Creanovate Pte Ltd and Another v Firstlink Energy Pte Ltd and Another Appeal [2007] SGCA 45

Case Number : CA 114/2006, 115/2006

Decision Date : 24 September 2007

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Tan Teng Muan and Loh Li Qin (Mallal & Namazie) for the appellants in Civil Appeal No 114 of 2006; Chopra Sarbjit Singh and Suja Michelle Sasidharan (Lim & Lim) for the appellant in Civil Appeal No 115 of 2006; Low Chai Chong, Loh Kia Meng and Yeo Shuyuan Joanna (Rodyk & Davidson LLP) for the respondent

Parties : Creanovate Pte Ltd; Tang Kok Heng — Firstlink Energy Pte Ltd

Companies – Directors – Duties – Directors of company having interest in another company – Whether directors breached fiduciary duties to first company and ss 162 and 163 of Companies Act by causing it to advance moneys to other company such that first company suffered loss as result – Whether loan within meaning of ss 162 and 163 of Companies Act extending beyond loans in conventional sense – Sections 157, 162, 163 Companies Act (Cap 50, 1994 Rev Ed)

Contract – Contractual terms – Conditions – Whether other company's failure to fulfil conditions precedent under agreement with first company amounting to total failure of consideration – Whether first company entitled to refund of moneys advanced to other company

24 September 2007

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 The respondent in both Civil Appeal No 114 of 2006 ("CA 114") and Civil Appeal No 115 of 2006 ("CA 115"), Firstlink Energy Pte Ltd, is a wholly-owned subsidiary of Firstlink Investments Corporation Limited ("FICL"). It served as a vehicle for FICL in respect of the latter's venture into the coal industry.

2 The first appellant in CA 114, Creanovate Pte Ltd ("Creanovate"), is a limited exempt private company incorporated in Singapore on 27 July 2004. The appellant in CA 115, Ngu Tieng Ung ("Ngu"), and the second appellant in CA 114, Tang Kok Heng ("Tang"), were former directors of the respondent. Tang was also the majority shareholder of Creanovate.

3 The respondent, an Indonesian company formed by Tang (PT Perdana Andalan Coal ("PT PAC")) and Creanovate entered into a subscription agreement on 8 January 2005 ("the Subscription Agreement") for the purposes of coal mining investment in Indonesia. Tang and Ngu, who had been appointed as directors of the respondent, managed the respondent's affairs where coal-related activities were concerned. The full factual background is set out below (at [7]–[30]).

4 In the court below, the respondent succeeded in its claim against Creanovate (Suit No 521 of 2005) for the aggregate sum of $3.26m. The respondent also succeeded in its claim for another sum of $1m which had been lent to Creanovate.

5 In Suit No 523 of 2005, the court below also allowed the respondent's claim against Ngu and Tang for the sum of $4.26m. The trial judge ("the Judge") found Ngu and Tang liable for breach of

their fiduciary duties as directors of the respondent. The Judge also held that Ngu and Tang would be liable to pay any shortfall up to the amount of $3.32m (being the aggregate sum of $4.26m less a sum of $940,000, as the Judge was of the view that the respondent had failed to adequately plead how Ngu and Tang could be liable to account for this sum when they were not on the board of the respondent at the time this sum was advanced) in the event that Creanovate did not pay the aggregate sum of $4.26m in full.

6 At the hearing before us, we dismissed both CA 114 and CA 115 with costs and the usual consequential orders. We now give our reasons for doing so.

Factual background

7 As part of FICL's plan to enter the natural resources industry, FICL acquired a 56.22% stake in Green Salt Group Ltd ("Green Salt"), which had certain investments in salt mine operations in China sometime in November 2003. The acquisition of the stake in Green Salt entailed FICL issuing approximately 13% of its enlarged share capital to Asiacorp Development Ltd, a company in which Ngu was one of the substantial shareholders. As a result, Ngu, who was then a director of a public listed company in Malaysia, became a substantial shareholder of FICL. On 1 July 2004, Ngu was appointed to the Executive Committee of FICL. It was also around this time that Tang approached Ngu with a business proposal for coal trading.

8 On 27 July 2004, Creanovate was incorporated. Tang, as we have already noted (at [2] above), was the majority and controlling shareholder of Creanovate.

9 On 10 August 2004, Tang made a presentation to Darren Kee Chit Huei ("Kee"), the executive director of FICL at that point in time, in respect of the business proposal for coal trading. The only other director of FICL at the material time was Joe Wong Siu Kay ("Wong").

10 Very shortly after, on 19 August 2004, the respondent, Creanovate and Tang entered into a joint venture agreement dated 19 August 2004 ("JVA"). Under the JVA, Creanovate and Tang were obligated to supply coal exclusively to the respondent and were authorised to act as the respondent's agents/representatives in the purchase and sale of coal. The respondent was to provide financing for coal trading, whereas Creanovate and Tang were to undertake the operational aspects of the business. The trading profits were to be shared between the respondent and Creanovate in the proportions of 40% and 60% respectively. On 24 August 2004, the JVA was presented to FICL's board of directors.

11 Under cl 3 of the JVA, the respondent was required to advance $171,000 to Creanovate to "set up basic communications, living and transport infrastructure at the stock pile site prior to the start of the business". The respondent therefore disbursed a total of $170,000 ($30,000 on 19 August 2004, $35,000 on 27 September 2004, $15,000 on 5 October 2004 and $90,000 on 21 October 2004) to Creanovate. These moneys appear to have been lost and have since been written off entirely in FICL's accounts for the financial year ending 31 December 2004. These advances did not form part of the respondent's claims against Creanovate.

12 However, even before the coal trading venture under the JVA commenced, Tang, acting on behalf of Creanovate, started to request for more advances from the respondent. On 1 September 2004, Tang sought an advance of $30,000 from the respondent as he "need[ed] the money urgently to settle some urgent outstanding matters". This sum was purportedly for coal mining.

13 On 6 September 2004, Creanovate (through Tang) wrote to the respondent, inviting the

latter to participate in a coal mining investment in Indonesia by taking up a minimum 25% shareholding in Creanovate's subsidiary. In the same letter, Tang requested an advance of $2m from the respondent to participate in a coal mining investment in Indonesia. Tang also requested $940,000 by the next day "to meet our financial obligations". The respondent accordingly advanced $940,000 to Creanovate on 7 September 2004.

14 In the court below, an officer from the Overseas Chinese Banking Corporation ("OCBC Bank") gave evidence for the respondent. The bank officer, Mr Andrew Lam, testified that on 7 September 2004, Tang went to OCBC Bank to encash two cheques, one for $500,000 and the other for $250,000. Upon encashment, the proceeds were used to purchase two cashier's orders for $500,000 and $250,000 in favour of OCBC Securities Pte Ltd and UOB Kay Hian Pte Ltd, respectively. The named applicant for the cashier's orders was Creanovate. The cashier's orders were duly issued. However, the next day, the two cashier's orders were re-deposited into Creanovate's account. Immediately thereafter, Tang encashed two cheques for $550,000 and $200,000. The proceeds from the $550,000 cheque were used by Ngu to purchase a cashier's order for $500,000 in favour of Topbound Pte Ltd, a company in which he was a controlling shareholder. The remaining moneys were pocketed in cash.

15 In the court below, the respondent contended that it was therefore self-evident that whatever might have been the explanation for re-depositing the cashier's orders back into Creanovate's account, there could be no doubt that the moneys received by Creanovate were never intended to be used for coal investments and had been diverted for Tang's and Ngu's personal use.

16 Tang and Ngu were appointed as directors of the respondent on 9 and 15 September 2004 respectively. Prior to Tang's appointment as a director of the respondent, Kee and Wong had been the only directors. Kee's evidence was that Tang and Ngu then took full control of the respondent's affairs as Kee and Wong had their own respective roles in FICL's other businesses.

