IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1994] SGCA 143

CA 45/1994

Between

Intraco Limited

… *Plaintiff*

And

Multi-Pak Singapore Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Version No 1: 29 Oct 2026 (23:45 hrs)

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Intraco Limited v Multi-Pak Singapore Pte Ltd

[1994] SGCA 143

CA 45/1994
Goh Joon Seng J; Karthigesu JA; L P Thean JA
29 December 1994

1 conspiracy had been made out. Judgment for the amount claimed was entered against the appellants. The appellants appealed.

2 Held, allowing the appeal:

3 (1) The purchase of the debts by the respondents from the appellants was linked to the subscription by the appellants of the shares in the respondents and the advance of the loan to the respondents. The true nature of the transactions was that the appellants subscribed for the shares in the respondents and advanced the loan to them in return for the respondents purchasing the debts from the appellants.

4 (2) There was no breach of s 76 of the Companies Act. The transactions did not amount to `giving financial assistance' to the appellants to acquire the shares in the respondents. Looking at the transactions in their proper commercial context, the transactions were clearly entered into bona fide in the commercial interest of the respondents.

5 (3) The onus was on the respondents to show that the directors acted in disregard of the interests of the respondents in entering into the transactions with the appellants. No such evidence was adduced by the respondents. An honest and intelligent man in the position of the directors, taking an objective view, could reasonably have concluded that the transactions were in the interests of the respondents. The decision to purchase the debts in return for the appellants subscribing for the shares and advancing the loan was a management decision taken by the directors which turned out, in retrospect, to be a poor decision, but it did not appear that this decision was not arrived at bona fide. In the result, the directors of the respondents had not acted in breach of their fiduciary duties.

6 Legislation referred to

7 Companies Act (Cap 50, 1985 ed) s 76, 157

8 1 Belmont Finance Corporation v Williams Furniture Ltd and ors (No 2) < 1980 > 1 All ER 393 (folld)

9 2 Charterhouse Investment Trust Ltd and ors v Tempest Diesels Ltd < 1986 > BCLC 1 (folld)

10 3 Charterbridge Corporation Ltd v Lloyds Bank Ltd and anor < 1970 > Ch 62 (folld)

11 4 Howard Smith Ltd v Ampol Petroleum Ltd and ors < 1974 > AC 821 (refd)

12 **Judgment:**

13 Coram: Karthigesu JA L P Thean JA Goh Joon Seng J

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14 < Delivered by L P Thean JA >

15 **GROUNDS OF JUDGMENT**

16 This appeal arose from a claim by the respondents against the appellants and three other defendants, namely, Peter Ng Soo Jin, David Ng Soo Hor and Pattinson Temple for the sum of $2,371,079.62 paid by the respondents to the appellants for the purchase of debts owed to the appellants by two companies, City Carton Co Pte Ltd (`City Carton') and Box-Pak (S) Pte Ltd (`Box-Pak'). At the relevant time, Peter Ng and David Ng were directors of City Carton, Box-Pak and the respondents, and Pattinson Temple was the financial controller of the three companies. After the commencement of the action, the three individuals, named as the second, third and fourth defendants, were not served and did not give evidence at the trial, and the action proceeded solely against the appellants. The claim against the appellants was based on three grounds, namely:

17 (i) that the appellants were constructive trustees of the sum for the respondents;

18 (ii) that the appellants were liable to the respondents for damages for conspiracy, and

19 (iii) that the appellants held the sum on a resulting trust for the benefit of the respondents. The High Court held in favour of the respondents on the first and the second grounds and judgment was entered against the appellants for the sum with interest and costs. Against that decision, the appellants appealed. We allowed the appeal and now give our reasons.

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20 The facts

21 City Carton was a major local paper carton manufacturer and Box-Pak was its wholly owned subsidiary. City Carton in turn was wholly owned by a company, Board Holdings Pte Ltd (`Board Holdings'). The directors and presumably controlling shareholders of Board Holdings caused to be incorporated the respondents in April 1978 intending through the respondents to set up a paper mill which would then supply City Carton's requirements and thereby enable them to achieve self-sufficiency. There was no evidence as to the structure of the shareholdings of the respondents at the initial stage. However, there was evidence which showed that in 1982 the respondents were a subsidiary of Board Holdings and were therefore a related company of City Carton.

