Public Prosecutor v Lew Syn Pau and Another
[2006] SGHC 146

Case Number : CC 14/2006

Decision Date : 11 August 2006

Tribunal/Court : High Court

Coram : Sundaresh Menon JC

Counsel Name(s) : Ng Cheng Thiam, Amarjit Singh and Ong Luan Tze (Deputy Public Prosecutors) for the Prosecution; Michael Hwang SC and Nicholas Narayanan (Michael Hwang) for the first accused; K Shanmugam SC, Kenneth Pereira and Eugene Thuraisingam (Allen & Gledhill) for the second accused

Parties : Public Prosecutor — Lew Syn Pau; Wong Sheung Sze

Companies – Incorporation of companies – Lifting corporate veil – Whether principle of separation of legal personalities may be displaced – Whether acts of subsidiary may be treated as acts of holding company

Criminal Law – Statutory offences – Companies Act – Accused and abettor charged with authorising holding company to give financial assistance directly or indirectly for acquisition of company's own shares – Financial assistance given by subsidiary of holding company – Whether such financial assistance prohibited by s 76 Companies Act – Sections 76(1)(a)(i)(A), 76(1)(a)(i)(B) Companies Act (Cap 50, 1994 Rev Ed)

11 August 2006 *Judgment reserved.*

Sundaresh Menon JC:

Background

1 The study of company law often begins with the celebrated decision of the House of Lords more than a century ago in *Salomon v Salomon & Company, Limited* [1897] AC 22 ("*Salomon*"). In that case, the House of Lords held that a company and its shareholders had separate legal personalities and that the actions and liabilities of the former were not ordinarily to be attributed to the latter. That proposition might seem trite today but its familiarity should not be allowed to obscure its continuing vitality as a fundamental principle of company law.

2 In ruling as it did, the House of Lords reversed the decisions of both the Court of Appeal and the High Court. Vaughan Williams J at first instance thought that the business in truth belonged to Mr Salomon, and that the company was employed by him as his agent and that as such he was bound to indemnify the agent. The Court of Appeal arrived at its conclusion by a somewhat different route. That court was convinced that there was in truth no separation between the legal personality of Mr Salomon and that of the company and this was expressed in a variety of ways. The company was described as a myth and a fiction and it was suggested that the legislation in question contemplated independent shareholders who "had a mind and a will of their own, and were not the mere puppets of an individual who … carried on his old business in the same way as before, when he was a sole trader" (*per* Lopes LJ as quoted by Lord Halsbury LC at 32). Clearly both courts struggled with the notion that a merchant could establish a company, transfer his business to it and then not be liable himself for the losses even though he appeared to control the will and mind of the company and to conduct his business in just the same way that he had done before the incorporation.

3 Some things have not changed even after a hundred years. Intelligent minds are still boggled

by the idea that a company and its shareholders are separate legal persons and when confronted with what appears to be a situation of a shareholder being in a position to control a company there is sometimes a tendency to overlook this crucial separation. In my view this lies at the heart of the present case.

The evidence and the facts

4 The facts are substantially not in dispute. The parties settled upon a "Statement of Agreed Facts" which contained almost all the relevant factual material. In addition, the Prosecution called seven witnesses. Their evidence was taken over a day and a half. There was little, if any, cross-examination. Finally, the Prosecution also tendered the long statements taken from each of the two accused persons under s 121 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("the CPC"). There was some debate as to the precise weight I should accord and the overall approach I should take to these statements when considering a submission at the close of the Prosecution's case that the defence ought not to be called. I return to this at a later point.

5 The first accused is one Mr Lew Syn Pau. Mr Lew is a friend and business associate of the second accused, Mr Wong Sheung Sze. At the material times, Mr Wong was the executive chairman and a director of Broadway Industrial Group Ltd ("BIGL"). BIGL is a company listed on the main board of the Singapore Exchange. Mr Wong was also a director of the following companies:

(a) Compart Holdings (S) Pte Ltd ("Compart Holdings"), a private limited company incorporated in Singapore;

(b) Compart Asia Pte Ltd ("Compart Singapore"), also a private limited company incorporated in Singapore; and

(c) Compart Asia Pacific Limited ("Compart Mauritius"), a company incorporated in the Republic of Mauritius.

6 For convenience I refer to these companies collectively, but not including BIGL, as the Compart Group. They were all related companies. Compart Mauritius was a wholly owned subsidiary of Compart Singapore which in turn was a subsidiary of Compart Holdings. Compart Holdings was in turn a subsidiary of BIGL.

7 In terms of shareholdings, BIGL owned 50.49% of Compart Holdings, which in turn held 93.84% of the shares in Compart Singapore. BIGL also directly owned some 2.74% of the shares in Compart Singapore. As noted above, Compart Singapore in turn owned all the shares of Compart Mauritius.

8 Mr Lew was a director of each of the aforementioned companies in the Compart Group but he was not a director of BIGL.

9 BIGL is an investment holding company. Its business activities were organised into what were described as the "packaging" and the "components" segments. The latter is of particular interest in the present case as it was owned and operated through the Compart Group of companies, consisting of Compart Holdings, Compart Singapore and a number of subsidiaries including Compart Mauritius. For convenience, I refer to BIGL and its related companies collectively as the BIGL Group.

10 The Compart Group and the components segment of BIGL that was operated through this group was financially the strongest performing part of BIGL's business. It was accepted by both the Prosecution and the Defence that for the financial year 2003, BIGL itself made a profit of $260,000;

its packaging segment made a loss of $212,000; and its components segment, *ie*, the Compart Group, made a profit of $10,509,000. Similarly for the financial year 2004, BIGL itself made a profit of $1,223,000; the packaging segment made a profit of $907,000; and the components segment made a profit of $24,349,000.

11 One feature of the way the components segment was run was that Compart Mauritius would purchase products produced by other companies in the Compart Group and then sell these products to customers. In his long statement, Mr Wong described it as a paper company through which sales were channelled. In effect, it operated as a middleman and I was given to understand that the business was set up in this way for tax planning reasons.

12 I pause here to make some observations about the accounting treatment of the finances of the BIGL Group. BIGL, being purely an investment holding company, had no business operations of its own. Its income derived principally from dividends declared in respect of its shareholdings in its subsidiaries.

13 It was therefore the case that other things remaining equal, the group's consolidated net worth would tend to increase with that of its subsidiaries. It was also accepted that the financial statements that were presented to the public included figures for BIGL itself as well as consolidated figures for the group as a whole including BIGL's subsidiaries. In particular, the balance sheet and income statement of Compart Mauritius was consolidated into Compart Singapore's accounts, which in turn was consolidated into Compart Holdings' accounts and finally this was included in the BIGL Group consolidated financial statements. It was not disputed that the Compart Group was very largely responsible for the favourable consolidated financial results of the BIGL Group.

14 Despite this all was not well with BIGL's financial health. In August 1999, BIGL had issued 925 "Redeemable Cumulative Convertible Preference Shares" ("RCCP Shares") to a company known as "3i Group plc" ("3i"). The maturity date for the RCCP Shares was sometime in October 2004. At maturity, 3i would be entitled to redeem the RCCP Shares and BIGL then would have to pay 3i an amount of around $11.8m which sum included interest on the principal value of the RCCP shares.

15 As early as August 2002, BIGL had tried to obtain credit from the United Overseas Bank ("UOB"). UOB had rebuffed these efforts as it felt that BIGL had a weak balance sheet. BIGL in fact had a negative net worth for a period of time until December 2002. UOB was also aware of BIGL's debt liability under the RCCP Shares and it was not confident that this level of debt was sustainable. UOB had therefore indicated that it would not advance any further credit until and to the extent a fresh equity injection was made by BIGL's shareholders.

16 By early 2003, BIGL's total debt liability stood at around $23.5m, of which some $11.2m was in respect of the liability to 3i (including interest).

17 In BIGL's financial statements for the financial year 2002, its auditors, PricewaterhouseCoopers ("PwC"), had expressed concerns as to BIGL's ability to continue as a business entity. These concerns stemmed largely from debts which were then expected to fall due in the following 12 months. Both the BIGL board of directors and PwC noted that the outlook depended upon BIGL's ability to dispose of some of its non-core assets at prices that would be sufficient to meet the anticipated liabilities as and when these crystallised or upon the outcome of other alternatives that were then being explored.

18 In March 2003, BIGL appointed PricewaterhouseCoopers Corporate Finance Pte Ltd, ("PwCCF") as its financial adviser to assist:

(a) in the overall financial restructuring of BIGL and its subsidiaries; and

(b) to find potential investors for BIGL

19 BIGL through Mr Wong also engaged Mr Lew in the latter's capacity as a director of his own company, Capital Connections Pte Ltd ("Capital Connections"), to assist in finding suitable prospective investors for BIGL. An official engagement letter was signed relating to this. Under the terms of this engagement, BIGL agreed to pay Capital Connections a fee of 1% of the aggregate amount of new equity funds successfully raised by Capital Connections for BIGL. This fee would only be payable to Capital Connections when the amount, structure and terms upon which the funds were to be raised had been accepted and the funds had been received by BIGL.