17 Shortly thereafter, Creanovate asked for further advances. On 3 and 17 November 2004, the respondent advanced the sums of $500,000 and $280,000, respectively, to Creanovate. The respondent adduced evidence which showed that these two advances were also withdrawn by Tang in cash on the very day that they were credited into Creanovate's account.

18 All these advances were made prior to the parties*, ie*, the respondent, Creanovate and PT PAC, entering into the Subscription Agreement on 8 January 2005. According to the respondent, the Subscription Agreement was the product of discussions between Ngu and Tang. Tang had represented that PT PAC had a 60% equity interest in PT Kencana Artha Buana ("PT KAB"), which in turn had a 72.5% equity interest in PT Senamas Energuido Mula ("PT SEM"). Tang had also represented that PT KAB and PT SEM supposedly had concessions to extract coal in southern Kalimantan.

19 Under the terms of the Subscription Agreement, the respondent was to advance a sum of $2m to Creanovate, the aggregate of $1.72m which had already been advanced being taken into account. Under cl 2(2) of the Subscription Agreement, the sums advanced to Creanovate would have to be returned if the conditions precedent as set out (*ie*, confirmation from a qualified authority/solicitor that PT PAC had a 60% equity interest in PT KAB, which had a 72.5% equity interest in PT SEM) were not met by 22 February 2005. Subject to the satisfaction of the conditions precedent, the respondent would subscribe for $3.5m worth of exchangeable bonds (which could be converted into a 30% equity interest in PT PAC) using the $2m advance and an additional $1.5m payable upon completion.

20 On 18 January 2005, the respondent advanced $250,000 to Creanovate. The respondent advanced another $300,000 to Creanovate on 19 January 2005, and another $280,000 on 20 January 2005. In the court below, evidence was adduced by the respondent which showed that Tang's wife, Lim Lee Foon, received $355,000 on 19 January 2005 by encashing three separate cheques drawn on Creanovate's bank account.

21 On 3 February 2005, the respondent advanced a further sum of $710,000 to Creanovate. This was once again withdrawn by Tang the very same day. By this time, the sums advanced by the respondent to Creanovate amounted to $3.26m, which was far in excess of the $2m contemplated under the Subscription Agreement.

22 On 21 February 2005, Ngu and Tang requested (in the respondent's name) $1m from FICL purportedly for coal mining business in Indonesia. According to the appellants, this sum was needed to fund a shipment of coal to Paul Oil Co Ltd. In the letter, Ngu and Tang also undertook to FICL's board of directors that the sum would be repaid to FICL no later than two months from the date of the letter. Evidence was adduced by the respondent in the court below which showed that the moneys had been used by Ngu's brother, Ngu Tieng Chai, to purchase a $1m cashier's order in the name of Kim Eng Securities Pte Ltd, a stockbroking firm the very next day.

23 The respondent wrote to Creanovate on 7 March 2005 reminding it of its obligations under the Subscription Agreement. Tang replied on 9 March 2005 and requested an extension of the deadline to 15 March 2005. On 15 March 2005, Tang wrote to the respondent purporting to attach a legal opinion on the Indonesian coal mines structure. In the letter, Tang stated that there were still some outstanding regulatory matters, namely, the issue of whether there had to be a conversion of PT KAB's legal status before PT PAC could acquire shares therein and also regulatory approval of the change in shareholders of PT SEM. In the court below, the respondent contended that the purported legal opinion called for an explanation from the appellants since it was allegedly given by one "Zacky Syarif", a lawyer from the Indonesian law firm, Syarif, Thaharsyah & Partner, when Zacky Syarif was, to the respondent's knowledge, an employee of PT PAC.

24 On 5 April 2005, FICL resolved to cancel the respondent's subscription of exchangeable bonds in Creanovate and convert the investment into a 51% direct equity interest in PT PAC to be held by Firstlink Coal Pte Ltd, another wholly-owned subsidiary of FICL. According to the minutes of FICL's board meeting, FICL decided to do so because:

> [FICL's] management on its own initiative had obtained a legal opinion from an Indonesia [*sic*] legal firm, which states that the corporate structure and the joint venture arrangements are generally in place. However, the 60% shares in PT KAB is [*sic*] currently held by an individual on behalf of PAC. But ... Indonesian law does not recognise the concept of trusts and hence it is not legally binding.

25 Pursuant to the above board decision of 5 April 2005, the respondent, Creanovate, PT PAC and one Benhard Siagian ("Benhard") entered into a settlement agreement ("the Settlement Agreement"). There is a dispute as to when the Settlement Agreement was entered into. The Settlement Agreement provided that the Subscription Agreement would be terminated and be of no effect whatsoever. The Settlement Agreement also provided that the sums advanced by the respondent to Creanovate pursuant to the Settlement Agreement would be settled by the transfer of 51% of the shares in PT PAC ("the Settlement Shares") from Creanovate to the respondent. The Settlement Agreement was conditional upon the fulfilment of the condition precedent that the relevant Indonesian authority approve the transfer of the Settlement Shares, failing which Creanovate had to immediately refund the "Advance Sum". Ngu signed the Settlement Agreement on the

respondent's behalf. However, FICL's board took the view that "notwithstanding the Board's endorsement to enter into the settlement agreement, ... Ngu [was] not authorised to sign as Creanovate had misled the [respondent] in view of the missing mine" (see the minutes of the board meeting of 18 May 2005).

26 On 19 April 2005, Tang was dismissed as a director of the respondent. He resigned on the same date. On 18 May 2005, FICL's board decided that Tang would be given a week to come up with a satisfactory scheme to find a replacement mine (to make up for the loss of the coal mine which PT SEM had sold off despite the Subscription Agreement), failing which FICL would terminate the Subscription Agreement and commence legal action to recover the advances made to Creanovate. No replacement mine was found and the respondent commenced the suits in the court below.

27 Ngu was absent from FICL's annual general meeting ("AGM") on 28 April 2005. According to the minutes of that AGM, the board resolved that Ngu was to confirm whether the rumours that he was allegedly under investigation by the Securities Commission of Malaysia and that his passport had been impounded by the relevant authorities in Malaysia were true. According to the minutes of a FICL board meeting on 6 May 2005:

> It was noted through a news article in Malaysia that [Ngu] ... had been charged by the Sessions Court Malaysia on 5 May 2005 for alleged criminal breach of trust amounting to RM37 million involving a construction consultancy company eight years ago.
>
> In view of the above, [Ngu] through a teleconference, had tendered his resignation as CEO/MD with immediate effect. However, he had requested to remain as a Non-Independent Non-Executive Director on the board. [Ngu] confirmed that he would send his resignation letter as CEO/MD to the [respondent] later. The Board had unanimously accepted his resignation as CEO/MD and agreed that he remains as Non-Independent Non-Executive Director on the board.

28 On 5 May 2005, FICL wrote to Ngu and Tang for the return of the $1m advance (see [22] above). By a letter dated 11 May 2005, Creanovate (through Tang) wrote to FICL stating:

> [W]e will return SGD700,000 by this Friday, 13 May 2005 in relation to the advancement of SGD1,000,000 for coal trading purpose [*sic*]. The balance of SGD300,000 will be treated as balance of settlement for the subscription of Exchangeable Bond[s] in Creanovate.

29 On 12 May 2005, Creanovate repaid the respondent $90,000. Ngu also returned a $150,000 advance that he had taken on 30 November 2004, purportedly on behalf of Creanovate.

