IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 93

Originating Summons No 1028 of 2018

In the matter of Section 155A(3) of the Companies Act (Cap 50)

And

In the matter of an Application by

Thomas Haeusler

… *Applicant*

GROUNDS OF DECISION

[Companies] — [Directors] — [Prohibitions] — [Disqualification under s 155A of the Companies Act] — [Application for leave to act as director] [Companies] — [Striking off defunct companies]

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Introduction

1 Section 344 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") (see [31] below) empowers the Registrar of Companies ("the Registrar") to strike a company off the register if he has reasonable cause to believe that the company is not carrying on business or is not in operation. Section 155A of the Act (see [67] below) disqualifies a person from acting as a director of a company for five years if the Registrar has struck off three companies of which that person was a director under s 344 within the preceding five years. Section 155A(3) of the Act permits a person who is disqualified from acting as a director under s 155A(1) to apply to the court for leave to act as a director during the five-year period of disqualification.

2 The applicant is disqualified from acting as a director of any company under s 155A(1) of the Act for a period of five years with effect from 6 June

2017.[1] He now applies under s 155A(3) of the Act for leave to act as a director during the period of his disqualification. As required by that provision, the applicant has given the Minister 14 days' notice of this application. The Minister opposes the application.

3 Having heard submissions from the applicant and the Minister, I have dismissed the application. The applicant has appealed against my decision. I now set out the grounds for my decision.

4 These grounds will reveal that my summary of the legislative provisions at [1] above, although sufficient as an introduction, is an oversimplification. The scope of s 155A(1) is wider than my summary in two respects. First, the disqualification in s 155A(1) is not concerned merely with barring a person whose name appears on the formal register of the directors of a company from doing an act in that capacity. The disqualification extends even to taking part in or being concerned in the management of a company, whether directly or indirectly. The disqualification also applies to any person who is within the extended definition of "director" in s 4 of the Act, *ie*, a person who holds no formal appointment as a director but in accordance with whose directions or instructions the directors or a majority of the directors of a company are accustomed to act. Second, the disqualification in s 155A(1) is not confined to a "company" as defined in s 4 of the Act, *ie*, an entity incorporated under the Act. It disqualifies a person from acting as a director even of a foreign company to which Division 2 of Part XI of the Act applies. That is, in essence, a foreign company which does, or intends to, establish a place of business or carry on business in Singapore.

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1 First Affidavit of Thomas Haeusler, at para 8.

5 Nevertheless, for convenience, and unless the context indicates otherwise, I shall use three terms compendiously in these grounds of decision. First, I shall use the phrase "act as a director" as shorthand for any act which is prohibited by s 155A(1). Second, I shall use the word "disqualification" as shorthand for the effect of s 155A(1) on a director. Third, in the context of s 155A, I shall use the word "company" to encompass every type of corporate entity to which s 155A applies. Furthermore, as this case was decided before the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ("the IRDA") came into force on 30 July 2020, I refer to the Companies Act as it stood on the date on which this application was filed.

Facts

The applicant and his companies

6 The applicant is a Swiss national. He obtained his PhD in law from Basel University and qualified as a legal practitioner in Switzerland. He is also a full member of the Society of Trust and Estate Practitioners ("STEP"). He has provided consultancy services to high net worth individuals, family offices and highly reputable institutions on corporate finance and estate planning for over 20 years.[2]

7 In 2006, the applicant came to live in Singapore.[3] In 2009, he became a permanent resident of Singapore.[4] In 2012, he set up a boutique consulting company known as Latitude 1.1 Group Pte Ltd ("Latitude").[5] He has been

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2 Second Affidavit of Thomas Haeusler, at para 5.

3 Second Affidavit of Thomas Haeusler, at para 6.

4 Second Affidavit of Thomas Haeusler, at para 6.

5 First Affidavit of Thomas Haeusler, at para 6.

Latitude's sole shareholder from the date it was incorporated. He was its sole director, Chairman and Chief Executive Officer from the date it was incorporated until he stepped down from those positions upon learning of his disqualification in August 2018.[6] Latitude is the sole vehicle by which the applicant provides his services and he is its sole owner. I therefore draw no distinction between Latitude and the applicant in these grounds.

8 The applicant's business is advising high net worth individuals, family offices and multinational corporations on setting up structures to hold investments and assets.[7] A core part of the service which the applicant offers his clients is incorporating and administering companies.[8] His clients then use these structures and companies to hold their assets such as bankable assets, investments in businesses, private aircraft, yachts, private equity investments and venture capital investments.[9]

9 The applicant has decided to make Singapore the centre of his life and business.[10] He has great confidence in Singapore as a safe and stable place to do business. Given both these factors, the applicant uses predominantly Singapore-incorporated companies in the structures he devises for his clients.[11] The applicant accepts appointment as a director in all of these Singapore-incorporated companies.[12] In almost all of them, the applicant is the only

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6 First Affidavit of Thomas Haeusler, Annex A, at p 1.

7 First Affidavit of Thomas Haeusler, at para 6.

8 Second Affidavit of Thomas Haeusler, at para 8.

9 Second Affidavit of Thomas Haeusler, at para 8.

10 Second Affidavit of Thomas Haeusler, at para 6.

11 Second Affidavit of Thomas Haeusler, at para 9.

12 Second Affidavit of Thomas Haeusler, at para 10.

director. Only on very few occasions is a representative of the applicant's client appointed alongside him as a director of one of these companies.[13]

10 The applicant's role as the director of each of these companies is to ensure that that company meets all its statutory, accounting and auditing obligations under Singapore law.[14] In this way, as at 31 July 2018, the applicant came to be a director not only of Latitude but also of 35 other Singapore companies which he had incorporated for his clients. These companies hold total assets of about $1bn.[15]

11 It is inevitable in these circumstances that the applicant's clients must repose a high degree of trust in him. He exercises control over the company which is the legal owner of their assets and is also a signatory to the company's bank account.[16]

12 The applicant asserts that he is not a mere nominee director.[17] By that, he means that he is not a mere placeholder, appointed only to fulfil the requirement in s 145(1) of the Act that every company incorporated in Singapore have at least one director who is resident in Singapore. As the applicant puts it:

> It is important to understand that I do not only formally act as the "resident director by law" in all these companies - by acting as director I continue my consulting work which has initially led to the set-up of the structure on an ongoing basis. I am not a nominee director. I am intimately involved in the companies' affairs, such as drafting of agreements, rendering advice as to

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13 Second Affidavit of Thomas Haeusler, at para 10; Transcript, p 17.

14 First Affidavit of Thomas Haeusler, at para 7.

15 Second Affidavit of Thomas Haeusler, at para 9.

16 Second Affidavit of Thomas Haeusler, at para 11.

17 Second Affidavit of Thomas Haeusler, at para 13.

> how to structure transactions, purchasing and selling of assets. I am always in close cooperation with, *inter alia,* the clients, their family officers, lawyers and other advisers.

As this passage makes clear, the applicant's involvement in these 35 companies is limited to services relating to the structure which he has devised, compliance with the regulatory requirements of the Act and any other specific tasks assigned by his clients. It is his clients, and not the applicant himself, who exercise ultimate executive control over the companies.[18]

The three struck-off companies

13 In May 2011, in the course of his business, the applicant accepted appointment as one of three directors of a company known as Fight Life Group Pte Ltd ("Fight Life") and as its sole director ordinarily resident in Singapore.[19] In December 2013, again in the course of his business, he accepted appointment as the sole director of two companies known as Shoyom Real Estate Holding Pte Ltd ("Shoyom") and West Shore Holding Pte Ltd ("West Shore").[20]

14 By 2016, each of these three companies had failed to file annual returns for at least two years.[21] As a result, the Registrar initiated proceedings under s 344 to have these companies struck off the register. The Registrar did so by issuing two sets of notices to each company by registered post to that company's

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18 Transcript, pp 17–18 and 39.

19 Supplementary Affidavit of Wong Lok Hang Enoch, Exhibit WLHE-1, at p 9.

20 Supplementary Affidavit of Wong Lok Hang Enoch, Exhibit WLHE-1, at pp 13 and 16.

21 Reply Affidavit of Chua Shiao Theng Barbara, at paras 5 and 13.

registered address. All of these notices were also sent at the same time to the applicant at his home address, in his capacity as a director of each company.[22]

15 The Registrar sent the first set of notices in June 2016[23] in respect of Fight Life and in February 2017[24] in respect of Shoyom and West Shore. The notices informed the recipients of the following:

> (a) That s 344(1) of the Companies Act allows the Registrar to serve a notice on a company which he has reasonable cause to believe is not carrying on business or is not in operation giving that company 30 days to show cause to the contrary, failing which the Registrar will publish the company's name in the *Government Gazette* with a view to striking the company off the register.
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> (b) That the Registrar: (i) had reasonable cause to believe that the company in question was not carrying on business or was not in operation; and (ii) was therefore, by that notice, giving notice to the company as required by s 344(1) of the Act of his intention to strike the company's name off the register.
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> (c) That, if the recipient of the notice failed to show cause to the contrary within 30 days of the date of the notice, the company's name would be published in the *Government Gazette* and the company's name would be struck off the register 60 days after the date of publication.

I shall call these the "30-day notices".

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22 Reply Affidavit of Chua Shiao Theng Barbara, at paras 14–15 and Exhibits CST-1 and CST-2.

23 Reply Affidavit of Chua Shiao Theng Barbara, Exhibit CST-1, at pp 15–16.

24 Reply Affidavit of Chua Shiao Theng Barbara, Exhibit CST-1, at pp 17–20.

16 A 30-day notice is an express statutory condition precedent to the Registrar's power under s 344 of the Act to strike a company off the register. I set out the material provisions of s 344 in full at [31] below.

17 As foreshadowed, 30 days after serving the 30-day notices, the Registrar advertised each company's name in the *Government Gazette* under s 344(2) of the Act.

18 The Registrar next issued a second set of notices in August 2016 for Fight Life and in April 2017 for Shoyom and West Shore.[25] This notice informed each recipient of the effect of s 344(4) of the Act, *ie*, that the company's name had been published in the *Government Gazette* and that, if the recipient did not object to the striking off within 60 days of this notice, the company would be struck off the register under s 344(4). I shall call these the "60-day notices". A 60-day notice is not required by the Act and is not a condition precedent to striking off under s 344.

19 The applicant does not suggest that he did not receive the 30-day notices or the 60-day notices. In any event, it is undisputed that the applicant failed to show cause to the contrary within the time given in the 30-day notices and failed to object within the time given in the 60-day notices.[26] As a result, the Registrar struck Fight Life off the register on 4 October 2016[27] and struck Shoyom and West Shore off the register on 5 June 2017.[28] Under s 344(4) of the Act, each

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25 Reply Affidavit of Chua Shiao Theng Barbara, Exhibit CST-2, at pp 22–24.