20 PwCCF was not able to find a suitable investor. Mr Lew on the other hand appeared to fare better. He approached an associate from his previous business dealings, Mr Dick Tan Beng Phiau ("Mr Tan"), an Indonesian businessman who had previously expressed an interest in investing in a listed company in Singapore.

21 Following several discussions in Singapore between Mr Lew, Mr Tan and Mr Wong, it appeared that a deal was likely to be struck. Mr Wong, through PwCCF, then informed 3i of Mr Tan's interest in investing in BIGL. Mr Wong also intimated to 3i that BIGL would wish to redeem the RCCP Shares early if the intended share placement to Mr Tan was successful.

22 BIGL and 3i eventually reached an "in-principle" agreement in mid-December 2003 for BIGL to redeem the RCCP Shares early with BIGL repaying the principal amount of $9.25m and 3i foregoing its interest entitlement. The early redemption of the RCCP Shares promised BIGL a substantial savings of about $2.55m when compared to the amount it would have had to pay if the RCCP Shares were only redeemed upon maturity with no waiver of interest.

23 This in-principle agreement with 3i was premised on BIGL successfully securing a new investor for the company as well as new credit facilities to enable it to fund the redemption exercise.

24 In the meantime, in November 2003, Mr Tan had incorporated a private limited company in Singapore known as Silver Touch Holding Pte Ltd ("Silver Touch") intending that it would hold the BIGL shares to be acquired upon the intended share placement being completed.

25 A share placement agreement was subsequently executed between Silver Touch and BIGL on 8 January 2004 under the terms of which Silver Touch agreed to take up:

(a) a first tranche of 20 million new ordinary shares in BIGL at $0.20 per share, for the total sum of $4m; and

(b) a second tranche of 13 million new ordinary shares in BIGL at $0.20 per share for the total sum of $2.6m.

26 At the end of the exercise, Silver Touch would hold 22% of the shares in BIGL, making it one of the largest shareholders in BIGL. In comparison, Mr Wong's own shareholding in BIGL would be 14.63%.

27 Following this, BIGL applied to the Singapore Exchange for the listing of the new shares, which it intended to issue for the placement to Silver Touch. Mr Tan was identified to the Singapore Exchange as the owner of Silver Touch. The Singapore Exchange approved BIGL's application but on

the condition that the placement of the first tranche of 20 million shares to Silver Touch was to be completed by 22 January 2004.

28 On 8 January 2004 and 16 January 2004, BIGL made two public announcements in relation to the intended share placement to Silver Touch. These announcements disclosed the placement agreement and further indicated that the proceeds of the placement would be applied towards the early redemption of the RCCP Shares.

29 In the light of the placement agreement and with the prospect of a fresh equity injection from Silver Touch, BIGL approached UOB once again for additional credit support. UOB this time indicated that it was willing to extend a loan of $6m to BIGL subject to the conditions, amongst others, that:

(a) the placement was successfully completed and BIGL successfully obtained fresh funds through the equity injection from Silver Touch; and

(b) any loan from UOB was to be used only for the purpose of redeeming the RCCP Shares.

30 The offer was accepted towards the end of January 2004. In due course a term loan agreement was executed, under the terms of which UOB extended a loan of $6m to BIGL for a term of three years.

31 The in-principle agreement between 3i and BIGL in relation to the early redemption of the RCCP Shares was duly overtaken by a formal agreement between the parties. This agreement incorporated the following conditions, amongst others:

(a) the share placement agreement between Mr Tan and BIGL, and the loan agreement (between UOB and BIGL) offering new loan facilities up to $6m, had to be completed by 23 March 2004;

(b) the redemption exercise had to be funded by the proceeds from the share placement and the new bank facilities;

(c) the approval given by the Singapore Exchange for the share placement in question was not revoked; and

(d) the redemption exercise had to be completed by 31 March 2004.

32 Unfortunately, even as it was beginning to look as though matters were falling into place they had already threatened to unravel. On 20 January 2004, two days before the expiry of the Singapore Exchange's initial deadline for the completion of the first tranche of the share placement (which was 22 January 2004), Mr Tan informed BIGL that he was having difficulty coming up with the required funds as it was the Chinese New Year period. He also indicated that he would not be in Singapore during this time. BIGL accordingly sought an extension of time from the Singapore Exchange for the completion of the first tranche of the placement and the deadline was then extended to 3 February 2004.

33 Silver Touch subsequently requested another extension of time from BIGL for the completion of the share placement. BIGL in turn applied to the Singapore Exchange for a further extension of time. Once again this was forthcoming and the deadline for completion was extended to 13 February 2004. However, on this occasion, BIGL's solicitors were advised of concerns on the part of the Singapore Exchange over the delay in completion of the share placement. BIGL's solicitors were also advised

that the Singapore Exchange was insistent upon strict compliance with the extended deadline of 13 February 2004.

34 At some point of time before the extended deadline, concerns surfaced once again over the prospects of Silver Touch in fact completing the first tranche in time. Mr Wong then suggested that Mr Lew take a director's loan of $4.2m from Compart Mauritius out of which he would advance a sum of $4m to finance Mr Tan's intended subscription for the first tranche of 20 million new BIGL shares.

35 Mr Wong and Mr Lew each dealt in some detail in their long statements with the circumstances pertaining to the loan and in essence the following points were put forward:

(a) A day or two before the last date for the first placement (13 February 2004) Mr Tan informed Mr Lew that while he expected some funds to be available imminently this would not be in time to enable Silver Touch to complete the first placement. He therefore sought a bridging loan to overcome this difficulty. This was only expected to be required for a short period of a few weeks;

(b) Mr Lew tried various leads to raise the bridging finance but these did not appear viable given the very short time that was available. He also discussed the position with Mr Wong;

(c) Mr Wong was plainly keen to ensure that the placement would be completed as scheduled since on that premise rested the completion of the term loan from UOB and the early redemption of the RCCP Shares. Mr Wong was concerned over the possibility that if this came unstuck, it might result in the auditors qualifying the accounts in terms of BIGL's ability to meet its larger liabilities when they fell due. He was also concerned over the possibility that 3i might initiate litigation. Mr Wong was therefore anxious to see that the placement went ahead as planned;

(d) Mr Wong, having established that Compart Mauritius had funds available, then suggested that Compart Mauritius would give a temporary loan to Mr Lew who would in turn advance the required amount to Mr Tan to enable the placement to be completed but on the understanding that Mr Tan would repay the money within a month. There is no doubt that both Mr Lew and Mr Wong understood that money from Compart Mauritius would be advanced to Mr Lew with the specific intent that this was to enable a similar amount to be loaned to Mr Tan for the specific purpose of enabling Silver Touch to complete the first placement;

(e) Mr Wong explained that he preferred that the money be lent through Mr Lew because he himself did not know Mr Tan and felt more comfortable dealing with and through Mr Lew; and

(f) Mr Lew had concerns about the legality of such an arrangement and raised these with Mr Wong. Mr Wong then checked with his Mauritian lawyers and informed Mr Lew that there was no difficulty under Mauritian law for a company to make a loan to one of its directors as long as the board of directors authorised this. Mr Wong assured Mr Lew that he would attend to the necessary paper work. According to Mr Lew, Mr Wong appeared confident of getting the necessary approval and he then agreed to proceed on this basis. As it turned out the paper work, in particular the resolution, was completed later, though according to Mr Lew it was backdated to 13 February 2004 "to legalise it".

36 In fact, several other things occurred or were dated as if they had occurred on 13 February 2004.

37 On that day, Ms Lee Seet Cheng who worked as the accounts assistant for both Compart Singapore and Compart Mauritius, acting on instructions conveyed through Mr Wong's secretary, checked the balances available in the bank accounts of Compart Mauritius and then made preparatory arrangements to transfer the required sum of $4.2m to Mr Lew. In fact a total amount of $4,199,960 was remitted by way of two transfers on the same day from an account of Compart Mauritius with a bank in Hong Kong into a DBS Bank account in Singapore belonging to Mr Lew.

38 Ms Lee gave some oral evidence relating to these payments but I did not find her evidence very helpful. She stated that Mr Wong's secretary instructed her to make arrangements for these remittances and presented her with a copy of a circular resolution of the board of directors of Compart Mauritius authorising a loan to Mr Lew. She recalled that not all the signatures had been appended at the time she was presented with the resolution but she claimed that she was unable to recall anything else. She was also given the particulars of the account into which the remittance was to be made. She completed the preliminary arrangements for the remittance but did not check if the resolution had been signed by the other directors before advising the authorised account signatories that all was ready for the transfer to be authorised online. When questioned, she said that even if there had been no signatories at all on the resolution, she would have taken the preparatory steps and then notified the authorised signatories. She claimed initially that she was unable to recall who the authorised signatories were but eventually indicated that for transactions as large as these transfers were, two signatures would have been required and one of these would have had to have been Mr Wong or someone named Linus Lee who was a manager. Ms Lee also said Mr Linus Lee was not officially an officer of Compart Mauritius. No evidence was led by the Prosecution as to who in fact authorised the transfers in question.