22 In 1981, the paper carton industry suffered a slump and there was a substantial reduction in the demand for paper cartons. This was aggravated by an outbreak of a price war caused by new entrants into the paper carton industry. All these led to liquidity problems for City Carton and the paper mill project had to be suspended in late 1982. By then, City Carton had entered into an agreement with two Japanese companies, Rengo Co. Ltd (`Rengo') and Sumitomo Corporation, for technical assistance in the construction of the paper mill. Rengo was a major manufacturer of waste-based paper cartons. City Carton's interest was later assigned to the respondents in December 1982.

23 City Carton and Box-Pak were in great financial straits by the end of 1982. As a result, creditors of City Carton were obviously concerned with the realization of the amounts owing to them, and had from March 1983 commenced discussions with a view to working out a rescue plan for City Carton. Among the creditors were the appellants. The appellants were at that

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time the main supplier of raw materials to both City Carton and Box-Pak. As at December 1983, City Carton and Box-Pak together owed the appellants a total sum of $2,545,897.83. The appellants' senior manager of the paper and chemicals division, one Leslie Tan, became extensively involved in the creditors' efforts to revive City Carton. The other creditors who were involved included Bank of Montreal, Hong Leong Finance Ltd, Citibank N.A. and Midland International Trade Services Ltd.

24 In the middle of 1983, the respondents allotted and issued its shares to, inter alios, Aerospace Industries Pte Ltd and Avitra Investment Pte Ltd, both of which were controlled by one Patrick Goh Yoke Hian. By that time, Board Holdings had transferred its shares in the respondents to Avitra Pte Ltd, another company controlled by Patrick Goh. In consequence, the respondents had ceased to be a subsidiary of Board Holdings and was no longer a related company of City Carton. Nonetheless, both the companies (City Carton and the respondents) continued to be run by the same individuals who apparently had substantial interests, directly or indirectly, in both the companies. With the injection of funds, the paper mill project was re-activated and construction of the paper mill commenced at a site in Jurong. Both Peter Ng and David Ng remained as directors of the respondents. Patrick Goh was also appointed to the board of directors.

25 At a meeting on 15 December 1983, the creditors of City Carton accepted a proposal which, in their opinion, afforded them their best chance to secure substantial repayment of the debts owed by City Carton and Box-Pak. This proposal required a capital injection of $7.1 million into City Carton and the sale of part of their assets. This envisaged a conversion of the debts owed by them into equity. The creditors' efforts in the rescue plan began to be effected via the respondents. In 1983, City Carton received substantial interest free cash

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advances from the respondents and presumably these were facilitated by the injection of capital into the respondents. By 31 December 1983, the total amount owed by City Carton to the respondents amounted to $1.491 million. In a meeting on 28 February 1984, David Ng made known to those creditors present that the respondents would also convert the amount due and owing from City Carton into equity.

26 At a subsequent meeting of the creditors on 17 April 1984, the appellants confirmed that they would be converting all the amount owing to them into equity. However, at that time, the actual form of conversion had yet to be worked out and it was proposed that it would be done once approval was obtained by the appellants' board of directors. It was also envisaged that, as a result of the conversion, the appellants would appoint a director on City Carton's board of directors in order to oversee the operations of that company. Subsequently, as it turned out, there was a change of plans. The respondents agreed to take over the entire amount of debts owed to the appellants and the appellants agreed to subscribe for 20,000 shares of $100 each at par in the capital of the respondents for cash and to advance to the respondents a loan of $317,079.62. The reason for this change of plan was unclear.