26 Reply Affidavit of Chua Shiao Theng Barbara, at para 29.

27 Supplementary Affidavit of Wong Lok Hang Enoch, Exhibit WLHE-1, at p 8.

28 Supplementary Affidavit of Wong Lok Hang Enoch, Exhibit WLHE-1, at pp 12 and 15.

company was dissolved on the day that notice of its striking off was published in the *Government Gazette*.

20 The applicant accepts that, on 5 June 2017, the predicate of s 155A(1) of the Act was satisfied (*cf* [68]–[70] below). Three companies of which the applicant was a director had been struck off by the Registrar under s 344 of the Act within the five years preceding 5 June 2017. As a result, s 155A(1) operated automatically to disqualify the applicant from acting as a director of any company for five years "commencing after the date" of the last striking off, *ie*, commencing on 6 June 2017.[29]

21 The Registrar did not serve any notice on the applicant informing him that he had been automatically disqualified under s 155A of the Act with effect from 6 June 2017. As the Minister correctly points out, the Registrar cannot be faulted for this, as s 155A does not require him to notify a director that he has been disqualified under that section.

The applicant learns of his disqualification

22 Be that as it may, the Minister does not dispute the applicant's evidence that he was unaware of his disqualification when it took effect on 6 June 2017. In his ignorance, the applicant continued to act as a director of various companies as though he was not disqualified. In addition, he accepted appointment as a sole director of six new companies which he incorporated between 4 July 2017 and 7 May 2018, during his period of disqualification.[30] The Registrar did not block or reject the applicant's lodgments which were necessary for all of these activities in the electronic lodgment system known as

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29 Non-Party's Written Submissions, at para 8.

30 First Affidavit of Thomas Haeusler, at paras 11–12.

BizFile operated by the Accounting and Corporate Regulatory Authority ("ACRA").

23 In July 2018, the applicant attempted to lodge a share transfer in BizFile for one of his clients' companies.[31] The system refused to permit him to do so. It appears that the Registrar had by now imposed a block, presumably as a means of enforcing the applicant's disqualification. On 31 July 2018, the applicant had a meeting with an ACRA enforcement officer to find out the reason for the rejected lodgment. It was at this meeting that the applicant learned for the first time that he had been disqualified since 6 June 2017.[32]

This application

24 On 20 August 2018, the applicant made this application under s 155A(3) of the Act. As permitted by s 155A(4), the Minister is represented on this application by the Attorney-General. The primary facts on which the Minister relies to oppose the application are set out in an affidavit filed by Ms Chua Shiao Theng Barbara. Ms Chua is the Head of the Accountancy and Corporate Regulations Unit of the Economic Programmes Directorate under the Ministry of Finance ("MOF").[33] The Minister argues that the applicant's application should be dismissed.

25 On 31 August 2018, the applicant received a letter from ACRA informing him of his disqualification.[34] The letter incorrectly named the three

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31 First Affidavit of Thomas Haeusler, at para 9. Second Affidavit of Thomas Haeusler, at para 21.

32 First Affidavit of Thomas Haeusler, at paras 9 to 10 and Exhibit TH-2.

33 Reply Affidavit of Chua Shiao Theng Barbara, at para 1.

34 Second Affidavit of Thomas Haeusler, Exhibit TH-3.

companies whose striking off led to the applicant's disqualification. The applicant takes no point on this error.

26 The applicant had already applied in July 2018 to strike off one of his 36 companies voluntarily under s 344A of the Act (see [44] below).[35] The applicant now set about resigning as a director of the remaining 35 companies in order to comply with his disqualification. He resigned as a director of 32 companies within a month of learning of his disqualification.[36] By 5 September 2018, the applicant had resigned as a director from all of his companies,[37] save only for the one company which was still going through the voluntary striking off procedure.

Issues

27 I note at the outset that the applicant does not challenge his disqualification under s 155A(1) of the Act (*cf* [68]–[70] below).[38] In other words, he accepts that s 155A(1) of the Act operated automatically on 5 June 2017 to disqualify him from acting as a director for five years after that date, *ie*, with effect from 6 June 2017. On that premise, the applicant's application prays merely for leave "to act as director … during the period of [his] disqualification" under s 155A(3).

28 The applicant's prayer for relief sets out the ultimate question which I have to determine: should the applicant be granted leave under s 155A(3) to act as a director during the period of his disqualification under s 155A(1)? To

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35 Second Affidavit of Thomas Haeusler, at para 25 and Exhibit TH-5 at pp 5–6.

36 Second Affidavit of Thomas Haeusler, at para 25.

37 Second Affidavit of Thomas Haeusler, at para 25.

38 Reply Affidavit of Chua Shiao Theng Barbara, at para 9.

answer that ultimate question, I first consider the statutory objective of s 155A(1). That requires me to consider the statutory objective of s 344 of the Act. That is because Parliament has connected s 155A(1) directly and only to s 344. It has done this by legislating in s 155A(1) that *only* a striking off under s 344 will trigger a director's disqualification under s 155A, albeit by threefold repetition. Nothing else can trigger a disqualification under s 155A(1), no matter how egregious or repeated the director's behaviour.

29 The issues on this application, arranged in their logical sequence, are therefore as follows:

(a) What is the statutory objective of s 344 of the Act?

(b) What is the statutory objective of s 155A(1) of the Act bearing in mind (a) above?

(c) What is the proper conceptual approach to the discretion under s 155A(3) of the Act bearing in mind (a) and (b) above?

(d) Applying that conceptual approach to the facts of this case, should I exercise my discretion under s 155A(3) in the applicant's favour?

30 I analyse each issue in turn.

Section 344 of the Act

31 Section 344 of the Act gives the Registrar the power to strike a company off the register on his own initiative. To the extent that its provisions are material for present purposes, s 344 reads as follows:

> **Power of Registrar to strike defunct company off register**
>
> **344.**—(1) Where the Registrar has reasonable cause to believe that a company is not carrying on business or is not in operation, the Registrar may send to the company, and its directors, secretaries and members, a letter to that effect and stating that, if an answer showing cause to the contrary is not received within 30 days after the date of the letter, a notice will be published in the *Gazette* with a view to striking the name of the company off the register.
>
> (1A) Without prejudice to the generality of subsection (1), in determining whether there is reasonable ground to believe that a company is not carrying on business, the Registrar may have regard to such circumstances as may be prescribed.
>
> (2) Unless the Registrar receives an answer within one month from the date of the letter to the effect that the company is carrying on business or is in operation, he may publish in the *Gazette* and send to the company by registered post a notice that at the expiration of 60 days after the date of that notice the name of the company mentioned in that notice will unless cause is, in the form and manner specified in section 344C, shown to the contrary be struck off the register and the company will be dissolved.
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> …

32 Sections 344(1) and 344(2) remain unchanged from the original form in which they were enacted as part of the Companies Act (Act 42 of 1967) on 29 December 1967. But s 344(1A) of the Act is new. It was inserted into s 344 by the Companies (Amendment) Act 2014 (Act 36 of 2014) ("the Amendment Act") with effect from 1 July 2015. I first consider the statutory objective of s 344 as it stood before 1 July 2015 and then consider its statutory objective as it stands after that date.

Sections 344(1) and 344(2) of the Act

33 As the heading to s 344 indicates, that section empowers the "Registrar to strike [a] defunct company off [the] register". The unique feature of s 344 is that it empowers the Registrar to do this on his own initiative. I take "defunct" in this context to mean simply the two predicates of s 344. A defunct company is therefore a company which is either: (a) not carrying on business; or (b) not in operation.

34 From the regulatory perspective, it is perfectly understandable why the Act should empower the Registrar to take the initiative in striking a defunct company off the register. Section 19(5) of the Act endows a company with separate legal personality upon registration under s 19(3) and incorporation under s 19(4). The status of being a separate legal person is a statutory privilege. A company needs this privilege only so long as it has a corporate purpose. A company which is defunct has no corporate purpose and therefore no need for this privilege. A company which has no need for this privilege should not retain it and should surrender it voluntarily. If it does not do so, s 344 empowers the Registrar to withdraw the privilege on his own initiative.

35 In my view, therefore, the statutory objective of s 344 is to allow the Registrar to ensure that only companies which have a corporate purpose remain on the register. Once again, it is perfectly understandable why this statutory objective is a desirable objective. Simply put, the register should not be cluttered with defunct companies. A register cluttered with defunct companies ceases, in a conceptual sense, to be an accurate record of companies which are making use of their status as separate legal persons for a corporate purpose. A register cluttered with defunct companies also increases the administrative burden on the Registrar of monitoring compliance with the requirements of the Act and its

regulations and of imposing and enforcing the penalties for breaches of those requirements.

36 There was, however, a practical difficulty with s 344 as originally enacted. The Registrar has no way of knowing from his own records whether a company is defunct. And it is not practical for the Registrar to detect defunct companies by the brute force approach of simply serving a 30-day notice under s 344(1) on every single company on the register and striking off every company which fails to show cause to the contrary. First, the Registrar does not have the resources to conduct such an exercise even as a one-off, let alone on a periodic basis. Second, the brute force approach creates a high risk of a high number of false positives, *ie* the risk of striking a company off the register under s 344 which is not in fact defunct. This in turn creates a high risk of causing real disruption to real businesses. The Registrar's power under s 344 as originally enacted was therefore beset by practical shortcomings which prevented the Registrar from using it to achieve its statutory objective. The legislative package introduced by and with the Amendment Act was enacted to address, amongst other things, these practical shortcomings.

Section 344(1A) of the Act

37 The legislative package introduced by and with the Amendment Act comprised the following principal and subsidiary legislation:

(a) Section 344(1A) of the Act, which came into force on 1 July 2015;

(b) Regulation 89B of the Companies Regulations (Cap 50, Rg 1, 1990 Rev Ed) ("the Companies Regulations"), which came into force to support s 344(1A) of the Act, also on 1 July 2015;

(c) Sections 344A and 155A of the Act, which came into force together on 3 January 2016; and

(d) The Companies (Striking Off) Regulations 2015 (S 834/2015) ("the Striking Off Regulations"), which came into force to support s 344A, also on 3 January 2016.

38 This legislative package effected a sea change in the Act's approach to defunct companies remaining on the register. Section 344(1A) of the Act allows subsidiary legislation to prescribe the circumstances to which the Registrar can have regard in determining whether there is reasonable ground to believe that a company is not carrying on business within the meaning of s 344(1). Curiously, s 344(1A) does not address the second predicate in s 344(1) ("not in operation"). Parliament presumably saw that predicate as a question of fact to be determined on a case-by-case basis. In any event, this discrepancy is immaterial for present purposes.