39 The board of directors of Compart Mauritius comprising Mr Wong, Mr Ng Ah Hoy (a Singaporean), Mr Tommy Lo Seen Chong (a Mauritian citizen) and Mr York Shin Lim Voon Kee (a Mauritian citizen), did at some stage pass a circular resolution authorising the loan to Mr Lew. Mr Lew who was also a director signed the resolution but did so as an abstaining director. The resolution was dated 13 February 2004. The document I have seen had all the signatories on a single page but it appears that it was initially signed in counterparts by the directors. It seems likely therefore that Ms Lee would only have seen one of the original counterparts.

40 Mr Lew also signed a loan agreement with Compart Mauritius in respect of this loan for $4.2m. This too was dated 13 February 2004 though according to Mr Lew's long statement, this came with the director's resolution a few days after the money had been remitted. The agreement was signed by Mr Wong on behalf of Compart Mauritius. It provided for interest to be payable at a rate of 5% per annum commencing on 13 June 2004. There was thus a waiver of interest for a period of four months to begin with. This waiver was subsequently extended until 31 December 2004.

41 It is appropriate here to make some observations about the governance of Compart Mauritius which as I have noted above is a company incorporated in Mauritius:

(a) At all material times Compart Mauritius had a lawfully constituted board of directors.

(b) The responsibility for the stewardship and management of the assets of Compart Mauritius fell in the first instance on that board.

(c) Mr Wong was explicit in his long statement that the loan was given by Compart Mauritius and not by BIGL and that the boards of these companies were distinct. He further pointed out that the money belonged to Compart Mauritius and not to BIGL.

(d) Little evidence was led as to what the board in fact did or what it considered in relation to the initial grant of the loan to Mr Lew or the subsequent waivers of interest.

(e) The evidence as it now stands suggests that even if the board had not authorised the loan by the time the remittances were made, it was subsequently ratified by the board. Certainly a resolution signed by all the directors was produced before me. I discuss this further at [224]–[231] below.

(f) Mr Wong accepted in his long statement that none of the other directors of Compart Mauritius knew that the loan to Mr Lew was made with a view to its being applied towards enabling Silver Touch to acquire shares in BIGL. He stated that as far as the other directors were concerned, this was simply a loan to a director. In my view, this is not material to the present case. First, there was no suggestion by the Prosecution that the loan to Mr Lew was a sham. On the contrary, this loan is specifically referred to in both charges. Moreover, on the evidence as it stands, Compart Mauritius regarded Mr Lew as its debtor. A loan agreement was entered into with him; interest waivers were addressed to him; and Mr Lew in his own capacity later sued those to whom he had advanced the money. Further, it was asserted by the Defence and not challenged by the Prosecution that under Mauritian law, a subsidiary could lawfully provide financial assistance for and in connection with the acquisition of shares in its holding companies.

(g) Nonetheless, it was apparent that Mr Wong exercised substantial influence even to the extent of being a dominant figure in the board. Mr Lew noted in his long statement that Mr Wong was confident of getting the loan from Compart Mauritius approved and this is telling given the size of the loan and the pressures of time that were then being faced.

(h) It is also noteworthy that Mr Lew had never met the Mauritian directors and Mr Wong in his long statement could not recall their names. He did say they were professional directors and suggested that they were expected to and did carry out the normal responsibilities of directors and to be "watchdogs and guardians of the company".

(i) Mr Wong also said in his long statement that it was he who had approved and made the decision to advance the loan. However, elsewhere in the statement, he also stated that the decisions of the board were collectively made and that the Mauritian directors did not take instructions but made up their own minds.

42 The degree of influence if not control that was enjoyed by Mr Wong is to be seen in the context of his position as the largest single shareholder in BIGL and hence having the largest single stake in the BIGL Group. There is a commercial reality in this that cannot be overlooked. That is not to say that by virtue of the size of his shareholding, Mr Wong could do as he pleased with impunity or that the other directors were thereby expected to accede to his wishes without regard to the interests of the company of which they were directors. Directors by virtue of the fiduciary position they occupy have heavy responsibilities and where they fail in these responsibilities for whatever reason, including by reason of undue deference accorded to the wishes of a dominant shareholder, then they may find themselves being held accountable.

43 However, the key point to note is that the influence or control enjoyed by a dominant shareholder is unlikely by itself to give rise to the conclusion that the legal personalities of the company and its shareholder have been fused. This is all the more so in the context of a group of companies such as BIGL where the ultimate holding company is a public listed company,

44 The evidence as it stands does suggest that the corporate governance and internal controls of

Compart Mauritius left something to be desired. It did not appear satisfactory to me that a loan of such a substantial amount could be extended to Mr Lew without adequate credit checks being done, when such checks would not have been uncalled for having regard to the difficulties Mr Lew later had in settling the loan; or that the required arrangements were put in place by an accounts assistant in Singapore on the instructions of Mr Wong's secretary without even requiring sight of a valid resolution; or that the board of directors of Compart Mauritius even when it was asked to approve the loan was not told by Mr Wong of all the surrounding circumstances including in particular that the loan was ultimately to provide financial assistance to an intending acquirer of a stake in BIGL. However, I consider that these are ultimately not matters that are directly relevant to the issue facing me. The case before me concerns not the governance of Compart Mauritius, but rather the allegation that BIGL gave prohibited financial assistance to Mr Tan for the acquisition of its shares.

45 Returning to the factual narrative, Mr Lew and Mr Tan also signed a personal loan agreement dated 13 February 2004 pursuant to which Mr Lew agreed to advance to Mr Tan a personal loan of $4m "*to acquire shares in Broadway Industrial Group Ltd*". The agreement provided for the loan to be repaid by 29 February 2004. Under the terms of the agreement, Mr Tan was required to pay Mr Lew interest at the rate of 1% per month for the loan. Mr Tan also agreed to pledge the first tranche of 20 million BIGL shares with Mr Lew as security for the loan.

46 Mr Lew and Mr and Mrs Tan met at the bank on the same day. Mr Lew verified that the remittances from Compart Mauritius had been received and then handed over a cheque for $4m to Mr Tan. This was banked into Mrs Tan's account and Mr Tan immediately caused a cashier's order in favour of BIGL to be purchased with the loan proceeds. Once this was done, Mr Wong's secretary came to the bank and Mr Tan handed to her the cashier's order being the payment for the first tranche of 20 million shares at $0.20 each.

47 20 million BIGL shares were then issued in the name of Silver Touch. At Mr Lew's request, it was issued by way of a share certificate which was retained by Mr Lew. Mr Tan did not subsequently repay Mr Lew his loan on 29 February 2004 as he had undertaken to and this gave rise to some litigation.

48 Mr Wong and his wife later provided Mr Lew with a total sum of $3m to enable Mr Lew to repay part of the loan he had taken from Compart Mauritius. This together with what appears to have been Mr Lew's own funds were used by Mr Lew for this purpose. For reasons that were not apparent or explained the repayments were all made to Compart Singapore. The cheques were acknowledged to have been received by Compart Mauritius and according to the oral evidence of Ms Lee, she of her own accord and without any instructions effected a book entry to credit the payments to Compart Mauritius.

49 These payments were made on various dates between 13 October 2004 and 14 December 2004. The timing and manner of these payments clearly give rise to the inference that there was a substantial degree of co-operation and co-ordination between Mr Wong, Mr Lew and those handling the accounts of the Compart Group. In one instance, Mr Lew issued a cheque dated 29 November 2004 for the sum of $1.1m to Compart Singapore. The cheque had been drawn on his wife's and his joint account. On the same day, Mr Wong wrote a letter to Mr Lew acknowledging the receipt of the said cheque. It is apparent from the bank statements tendered in these proceedings that as at the date of the cheque, there would have been insufficient funds in that account to honour the cheque had it been presented promptly. On 10 December 2004, Mrs Wong remitted a sum of $1m to the Lews' joint account. It was only after this that the cheque which Mr Lew had earlier issued (on 29 November 2004) was presented.

50 With respect to the second tranche of 13 million shares at $0.20 each, totalling $2.6m, Mr Tan managed to raise the money and paid it to BIGL.

51 Pursuant to the engagement letter signed between BIGL and Capital Connections (see [19] above) the placement of two tranches totalling 33 million BIGL shares at $0.20 per share to Silver Touch was seen as a success. As such, BIGL paid Capital Connections the sum of $66,000, being the 1% commission in respect of the $6.6m raised.

52 Before leaving the facts, it may be noted that there can be no dispute that:

(a) the remittance to Mr Lew came from funds belonging to Compart Mauritius (I elaborate on this below at [153]–[159]);

(b) within the space of a few hours on 13 February 2004 an amount of $4.2m belonging to Compart Mauritius had been transferred to Mr Lew out of which a sum of $4m was paid to Mr Tan and used by him to pay BIGL for 20 million BIGL shares;

(c) Mr Tan sought and received financial assistance with the specific intention of enabling Silver Touch to acquire the 20 million BIGL shares; and

(d) both the accused persons knew and intended that moneys belonging to Compart Mauritius were being used for the specific purpose of enabling Silver Touch to acquire the shares in BIGL.