27 The respondents on 24 May 1984, entered into an agreement in writing with the appellants whereby the respondents took an assignment of all the debts owed by City Carton and Box-Pak to the appellants totalling $2,545,897.83 for the sum of $2,371,079.62. It was equally unclear as to how this sum was arrived at. Some four days later, on 28 May 1984, the respondents wrote a letter to the appellants confirming that 20,000 shares of $100 each in the capital of the respondents had been `allotted' to the appellants at par, payable in cash in full within one month. On 5 June 1984, Leslie Tan submitted a memorandum to the executive committee of the board of directors of the appellants to the effect that

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the respondents had agreed to take over the debts owed by City Carton in exchange for shares in the respondents. On 6 June 1984, the respondents were informed by the appellants that the latter's board of directors had approved the subcription of the shares in the respondents. On the same day, a cheque for the sum of $2,371,079.62 payable to the appellants was signed by Peter Ng and David Ng as directors of the respondents which was intended as payment for the assignment of the debts. The respondents' board resolution approving the allotment of shares to the appellants was passed on 11 June. As part of the agreement to subscribe for shares in the respondents, the appellants also agreed to advance to the respondents a loan of $371,079.62. Accordingly, two cheques were issued by the appellants to the respondents: one for $2m for the shares and the other for $371,079.62 for the loan. On 21 June 1984, the three cheques were deposited by the two parties to their respective accounts with the same bank at about the same time in the following sequence: the two cheques in favour of the respondents were deposited first to the account of the respondents, and immediately thereafter the cheque in favour of the appellants was deposited to the account of the appellants. On 25 July 1984, Leslie Tan and one Mrs Catherine Kwan, the appellant's financial controller and secretary, were appointed directors of the respondents.

28 Subsequently, the respondents were in financial difficulties. Barely seven months later, on 24 January 1985, the respondents went into receivership and later into liquidation. The receivers formed the view that the purchase of the debts owed by City Carton and Box-Pak was improper, and accordingly proceedings were instituted against the appellants, Peter Ng, David Ng and Pattinson Temple. As we have said, the three named individuals were not served with the writ and were not parties to the proceedings.

29 Decision below

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30 The court below accepted the evidence that City Carton and Box-Pak were technically insolvent at the time when the debts were assigned and found that there was little chance of their unsecured creditors being paid. The trial judge held that in light of the financial position of the two companies, there was no commercial justification for the respondents taking an assignment of the unsecured debts when they were in essence worthless. Consequently, he found that the directors had misapplied the funds of the respondents and held that they were in breach of their statutory duty under s 157(1) of the Companies Act (Cap 50, 1985 ed) in that they had failed to act honestly and to use reasonable diligence in the discharge of their duties at all times. The learned judge further found that the appellants had actual, or at least constructive, knowledge of the breach and declared that the appellants held the sum of money received as constructive trustees for the respondents. At the same time, he also found that the tort of conspiracy had been made out in that the appellants had acted in concert with the directors to commit a breach of their duty under s 157(1), an offence under s 157(3) of the Companies Act.

31 Appeal

32 Central to the appeal was the issue whether the purchase by the respondent of the debts owed by City Carton and Box-Pak to the appellants was linked to

33 (i) the subscription by the appellants of the 20,000 shares of $100 each in the capital of the respondents and

34 (ii) the advance of the loan of $371,079.62 by the appellants to the respondents. These transactions must be considered in the context of the factual matrix in which the parties were at the material time. The facts and events

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leading to the transactions and the implementation thereof have been set out earlier and it is only necessary to repeat the following. The agreement for the assignment of the debts was made between the respondents and the appellants on 24 May 1984. Following that, approximately four days later, the respondents informed the appellants that 20,000 shares of $100 each had been allotted at par to the appellants and that they were to be payable in cash. On 5 June, Leslie Tan submitted a memorandum to the chairman and members of the executive committee which was an executive committee of the board of directors of the appellants and exercised the powers of the board. The content of this memorandum was informative and it is helpful to set it out in full, which was as follows:

35 City Carton, a manufacturer of paper carton, established in 1973 has been together with its subsidiary Box Pak, customers of Intraco for the past 10 years. An ill-timed ambitious expansion plan together with the prolonged recession of 1982 and 1983 have brought the company almost to the verge of bankruptcy. The total owings of the company as of now is $23 million. Intraco has over 1983 and 1984 written off about $1.5 million and the amount outstanding in our books is about $900,000/-.

