Long Say Ting Daniel *v* Merukh Nunik Elizabeth (personal representative of the estate of Merukh Jusuf, deceased) (Motor-Way Credit Pte Ltd, intervener) [2012] SGHC 250

Case Number	: Originating Summons No 895 of 2011
Decision Date	: 18 December 2012
Tribunal/Court	: High Court
Coram	: Lee Seiu Kin J
Counsel Name(s)	: Carolyn Tan and Au Thye Chuen (Tan & Au LLP) for the plaintiff; Teh Ee Von (Infinitus Law Corporation) for the defendant; Sharma and James Selvaraj (Tan Lee & Partners) for the interveners.
Parties	: Long Say Ting Daniel — Merukh Nunik Elizabeth (personal representative of the estate of Merukh Jusuf, deceased) (Motor-Way Credit Pte Ltd, intervener)

Companies – Directors' liabilities

Companies – Directors' duties

18 December 2012

Lee Seiu Kin J:

1 This is an application by the plaintiff, Daniel Long Say Ting ("the plaintiff"), for prospective relief under s 391(2) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"). The plaintiff is the sole director of the company, Merukh Singapore Properties Pte Ltd ("the Company"). The defendant, Nunik Elizabeth Merukh ("the defendant"), is the daughter of the company's sole shareholder, Dr Jusuf Merukh, deceased ("the deceased"), and defends in her capacity as the personal representative of her father's estate ("the Estate"). After hearing counsel for both sides, I granted the application in respect of the plaintiff's potential liability to the Company. However, I was not prepared to extend prospective relief as against any action brought by the defendant. In my view, s 391 of the Act is intended to operate within the context of the company's relationship with its directors, officers and those employed as auditors and experts, and hence does not apply where proceedings are brought by persons other than the company. Furthermore, even if the plain words of s 391 do not preclude the granting of relief as against claims brought by third parties, this was not a case which warranted the court's exercise of that limited discretion. I set out below my grounds of decision.

The Facts

2 The deceased and plaintiff were the two directors of the Company and, after the deceased's sudden demise on 22 June 2011, the plaintiff was the sole director. The plaintiff's application arose out of three property sales which he conducted on behalf of the Company in his capacity as director. The three properties are (collectively referred to as "the Three Properties"):

(a) Blk 72 Bayshore Road, #29-16 Costa Del Sol, Singapore 469988 ("the Bayshore property") [note: 1] ;

(b) 10 Kitchener Link, #13-18 City Square Residences, Singapore 207225 ("the Kitchener

property") [note: 2]; and

(c) 87 Bukit Drive, #06-18 The Raintree, Singapore 587847 ("the Raintree") [note: 3].

3 Options to purchase the Three Properties were granted in quick succession - on 5, 6 and 9 September respectively. Shortly after the grants, the Estate issued two legal notices dated 19 and 26 September 2011 ("the legal notices") [note: 4] directing the plaintiff to cancel the options or, should the options have already been exercised, to deposit the sale proceeds into the defendant's bank account. Legal action for embezzlement of the Three Properties and/or the sale proceeds thereof was threatened. Later, the Estate decided not to rescind the sales upon advice that this would cause them more loss. The defendant then argued on affidavit that the legal notices were simply intended to "ask for clarification" with regard to the sales, and not to commence legal action against the plaintiff [note: 5]. It was averred that the plaintiff had been uncooperative after the sales, turning down the defendant's email request dated 29 September 2011 for a meeting to discuss the sale of the Three Properties, and refusing to sign a circular resolution to appoint the defendant to the Company's board of directors [note: 6].

4 Meanwhile, the threats of criminal and civil action contained in the legal notices led the plaintiff to apply for prospective relief under s 391(2) of the Act. He argued that he had granted the options to purchase for the Three Properties in order to avert potential recovery action and forced sales by the mortgagee bank, United Overseas Bank ("UOB"), which would have resulted in significant losses to the Company.

5 The defendant responded with two sets of objections. The preliminary objection was that an application for relief under s 391 of the Act was not available for proceedings brought by persons other than the Company. It was argued that any threat of legal proceedings contained in the legal notices emanated from the heirs and not from the Company, and thus fell outside the ambit of s 391. The secondary objection was that even if s 391 was available to the plaintiff as against actions brought by persons other than the Company, the court ought not to exercise its relieving discretion in the plaintiff's favour. The defendant listed a number of arguments in support of this position:

(a) First, the plaintiff should not have granted the options to purchase for the Three Properties without first obtaining the specific written consent of the Estate through the defendant, in her capacity as the personal representative of the Estate. This was because the deceased had provided all the moneys for the purchase of the Three Properties, and hence the Estate was the true beneficial owner of the Three Properties. The Company was but the bare legal owner of the Three Properties and held them on trust for the Estate, and as such the plaintiff had no authority to make a unilateral decision granting the options to purchase for the Three Properties, and to subsequently sell off these properties [note: 7].

(b) Second, even if the plaintiff did have the authority to grant the options to purchase and effect the sales, his doing so at such speed, and without first obtaining the consent of the Estate as the true beneficial owners, amounted to acting in breach of his duty to pursue the best interest of the Company and the Estate [note: 8].

(c) The sale was conducted in breach of s 160 of the Companies Act, as the plaintiff had failed to seek the prior approval of the Company in general meeting before disposing of the properties, which were "substantially the whole of the company's undertaking or property" [note: 9]. Section 160 is stated in the following terms:

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

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

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

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

6 At this juncture, it is essential for me to point out that the plaintiff did not, in his originating summons, confine his application for relief to proceedings brought by a specific party—whether this be the Company, the Estate, or the defendant in her capacity as representative of the Estate [note: 10]. It is thus conceivable that the plaintiff sought prospective relief from potential proceedings that might be brought by the Company against him *qua* director. Indeed, the defendant's claim that the plaintiff had breached s 160 of the Act, a claim which is rightfully the Company's to make according to the rule in *Foss v Harbottle* [1864] 67 ER 189, suggested that even the defendant did not preclude the possibility of the Company instituting a claim against the plaintiff, *qua* director, in the future. The same could be said of the initial allegation of "intention to embezzle the transactions of the [Three Properties] and conduct embezzlement to the monies resulted from the transaction" [note: 11] that was contained in the legal notices written by the lawyers of the Estate. In sum, I note that there was considerable uncertainty as to whom the prospective claim(s) which the plaintiff apprehended could be instituted by, as well as what the likely cause of action might be. Given these circumstances, I found it necessary to consider whether relief under s 391 of the Act ought to be granted to the plaintiff as against a potential claim brought against him *by the Company*, even if I was not prepared to extend such relief to a potential claim brought by the defendant or other persons *other than the Company*. I thus proceeded to examine the backdrop against which the plaintiff made his decisions, in order to determine whether he had acted honestly, reasonably, and accordingly ought fairly to be afforded prospective relief under s 391(2).

Background

7 The Three Properties that were sold represented only a fraction of the assets in what appears to have once been a business empire of considerable size. The deceased was a man of no small means and influence; he was a successful mining tycoon reputedly owning 500 mining concessions in Indonesia [note: 12], and had during his lifetime held such political posts as Speaker of the Indonesian House of Representatives and Deputy Minister for Agriculture Affairs. He had incorporated 14 companies in Singapore and was the sole shareholder of each of them, of which the Company was but one. The Company itself was incorporated on 30 April 2010, with the plaintiff and the deceased as directors, and the deceased as the sole shareholder. At its incorporation, the Company's business was described as "investment company". Besides the Three Properties, the plaintiff also produced evidence that the Company had embarked on the purchase of seven more condominium units [note: 13], but these purchases were subsequently aborted due to fund transfer problems from Indonesia. From

the period of 30 April 2010 until 30 April 2011, the Company drew no income while incurring expenses of $1,424,377.00 [note: 14], most of which went towards acquiring the various properties. All these acquisitions made by the Company were funded entirely through transfers from the deceased's bank account in Indonesia. He was, by all accounts, a deeply religious man, and he clearly saw the Company not as a profit generating enterprise but rather as a vehicle through which to devote his worldly trappings to Christian activities and staff welfare. The Company paid for the rental of the church he worshipped at in Singapore, purchased a fleet of Rolls Royce, BMW and Mercedes Benz motorcars and hired chauffeurs to provide transport for his family, staff, business associates, and pastors of his church. According to the plaintiff, the condominium units that the Company had purchased were meant as gifts to the key management staff of his companies in Indonesia, his close family members, as well as long-time local chauffeurs [note: 15].