53 As there is no dispute that financial assistance was provided to Mr Tan in order to enable Silver Touch to acquire the 20 million shares in BIGL, the key issues then are the following:

(a) Had the financial assistance in question been provided to Mr Tan by BIGL?

(b) Was such financial assistance as was provided prohibited by s 76 of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act")?

The charges

54 The charges against the accused persons in question were as follows:

(a) <u>As against the second accused, Mr Wong</u>

That you, **Wong Sheung Sze**, on or around 13 February 2004, in Singapore, being the Executive Chairman of Broadway Industrial Group Ltd ("the Company"), a company incorporated in Singapore, did knowingly and wilfully authorise the Company to indirectly give financial assistance to one Tan Beng Phiau Dick of Silver Touch Holding Pte Ltd, to wit, you authorised a S$4.2 million loan from Compart Asia Pacific Ltd, a subsidiary of the Company, to one Lew Syn Pau for Lew Syn Pau to use S$4 million therefrom as a loan to Tan Beng Phiau Dick, for the purpose of acquisition by Silver Touch Holding Pte Ltd of 20 million shares of the Company at S$0.20 each, by which act the Company had contravened section 76(1)(a)(i)(A) of the Companies Act (Chapter 50, 1994 Revised Edition) ("the Act"), and you have thereby committed an offence punishable under section 76(5) of the Act read with section 408(3)(b) of the Act.

(b) <u>As against the first accused, Mr Lew</u>

That you, **Lew Syn Pau**, on or around 13 February 2004, in Singapore, did abet, by intentionally aiding, one Wong Sheung Sze, who is the Executive Chairman of Broadway Industrial Group Ltd ("the Company"), a company incorporated in Singapore, to knowingly and wilfully authorise the Company to indirectly give financial assistance to one Tan Beng Phiau Dick of Silver Touch Holding Pte Ltd, to wit, Wong Sheung Sze authorised a S$4.2 million loan from Compart Asia Pacific Ltd, a subsidiary of the Company, to you and for you to use S$4 million therefrom as a loan to Tan Beng Phiau Dick, for the purpose of acquisition by Silver Touch Holding Pte Ltd of 20 million shares of the Company at S$0.20 each, by which act the Company had contravened section 76(1)(a)(i)(A) of the Companies Act (Chapter 50, 1994 Revised Edition) ("the Act"), and which act was committed in consequence of your abetment, and you have thereby committed an offence punishable under section 76(5) [of] the Act read with section 408(3)(b) of the Act and section 109 of the Penal Code (Chapter 224, 1985 Revised Edition).

55 It is clear that the charges rest upon the assertion that it was BIGL that provided the financial assistance. However, there is a tension inherent in this: while BIGL is alleged to have given financial assistance to Mr Tan, the charges also reflect that this was done using funds belonging to Compart Mauritius since it is clearly the latter that is said to have made the loan. This tension came to the fore even in the opening address of the Prosecution which culminated in the submission that Mr Wong had "effectively used the funds of BIGL via its subsidiary [Compart Mauritius] … to indirectly give financial assistance to [Mr Tan]." This led to the following exchange I had with Mr Ng Cheng Thiam, the learned Deputy Public Prosecutor who led the Prosecution:

Court: Yes. Mr Ng, … as I read paragraph 46 I just want to be clear that I've understood your case. Your case is that: the money was in fact the money of BIGL?

Ng: The group, as a group.

Court: Well, that's not what it says? It says ---:

…

[Reads] "The Prosecution will prove that by the … machination the 2nd Accused effectively used the funds of BIGL …"

Now, I just want to understand exactly what your case is.

Ng: Your Honour, the "BIGL" here stands for the entire group, in a sense that the BIGL controls the funds within the group.

56 This brings me right back to *Salomon*. The trouble with Mr Ng's response is that the entire group is of course not a legal entity either generally or specifically as an entity capable of owning the funds. As an attempt to reconcile the assertion that BIGL provided the financial assistance with the fact that the money that was used belonged to Compart Mauritius, it was not satisfactory.

The prohibition

57 The material portions of s 76 are as follows:

76.—(1) Except as otherwise expressly provided by this Act, a company shall not —

(*a*) whether directly or indirectly, give any financial assistance for the purpose of, or in

connection with —

(i) the acquisition by any person, whether before or at the same time as the giving of financial assistance, of —

(A) shares or units of shares in the company; or

(B) shares or units of shares in a holding company of the company;

…

(2) A reference in this section to the giving of financial assistance includes a reference to the giving of financial assistance by means of the making of a loan, the giving of a guarantee, the provision of security, the release of an obligation or the release of a debt or otherwise.

(3) For the purposes of this section, a company shall be taken to have given financial assistance for the purpose of an acquisition or proposed acquisition referred to in subsection (1)(*a*) (referred to in this subsection as the relevant purpose) if —

(a) the company gave the financial assistance for purposes that included the relevant purpose; and

(b) the relevant purpose was a substantial purpose of the giving of the financial assistance.

(4) For the purposes of this section, a company shall be taken to have given financial assistance in connection with an acquisition or proposed acquisition referred to in subsection (1)(*a*) if, when the financial assistance was given to a person, the company was aware that the financial assistance would financially assist —

(a) the acquisition by a person of shares or units of shares in the company; or

…

(5) If a company contravenes subsection (1), the company shall not be guilty of an offence, notwithstanding section 407, but each officer of the company who is in default 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 3 years or to both.

58 The material prohibition is contained in s 76(1)(*a*)(i)(A) and that forbids a company which is the target of an intended acquisition from directly or indirectly giving any financial assistance for the purposes of or in connection with the acquisition. It is to be contrasted with the prohibition contained in s 76(1)(*a*)(i)(B) which prohibits a *subsidiary company* from providing such financial assistance in relation to the acquisition of its holding company. While the facts of the present case might appear at first blush to fit more easily within the ambit of s 76(1)(*a*)(i)(B) that course was not open to the Prosecution in the present case because s 4 of the Act defines a "company" as one incorporated in Singapore. Compart Mauritius was thus not a "company" within the meaning of the section. Accordingly, in order to establish the ingredients of the charge, the Prosecution had to prove that the financial assistance in question had been provided by BIGL.

59 I turn to consider the meaning of s 76.

The interpretation of section 76 – preliminary points

60 I propose first to deal briefly with some preliminary submissions that were made by Mr Michael Hwang SC who appeared for the first accused, Mr Lew. There were two submissions in particular which I can dispose of relatively quickly.

61 The first was Mr Hwang's submission that I should apply a purposive approach to the interpretation of s 76 and that, on this basis, I should construe the prohibition in s 76 as applying only where financial assistance was given in connection with an acquisition that resulted in the acquiring party gaining control of the target company. Mr Hwang relied upon s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) which provides as follows:

> 9A.—(1) In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.

62 Mr Hwang further submitted that s 9A of the Interpretation Act is an expansion of the "mischief" rule stated in *Heydon's Case* (1584) 3 Co Rep 7a which was followed by Yong Pung How CJ in *Toh Teong Seng v PP* [1995] 2 SLR 273, and by virtue of which a court construing a statute is commended to have regard to the mischief that the enactment was intended to cure and to adopt such a construction as would suppress that mischief.

63 Mr Hwang then referred to the Companies (Amendment) Bill 1986 (Bill No 9 of 1986) that was introduced in Parliament on 31 March 1986 and was subsequently gazetted on 10 April 1986. Clause 14 of that Bill dealt with the repeal and re-enactment (in revised form) of s 76. In relation to unauthorised financial assistance for the acquisition of shares, the Explanatory Statement in respect of cl 14 states:

> … The main objective of the new section, as of the section it replaces, is to ensure that the capital of a company is preserved intact and not eroded by deliberate acts done otherwise than in the ordinary operations of the company undertaken in the pursuit of the objects for which it was established. To permit a company to purchase or acquire its own shares would lead to a reduction of its capital and thus defeat a fundamental principle of company law …

64 Mr Hwang submitted that regard should also be given to the legislative history of s 54 of the English Companies Act 1948 (c 38) since s 76 of our Act is *in pari materia* with that English provision. He submitted that s 54 of the English Companies Act of 1948 was in turn derived from s 45 of the English Companies Act 1929 (c 23) and the genesis of that enactment is to be found in a review and report as to desired amendments to the companies legislation that was undertaken by a committee chaired by Mr Wilfield Greene KC at the behest of the Board of Trade. Mr Hwang submitted that upon studying the recommendations of the Greene Committee, it becomes apparent that the original objective was to prohibit the practice of purchasers using the target company's funds *in order to gain control* of the company. He further submitted this rationale has been echoed in a line of cases including *In re VGM Holdings, Limited* [1942] Ch 235, (a decision of Lord Greene MR as he had by then become), *Victor Battery Company, Limited v Curry's Limited* [1946] Ch 242 and *Wallersteiner v Moir* [1974] 1 WLR 991 among others.

