meetings. They continue to contain the usual provisions on general meetings and their proceedings such as found in article 36 (first respondent) and article 61 (second respondent) which provide for the AGM being held annually within six months from the end of the financial year or not more than 15 months from the last AGM.

[82] To that extent, there is merit in the contention that provisions on AGM contained in section 340 should apply to these private companies, especially since the articles of these private companies make references to application of the governing companies legislation – which is defined as not only the now repealed Companies Act 1965, but also any re-enactment thereof or any other statutes governing companies, such as found in the definition section in the articles of the second respondent.

[83] And as for Appeal 602 for example, the articles of the two respondent companies in the identically worded article 42 states that the AGM of the company "shall be held in accordance with the provisions of the Act", whilst "the Act" in these articles is defined as "the Companies Act 1965 and every other Act for the time being in force concerning companies and affecting the Company".

[84] Of particular interest though is section 340 (4) of the CA 2016 which empowers the Registrar to extend the periods in respect of the holding of the AGM beyond the prescribed six months of the company's financial year end or the not more than 15 months after the last preceding AGM. This may be made on the application of the company, which in the appeals before us, could have been initiated by the first and second respondent companies who were restrained by the injunction from convening or holding their respective AGMs.

[85] On the assumption that section 340 is applicable, the two respondents herein could have referred the matter to the Registrar to extend time for the holding of the AGM during the material period (the other three respondents were not restrained from holding an AGM, as discussed earlier). The two respondents did not, but instead proceeded to deem the retirement of the appellant on the expiry of the period during which the AGM ought to have been held, thus denying his possible re- election. And in the case of the other three respondents, they even appointed another person in his place.

[86] In addition, section 340 (5) provides another mechanism to similar effect. Here, should an AGM fail to be convened as prescribed, any member may apply to the Court for an order that a general meeting be called. Any shareholder of the first and second respondents could have as such also made the application in Court to order the calling of the meeting (arguably notwithstanding the existence of the injunction order).

[87] In the same vein, it is critical that in order to ensure that the shareholders are afforded the full opportunity to exercise their rights that the retirement of company directors ought not to be in any manner made effective in the absence of a general meeting of its shareholders. And for the same reason, apart from section 340 of the CA 2016, it must be emphasised that should the board of directors of a company be unable or worse, refuse to convene its general meetings, the very shareholders of the company are entitled under the law to make it happen. These are further provided in sections 310 (b) and 311 of the CA 2016, as well as in section 313. These apply to both public and private companies.

[88] Invariably, and now under section 310(a) of the CA 2016, a company's general meetings are called by its board of directors, quite literally, year in, year out.

[89] However, a member holding at least 10 percent of the issued share capital of the company may directly exercise his statutory right under section 310 (b) of the CA 2016 to convene a meeting of members. For all intents and purposes, the board of directors may be disregarded in that process to convene the general meeting.

[90] The relevant parts of Section 310 state as follows:

> Power to convene meetings of members
>
> 310. A meeting of members may be convened by—
>
> (a) the Board; or
>
> (b) any member holding at least ten per centum of the issued share capital of a company or a lower percentage as specified in the constitution or if the company has no share capital, by at least five per centum in the number of the members.
>
> ……. [Emphasis added]

[91] Alternatively, and probably more practical, the members representing at least ten per centum of the paid up capital of the company carrying voting right may also under section 311 require the directors to convene the meeting instead by issuing a requisition to them for such purpose, stating the business to be raised and the text of the resolution that is intended to be moved at the said meeting.

[92] The relevant parts of section 311 state as follows:

> Power to require directors to convene meetings of members
>
> 311. (1) The members of a company may require the directors to convene a meeting of members of the company.
>
> (2) A requisition under subsection (1)—
>
> (a) shall be in hard copy or electronic form;
>
> (b) shall state the general nature of the business to be dealt with at the meeting;
>
> (c) may include the text of a resolution that may properly be moved and is intended to be moved at the meeting; and
>
> (d) shall be signed or authenticated by the person making the requisition.
>
> (3) The directors shall call for a meeting of members once the company has received requisition to do so from—
>
> (a) members representing at least ten per centum of the paid up capital of the company carrying the right of voting at meetings of members of the company, excluding any paid up capital held as treasury shares; or
>
> (b) in the case of a company not having a share capital, members who represent at least five per centum of the total voting rights of all members having a right of voting at meetings of members.
>
> (4) Notwithstanding subsection (3), in the case of a private company, members representing at least five per centum of the paid up capital of the company carrying the right of voting at meeting of members of the company may require a meeting of members to be convened if more than twelve months has elapsed since the end of the last meeting of members convened pursuant to a requisition under this section and the proposed resolution is not defamatory, vexatious or frivolous.