8 The plaintiff himself fell into the last mentioned category of persons. He was a chauffeur and had known the deceased since July 2005, when he served as the latter's Mercedes limousine driver during his Singapore business trips. The plaintiff also professed to be a staunch Christian, and the two men's friendship developed through their common religious beliefs. The plaintiff started taking on responsibilities far beyond his chauffeuring role, beginning with his assistance to the deceased in sourcing for and buying condominium units in Singapore in June 2007 [note: 16]. Later, the deceased gave the plaintiff a Power of Attorney to manage and carry out his business transactions, and made the plaintiff the local representative for the deceased's various business ventures here [note: 17]. It was the plaintiff who incorporated a total of 14 companies in Singapore which were all wholly owned by the deceased ("Merukh Companies"). The plaintiff also became the Company's full time local director despite having no prior business experience. It seems clear to me that the plaintiff's involvement in the deceased's Singapore business interests in general, and his directorship of the Company in particular, stemmed entirely from his role as the deceased's spiritual confidant and not from any particular business acumen or qualification.

9 With the Singapore companies so wholly reliant on the deceased's financing and decisions, one can imagine the confusion that ensued upon Dr Jusuf Merukh's sudden death on 22 June 2011. Suddenly, the hitherto unending financing stream was cut at its source, and the Company fell behind on various obligations such as payment of staff salaries, as well as the monthly loan instalments for the Three Properties. What followed was a flurry of emails, short message service texts ("texts") and letters [note: 18] exchanged between the plaintiff and the representatives of the deceased's Indonesian companies and his Estate. Counsel for the plaintiff was tireless in reminding me that there were significantly more appeals issuing from the plaintiff's side than were met with replies from the Indonesians.

10 The following account briefly describes the situation which the plaintiff was cast into upon the deceased's untimely death.

11 On 27 June 2011, five days after the deceased's death, the plaintiff sent a text to the deceased's eldest son, one Rudolf Johanes Merukh ("Rudy"), requesting a convenient time to meet up and discuss the Company's operations and properties. This was met with silence until 5 July 2011, when Rudy and the plaintiff exchanged a phone-call and texts regarding the Company's financial status and obligations. That same day, the plaintiff responded to Rudy's request for an email update, detailing the Company's operating costs and outstanding payments which included staff salary with compulsory Central Provident Fund ("CPF") contributions, the mortgage loans for the Three Properties amounting to $19,331.62 in total, and the outstanding $2,000,864.89 needed to complete the purchase of another condominium unit located at Meyer Road ("The Makena"). On 8, 14, 19, 21 and 28 July 2011, further emails were sent by the plaintiff or by the Company's staff to either Rudy or one

of the deceased's business representatives in Indonesia, appealing for funds with increasing urgency. The emails attest to the manifold pressures that the plaintiff faced. The spectre of repossession loomed over the Three Properties as UOB had issued repeated reminders for payment of the instalments throughout July and August, culminating in a final reminder accompanied by threat of legal action, on 20 August 2011 [note: 19]. Beginning with an email sent on 5 July 2011, the plaintiff had repeatedly appealed to Rudy for the transfer of funds to meet these instalment payments, warning that an auction sale of the Three Properties would probably result in a poor sales price and losses to the Company. In addition, funding was requested to complete the purchase of The Makena as the seller of that property had on 22 July 2011 issued a 21 days' notice instructing completion. That notice eventually lapsed and the sale was aborted.

12 Meanwhile, trouble was also brewing over at another of the deceased's Singapore companies, Merukh Republic Auto Pte Ltd ("Merukh Auto"), where the plaintiff was the co-local director with one Mr Tan Kim Huat. The plaintiff was also the personal guarantor for Merukh Auto's debts. The defendant averred that the affairs of Merukh Auto had nothing to do with the decisions made by the plaintiff in respect of the Company, but in my view those affairs are relevant to give a complete picture of the milieu in which the plaintiff made his decisions. The creditors who had financed Merukh Auto's car purchases had, sometime in July 2011, called to repossess the cars that had been purchased for the use of various pastors. As personal guarantor, the plaintiff faced a claim from one of the creditors, Motor-Way Credit Pte Ltd ("Motor-Way"), for the shortfall caused by the depreciation of the repossessed cars. Meanwhile, the salaries and CPF contributions of the staff of the Company and of Merukh Auto, including that of all the hired chauffeurs, remained outstanding, resulting in the possible commission of offences under the Employment Act (Cap 91, 2009 Rev Ed) and the Central Provident Fund Act (Cap 36, 2001Rev Ed) ("the CPF Act") for failure to pay salaries and make CPF contributions respectively. In fact, the latter came to pass when, after a series of unheeded warnings threatening penalties and criminal sanction throughout the months of July and August 2011, a charge under s 7(1) of the CPF Act was issued against Merukh Auto [note: 20]. In sum, it was clear from the correspondence that after the deceased's death, the plaintiff as the proverbial last rat on the sinking ship faced multiple pressures to keep both Merukh Auto and the Company from penalty and financial loss.

13 On 18 July 2011, just under a month after the deceased's death, Rudy and the plaintiff had a phone conversation in which Rudy instructed that the Merukh family had decided to sell all the Three Properties and cars in Singapore, and to wind down the Singapore companies under the plaintiff's charge - an instruction that was confirmed in Rudy's text to the plaintiff on 20 July 2011 [note: 21]. The Company's staff in Singapore followed up on 28 July 2011 with an email to Rudy, requesting the executor of the Estate to sign an attached copy of the Company's board circular resolution ("the Board Resolution") to sell off all properties and cars owned by the Company and the other Merukh Companies (including the Three Properties which were named therein), settle all debts, and authorise closure or disposal of all Merukh Companies registered in Singapore [note: 22]. It was after this that the marketing of the Three Properties began in earnest. On 3 August 2011, the plaintiff informed Rudy via email that he had appointed a property agent to market the Three Properties, and warned Rudy of the need to sell quickly in order to avoid repossession by the bank and an auction sale which would likely yield an unsatisfactory price [note: 23]. Motor-Way had made offers for the Bayshore and Kitchener properties of $1,800,000 and $1,500,000 respectively, which were slightly below the purchase prices and current market prices. The plaintiff explained in the same email that this was because the property market was weak due to anticipated government cooling measures and the instability of the financial markets, and requested for Rudy to comment on the offer. There was no evidence of a reply from Rudy. Further emails were sent by the Company's staff to Rudy on 15, 17, 22, 25 and 30 August 2011, all urgently appealing for the Board Resolution to be signed and for funds

to be transferred so as to meet the staff salary and CPF payments which now totalled $117,982. The plaintiff himself sent Rudy a formal letter on 25 August 2011, stating that he would be striking off all the solvent Merukh Companies in Singapore shortly, and hoped to do the same with Merukh Auto and the Company once their outstanding loan and credit issues had been resolved. The plaintiff stated that he was trying his best to get a buyer for "at least one of the three properties" so as to raise some funds to meet the various pressing obligations, but that the market was slow and no offers were presently forthcoming. When this again met with no response, the plaintiff emailed Rudy a copy of UOB's final reminder dated 20 August 2011, as well as a letter issued by Motor-Way's lawyers claiming against the plaintiff as guarantor for Motor-Way's outstanding debts. The final email before the granting of options to purchase for the Three Properties began was dated 31 August 2011. There, the plaintiff expressed that more than a week had passed since his email to Rudy pertaining to the outstanding employees' salaries and the required documentation to sell off the Three Properties and the deceased's Toyota Wish car, in order to settle the debts, salaries and CPF contributions. There was a note of frustration and finality to the email that was not present in earlier emails [note: 24]. Then on 2 September 2011, the plaintiff received an offer for the Bayshore property which exceeded the orginal purchase price. He emailed Rudy to inform him that he planned to grant the option to purchase. When no reply was given, the plaintiff granted the option to purchase for the Bayshore property on 5 September 2011. The plaintiff then went on to grant an option to purchase for the Kitchener property the next day, and promptly emailed Rudy attaching a copy of both of these options [note: 25].