65 Mr Hwang then drew my attention to the later work of the Jenkins Committee appointed in 1959 by the UK Board of Trade to review the English Companies Act 1948. Mr Hwang pointed out extracts from the Jenkins Committee Report (Cmnd 1749 (1962)) which expressed reservations on the part of

some at least as to the continuing relevance of the prohibition in such broad terms, and which also repeated the rationale of the prohibition as being to prevent parties gaining control of a company with substantial assets using the funds of the company itself to do so.

66 Mr Hwang's first submission came down to this: s 76 should be interpreted so as to prohibit only those instances of financial assistance where the intended purchaser does in fact acquire a controlling interest in the company. In other cases, where the purchaser does not acquire control, there are adequate civil remedies available to a company to secure repayment of any loans made as well as against its directors for any breach of duty in allowing the loan. On the facts of this case, Silver Touch never acquired control of BIGL and Mr Hwang therefore invited me to hold that on this ground alone his client should be acquitted.

67 The short answer which disposes of this submission is that the language of s 76 on this issue is clear and it does not admit of the restrictive interpretation that Mr Hwang urges upon me.

68 It is also significant that the wisdom of neither the Greene Committee nor the Jenkins Committee resulted in the English provisions being amended so as to be applicable only in cases where the purchaser acquires control. Moreover, our Legislature had occasion to consider the matter on several occasions and obviously had access to the reports of these committees. At the time s 76 was repealed and re-enacted in 1986, representations were received on the proposed amendments. Yet the section was framed without the limitation Mr Hwang advocates. In those circumstances, the legislative history in question militates against the adoption of the suggested interpretation. I therefore do not accept this submission.

69 The second preliminary point that I can dispose of is this: Mr Hwang submitted that criminal sanctions cannot be imposed upon accused persons where these are founded on events occurring outside Singapore. He submitted that there is a presumption at law that Singapore legislation does not have extra-territorial application or does not apply to foreign persons whose acts are performed outside Singapore. Mr Hwang relied on the principles enunciated in this respect by the Court of Appeal on *PP v Taw Cheng Kong* [1998] 2 SLR 410.

70 I do not propose to deal with this in any detail because it is clear to me that the presumption against extra-territorial application of a statute is not relevant in the present case.

71 There are two facets to the argument. Mr Hwang submitted that in so far as the matters complained of by the Prosecution relate to the actions of a Mauritian entity (Compart Mauritius), that was a foreign entity not caught by the terms of s 76. As I have already noted, when dealing with a subsidiary rendering assistance in the acquisition of the shares in its parent, the section prohibits the actions of a "company" and this does not cover a foreign corporation. There is no need to have recourse to the presumption against extra-territorial application in this regard since the plain language of the statute does not extend to a foreign corporation.

72 The second facet of the argument relates to the situation where the prohibited act is said to have been done by a company that is *prima facie* within the scope of the Act. Mr Hwang's argument here was that even if the prohibited act and the party doing that act were notionally within the ambit of the legislation, they would be outside it if the relevant physical actions were done outside the territorial limits of Singapore. He referred in this regard to the following facts:

(a) the agreement for the loan to Mr Lew was signed outside Singapore;

(b) the funds for the loan came from bank accounts in Hong Kong; and

(c) the directors who signed the resolution authorising the loan to Mr Lew were outside Singapore at the material time.

73 He therefore submitted that all the material events leading to the transaction occurred outside Singapore and that the present prosecution is an attempt to exercise criminal jurisdiction in respect of acts committed outside Singapore.

74 I asked Mr Hwang if his position would be the same were it to be assumed that the directors of a Singapore company wishing to provide financial assistance contrary to the prohibition, went across the causeway to Malaysia, passed the necessary resolution, telephoned the company's bank overseas where the company had funds, and instructed it to remit the necessary amount for the assistance before returning to Singapore. Mr Hwang accepted that such a case would likely constitute a violation of s 76 notwithstanding the presumption against the extra-territorial application of our statutes but he suggested this would be because it came squarely within the terms of s 76.

75 In my view, the hypothetical I put to Mr Hwang highlights the difficulty in his argument. The presumption in fact had no relevance at all to the charges in this case which alleged that a Singapore incorporated company listed on the Singapore Exchange had indirectly given financial assistance to an investor who wished to acquire shares in that company. A company acts through its agents but regardless of where particular components of the overall matrix of fact had occurred, if what was alleged in the charges was made out, there would have been a violation by a Singapore company of a Singapore statute in Singapore. In the premises, it was not even necessary to have regard to the other connecting factors with Singapore which Mr Ng reminded me of, namely the fact that the monies had been routed through the Singapore bank accounts of Mr Lew and Mrs Tan; that the payment for the shares was made in Singapore using a cashier's order issued here; that the share certificate was handed to Mr Lew in Singapore; or that the online instructions for the transfers were effected from the BIGL offices in Singapore. I therefore also do not accept this submission.

The key issues

76 Having disposed of those preliminary points, I turn to the crux of the case and I propose to analyse this under the following main sub-issues:

(a) the approach to the interpretation of s 76;

(b) the scheme of s 76;

(c) the giving of *financial* assistance;

(d) giving financial assistance *indirectly*;

(e) the Prosecution's case;

(f) my conclusions.

The approach to the interpretation of section 76

77 Section 76 is a penal provision. The officers of a company that is in contravention of the prohibition may be found guilty of an offence and be punished accordingly. Traditionally, such provisions were construed strictly and narrowly but this is no longer the starting premise. In *Forward Food Management Pte Ltd v PP* [2002] 2 SLR 40, Yong Pung How CJ reviewed earlier Singapore

authorities as well as several from England, Australia and Canada before conveniently summarising the position thus at [26]:

> As the above passages show, the strict construction rule is only applied to ambiguous statutory provisions as a tool of last resort. The proper approach to be taken by a court construing a penal provision is to first consider if the literal and purposive interpretations of the provision leave the provision in ambiguity. It is only after these and other tools of ascertaining Parliament's intent have been exhausted, that the strict construction rule kicks in in the accused person's favour.

78 I therefore approach the interpretation of s 76 with no pre-disposition towards a narrow or restrictive interpretation. Rather, I approach it having regard to the legislative objectives and the language used to achieve those objectives and consider whether the acts of the accused persons before me can fairly be said to be caught by the prohibition.

The scheme of section 76

79 It is convenient first to recall the legislative objective in enacting s 76. This was restated in 1986 (when the section was repealed and re-enacted with a number of changes) by the Minister for Finance at the time he moved the second reading of the Bill as follows: "The main purpose of the section is to ensure that the capital of the company is preserved intact." See: *Singapore Parliamentary Debates, Official Report* (5 May 1986), vol 48 at col 39.

80 Such statements can illuminate the search for the proper meaning to be placed upon an enactment but they must be taken in context. Mostly importantly, such explanatory statements are not meant to displace the language of the statute.

81 The statute itself specifically prohibits a company *inter alia* from:

(a) giving financial assistance for the purpose of or in connection with the acquisition by any person of shares in the company;

(b) giving such financial assistance where the acquisition in question is of shares in its holding company;

(c) acquiring its own shares or shares in its holding company;

(d) lending money on the security of its own shares or shares in its holding company,

save as permitted by the Act.

82 Section 76 itself prescribes a number of exemptions from one or more of these prohibitions. These are set out at sub-ss 76(8) through 76(15). These are not directly relevant to the case at hand since there is no suggestion that any of the exemptions in question is applicable.

83 There is no statutory definition as such of the term "financial assistance". However, s 76(2) identifies five specific types of assistance which are "included" within the reference to the giving of financial assistance under the section.

84 As to the required linkage between the giving of financial assistance and the acquisition of the shares:

(a) Section 76(3) provides in effect that a company will be taken to have given financial

assistance for the purpose of the acquisition as long as that was a substantial purpose (even if only one among several purposes) of giving the assistance.

(b) Section 76(4) provides in effect that if the company was aware at the time financial assistance was given that this would "financially assist" the acquisition, it will be taken to have given such assistance in connection with the acquisition.

85 In the case before me, there was no issue that financial assistance was rendered to Mr Tan and that this was for the purpose of the acquisition by Silver Touch of 20 million BIGL shares.

86 I refer also to s 76(5). That section provides that where a company contravenes s 76(1) the company does not commit an offence but the officers in default do. It also prescribes the applicable sanctions.

87 That is the broad scheme of the section.

The giving of *financial* assistance

88 Although it seems obvious, it bears noting that the Act does not proscribe the giving of assistance generally. A company may have very good commercial reasons for facilitating the conclusion of an intended acquisition of its shares and it is entitled to exercise efforts to secure that end as long as it does not give *financial* assistance. This is a critical issue in the present case.

89 It is useful here to recall the dictum of Hoffman J (as he then was) in *Charterhouse Investment Trust Ltd v Tempest Diesels Ltd* [1986] BCLC 1 ("*Charterhouse*") at 10:

> 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 (4) SA 419 at 425 cited in the *Belmont* case:
>
> > '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.'
>
> There is no definition of giving financial assistance in the section, although some examples are given. The words have no technical meaning and 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.