39 Regulation 89B of the Companies Regulations is the subsidiary legislation enacted under s 344(1A) of the Act. Regulation 89B prescribes six specific circumstances to which the Registrar may have regard in determining whether there is reasonable ground to believe that a company is not carrying on business:

> **Prescribed circumstances on whether company is carrying on business**
>
> **89B.** For the purposes of section 344(1A) of the Act, the circumstances to which the Registrar may have regard in determining whether there is reasonable ground to believe that a company is not carrying on business are the following:
>
> (*a*) the fact that the company has failed to file its annual return as required under section 197 of the Act;

> (*b*) the fact that the company has failed to respond to any correspondence sent by the Registrar by registered post, where a response is required;
>
> (*c*) the fact that mail sent by the Registrar to the registered office of the company is returned undelivered;
>
> (*d*) the fact that credible information has been received by the Registrar indicating that the company is not carrying on business;
>
> (*e*) the fact that none of the locally resident directors of the company could be contacted or located by the Registrar after the Registrar had taken reasonable efforts to do so;
>
> (*f*) the fact that the sole director or the last remaining director of the company, shown in the register of directors kept under section 173 of the Act, is dead or is disqualified from acting as a director under the Act.

40 The statutory objective of reg 89B is very clearly to address the practical shortcomings of s 344. It does this by prescribing six objective circumstances, any one of which suffices *prima facie* to bring a company within s 344(1) of the Act and to justify a striking off under s 344(2).

41 Regulation 89B assists the Registrar to achieve the statutory objective of s 344 in three ways. First, the Registrar can ascertain whether any of the prescribed circumstances exist by examining his own records, without any need for external factual inquiry on a company-by-company basis. Second, this first point taken together with the objective nature of these six circumstances renders the exercise of detecting and striking defunct companies off the register susceptible to algorithm and therefore to automated detection and action. Third, the publication of these six prescribed circumstances puts promoters, shareholders and directors on notice with certainty and with the degree of stability attached to subsidiary legislation as to what behaviour on their part will

expose their companies to the risk of being struck off by the Registrar on his own initiative.

42 This latter point is particularly important for companies which are *not* defunct. The common thread running through all six prescribed circumstances is that they are closely correlated to a company being defunct. But these circumstances are not invariably correlated to a company being defunct. For that reason, even after reg 89B prescribed these six circumstances, the risk of a false positive remains. The publication of these prescribed circumstances through reg 89B therefore allows the persons who control a company which is *not* defunct to know what behaviour to avoid, lest they create a risk that the company is detected as a false positive under reg 89B and struck off by the Registrar on his own initiative.

Section 344A of the Act

43 From the company's perspective, a striking off under s 344 is an involuntary striking off. As part of the same legislative package, Parliament also enacted a s 344A of the Act. Section 344A sets out a procedure for a company to have itself struck off the register voluntarily. Parliament's intent in enacting s 344A of the Act was therefore to create a new avenue by which those who control a company can avoid an involuntary striking off under s 344.

44 Section 344A of the Act allows a company, acting by its directors or a majority of them, to apply to the Registrar to be struck off the register. Subject to that sole difference, the procedure for a voluntary striking off under s 344A of the Act mirrors the procedure for involuntary striking off under s 344. Both

involve a 30-day notice, publication of the company's name in the *Government Gazette* and a 60-day notice before the company is struck off and dissolved.

45 The Striking Off Regulations prescribe the grounds and conditions for voluntarily striking a company off the register. In summary, the company: (a) must be defunct; (b) cannot be a party to any civil or criminal proceedings worldwide; (c) must have no assets or liabilities, current or contingent; and (d) cannot be subject to any ongoing or pending regulatory action or disciplinary proceedings (see reg 2 of the Striking Off Regulations).

46 The statutory objective of s 344A is exactly the same as the statutory objective of s 344: to ensure that only companies which have a corporate purpose remain on the register. Section 344 empowers the Registrar to strike a defunct company off on his own initiative. Section 344A empowers, for the first time, the directors of a company to apply to have their defunct company struck off the register voluntarily.

47 Where a defunct company does not meet the grounds and conditions necessary for a voluntary striking off under s 344A, the only course of action to bring its affairs voluntarily to an orderly conclusion is a dissolution following a winding up. In the case of a defunct company, this will ordinarily be a voluntary winding up, given that it will most likely have no assets and no liabilities, and therefore have no creditors or, at the very least, offer its creditors no incentive to commence a compulsory winding up.

What are not the statutory objectives of s 344

48 Having set out the statutory objective of s 344, I now consider three objectives which are not in my view the statutory objective of s 344. First, it is not s 344's objective to deter companies from being or becoming dormant.

Second, it is not s 344's objective to deter companies from breaching the Act. Third, it is not s 344's objective to deter companies from being or becoming defunct.

Not to deter or penalise dormancy

49 The statutory objective of s 344 is not to deter a company from being or becoming dormant. A dormant company, like a defunct company, can be described as a company which is not carrying on business and which is not in operation within the meaning of s 344(1). The difference is that a dormant company may awake in the future whereas a defunct company has no future. In that sense, a dormant company has some semblance of a corporate purpose while it is dormant, even though it is not carrying on business or in operation.

50 The Act expressly recognises the concept of a dormant company in ss 205B(2) and s 373(19)(*a*) of the Act. The Act also expressly facilitates dormancy by relieving a dormant company of the obligation to prepare its financial statements and to have its accounts audited: see ss 201A, 205B(1) and 373(9).

51 It is also notable that s 205B(3) of the Act – which makes it *easier* for a company to qualify as a dormant company within the meaning of s 205B(2) – was part of the very same legislative package which resulted in s 344(1A) and reg 89B. Parliament could not have intended to make dormancy easier with one set of provisions in that legislative package yet at the same time intended to deter dormancy by other provisions in the same legislative package.

52 The power under s 344 of the Act is not therefore linked to any statutory hostility to dormancy. It is the defunct company – and not the dormant company

– which is the true and only target of s 344. Deterring dormancy is not the statutory objective of s 344.

Not to deter a breach of the Act

53 The statutory objective of s 344 is not to deter a breach of the Act. If that were the statutory objective, a breach of the Act would be the predicate for striking off under s 344. But the sole predicate for striking off under s 344(1) is the Registrar having reasonable cause to believe that a company is defunct.

54 It is true that three of the circumstances prescribed by reg 89B involve a breach of the Act. Every time a company fails to file an annual return, it is in breach of s 197(1) of the Act (reg 89B(*a*)). Every time a company fails to have a registered office in Singapore to which communications and notices may be addressed it is in breach of s 142(1) of the Act (reg 89B(*c*)). And every time a company has not a single director who is ordinarily resident in Singapore and who is not disqualified from acting as a director, it is in breach of s 145(1) of the Act (reg 89B(*f*)). I shall refer to these three circumstances prescribed by reg 89B as the "breach circumstances".

55 A company's breach of s 197(1) and of s 142(1) of the Act also puts every director of the company in breach of the Act. Every director of a company who fails to file its annual return commits a criminal offence under s 197(6). And every director of a company which fails to have a registered office to receive communications and notices commits a criminal offence under s 142(2). Although the Act imposes these obligations on the company, every director of the company is in substance subject to these two obligations (although not perhaps in strict legal form: see *Mukherjee Amitava v Dystar Global Holdings (Singapore) Pte Ltd and others* [2018] 5 SLR 256 at [99]–[123]; affirmed on

appeal on this point in *Mukherjee Amitava v Dystar Global Holdings (Singapore) Pte Ltd and others* [2018] 2 SLR 1054 at [44]–[45]).

56 However, a closer examination of reg 89B supports the conclusion that penalising a breach of the Act is not the statutory objective of s 344. Three of the six circumstances prescribed by reg 89B involve conduct which is not, in itself, a breach of the Act. First, it is not a breach of the Act for a company to fail to respond to correspondence, even if the correspondence is from the Registrar, even if the correspondence is sent by registered post and even if a response is required (reg 89B(*b*)). Second, it is not a breach of the Act for a company not to carry on business, let alone for a company to have credible information passed on to the Registrar indicating that it is not carrying on business (reg 89B(*d*)). Finally, it is not a breach of the Act for the Registrar to be unable to contact or locate the company's locally-resident directors (reg 89B(*e*)). I shall refer to these three circumstances prescribed by reg 89B as the "non-breach circumstances".

57 The very existence of the non-breach circumstances in reg 89B establishes that Parliament undoubtedly intended that the Registrar's power under s 344 of the Act to strike a defunct company off the register on his own initiative should extend even to a company which is fully compliant with the Act. It seems to me difficult to envisage the circumstances in which the Registrar will exercise his power to do so. I say that for two reasons. First, from the regulatory perspective, a defunct company which is fully compliant is not as much of a blot on the register as a defunct company which is non-compliant. Second, from the practical perspective, invoking s 344 against a fully compliant company simply because it satisfies one of the non-breach circumstances prescribed by reg 89B runs the risk that it is a false positive. That risk exists even if the company and its directors do not respond to the 30-day notice and

the 60-day notice. Even though a company which is struck off under s 344(2) can be restored to the register under s 344(5), the practical and commercial consequences of striking off a company which is not defunct are far greater than the consequences of not striking off a company which is defunct. And there is no compelling regulatory reason to run that risk when a company is fully compliant.

58 But all that is not to the point when ascertaining the statutory objective of s 344. The point is that the power which s 344 gives the Registrar is undoubtedly independent of any breach of the Act. It therefore cannot be the statutory objective of s 344 to deter or penalise a breach of the Act.

59 The only common thread running through the six circumstances prescribed by reg 89B is that they correlate strongly to a company being defunct. It is the defunct company – and not the non-compliant company – which is the true and only target of s 344.

Not to deter companies from being or becoming defunct

60 The statutory objective of s 344 is not to deter a company from being or becoming defunct, to deter those who control a defunct company from allowing it to remain on the register or to deter those who control a company (whether or not defunct) from allowing the Registrar to strike it off under s 344.

61 Even after Parliament enacted the legislative package of which s 344(1A) and reg 89B are a part, it is not a breach of the Act for a company to be or become defunct or for those who control it to allow that to happen. And, although I accept (see [34] above) that it is undesirable from a regulatory perspective for a defunct company to remain on the register, it is even now not a breach of the Act for those who control a defunct company to allow that to

happen. There is nothing in s 344, or indeed anywhere else in the Act, which imposes a duty on those who control a defunct company to remove it from the register. Indeed, the entirely voluntary nature of the avenue provided by s 344A confirms that there is no such duty. Finally, there is no language in s 344 at all which even hints at any penalty to be visited upon those who control a company (whether or not defunct) and allow the Registrar to strike it off under s 344. The dissolution of the company and the loss of the statutory privilege of separate legal personality which the Act confers on the company is the only conceivable penalty imposed by s 344 on the company and on those who control it.

62 It is therefore not the statutory objective of s 344 – whether before or after Parliament introduced the legislative package which includes s 344(1A) and reg 89B – to deter a company from being or becoming defunct, to deter those who control a defunct company from allowing it to remain on the register or to deter those who control a company (whether or not defunct) from allowing the Registrar to strike it off under s 344.

Encouraging compliance is an incidental effect

63 This analysis reinforces my conclusion that the sole statutory objective of s 344 is to empower the Registrar to ensure that only companies which have a corporate purpose remain on the register. That is why dormancy is not, in itself, grounds for striking off. Those who control a company which is dormant may yet keep it compliant and may yet have a corporate purpose for it to fulfil once they awaken it. That is also why s 344 allows a striking off even without a breach of the Act: a company may be defunct even though it continues to

comply with the Act. And a company may not be defunct even though it has failed, perhaps even egregiously, to comply with the Act.