14 All had been quiet on the Indonesian front until 8 September 2011, when the defendant wrote to the plaintiff stating that the Estate did not want the Three Properties to be sold for less than $2,000,000, $1,700,000 and $1,200,000 respectively [note: 26]. However, the plaintiff had already granted the options to purchase for the first two properties for prices lower than this stated minimum a few days prior, and he went on to grant the option to purchase The Raintree for a sum $10,000 less than the minimum stated price the following day. This was one of the main sources of unhappiness between the Merukh family and the plaintiff. Before me, counsel for the plaintiff submitted that the sale prices obtained by the plaintiff for the Three Properties ($1,917,500, $1,551,000 and $1,190,00 for the Bayshore property, Kitchener property and The Raintree respectively), exceeded the original purchase prices of $1,916,200, $1,550,000 and $1,155,000, and were only slightly lower than the minimum prices that the family had desired. Further, the sale prices were very close to the market prices of $1,917,000, $1,545,000 and $1,188,000 stated in the valuation report of an expert witness in his affidavit dated 25 October 2011. Counsel for the plaintiff argued that this was an achievement considering the poor market conditions at the time. During the hearing, I also noted that since the property market had fallen even further after September 2011, it was on hindsight fortunate for the defendants that the properties had been sold quickly and at a profit. However, counsel for the defendant averred that it was not only the sale price but also the manner in which the sale had been conducted, which was objectionable. She questioned the "fire sale" manner in which the options had been granted, stating that this was unnecessary since the sale proceeds of the Bayshore property would have sufficed to cover the most pressing debts (*viz*, the employees' salaries and CPF contributions, penalty for late payment of CPF contributions, and the outstanding instalments for the Three Properties). Counsel for the defendant also argued that there was no urgency to sell the Three Properties because the defendant had on 3 August 2011 requested and obtained a six-month grace period from UOB for payment of the outstanding instalments. However, I noted that there was no evidence to show that the plaintiff had been informed about this grace period. As such, the obtaining of the grace period had no impact on my consideration of the honesty and reasonableness of the plaintiff's decisions.

The legal issues

15 This case raised two questions. The first was the novel question on the scope of s 391 of the Act – in particular, whether the section was wide enough to provide relief against proceedings brought by *persons other than the company*. The second was whether, in the event that s 391 applied, the plaintiff had acted honestly and reasonably and having regard to the circumstances of the case, ought fairly to be excused from liability for negligence, default, breach of duty or breach of trust. I noted the defendant's contention that the second question was irrelevant if the first question was answered in the negative. However, given that the application was one for prospective relief under s 391(2), and given the considerable uncertainty as to whom the prospective claim(s) which the plaintiff apprehended could be potentially instituted by (as observed at [6] above), I found it necessary, for the avoidance of doubt, to address the second question.

16 I turn now to the first question.

The scope of s 391 of the Act

17 The paucity of local cases addressing the particular question of whether s 391 of the Companies Act applies to claims brought by persons other than the company, made it necessary to seek guidance from English and Australian jurisprudence. The relieving provisions in their respective legislation share similar origins with ours, and are similarly worded.

18 Section 391 of the Companies Act provides that:

> (1) If in any proceedings for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.
>
> (1A) For the avoidance of doubt and without prejudice to the generality of subsection (1), "liability" includes the liability of a person to whom this section applies to account for profits made or received.
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> (2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust he may apply to the Court for relief, and the Court shall have the same power to relieve him as under this section it would have had if it had been a court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought.
>
> (3) The persons to whom this section applies are —
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> (*a*) officers of a corporation;
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> (*b*) persons employed by a corporation as auditors, whether they are or are not officers of the corporation;
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> (*c*) experts within the meaning of this Act; and
>
> (*d*) persons who are receivers, receivers and managers or liquidators appointed or directed by the Court to carry out any duty under this Act in relation to a corporation and all other

persons so appointed or so directed.

19 The somewhat cryptic wording of s 391 of the Act, as well as that of the corresponding English and Australian relieving provisions which, has yielded jurisprudence that is divided as to various aspect of the provision's scope. There have been differing views as to whether the provision affords relief against criminal liability (a question which I answered in the negative in *Re IDEAGLOBAL.COM Ltd* [2000] 1 SLR(R) 804), against liabilities originating from breaches of other statutory duties other than those found in the Companies Act (see *Customs and Excise Commissioners v Hedon Alpha Ltd and others* [1981] 2 All ER 697 ("*Hedon Alpha*") , *Deputy Commissioner of Taxation v Dick* [2007] NSWCA 190, and *ASIC v Vines* [2005] NSWSC 1349 ("*Vines*")) and, as in the present case, against claims brought by persons other than the company. The English cases answer this last question in the negative, while the Australian cases take a wider view and answer the question in the positive. It is convenient at this juncture to briefly examine the two contrary positions.

Two Contrary Positions

The English Position

20 The English equivalent of s 391 of the Act is s 1157 of the Companies Act 2006 (c 46) (UK) ("the 2006 Act"), which is identical to its predecessor, s 448 of the Companies Act 1948 (c 38) (UK) ("the 1948 Act"). The leading case on the scope of the section in relation to third party claims is *Hedon Alpha*. There, relief under s 448(1) of the 1948 Act was sought by the defendant director as against proceedings brought by the Customs and Excise Commissioners for a breach of s 2(2) of the Betting and Gaming Duties Act 1972 (c 25) (UK) ("the 1972 Act"). The English Court of Appeal declined to grant relief on two grounds: (a) that the commissioners' action was not a proceeding for "negligence, default, breach of duty or breach of trust" but rather for debt; and (b) that the court's power to grant relief under s 448 of the 1948 Act applied only where a suit was brought by the company and not by a third party. At 701g, Stephenson LJ acknowledged the presence of conflicting academic views on the subject:

> There is a surprising absence of authority (1) on the meaning of 'default' in s 448, and (2) on the extent of the section's application. … As to (2), the current edition of Palmer's Company Law (22nd Edn, 1976 p 683) expresses the opinion:
>
> > 'that the court's power to grant relief in appropriate circumstances under section 448 is sufficiently wide to extend to actions by third parties as well as actions by the company, but the point is not free from doubt.'
>
> But an opinion inclining the other way is expressed in *Pennington's Company Law* (4th Edn, 1979, p 548):
>
> > '... relief can be given against any of the criminal penalties imposed by the Companies Acts 1948 to 1976, but not, it would seem, against civil liability to anyone other than the company, and so apparently no relief may be given in the rare cases where a member or auditor of a company has a personal right to sue its directors.'

