Re IDEAGLOBAL.COM Ltd
[2000] SGHC 65

Case Number : OS 289/2000

Decision Date : 22 April 2000

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : Nish Shetty (Wong Partnership) for the applicants

Parties : —

Companies – Directors – Loan made to another company owned by director – Contravention of s 163(1) of Companies Act (Cap 50, 1994 Rev Ed) – Application for relief under s 391(2) of Companies Act (Cap 50, 1994 Rev Ed) – Whether court has jurisdiction to grant relief under s 391 from prosecution for an offence – ss 163(1) & 391(2) Companies Act (Cap 50, 1994 Rev Ed)

: This is an application for relief under s 391(2) of the Companies Act (Cap 50) (`the Act`). After hearing counsel for the applicant, I dismissed the application on 17 April 2000 and set out below my grounds of decision.

Background facts

According to the affidavit filed by Mr Olivier Mougin on its behalf, the applicant is a company (`the Company`) that provides financial information and analyses to major financial institutions in Singapore and abroad. It was incorporated on 5 July 1995 and commenced operations in January 1996. Mougin said that the Economic Development Board had granted the Company `Pioneer Service` status under the Economic Expansion Incentives (Relief from Income Tax) Act which would render its revenue from its operations in Singapore free from income tax for six years. Mougin did not state the date of such grant. I understand from counsel that the situation is as follows. It takes some time for the tax free status to become effective and in mid-1998 when the relevant events occurred the tax free status had not been formally granted yet. Mougin did not exhibit in his affidavit the documents relating to the `Pioneer Service` status, nor indeed did he describe it in any detail. However in view of my holding on the position in law, it is not necessary to procure the information and documents. I am content to assume the facts as stated in Mougin`s affidavit and as clarified by counsel.

According to Mougin, the Company was profitable at an early stage and had operated since inception on a self-financing basis. The Company had no substantial creditors and no outstanding shareholders` loans. In fact a sizeable cash balance was built up after a few years and the management proposed to return a substantial part of it to the shareholders in the form of dividends. The manner in which they went about achieving this is summarised in paras 11 to 16 of Mougin`s affidavit:

> *11 On 15 May 1998, an extraordinary general meeting was convened to approve inter alia the payment of the sum of USD4m by way of tax exempt dividends to the shareholders of the applicant company. The EGM was convened in consultation with the Company`s advisors, particularly the company`s legal advisors. ...*
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> *12 The proposed payment of a tax-exempt dividend totalling USD4m was approved by the shareholders at the EGM. Further to the approval, a dividend of USD4m was paid out on 3 June 1998.*

13 On or about 26 June 1998, it was brought to the Company`s attention by their advisors that there were insufficient tax credits at that point in time for the dividend declared and paid. This would have meant that the dividend paid out would not have been tax-exempt and the shareholders would have been exposed to adverse tax consequences.

14 The Company then sought advice from its legal advisors and tax advisers on how to resolve the issue as the dividend had already been declared and paid...The Company was advised that the payment to the shareholders could be treated as an `Advance` or a loan to the shareholders pending receipt of the tax credits from the authorities. This advance could then be set off against the tax exempt dividends, once declared.

15 The Company accepted this advice and with the help of the Company`s legal advisors, the Company sought from its shareholder approval to treat the payments made as advances. This was done by way of a memorandum to that effect. ...

16 Based on the advice given, a second payment of a total of USD7.75m was made on 4 August 1998. This sum was also to be treated as an advance pending the receipt of exempt income balance from the IRAS. ...

It turned out that one of the shareholders of the Company, Pinewood Investments Pte Ltd (`PIPL`), was owned and controlled by a director of the Company, Mr Shirish Modi, who is also its chairman and CEO. When Modi entered into employment with the Company he was offered an option to purchase shares at 1996 prices. Modi exercised this option in 1998 but chose to purchase the shares in the name of PIPL. This fact was known to all the other shareholders of the Company as well as to its legal advisors and the company secretary.