90 It is correct in my view that the term "financial assistance" is to be understood as a matter of commercial usage though it is important to have regard to the section as a whole for any light one might find there.

91 There are some provisions which appear to me to bear on this. I return here to s 76(2). That section provides that the giving of financial assistance within the meaning of the section includes:

(a) the making of a loan;

(b) the giving of a guarantee;

(c) the provision of security;

(d) the release of an obligation; or

(e) the release of a debt.

92 There is a common thread that runs through each of these instances of prohibited assistance and that is that the act in question actually or contingently depletes the assets of the assisting company. The release of a debt or an obligation are the obvious examples of actual depletion of assets. Each of the others however potentially at least has the same effect. The loan that is not repaid, the guarantee that is called upon, the security that is resorted to can all lead to a depletion of the company's assets.

93 This was at the forefront of the argument of Mr Shanmugam SC, who appeared for the second accused, Mr Wong. Mr Shanmugam submitted thus: the assistance in question must first and foremost be "financial". This requires in essence that there be some form of financial support emanating from the company subject to the prohibition. Where that company has not undertaken any obligation itself in relation to the giving of financial assistance and does nothing whereby any of its assets are encumbered in any way, then it is impossible to contend that there has been any *financial* assistance given by the company.

94 An argument in similar terms was accepted and formed the basis of the decision of the Court of Appeal in the Supreme Court of New South Wales in *Burton v Palmer* (1980) 5 ACLR 481 ("*Burton*") and this was relied upon by Mr Shanmugam. The facts in *Burton* are not directly relevant save to note that the alleged financial assistance there consisted of an undertaking on the company's part to repay a debt that was due and owing from it to the vendor of the shares who wanted to end his association with the company and his erstwhile partners.

95 Hutley JA in the course of his judgment (at 484) proposed the following test to determine whether there was financial assistance within the meaning of the statutory provision in question (corresponding to our own s 76):

> The ways in which a company can infringe s 67 of the Companies Act 1961 are infinitely various *but the essence of the matter is clear – has the company diminished its financial resources, including future resources, in connection with the sale and purchase of its shares*. As the reduction may be indirect, it is not to be determined by considering only what is done by the parties to the transaction. Others may acquire rights against the company which diminish its resources in connection with the transaction and thus bring the section into play. The issue is what is the impact upon the company of what took place, *it being borne in mind that the assumption by a company of obligations, even if it is unlikely that they may have to be honoured, diminishes its resources*. [emphasis added]

96 Mahoney JA who gave the other reasoned judgment proceeded on a slightly different basis. Mahoney JA had regard to the legislative object of the section, namely, that those who acquired shares in a company should do so with their own funds and not with the help of the company, and then proceeded as follows at 490:

> What the company did was to enable the transaction involving the purchase of its shares to go forward but what it did for that purpose was merely to pay what it presently owed. If, apart from the proposal for the sale of its shares, the plaintiff had demanded that the company discharge its indebtedness to him, he would have been entitled in law to have it do so. It would be expected

that a company, assuming an indebtedness of this kind, would act properly and reasonably on the receipt of such a demand and meet its just obligations. The alternative would be for it to refuse to pay, to be sued, and, in the end, to be forced to pay with costs. *I do not think that it was the purpose of s 67 to require a company, merely because the demand was made in the context of a proposal for the sale of its shares, to do otherwise than what it would ordinarily have been proper for it to do.* I do not think that the words "give any financial assistance" require the adoption of such a view. I therefore do not think that this submission should be accepted. [emphasis added]

97 What is clear from the extracts I have quoted is that the court in *Burton* thought that where a company gave financial assistance for an acquisition, its assets were either being used or were at risk of being depleted in connection with that acquisition and this was being done otherwise than in the ordinary course of its business.

98 The same approach was taken by Hodgson J at first instance in the Supreme Court of New South Wales in *Darvall v North Sydney Brick & Tile Co Ltd* though with some explanation. This decision is reported at (1987) 12 ACLR 537 and the decision of the Court of Appeal when it went on appeal is found at (1989) 15 ACLR 230. I shall refer to the case generally as "*Darvall*". Hodgson J stated as follows in his decision at 560:

As regards the submission that the transaction could not amount to the giving of financial assistance because it was not shown that the company had diminished its financial resources, this involves, I think, a misreading of what was said in *Burton v Palmer* [[1980] 2 NSWLR 878] … At 881 Hutley JA said that the essence of the matter was contained in the question: Has the company diminished its financial resources, including future resources, in connection with the sale and purchase of its shares? However, his Honour went on to say that "the assumption by a company of obligations even if it is unlikely that they may have to be honoured, diminishes its resources". Subject to one matter which I will come to, it seems to me that an agreement whereby Norbrik is bound to part with its Baulkham Hills land in return for whatever benefits might flow under the joint venture agreement is relevantly a diminution of its financial resources. It would certainly constitute consideration for a further agreement, whereas discharge of an existing obligation such as occurred in *Burton v Palmer* would not constitute such consideration.

99 In my judgment, Hodgson J in the foregoing passage was emphasising and clarifying an important aspect of the approach taken in *Burton* which tends to get overlooked if one places undue emphasis on the need to find some actual diminution or depletion of the company's assets. The criteria is not whether there has been actual depletion, but rather whether the company's assets have been placed at risk and there is a potential for future depletion to take place by virtue of an undertaking or obligation entered into by the company at the time of and in connection with the acquisition of its shares.

100 As mentioned above, *Darvall* went on appeal ((1989) 15 ACLR 230) and Kirby P in the Court of Appeal applied the depletion of assets test advanced in *Burton* though he also expressed reservations as to whether Hutley JA's *dictum* in *Burton* could be accepted as applicable in every case. The following extract from Kirby P's judgment at 261–262 is instructive as to how he understood and applied the test:

[The section] is concerned with the misuse of a company's financial resources. *That misuse can occur in actuality and in potentiality.* If a cheque is drawn and the company's funds are used, the section obviously applies. But such will rarely be the case. Other means of using the financial resources of the company may be utilised. They will diminish the financial resources of the

company, in potentiality. [emphasis added]

101 The other two judges in the Court of Appeal (Mahoney and Clarke JJA) did not deal with this issue.

102 Hutley JA's approach in *Burton* has not been universally accepted in Australia. There are a few authorities that have not embraced it and to these I now turn.

103 I have already mentioned (at [100] above) the reservations expressed by Kirby P in the Court of Appeal decision in *Darvall* although he nonetheless applied the test in that case with the important explanation that I have referred to.

104 In *Re National Mutual Royal Bank Ltd* (1990) 3 ACSR 94 ("*Re National Mutual*") McPherson SPJ in the Supreme Court of Queensland (at 101) doubted that Hutley JA's dictum could be taken to support "so sweeping a generalisation" as that a transaction by a company cannot constitute the giving of financial assistance unless there is some diminution of its financial resources. The key contention upon which the argument rested in *Re National Mutual*, that there was no financial assistance, was that the company's assets were already encumbered under charges that had been given prior to and unconnected with the intended purchase of the company's shares and that the impugned transaction involved the mere substitution of chargees and nothing more.

105 However MacPherson SPJ rejected this contention and noted as follows at 100–101:

> I am satisfied that this submission does not accurately reflect the true state of affairs. Some of the companies in the group had not previously charged their assets to Westpac; in addition, the liability under the facility agreement provides for payment of an establishment fee of $1m, and also a put and call option fee (Sch 12), neither of which was payable under the Westpac charge. To that extent, the charges in favour of the bank are more extensive than those in favour of Westpac. That makes it difficult to sustain an argument that nothing was involved but the substitution of one security for another which produced no diminution in the financial resources of the company or group.

106 In the circumstances, it is plain that the case was in fact entirely capable of being reconciled with Hutley JA's test in *Burton*. The real difficulty which MacPherson SPJ was seeking to avoid, is the danger that such cases are approached on the footing of extremely sophisticated and unduly technical arguments designed to establish that in some economic sense the company's overall asset position is not in fact worsened as a result of the impugned transaction.

107 However, this would only arise from a misapplication of the test. The search is not for a theoretical economic equivalence in the financial position of the company before and after it has entered into the impugned transaction. Rather, it is simply whether in the ordinary commercial sense the assets of the company have been used or put at risk in connection with the acquisition of its own shares. For reasons which are explained later (see [194]–[213] below) the assets of a company's subsidiary would not in general be treated as the assets of the company itself.

108 In *ZBB (Australia) Ltd v Allen* (1991) 4 ACSR 495 ("*ZBB*") Waddell CJ in the New South Wales Supreme Court found that there was financial assistance in connection with shares subscribed for pursuant to an underwriting agreement entered into in connection with a public offering. The company in that case had agreed to deposit with any nominated member of the underwriter's group the whole of the proceeds of the subscription in return for the agreement to underwrite the issue of shares.