30 On 31 May 2005, Kee, on behalf of the respondent, made a formal demand to Creanovate for the return of $3.26m. In the letter, Kee said that the Subscription Agreement was null and void as a result of the misrepresentation that Creanovate was the owner of the coal mine owned by PT SEM. There was no response from Creanovate or Tang to this letter. At a FICL board meeting on 3 June 2005, Ngu informed the board that he "would discuss the repayment of the S$1 million loan to Creanovate and address all outstanding issues with [Tang] and would revert to the Board accordingly". Notwithstanding these assurances, no action was taken by Ngu. The respondent then commenced the present proceedings.

The decision in the court below

31 As a preliminary observation, we note that at the conclusion of the trial, the appellants had made a submission of no case to answer. In so far as Suit No 521 of 2005 (which culminated in

CA 114) was concerned, the Judge granted judgment to the plaintiff against Creanovate for the total sum of $4.26m. We emphasise, at the outset, that we agree fully with the Judge's findings as well as decision (see generally *Firstlink Energy Pte Ltd v Creanovate Pte Ltd* [2007] 1 SLR 1050 ("GD"), especially at [40]–[48]) and *therefore do not deal further with this particular appeal*. The focus, therefore, from this point onwards in the present judgment is on Suit No 523 of 2005 (or, rather, CA 115).

32 In so far as Suit No 523 of 2005 was concerned, the Judge granted judgment against Ngu and Tang for the sum of $4.26m less $940,000 as, in his view, the respondent's claim for that particular sum failed. The Judge segregated the respondent's total claim of $4.26m as follows (see GD at [49]):

(a) $940,000 paid on 7 September 2004 ("the first payment");

(b) $500,000 and $280,000 (a total of $780,000) paid on 3 November 2004 and 17 November 2004, respectively ("the second series of payments");

(c) $250,000, $300,000, $280,000 and $710,000 (a total of $1.54m) paid from 18 January 2005 to 3 February 2005 ("the third series of payments"); and

(d) $1m paid on 21 February 2005 ("the fourth payment").

33 In respect of the first payment, the Judge dismissed the respondent's claim on the ground that Ngu and Tang were not even directors of the respondent at the time the payment was made (see GD at [50]). The Judge was also of the view that the respondent's pleadings (or rather, the lack thereof) were fatal to its claim against Ngu and Tang for the sum of $940,000. Although the respondent had pleaded in para 9 of its amended statement of claim that Ngu and Tang were liable to account to the respondent for the sum of $4.26m as constructive trustees on the ground of "knowing receipt", the respondent failed to plead that Ngu and Tang knew that the moneys which they had received were traceable to a breach of duty. Secondly, although the respondent alleged breach of fiduciary duty and/or trust in relation to the aggregate sum of $4.26m (and therefore of the $940,000 as well), the respondent failed to plead any material facts to show how Ngu and Tang could be said to owe any such duties in relation to the payment of $940,000 when they were not on the board of the respondent at the time the moneys were advanced (see GD at [57]).

34 In respect of the second and third series of payments, the Judge found that these payments constituted "loan[s]" within the meaning of ss 162 and 163 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act") (GD at [62]–[66]) and that, therefore, Ngu and Tang were liable to effect repayment. The Judge also found that notwithstanding that the second series of payments had been made by the respondent to Creanovate even before the Subscription Agreement had been entered into, the respondent was not wrong to have pleaded that Ngu and Tang authorised the release of the moneys before the conditions precedent in the Subscription Agreement were fulfilled (GD at [68]).

35 For the $1m claim in respect of the fourth payment, the Judge considered this payment only in the context of the respondent's case against Ngu and Tang. The Judge took the view (GD at [82]) that the letter dated 21 February 2005 from the respondent (which was signed by Ngu and Tang as directors of Creanovate) to FICL showed that the moneys were to be advanced to Creanovate. The Judge was of the view that the $1m was clearly a loan which fell foul of the prohibitions in ss 162 and 163 of the Act for two reasons. First, Tang had said that he would return $700,000 of the $1m advance while treating the balance of $300,000 as balance of settlement under the Subscription Agreement. Second, at a board meeting on 3 June 2005, Ngu had said that he would discuss the

repayment of the $1m loan.

36 The Judge also noted at [85] of the GD that the authorisation of the second and third series of payments and the fourth payment constituted a breach of the fiduciary duties owed by Ngu and Tang to the respondent as directors.

Our decision

37 The crux of the appellants' case was that the advances of $4.26m to Creanovate were for the purposes of the intended coal business in Indonesia. It is true that the Judge did not (owing to reasons centring on the state of the pleadings) make a determinative finding that the coal investment was a sham or that the Subscription Agreement was in substance a loan transaction masquerading as a subscription for exchangeable bonds. However, his review of the evidence does, in our view, more than deal with this particular issue in *substance*; in particular, the following extract from his judgment is extremely significant and bears quoting in full (see GD at [72]):

> In the course of the trial, the plaintiff [the respondent in the present appeal] had called as witness a bank officer from the Overseas Chinese Banking Corporation with which Creanovate had a bank account. *His evidence showed that moneys which the plaintiff had advanced to Creanovate had, after they were banked in, been diverted to Ngu and Tang, and, in several instances, for payment to Ngu's stockbrokers*. It was also shown that the withdrawals were by cash cheques. I surmised that this was done *to avoid detection of the real use of the money.* I formed this impression because initial withdrawals by cheque for the purpose of purchasing cashier's orders in favour of Ngu's stockbrokers *were reversed as if to correct an error but the cashier's orders were subsequently obtained nevertheless using withdrawals by cash cheques instead! The reversal of the initial withdrawals appeared to be a devious attempt to mislead.*[emphasis added]

38 Furthermore, even though the appellants had the opportunity in the court below to rebut the evidence adduced by the respondent, which, we must note, was overwhelmingly against their favour, the appellants choose to make a submission of no case to answer. The views of M Aronson & J Hunter in *Litigation: Evidence and Procedure* (Butterworths, 6th Ed, 1998) at p 732 were cited by this court in *Bansal Hermant Govindprasad v Central Bank of India* [2003] 2 SLR 33 at [10]. The authors had noted thus:

> A decision by a defendant not to adduce evidence in his defence is a decision that ought not to be lightly taken. Where a defendant makes such an election, the result will be that the court is left with only the plaintiff's version of the story. So long as there is some prima facie evidence that supports the essential limbs of the plaintiff's claim(s), then the failure by the defendant to adduce evidence on his own behalf would be fatal to the defendant.

Reference may also be made to this court's decision in *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR 745, especially at [5]–[6].

39 In our view, there was overwhelming evidence adduced in the court below which suggested that Ngu and Tang had in fact diverted the $4.26m advanced by the respondent to Creanovate for their own benefit or, for that matter, to their stockbrokers. The appellants' decision to make a submission of no case to answer was therefore highly prejudicial to their defence.

40 Indeed, that there had been a flagrant and lamentable misuse of the respondent's funds was confirmed once again before us as counsel for the respondent, Mr Low Chai Chong, took us through

the relevant documents. In contrast, counsel for the appellants was unable to explain, when pressed by us, what had happened to the funds and when and how they had been invested in coal mining. This was not surprising, given that the evidence shows that the appellants had appropriated the funds for their personal use.

41 In our view, the appropriations of the funds for the personal use of Tang and Ngu were clear breaches of their fiduciary duties as directors of the respondent, both in equity and under s 157 of the Act. Whilst this abuse could be characterised in the manner which the Judge did (at [34]–[35] above), the plain fact is that there was a *prima facie* abuse of funds and a consequent breach of both fiduciary duties as well as directors' duties. Indeed, counsel for the appellants spent much effort before us utilising procedural arguments of the most technical (and, we should add, unmeritorious) nature in order to avoid the substantive issue of abuse of the respondent's funds. This was a classic example of a totally unmeritorious resort to procedural arguments (especially those centring on pleadings) to avoid liability for an unanswerable claim on the merits.