The legal issue

The problem confronting the Company and its directors is that there is a loan extended by the Company to PIPL, which is owned by one of the directors of the Company, putting them in breach of s 163(1) of the Companies Act. Subsections (1) and (7) of s 163 provide as follows:

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

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

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

if a director or directors of the first-mentioned company is or together are interested in shares in the other company of a nominal value equal to 20% or more of the nominal value of its equity share capital.

...

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

It would appear that the Company had contravened s 163(1) and by virtue of s 163(7), the directors who authorised the loan would have committed an offence and be liable on conviction to a fine up to $20,000 or to imprisonment of up to two years. The Company`s position is that the loan was made pursuant to legal advice, albeit given wrongly, and without knowledge that s 163(1) would be contravened. The directors and the Company had acted bona fide throughout for the legitimate purpose of tax avoidance. Had they known that this would contravene any law, they would not have proceeded with this course of action. No person had been prejudiced by this action. Hence the Company and directors prayed for relief to be granted under s 391 of the Act, which provides as follows:

Power to grant relief

(1) If in any proceedings for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.

(2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust he may apply to the Court for relief, and the Court shall have the same power to relieve him as under this section it would have had if it had been a court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought.

(3) The persons to whom this section applies are -

(a) officers of a corporation;

(b) persons employed by a corporation as auditors, whether they are or are not officers of the corporation;

(c) experts within the meaning of this Act; and

(d) persons who are receivers, receivers and managers or liquidators appointed or directed by the Court to carry out any duty under this Act in relation to a corporation and all other persons so appointed or so directed.`

The relief sought is against prosecution of the directors of the Company under s 163(7) for contravention of s 163(1) of the Act. The first question is that of jurisdiction, ie whether the Court has powers to grant relief under s 391 from prosecution for an offence. Section 391(1) relates to proceedings that have actually been brought against a person and provides that the court may relieve him in whole or in part from liability in that action. That is not the case here, where no proceedings against any director have been taken out. The Company is applying under s 391(2), where an action is apprehended. However the difficulty faced by the Company is that s 391(2) relates to a ` ***claim*** ` that might be made against a person ` ***in respect of any negligence, default, breach of duty or breach of trust*** `. Although the terms `default` and `breach of duty` could conceivably relate to an offence, the others, namely, `negligence` and `breach of trust` clearly do not. Taken as a group, these words do not suggest that criminal breaches are within their contemplation. More importantly, the word `claim` clearly has no application to a prosecution for an offence.

Counsel argued that s 391(2) should be read together with s 391(1) because the same powers of relief are vested in both subsections. The first subsection relates to the situation where proceedings have been taken out against the applicant and the second where the applicant apprehends that such proceedings may be taken out. Therefore the word `claim` in sub-s (2) should bear the same meaning as the word `proceedings` in sub-s (1). A necessary further argument would be that the word `proceedings` is wide enough to cover a prosecution for an offence. The difficulty I have with this argument is that it is equally logical to say that the word `claim` in sub-s (2) indicates that the intention of the legislature was to limit the word `proceedings` in sub-s (1) to matters in which the word `claim` is appropriate, ie to civil proceedings in which any party would have grounds to make a claim against the applicant. Subsection (2) also uses the word `proceedings` to describe the action referred to in sub-s (1) and therefore it cannot be said that the use of the word `claim` was not deliberate.

Counsel submitted that s 391(2) is wide enough to cover criminal proceedings and referred firstly to Woon and Hicks` ***The Companies Act of Singapore: An Annotation*** . In relation to the application of this provision in criminal proceedings, the editors` comment is as follows (at para XII[258]):

> ***S 391(1) application to criminal proceedings*** *English courts have held that their equivalent of s 391 will apply to relieve a person of criminal liability:* ***Re Barry and Staines Linoleum Ltd*** *... ;* ***Re Gilt Edge Safety Glass Ltd*** *...;* ***Customs & Excise Commissioners v Hedon Alpha Ltd*** *... per Ackner LJ. Australian courts have taken the view that the section is inappropriate to relieve a person from criminal as opposed to civil liability: Lawson v Mitchell ... There is no local authority as to whether the wider English view or the narrower Australian view is right. Chan Sek Keong J declined to decide the point in* ***Swee Leong Cheng v Project Aqua Culture & Trading Co Pte Ltd*** *... As a matter of policy, perhaps it would be preferable to extend rather than to restrict the court`s powers in this matter.`*

I now turn to consider the authorities.