36 A group of outside shareholders have now launched a rescue operation for the company. The rescue operation envisages Multi-Pak, a $30 million company started to manufacture paper from pulp and waste paper, taking over City Carton as its subsidiary and injecting new cash into it. Multi-Pak which will commence operation in July promises to be a viable operation as there is considerable demand for paper in Singapore and in the Asean countries. Intraco will be appointed as the sole distributor of their products.

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37 As part of the rescue operation, the shareholders of Multi-Pak have offered Intraco to take over the entire $2.4 million owings by City Carton in exchange for shares in Multi-Pak. We have agreed to this in principle because if we stay with City Carton and the rescue operation does not materialise, there is every danger that we would end up recovering perhaps less than 5% of the original debts. As the offer stands, we would end up as a shareholder of Multi-Pak and recover some of the money by the commission from selling paper.

38 The conversion does not involve any cash injection on our part but it seems just the only way for us to recover our credit.

39 Unfortunately, Leslie Tan, who was deeply involved in the negotiations with Peter Ng and David Ng in respect of these transactions, had passed away by the time the action came on for trial. The memorandum was prepared by him in the ordinary course of business and explained to a certain extent what the appellants sought to achieve with the sale of the debts and the subscription of the shares: the appellants, being a substantial unsecured creditor of City Carton and Box-Pak, had obviously decided that a conversion of those debts into equity in the respondents was the best possible method to recover the amounts owed to them. The proposal contained therein was approved by the executive committee, and on the following day, 6 June 1984, the respondents were accordingly informed that the board of directors of the appellants had approved the subscription of the 20,000 shares of $100 each in the capital of the respondents. On the same day, a cheque for $2,371,079.62 payable to the appellants was signed by Peter Ng and David Ng on behalf of the respondents. It was unclear whether the cheque was delivered or handed to the appellants on that day. As a matter of inference, it seemed to us highly unlikely that the cheque was issued and delivered to the appellants then. The respondents would not have taken over the debts and paid for them without some other consideration

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emanating from the appellants, bearing in mind that the debts were known to all parties concerned to be of little value. The other consideration, as the evidence unfolded, consisted of the subscription by the appellants of 20,000 shares of $100 each in the capital of the respondents and the loan of $371,079.62 to the respondents. It is true that no mention of this was made in the agreement for the assignment of the debts made on 24 May 1984. But on the facts, the inference that the subscription of the shares and the advance of the loan were part of the arrangement for the assignment of the debts was irresistible.

40 On 11 June 1984, the board of directors of the respondents resolved that 20,000 shares of $100 each be allotted at par to the appellants payable in cash within one month; the shares were duly allotted on 20 June 1984 and payment therefor was made on the following day, 21 June. The payment for the shares, the advance of the loan and the payment for the purchase of the debts by the respective parties were of some significance. On that day, the appellants issued two cheques in favour of the respondents:

41 (i) one for $2m in payment for the shares and

42 (ii) the other for $371,079.62 for the loan to the respondents; the total of these two amounts came to $2,371,079.62. These two cheques were paid and credited to the bank account of the respondents, and immediately following that the respondents' cheque for $2,371,079.62 payable to the appellants representing the consideration for the purchase of the debts was paid and credited to the appellants' bank account.

43 Clearly, the purchase of the debts by the respondents from the appellants was linked to the

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44 (i) subscription by the appellants of the 20,000 shares in the respondents, and

45 (ii) the loan of $371,079.62 by the appellants to the respondents. It could not have been a mere coincidence that the cheques for the respective sums were deposited to the respective bank accounts of the parties on the same day, and that the total of the amount paid for the shares and the amount of loan equalled the purchase price for the debts. Although the agreement for the assignment of the debts was made nearly one month earlier, it was not carried out and implemented until the payment for the shares and release of the loan were made. The transactions were orchestrated to be completed on the same day and at about the same time. In our view, the inescapable conclusion is that the appellants subscribed for the shares in the respondents and advanced the loan to them in return for the respondents purchasing the debts from the appellants. That, in essence, was the true nature of the transactions.