21 In the face of the two opposing views, Stephenson LJ preferred the narrower, opining (at 702b) that:

> I agree with the judge in preferring counsel for the commissioners' submissions and construction of these two statutes, and I agree with both of the judge's grounds for determining the

preliminary question as he did. *But I would put his second ground first and hold that section 448 is inapplicable to the commissioners' claim because it is inapplicable to any claim by third parties to enforce any liability except a director's liability to his company or his director's duties under the Companies Acts.* Wide and general though the opening words of s 448 are, read in their context they do not allow an officer or auditor of a company to claim relief in 'any' legal proceedings which may be brought against him in his capacity as an officer or auditor of a company by the rest of the world. If Parliament had wished to provide a director, whom it exceptionally makes liable to discharge a company liability, with the protection of s 448 or some other protection, it would, in my judgment, have done so by express words, either by subjecting the statutory liability to the right to claim relief under s 448 or, as in the Social Security Act 1975, by subjecting it to some other restriction. That Parliament has not done in s 2 of the 1972 Act and it is that Act, not the Companies Act 1948, which governs the appellant's liability to the respondents for betting duty and imposes an absolute liability on him irrespective of knowledge or any personal fault. By becoming a director of the defendant company he became liable for this debt of the company without qualification.

[emphasis added in italics]

22 Ackner LJ came to the same conclusion, although he seemed to give more primacy to the first ground (*viz*, that the breach of the 1972 Act was not a "default"). At 703d he stated that:

> That [the Commissioners' claim against the defendant is for debt and not default] is sufficient to dispose of this appeal, but I accept that the true ambit of s 448, with one limited exception, is restricted to claims by or on behalf of the company or its liquidator against the officer or auditor for their personal breaches of duty. … Section 448 thus gives similar protection to directors to that which is accorded to trustees under s 61 of the Trustee Act 1925.

23 Ackner LJ then went on to cite the example of the Social Security Act 1975, which provided specific relief for directors in relation to liabilities incurred under it, as an indication that relief under s 448 was not intended to be involved by way of defence to a claim arising under those separate pieces of legislation.

24 It bears noting, however, that a part of both Stephenson LJ's and Ackner LJ's reasoning (at 701g and 703d respectively), focussed less on the issue of whether the relieving provision covered *claims brought by third parties*, and more on the issue of whether this relief extended to *claims originating from other pieces of legislation apart from the 1948 Act itself*. While Stephenson LJ made it clear that he "would put [the] second ground first" and decline relief under s 448 of the 1948 Act based primarily on the undesirability of extending such relief to proceedings brought by persons other than the company, it is somewhat unclear whether Ackner LJ's decision was similarly based, or he was primarily influenced by the statutory construction of other liability-creating statutes.

25 Be that as it may, *Hedon Alpha* is well-established in English law as authority for the proposition that the court's power to grant relief under s 1157 of the 2006 Act does not extend to claims brought against directors, officers or those employed as auditors of the company, by persons other than the company.

The Australian Position

26 A contrary position was adopted in Australia. In *Daniels and Others (formerly practising as Deloitte Haskins & Sells) v Anderson and Others* [1995] 37 NSWLR 438 ("*Daniels*"), the Supreme Court of New South Wales extended relief under s 1318 of the Corporations Act 2001 (No 50 of 2001) ("the

Corporations Act") to relieve a director of claims in indemnity and contributory negligence, brought against him by third party auditors whom his company had earlier sued for negligence and breach of contract. The reasoning for this was brief, and the court simply stated (at 524G) that:

> We assume that the section could properly be pleaded by [the director] as a defence and empowers the court to grant relief where a third party and not the corporation itself proceeded against him for negligence: Compare *Customs and Excise Commissioners v Hedon Alpha Ltd* [1981] QB 818 at 825-826 and *Dimond MFG Co v Hamilton* [1969] NZLR 609 at 645. The purpose of the section is to excuse company officers from liability in situations where it would be unjust and oppressive not to do so, recognising that such officers are businessmen and women who act in an environment involving risk in commercial decision-making. …

27 Further explanation for the wide interpretation of the court's relieving discretion was proffered in *Edwards and others v Attorney General and Another* (2004) 60 NSWCA 272 ("*Edwards*"). The facts of the case are unique. Relief under s 1318 of the Corporations Act was sought by certain directors of an asbestos-trading company, who feared personal liability upon a forecasted exhaustion of company funds dedicated to meet ongoing asbestos-related injury claims brought by employees. The Supreme Court of New South Wales granted the relief prayed for upon the authority of *Daniels*. Young CJ acknowledged the contrary position taken by the English Court of Appeal in *Hedon Alpha*, but proceeded to cast doubt on that reasoning, stating (at [138]) that:

> The limitation read into the English equivalent of s 1318 is not one which appears in the text of the section. The English Court reasoned mainly from the state of affairs in England when the English Companies Act 1929 was adopted. It is doubtful whether those factors have any relevance to New South Wales.

28 By the "state of affairs in England", the learned Young CJ was presumably referring to the introduction into United Kingdom companies legislation of new penalties for "defaults" of company officers and the corresponding addition of the word "default" into the section within the English Companies Act 1929 (ch 23) (UK) ("the 1929 Act") empowering the court to grant relief. The type of "default" envisioned by the relief provision was a decisive issue in *Hedon Alpha* but did not arise on the facts of *Edwards.*

29 Perhaps a more pertinent critique of the English position was that proffered by the Court at [139] of *Edwards*:

> It is also significant that the learned judges in the English Court of Appeal gave no weight at all to subsection 3 of the s 448 of the English Act which they were considering which is the equivalent of s 1318 of the Corporations Act. It is almost impossible to see how a claim by the company would ever be tried by a jury. The scheme of the Corporations Act is that it was mostly when an application was made in the winding up or in equity for breach of duty that the section would be brought into play. However, subsection 3 clearly envisages that there will be a common law cause of action against the director and the judge may direct a verdict. This is almost conclusive material to show that the legislature thought that there would be a far wider set of applications than those by the company in the winding up or otherwise in equity.
>
> Whilst doubtless most applications for relief by directors will arise in the context of an alleged breach of duty to the company, when one remembers the authoritative dicta that one must not approach the section in a narrow way, one must have very real doubts as to the correctness of the approach taken by the Court of Appeal in the *Hedon Alpha* case.

30 Accordingly, the Court declined to follow *Hedon Alpha*.

31 There has been no local authority stating whether the English or Australian position should be adopted in Singapore. Hence, it was necessary for me to analyse the text as well as the legislative history of the section in order to discern its intended scope.

Text and placement of s 391 of the Act

32 Section 391 of the Act is widely drafted and imports no limitation on the court's relief discretion based solely on the identity of the party bringing the claim. The plain words "in any proceedings for negligence, default, breach of duty or breach of trust" are capable of encompassing actions instituted by the company, third parties, or indeed by individual shareholders themselves. Further, having regard to the wide class of persons to whom s 391 relief extends, and the numerous and different types of civil claims which could potentially be brought against such persons by entities other than the company or its liquidators, it is conceivable that the section envisions extending relief beyond the context of the *company's* relationship with the persons seeking relief.

33 I note, however, that weighing against a broad interpretation permitted by the wide wording of s 391 of the Act is the placement of the section within Part XII, Division 1 of the Companies Act entitled "Enforcement of this Act". This suggests that the section is confined to regulating the duties owed by the persons listed under s 391(3) to *the company*, within the entire legislative scheme of the Companies Act. It was noted in *Hedon Alpha* (at 701d) that:

> ... the language of s 448 [of the 1948 Act] was apt to describe the area in which a company director might be in breach of his duties to the company, *and the ambit and concern, the context or matrix, of the section was company law and the relation of the officer (or auditor) of a company to the company and not to third persons.*
>
> [emphasis added]

34 Nonetheless, in view that statutory interpretation should not be conducted in a vacuum, I find it necessary to turn now to the legislative history of s 391 of the Act.