64 Having said that, it is undoubtedly one of the incidental effects of s 344 that it deters the directors of every company, whether defunct or not defunct, from permitting any of the prescribed circumstances in reg 89B from coming about. This applies equally to the three non-breach circumstances prescribed by reg 89B as it does to the three breach circumstances prescribed by reg 89B. This incidental effect is, however, not the statutory objective of s 344. But in the sense that three of the prescribed circumstances involve a breach of the Act, and in that sense only, s 344 is not wholly detached from deterring a breach of the Act. But, for the reasons I have already given, that is an incidental and partial effect of s 344 and not its statutory objective.

Conclusion on s 344

65 I have thus far established that: (i) the statutory objective of s 344 of the Act is to empower the Registrar to ensure that only companies which have a corporate purpose remain on the register; (ii) the statutory objective of s 344(1A) of the Act and reg 89B is to assist the Registrar in exercising his power under s 344 by prescribing objective circumstances by which he can determine from information in his own records whether a company is likely not to be carrying on business; (iii) the policy underlying this statutory objective is to maintain the coherence and integrity of the register as an accurate record of only those companies which continue to use the privilege of separate legal personality for a corporate purpose; and (iv) an incidental and partial effect, but not a statutory objective, of s 344 is to deter breaches of certain specific provisions of the Act.

66 As I have pointed out, however, it remains the case that s 344 does not penalise those who control a company for allowing the company to be struck off under s 344. That brings me neatly to s 155A of the Act.

Section 155A(1) of the Act

67 I now set out s 155A in full:

> **Disqualification for being director in not less than 3 companies which were struck off within 5-year period**
>
> **155A.**—(1) Subject to subsection (5), a person —
>
> (a) who was a director of a company (Company A) at the time that the name of Company A had been struck off the register under section 344; and
>
> (b) who, within a period of 5 years immediately before the date on which the name of Company A was struck off the register under section 344 —
>
> (i) had been a director of not less than 2 other companies whose names had been struck off the register under section 344; and
>
> (ii) was a director of those companies at the time the names of the companies were so struck off the register,
>
> shall not act as director of, or in any way (whether directly or indirectly) take part in or be concerned in the management of, any company or any foreign company to which Division 2 of Part XI applies for a period of 5 years commencing after the date on which the name of Company A was struck off.
>
> (2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 2 years or to both.

> (3) A person who is subject to a disqualification under subsection (1) may apply to the Court for leave to act as director of, or to take part in or be concerned in the management of, a company or a foreign company to which Division 2 of Part XI applies during the period of disqualification upon giving the Minister not less than 14 days' notice of his intention to apply for such leave.
>
> (4) On the hearing of any application under this section, the Minister may be represented at the hearing and may oppose the granting of the application.
>
> (5) This section shall only apply where Company A and the companies referred to in subsection (1)(*b*)(i) were struck off on or after the date of commencement of section 76 of the Companies (Amendment) Act 2014.

A curious feature

68 A curious feature of s 155A is that s 155A(1)(*a*) and s 155A(1)(*b*)(i) are predicated on Company A (as defined in s 155A(1)) being struck off on a particular date and *two* other companies being struck off "within a period of 5 years *immediately before* the date on which … Company A was struck off" [emphasis added].

69 This wording is curious. The use of the phrase "immediately *before* the date" [emphasis added] in s 155A(1)(*b*) makes it at least arguable that s 155A(1) is not triggered if Company A is struck off on the *very same* day as one of the two other companies referred to in s 155A(1)(*b*)(i). If s 155A(1)(*b*)(i) were instead predicated on the two other companies being struck off within a period of five years immediately "*on or* before the date" on which Company A is struck off, or immediately "before the *time*" on which Company A is struck off, it would be clear that the second of the three companies and Company A can be struck off on the same day. But that is not how s 155A(1) has been drafted.

70 So, to take the facts of this case, both Shoyom and West Shore were struck off on 5 June 2017. On that date, 5 June 2017, there were no *two* companies which had been struck off in the five years *before* 5 June 2017. Instead, there was only *one* company – Fight Life – which had been struck off in the five years *before* 5 June 2017. There were, of course, two companies which were struck off "*on or* before" 5 June 2017 or "before the *time*" on which the last of the three companies was struck off. But, as I have mentioned, that is not how s 155A(1) is drafted.

71 It is therefore more than arguable that s 155A(1) as drafted requires the second and the third of the three companies to be struck off on *different* days. This argument in fact found favour with the Court of Appeal in a decision handed down after I had dismissed the applicant's application but before these grounds of decision (see *Kardachi, Jason Aleksander v Attorney-General* [2020] 2 SLR 1190 ("*Kardachi*") at [34]–[35] and [48]).

72 It is not necessary for me to resolve this curious feature of s 155A. That is because, as I have mentioned, the applicant accepts that the predicate of s 155A(1) has been satisfied and that the section therefore operated to disqualify him from acting as a director with effect from 6 June 2017. That leaves the exercise of the discretion under s 155A(3) as the applicant's only avenue to act as a director during the period of his disqualification.

73 I therefore turn to consider the second issue before me: the statutory objective of s 155A.

The statutory objective of s 155A

74 I accept the Minister's submission that I can derive the statutory objective of s 155A of the Act from the public consultation paper on the second

part of the draft Companies (Amendment) Bill 2013 which the Minister released in late 2013. This draft Bill eventually became the Amendment Act.

75 This consultation paper notes that that there was at that time no provision in the Act which disqualified a director of a struck-off company. Thus, it proposed a new s 155A "which disqualifies a person from acting as a director, if three or more companies in which he was a director of [*sic*], are struck off as a result of ACRA-initiated review within a period of five years". Importantly, the consultation paper also states that the proposed s 155A was "intended to prompt directors of the company *to take active steps to wind-up a defunct company on their own accord*" [emphasis added] (MOF and ACRA, *Public Consultation on Second Part of Draft Companies (Amendment) Bill 2013* (23 October 2013) at Annex C, p 9).[39]

76 I accept that the statutory objective of s 155A is to deter the directors of a defunct company from leaving it to the Registrar to strike it off the register under s 344 of the Act. That is a perfectly understandable objective. It is undoubtedly desirable from a regulatory perspective for the directors of a defunct company, and not the Registrar, to take the initiative to bring the affairs of the company to an orderly conclusion. That is why s 344A was enacted as part of the same legislative package as s 155A. Its enactment gave the directors of a defunct company, for the first time, two avenues to bring its affairs to an orderly conclusion: through a voluntary striking off and through a voluntary liquidation.

77 It is preferable for the directors of a defunct company, and not the Registrar, to take the initiative in bringing its affairs to an orderly conclusion

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[39] Non-Party's Supplemental Bundle of Authorities, Tab 16, p 9.

for three reasons. First, action initiated by the directors reduces significantly the risk of a false positive, *ie*, the risk that the Registrar will strike a company off which is not defunct. Second, even if the company is defunct, the directors are in a far better position than the Registrar to know whether a striking off is the appropriate way to bring its affairs to an orderly conclusion, *ie*, without prejudicing the interests of creditors, shareholders and other stakeholders. If a striking off is not appropriate, the directors should instead initiate a voluntary liquidation. Third, the Registrar's administrative burden would be greatly and intolerably increased if he had to detect and strike off every defunct company on his own initiative under s 344.

78 Section 155A achieves its statutory objective by imposing a penalty on the directors of defunct companies who repeatedly leave it to the Registrar to strike the companies off under s 344. In so doing, the incidental effect of s 155A is to impose an indirect penalty on directors who permit any of the six circumstances prescribed by reg 89B from becoming true in respect of a company. That indirect penalty is imposed regardless of whether the prescribed circumstance engaged entails a breach of the Act. This indirect penalty in turn creates a *de facto* duty on a director to prevent these six prescribed circumstances from becoming true even though there is no *de jure* duty to that effect in the Act. It does this by setting up these six circumstances as triggers which can set a director down a path leading to a five-year disqualification. But once again, that is not the statutory objective of s 155A but merely one of its incidental effects.

79 The Minister submits that one of the statutory objectives of s 155A is to improve the rate of filing of annual returns, an obligation under s 197 of the Act. A failure to file annual returns is the first of the six prescribed circumstances in reg 89B. It appears that the failure to file annual returns is the primary ground

for striking off under s 344.[40] I have no doubt that improving compliance with s 197 of the Act is one of the incidental effects of s 155A. But I do not accept that this is its statutory objective. The Minister draws an analogy between s 155A and s 155 of the Act. Section 155 disqualifies a director if he is in persistent default of delivery of documents to the Registrar following a conviction or an order under s 13 or s 399 of the Act. But the predicate of s 155A is quite different from that of s 155. Section 155 expressly predicates its disqualification upon persistent breaches of the Act. Section 155A expressly predicates its disqualification on three strikings off under s 344. A striking off under s 344 of the Act is not a breach of the Act. And a striking off under s 344 may arise with no underlying breach of the Act, as I have demonstrated. The Minister's submission amounts to arguing that Parliament intended to threaten the directors of a company which is *not* defunct with an unwarranted striking off under s 344 if they fail to file its annual returns in compliance with s 197 of the Act. That cannot be the statutory objective of s 344, whether before or after the insertion of s 344(1A).

80 The Minister also submits that one of the statutory objectives of s 155A is to discourage persons from taking up directorships of multiple companies without exercising any supervision over those companies.[41] The Minister cites no authority for this submission. I do not accept it. A person can be a director of 100 companies. If he exercises no supervision over any of them, but they all ensure that none of the circumstances prescribed by reg 89B come about because their company secretarial services are competently provided, the companies will never be struck off under s 344 and the director will never be disqualified under s 155A. By the same token, if a person is a director of just

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40 Non-Party's Written Submissions, at paras 26–28.

41 Non-Party's Written Submissions, at paras 35–37.

three companies, all of which are fully compliant with the Act, and exercises close day-to-day supervision of those companies in accordance with his duties under the Act, the companies could nevertheless be struck off under s 344 on one of the non-breach circumstances prescribed by reg 89B. The director would then find himself disqualified and possibly deprived of his livelihood. I cannot accept that such an arbitrary outcome is a statutory objective of s 155A.

81 I therefore conclude that the statutory objective of s 155A is, and is only, to deter a director of a defunct company from leaving it to the Registrar to strike the company off the register under s 344 of the Act. As I have said, that is an entirely understandable and desirable objective. What causes difficulty is the manner in which s 155A achieves this statutory objective.