46 It is relevant to mention also that following the completion of these transactions Leslie Tan and Catherine Kwan (both employees of the appellants) joined the board of directors of the respondents. Again, as a matter of inference, this must have been agreed to by the respondents and the appellants as part of the arrangement made between them.

47 We now turn to the next issue, and that is whether in entering into these transactions the directors of the respondents committed a breach of duty. On this issue, two questions arise: first, as the purchase of the debts by the respondents was in exchange for the appellants subscribing for shares and advancing the loan, whether there was a breach of s 76 of the Companies Act (Cap 50, 1985 ed), and second, apart from s 76, whether in entering into these

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transactions the directors of the respondents acted in breach of their fiduciary duties to the respondents.

48 It is convenient at this stage to set out s 76, so far as relevant, which reads as follows:

49 76.-(1) Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares.

50 The respondents relied on the case of Belmont Finance Corporation v Williams Furniture Ltd and ors (No 2) < 1980 > 1 All ER 393 and contended that the transactions contravened s 76. There, the third defendant, Grosscurth, wanted to acquire the entire share capital of Belmont Finance Corpn Ltd (`Belmont'), which was wholly-owned by the second defendant, City Industrial Finance Ltd (`City'), which in turn was wholly-owned by the first defendant, Williams Furniture Ltd (`Williams'). Grosscurth was the controlling shareholder of Maximum Finance Ltd (`Maximum'). Grosscurth and his associates agreed with Williams and City to sell all their shares in Maximum to Belmont for 500,000 and to buy the entire share capital of Belmont from City for 489,000. At the same time, Williams and City agreed to lend Belmont 200,000 for 12 months secured on the share capital of Maximum. Grosscurth guaranteed to Belmont that the aggregate pre-tax profits of Maximum and its subsidiaries for a certain period of time would be not less than 500,000 and City agreed to subscribe for 230,000 1 preference shares in Belmont out of the 489,000 it

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received for the sale of Belmont. The end result was that Grosscurth and his associates became the owners of all the shares of Belmont and through it, Maximum. Belmont subsequently went into liquidation. It was then found on valuation that Maximum was worth only about 60,069 and not 500,000. An action was later commenced against, inter alios, Grosscurth, Williams and City. At the trial, it was established that at the material time of the transaction, the respective parties genuinely believed that Maximum's shares were worth 500,000 and that buying Maximum was a good commercial transaction, and on that ground the High Court dismissed the claim. On appeal, the Court of Appeal held that the purchase of Maximum was not a bona fide commercial transaction in its own right but was merely part of a scheme to enable Grosscurth and his associates to acquire Belmont using Belmont's own funds and that it was not a transaction in the ordinary course of Belmont's business to acquire Maximum and did not enable Belmont to acquire anything which it genuinely needed for its own purpose. Accordingly, it was held that there was a breach of s 54 of the Companies Act 1948 (which was in pari materia with s 76 of our Companies Act). Buckley LJ in his judgment said, at p 403:

51 In truth the purchase of the share capital of Maximum was not a commercial transaction in its own right ..... It was not a transaction whereby Belmont acquired anything which Belmont genuinely needed or wanted for its own purposes: it was one which facilitated Mr Grosscurth's acquiring Belmont for his own purposes without effectively parting with Maximum. That the purpose of the sale of Maximum to Belmont was to enable Mr Grosscurth to pay 489,000 for Belmont was at all relevant times known to and recognised by Mr James and the members of his team as well as by Mr Copeland. There is no good reason disclosed by the evidence to suppose either that Mr Grosscurth and his associates could have sold Maximum to anyone else for 500,000 or that

