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Vacation vs Removal: High Court Upholds Automatic Cessation Of Director's Office Under Section 208

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The distinction between a "removal" and an "automatic vacation" of a director is highly technical, yet its implications for directors' rights and corporate control are anything but academic.

The High Court recently addressed this question in *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd* [2026] MLJU 2425.

Facts

The defendant, Nautilus Tug & Towage Sdn Bhd (NTT), was an 80:20 joint venture. Azimuth Marine Sdn Bhd (AMSB) held the majority stake, while Nautical Supreme Sdn Bhd (NSSB) held the minority stake. The plaintiff, Dato' Seri Timor Shah Rafiq, was a non-executive director nominated to the NTT board by NSSB.

On 23 August 2024, the plaintiff wrote directly and unilaterally to Vale Malaysia Minerals Sdn Bhd (Vale), NTT's sole client under the Harbour Tug Services Agreement. He also wrote to EXIM Bank Malaysia Berhad (EXIM Bank), NTT's principal financier under a USD 51.8 million facility.

In doing so, he disclosed the full landscape of NTT's internal litigation. This included derivative actions, shareholder disputes, and the various allegations levelled against the directors nominated by AMSB. Crucially, he did all of this without the board's knowledge, authority, approval, or mandate.

The plaintiff had also, on 15 August 2016, executed a Deed of Indemnity and Undertaking with NSSB. Under that Deed, NSSB agreed to indemnify him against adverse costs orders arising from litigation conducted in the discharge of his directorial duties. The plaintiff never disclosed this Deed to the NTT board.

On 19 September 2025, a duly convened board meeting took place, and the plaintiff was in attendance. However, he declined to answer the questions posed to him and left before deliberations concluded. Following his departure, the majority directors recorded that the plaintiff's directorial office had automatically become vacant under Articles 72(g) and 72(h) of NTT's Constitution.

The plaintiff challenged this declaration. He contended that it was, in substance, a removal engineered to circumvent a 2017 Consent Order. The Consent Order restrained AMSB and NTT from taking any steps to remove him as a director pending arbitration. He asserted that the Consent Order remained in full force and that any cessation of his directorship, whatever its label, fell foul of it.

Decision

The High Court dismissed the plaintiff's application. It held that his directorship had ceased by automatic operation of law.

1. Removal And Vacation Are Two Different Regimes

The court began by drawing a firm line between two mutually exclusive statutory mechanisms under the Companies Act 2016 (CA 2016). Section 206 governs removal and requires shareholder action through an ordinary resolution with special notice. Section 208 governs automatic vacation and operates by force of law upon a specified event in the constitution. No vote or resolution is required. The board's role is merely to observe and record a vacancy that has already arisen.

The court found that no removal under Section 206 had occurred, as no shareholders' meeting was convened, no ordinary resolution was passed, and no special notice was served. The machinery of Section 206 was simply not engaged.

What the board did was deliberate on the facts before it and considered whether those facts engaged Articles 72(g) and 72(h). Having concluded that they did, it recorded the vacancy that had thereby arisen.

2. Article 72(g) Was Engaged By The Unauthorised Communications

Article 72(g) provides that a director's office shall become vacant if, without the consent of the company in general meeting, he holds any other office of profit under the company.

The court construed this provision purposively. It is not confined to a formal second employment contract. Instead, it captures any arrangement by which a director exploits his directorial office to secure personal advantage. This includes financial,

positional, or strategic advantage (for himself or for a third party) without shareholder sanction.

The plaintiff's unilateral communications with Vale and EXIM Bank fell within this mischief. Authority to bind the company vests in the board collectively, not in individual directors. By writing to NTT's critical counterparties without mandate, the plaintiff assumed an executive function he was not granted and advanced NSSB's agenda. This was the substance of holding an "office of profit" without consent.

3. Article 72(h) Was Additionally Engaged By The Undisclosed Deed Of Indemnity

Article 72(h) provides that a director's office shall become vacant if he is directly or indirectly interested in any contract or proposed contract with the company and fails to declare the nature of his interest in the manner required by the Act.

The court held that the phrase "*directly or indirectly interested*" is broad. It captures beneficial, pecuniary, or competitive interests a director may hold in arrangements to which the company is a party. However, the breach lies not in the mere existence of an interest, but in the failure to declare it.

The undisclosed Deed of Indemnity engaged this provision. Under that Deed, the plaintiff was personally insulated from adverse costs orders in the very derivative and inspection proceedings involving NTT. The failure to disclose that protection constitutes the very mischief the provision was designed to prevent.

4. The 2017 Consent Order Did Not Bar The Vacancy

The court held that the 2017 Consent Order was confined, on its proper construction, to restraining shareholder-driven removal under Section 206. It could not be construed as freezing the Constitution or immunising the plaintiff against the automatic consequences of his own future misconduct.

Commentary

This judgment is significant for a number of reasons.

First, it draws a sharp line between Section 206 and Section 208. A vacancy under Section 208 is a legal fact arising by force of the constitution, not a species of removal.

Second, the judgment gives Article 72(g) renewed contemporary force. This provision is inherited from Table A of the Fourth Schedule of the Companies Act 1965. It is often dismissed as a historical relic. But by construing "office of profit" purposively, the court adopted a modern approach, extending it beyond formal employment contracts to conduct that is functionally remunerative. Directors who use their office as a springboard for third-party interests should take note.

Third, the decision offers a firm and welcome affirmation of the internal management rule. The court declined to intervene in what was, substantially, a board decision to observe and record a constitutional consequence. The board's function of applying the company's own constitution to the conduct of its directors is not to be second-guessed by the court absent fraud, oppression, or illegality.

Fourth, the judgment makes clear that nominee directors are not agents of their nominator. Their duty of loyalty is to the company, without qualification. Unilateral engagement with clients and financiers is not an exercise of directorial power, it is an usurpation.

Finally, the judgment is a timely reminder that court orders restraining removal do not shield directors from the constitutional consequences of their own misconduct.

As corporate disputes grow increasingly sophisticated and tactical, this decision confirms that our courts will give effect to the constitutional bargain that shareholders have themselves adopted. The courts will not permit procedural artifice - whether by a company seeking removal by the back door, or by a director seeking to shelter behind a consent order - to override it. The decision is presently subject to appeal, and its principles remain to be tested by the appellate court.

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