Re Barry and Staines Linoleum Ltd

The earliest decision is the English case of **Re Barry and Staines Linoleum Ltd** [1934] Ch 227. It concerns a director who had inadvertently failed to obtain his qualification shares within the time

fixed. After that time, he had technically ceased to be a director although he continued to act and receive remuneration as one. He petitioned the Court under s 372 of the English Companies Act 1929, which is in pari materia with s 391 of the Act, for relief from liability under Section 141 of the 1929 Act. The relevant provisions of s 141 are as follows:

> *(1) ... it shall be the duty of every director who is by the articles of the company required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the articles.*
>
> *...*
>
> *(3) The office of director of a company shall be vacated if the director does not within two months from the date of his appointment or within such shorter time as may be fixed by the articles, obtain his qualification, or if after the expiration of the said period or shorter time he ceases at any time to hold his qualification.*
>
> *...*
>
> *(5) If after the expiration of the said period or shorter time any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding five pounds for every day between the expiration of the said period or shorter time or the day on which he ceased to be qualified, as the case may be, and the last day on which it is proved that he acted as a director.* `

Maugham J accepted that the provision conferred jurisdiction to grant relief against prosecutions without any analysis of it. He said that it was ` ***beyond doubt*** ` that s 372(1) applies in proceedings in a court of summary jurisdiction to recover penalties against directors, including proceedings under s 141. He went on to say that s 372(2) (at p 232):

> *... gives power to the court to grant relief in cases where application is made for it by a director who, although no proceedings such as are described in sub-s 1 are being taken against him, apprehends that a claim may be made against him under that subsection. A director apprehending such a claim may apply to the court for relief, and in my opinion the court, upon such an application is given, in the words of sub-s 2, `the same power to relieve him as under this section it would have had if it had been a court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought.`*

However he said that there was a ` ***wide difference*** ` between proceedings before a court of summary jurisdiction for a fine or penalty and proceedings to recover money due to the company from one of its officers. Maugham J noted that in the former instance the fine or penalty went to the Exchequer although s 365 gives the court power to direct that the fine or penalty be applied towards payment of costs of the proceedings or to reward an informant. In the latter situation, the Exchequer was not directly concerned but (at p 233):

> *... the sum is prima facie to go to benefit shareholders if the company is*

> *solvent or creditors if it is insolvent. Section 372 of the Companies Act 1929 says nothing about the parties who ought to be present when an application for relief is made or about the circumstances in which the court is to relieve an officer of a company from liability to the company ..., and in my opinion, although as I have said, I think there is jurisdiction under s 372, that jurisdiction ought to be exercised with great care.*

Maugham J held that the circumstances of the case merited the grant of relief from the petitioner`s liability to be fined under s 141(5).

Re Gilt Edge Safety Glass Ltd

The next case cited is also an English decision, that in **Re Gilt Edge Safety Glass Ltd** [1940] Ch 495. The two applicants there, after they had ceased to hold the qualifying value of shares to be directors of a company, had continued to act as such. Summary proceedings were commenced against them in the magistrates` courts under s 141(1) of the 1929 Act. They petitioned the court for relief under ss 372(1) and (2). Crossman J held that s 372(1) related to the proceedings for negligence, default, breach of duty or breach of trust which would be the summary proceedings commenced in the magistrates` court. He said that it was for the magistrate dealing with the summons pending there against the petitioners to deal with an application under s 372(1). However pursuant to s 372(2), he granted relief to the petitioners from civil liability to the company. The learned judge accepted the decision in ***Re Barry and Staines Linoleum Ltd*** without any consideration of the scope of the provision, saying (at p 501):

> *I think that it follows from the decision of Maugham J in **Re Barry and Staines Linoleum Ltd**, that the phrase `any claim ... in respect of any negligence, default, breach of duty or breach of trust` in s 372, sub-s 2, ... includes proceedings against the petitioners under s 141, sub-s 5, and so includes the proceedings against the petitioners which were commenced ... at Bow Street Police Court, as in that case the learned judge gave relief under s 372, sub-s 2, from prospective liability to fines and penalties under s 141, sub-s 5.*

It should be noted however that Crossman J only granted the petitioners relief from civil liability to the company under s 372(2) and held that an application for relief under s 372(1) had to be dealt with by the court hearing the proceedings for the default.