…….. [Emphasis added]

[93] In such a situation, although the convening of the general meeting would effectively be placed in the hands of the directors, it was forced by the said members having the requisite shareholdings on the directors who would have otherwise not pursued the business intended to be moved by the members, or not call for an AGM at all.

[94] However should the members proceed to invoke section 311, issue the requisition to the board of directors to convene a meeting, but the directors fail to do so despite the requirements of section 312, section 313 confers on the members who requisitioned the meeting, or any of the shareholders representing more than one half of the total voting rights of all the members who requisitioned the meeting, to directly convene the same.

[95] The meeting - such as an EGM, must be convened by them not later than three months from the date on which the directors received the requisition for the EGM under section 311. The meeting must also be convened in the same manner, or as nearly as possible as that in which meetings are requisitioned to be convened by the company directors, and that any reasonable sums incurred by the members for such purpose will be reimbursed by the company, who will in turn retain such amount otherwise due from the company as remuneration to the defaulting directors for their service as directors.

[96] The entirety of section 313 reads as follows:

Power of members to convene meeting of members at company's expense

313. (1) If the directors—

(a) are required under section 311 to call a meeting of members; and

(b) do not do so in accordance with section 312, the members who requisitioned the meeting, or any of the members representing more than one half of the total voting rights of all of the members who requisitioned the meeting, may call for a meeting of members.

(2) Where the requisition received by the company included the text of a resolution intended to be moved at the meeting, the notice of the meeting shall include the text of the resolution.

(3) The meeting shall be convened on a date not more than three months after the date on which the directors received a requisition under subsection 311(1) to call for a meeting of members.

(4) The meeting shall be convened in the same manner, as nearly as possible, as that in which meetings are requisitioned to be convened by directors of the company.

(5) The business which may be dealt with at the meeting includes a resolution of which notice is given in accordance with this section.

(6) Any reasonable expenses incurred by the members requisitioning the meeting by reason of the failure of the directors to call a meeting shall be reimbursed by the company.

(7) Any sum so reimbursed shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration in respect of the services of the directors as who were in default.

[Emphasis added]

[97] In the event that the shareholders are unable to take advantage of sections 310 or 311, because a general meeting simply cannot be called or conducted as prescribed by the CA 2016 or the constitution of the company, resort may still be had to another provision, which is found in

section 314. This provision empowers the Court to order a meeting of members upon production of sufficient evidence of the impracticability of convening one, effectively showing there can be no other alternative but for a meeting to be ordered under judicial supervision.

[98] This means that it must also be shown to the satisfaction of the Court that all available legal avenues prescribed in the CA 2016 enabling a general meeting to be convened and held including pursuant to sections 310 and 311, have been exhausted, without success or are outrightly impracticable to pursue.

Deemed retirement approach is inconsistent with shareholder democracy

[99] It is our view that the availability of all these provisions, which serve to promote shareholder democracy and activism, strongly militate against an approach which conveniently deems retirement of directors subject to rotation automatic upon the expiry of the relevant period, without more. This deeming approach ignores the language of the governing statutory provisions and articles of association, and worse, outrightly dismisses the entrenched right of the retiring directors to seek re-election, and the corresponding right of the shareholders to consider and vote on any such proposal. In the final analysis the deeming approach may even be argued to represent a grave hindrance to and an interference with corporate democracy in modern company law.

Section 208 and articles do not include deemed retirement due to non-holding of AGM in the list of situations resulting in automatic vacation of office of director

[100] Now, reverting to Phoenix Shannon plc v Purkey (supra), for completeness, the second reason stated by the Court against implying deemed retirement into the relevant articles is that article 93 of the company concerned which provided for a list of situations triggering the vacation of the office of a director did not include the failure to hold an AGM, as required by the articles, to result in the automatic vacation of office of the retiring directors. The Court in Phoenix Shannon plc v Purkey observed that had it been intended that the failure to hold an annual general meeting would result in the automatic vacation of office by the said directors, such a provision would have been inserted in article 93.

[101] The articles of the two respondents are unambiguous in similarly not including the absence of the AGM as resulting in the automatic vacation of the office of a director who ought to have retired at the said AGM.

[102] Article 68 of the articles of association of the first respondent states:

> 68. The Office of Director shall ipso facto be vacated:
>
> (a) If he becomes bankrupt or insolvent or compounds with his creditors.
>
> (b) If he becomes of unsound mind or is found lunatic.
>
> (c) If he ceases to be a director by virtue of section 144 of the Ordinance.
>
> (d) If he resigns his office in writing to the Company.
>
> (e) If the Company in general meeting shall at any time pass a resolution to that effect.
>
> (f) If, being directly or indirectly interested in any contract with the Company he participates in the profits of any contract with the Company, and fails to comply with section 151 of the Ordinance.

[103] Similarly, article 93 of the articles of the second respondent provides:

> 93. The office of a director shall ipso facto be vacated:
>
> (a) If he becomes bankrupt or suspends payment or compound with his creditors.