42 We therefore agree with the Judge's decision in Suit No 523 of 2005. Indeed, we are firmly of the view that Ngu and Tang are liable to indemnify the respondent for the losses caused by their breach of their fiduciary duties as the respondent's directors. However, there is one issue of law in the Judge's finding that we have to respectfully disagree with. The Judge held that Ngu and Tang were also liable for the sums which had been advanced by the respondent to Creanovate for the purpose of investing the same in a coal mining venture on the ground that the advances were "loan[s]" made to them in breach of ss 162 and 163 of the Act. In our view, the Judge gave to the expression "loan" in those sections a meaning that was not intended by the Legislature.

Sections 162 and 163 of the Act

The provisions

43 It would be appropriate to first set out the relevant provisions in full.

44 Sections 162 and 163 of the Act read as follows:

> **Loans to directors.**
>
> **162.** —(1) A company (other than an exempt private company) *shall not make a loan* to a director of the company or of a company which by virtue of section 6 is deemed to be related to that company*, or enter into any guarantee or provide any security in connection with a loan made to such a director by any other person* but nothing in this section shall apply —
>
> (*a*) *subject to subsection (2), to anything done* to provide such a director with funds to meet expenditure incurred or to be incurred by him for the purposes of the company or for the purpose of enabling him properly to perform his duties as an officer of the company;
>
> (*b*) *to provide a loan* to such a director who is engaged in the full-time employment of the company or of a corporation that is deemed to be related to the company, as the case may be, for the purpose of purchasing or otherwise acquiring a home occupied or to be occupied by the director, except that not more than one such loan may be outstanding from the director at any time;
>
> (*c*) *to any loan made* to such a director who is engaged in the full-time employment of the company or of a corporation that is deemed to be related to that company, as the case may be,

where the company has at a general meeting approved of a scheme for the making of loans to employees of the company and the loan is in accordance with that scheme; or

(*d*) *to any loan made* to such director in the ordinary course of business of a company whose ordinary business includes the lending of money or the giving of guarantees in connection with loans made by other persons if the activities of that company are regulated by any written law relating to banking, finance companies or insurance or are subject to supervision by the Monetary Authority of Singapore.

(2) Subsection (1) (*a*) or (*b*) shall not authorise the making of any loan, or the entering into any guarantee, or the provision of any security except —

(*a*) with the prior approval of the company given at a general meeting at which the purposes of the expenditure and the amount of the loan or the extent of the guarantee or security, as the case may be, are disclosed; or

(*b*) on condition that, if the approval of the company is not given as aforesaid at or before the next following annual general meeting, the loan shall be repaid or the liability under the guarantee or security shall be discharged, as the case may be, within 6 months from the conclusion of that meeting.

(3) Where the approval of the company is not given as required by any such condition the directors authorising the making of the loan or the entering into the guarantee or the provision of the security shall be jointly and severally liable to indemnify the company against any loss arising therefrom.

(4) Where a company contravenes this section any director who authorises the making of any loan, the entering into of any guarantee or the providing of any security contrary to this section shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 2 years.

(5) Nothing in this section shall operate to prevent the company from recovering the amount of any loan or amount for which it becomes liable under any guarantee entered into or in respect of any security given contrary to this section.

(6) For the purpose of subsection (1), the reference to director therein includes a reference to his spouse, son, adopted son, step-son, daughter, adopted daughter and step-daughter.

Prohibition of loans to persons connected with directors of lending company

163. —(1) Subject to this section, it shall not be lawful for a company (other than an exempt private company) —

(*a*) to make a loan to another company; or

(*b*) to enter into any guarantee or provide any security in connection with a loan made to another company by a person other than the first-mentioned company,

if a director or directors of the first-mentioned company is or together are interested in 20% or more of the total number of equity shares in the other company (excluding treasury shares).

(2) Subsection (1) shall extend to apply to a loan, guarantee or security in connection with a

loan made by a company (other than an exempt private company) to another company where such other company is incorporated outside Singapore, if a director or directors of the first-mentioned company —

(*a*) is or together are interested in 20% or more of the total number of equity shares in the other company (excluding treasury shares); or

(*b*) in a case where the other company does not have a share capital, exercises or together exercise control over the other company whether by reason of having the power to appoint directors or otherwise.

(3) For the purposes of this section —

(*a*) where a company makes a loan to another company or gives a guarantee or provides security in connection with a loan made to another company, a director or directors of the first-mentioned company shall not be taken to have an interest in shares in that other company by reason only that the first-mentioned company has an interest in shares in that other company and a director or directors have an interest in shares in the first-mentioned company; and

(*b*) "interest in shares" has the meaning assigned to that expression in section 7.

(4) This section shall not apply —

(*a*) to anything done by a company where the other company (whether that company is incorporated in Singapore or otherwise) is its subsidiary or holding company or a subsidiary of its holding company; or

(*b*) to a company, whose ordinary business includes the lending of money or the giving of guarantees in connection with loans made by other persons, to anything done by the company in the ordinary course of that business if the activities of that company are regulated by any written law relating to banking, finance companies or insurance or are subject to supervision by the Monetary Authority of Singapore.

(5) For the purposes of this section, an interest of a member of a director's family shall be treated as the interest of the director and the words "member of a director's family" shall include his spouse, son, adopted son, step-son, daughter, adopted daughter and step-daughter.

(6) Nothing in this section shall operate to prevent the recovery of any loan or the enforcement of any guarantee or security whether made or given by the company or any other person.

(7) Where a company contravenes this section, any director who authorises the making of any loan, the entering into of any guarantee or the providing of any security contrary to this section shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 2 years.

[emphasis added]

Their background

45 The legislative history of these two provisions is as follows. Section 162 of the Act was originally introduced in 1966 as s 133 of the Companies Act 1967 (No 42 of 1967) and (as the marginal

note to s 133 clearly indicates) was based on s 190 of the Companies Act 1948 (c 38) (UK) ("the 1948 UK Act") as well as s 125 of the Australian Companies Acts 1961 (reproduced in part below at [67]). In so far as the latter provision is concerned, as a seminal Australian textbook points out, "[t]his section [*viz*, s 125] is *newly imported from England* into Australian companies legislation, *though with rather more elaboration* so as to widen the exception to the general prohibition than its counterpart in the English legislation" (see W E Paterson & H H Ednie, *Australian Company Law* (Butterworths, 1962) at p 348) [emphasis added]. In another leading Australian text, it has been observed that s 125 of the Australian Companies Act 1961 "is based on the English section [*viz*, s 190 of the 1948 UK Act] but paras. (*e*) and (*f*) of sub-s. (1) and sub-ss. (4)–(8) inclusive are not to be found in the English section" (see The Honourable Mr Justice Wallace & J McI Young, *Australian Company Law and Practice* (The Law Book Company Limited, 1965) at p 397).

