

ACRA LEGAL DIGEST

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A WORD FROM THE EDITORIAL TEAM

Welcome to the sixth issue of our Digest.

In this issue, we bring you a case summary of the High Court's decision in *Vita Health Laboratories Pte Ltd and Others v Pang Seng Meng*, in which the Court made several observations on the business judgment rule in relation to director's duties; two legislative amendments to the Accountants Act 2004; a summary of the new Practice Direction on the renewal of registration for public accountants (Practice Direction No. 4 of 2004); an update on the Limited Liability Partnerships Bill which was read for the first time on 19 October 2004; and a write-up on the newly appointed members of the Council on Corporate Disclosure and Governance.

All information contained herein is correct at the time of publication. Please do not hesitate to send us your comments or suggestions for future topics to:
www.acra.gov.sg/feedback.

The Editorial Team
Accounting and Corporate Regulatory Authority
16 November 2004

1 CASE SUMMARY

Vita Health Laboratories Pte Ltd and Others v Pang Seng Meng [2004] 4 SLR 162; [2004] SGHC 158

1.1 Introduction

This case is of particular interest because it contains an excellent summary of the duties of company directors, an area that the Company Law and Regulatory Framework Committee (CLRFC) reviewed and made recommendations on in its Report to the Government in 2002.

1.2 Facts

The fourth plaintiff, Vita Life Sciences Limited (VLS), an Australian company, was holding company of the third plaintiff, Vita Corporation Pte Ltd (VCL), which in turn was holding company of the first and second plaintiffs, Vita Health Laboratories Pte Ltd and Vita Health Laboratories (Hong Kong) Ltd (VHLS and VHLHK, respectively). The group was collectively known as the Vita Health Group of Companies (VHGC).

The defendant was the operating and controlling mind of VHGC at all material times. Between 1997 and 1998, he persuaded 2 large investment companies to invest in VCL. Under the investment agreements, VHGC was required to be listed on a stock exchange by end-1999. To effect a backdoor listing on the ASX, the defendant arranged for VLS to take over VHGC in exchange for shares in VLS. The arrangement was contained in a share sale agreement.

In March 2002, the defendant resigned from all management positions due to tension within the company. Soon after, the present proceedings were initiated and a special accountant was appointed to investigate VHGC's transactions.

The plaintiffs claimed that the defendant had breached his fiduciary duties as director by:

- (a) fraudulently creating false and unrecoverable receivables purportedly due from third party entities overseas;
- (b) purchasing excessive stock which they had no reasonable prospect of selling;
- (c) making payments from company monies to his relatives without proper authorisation.

The Court allowed the plaintiffs' claims.

[Note: The decision is being appealed against and is scheduled for hearing in January 2005.]

1.3 Pronouncements and Observations of the Court

- Common law duties of a director: Every director has fiduciary duties and legal responsibilities to his company. Corporate powers must be exercised in good faith solely for the purpose for which they were granted and for the general benefit of the company. The common law duties are epitomised in s 157(1) of the Companies Act which requires the application of honesty and discharge of reasonable diligence by directors.

[s157. —(1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.]

In analysing the scope of section 157, Yong Pung How CJ made the following comments in the case of *Lim Weng Kee v PP* [\[2002\] 4 SLR 327](#):

[T]he civil standard of care and diligence expected of a director is objective, namely, whether he had exercised the same degree of care and diligence as a reasonable director found in his position. The standard is not fixed but a continuum depending on various factors such as the individual's role in the company, the type of decision made, the size and business of the company.

- Incompetence is not necessarily considered a breach of a director's fiduciary duty. It may, however, result in an action for other types of liability.
- Director's liability for losses to the company: A director who by action or inaction causes losses to a company may find his conduct open to scrutiny. Without evidence of a lack of good faith, however, it is improper to assert that directors are liable for all losses sustained by a company.
- The business judgment rule: The Court agreed with what was stated in *ECRC Land Pte Ltd (in liquidation) v Wing On Ho Christopher and Others* [\[2004\] 1 SLR 105](#); [\[2003\] SGHC 298](#):

The court should be slow to interfere with commercial decisions taken by directors (see *Intraco v Multi-Pak Singapore* [\[1995\] 1 SLR 313](#)). It should not, with the advantage of hindsight, substitute its own decisions in place of those made by directors in the honest and reasonable belief that they were for the best interest of the company, even if those decisions turned out subsequently to be money-losing ones.