(b) If he be found lunatic or become of unsound mind.

(c) If he ceases to hold the number of shares required to qualify him for office or fail to acquire the same within two months after his appointment or election.

(d) If he is concerned or interested in or participates in the profits of any contract with or work done for the Company, except for work done in a professional capacity; but no director shall vacate his office by reason of his being a member of any Company which has entered into contracts with or done any work for this Company, or which is concerned in or participates in the profits of any contract with the Company. Nevertheless, he shall not vote in respect of any contract in which he is so interested.

(e) If he absents himself from the meetings of the directors for a continuous period of six months without special leave or absence from the directors and the board resolve that his office be vacated.

(f) If by notice in writing to the Company he resigns his office.

(g) If he is requested in writing by all his co-directors to resign.

(h) If he becomes prohibited from being a director by reason of any order made under sections 130 or 303 of the Act.

[104] The above lists in the articles of the first and second respondents do not include the failure to retire by rotation when due (at the AGM that could not be or was not held) as triggering the vacation of office of the director in question. This further reinforces the proposition that does not find favour with the deemed retirement approach. On this ground alone, we can conclude that even the very constitutional documents of the respondent companies do not contemplate or construe a retirement of a director as constituting an automatic vacation of his office.

[105] Relevantly, this also concerns one other provision of the CA 2016 which is of importance in further demonstrating the inter-relationship between retirement by rotation and re-election of directors which warrants that one cannot be pursued without the other.

[106] This is section 208 on vacation of office of director, which mirrors the provisions found in the articles of many companies (just like the above articles 68 and 93) and reads as follows:

Vacation of office of director

208. (1) The office of a director of a company shall be vacated if the person holding that office—

(a) resigns in accordance with subsection (2);

(b) has retired in accordance with this Act or the constitution of the company but is not re-elected;

(c) is removed from office in accordance with this Act or the constitution of the company;

(d) becomes disqualified from being a director under section 198 or 199;

(e) becomes of unsound mind or a person whose person or estate is liable to be dealt with in any way under the Mental Health Act 2001 [Act 615];

(f) dies; or

(g) otherwise vacates his office in accordance with the constitution of the company.

(2) Subject to subsection 196(3) and section 209, a director may resign his office by giving a written notice to the company at its registered office.

(3) A notice under subsection (2) shall be effective when it is delivered at the address of the registered office or at a later date specified in the notice.

(4) If a vacancy is created resulting from circumstances referred to in subsection (1), the Board shall have the power, at any time, to appoint any person to be a director to fill such casual vacancy and the director so appointed shall hold office—

(a) in the case of a public company, until the next annual general meeting; or

(b) in the case of a private company, in accordance with the terms of appointment.

[Emphasis added]

[107] Crucially, and especially pertinent for present purposes, section 208 includes what is not commonly found in most articles, which is the retirement of a director who is not re-elected. This is found in section 208(1), in subsection (b), which clearly provides that the office of a director of a company shall be vacated if the person holding that office has retired in accordance with the CA 2016 or the constitution of the company but is not re-elected.

[108] Here, as a matter of fact the appellant was deemed to have retired and not re-elected. But it must be stressed that not only did the appellant not retire in accordance with the articles of the relevant companies in the absence of an AGM but that he also did not get to even exercise his eligibility to seek re-election (due to the absence of AGM).

[109] The appellant cannot therefore be construed as having vacated his office of director under section 208(1)(b) of the CA 2016.

[110] It is worthy of emphasis that according to section 208 (1) (b) which applies to the respondents, the office of a director shall be vacated if the director has retired in accordance with the articles of the company but is not re-elected. We reiterate that the appellant however did not retire in accordance with the articles of either the first or second respondent companies. The respondents could not show which specific provisions of the articles had been relied on for the retirement they asserted to have taken effect.

[111] And neither is the fact of the appellant's non-re-election a consequence of any of the provisions of the articles, which, properly construed and applied, ought rightfully to mean that the non-re-election of the retiring director (which triggers the vacation of office under section 208 (1) (b)) must result from his non-offering himself for re-election or his re- election proposal being voted down by the shareholders at a general meeting. Neither is shown to have happened here.

Conclusion

[112] In light of the analysis and reasons as set out above, we are of the view that the decision of the High Court which allowed the declaration that the appellant had, according to the relevant articles, automatically retired and vacated his office as a director of the relevant respondent companies on the completion of the period during which the AGM ought to have been convened despite the non-convening of the AGM, to be erroneous and cannot be sustained. The appellant's retirement and vacation of office in the respondent companies in the three appeals are therefore not valid.

[113] As such, the decisions of the High Court in OS 574, OS 609 and OS 642 are hereby set aside. Accordingly Appeals 602, 604 and 605 are allowed, with costs to the appellant, subject to allocatur.

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