Two significant incidents in the legislative history of s 391 of the Act

35 There were two legislative incidents in the history of the relieving provision that proved particularly illuminating in my understanding of the scope and rationale of the relieving provision. They were:

(a) the Company Law Amendment Report of 1906 (United Kingdom, Company Law Amendment Committee, *Report* (Cd 3052, 1906) (Chairman: Lord Loreburn)) ("the Loreburn Report"), which recommended the enactment of the original relieving provision within the English Companies Act of 1907 (7 Edw 7 c 50) ("the 1907 Act"); and

(b) the English Company Law Amendment Committee Report of 19226 (United Kingdom, Company Law Amendment Committee, *Report* (Cmnd 2657, 1926) (Chairman: Mr Wilfred Greene KC)) ("the Greene Report"), which resulted in significant changes to the original relieving provision within the 1929 Act.

The Loreburn Report and the Enactment of s 32 of the Companies Act 1907

36 The Loreburn Report was the culmination of wide-ranging reviews of 1862-1900 companies legislation in England undertaken by a review committee established under the Board of Trade, which comprised such leading company lawyers of the day as Palmer and Gore-Brown. The Loreburn Report recommended the enactment of a statutory relieving provision within companies legislation, in the following terms [note: 27] :

> We have already expressed an opinion that the number of companies into the formation or management of which fraud enters is small in comparison with the number of sound undertakings registered and working under the Acts, and this being so the dishonest director is the exception. We think that nothing could be more unfortunate than that provisions designed for checking or punishing dishonesty or gross negligence should be turned into an engine of oppression for honest and prudent men. Now there are a variety of sections in the Companies Acts which impose upon directors and other persons connected with a company the duty of doing certain acts, making certain disclosures and returns, and furnishing certain information at the risk of incurring a penalty or liability to damages. It would not in our opinion be either safe or wise to diminish these obligations otherwise than as in this Report suggested, *but we do think that it would be both safe and wise to make some amendment in the law which shall prevent such penal provisions from operating unfairly.* We therefore recommend that the law be amended:-
>
> > (1) By giving power to the Court to relieve any director or promoter from liability for breach of any duty imposed on him by the Companies Acts, 1862 to 1900, provided that the breach has been occasioned by honest oversight, inadvertence, or error of judgment on his part.
> >
> > (2) By giving the Court power, in an action for negligence or breach of trust against a director, to relieve him from his liability on such terms as the Court may consider proper, where the Court is satisfied that he has acted honestly and reasonably.
>
> An analogous power, we may point out, has been already given to the Court in the case of trustees by Section 3(1), (a), of the Judicial Trustees Act, 1896." (Cd 3052, 1906, at para 24)
>
> [emphasis added in italics]

37 It is important to understand the context in which the recommendations were made. In Rod Edmunds & John Lowry, "The Continuing Value of Relief for Directors' Breach of Duty" (2003) 66 MLR 195 at p 198, the writers explain that:

> A major anxiety underlying the Committee's deliberations was the diminution in large company registrations between 1900 and 1905. Various reasons were identified by way of explaining this reduction. Of particular significance was the finding that the Companies Act 1900 had introduced stringent provisions relating to the contents of the prospectus and had increased the liabilities of promoters and directors. This, in turn, so it was found, led to a shortage of individuals willing to assume the office of director.

38 It seemed to me that the recommendation envisioned a relieving provision that would serve primarily as a counterweight *within the environment of company legislation*, balancing the severity of the "provisions designed for checking or punishing dishonesty or gross negligence", and preventing "such penal provisions from operating unfairly" (see above at [36]). This is the thrust of the first recommendation of the Loreburn Report set out at [36] above, and lends strong support to the view that at the genesis of the original English provision, third party claims were not a consideration at all. Interestingly however, the House of Commons accepted the second but not the first recommendation

(HC Debates, 21 August 1907 [note: 28]), with the second recommendation taking the form of s 32 in the 1907 Act. Section 32 was stated in the following terms:

> If in any proceeding against a director of a company for negligence or breach of trust it appears to a court that the director is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, the court may relieve him, either wholly or partly, from his liability on such terms as the court may think proper.

39 The adoption of the Loreburn Committee's second recommendation however, does not detract from a narrow interpretation of the provision, as it has been explained that the words "negligence or breach of trust" were primarily directed at ameliorating the harshness of a company law regime which still drew close analogies with trust principles and which commonly exposed directors to strict liability standards upon a breach of their fiduciary duties to the company which was regarded as the beneficiary. As the Supreme Court of Victoria noted in *Lawson v Mitchell* [1975] VR 579 ("*Lawson*") (at 585-586 *per* Young CJ and Newton J):

> Furthermore, by 1907 the civil liability of a director to compensate his company for loss had become well defined by decisions of the courts, and those decisions had established that in general such liability existed only in cases where loss had been caused to the company by negligence on the part of the director, or else by some misconduct on his part in relation to property of the company; such misconduct was frequently referred to in the decisions as a "breach of trust", because it was established that a director owed a fiduciary duty to his company.

40 Indeed, s 32 of the 1907 Act adopted the language of s 3(1)(*a*) of the English Judicial Trustees Act 1896 (c 35) (UK), now s 61 of the Trustees Act 1925 (c 19) (UK). In *Vines*, the Supreme Court of New South Wales explained (at [63] *per* Austin J):

> The trustee provision was originally introduced in England by s 3 of the Judicial Trustees Act 1896, and is now found in s 85 of the Trustee Act 1925 (NSW), which has preserved the word "reasonably". There were, in 1906, some similarities in the exposure to liabilities of company directors and trustees. Trustees were then, and continue to be, exposed to strict liability in various circumstances. Trustees who misapply trust assets (by, for example, paying a non-beneficiary) or who act outside the terms of the trust instrument and legal authority (by, for example, making an unauthorised investment) may find themselves exposed to liability however honestly and carefully they have acted, and even in circumstances where they have acted on legal advice (see *Underhill and Hayton's Law Relating to Trusts and Trustees* (14th edn, 1987), Article 56). Similarly, company directors were until recently exposed to liability if they caused their company to act *ultra vires* or contrary to restrictions in the articles of association. An example of this kind of liability may be found in *Re Claridge's Patent Asphalte Co Ltd* [1921] 1 Ch 543, where Astbury J used the statutory exoneration provision to relieve the director from liability.

41 As such relief operated (and continues to operate) only within the trustee-beneficiary relationship, the analogy when extended to the company context would lend itself to a narrow application restricted to relieving breaches of a director's fiduciary duties owed to the company as trustee. Such an argument was accepted by Stephenson LJ at p 701d of *Hedon Alpha*.

42 Hence, it is patently clear to me that the original English relieving provision did not consider claims emanating from third parties to be among the pressures which the provision sought to diminish.

The Greene Report and the Enactment of s 372 of the Companies Act 1929

43 The next significant development in the history of the relieving provision was the replacement of s 279 of the English Companies (Consolidation) Act 1908 (which was a substantive reproduction of s 32 of the 1907 Act that had come before it) with s 372 of the 1929 Act, following recommendations within the Greene Report. Section 372 was substantially similar to its predecessor, except in three respects:

(a) the addition of "default" and "breach of duty" to the earlier list comprising "negligence" and "breach of trust";

(b) the extension of the section to cover officers, managers and auditors as well as directors; and

(c) the reference to "all the circumstances of the case, including those connected with [the director's] appointment" in determining whether he ought fairly to be excused from liability.