It is not for the court to penalise directors who have made incorrect commercial judgments in good faith. That is the role of the marketplace. Business failure should not automatically imply legal liability. The purpose of trading through a limited liability company is to limit and spread business risk. Improper interference by the law may inhibit entrepreneurship which necessarily involves some degree of business risk.

- Lifting the corporate veil: A director who causes accounts to be mis-stated, blatantly abuses his position and breaches his corporate duties cannot evade his legal responsibility by attempting to hide behind the corporate veil. There may also be issues of liability and or indemnities with regard to his fellow directors, shareholders, auditors and third parties. In appropriate cases, the court will not hesitate to lift the corporate veil. Creative accounting with an intention to deceive should be condemned as it adversely affects commercial transactions which depend upon the integrity of company accounts and financial statements.
- When is delegation by a director deemed improper?: It is impractical and unfair to expect a director to personally undertake all functions and responsibilities. However, it is reasonable to expect that a director will delegate his duties to subordinates who are capable of assuming those duties. There is no precise answer to what is proper delegation. It can however be safely assumed that the court will be reluctant to penalise a director who has in good faith delegated his functions and/or powers to competent subordinates. Directors are officers of the company and are expected to remain alert and watchful from their positions of control. They should be inquiring but not overly suspicious in carrying out their duties as supervisors.
- Summary of directors' duties: The following principles summarised by Parker J at first instance (see *Re Barings plc* [1999] 1 BCLC 433 at 489) and approved by the English Court of Appeal in *Re Barings plc (No 5)* [2001] 1 BCLC 523 at [36] are equally applicable in Singapore:
 - (i) Directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.
 - (ii) Whilst directors are entitled (subject to the articles of association of the company) to delegate particular functions to those below them in management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions.

- (iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, must depend on the facts of each particular case, including the director's role in the management of the company.

1.4 Conclusion

In its recommendations to the Government, the CLRFC had considered the reforms in UK and New Zealand with respect to directors' duties and had proposed that Singapore adopt the UK statutory restatement of the principles of directors' duties, with the appropriate modifications to suit Singapore's circumstances. The idea is to codify directors' duties in the law and to provide for statutory remedies to enforce these duties. As at the date of writing, the UK statutory restatement of directors' duties has yet to be released.

2 LEGISLATIVE UPDATE ON ACCOUNTANTS ACT 2004

There were two amendments which came into force on 1 September 2004. They are highlighted in italics below. The rationale for the amendments is to bring the provisions of the Act in line with ACRA's operational procedures.

- **Renewal of registration**

Section 13(1): Unless the Oversight Committee or the Registrar allows otherwise, a public accountant who desires to renew his certificate of registration upon its expiry shall, *not less than one month before the date of the expiry*, submit his application for the renewal to the Oversight Committee in such form or manner as the Oversight Committee may require.

- **Removal from Register of Public Accountants**

Section 15(1): The Registrar shall remove from the Register of Public Accountants the name and relevant particulars of any public accountant:

- (a) who has died;
- (b) who has become unfit to practise as a public accountant by reason of any physical or mental condition;
- (c) who has been adjudged a bankrupt;
- (d) who, *without reasonable excuse*, has failed to renew his certificate of registration after one month from the date of the expiry thereof

3 PRACTICE DIRECTION NO. 4 OF 2004 (RENEWAL OF CERTIFICATE OF REGISTRATION FOR PUBLIC ACCOUNTANTS)

ACRA issued Practice Direction No. 4 of 2004 on 5 November 2004. The Practice Direction sets out the procedures for renewing certificates of registration under the Accountants Act 2004. A copy of the Practice Direction is available at <http://www.acra.gov.sg/legislation/practice0511.html>.

A summary of the important points of the Practice Direction is as follows:

1. A certificate is valid from its date of issuance/renewal until 31st December of that year.
2. An application for renewal must be made in the prescribed form, be signed by the public accountant concerned and be accompanied by the prescribed fees.