A blunt instrument

82 The disqualification which s 155A(1) imposes is the bluntest of blunt instruments. I say that for six reasons.

Always automatic

83 First, the disqualification is always automatic. The disqualification does not require any administrative act by the Registrar or any judicial act by the court. It is automatic regardless of whether the companies were struck off by reason of one of the three breach circumstances prescribed by reg 89B or one of the three non-breach circumstances prescribed by reg 89B. It is automatic regardless of whether the director bore any personal fault at all for the prescribed circumstance coming about. It is automatic regardless of when the director was appointed a director of the three companies: whether it was from the time the company was incorporated or just one day before the company was struck off.

Fixed five-year period

84 Second, the disqualification is for a fixed five-year period. Section 155A(3) does not give the court the power to cut the five-year period short in a deserving case, for example where the three companies were all struck off on the non-breach circumstances prescribed by reg 89B. Section 155A(3) empowers the court only to grant leave to the applicant "to act as director of … a company … *during the period of disqualification*" [emphasis added].

85 Section 155A(3) thereby contemplates a fixed five-year term of disqualification which arises automatically and which must remain intact until it expires. The court's only power under s 155A(3) is to carve out of that five-year period a limited liberty for the applicant to act as a director of "a company". This does not, of course, mean that an application under s 155A(3) must be made in respect of one and only one company. After all, under s 2(1) of the Interpretation Act (Cap 1, 2002 Rev Ed), "words in the singular include the plural". But it does mean that an application under s 155A(3) cannot be a blanket application, seeking to relieve a director entirely of his disqualification under s 155A(1). That would amount to cutting short the fixed five-year period of disqualification. That is contrary to Parliament's intent in enacting s 155A(1). That is also outside the power which Parliament has given the court in s 155A(3). The application must instead name one or more specific companies which the applicant is seeking leave to act as a director of "during the period of [his] disqualification".

Always immediate

86 Third, the disqualification must commence immediately, "after the date on which" the third company is struck off. Section 155A thus gives the Registrar no power to allow a disqualified director a grace period within which he can

lawfully continue to act as a director, no matter how compelling the reason or how exigent the circumstances. A director who acts in breach of the disqualification commits a crime and is liable to be fined $10,000 or imprisoned for two years. The only comfort which the Registrar can give a director is an indication that the director will not be prosecuted for the crime.

87 Section 155A therefore affords no scope to permit a director lawfully to act as a director in order to ensure a prompt and orderly transition of his office to his replacement. It affords no scope for a director lawfully to act as a director even if his immediate disqualification will leave the company with zero directors or with no director ordinarily resident in Singapore as required by s 145(1) of the Act (*cf* s 145(5) read with s 145(6)(*b*)).

Applies to directors who have already accepted appointment

88 Fourth, disqualification under s 155A can befall a director who accepted appointment as a director before s 155A came into force. It is true that s 155A(5) provides that a director cannot be disqualified under s 155A unless all three companies were struck off under s 344 on or after s 155A came into force on 3 January 2016. This prevents the unfairness which would arise if a company which was struck off under s 344 *before* s 155A came into force counted towards a director's limit of three companies struck off within five years under s 155A(1).

89 But that is not the only unfairness which can arise under s 155A. It can also give rise to unfairness in the sense that a director is, on and after 3 January 2016, exposed to a risk of disqualification under s 155A(1) even though he accepted appointment as a director of any one of the struck-off companies when s 155A did not exist. The unfairness arises because the director will have lost the opportunity to bargain *ex ante* for contractual or other protection in the terms

of his appointment as a director to mitigate the risk of any of the prescribed circumstances coming about in respect of the company, and thereby to mitigate the risk that he could find himself disqualified in the future, and quite possibly lose his livelihood, as a result of that company being one of three companies struck off under s 344.

90 Certainly in the first few years of its operation, s 155A will operate to disqualify many directors – the applicant amongst them – who accepted appointment as a director at a time when the Registrar striking a company off under s 344 carried no possible personal consequence for a director whatsoever.

Total disqualification

91 Fifth, the disqualification under s 155A(1) is total. The disqualified director cannot "in any way (whether directly or indirectly) take part in or be concerned in the management of, any company". The premise of s 155A(1) is therefore that merely holding office as a director of three companies which are struck off under s 344 within five years renders a director wholly unfit even to participate in the management of a company, *eg*, as an employee, and even to do so indirectly, *eg*, as a consultant.

92 While the phrase "take part in or be concerned in the management of" has not been judicially defined, it is evident that it is widely phrased to encompass the full gamut of management tasks and activities.[42] It has been suggested that what this same phrase proscribes in the context of s 154(3) of the Act is the "element of decision-making which … affect[s] the company and the conduct of its affairs" and that "it is not necessary that this should be at the

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42 Non-Party's Written Submissions, at paras 83 and 86.

highest corporate echelons" (Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at para 08.077).

93 This total disqualification is imposed on every director caught by s 155A(1) even though all three companies may have been struck off on the three non-breach circumstances prescribed by reg 89B. This total disqualification is imposed even though the director may bear no personal responsibility at all for any of the circumstances prescribed by reg 89B coming about in respect of the three struck-off companies. This total disqualification is imposed even if the director depends for his livelihood on his directorship of or management of companies other than the three struck-off companies. This total disqualification is imposed even though the director merely taking part in the management of another company during the fixed five-year period of disqualification means that he holds no office recognised by the Act in that company and bears no statutory responsibility for that company's compliance obligations under the Act.

No notice

94 Sixth, s 155A does not require the Registrar to notify a director that he has been disqualified under s 155A(1).The Minister's response is simply that s 155A does not require the Registrar to notify a director that he has been disqualified under that section. That is undoubtedly true.

95 But it is the case that the Registrar gives notice to directors on a number of compliance matters even though there is no statutory obligation to do so. The 60-day notice is just one example. The Registrar gives these notices voluntarily, presumably to meet the expectations of the commercial community, to avoid creating a trap for the unwary and to ensure or encourage compliance by pre-empting breaches which may arise from ignorance.

Conclusion on s 155A

96 The disqualification of a director has a significant impact on his livelihood and constitutes a "substantial interference with the freedom of the individual" (*In re Lo-Line Electric Motors Ltd and* others [1988] 1 Ch 477 at 486). Despite this, under s 155A, a director whose companies are in breach of no provision of the Act whatsoever may yet find himself automatically and totally disqualified with immediate effect for a fixed five-year period from even being an executive employee of a company and without even knowing of the disqualification. That fate will befall the director even if it destroys his livelihood. That fate will befall the director even if it was impossible for him, for reasons entirely beyond his control, to satisfy the grounds and conditions for initiating a voluntary striking off or a voluntary winding up of the company. All of this makes the disqualification imposed by s 155A a most draconian penalty. I must assume that it is draconian by design and not through inadvertence.

97 It is of course true that the office of a director is a serious one and that any person who acts as a director ought to know, at the very least, the primary and subsidiary legislation which govern the rights, privileges and duties of that office. The ideal director will ensure that he strikes off his defunct companies voluntarily or winds them up voluntarily. He will ensure that none of the circumstances prescribed by reg 89B ever come about in respect of any of his companies, whether or not defunct. He will understand upon receipt the regulatory significance of a 30-day notice under s 344(1) and a 60-day notice foreshadowing a striking off. He will understand upon receipt the regulatory significance of a striking-off notice which the Registrar issues when a company is struck off. He will count these notices and ensure that the count never reaches three. If he fails to do that, he will know that he has been automatically disqualified under s 155A(1) if he receives three such notices within a five-year

period. All of that is especially true of a director such as the applicant, who accepts appointment as a director in the course of his business and for the purpose of ensuring a company's compliance with the Act and its subsidiary legislation. But not every director is the ideal director. The fact remains that s 155A(1) has created a significant trap for the unwary and ordinary director.

98 The critical issue then is whether the approach to exercising the discretion under s 155A(3) gives the court sufficient latitude to alleviate the draconian effects of the penalty imposed by s 155A(1) in a deserving case and, if so, how to recognise a deserving case. It is to that critical third issue that I turn next.

The conceptual approach to s 155A(3) of the Act

99 On the scope of the discretion under s 155A(3), the Minister argues that it ought to be applied on the same principles as the discretion under s 154(6) of the Act. That section permits the court to grant leave to a director who has been automatically disqualified under s 154(1) of the Act or disqualified by an order under s 154(2) of the Act to act as a director during the period of his disqualification. In particular, the Minister relies on *Ong Chow Hong (alias Ong Chaw Ping) v Public Prosecutor and another appeal* [2011] 3 SLR 1093 ("*Ong Chow Hong*"), a case decided under s 154(6) of the Act.

Ong Chow Hong

100 In *Ong Chow Hong*, VK Rajah JA sitting as a High Court judge examined the statutory objective of the Act's regime for disqualifying directors.

101 In that case, a non-executive director of a public listed company, who was also the chairman of its board of directors, failed to ensure that the company

made proper disclosure to Singapore Exchange Limited of an investigation into the company by the Corrupt Practices Investigation Bureau. For this breach of his duties, he was charged with and convicted of an offence under s 157(1) of the Act (at [10]). The court which convicted him took the view that the objective of a disqualification order under s 154(2) of the Act was predominantly punitive in nature (at [11]) and disqualified him by order from acting as a director for 12 months. The director appealed to the High Court on the basis that the period of disqualification was manifestly excessive. The Prosecution cross-appealed on the basis that it was manifestly inadequate.

102 One of the issues on appeal to Rajah JA was whether the statutory objective of Singapore's disqualification regime for directors was protective, punitive or an amalgam of both (at [3]). A protective objective focuses on the need to protect the public from the risk posed by the errant director. A punitive objective, on the other hand, sees disqualification as a response to the errant director's wrongdoing. It thereby imports the principles which are relevant when imposing a criminal sentence into the discretion to make a disqualification order under s 154(2) of the Act (at [12]). The distinction between a protective objective and punitive objective is critical because it "inform[s] the court on the applicable relevant considerations when assessing the appropriateness and extent of a disqualification order" (at [12]).

103 After examining the genesis and development of the directors' disqualification regime in Singapore, Australia and England, Rajah JA held that the essential statutory objective of our regime has been and continues to be to protect the public from the risk posed by an errant director and not to punish the errant director (at [20]):

> The statutory policy therefore appears to be that disqualification orders ought to be generally imposed to protect

> the public from individuals who are shown to be unworthy of being privileged with the protective shield of corporate autonomy. In other words, the disqualification regime serves to protect the public from abuses of the limited liability privilege.

104 Rajah JA further held that the protective objective of s 154 consists of two intertwined strands (at [22]–[23]):

(a) First, the thin definition of protection. This is concerned with protecting the public from the risk of harm posed by the specific director who is the subject of the disqualification.

(b) Second, the thick definition of protection. This concerns the wider need to protect the public from the risk of harm by *all* errant directors by an "uncompromising reaffirmation of the expected exemplary standards of corporate governance".

105 Rajah JA also observed that local jurisprudence on s 154 of the Act had largely focused on the thin definition of protection without appreciating the thick definition of protection. He held that, when the grounds for disqualification under s 154(2) arise from an inadequate disclosure to the market in a disclosure-based regime such as we have in Singapore, the thick definition is of particular significance because of the need to deter other errant directors and to preserve investor confidence in Singapore's capital markets (at [23]–[24]).