44 The much wider terms of s 372 of the 1929 Act have been attributed to the simultaneous introduction into the 1929 Act of a section which invalidated certain indemnity provisions within the company's articles or contracts. This was s 152 of the 1929 Act, and it was in the following terms:

> Subject as hereinafter provided, *any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any director, manager or officer of the company, or any person (whether an officer of the company or not) employed by the company as auditor from, or indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void*: Provided that--
>
> > (*a*) in relation to any such provision which is in force at the date of the commencement of this Act, this section shall have effect only on the expiration of a period of six months from that date; and
> >
> > (*b*) nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force; and
> >
> > (*c*) notwithstanding anything in this section, a company may, in pursuance of any such provision as aforesaid, indemnify any such director, manager, officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under section three hundred and seventy-two of this Act in which relief is granted to him by the court.
>
> [emphasis added in italics]

45 The enactment of s 152 of the 1929 Act was recommended in response to the widespread practice of including terms in the company's articles of association exempting directors, managers and other officers of a company, as well as auditors, from liability from anything short of wilful neglect or even dishonesty, as exemplified in cases such as *Re City Equitable Fire Insurance Company, Limited* [1925] 1 Ch 407 ("*City Equitable*") and *Re Brazilian Rubber Plantations and Estates Limited* [1911]

1 Ch 425. The invalidation of such indemnity clauses clearly increased the risk exposure of directors *vis-à-vis* their companies, and hence the scope of the relief provision was widened specifically to restore some of the protection that the articles of association were no longer permitted to give. As the Supreme Court of Victoria explained in *Lawson* (at p 589, line 44 and p 590, line 25 *per* Young CJ and Newton J)*:*

> … We consider that the reason why s.372 of the English 1929 Act used much wider language than s.279 of the 1908 Act was to ensure that the Court should have a wide power in appropriate cases to relieve a director, other officer or auditor of a company from civil liability; *thus some amelioration was provided for the loss of protection under articles of association or otherwise, which was brought about by s.152.* The wide words in s.372(1) "negligence, default, breach of duty, or breach of trust" in fact simply reproduced the same set of words in s.152. …
>
> ...
>
> Our conclusion [is] that the enactment of s.152 by the English Companies Act 1929 was the reason for the wider language used in s.372 as compared with the language used in s.279 of the Companies (Consolidation) Act 1908 ...
>
> [emphasis added in italics]

46 Similarly, the inclusion of officers, managers and auditors under the fold of s 372 of the 1929 Act, simply reflected the fact that the now prohibited indemnity clauses in companies' articles of association often extended to these classes of persons as well (for example, the clause in *City Equitable*). Finally, the direction to take into account the director's circumstances of appointment reflected the Greene Report's recommendation that "such a provision would meet the case of a director who has been appointed because of his special knowledge or for a special purpose and not to direct the business of the company generally" (Greene Report at para 47).

47 The fact that the relief provision is related to the indemnity provision assists in interpreting the former. If the latter does not extend to wrongs done to persons other than the company, then there is a strong case for the former to be so restricted as well. The equivalent of s 152 of the 1929 Act (now s 232 of the 2006 Act) is s 172 of the Act, which is stated in the following terms:

> (1) Any provision, whether in the articles *or in any contract with a company or otherwise*, for exempting any officer or auditor of the company from, or indemnifying him against, any liability which by law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty *in relation to the company*, shall be void.
>
> (2) This section shall not prevent a company —
>
> (*a*) from purchasing and maintaining for any such officer insurance against any liability referred to in subsection (1); or
>
> (*b*) from indemnifying such officer or auditor against any liability incurred by him —
>
> (i) in defending any proceedings (whether civil or criminal) in which judgment is given in his favour or in which he is acquitted; or
>
> (ii) in connection with any application under section 76A(13) or 391 or any other provision of this Act, in which relief is granted to him by the court.

[emphasis added in italics]

48 The plain words of s 172 of the Act, as well as that of the 1929 English provision from which it originated, confine the ambit of the section to liability of which the relevant person "may be guilty *in relation to the company*" (emphasis added). The same conclusion appears to have been reached by the Australian Companies and Securities Law Review Committee ("the Committee") in *Company Directors and Officers: Indemnification, Relief and Insurance* Discussion Paper No 9, April 1989 (at para 57), in the course of a comprehensive review of the two corresponding sections in Australia (s 237 (the indemnity-prohibiting provision) and s 535 (the relieving provision) of the Corporations Act). After noting the restrictions which the text of s 237 appeared to place on its ambit, as well as acknowledging the narrow interpretation of the cognate relieving provision that had been adopted by the English in *Hedon Alpha*, the Committee went on to acknowledge (at para 60) that:

> But it is possible to read section 237 as being impliedly confined to liability in respect of breaches of duty owed to the company. The reference to "exempting" is consistent with that since, apart from the Legislature or a Court, the only person who can exempt another person from liability is the person in whose favour the liability exists.

49 It seems to me that the restriction that the text of s 172 of the Act imposes on its ambit should similarly apply to s 391. This is because the legislative intention of s 391 can be gleaned from the understanding, as discussed at [44]–[47] above, that its English predecessor was designed specifically to restore at the court's discretion the relief that the English predecessor of s 172 sought to deny. Even though the words "in relation to the company" are not found in s 391, in light of its origins, s 391 ought to be read in harmony with s 172, whose plain words *do* impose such a restriction on its scope.

Summary

50 What emerges from the foregoing historical review is that the relief provision has always been used as a *counterweight to other provisions which injected a greater degree of transparency and punitiveness into company legislation.* This suggests that the relief was intended to have narrow application, confined to proceedings brought by the company and not by third parties.

Addressing the Australian position

51 I began my analysis by recognising that the plain words of s 391 of the Act did not, on their face, preclude the extension of the court's discretionary relief to proceedings brought against the director by a person other than the company. In this respect I would agree with the learned Young CJ when he opined in *Edwards* (at [138]) that "[t]he limitation read into the English equivalent of [s 391] is not one which appears in the text of the section". However, my reading of the text has been informed by an understanding of the legislative goals which the architects of the original relieving provision had in mind. It seemed to me that the provision was conceived for the specific purpose of calibrating a balance between relief and duty under an increasingly strict statutory regime, and not only as a device to provide general relief to directors from all the potential dangers of directorship. In light of this, I was reluctant to depart from the established English position which holds that s 391 applies only to proceedings brought by the company.

52 In taking this position, I was aware of the weight of Australian authority to the contrary. I have given these views serious consideration, as it has indeed been Australian cases such as *Lawson* and *Vines* whose robust analyses have most aided my understanding of the history and rationale behind the relieving provision. However, as the issue of third party claims did not arise in those cases, I had

to rely on the two leading authorities on the specific point, namely *Daniels* and *Edwards*. These decisions were unfortunately much less fully reasoned than *Lawson* and *Vines*. The court in *Daniels* simply accepted without discussion that the provision applied as against proceedings brought by third parties. In *Edwards*, aside from opining that "one must not approach the section in a narrow way" (at [140]) given the absence of express textual restriction, the court also placed weight on the existence of a subsection 3 within the English and Australian relieving provisions, which envisioned a case being tried by a judge with a jury, and empowered the judge to withdraw the case from the jury and direct judgment in such terms that he thought fit and proper, should he be satisfied that the defendant ought to be relieved. The court in *Edwards* treated the existence of this subsection as conclusive of legislature's intention that "there would be a far wider set of applications than those by the company in winding up or otherwise in equity", because "[i]t is almost impossible to see how a claim by the company would ever be tried by a jury" (at [139]). The plaintiff relied heavily on this argument to support a wide reading of the relieving provision in Singapore, and contended that the only reason for the absence of such a subsection in s 391 of the Act was the lack of jury trial in Singapore. The plaintiff's argument was clearly fallacious because the original enactment of the Act - the Companies Act 1967 ("the 1967 Act") - did not contain a section equivalent to s 1318(3) of the Australian Corporations Act or s 1157(3) of the English Companies Act. The omission of such a subsection in our original Companies Act, which *predated the abolition of the jury system in Singapore in 1969*, suggests that its absence cannot be wholly attributed to the lack of jury trial in Singapore. However, neither did it proffer any reason why the subsection was omitted from the 1967 Act, as this choice was not explained in the relevant Parliamentary debates. In my view, the presence or absence of such a subsection within s 391, was not in any way indicative of particular Parliamentary intention as to whether the provision ought to apply to third party claims.