109 At the time of the agreement, the underwriter was technically insolvent. Waddell CJ noted as follows at 503:

> The immediate deposit by the plaintiff of the whole of the subscription moneys with Duke Pacific clearly assisted it to send them to ZBB because it was out of pocket the sum involved for only 24 hours. In these circumstances, it must be concluded that, by making the deposit the plaintiff gave, indirectly, financial assistance, to use a neutral word, in relation to the acquisition by Duke Securities by subscription of shares in the plaintiff. It did so by enabling Duke Pacific to make the necessary advance to Duke Securities without using any of its own funds except for a few hours.

110 He then proceeded to consider Hutley JA's dictum in *Burton* and observed as follows (also at 503):

> Section 67 expressly prohibited the giving of financial assistance "by means of a loan, guarantee or the provision of security or otherwise". *Clearly his Honour did not mean to imply that the making of a loan did not diminish the company's financial resources even though, of course, the reduction in money assets is balanced by the asset of an obligation of repayment*. [emphasis added]

111 In my view, this is entirely correct. Waddell CJ in fact applied the depletion of assets test sensibly. Indeed, the depletion of the company's assets in the case before him by way of the deposit it made was not even balanced by the obligation to repay because the debtor was in fact technically insolvent.

112 I have mentioned the last two authorities in particular because they formed the basis upon which the Full Court of the Supreme Court of Western Australia declined to adopt this test in *Dempster v National Companies and Securities Commission* (1993) 10 ACSR 297 ("*Dempster*"). This was a case which I drew to the attention of counsel and invited their submissions upon, and it is now relied upon substantially by the Prosecution.

113 It is appropriate first to set out the reasoning upon which Malcolm CJ (with whom Walsh and Anderson JJ concurred) proceeded and this can be seen generally at 345–353:

> (a) Malcolm CJ examined the Court of Appeal decision in *Darvall* and noted that although Kirby P applied the depletion of assets test he expressed some reservations, and the other Court of Appeal judges in *Darvall* did not examine the issue. Malcolm CJ accordingly concluded (at 351–352) that *Darvall* did not support the proposition for which *Burton* is authority;
>
> (b) Malcolm CJ then noted that this test was rejected by McPherson SPJ in *Re National Mutual*. He also noted (at 352) that Waddell CJ in *ZBB* had expressed reservations;
>
> (c) Lastly, Malcolm CJ appears to have considered that the decision of the English Court of Appeal in *Belmont Finance Corporation Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 ("*Belmont Finance*") stood for the proposition that financial assistance could be found even if "the company's balance sheet is undisturbed in the sense that the cash paid out is replaced by an asset of equivalent value". He held (at 346–347 and 352–353) that this was inconsistent with *Burton*.

114 Accordingly, Malcolm CJ concluded at 353:

> The most which may be said about the impoverishment test is that it may provide some

assistance in determining whether the transaction was a genuine commercial transaction. It may be relevant to the question of financial assistance and to the question of purpose, but, in my opinion, it would not be decisive of either question.

115 To the extent *Dempster* stands for the proposition that the fact there has been actual or potential depletion is not necessarily decisive of the issue whether there has been financial assistance I would agree for reasons that I turn to shortly. To the extent it stands for the proposition that financial assistance may be found even in the absence of any actual or potential depletion of the company's assets, I would disagree. In my judgment, the latter proposition rests on a misapprehension that the depletion of assets test requires the court to be satisfied that in a strict sense the company's net worth has in fact been diminished.

116 Similar concerns have been expressed by the Federal Court of Australia in *Milburn v Pivot Ltd* (1997) 15 ACLC 1,520 ("*Milburn*"). Goldberg J in *Milburn* first advanced the following propositions in relation to the prohibition at 1,544:

(a) The prohibition is one against a company giving *financial* assistance.

(b) The relevant inquiry is not whether a person acquiring shares in the company has obtained a benefit but rather whether the company has given financial assistance. In other words, the inquiry is undertaken from the point of view of the assisting company.

(c) The range and scope of financial transactions now available are such that it is important to examine the commercial substance of a transaction rather than its form.

(d) The prohibition is not confined to financial assistance to the purchaser but can include such assistance whomever it may be given to.

117 I accept all of these propositions as correct. Goldberg J then considered whether there had to be "impoverishment" and in that context examined the cases commencing with *Burton* and resting with *Dempster* before apparently accepting Malcolm CJ's rejection of the *Burton* approach. Immediately after this, follows this passage from Goldberg J's judgment at 1,546:

> An example of a situation where there is no diminution of a company's resources is where the company gives a guarantee. In such a situation a contingent liability is created yet no diminution of resources occurs. Nevertheless s 205(2) of the Corporations Law includes the giving of a guarantee within the giving of financial assistance. This view may be seen to conflict with the observations of Hutley JA in *Burton v Palmer*:
>
> > "The issue (is there an infringement of s 67) is what is the impact upon the company of what took place, it being borne in mind that the assumption by a company of obligations, even if it is unlikely that they may have to be honoured, diminishes its resources."
>
> It is not easy to see how the giving of a guarantee by a company diminishes its resources except in a contingent sense. But even in this sense one cannot point, at the time of giving of the financial assistance, to any diminution in fact of the company's resources.

118 This passage demonstrates my point, and I myself reject the notion that there must in fact be an actual economic diminution of the assets of the company at the time of the transaction. Once the test is applied in the broader sense that I have suggested at [107] above, this objection ceases to be valid.

119 I have already referred to a number of Australian decisions that have applied *Burton*. To this, I should add the decision of the New South Wales Supreme Court in *Tallglen Pty Ltd v Optus Communications Pty Ltd* (1998) 28 ACSR 610 ("*Tallglen*") in which Young J considered the foregoing cases before following *Burton* not only because he felt he was bound by that decision but, as he noted at 617, because he agreed with it.

120 Young J saw the debate between the cases that advocated the *Burton* approach and those that appeared to spurn it as capable of being resolved by understanding the proper limits of the test. As Young J noted at 619:

> Certainly Hutley JA did not say that one just looked at the balance sheet. One does not have to be involved in commercial law long to realise the number of frauds that are committed by assuming that $x in cash is exactly the same as a promise by A to pay $x on demand, even though, in law they may have equivalence …

121 Young J further noted at 620–621:

> I agree also that Hutley JA was not limiting himself by the term "resources" to balance sheet matters and to actual as opposed to contingent diminutions.

122 I endorse without reservations both those explanations of Hutley JA's *dictum* in *Burton* as well as the good sense that underlies those observations.

123 Even though *Dempster* was a case I had introduced into the proceedings, having considered the reasoning underlying the decision I have reached the conclusion that it is not persuasive on this point and I therefore decline to follow it.

124 I arrive at this conclusion for several reasons. First, I have already analysed the authorities upon which Malcolm CJ relied in *Dempster* and as I have explained above, I do not consider that any of those authorities are inconsistent with or detract from the depletion of assets test articulated in *Burton* provided that test is properly understood. The subsequent decisions, in particular *Tallglen*, put the test in its proper context.

125 To the extent reservations have been expressed about the test, these stem in my view from a failure to appreciate its commercial underpinnings. I reiterate what I have said above at [107]: the search is not one directed at technical economic equivalence in the company's position before and after the transaction. Rather, the real issue is whether the assets of the company have in fact been used or been put at risk for the purpose of the intended acquisition. If the answer to this is in the affirmative, then there may be financial assistance in the relevant sense whether or not the risk has materialised and whether or not the actual asset position has diminished. This is subject to some exceptions which I note below at [133]–[151].

126 Secondly, having regard to the legislative purpose of the prohibition contained in s 76 namely to preserve the company's capital and prevent the use of its assets in connection with an intended acquisition of its shares, there does not appear to me to be any good reason to conclude that the legislature intended to criminalise conduct which did not in any way entail the use of a company's resources whether directly or in any way that encumbered or placed such resources at risk. I note in this regard that the same view is expressed in Prof Walter Woon's treatise, *Woon's Corporations Law* (LexisNexis, 2006, Issue 21) at para F1501, as follows:

> **The mischief of the section** It is suggested that the mischief that the section is aimed at is the

improper depletion of a company's assets to the detriment of its creditors: *Skelton v South Auckland Blue Metals Ltd* [1969] NZLR 955, 958 (Supreme Court of New Zealand). The creditors have nothing except the company's assets to look to in the event of insolvency; therefore, a company cannot part with those assets without sufficient consideration. Assisting a party to acquire the company's shares usually involves a depletion of the assets. In *Burton v Palmer* (1980) 5 ACLR 481, 484 (Court of Appeal, New South Wales) Hutley J said:

> The ways in which a company can infringe s 67 of the Companies Act 1961 … are infinitely various but the essence of the matter is clear – has the company diminished its financial resources, including future resources, in connection with the sale and purchase of its shares …

It is suggested that this is the correct test to be applied in interpreting s 76. It is true that these dicta of Hutley J's have not commanded unanimous approval by Australian judges: see eg *Dempster v National Companies and Securities Commission* (1993) 10 ACSR 297, 353 (Full Court of the Supreme Court of Western Australia). However, in the cases that reject this test, it has not been explained why the legislature should criminalise the giving of financial assistance by a company where the company's assets are not diminished. What is the underlying public policy against such transactions if the company, its shareholders and its creditors suffer no detriment? … In commerce, certainty is required. Section 76 is one provision that creates constant uncertainty because of the width of the prohibition …

127 Thirdly, I note that the test has been applied in other jurisdictions with provisions in similar terms. Prof Woon's treatise refers to the decision of the Malaysian High Court in *Simmah Timber Industries Sdn Bhd v David Low See Keat* [1999] 5 MLJ 421 where Kamalanathan Ratnam J stated as follows at 436:

> Clearly in this case, there is, not only the depletion of monies due to the company by such monies being paid out to the second defendant, but there is a depletion of the company's assets, by them being transferred to the second defendant and which assets the second defendant has leased back to the company, for which payments were being made … This is a cleverly planned subterfuge to deplete the company of its assets. The question to ask is, 'Has the company's financial resources been diminished, including its future resources, as a result of this lease-back agreement?' In my judgment, the first and second defendants created the mischief that was clearly envisaged by s 67 of the Act.