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Belmont could have disposed of Maximum for 500,000 to anyone else at any time. The purchase of the share capital of Maximum may have been intra vires of Belmont (a matter which we have not been invited to consider), but it was certainly not a transaction in the ordinary course of Belmont's business or for the purposes of that business as it subsisted at the date of the agreement. It was an exceptional and artificial transaction and not in any sense an ordinary commercial transaction entered into for its own sake in the commercial interests of Belmont. It was part of a comparatively complex scheme for enabling Mr Grosscurth and his associates to acquire Belmont at no cash cost to themselves, the purchase price being found not from their own funds or by the realisation of any asset of theirs (for Maximum continued to be part of their group of companies) but out of Belmont's own resources. In these circumstances, in my judgment, the agreement would have contravened s 54 of the 1948 Act even if 500,000 was a fair price for Maximum.

52 In this case, counsel for the respondents contended that as the debts purchased by the respondents were worthless, the assignment was not in the commercial interests of the respondents, and that the only purpose for which the debts were purchased was in order to enable the appellants to become a shareholder of the respondents without having to pay cash for the shares, thereby breaching s 76.

53 Counsel for the appellant, on the other hand, contended that it was not a breach of s 76 when a company entered into a transaction with a party in its own commercial interests and not solely to provide financial assistance to the other party to buy shares in it, although it resulted in the other being put in funds to acquire the shares. We were referred to the following passage from the judgment of Buckley LJ in Belmont (No 2) at p 402:

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54 If A Ltd buys from B a chattel or a commodity, like a ship or merchandise, which A Ltd genuinely wants to acquire for its own purposes, and does so having no other purpose in view, the fact that B thereafter employs the proceeds of the sale in buying shares in A Ltd should not, I would suppose, be held to offend against the section; but the position may be different if A Ltd makes the purchase in order to put B in funds to buy shares in A Ltd. If A Ltd buys something from B without regard to its own commercial interests, the sole purpose of the transaction being to put B in funds to acquire shares in A Ltd, this would, in my opinion, clearly contravene the section, even if the price paid was a fair price for what is bought, and a fortiori that would be so if the sale to A Ltd was at an inflated price. The sole purpose would be to enable (ie. to assist) B to pay for the shares. ..... If the transaction is of a kind which A Ltd could in its own commercial interests legitimately enter into, and the transaction is genuinely entered into by A Ltd in its own commercial interests and not merely as a means of assisting B financially to buy shares of A Ltd, the circumstance that A Ltd enters into the transaction with B, partly with the object of putting B in funds to acquire its own shares or with the knowledge of B's intended use of the proceeds of sale, might, I think, involve no contravention of the section but I do not wish to express a concluded opinion on that point.

55 Waller LJ said, at p 414:

56 To avoid a contravention of s 54 it is not sufficient, in my view, to show that the company is purchasing an asset which is worth the price being paid. The company must also show that the decision to purchase is made in the commercial interests of the company. If this were so, then the fact that the proceeds are used by the seller for the purchase of shares in the company would not necessarily infringe s 54. That would only happen if the decision was made

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partly with the intention on the part of the board that the proceeds should be used for the purchase of shares in the company.

57 The crucial question that fell to be considered was the interests of the respondents in the transactions. The transactions must be viewed in their proper commercial context. It is true that at the relevant time the respondents had ceased to be a related company of City Carton; but it is clear that both the companies were controlled by the same group of individuals, namely, Patrick Goh, Peter Ng and David Ng. City Carton had received substantial interest free cash advances from the respondents. As at 31 December 1983, the amount owed by City Carton to the respondents amounted to $1.491m. The respondents at all material times had been actively involved in the rescue operation of City Carton. It is also clear that the respondents had the intention of converting the amount owed by City Carton into equity in that company and eventually of taking over City Carton as a subsidiary for the purpose of their business. It would be beneficial to the respondents to integrate the business of City Carton into their operations. In a discussion paper prepared by the Bank of Montreal Asia Ltd for the purpose of arranging a syndicated loan of $24m to the respondents, it was stated that it would be beneficial for the respondents `being in the up-stream of the sector of the industry' to have `an interest in a company down-stream', i.e. City Carton, so as to provide a linkage to the market. This paper was admitted in evidence, and Jeffrey Heng, one of the receivers of the respondents, in his evidence accepted that `the information in this document would be as accurate as possible'.