53 More fundamentally however, it is entirely possible for a case involving proceedings brought by a company against a director, to be tried by jury. For example, in *Bell and another v Lever Brothers Limited and others* [1932] 1 AC 161, proceedings were brought by the company against its two directors for diversion of business opportunities away from the company in breach of their fiduciary duty. A jury was called upon to answer the question of whether their actions justified the company terminating their contracts of service (the discretionary relief was not prayed for here). Hence, the court in *Edwards* might have been too quick to draw its conclusion based simply on the existence of a section envisioning the involvement of a jury in claims against directors.

Summary

54 In sum, I was not persuaded by the Australian authorities advocating a wider application of s 391 of the Act to proceedings brought by persons other than the company. I preferred the narrower English position, as it accorded with my understanding of the origin and rationale of the provision as a balancing mechanism within the context of a company's relationship with its officers. This, coupled with the absence of specific Parliamentary debate on the ambit of s 391 of the Act, led me to conclude that Parliament had no intention to depart from the English origins of the provision so as to extend its application to proceedings brought by persons other than the company. Therefore, in answer to the first question at [15] above, I hold that s 391 of the Act pertains only to an action brought by the corporation as against an applicant listed in s 391(3) of the Act.

55 Even if, however, there were a case for interpreting the scope of s 391 of the Act more broadly in the interest of promoting commercial risk-taking and entrepreneurial activity, the present facts were not those which justified such an indulgence. There was negligible commercial risk-taking and entrepreneurial activity taking place at the Company, to say the least. It was not an active profit-generating enterprise, but a passive investment vehicle. Its director was a man whose capacity within the company would have been little enhanced by the statutory protection of honest entrepreneurial

business judgment and commercial risk-taking, as his role involved precious little of that. One of the reasons why the court in *Edwards* was amenable to granting relief was that the directors' ability to carry on a viable business was being hindered by the prospect of potential negligence claims brought by employees (see *Edwards* at [154] *per* Young CJ). This was not the case here, as the Company was already in the process of being wound up, and in any case had never been an active business concern whose operations would be unduly hindered by the threat of litigation.

56 Hence I declined to extend prospective relief under s 391(2) to the plaintiff as against proceedings for negligence, breach of duty or breach of trust which might be brought by persons other than the Company.

57 The conclusion that I reached on the first question was sufficient to dispose of the application for relief as against proceedings brought by the defendant. However, in the interest of completeness and in view of the fact that the defendant had alluded to a potential claim by the Company for the plaintiff's breach of statutory and fiduciary duty to the Company, I found it necessary to go on to address the second question.

Whether the plaintiff acted honestly, reasonably, and ought fairly to be excused

58 In order to be eligible for relief under s 391 of the Act, the plaintiff bore the burden of proving three elements. Firstly, that he acted honestly; secondly, that he acted reasonably, and thirdly, that it was fair to excuse him having regard to all the circumstances of the case (*Re Duomatic Ltd* [1969] 2 Ch 365, *Re Ena Jainab, Deceased, Juliah Ammal and Anor* [1930] SSLR 26).

Did the plaintiff act honestly?

59 The plaintiff had first to satisfy the court that he acted honestly. Local cases concerning s 391 of the Act have not had to elaborate extensively on the meaning of the term "honestly", as the conduct of the impugned company officers in the majority of these cases had unfortunately been manifestly deceitful. They usually involve a deliberate lack of disclosure and calculated concealment of information (*eg*, *Vita Health Laboratories Pte Ltd and Others v Pang Seng Meng* [2004] 4 SLR(R) 162 ("*Vita Health"*), *Hytech Builders Pte Ltd v Tang Eng Leong and another* [1995] 1 SLR(R) 576 ("*Hytech"*), and *W&P Piling Pte Ltd (in liquidation) v Chew Yin What and others* [2007] 4 SLR(R) 218 ("*W&P Piling*")). In *Hytech*, Warren Khoo J (at [63]) described the requirement as one of acting "honestly and in good faith". It was found that the defendant director's failure to make various discloses to the board of directors, was (at [68]):

> ... not ... the way an honest person would have acted. It [was] more the way of a person whose sense of right and wrong [had] been dulled by self-interest.

60 The Australian jurisprudence provides useful guidance on the interpretation of acting honestly. Section 1318 of the Corporations Act is almost *in pari materia* with our s 391 of the Act, and is hence helpful to our inquiry. Australian authorities have in recent years equated acting "honestly" with the absence of moral turpitude (see *Commonwealth Bank of Australia v Friedrich and ors* [1990-1991] 5 ACSR 115 at 196 ("*Friedrich"*), and *Australian Securities and Investments Commission v Macdonald and Others (No 12)* [2009] NSWSC 714 ("*Macdonald"*) at [22]). The recent case of *Australian Securities and Investments Commission v Healey (No 2)* [2011] FCA 1003 (31 August 2011) ("*Healey"*) is instructive, stating (at [87]-[88]) that:

> … A mere absence of dishonesty will not satisfy the requirements of the provisions.

For the purpose of this proceeding, I accept that a person acts honestly, in the ordinary meaning of the term, if the person's conduct is without moral turpitude, that is:

(a) without deceit or conscious impropriety;

(b) without intent to gain an improper benefit or advantage; and

(c) without carelessness or imprudence that negates the performance of the duty in question.

61 It has also been stated that the inquiry is objective and that "[t]he lack of a subjective intention to deceive cannot avoid a conclusion that a person failed to act honestly if a reasonable person would have concluded that the conduct was dishonest" (*per* Gzell J in *Macdonald* at [19]; see also *Australian Securities and Investments Commission v Edwards (No 3)* [2006] NSWSC 376 at [9] *per* Barrett J). However, a person's subjective intent constitutes evidence from which a conclusion may be drawn about whether he acted honestly.

62 In my view, the plaintiff's decision to grant the options to purchase for the Three Properties at the price and in the quick succession that he did, was not motivated by intent to gain an improper benefit or advantage for himself. Neither did his failure to place the decision before the shareholders in general meeting reek of deceit and impropriety in the way that the non-disclosures in *Hytech* and *W&P Piling* did. Rather, his omission seemed to me to be a genuine oversight. I say this in light of the plaintiff's repeated attempts to extract a response from the Indonesians regarding the marketing of the Three Properties, and to obtain the signature of the administrator or the executor of the Estate on the circular board resolution which reflected Rudy's earlier instructions on the Merukh family's decision to sell all Three Properties and discharge the debts of the family companies in Singapore. Clearly the grants and the subsequent sales, though rapid, were part of a long-drawn process, and were far from an undercover affair carried out swiftly and silently by the plaintiff while the Merukh family remained oblivious. Furthermore, the evidence did not lead me to believe that the plaintiff harboured any intent to gain improper benefit or advantage from the sales. In contrast with *Hytech*, where the defendant director was found to have covertly diverted a business opportunity from the company, failing to disclose both the fact of his receipt of money upon that opportunity as well as what he had done with the proceeds, there was no evidence of such concealment in the present case. The defendant averred that the plaintiff had not accounted for the option fees received, and stated that "we should be more careful with what he does with the sale proceeds", suggesting that the plaintiff might make dishonest use of the proceeds. To this, I note that the plaintiff had consistently made clear to Rudy in his letters prior to the sale that his purpose for trying to get a buyer for the Three Properties was for the purpose of raising funds to meet the most pressing payments; and had said in his email of 2 September 2011 that he was going ahead to sell the property "in view of the UOB bank's impending action against us due to our default". This was consistent with the plaintiff's lawyer's letter to the defendant's Indonesian lawyers dated 21 September 2011, informing the defendant that the proceeds of sale would be first used to settle the Company's debts before the surplus balance could be handed over to the Estate. These documents went toward establishing the plaintiff's motivation for effecting the sales. The separate issue of the application of sale proceeds was not before me.