46 However, the fact remains that the *original* source of s 162 of the Act is the *UK* provision (*ie*, s 190 of the 1948 UK Act), albeit with the elaboration furnished by s 125 of the Australian legislation (see also *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 2007) at para 9.470). As a leading local reference work has put it (see *Woon's Corporations Law* (LexisNexis, 2006) at paras 2855–2900):

> In the UK the Cohen Committee (see Cohen Committee Report 1945 (Report of the Committee on Company Law Amendment) (Cmnd 6659)) recommended that *if a director can offer good security for a loan it is no hardship to him to borrow elsewhere. He should not be given better terms by the company than are available commercially* [see also [53] below]. *Thus UK 1948 s 190* was passed, *on which sub-ss (1) to (3) of s 162* [of the Act] *are indirectly based (by way of Aus 1961 s 125). Subsections (4) and (5) of s 162 are taken from the Australian section.* [emphasis added]

47 Section 163 of the Act, on the other hand, was introduced by the Singapore Parliament in 1974 *via* the Companies (Amendment) Act 1974 (No 10 of 1974) (and, for a local decision thereon, see the Singapore Court of Appeal decision of *Dart Sum Timber (Pte) Ltd v Bank of Canton Ltd* [1982-1983] SLR 46, reversing the High Court's decision (see *The Bank of Canton Ltd v Dart Sum Timber (Pte) Ltd* in [1981] 2 MLJ 58)). In introducing this particular amendment at the Second Reading stage, the Minister for Finance, Mr Hon Sui Sen, observed thus (see *Singapore Parliamentary Debates, Official Report* (27 March 1974) vol 33 at cols 955–956 and 958):

> The reasons for introducing this Bill are the same as those I mentioned in introducing the amending Acts of 1971 and 1973, namely, to give effect to recommendations by the U.K. Jenkins Committee Report on Company Law Reform [see United Kingdom, *Report of the Company Law Committee* (Cmnd 1749, 1962) (Chairman: Lord Jenkins) ("the *Jenkins Committee Report*")], particularly insofar as these recommendations affect the principle of greater disclosure of information by companies as a safeguard against malpractices and the powers and duties of directors.
>
> …
>
> ... The purpose of this amendment is to close a loop-hole which at present exists under section 133 of the [Companies Act 1967, presently s 162 of the Act] which prohibits a company from making loans to its directors. This section can be circumvented by making loans to a company in which a director of the lending company has effective control.

48 Indeed, the *Jenkins Committee Report* (referred to in the preceding paragraph) recommended that s 190 of the 1948 UK Act "should be strengthened" (see the *Jenkins Committee Report* at

para 98; see also *id* at para 99).

49 A leading local text which we have already referred to also furnishes further legislative background, as follows (see *Woon's Corporations Law* ([46] *supra*) at para 2953):

> This section [*ie*, s 163 of the Act], as originally enacted in 1974, was taken from [the] UK Companies Bill 1973, which was not passed. See now UK 1985 ss 330–346 and Aus 1981 s 230 which both include references to loans to connected companies. Singapore s 163 was substantially re-enacted in 1984, retaining only sub-s (1), and was amended again in 1987.

The meaning of "loan"

50 The principal argument relied upon by the Judge in support of his view that a "loan" within the meaning of ss 162 and 163 of the Act extends beyond loans in the conventional sense rests on the first exception as embodied in s 162(1)(*a*) of the Act (hereafter referred to as "Exception (*a*)"). The Judge also reasoned that "[t]here is no reason why a narrower meaning of 'loan' should be adopted for s 163 when it was intended as an extension of the prohibition in s 162" (see GD at [67]; see also generally [64]–[66]).

51 A loan in the conventional sense (or, as the appellants put it in the court below, "a loan *simplicter*" (see GD at [62])) is succinctly described in *Chitty on Contracts*, vol 2 (H G Beale gen ed) (Sweet & Maxwell, 29th Ed, 2004) at para 38-223, as follows (in a passage that was also cited by the Judge in GD at [63]):

> A contract of loan of money is a contract whereby one person lends or agrees to lend a sum of money to another, in consideration of a promise express or implied to repay that sum on demand, or at a fixed or determinable future time, or conditionally upon an event which is bound to happen, with or without interest.

52 Whilst attractive at first blush, we were not, in the final analysis and with the greatest respect, persuaded by the argument as well as reasoning of the Judge as set out at [50] above.

53 First, it is clear from the relevant UK company law reform report that forms the backdrop to the UK provision upon which s 162 is based (*viz*, s 190 of the 1948 UK Act) that only loans in the conventional sense were intended to be covered. In this regard, reference may be made to the report which formed the immediate and direct backdrop to s 190 of the 1948 UK Act (or, more accurately, s 35 of the Companies Act 1947 (c 47) (UK), which was the immediate predecessor of s 190 of the 1948 UK Act). This is the *Report of the Committee on Company Law Amendment* (Cmnd 6659, June 1945) (chaired by Mr Justice Cohen (as he then was), and popularly known as "the *Cohen Committee Report*"). Paragraph 94 of the report is particularly apposite, where it is observed thus:

> We consider it *undesirable* that directors should *borrow* from their companies. If the director can offer good security, it is no hardship to him to *borrow* from other sources. If he cannot offer good security, it is *undesirable* that he should obtain from the company *credit* which he would not be able to obtain elsewhere. Several cases have occurred in recent years where directors have *borrowed money* from their companies on inadequate security and have been *unable to repay the loans*. We accordingly recommend that, *subject to certain exceptions*, it should be made illegal for any loan to be made by a company or by any of its subsidiary companies or by any other person under guarantee from or on security provided by the company or by any of its subsidiary companies to any director of the company. [emphasis added]

54 It is clear from the passage just quoted that the Cohen Committee was referring to loans in the conventional sense only.

55 Section 190 of the 1948 UK Act itself reads as follows:

> Prohibition of loans to directors.
>
> **190.**—(I) It shall not be lawful for a company to make a loan to any person who is its director or a director of its holding company, or to enter into any guarantee or provide any security in connection with a loan made to such a person as aforesaid by any other person :
>
> Provided that nothing in this section shall apply either —
>
> (*a*) to anything done by a company which is for the time being an exempt private company; or
>
> (*b*) to anything done by a subsidiary, where the director is its holding company; or
>
> (*c*) subject to the next following subsection, to anything done to provide any such person as aforesaid with funds to meet expenditure incurred or to be incurred by him for the purposes of the company or for the purpose of enabling him properly to perform his duties as an officer of the company; or
>
> (*d*) in the case of a company whose ordinary business includes the lending of money or the giving of guarantees in connection with loans made by other persons, to anything done by the company in the ordinary course of that business.
>
> (2) Proviso *(c)* to the foregoing subsection shall not authorise the making of any loan, or the entering into any guarantee, or the provision of any security, except either —
>
> (*a*) with the prior approval of the company given at a general meeting at which the purposes of the expenditure and the amount of the loan or the extent of the guarantee or security, as the case may be, are disclosed; or
>
> (*b*) on condition that, if the approval of the company is not given as aforesaid at or before the next following annual general meeting, the loan shall be repaid or the liability under the guarantee or security shall be discharged, as the case may be, within six months from the conclusion of that meeting.
>
> (3) Where the approval of the company is not given as required by any such condition, the directors authorising the making of the loan, or the entering into the guarantee, or the provision of the security, shall be jointly and severally liable to indemnify the company against any loss arising therefrom.

56 The interpretation to the effect that s 190 of the 1948 UK Act only covered loans in the conventional sense is confirmed by the fact that the above provision was *amended* in order to *extend* the concept of a loan in the conventional sense to *quasi-loans* (see generally ss 330–341 of the UK Companies Act 1985 (c 6) (UK) ("the 1985 UK Act")), which position has been modified under the new Companies Act 2006 (c 46) (UK) to the extent that, *inter alia*, loans, quasi-loans and credit transactions will generally require the approval of the company's members. This latest statute has already been enacted and, it is understood, will be brought into force soon (see, in particular, ss 197–

202 thereof).