Lawson v Mitchell

The third decision, in chronological order, is that of the Full Court of the Supreme Court of Victoria in **Lawson v Mitchell** [1975] VR 579. The plaintiff there had laid an information before a magistrates` court to complain that the defendant, as director of a company, had not caused true and fair accounting records to be kept and thereby had committed an offence. After the magistrate found that the offence had been made out, the defendant applied for relief pursuant to s 365 of the Companies Act 1961 (in pari materia with s 391 of the Act). The magistrate agreed that in the circumstances relief ought to be given and dismissed the information. The plaintiff applied to the Supreme Court to review that decision.

Young CJ and Newton J (delivering a joint judgment) and Kaye J declined to follow the two English

decisions and held that s 365 of the 1961 Act did not apply to criminal proceedings. Young CJ and Newton J said (at p 582):

> *Notwithstanding the decisions in **Re Barry & Staines Linoleum Ltd** ... and **Re Gilt Edge Safety Glass Ltd** ..., we consider that s 365 empowers a court to grant relief from civil liability only. We consider that s 365 has no application to criminal liability, whether upon a summary prosecution in a Magistrates` Court or upon indictment. These conclusions are, in our opinion, supported by a consideration of s 365 in its present form as a mere matter of statutory interpretation, and we believe that the conclusions are reinforced by a consideration of the history of the provision.*

The joint judgment went on to consider s 365 from the viewpoint of statutory interpretation. The learned judges found that whereas the words in the provision were ` ***entirely apt*** ` to cover relief from civil liability, they clearly had no application to criminal liability. One of the reasons given was in relation to s 365(3) which is a provision relating to jury trials. Although this is not present in our Companies Act, this is relevant for the purpose of determining the scope of the section. Section 365(3) of the 1961 Act provides as follows:

> *Where any case to which sub-section (1) of this section applies is being tried by a judge with a jury the judge after hearing the evidence may, if he is satisfied that the defendant ought in pursuance of that sub-section to be relieved either in whole or in part from the liability sought to be enforced against him, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the judge thinks proper.*

Young CJ and Newton J said that the use of the words `defendant` and `judgment to be entered`, and the reference to costs indicate that this refers to civil trials only and not to criminal trials at all.

Another reason given by the learned judges was that s 365(2) was silent as to who would the respondent to the application be. While in civil proceedings this would be obvious, if it applied to criminal proceedings there is the question whether the Attorney General was the appropriate respondent and whether an order under this provision would bind the Crown. Moreover, such powers would add little to the already wide discretion given to the court to determine punishment upon conviction. And the word `claim` did not appear to be apt to describe a criminal prosecution. Furthermore, if the provision applied to criminal proceedings, it would cover all the offences under the Companies Act. The learned judges considered that there was no justification for the view that s 365 was intended to operate as a proviso for these statutory offences, some of which already provided for relief if the officer concerned had acted honestly or reasonably. The joint judgment then embarked on a detailed consideration of the legislative history of s 365 and concluded that it showed that the provision was not intended to apply to criminal proceedings.

Turning to the two preceding English decisions, Young CJ and Newton J pointed out that in ***Re Barry*** and ***Staines Linoleum Ltd*** , Maugham J had given no reasons in his extempore judgment for his conclusion that the provision applied to criminal proceedings. It appeared that no argument to the contrary was made to him as the only parties there were the petitioner-director and the company itself. As for ***Re Gilt Edge Safety Glass Ltd*** , the conclusion of Maugham J was accepted as correct by Crossman J in the latter`s extempore judgment, again without the contrary view being argued. The learned judges said that they found nothing in text books published prior to the first English decision

which suggested that it was then thought that the provision could apply to criminal proceedings. Therefore, for the reasons they have given in relation to the statutory interpretation and legislative history of the provision, and the fact that they did not see any policy grounds to do so, they declined to follow the English decisions.