63 Finally, I did not find that the manner in which the sales had been carried out, or the failure to seek the approval of the shareholders in general meeting, was conduct so careless and imprudent that a reasonable person would have concluded that it was dishonest and involving moral turpitude. I was hence hard-pressed to find that the plaintiff was not acting honestly, whether on a subjective or objective analysis. The question of whether he should have sold all Three Properties so rapidly,

instead of just one, is more suitably examined at the next stage of inquiry, to which I now turn.

Did the plaintiff act reasonably?

64 In determining whether or not the director has acted reasonably, one consideration is whether the director acted in the affairs of the company as he would have done in relation to his own affairs. This test has been used in the context of relief for trustees under s 60 of the Trustees Act (Cap 337, 2005 Rev Ed) (See *Chng Joo Tuan Neoh and Khoo Ee Lay v Khoo Tek Keong, Khoo Sian, and Cheah Inn Keong* [1932] SSLR 100 citing *Re Stuart, Smith v Stuart* [1897] 2 Ch 583). The experience and qualifications of the person in question are relevant, as exemplified by the decision in *Re Haji Ali bin Haji Mohamed Noor*, *Deceased* [1933] SSLR 253. There, a trustee who had caused loss to an estate of which she was co-executor was nevertheless found to have acted reasonably, having regard to the fact that she was a semi-illiterate woman who had negligible knowledge of business matters. Her co-executor was, however, found not to have acted reasonably as he was a successful businessman and had been appointed as trustee and executor precisely for his maturity and business experience.

65 Likewise, in assessing whether it was reasonable of the plaintiff to grant the options to purchase for the Three Properties at the price and speed at which he did, and to neglect to place the disposals before the shareholders in general meeting, I had regard to the fact that the plaintiff was not an experienced businessman. He had no other business interests aside from the directorships of the Merukh Companies which the deceased had invited him to hold. I was convinced he was not appointed to the directorships for his business experience or training, but rather based on the trust that the deceased had in him as a spiritual confidant (see above at [8]). With this in mind, I was minded to conclude that the plaintiff would indeed have acted likewise had the debts, and the Three Properties sold, been his own. Neither did I find that the plaintiff acted negligently in failing to find more buyers offering a higher price. I agreed with counsel for the plaintiff that the property market had been soft at the end of 2011 due to anticipated cooling measures (see above at [14]). Further, the sale price obtained on each of the Three Properties was very close to the open-market valuation given by the expert valuer in his affidavit of 25 October 2011, and not far off from the defendant's own desired minimum prices as stated at [14] above.

66 On these facts, I found that the plaintiff did act reasonably.

Having regard to all the circumstances, ought the plaintiff be fairly excused?

67 The final hurdle for the plaintiff was to convince the court that his actions were not only honest and reasonable but, in the circumstances of the case, ought fairly to be excused. It may be that the director is found to have acted both honestly and reasonably, but that the court finds that it ought not to excuse him, as was the case in *Vines*. There, the defendant director was, despite having been found to have acted honestly and reasonably, not excused from liability owing to his very critical position as the company's chief financial officer and the fact that the contraventions related to failure to disclose important information to the board. The court set out a number of factors going towards its determination of whether fair excuse ought to be granted, such as whether the person concerned obtained and followed competent advice before acting in contravention, whether the conduct was in accordance with some established practice, and whether the person concerned was paid for undertaking the contravening conduct. A critical factor was the seriousness of the contravention, which the court elaborated upon in the following terms (*per* Austin at [52]):

> [the seriousness of the contravention] has three components: the importance of the provision contravened, in terms of public policy (as in *Reiffel v ACN 075 839 266 Ltd* (2003) 45 ACSR 67);

the degree of flagrancy of the contravention; and the consequences of the contravention in terms of harm to others. In a case where the contravention amounts to mere inadvertent and temporary non-compliance with a procedural requirement having no damaging consequences (say, a contravention constituted by being late by a few days in filing a form) the court is likely to be much more ready to provide relief than in a case where the contravention is of a provision that has substantial importance from the point of view of public policy, or the defendant's contravention is reckless, or the contravening conduct has caused substantial loss.

68 In the present case, I did not find the plaintiff's breach of s 160 of the Act so egregious as to make a grant of relief a disservice to the administration of company law (see *Friedrich* at 199, *per* Tadgell J). Neither did I find his breach flagrant or deceitful, as it was evident that quite apart from any attempt to deliberately conceal the option grants and subsequent sales, the plaintiff had been nothing short of desperate to make contact with the Merukh family and update them on the progress of the marketing of the Three Properties, in the hopes of securing the Estate's advice and approval. The consequence of the breach was not severe as the defendants could hardly be said to have suffered losses, the sale prices secured for each of the Three Properties not falling more than $150,000 short of the minimum prices stipulated in the defendant's letter of 8 September 2012, and in any case higher than the original purchase prices. I also took into account the circumstances connected with the plaintiff's appointment as director, namely that he was little more than the deceased's trusted chauffeur.

Conclusion

69 In these circumstances, I was satisfied that the plaintiff had acted honestly and reasonably, and ought fairly to be excused from liability in relation to his decision to grant the options to purchase for the Three Properties. I hence granted the plaintiff the prospective relief sought under s 391(2) of the Act as against claims brought by the Company or on the Company's behalf. I ordered that he be relieved in whole from liability for any negligence, default, breach of duty or breach of trust in his capacity as director of the Company arising from his decision to grant the options to purchase for the Three Properties on 5, 6 and 9 September 2011, and the subsequent sales thereof, *vis-a-vis* the Company.

[note: 1] plaintiff's affidavit dated 13 October 2011 at pp 60-64

[note: 2] plaintiff's affidavit dated 13 October 2011 at pp 65-69

[note: 3] plaintiff's affidavit dated 13 October 2011 at pp 70-74

[note: 4] plaintiff's affidavit dated 13 October 2011 at pp 79-89

[note: 5] defendant's affidavit dated 10 January 2012 at para 28

[note: 6] defendant's affidavit dated 10 January 2012 at para 30

[note: 7] defendant's written submissions dated 23 March 2012 at para 26

[note: 8] defendant's written submissions dated 23 March 2012 at para 34(a)

[note: 9] defendant's written submissions dated 23 March 2012 at para 34(b)

[note: 10] originating summons no 895 of 2011 dated 13 October 2011, prayer 1

[note: 11] plaintiff's affidavit dated 13 October 2011 at pp 79-89

[note: 12] plaintiff's affidavit dated 13 October 2011 at para 9

[note: 13] plaintiff's affidavit dated 13 October 2011 at DL-11

[note: 14] Samantha Ng's affidavit dated 30 December 2011 at p 9

[note: 15] plaintiff's affidavit dated 13 October 2011 at paras 11-12

[note: 16] plaintiff's affidavit dated 13 October 2011 at para 7

[note: 17] plaintiff's affidavit dated 13 October 2011 at para 8

[note: 18] plaintiff's affidavit dated 13 October 2011 at pp 362- 444

[note: 19] plaintiff's affidavit dated 13 October 2011 at pp 438-440

[note: 20] plaintiff's affidavit dated 13 October 2011 at p 482

[note: 21] plaintiff's affidavit dated 13 October 2011 at pp 365-366

[note: 22] plaintiff's affidavit dated 13 October 2011 at p389

[note: 23] plaintiff's affidavit dated 13 October 2011 at pp 408-409

[note: 24] plaintiff's affidavit dated 13 October 2011 at p 443

[note: 25] plaintiff's affidavit dated 13 October 2011 at pp 445-454

[note: 26] plaintiff's affidavit dated 13 October 2011 at p 78

[note: 27] Cited in *Vines* at [11]

[note: 28] Cited in *Vines* at [12]