58 As a matter of inference, the directors at the time must have believed that City Carton, though technically insolvent, had reasonable prospects of improvement and was still viable. By taking over the debts from the appellants in return for the appellants' subscribing for the shares, the respondents had

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formed a business alliance with the appellants, a Government-linked company, and this would be beneficial to the respondents, then a fledgling company, which had yet to commence production and marketing. In other words, these transactions were commercially beneficial to the respondents as well as the appellants. This must have been the view taken by the directors of the respondents. It seemed to us highly improbable that the directors would enter into these transactions, if they had not entertained that view. There was no reason why they should cause the respondents to enter into these transactions for the benefit the appellants solely without some reciprocal benefits to the respondents. Looked at in the proper context, the transactions were entered into in the commercial interests of the respondents and not for the purpose of putting the appellants in funds to subscribe for the 20,000 shares in the respondents.

59 In Charterhouse Investment Trust Ltd and ors v Tempest Diesels Ltd < 1986 > BCLC 1, Hoffmann J provided a helpful guide in applying s 54. He said, at p 10:

60 There are two elements in the commission of an offence under s 54. The first is the giving of financial assistance and the second is that it should have been given `for the purposes of or in connection with', in this case, a purchase of shares. As Schreiner JA said in a passage in Gradwell (Pty) Ltd v Rostra Printers Ltd 1959 SA 419 at 425 cited in the Belmont case:

61 `Unless what was to be done would amount to giving of financial assistance within the meaning of the sub-section the purpose and the connection would not be important.'

62 There is no definition of giving financial assistance in the section, although some examples are given. The words have no technical meaning and

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their frame of reference is in my judgment the language of ordinary commerce. One must examine the commercial realities of the transaction and decide whether it can properly be described as the giving of financial assistance by the company, bearing in mind that the section is a penal one and should not be strained to cover transactions which are not fairly within it.

63 The Belmont case shows that the sale of an asset by the company at a fair value can properly be described as giving financial assistance if the effect is to provide the purchaser of its shares with the cash needed to pay for them. It does not matter that the company's balance sheet is undisturbed in the sense that the cash paid out is replaced by an asset of equivalent value. In the case of a loan by a company to creditworthy purchaser of its shares, the balance sheet is equally undisturbed but the loan plainly constitutes giving financial assistance, It follows that if the only or main purpose of such a transaction is to enable the purchaser to buy the shares, the section is contravened.

64 On the first element, we entertained grave doubts whether the transactions amounted to `giving financial assistance' to the appellants to acquire the shares in the respondents. The subscription for the shares and the advance of the loan were in return for the purchase of the debts by the respondents, or the vice versa. In effect, the shares were allotted by the respondents for consideration other than cash. It is true that the debts were quite worthless, but, as we have said, the directors of the respondents were obviously of the view at that time that City Carton could be revived and that they intended to make City Carton a subsidiary of the respondents. There was not much evidence on the financial condition of the respondents at the time. Given that it was just starting a paper mill, that it had injected $1.491m into City Carton, that its issued share capital at the time was only $10,560,000, that the syndicated loan sought to be arranged by the Bank of Montreal Asia Ltd did not materialize,

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and finally that by January 1985 they were in severe financial straits, the respondents could not have been a financially strong or solid company as to warrant an investor such as the appellants injecting cash in the sum of $2m into the company. From their point of view, subscribing for the shares for consideration other than cash would probably be the only acceptable way of investing in that company.

65 Assuming that the transactions amounted to giving financial assistance to the appellants to subscribe for the shares, there would still be the second `element' with which the respondents had to contend. We have discussed the commercial benefits that would accrue to the respondents. Looking at the transactions in their proper commercial context, we did not think that they were entered into solely or mainly for the purpose of enabling the appellants to acquire the shares in the respondents at no costs to themselves. The transactions were entered into bona fide in the commercial interest of the respondents as well. In our judgment, the transactions were not in breach of s 76 of the Companies Act.