In his separate judgment, Kaye J analysed the provision and concluded that the terms used were not appropriate to refer to criminal proceedings. The learned judge also pointed out the inherent procedural problems if it did apply. He said (at p 595):

> *... the exercise of power to relieve a person wholly or partly in respect of prospective liability for conviction and punishment would create great problems. It might require a court to make findings of fact upon an information for an offence - perhaps in advance of its formulation - and an adjudication that the person at risk should not be convicted, or if convicted not punished. ... The procedure followed to absolve a person from risk of conviction is to grant him either a pardon or an indemnity or immunity from prosecution. In addition the Crown might enter a* ***nolle prosequi*** *for this purpose.*

Kaye J however noted the antiquity of the two English decisions and the fact that references have since been made to them by learned commentators and authors. He said that ` ***this court ought not to depart from them unless there is some demonstrable error in the principle adopted by the Chancery Division*** `. He then embarked on an analysis of the legislative history of the provision and concluded that there were no circumstances that would warrant following those decisions as the provision, (at p 600):

> *being designed to relieve persons from liability, is not one of the class under which in the past rights have been acquired or duties incurred, and by not following the decisions neither injustice nor inconvenience is likely to be suffered.*

Customs and Excise Commissioners v Hedon Alpha Ltd

The next case is decision of the English Court of Appeal in **Customs and Excise Commissioners v Hedon Alpha Ltd** [1981] QB 818[1981] 2 All ER 697. The defendant company had failed to pay general betting duty due under the Betting and Gaming Duties Act 1972. The Commissioners brought proceedings under s 2(2) of the 1972 Act to recover the duty from the company and from the second and third defendants as its directors. In his defence, the third defendant pleaded that he had acted throughout honestly and reasonably and, if he had been in default, prayed for relief under s 448(1) of the Companies Act 1948 (in pari materia with s 391 of the Act). The court below ruled that s 448 did not apply to proceedings under s 2(2) of the 1972 Act on two grounds: (i) that the commissioners` action was not a proceeding for default but for debt; and (ii) that s 448 did not apply to proceedings for the recovery of debts or the enforcement of civil liabilities by third persons. The judge below also said that proceedings under s 448 covered claims made against a party by companies or their liquidators, the Board of Trade and private prosecutors, including penal proceedings for the enforcement of the Companies Act.

The Court of Appeal dismissed the appeal, agreeing with the two grounds given in the court below. Stephenson LJ said that there was a surprising absence of authority on the meaning of `default` in s 448 and on the extent of the application of the provision. He noted that the editors of ***Palmer`s***

Company Law (22nd Ed) were uncertain as to its application to actions by third parties whereas those of ***Penington`s Company Law*** (4th Ed) said that it did apply to criminal proceedings. Stephenson LJ did not expressly approve the statement of the High Court that s 448 applied to criminal proceedings and was content to say that ` ***s 448 is inapplicable to the commissioners` claim because it is inapplicable to any claim by third parties to enforce any liability except a director`s liability to his company or his director`s duties under the Companies Acts*** .` It is doubtful whether the learned Lord Justice intended this to include enforcement of a director`s duties by way of prosecution for an offence, particularly in view of the following comment in relation to the need for clear words in a provision in order to displace another statutory provision (at [1981] QB 818, 824; [1981] 2 All ER 697, 702):

> *Wide and general though the opening words of s 448 are, read in their context they do not allow an officer or auditor of a company to claim relief in `any` legal proceedings which may be brought against him in his capacity as an officer or auditor of a company by the rest of the world. If Parliament had wished to provide a director, whom it exceptionally makes liable to discharge a company liability, with the protection of s 448 or some other protection, it would, in my judgment, have done so by express words, either by subjecting the statutory liability to the right to claim relief under s 448, or as in the Social Security Act 1975, by subjecting it to some other restriction.*