3. A public accountant seeking to renew his certificate of registration must:
 - (a) pass a practice review (if applicable) under Part V of the Accountants Act 2004;
 - (b) meet the required standard of professional conduct or practice required by ACRA i.e. the Code of Professional Conduct and Ethics set out in the Fourth Schedule to the Accountants (Public Accountants) Rules 2004, and any pronouncements of the Public Accountants Oversight Committee on all professional matters and professional ethics; and
 - (c) comply with the prescribed requirements relating to continuing professional education (CPE) i.e. attain at least 40 CPE hours during the 12 months immediately before the date of application for renewal. The CPE shall be that prescribed in the syllabus approved by the Oversight Committee. Details may be found in Practice Direction No. 2 of 2004 (Continuing Professional Education Syllabus). A copy of the Practice Direction is available at <http://www.acra.gov.sg/legislation/practice1608.html>.
4. A public accountant who has a valid reason for not meeting the CPE requirements is to write to the Oversight Committee at least 1 month before the expiry of the certificate of registration for consideration. The Oversight Committee may, if it thinks fit, exempt him from the CPE requirements. A public accountant who has by virtue of his medical condition been unable to meet the CPE requirements must submit supporting documentary evidence of his illness or disability 1 month before the expiry of the certificate of registration.
5. The renewal fee for a public accountant is \$450. In addition, a separate fee is payable by each public accounting firm or public accounting corporation. The additional fee depends on the number of listed corporations audited by the firm or corporation.
6. The Practice Direction also sets out the administrative timeframe for renewal.
7. If a public accountant fails to renew his certificate of registration by 31st January of the following year without reasonable excuse, the Registrar is empowered under the Accountants Act 2004 to remove his name and particulars from the Register of Public Accountants.

4 UPDATE ON THE LIMITED LIABILITY PARTNERSHIP BILL

The Limited Liability Partnership Bill was read the first time in Parliament on 19 October 2004. The Bill will have to be read a second time, after which it will have to be passed by Parliament. It will come into operation only after the Minister for Finance appoints a date for its commencement by notification in the Government Gazette.

If you wish to read more about on the deliberations of the policies reflected in the bill, you can refer to

<http://app.mof.gov.sg/pressrelease/pressdetails.asp?pressID=139> for the final report and <http://www.parliament.gov.sg/Legislation/Htdocs/leg-main.html> for a copy of the Bill. In addition, you can also read about it in The ACRA Legal Digest Issue 2 at <http://www.acra.gov.sg/legislation/index.html#1>.

ACRA will post an announcement on its website at www.acra.gov.sg closer to the commencement date in the first two quarters of 2005. Please keep a look-out for the announcement.

5 NEW APPOINTMENTS TO THE COUNCIL ON CORPORATE DISCLOSURE AND GOVERNANCE (CCDG)

The Minister for Finance has appointed/ reappointed the following persons to the CCDG. Other than Ms Chua Sock Koong and Mr Patrick Daniel who are appointed from 14 October 2004, the other members are appointed from 1 September 2004.

S/N	Name	Designation
1	Mr J Y Pillay [Chairman CCDG]	Chairman Singapore Exchange Limited
2	Ms Chua Geok Wah	Accountant-General Accountant-General's Department
3	Ms Chua Sock Koong (<i>new member</i>)	Chief Financial Officer Singapore Telecommunications Limited
4	Mr Emmanuel Daniel (<i>new member</i>)	Managing Director The Asian Banker
5	Mr Patrick Daniel (<i>new member</i>)	Managing Editor English and Malay Newspapers Division Singapore Press Holdings
6	Mrs Fang Ai Lian	Chairman Ernst & Young
7	Ms Euleen Goh Yiu Kiang	Chief Executive Standard Chartered Bank, Singapore

S/N	Name	Designation
8	Mr Koh Cher Siang	Commissioner of Inland Revenue Inland Revenue Authority of Singapore
9	Mr Liew Mun Leong	President & CEO CapitaLand Limited
10	Dr Loo Choon Yong	Executive Chairman Raffles Medical Group Limited
11	Associate Prof. Mak Yuen Teen	Co-Director NUS Corporate Governance and Financial Reporting Centre
12	Mr John Palmer	Deputy Managing Director Monetary Authority of Singapore
13	Ms Juthika Ramanathan	Chief Executive Accounting and Corporate Regulatory Authority
14	Mr Lawrence Wong (<i>new member</i>)	Head (Group Asset Management) Overseas-Chinese Banking Corporation Limited
15	Mr Lucien Wong	Managing Partner Allen & Gledhill

The following members retired from the CCDG from 1 September 2004.

S/N	Name	Designation
1	Mr Chew Heng Ching	Chairman Singapore Institute of Directors
2	Mr Stephen Lee	Managing Director Great Malaysia Textile Manufacturing Company Pte Ltd
3	Mr Ng Boon Yew	Group Chief Financial Officer Singapore Technologies Pte Ltd
4	Mr Seah Liang Chiang	Managing Director DSC Holdings Pte Ltd



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