106 This is not to say that the nature and circumstances of the director's wrongdoing are entirely irrelevant under s 154 of the Act. The circumstances of the offence must at the very least be a relevant consideration in so far as they go to the risk which the director poses to the public and the need to protect the public from that risk. This is illustrated by the facts of *Ong Chow Hong* itself. Having concluded that the objective of our disqualification regime is

predominantly protective, Rajah JA analysed the nature and circumstances of that director's offence under s 157 of the Act. He concluded that the thick definition of protection required the director's disqualification to be increased from a period of one year to two years in order to deter "similar irresponsible conduct" by other directors of public companies (at [35]).

The statutory objective of s 155A is deterrence

107 I accept that *Ong Chow Hong* is authority that the statutory objective of s 154 of the Act is predominantly protective. I also accept, with respect, that it is correct in that regard. But *Ong Chow Hong* was decided before the legislative package which includes s 155A was enacted. I do not accept that *Ong Chow Hong* is authority that the statutory objective of s 155A is protective, at least not in the same sense as it is for s 154.

108 Section 154(1) of the Act read with s 154(3) provides that a director is automatically disqualified from acting as a director if he: (a) has been convicted of an offence involving fraud or dishonesty punishable with imprisonment for three months or more; (b) has been convicted of any offence under Part XII of the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("the SFA") on or after 1 July 2015; or (c) has had a civil penalty imposed on him under s 232 of the SFA on or after 1 July 2015. Section 154(2) of the Act read with s 154(3) provides that a court may make a disqualification order against a director upon convicting him of an offence: (a) in connection with the formation or management of a company; (b) under s 157 of the Act; or (c) under s 339 of the Act. Section 157(3)(*b*) of the Act makes it a crime for a director of a company to breach his duty under s 157(1) to "act honestly and use reasonable diligence in the discharge of the duties of his office". Section 339 of the Act makes it a crime for an officer of a company: (a) to fail to keep proper books of account

under certain circumstances; or (b) knowingly to be a party to a company contracting a debt when the officer has no reasonable or probable ground of expectation that the company will be able to pay the debt.

109 What triggers a disqualification under s 154 is the director's personal criminal wrongdoing which has been the subject of a judicial determination. The only exception is a disqualification under s 154(1)(*b*) of the Act which results from a civil penalty imposed under s 232 of the SFA. Even then, establishing liability for a civil penalty under s 232 of the SFA requires proving all of the elements of a criminal offence under the SFA. In that sense, the imposition of a civil penalty under s 232 of the SFA is also based on personal criminal wrongdoing by the director which has been the subject of judicial determination, albeit by a civil court rather than a criminal court. Where a director is disqualified under s 154, therefore, it is the very fact of the judicial determination of personal criminal wrongdoing which both attracts the disqualification and engages the protective objective which the disqualification serves.

110 A disqualification under s 155A arises without any need for any wrongdoing whatsoever, let alone criminal wrongdoing, let alone personal criminal wrongdoing, let alone criminal wrongdoing which has been the subject of judicial determination. It is not a crime to allow a company to become defunct or to cease operation. It is not a crime to leave a defunct company on the register for the Registrar to strike off under s 344. It is not a crime to allow a company to be struck off under s 344. Going back to reg 89B, it is not always a crime to allow one of the circumstances prescribed by reg 89B to come about. And even when one or more of the three strikings off are based on one of the breach circumstances prescribed by reg 89B (*ie*, which amount to a crime), a director may find himself disqualified under s 155A not because of his personal criminal

wrongdoing but by a form of collective responsibility, simply because he had the misfortune to hold office as a director at the time of the striking off.

111 Because a disqualification under s 155A(1) can arise without any wrongdoing by anyone, it seems to me that the disqualification does not engage the protection of the public in any way. In other words, the penalty of disqualification imposed by s 155A is designed to support the statutory objective of s 344, and is therefore directed at protecting the register from being cluttered with defunct companies and is not directed at protecting the public from a director who has been judicially determined to have engaged personally in criminal wrongdoing.

112 Furthermore, even where at least one of the strikings off which leads to a director's disqualification arises from one of the breach circumstances prescribed by reg 89B, it is a nonsense to say that the public needs to be protected from that director in the same way as it does from a director who has been disqualified under s 154(2). A director who is disqualified because he permitted an inaccurate disclosure (*Ong Chow Hong*) or because he engaged in insider trading (*Madhavan Peter v Public Prosecutor and other appeals* [2012] 4 SLR 613) poses an obvious risk to the public. A director who has failed to file a company's annual returns may pose a risk to the coherence of the register and undoubtedly imposes an administrative burden on the Registrar. But he poses no risk to the public from which the public ought to be protected. *A fortiori* where a director is disqualified with no personal fault on his part but simply through collective responsibility.

113 To my mind what underlies the statutory objective of s 155A is neither punishment nor protection but deterrence. It cannot be punishment because it is not a breach of the Act to allow a defunct company to remain on the register. It

cannot be protection because it is a nonsense to say that public needs to be protected from every single director who attracts the automatic fixed five-year total disqualification under s 155A. Section 155A exists as a blunt instrument to support the statutory objective of s 344. It simply imposes a draconian penalty to act as a deterrent for every director against allowing a defunct company to remain on the register and gives every director of a defunct company a powerful incentive voluntarily to strike off or wind up the company instead of leaving it to the Registrar to strike it off. Where neither of those courses of action is possible, typically because of the failure or refusal of the shareholders or remaining directors to cooperate, the draconian penalty imposed on the hapless director is nevertheless the intended effect of s 155A.

The Huang Sheng Chang factors

114 In considering the exercise of the court's discretion under s 154(6) of the Act to grant leave to act as a director after an automatic disqualification under the equivalent of s 154(1) of the Act, *Ong Chow Hong* cited (at [18]) the five factors listed by Wee Chong Jin CJ sitting as a High Court judge in *Huang Sheng Chang and others v Attorney-General* [1983–1984] SLR(R) 182 ("*Huang Sheng Chang*"). Rajah JA expressed the view (at [18]) that these factors remain relevant under our current regime for the disqualification of directors. The five factors (which I shall refer to as "the *Huang Sheng Chang* factors") are:

(a) the nature of the offence of which the director has been convicted;

(b) the nature of the director's involvement;

(c) the director's general character;

(d) the structure and the nature of the business of each of the companies which the director seeks the leave of the court to become a director of or to take part in the management of; and

(e) the interests of the general public, the shareholders, the creditors and the employees of these companies and the risks to the public and to those persons should the applicant be permitted to be a director of those companies or to take part in their management.

115 The Minister submits that the *Huang Sheng Chang* factors are an appropriate starting point for considering the factors which should go towards the exercise of the discretion under s 155A(3) of the Act. I do not accept that submission for two reasons.

116 First, the *Huang Sheng Chang* factors were posited in the context of a disqualification predicated on a judicial determination of personal criminal wrongdoing by a director. As Rajah JA put it in *Ong Chow Hong* at [20], "[t]he rationale behind s 154(1) ought logically be that the individual's fraudulent or dishonest conduct was *prima facie* evidence of his or her suitability of being a director, thereby justifying the automatic restraint". The *Huang Sheng Chang* factors are therefore designed to balance the director's interest in being permitted to resume economically productive activity and the company's interest in gaining access to his management skills and experience against the regulatory interest in protecting the company and its stakeholders as well as the general public from the *prima facie* risk of harm which the director poses to them all by reason of the judicial determination of personal criminal wrongdoing against him. By contrast, as I have demonstrated, a disqualification under s 155A arises without any need for any wrongdoing whatsoever, let alone criminal wrongdoing, let alone personal criminal wrongdoing, let alone a

judicial determination to that effect. To my mind, disqualification under s 155A engages no interest in protecting the company, its stakeholders or the public whatsoever.

117 Second, it appears to me that the *Huang Sheng Chang* factors are capable of undermining the deterrent objective of s 155A. Thus, for example, whether a director is or is not of good character is relevant to the protection objective of s 154, and therefore relevant when assessing the *prima facie* risk which that director poses when making a disqualification order under s 154(2) or when considering an application for leave to act as a director under s 154(6). But a director's good character is wholly irrelevant to the deterrent objective of s 155A.

118 For the same reason, I do not accept that commercial integrity is an overarching consideration when granting leave to act as a director under s 155A(3).[43] This factor is drawn from the Privy Council's decision in *Quek Leng Chye and another v Attorney-General* [1985–1986] SLR(R) 282 (the final appeal from Wee CJ's decision in *Huang Sheng Chang*). At [5], the Privy Council said that the burden of proof lies upon an applicant to satisfy the court that he is "possessed of the high degree of commercial integrity with which those exercising influential managerial functions in limited liability companies should be endowed if the public is to be given adequate financial protection".

119 Like good character, commercial integrity is irrelevant on an application under s 155A(3) for two reasons. First, the predicate of a disqualification under s 155A(1) does not engage a director's commercial integrity at all. Allowing three companies to be struck off under s 344 does not impugn a director's

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[43] Transcript, at p 7; Non-Party's Written Submissions at para 90.

commercial integrity. Neither does failing to strike a defunct company off the register voluntarily or failing to wind it up voluntarily. Second, taking commercial integrity into account is capable of undermining the deterrent objective of s 155A. As with good character, whether a director does or does not possess commercial integrity is relevant when assessing the *prima facie* risk which he poses in the analysis under s 154. But commercial integrity is wholly irrelevant to the deterrent objective of s 155A.

120 It therefore appears to me that the conceptual approach to the discretion under s 155A(3) requires a bespoke set of factors which recognise the unique nature of the disqualification imposed by s 155A and which support its deterrent objective, or at the very least which do not undermine that objective. These factors may include some of the *Huang Sheng Chang* factors, but only if that is warranted as a matter of principle, not simply by a flawed analogy with s 154.

The discretion under s 155A(3)

121 I now turn to consider the fourth issue: the exercise of the discretion under s 155A(3).

Burden is on the applicant

122 It is uncontroversial that the applicant bears the burden of persuading the court to exercise its discretion under s 155A(3). Like the discretion under s 154(6) of the Act, the discretion under s 155A(3) of the Act ought not to be applied so widely as to emasculate the disqualification or to nullify its statutory objective (see *Lee Huay Kok v Attorney-General* [2001] 3 SLR(R) 287 ("*Lee Huay Kok*") at [10]). But by the same token, the discretion ought not to be applied so narrowly as to emasculate the court's power to grant leave. Both ss 155A(1) and 155A(3) represent the will of Parliament. Both have a statutory

objective which the court must advance equally. The court's task, therefore, is to advance the statutory objective of s 155A(1) without rendering s 155A(3) a dead letter.