Griffiths LJ also did not expressly say that s 448 applied to criminal proceedings and described it as applying where a director had:

> *failed in some way in the discharge of his obligations to his company or their shareholders or who had infringed one of the numerous provisions in the Companies Acts that regulate the conduct of directors.*

Ackner LJ held that the word `default` in s 448 referred to `a species of misconduct by an officer of a company or a person employed by a company as auditor, against liability for which a court may relieve him either wholly or in part. He then made the following statement (emphasis added):

> *That is sufficient to dispose of this appeal, but I accept that the true ambit of s 448, with one limited exception, is restricted to claims by or on behalf of the company or its liquidator against the officer or auditor for their personal breaches of duty.* ***The only exception relates to the criminal process for the enforcement of certain specific duties imposed by the 1948 Act on the company`s officers, eg the requirement to hold a specified share qualification****. Section 448 thus gives similar protection to directors to that which is accorded to trustees under s 61 of the Trustee Act 1925. Significant support for the proposition that s 448 operates, with the exception referred to above, only in relation to claims by a company against its officer or auditor is provided by the Social Security Act 1975, s 152(4).*

The following observations may be made in relation to the Court of Appeal decision in ***Customs and Excise Commissioners v Hedon Alpha Ltd*** :

(i) Stephenson and Griffiths LJJ did not specifically say that the provision is applicable to criminal proceedings.

(ii) Ackner LJ held that there was only one exception to the limitation of the scope of s 448, and that relates to the criminal process for the enforcement of certain duties imposed by the 1948 Act on the companies officers.

(iii) The decision of the Supreme Court of Victoria in Lawson v Mitchell was not considered.

Swee Leong Cheng v Project Aqua Culture & Trading Co Pte Ltd

The High Court had occasion to consider this issue in **Swee Leong Cheng v Project Aqua Culture & Trading Co Pte Ltd** [1988] SLR 557 . The petitioner there was issued summonses under ss 175 and 197(4) of the Companies Act for being a party to the default of the company in failing to hold its 1983 and 1984 annual general meetings and in failing to lodge annual returns for those years, these being offences under the Act. He petitioned the High Court for relief from those proceedings pursuant to s 391(1) of the Act.

Chan Sek Keong JC [as he then was] held that the power to grant relief under s 391(1) may only be exercised by the court before which proceedings were taken. He said that, assuming the term `proceedings` in the provision included criminal proceedings, these relate to the criminal proceedings against the petitioner pending in the magistrates` courts. The learned judge held that on this ground alone, the petition must be dismissed. He also discussed the issue whether s 391 applied to criminal proceedings although he declined to make any finding on this as he did not have the benefit of full arguments on this point and it was not necessary for his decision. The learned judge said (at p 563):

> *This leads me to the fundamental point as to whether s 391 was ever intended to apply to criminal offences. The use of the expression `claim` in s 391(2) would suggest that relief is granted only for civil breaches of duty or defaults. It is true that in England, the courts have applied the equivalent provisions in the English Companies Act to grant relief against criminal sanctions: see **Re Barry and Staines Linoleum Ltd** [1934] Ch 227. However, in **Lawson v Mitchell** [1979] VR 529, the Full Court of the Supreme Court of Victoria, after an exhaustive discussion of the history, the English provision and the English authorities, viz **Re Barry and Staines Linoleum Ltd** and **Re Gilt Edge Safety Glass Ltd**, came to the conclusion that the equivalent provision in the Victoria Companies Act 1961 did not apply to proceedings for an offence under the said Act. Counsel has not addressed me on this point. In view of my other findings, I will leave this point open for decision in some other application at some other time.*

Conclusion

I started my analysis by considering the interpretation of s 391(2) in the context of the entire section and found that the terms were not consistent with an intention to include criminal proceedings within its scope. I would not have hesitated to dismiss the application were it not for the fact that there were English decisions that seemed to extend that scope beyond what was apparent on the face of the provision.