66 We next turn to the question whether apart from s 76 the transactions were entered into by the directors of the respondents in breach of their fiduciary duties to the respondents. The onus of proving this was on the party asserting it. It therefore fell upon the respondents to show that the directors acted in disregard of the interests of the respondents in entering into these transactions with the appellants. On this, no evidence had been adduced by the respondents.

67 We were referred to the decision of Pennycuick J in Charterbridge Corporation Ltd v Lloyds Bank Ltd and anor < 1970 > Ch 62. There, the plaintiffs sought a declaration that a legal charge and a guarantee given by a company known as Castleford to secure the debts of another company,

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Pomeroy, were ultra vires as being outside the powers of Castleford. The two companies were part of the same group of companies and had common directors. The basis of the claim was twofold, first, that it was ultra vires Castleford, i.e. outside the corporate powers, to give the guarantee and legal charge, and, secondly, that the charge and guarantee were created for purposes not for the benefit of Castleford. The learned judge decided that Castleford was carrying out the purposes authorised by its memorandum and that the transactions were effected pusuant to the express power conferred by the memorandum and were not ultra vires. He then proceeded further and said, at p 74:

68 That is sufficient to dispose of the action; but in case I am wrong on my view of the law, I must proceed to express a conclusion upon the contention that in creating the guarantee and legal charge, the directors were not acting with a view to the benefit of Castleford. That is a question of fact, and the burden of proof lies on the plaintiff company. As I have already found, the directors of Castleford looked to the benefit of the group as a whole and did not give separate consideration to the benefit of Castleford. Mr Goulding contended that in the absence of separate consideration, they must, ipso facto, be treated as not having acted with a view to the benefit of Castleford. That is, I think, an unduly stringent test and would lead to really absurd results, ie., unless the directors of a company addressed their minds specifically to the interest of the company in connection with each particular transaction, that transaction would be ultra vires and void, notwithstanding that the transaction might be beneficial to the company. Mr Bagnall for the bank contended that it is sufficient that the directors of Castleford looked to the benefit of the group as a whole. Equally, I reject that contention. Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of

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that company. This becomes apparent when one considers the case where the particular company has separate creditors. The proper test, I think, in the absence of actual separate consideration, must be whether an honest and intelligent man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.

69 Counsel for the appellants relied on this dicta and submitted that the circumstances here were not such as to lead to an inference of dishonesty on the part of the directors of the respondents, but were such that a reasonable man could have inferred that the transactions were entered into bona fide by the directors in the interests of the respondents. He contended that as the directors of the respondents were also the directors of City Carton, they had considered the group as an economic entity and therefore acted for the benefit of the group as a whole. At the same time, he submitted that the directors would have reasonably regarded the equity participation of the appellants as beneficial to the respondents. We accepted this submission. We were of the opinion that an honest and intelligent man in the position of the directors, taking an objective view, could reasonably have concluded that the transactions were in the interests of the respondents. There was clearly no evidence that the directors of the respondents had acted in breach of their duties to the respondents.

70 We have dealt with the commercial purpose and reasons of the transactions and it is unnecessary for us to repeat them here. Suffice it here to say that the decision to purchase the debts in return for the appellants subscribing for the shares and advancing the loan was a management decision taken by the directors which turned out, in retrospect, to be a poor decision. It did not appear to us that this decision was not arrived at bona fide. In this respect, we found most apposite the following passage from the speech of Lord

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Wilberforce in Howard Smith Ltd v Ampol Petroleum Ltd and ors < 1974 > AC 821 at p 832:

71 Their lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management decision, on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.

72 As the directors of the respondents had not acted in breach of their fiduciary duties, the claim against the appellants must fail and ought to have been dismissed. We therefore allowed the appeal and ordered accordingly.

Goh Joon Seng J
Karthigesu JA
L P Thean JA

Walter Woon with Wilson Wong and Tham Kok Leong for the appellants
C R Rajah with Sugidha Nithi for the respondents

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