Exceptional circumstances not required

123 For these reasons, I have difficulty with the Minister's submission that an applicant must demonstrate "exceptional" circumstances in order to secure leave under s 155A(3).[44] If all that is meant by "exceptional" is "unusual" or "not typical", then I accept the submission. It is of course true that the power under s 155A(3) ought to be exercised only if there are some circumstances in a particular application which are unusual or not typical, *ie*, circumstances which do not arise in every disqualification under s 155A(1). That must be the approach to the discretion under s 155A(3) in order to avoid emasculating the disqualification under s 155A(1).

124 But it appears to me that what the Minister means by "exceptional" is "by way of exception", with the suggestion that the starting point is weighted against granting leave. To that extent, I do not accept the Minister's submission. Granting leave under s 154(6) may well require exceptional circumstances. That is because an applicant under s 154(6) of the Act is *prima facie* unfit to act as a director. That is because, as I have mentioned, a disqualification under s 154 can arise only from personal criminal wrongdoing which has been the subject of judicial determination. But, as I have shown, the nature of a disqualification under s 155A is wholly different. Exercising the discretion under s 155A(3) only by way of exception risks narrowing the discretion to the point where s 155A(3) becomes a dead letter.

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44 Non-Party's Written Submissions, at para 89.

Capacity for compliance

125 I confine the analysis which follows to cases in which all of the three strikings off under s 344 have arisen from one or more of the breach circumstances prescribed by reg 89B. The analysis may well be different where a director finds himself disqualified under s 155A with no underlying breach of the Act whatsoever. In that situation, the disqualification will not spring from non-compliance and the exercise of the discretion may well call for a different approach.

126 Where the three strikings off arise from a breach of the Act, it appears to me that the key concept under s 155A(3) is not protection of the public or punishment of the director but the effectiveness of the deterrent in s 155A. I therefore consider that, in order to secure leave under s 155A(3), an applicant must demonstrate a capacity for compliance. That is because the strikings off themselves have demonstrated, *ex hypothesi* and *prima facie*, that the applicant lacks the capacity for compliance.

127 After I decided this application but before I delivered these grounds of decision, the Court of Appeal delivered its decision in *Kardachi*. That case too considered the exercise of the discretion under s 155A(3) of the Act. The Court of Appeal in that case held that the inquiry under s 155A(3) requires a holistic assessment of a number of non-exhaustive considerations, including: (a) the applicant's capacity for compliance with the regulatory requirements of the Act and its subsidiary legislation in the future; (b) any exculpatory reasons for the applicant's failure voluntarily to strike off or wind up the three companies which were struck off; (c) the nature of the company or group of companies in which leave to act as a director is sought; and (d) why it is necessary for him to be given leave to do so (at [70]–[73]). I consider my analysis to be consistent with

Kardachi and I gratefully adopt it, with respect. My analysis differs only as to the relevance of the *Huang Sheng Chang* factors to an application under s 155A(3). For the reasons I have already given, I do not with respect consider those factors to be directly relevant on an application under s 155A. In any event, this difference of analysis makes no material difference to the outcome of the application before me.

128 I consider that there are three dimensions to the applicant's capacity for compliance. The first dimension relates to his capacity for compliance as demonstrated in the circumstances which led to the three companies in question being struck off under s 344. The second dimension relates to his capacity for compliance as demonstrated by the compliance record of the other companies of which he is a director, *ie*, excluding the three struck-off companies. The third dimension relates to his capacity for compliance as demonstrated by his conduct during the period of his disqualification.

129 With this conceptual framework in mind, I make five observations.

130 First, as I have pointed out, the clear intent of s 155A(1) is that a director who is disqualified under that section should serve a fixed five-year period of disqualification. A blanket application for leave to act as a director of any company at all amounts to asking the court to emasculate s 155A(1). It is, in any event, outside the court's power under s 155A(3). An applicant under s 155A(3) should therefore identify the specific company or companies in respect of which he is seeking leave under s 155A(3) to act as a director. He should also explain to the court the specific level of involvement he is seeking leave to have in that company, *ie*, whether he is seeking leave to accept appointment as a director of the company, to take active part in the day-to-day management of the company or simply to be an occasional consultant to the company. He will also have to

explain why that level of involvement is necessary or desirable and appropriate, both from his perspective and from each company's perspective.

131 Second, the automatic, immediate and total disqualification under s 155A(1) means that a director has no legal basis whatsoever on which to continue to act as a director of even a single company as soon as the disqualification takes effect. This is the case even if he files an application under s 155A(3). The Registrar may indicate to the director, after the disqualification takes effect, that the director will face no prosecution for a specified period so as to allow him to effect an orderly transition to replacement directors in every one of the companies in which he holds office as a director. An applicant who seeks leave under s 155A(3) must establish to the court that he took prompt steps to effect that transition. Any applicant who fails to effect that transition during any period allowed by the Registrar, or who uses that period for anything other than its intended purpose, will not only be exposed to criminal prosecution but will also have failed to demonstrate one of the dimensions of his capacity for compliance.

132 Third, s 155A(1) envisages that an applicant must serve at least *some* period of disqualification, *ie* some period of time during which he does *no* act as a director of *any* company. This period is not reckoned from the date on which the disqualification takes effect under s 155A(1). This period is also not reckoned from the date on which the director resigns formally as a director of every company in which he holds that office. It is reckoned from the date on which the applicant complies with the disqualification and *ceases to act as a director* in relation to *any* company. It is only on that date that an applicant can say that he has started serving the disqualification under s 155A(1). Until that date, the applicant commits an offence by acting as a director, even if the Registrar has indicated that no prosecution will ensue if certain conditions are

met. An applicant will ordinarily be expected therefore to establish by evidence to the satisfaction of the court precisely when he started serving his disqualification and that he served an appreciable period of his disqualification *before* filing the application. It will be difficult in ordinary circumstances to secure leave to act as a director before serving any period of disqualification or even after mere days or weeks of starting to do so.

133 Fourth, the period for which the applicant has served his disqualification is a relevant consideration (*Lee Huay Kok* at [10]). The reason this factor is relevant on the analysis under s 155A(3) is because of the deterrent objective of s 155A. If the applicant is able to satisfy the court that the period of disqualification already served has achieved its deterrent objective, the court may grant leave under s 155A(3) even though an application on precisely the same facts would have been dismissed if it had been made before serving the disqualification or even after mere days or weeks of starting to do so. For this purpose, of course, the deterrent objective of s 155A covers not just the deterrent effect of the disqualification on the applicant personally but also its deterrent effect on the general class of persons who hold office as director or aspire to do so. To that extent, the deterrent objective of s 155A(3) also has a thin and a thick definition (see [104] above).

134 Fifth, and subject to each of the foregoing points, it is possible for an applicant to secure leave under s 155A(3) by establishing by evidence to the satisfaction of the court: (a) that he left it to the Registrar to strike off the three defunct companies because of circumstances beyond his control and despite his best efforts; and (b) that the breaches of the Act which led to the three companies being struck off came about because of circumstances beyond his control and despite his best efforts. If the director accepted appointment as a director *after* s 155A came into force on 3 January 2016, the applicant will also have to

establish how the terms on which he accepted appointment as a director catered for the risk that: (a) he would have to allow the three defunct companies to remain on the register despite being defunct; and (b) he would be put in breach of the Act by circumstances beyond his control and despite his best efforts.

135 For this purpose, I accept the Minister's submission that leaving compliance to another director or even to an external service provider does not demonstrate that the circumstances were beyond a director's control or that they came about despite his best efforts. Every director is subject to the same duties under the Act (*W&P Piling Pte Ltd (in liquidation) v Chew Yin What and others* [2007] 4 SLR(R) 218 at [80]. This includes the duty of honesty and reasonable diligence under s 157. Every director is expected to acquire and maintain sufficient knowledge and understanding of a company's business (*Vita Health Laboratories Pte Ltd and others v Pang Seng Meng* [2004] 4 SLR(R) 162 at [21]). This is so whether the director is executive or non-executive and whether the director is appointed for the sole purpose of satisfying the requirement in s 145(1) of the Act or otherwise.

136 I now turn to consider the applicant's arguments for granting leave under s 155A(1).

The exercise of the discretion

Blanket application

137 The first point I make is that the applicant's application is a blanket application for leave to act as a director of any company during the period of the disqualification. For the reasons I have given, it is not appropriate for an applicant under s 155A(3) to seek blanket relief from his disqualification. And s 155A(3) does not give me the power to grant such relief.

138 Nevertheless, I do not dismiss the applicant's application on this technical ground alone. A disqualification under s 155A(1) has the potential to destroy an applicant's livelihood. And the disqualification may arise with no underlying breach of the Act whatsoever. If the applicant had been able to make out a case for the exercise of my discretion under s 155A(3), I would have been prepared to consider an oral application to amend the prayer for relief in his originating summons so that it sought leave for him to act as a director only in respect of one or more named companies. In the event the amendment had been allowed, I would of course have ensured that the Minister had sufficient time to consider the change in the applicant's relief and sufficient opportunity to respond to the change with additional evidence and submissions, if thought necessary.

139 For the reasons which follow, however, I do not consider that the applicant has established a case for the exercise of the discretion even in relation to a single named company. In short, I do not accept that the applicant has demonstrated a sufficient capacity for compliance to merit leave under s 155A(3) at this early stage of his disqualification.

The three struck-off companies

140 The applicant submits that he should be granted leave to act as a director under s 155A(3) because the three companies were struck off for reasons which do not suggest any negligence or lack of knowledge of the obligations of corporate governance on his part.[45]

141 I do not accept this submission. The applicant had a duty to file annual returns for each of the struck-off companies under the Act. In addition, ensuring

[45] Transcript, at pp 9–12.

compliance with the Act was one of the purposes for which the applicant was appointed a director of each of these three companies. As the Minister points out, the applicant did not file annual returns for these three companies for at least two consecutive years.[46] In all, the applicant failed to file annual returns for these three companies on seven occasions within four years.[47] This amounts to personal criminal wrongdoing by the applicant under s 197(6) of the Act. This also amounts to a pattern of regulatory non-compliance by the applicant which weighs against his capacity for compliance.

142 I also note that counsel for the applicant concedes that the applicant was unaware of the existence of, much less the effect of, s 155A until the ACRA officer drew it to his attention on 31 July 2018.[48] That is why he was unaware, when the Registrar struck Shoyom and West Shore off the register on 5 June 2017, that he was disqualified under s 155A(1) of the Act. This too weighs against the applicant's capacity for compliance.

Other companies

143 The Minister points out that ten other companies of which the applicant was a director repeatedly failed to file annual returns.[49] Two of these ten companies filed no annual returns from 2012 onwards. Seven of these ten companies filed no annual returns from 2013 onwards. One of these seven companies was his personal vehicle, Latitude. One of the ten companies filed no annual returns from 2014 onwards. Of these ten companies, four of them

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46 Reply Affidavit of Chua Shiao Theng Barbara, at para 5.