In ***Re Barry and Staines Linoleum Ltd*** , Maugham J in an extempore judgment, accepted without discussion that the provision covered criminal proceedings. In ***Re Gilt Edge Safety Glass Ltd*** , Crossman J said that such was the conclusion of Maugham J. But Crossman J did not need such a

finding for the purpose of his decision, which was that s 372(1) was only applicable in the proceedings taken out in respect of the default. And in ***Customs and Excise Commissioners v Hedon Alpha Ltd*** , the English Court of Appeal did not make a unanimous finding that the provision applied to all criminal proceedings under the Companies Act. Only Ackner LJ commented on it. The learned Lord Justice held that s 448 was restricted to claims by or on behalf of the company or its liquidator against an officer or auditor for their personal breaches of duty with only one exception, which was in respect of the enforcement of certain duties imposed by the 1948 Act on the companies` officers.

The decision of the Full Court of the Supreme Court of Victoria in ***Lawson v Mitchell*** is the only decision in which a full consideration was made of the scope of the provision. In my respectful view, the reasoning there is unassailable. Chan Sek Keong JC in ***Swee Leong Cheng v Project Aqua Culture & Trading Co Pte Ltd*** appreciated that the terms used in s 391 were relevant only to civil proceedings.

Counsel referred me to the comment in Woon and Hicks` ***The Companies Act of Singapore: An Annotation*** , where the learned editors suggested that: ` ***As a matter of policy, perhaps it would be preferable to extend rather than to restrict the court`s powers in this matter*** `. In my view this suggestion fails to take into consideration the constitutional position of the judiciary vis-a vis the executive. Whereas judicial power is vested in the Supreme Court and subordinate courts (see art 93, Constitution), the discretionary power to institute, conduct or discontinue any proceedings for any offence is vested in the Attorney General (see art 35(8), Constitution). There is therefore the question whether a provision that vests such discretion in a court is constitutional. As I did not have the benefit of submissions on this issue, I shall be content to take it no further than this because my decision can be supported at a lower plane. In exercising his powers of prosecution, the Attorney General and his deputies are guided by, among other things, any investigation carried out, as well as the dictates of policy. A court does not have access to such information and its role in the trial of an offence is to determine, from the evidence before it, whether the accused has committed the offence and if so, the appropriate punishment to mete out. But the court has wide latitude on the appropriate sentence that it may pass. Section 391(2) contains no requirement that a court should hear the views of the Registrar before making a decision. If it applied to criminal proceedings, it would open the door for pre-prosecution applications, ie people who apprehend that they may be prosecuted could pre-empt that by making an application for `absolution`. The question then arises as to whether the court has powers to require the attendance of the Registrar, who might be compelled to conduct an investigation in every case. The consequence is that the entire prosecution process will be turned upon its head.

As I have stated at the outset, the basis for interpreting s 391 as applying to criminal proceedings is tenuous from a plain reading of the provision. The decision in ***Re Barry and Staines Linoleum Ltd*** is rather doubtful. Even if it can be said that the decision was followed in ***Re Gilt Edge Safety Glass Ltd*** - and I have my doubts as to this - it was not done with much enthusiasm. At any rate, it was not necessary for the decision in the latter case to hold that the provision applied to criminal proceedings. The same can be said for the English Court of Appeal decision in ***Customs and Excise Commissioners v Hedon Alpha Ltd*** . The only reasoned decision is that of the Full Court of the Supreme Court of Victoria in ***Lawson v Mitchell*** with which I fully agree. There is the practical problem of the operation of the provision if it applied to criminal proceedings. And last but not least, there is the question of encroachment on the prosecutorial discretion of the Public Prosecutor and whether this is constitutional. In my opinion, putting aside the question of constitutionality, if Parliament had intended such a fundamental change to the criminal process, it would have drafted the provision in much clearer terms. Accordingly I would hold that s 391 has no application to criminal proceedings. It would follow that this court has no jurisdiction to hear the application and it must therefore be dismissed.

Outcome:

Application dismissed.