57 Logically and commonsensically, if the concept of a loan as originally enacted in the UK legislation (*and upon which ss 162 and 163 of the Act were,* inter alia*, based* (see [45]–[46] above)) was intended to cover (or could even be construed as covering) transactions that went beyond loans in the conventional sense, there would have been *no need* for the UK Parliament to amend the existing provisions in order to extend them to quasi-loans. Indeed, the *same* point may be made with respect to the relevant *Australian* developments (which are dealt with below at [67]–[68]). It will suffice for the moment to note that s 125 of the Australian Companies Acts 1961 was, as already mentioned earlier (at [45]), *based on s 190 of the 1948 UK Act*. What is of first importance for our present purposes is the fact that *there is no indication whatsoever that s 125 of the Australian Companies Acts 1961 was intended to encompass a concept of a loan other than in the conventional sense* – a concept which, as we have just seen, was also part of the corresponding *UK* provision upon which it was largely based (*viz*, s 190 of the 1948 UK Act).

58 To return to the present UK position, the relevant provisions in the 1985 UK Act now cover (as noted at [56] above) *quasi-loans*. Special note may be taken of ss 330 and 331 thereof, which read as follows:

> *Restrictions on a company's power to make loans, etc., to directors and persons connected with them*
>
> General restriction on loans etc. to directors and persons connected with them.
>
> **330.**—(1) The prohibitions listed below in this section are subject to the exceptions in sections 332 to 338.
>
> (2) A company shall not —
>
> (*a*) make a loan to a director of the company or of its holding company ;
>
> (*b*) enter into any guarantee or provide any security in connection with a loan made by any person to such a director.
>
> (3) A relevant company shall not —
>
> (*a*) make a quasi-loan to a director of the company or of its holding company ;
>
> (*b*) make a loan or a quasi-loan to a person connected with such a director ;
>
> (*c*) enter into a guarantee or provide any security in connection with a loan or quasi-loan made by any other person for such a director or a person so connected.
>
> (4) A relevant company shall not —
>
> (*a*) enter into a credit transaction as creditor for such a director or a person so connected ;
>
> (*b*) enter into any guarantee or provide any security in connection with a credit transaction made by any other person for such a director or a person so connected.
>
> (5) For purposes of sections 330 to 346, a shadow director is treated as a director.

(6) A company shall not arrange for the assignment to it, or the assumption by it, of any rights, obligations or liabilities under a transaction which, if it had been entered into by the company, would have contravened subsection (2), (3) or (4) ; but for the purposes of sections 330 to 347 the transaction is to be treated as having been entered into on the date of the arrangement.

(7) A company shall not take part in any arrangement whereby—

(*a*) another person enters into a transaction which, if it had been entered into by the company, would have contravened any of subsections (2), (3), (4) or (6) ; and

(*b*) that other person, in pursuance of the arrangement, has obtained or is to obtain any benefit from the company or its holding company or a subsidiary of the company or its holding company.

Definitions for ss. 330 ff.

331.—(l) The following subsections apply for the interpretation of sections 330 to 346.

(2) " Guarantee" includes indemnity, and cognate expressions are to be construed accordingly.

(3) A quasi-loan is a transaction under which one party ("the creditor") agrees to pay, or pays otherwise than in pursuance of an agreement, a sum for another ("the borrower") or agrees to reimburse, or reimburses otherwise than in pursuance of an agreement, expenditure incurred by another party for another ("the borrower") —

(*a*) on terms that the borrower (or a person on his behalf) will reimburse the creditor ; or

(*b*) in circumstances giving rise to a liability on the borrower to reimburse the creditor.

(4) Any reference to the person to whom a quasi-loan is made is a reference to the borrower ; and the liabilities of a borrower under a quasi-loan include the liabilities of any person who has agreed to reimburse the creditor on behalf of the borrower.

(5) "Recognised bank" means a company which is recognised as a bank for the purposes of the Banking Act 1979.

(6) "Relevant company" means a company which —

(*a*) is a public company, or

(*b*) is a subsidiary of a public company, or

(*c*) is a subsidiary of a company which has as another subsidiary a public company, or

(*d*) has a subsidiary which is a public company.

(7) A credit transaction is a transaction under which one party ("the creditor") —

(*a*) supplies any goods or sells any land under a hire-purchase agreement or a conditional sale agreement ;

(*b*) leases or hires any land or goods in return for periodical payments ;

(*c*) otherwise disposes of land or supplies goods or services on the understanding that payment (whether in a lump sum or instalments or by way of periodical payments or otherwise) is to be deferred.

(8) "Services" means anything other than goods or land.

(9) A transaction or arrangement is made "for" a person if —

(*a*) in the case of a loan or quasi-loan, it is made to him ;

(*b*) in the case of a credit transaction, he is the person to whom goods or services are supplied, or land is sold or otherwise disposed of, under the transaction ;

(*c*) in the case of a guarantee or security, it is entered into or provided in connection with a loan or quasi-loan made to him or a credit transaction made for him ;

(*d*) in the case of an arrangement within subsection (6) or (7) of section 330, the transaction to which the arrangement relates was made for him ; and

(*e*) in the case of any other transaction or arrangement for the supply or transfer of, or of any interest in, goods, land or services, he is the person to whom the goods, land or services (or the interest) are supplied or transferred.

(10) "Conditional sale agreement" means the same as in the Consumer Credit Act 1974.

59 Interestingly, the definition of "quasi-loan" in s 331(3) of the 1985 UK Act (reproduced in the preceding paragraph) is not as broad as one would have thought. It is, of course, certainly broader than the concept of a "loan" in s 190 of the 1948 UK Act (the equivalent in the 1985 UK Act being s 330, also reproduced in the preceding paragraph). However, it is not as broad as the concept of "financial benefit" under the current Australian law (briefly discussed at [73] below). It nevertheless addresses situations such as that in the English High Court decision of *Champagne Perrier-Jouet SA v H H Finch Ltd* [1982] 1 WLR 1359 ("*Champagne Perrier-Jouet SA*"), where it was held that a company which had paid a director's bills and supplied (on credit) goods to the company which he controlled had not made a "loan" within the scope of s 190 of the 1948 UK Act. This holding in fact supports the view that the concept of a "loan" in s 190 of the 1948 UK Act is to be interpreted in its conventional sense. Indeed, this is precisely the premise on which the court in *Champagne Perrier-Jouet SA* proceeded – a point which we will elaborate in more detail below (at [61]). The concept of a "quasi-loan" under s 331(3) of the 1985 UK Act also covers situations where a director utilises the company's funds for what is, in effect, an item of personal expenditure, for which the director should therefore reimburse the company.

60 It suffices for present purposes to reiterate that even the concept of a "quasi-loan", whilst broader than the concept of a "loan" in its conventional sense, is not intended to have as broad a scope as, for example, the current Australian provisions. Indeed, we are of the view that the fact

situation in the present appeal would probably not fall within the ambit of a "quasi-loan" under the 1985 UK Act in any event. In particular, the advances concerned were not repayable in the manner which a loan in a conventional sense would require. Indeed, it is important to note that a key element of a "quasi-loan" in s 331(3) of the 1985 UK Act is that of *reimbursement* (whether pursuant to an agreement or otherwise).

61 Second, and on a related note, the relevant case law confirms the preceding point (see also Dame Mary Arden, Dan Prentice & Sir Thomas Stockdale, *Buckley on the Companies Acts* (LexisNexis, 15th Ed, 2006) at para 330). Reference may be made, in particular, to *Champagne Perrier-Jouet SA* ([59] *supra*), which, incidentally, is also cited in *Woon's Corporations Law* (see [46] *supra*, see also [71] *infra*), where Walton J observed thus (at 1363):

> [I]n the context of a prohibition in s 190 [of the 1948 UK Act] and the use of the same word "loan" in clause 10 of Table A [of the same Act], I am clearly of opinion that the correct meaning thereof is that to be found in the *Shorter Oxford English Dictionary*, 3rd ed. (1944) – "A sum of money lent for a time to be returned in money or money's worth ..." – from which it follows that money paid to B at the request of A is quite definitely not a loan. If authority for such an obvious proposition is required it is, of course, to be found in *Pott's Executors v Inland Revenue Commissioners* [1951] A.C. 443.