47 Reply Affidavit of Chua Shiao Theng Barbara, at para 13.

48 Transcript, at pp 2–6.

49 Reply Affidavit of Chua Shiao Theng Barbara, at paras 22–24 and 31; Transcript, at pp 39–40 and 47.

filed no annual returns from the date on which the applicant incorporated them. In all, the Minister points out that the applicant failed to file annual returns for various companies at least 40 times over the ten years from 2008 to 2018.[50] Only in respect of some of these ten companies did the applicant rectify the breach, and even then only in 2017 and 2018.

144 The applicant submits that these failures are not relevant to the exercise of the discretion under s 155A(3) because they did not arise with respect to the three companies from whose striking off his disqualification springs. I do not accept this submission. As I have mentioned, an applicant's capacity for compliance comprises three dimensions. One of those dimensions is his capacity for compliance in respect of companies other than the three struck-off companies.

145 I accept the Minister's submission that the applicant's pattern of regulatory non-compliance with respect to these other companies also weighs against his capacity for compliance.[51] I do not, however, accept the Minister's submission that this conduct counts against the applicant's commercial integrity.[52] That is too strong an inference to draw from a breach of a regulatory requirement. In any event, commercial integrity is, for the reasons I have given, immaterial to the exercise of the discretion under s 155A(3).

Hardship

146 The applicant submits that his role as a director of his 36 companies is his main source of business and income. He submits further that his inability to

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50 Non-Party's Written Submissions, at para 100; Transcript, at p 52.

51 Non-Party's Written Submissions, at para 100; Transcript, at pp 25, 42 and 54.

52 Non-Party's Written Submissions, at paras 104–106.

act as a director of these companies will adversely affect the livelihoods and businesses of many of his employees and the partners with whom he works, as well as his clients who have reposed their trust in him personally.

147 I accept the Minister's submission that hardship is generally not a relevant consideration under s 155A(3).[53] A disqualification under s 155A(1) is a penalty. And it is in the nature of penalties that they cause hardship (*Huang Sheng Chang* at [45] and *Lim Teck Cheng v Attorney-General* [1995] 3 SLR(R) 223 at [14]). This hardship will be felt by the disqualified director, by the companies of which he is a director, by the shareholders of those companies, by the employees of those companies and by those companies' other stakeholders. This hardship is an intended or incidental effect of every disqualification under the Act, not just of the disqualification under s 155A(1).

148 The applicant has failed to show that his disqualification will cause any hardship to any person or group of persons which goes beyond the hardship which Parliament intended s 155A(1) to cause.

Systemic considerations

149 The applicant submits that his disqualification will lead to the possible outflow of the $1bn in assets under management which his clients hold through the structures and companies which he has established.[54]

150 I have already dealt with this submission in so far as it relates to hardship. But the implication of this submission is that Singapore might suffer some form of systemic consequence as an international private wealth

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53 Non-Party's Written Submissions, at para 93.

54 Transcript, at pp 21–23.

management centre arising from implementing an automatic disqualification such as s 155A or from taking too narrow an approach to the discretion under s 155A(3).

151 I reject this as a factor in the exercise of the discretion under s 155A(3). Parliament has undoubtedly weighed this systemic consideration carefully in enacting the legislative package which includes s 344(1A), s 344A and s 155A of the Act, reg 89B and the Striking Off Regulations. No doubt Parliament has also weighed other systemic considerations including any possible chilling effect which s 155A might have on Singapore as an international commercial centre and incorporation centre. I cannot have regard to these systemic considerations at this stage. That would amount to looking behind the intent of Parliament as expressed in the words of s 155A. I must, and can only, give effect to Parliament's intent as expressed in those words.

No prejudice to clients

152 The applicant also argues that the nature and structure of the applicant's companies is such that they involve affluent individuals who do not require the same level of protection through disqualification of a director as, for example, an ordinary member of the public.[55]

153 This point is immaterial. The statutory objective of the disqualification under s 155A(1) is not protection but deterrence.

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[55] Transcript, at pp 10–11 and 16.

Period of disqualification served

154 The applicant was disqualified with effect from 6 June 2017. But, because he was unaware that the disqualification had taken effect, he did not commence serving his disqualification until 5 September 2018.

155 I accept the Minister's submission that the period of disqualification which the applicant has served is too short. The applicant has undoubtedly demonstrated a capacity for compliance by resigning from all but one of his directorships within five weeks of learning of his disqualification, within the period allowed by the Registrar, and by voluntarily initiating the process to have the remaining company struck off. That satisfies one dimension of his capacity for compliance. And I accept that his disqualification will end, in accordance with s 155A(1), on 5 June 2022. That is so even though he did not begin serving it until 5 September 2018.

156 But the factor which is relevant to the analysis under s 155A(3) is the period of disqualification which the applicant has in fact served before making his application under s 155A(3). The fact remains that the applicant made his application on 20 August 2018, before he had started serving any period of disqualification. And he had served only seven weeks of disqualification on the date on which I heard his application. To grant the applicant leave under s 155A(3) to act as a director of even a single company when he has served such a short period of disqualification would, to my mind, be inconsistent with the deterrent objective of s 155A(1).

Circumstances beyond his control

157 The final point which the applicant makes is that the three strikings off and the underlying breaches of the Act – both in respect of the three companies

as well as his other companies – came about due to factors beyond his control and despite his best efforts.[56]

158 The applicant's evidence, which the Minister does not challenge and which I accept, is that the clients for whom he incorporated the three struck-off companies became uncontactable, failed to pay him for his services and abandoned the companies.[57] Therefore, he could not obtain in a timely manner the information he needed to file their annual returns. He also could not obtain funds from the clients to pay for either a voluntary striking off or a voluntary liquidation. He could not even obtain approval from the shareholders to authorise him to take any such step.

159 The applicant points out that, despite the care with which he chooses his clients, there is always a risk that a client will fail or refuse to provide financial information in time or otherwise to cooperate with him in complying with the regulatory requirements of the Act and its subsidiary legislation.[58] For the three struck-off companies, the applicant points out that he was the sole remaining director of these companies who was ordinarily resident in Singapore. He was therefore prohibited from resigning as a director by s 145(5) of the Act and had no choice other than "sitting the case out", presumably until a striking off under s 344.[59]

160 As for the other companies, the applicant submits that the three main reasons for their breaches of the Act were that: (i) there were disputes between

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56 Transcript, at p 12.

57 First Affidavit of Thomas Haeusler, paras 17–20.

58 Second Affidavit of Thomas Haeusler, at para 17.

59 Second Affidavit of Thomas Haeusler, at para 32. Supplementary Affidavit of Wong Lok Hang Enoch, Exhibit WLHE-1.

his clients such that he could not obtain an agreement to convene annual general meetings ("AGMs"); (ii) the subsidiaries of some of them failed to provide their financial statements for reasons ranging from the need to translate their accounts into English to disputes with external parties or even between shareholders; and (iii) his clients failed to pay his fees.[60]

161 I accept that a factor which can legitimately be taken into consideration on an application under s 155A(3) is whether the applicant's failure to remove a defunct company from the register voluntarily and to prevent any of the breach circumstances prescribed by reg 89B from coming about arose from circumstances beyond the director's control or despite his best efforts. But I do not accept that these three strikings off which led to the applicant's disqualification were due to factors beyond his control or came about despite his best efforts.

162 I accept, as the Minister submits,[61] that a director faced with shareholders who are failing or refusing to cooperate in fulfilling a company's compliance obligations has certain courses of action open to him to minimise the risk of breaching the Act, and thereby to minimise the risk of the company being struck off under s 344 as a result of compliance breaches. The Minister first suggests that a director can minimise these risks by doing better due diligence on his clients.[62] I accept this point in principle. I therefore accept that this point will be a relevant factor in exercising the discretion under s 155A(3) in relation to applicants who accept directorships on or after 3 January 2016. But I do not accept this point in relation to this applicant. He did not have a

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60 Second Affidavit of Thomas Haeusler, at paras 28–31.

61 Non-Party's Written Submissions, at paras 63–67.

62 Non-Party's Written Submissions, at para 63.

reasonable opportunity to minimise these risks by doing better due diligence on his clients or even by bargaining for terms in his appointment to cater for these risks. That is because the applicant accepted appointment as a director in all three companies when the only consequence for these types of breaches of the Act was a fine, not a striking off and certainly not a disqualification leading to the potential loss of his livelihood.

163 The Minister next suggests that a director can apply to ACRA for approval to file the company's annual returns without holding an AGM or with the signature of only one director.[63] I do not accept this point. This course of action is a non-statutory procedure and is an indulgence granted by the Registrar. It affords only temporary relief. It does not assist a director, such as the applicant, whose shareholders have permanently lost all contact with him.

164 The Minister next suggests that a director can apply to strike a company off the register voluntarily, and submits that this applicant could and should have done so.[64] That is undoubtedly the case since s 344A of the Act and the Striking Off Regulations came into force on 3 January 2016. I therefore accept this point. It is true that invoking s 344A requires an application by a majority of directors. In this case, the applicant was the sole director of two out of the three struck-off companies. He could therefore have used s 344A to ensure that at least those two companies were not struck off under s 344.

165 It is true that the s 344A procedure is available only where the company is not carrying on business, and even then only if the director or directors applying under s 344A can confirm that the company has no assets and

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63 Non-Party's Written Submissions, at para 64.

64 Transcript, at pp 31 and 44.

liabilities and is subject to no ongoing proceedings. In this case, it appears from the evidence that none of these three companies ever carried on business. And by the time the Registrar struck them off under s 344, if not earlier, they were in fact defunct. There was no impediment to the applicant striking these two defunct companies off the register voluntarily under s 344A. That is precisely the statutory objective of both s 344 and s 344A.

166 The applicant suggests that he could not have invoked s 344A without the consent of the relevant shareholders. I consider any risk to him posed by aggrieved shareholders in these circumstances to be fanciful. Directors in the applicant's position who accept appointment on or after 3 January 2016 can eliminate that risk entirely by suitably drafted terms of engagement.

167 In the final alternative, the Minister submits that a director can apply for a defunct company to be wound up compulsorily on the just and equitable ground under s 254(1)(*i*) of the Act. That route was not available to the applicant. Section 253(1) of the Act does not give a director, *qua* director, standing to apply to have his company compulsorily wound up. However, s 124(1)(*b*) of the IRDA has since filled that gap. A director now has standing *qua* director to apply to have his company compulsorily wound up either on the just and equitable ground under s 125(1)(*i*) of the IRDA or even on the ground that the company is in default of its obligation to lodge its annual return or to hold an AGM under s 125(1)(*b*) of the IRDA. To the extent that the latter course will require the director to incur the expense not only of engaging solicitors to file the winding-up application but also possibly of funding a private liquidator, that is part of the cost of taking on an appointment as director and ought to be factored in at the time of appointment either by way of a deposit of funds to account or by being priced into the cost of the director's services.

Conclusion

168 For the foregoing reasons, I have dismissed the applicant's application with costs.

Vinodh Coomaraswamy
Judge of the High Court

Adrian Tan (August Law Corporation) for the applicant;
Gordon Lim and Enoch Wong (Attorney-General's Chambers)
for the non-party.