62 This is not to state that a loan under ss 162 and 163 of the Act may not be informal (see, for example, the English High Court decision of *Ciro Citterio Menswear plc v Thakrar* [2002] 1 WLR 2217), but it would still have to be a loan in the conventional sense. Hence, a loan in this context would clearly exclude what is, in effect, directors' *remuneration*: see, for example, the English High Court decision of *Re Grayan Building Services Ltd* [1995] BCC 554 at 564 (affirmed by the Court of Appeal but without, apparently, any comment on this particular point (the Court of Appeal decision is to be found in the same report, just cited)), as well as the English Court of Appeal decision of *Currencies Direct Ltd v Ellis* [2002] 2 BCLC 482 (though *cf* the decision on an earlier sum paid, in respect of which there was no appeal against the trial judge's decision: see the High Court decision at [2002] 1 BCLC 193, especially at [42]). It would also clearly exclude the fact situation (except for the one instance set out at [35] above) in the present appeal.

63 Third, there is nothing in the legislative materials available to this court to indicate that the Singapore Parliament had – contrary to the clear indication in the marginal notes to ss 162 and 163 of the Act themselves (see above at [44]) – intended to depart from the UK position as set out above. For example, in the explanatory notes to cl 133 of the Companies Bill 1966 (Bill 58 of 1966), which was the original version of s 162 of the Act, it was observed thus:

> Clause 133 restricts the right of a company to make loans to its directors or to directors of related companies. Exempt private companies are not within this prohibition. This is a new provision that will ensure that directors do not take undue advantage of their position in the company.

64 Fourth, although the wording utilised in Exception (*a*) (*viz*, "anything done") differs from the corresponding wording utilised (*viz*, "loan") in s 162(1)(*b*), (*c*) and (*d*) (hereafter referred to as "Exception (*b*)", "Exception (*c*)" and "Exception (*d*)" respectively), this does not detract from the fact that Exception (*a*) must be read *in relation to as well as in the context of* the language and intent of the *main body* of s 162(1) itself. It is clear, on a literal reading of s 162(1), that that provision refers to loans in the *conventional* sense. It is equally clear, in our view, that Exceptions (*b*), (*c*) and (*d*) *also* refer to loans in the conventional sense. Indeed, this must follow from the contrast drawn by the Judge himself between the language of Exception (*a*) on the one hand and the language of the main

body of s 162(1) as well as (by implication) of Exceptions (*b*), (*c*) and (*d*) on the other. In the circumstances, it would appear that the funds provided to a director in the context of Exception (*a*), being (in their very nature) an *exception* to *s 162(1)* itself, must, *ex hypothesi*, amount to *a loan* in the *conventional* sense. Exception (*a*) nevertheless proceeds to emphasise that, notwithstanding the *(conventional) form* in which the transaction has been framed, the *purpose* is quite different, for it is (to utilise the actual language of this exception itself) "to provide such a director with funds to meet expenditure incurred or to be incurred by him for the purposes of the company or for the purpose of enabling him properly to perform his duties as an officer of the company". This would also explain the *difference in language* between Exception (*a*) on the one hand ("anything done") and Exceptions (*b*), (*c*) and (*d*) on the other ("loan") inasmuch as given the purpose of Exception (*a*) (as just set out in the preceding sentence), the funds concerned, although provided to the director concerned in the *(conventional) form of a loan*, are *not* (*unlike* the loans referred to in Exceptions (*b*), (*c*) and (*d*)) intended to be repaid because they would be used for the benefit of the company itself.

65 Fifth, and as (or even more) importantly, Exception (*a*) is *clearly subject to s 162(2)*. This is, in fact, a point to which we shall return, albeit with respect to a somewhat different argument, in the next paragraph. For present purposes, it is important, in our view, to note that *s 162(2) itself refers to "the making of any loan, or the entering into any guarantee, or the provision of any security"* [emphasis added]. It will be immediately seen that the key concepts (in particular, that of a loan) in s 162(2) are the *same* as those in s 162(1). Further, there is nothing in the language or context of s 162(2) to suggest that the concept of a loan in that subsection is to be given a meaning different from that in s 162(1). In the result, the meaning of a loan in s 162(2) is also a reference to a loan in the *conventional* sense. But, if this so, then *the interpretation of Exception (*a*) must be constrained by the meaning of the language utilised in s 162(2) since it is subject to s 162(2)*, *and*, that being the case, the reference in Exception (*a*) must necessarily refer to a loan in the *conventional* sense as well.

66 Sixth, there might, by implication at least, have been too much focus on the literal differences in language or wording between Exception (*a*) to s 162(1) on the one hand and Exceptions (*b*), (*c*) and (*d*) of the same on the other. In particular, Exception (*a*) commences with the words "subject to subsection (2)", whereas Exception (*b*) does *not*. *Yet*, s 162(2) of the Act expressly refers, right at its outset, to *Exceptions (*a*) and (*b*)* (in the words "[s]ubsection (1)(*a*) or (*b*)"). Strictly speaking, Exception (*b*) ought also – like Exception (*a*) – to have contained the words "subject to subsection (2)" as well. Or, to view the same point from a slightly different perspective, the words "subject to subsection (2)" in Exception (*a*) (*viz*, s 162(1)(*a*)) were superfluous in the light of the express reference to Exception (*a*) in the opening words of s 162(2) itself. That this is so is evident from the omission of the words "subject to subsection (2)" in Exception (*b*) (*viz*, s 162(*b*)). Be that as it may, the *general* point that is directly relevant to the legal issue presently considered is this: *Literal differences in statutory language might not matter, although this depends on the precise context in which the differences occur*. It is clear, in our view, that one cannot, in the circumstances, take the differences in language between Exception (*a*) and the rest of s 162(1) as being *legally* significant. Indeed, it might be argued, having regard to the particular difference in language discussed in the present paragraph, that such differences are, with respect, probably due more to looseness in drafting than anything else.

67 Seventh, and on a closely related note, the actual language of s 125 of the Australian Companies Acts 1961 (on which s 162 of the Act was based) ought also to be noted. The material parts of this provision read as follows:

> **125. Loans to directors.—**(1) A company shall not make a *loan* to a director of the company or of a company which, by virtue of subsection (5) of section six is deemed to be related to that

company, or enter into any guarantee or provide any security in connection with loan made to such a director by any other person but nothing in this section shall apply —

(*a*) to *anything done* by a company which is for the time being an exempt proprietary company;

(*b*) to *anything done* by a subsidiary in relation to such a director, where the director is its holding company;

(*c*) subject to subsection (2) of this section to *anything done* to provide such a director with funds to meet expenditure incurred or to be incurred by him for the purposes of the company or for the purpose of enabling him properly to perform his duties as an officer of the company;

(*d*) [Inserted by the Queensland Companies Act: subject to subsection (2) of this section,] to *anything done* to provide such a director who is engaged in the full-time employment of the company or its holding company, as the case may be, with funds to meet expenditure incurred or to be incurred by him in purchasing or otherwise acquiring a home;

(*e*) to any loan made to such a director who is engaged in the full-time employment of the company or its holding company, as the case may be, where the company has at a general meeting approved of a scheme for the making of loans to employees of the company and the loan is in accordance with that scheme; or

(*f*) in the case of a company whose ordinary business includes the lending of money or the giving of guarantees in connection with loans made by other persons, to *anything done* by the company in the ordinary course of that business.

(2) Paragraph (*c*) or (*d*) of subsection (1) of this section shall not authorise the making of any loan, or the entering into any guarantee, or the provision of any security except —

(*a*) with the prior approval of the company given at a general meeting at which the purposes of the expenditure and the amount of the loan or the extent of the guarantee or security, as the case may be, are disclosed; or

(*b*) on condition that, if the approval of the company is not given as aforesaid at or before the next following annual general meeting, the loan shall be repaid or the liability under the guarantee or security shall be discharged, as the case may be, within six months from the conclusion of that meeting.

[emphasis added]

68 It can be immediately seen that, except for one exception (namely, s 125(1)(*e*)), the phrase "anything done" is utilised in preference to the word "loan", whereas the position with respect to s 162 of the Act is *the complete opposite*. Once again, it is clear, in our view, that the controlling language is to be found in the main text of s 125(1) of the Australian Companies Act 1961, just as it is the case with regard to s 162(1) of the Act (as we have stated at [64] above). If so, then the word "loan" in the main text of s 125(1) of the Australian legislation is the controlling concept. Utilising the approach of the Judge, this word ("loan") must be distinguished from the phrase "anything done" utilised in the vast majority of the exceptions therein, with the latter entailing a broader concept than the former. With respect, this was not the meaning intended in s 125 of the Australian legislation. Indeed, from purely the perspective of common sense and logic, it is clear that

the exceptions embodied in ss 125(1)(*a*)–(*f*) are simply that, *viz*, exceptions, and do *not* operate to "swallow up", as it were, the main provision as contained in the main text of s 125(1) itself. If this is the case, then the phrase "anything done" (as utilised in ss 125(1)(*a*), (*b*), (*c*), (*d*) and (*f*)) does *not* have a *broad* meaning, but is, rather, to be correlated with the word "loan" in the main text of s 125(1) *as utilised in the conventional sense*.

69 Eighth, and on an even more closely related note, similar arguments (to those set out in the preceding paragraph) may be made when one compares the language of s 162 of the Act with that of s 190 of the UK 1948 Act (reproduced above at [44] and [55], respectively). We note, in particular, the fact that the phrase "anything done" permeates s 190(1) of the 1948 UK Act. In this regard, special note should be taken of the difference in language between s 162(1)(*d*) of the Act on the one hand and s 190(1)(*d*) of the 1948 UK Act on the other.

70 Ninth, and more importantly, *even if* we accept that Exception (*a*) relates to a situation which is *not* a loan in the *conventional* sense, this particular exception is precisely that – a *limited* situation or instance which *cannot*, therefore, be *generalised* into a blanket proposition to the effect that *ss 162 and 163* apply not only to loans in the conventional sense, but also to *other* transactions that go beyond the parameters of the former.

71 Tenth, and no less importantly, it has been very perceptively observed in a leading local work thus (see *Woon's Corporations Law* ([46] *supra*) at para 2901):

> The exemption of advances to cover business expenses in subsection (1)(a) [of s 162 of the Act] may imply a wide definition of 'loan'. *However, on principle, in a criminal provision the word 'loan' should be restrictively construed. The word should be given its ordinary meaning*: *De Vigier v IRC* [1964] 1 WLR 1073. (See also *Potts v IRC* [1951] 1 All ER 76; *Champagne Perrier Jouet SA v H H Finch Ltd* [1982] 3 All ER 713.) [emphasis added]

72 Eleventh, the *latest position* in *other jurisdictions* buttresses the view that ss 162 and 163 of the Act apply *only* to loans in the *conventional* sense. We have already noted (at [53]–[54] above) that the original UK position (on which the original Singapore provision (*viz*, s 162) was based) applied only to loans in the conventional sense. More significantly, we also noted above that *because* the UK equivalents of ss 162 and 163 of the Act were found to be *too limited in scope*, the UK provisions were *amended* in order to *extend* to *quasi-loans* (see generally [56]–[57] above). Even more significantly, *even* the concept of a *quasi-loan* under the present UK position (as embodied in the provisions just quoted) would appear *not to cover* such a broad situation as that which existed in the present appeal.

73 Twelfth, and on a closely related note, it is clear that where the legislature concerned intended the provision in question to extend *beyond* loans in the conventional sense (or even quasi-loans under the present UK position), *much broader language was utilised*. Correlatively, in such situations, the word "loan" (and its allied terminology or nomenclature) was *not* utilised. This is, in fact, the *present Australian position*. In particular, reference may be made to ch 2E of the Australian Corporations Act 2001 (Cth). The relevant provisions in the aforementioned Act are quite different from ss 162 and 163 of the Act. It will suffice for the purposes of the present appeal to observe that the relevant provisions in the 2001 Australian Act focus not on the concept of a "loan" as such but, rather, on the much broader concept centring on the phrase "give a *financial benefit*" [emphasis added]. Further details may be found in a leading work on Australian corporation law: see generally *Ford's Principles of Corporations Law* ([46] *supra*) at paras 9.470–9.570.

No gap in the law

74 However, lest it be thought that a *gap* might be left in the law in general and (in particular) an unjust result on facts such as those which existed in the present appeal be engendered as a result of a less expansive interpretation of the concept of "loan" in ss 162 and 163 of the Act, it is our view that such a concern is wholly unfounded and unnecessary. Indeed, on the facts of the present appeal, we are of the view (already noted earlier in this judgment at [41]) that, *quite apart from* ss 162 and 163 of the Act, it is clear that the appellants had committed *a clear breach of fiduciary duty*. In a nutshell, they had, on the evidence, clearly utilised (or, more accurately, abused) the funds in question for their own personal purposes. On this ground alone, their appeal failed.

75 Indeed, it is also our view (as stated at [41] above) that the appellants' conduct fell squarely within the ambit of *s 157* of the Act. Section 157 is an important provision. It was first introduced as part of the 1966 Companies Bill ([63] *supra*) as cl 132 thereof. In the explanatory notes to the Bill, it was observed thus:

> Clause 132 is *a most important provision.* It establishes *a statutory duty* upon directors to act honestly and to use reasonable diligence. It prohibits an officer from acquiring an advantage because of information gained by virtue of his position *and provides for civil and criminal liability. This is a new and important provision.* [emphasis added]

76 Section 157(1) of the Act is, in fact, relevant to the facts of the present appeal, and reads as follows:

> A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

77 Section 157(2) reads as follows:

> An officer or agent of a company shall not make improper use of any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company.

78 The legal consequences of contravening s 157 of the Act are set out in s 157(3), as follows:

> An officer or agent who commits a breach of any of the provisions of this section shall be —
>
> (*a*) liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach of any of those provisions; and
>
> (*b*) guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months.

79 It is also important to note that s 157(4) preserves the general principles of common law and equity. The subsection itself reads as follows:

> This section is in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company.

80 Hence, it is clear, based on the facts in the present appeal, that the Judge could have found the directors liable both under s 157 (in particular, subsection (1)) of the Act as well as for breach of fiduciary duty (see also above at [41]). In the circumstances, there was no need to have recourse to ss 162 and 163 of the Act, which we have found not to be applicable in any event. With respect to

the Judge, we are of the view that the issues canvassed by the respondent have been adequately pleaded.

81 We also observe, in passing, that ss 162 and 163 of the Act appear to be more specific situations that would probably also be covered under s 157 of the same. In other words, s 157 is a *general* provision relating to the duty and liability of the directors and officers of a company, whereas ss 162 and 163 relate to a *specific* situation impacting on the duty and liability of such directors and officers in the context of *loans* to directors as well as to persons connected with the directors of the lending company.

Conclusion

82 For the reasons stated above, we dismissed the appeals with costs and with the usual consequential orders to follow, although, as explained above, we differed from the Judge with regard to the interpretation to be placed on the word "loan" in ss 162 and 163 of the Act.

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