128 To this may be added the South African decision of *Lipschitz No v UDC Bank Ltd* [1979] 1 SA 789 ("*Lipschitz*").

129 *Lipschitz* was a decision of the Appellate Division of the Supreme Court of South Africa. The case concerned a prohibition against a company giving financial assistance in connection with the acquisition of its shares. One of the key issues facing the court was what amounted to "financial" assistance within the meaning of the prohibition. A line of earlier cases in South Africa had applied what was referred to as "the impoverishment test" to determine if there was financial assistance. Perhaps the best known of the cases applying the impoverishment test was *Gradwell (Pty) Ltd v Rostra Printers Ltd* [1959] 4 SA 419 ("*Gradwell*").

130 In *Gradwell*, Schreiner JA had said at 425–426:

> Having money available the company could part with it in various ways that would enable the recipient to purchase the company's shares with the money. It could for instance buy an asset,

not required for the purposes of its business, in order to provide the seller of the asset with money with which to buy the shares. It was contended on behalf of Crowden that this would be giving financial assistance. If the purchase of the asset were effected at a price known to be inflated, this would no doubt be giving of financial assistance. It would indeed be equivalent to a gift and would clearly involve a reduction of the company's capital … But whatever may be the position in such a case the paying off of an existing debt seems to be decidedly more difficult to bring within the notion of giving financial assistance. The payer's assets and liabilities are put into a different form but the balance is unchanged. And the same applies to the financial position of the payee. Here the company would have no more and no less after the completion of the transaction than before.

131 This had given rise to the notion that financial assistance would only be found to exist if there was a deterioration in the company's balance sheet. I have already expressed my views on such a notion and the decision in *Lipschitz* is to precisely the same effect. The following passage from the judgment of Miller JA at 800–801 makes this clear:

> Section 86 *bis* (2) expressly and unequivocally includes within the meaning of "financial assistance" acts not necessarily nor even probably involving impoverishment of the company or the employment at all of its "pecuniary resources". The giving by a company of a guarantee or the provision by it of security does not *per se* involve the actual or even probable disbursement or employment of the company's funds … yet, if such guarantee or security was provided by the company and if it were to be established that it was provided for the purpose of or in connection with the purchase of the company's shares, the section would be shown to have been contravened whether or not such guarantee or security actually rendered or was likely to render the company poorer, for the section expressly provides that the giving of a guarantee or the provision of security constitutes financial assistance … Clearly, the purpose of the Legislature in specifically including the giving of a guarantee and the provision of security in the concept of "financial assistance" was to guard also against a company's merely exposing its funds to possible risk (as distinct from actually employing or depleting its funds) for the purpose of or in connection with the purchase of its shares.

132 In my view, these remarks of Miller JA reveal that his difficulty with the impoverishment test was really to the extent it is suggested that there must be an actual economic diminution in value of the assets of the company. I agree such insistence would not be consistent with the broad terms of s 76. However, if one considers the position in the way I have suggested it should be, namely to direct the inquiry at whether there has been use of the assets of the company or exposure of those assets to a risk of diminution, the objection fades away.

133 Before leaving this point, I should touch on *Belmont Finance*. In that case, a purchaser wished to acquire shares in a company. The company acquired another company called "Maximum" from the purchaser in order to put the purchasers in funds and so enabled the purchaser to enter into the purchase. It was argued that the company had paid a fair price for the asset. All the company had done, so it was submitted, was to exchange cash for the asset. It was suggested on this basis that there was no financial assistance.

134 At the first instance, Foster J held that there was no financial assistance because the asset purchased by the company was a *bona fide* commercial transaction and the fact that it had the effect of enabling the intending purchaser of the company's shares to complete the acquisition did not render it unlawful financial assistance. The Court of Appeal reversed this.

135 Before turning to the Court of Appeal's treatment of the legal principles, certain factual matters

should be highlighted. The following points were made in the judgment of Buckley LJ at 403:

> 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. I think, however, that Mr Howard Williams's report and evidence clearly establish that £500,000 was in truth an inflated price.

136 This was highlighted also in the judgment of Goff LJ who noted at 407 that the "shares were not …. worth anything like that amount". In that light, I turn to the Court of Appeal's treatment of the relevant principles and it is set out in the judgment of Buckley LJ at p 402:

> Foster J treated as a proposition of law, accepted by counsel for Belmont, that a company does not give financial assistance in connection with a purchase of its own shares within the meaning of s 54 by reason only of its simultaneous entry into a bona fide commercial transaction as a result of which it parts with money or money's worth, which in turn is used to finance the purchase of its own shares …
>
> If A Ltd buys from B a chattel or 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 A Ltd buys something from B at a fair price, which A Ltd could readily realise on a resale if it wished to do so, but the purpose, or one of the purposes, of the transaction is to put B in funds to acquire shares of A Ltd, the fact that the price was fair might not, I think, prevent the transaction from contravening the section, if it would otherwise do so, though A Ltd could very probably recover no damages in civil proceedings, for it would have suffered no damage. 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.
>
> The reasoning of the judge's judgment appears to me, with deference to him, to overlook the word 'only' in the suggested proposition of law.

137 Malcolm CJ in *Dempster* appears to have thought that *Belmont Finance* stood for the

proposition that financial assistance could be found even if cash paid out were replaced with an asset of identical value (see [113(c)] above). I don't quite agree. It is plain from the passages I have just cited that the English Court of Appeal in *Belmont Finance* was satisfied that the company was purchasing Maximum at a considerable overvalue. In my view, the principle to be extracted from *Belmont Finance* is that a company is not entitled to enter into a commercial transaction that is not *bona fide* in its own commercial interests if this is done primarily to enable or facilitate the acquisition of its shares.

138 On the facts, the Court of Appeal in *Belmont Finance* found it was not in the company's own interest to enter into this transaction. Buckley LJ advanced various hypotheticals, the key to all of which was in the question: Has the company done something that is not genuinely in is own commercial interests but which is done in order to enable the acquisition of the company's shares?

139 Buckley LJ's hypotheses include one where the company buys an asset not in its own interest but to enable the purchase of its shares even if it is at a fair price which could readily be realised on a resale. This may in fact have been the basis for the interpretation placed on *Belmont Finance* by some of the later cases. The hypothetical in question is of course entirely theoretical and somewhat artificial. I cannot imagine the point of a transaction where all that is being done is to swap cash for an asset that is exactly as good as cash and precisely as liquid; or that such a transaction would ever be needed in order to *enable* the acquisition of the company's shares since the intending purchaser could convert his totally liquid asset into cash on his own without needing the company's help. The point only arises where there is a potential for the conversion of the asset into cash not to proceed quite so smoothly. This will in fact generally be the case and where it is so, the company will have taken the risk that its assets will be depleted. Where that risk has been taken to enable the acquisition of shares in the company, it brings the prohibition into play.

140 It should be noted that s 76(2) specifically identifies certain types of transactions that will be included within the term "financial assistance". Where the impugned transaction falls within one of these types of transactions it is a relatively straightforward matter – the financial assistance will be prohibited (assuming it is in all other relevant aspects caught by the section) unless exempted under one of the other provisions in s 76. Thus, if a company had good commercial reasons for entering into such a transaction, it could for instance go through the procedure set out in s 76(10) through s 76(14).

141 However, as I have already noted, s 76(2) is indicative rather than exhaustive. A court faced with a transaction that is challenged under the section will peel away the skin and scrutinise the kernel to determine whether in fact the transaction is caught by the prohibition. Here the situation becomes a little more complicated. In getting to the substance of the matter, there is always a danger that focusing on the fact that the company's assets might have been depleted, one loses sight of the equally important fact that the company may have entered into the transaction for perfectly good and legitimate commercial reasons rather than to deplete its assets in aid of the intended acquisition of its own shares. It would neither be desirable from the perspective of promoting legitimate enterprise nor necessary from that of protecting the company and its creditors, since some risk is inevitable in free enterprise, to lean in favour of invalidating such transactions without regard to the real commercial interests that caused the company to enter into the transaction. I note that Buckley LJ in *Belmont Finance* in fact put forward the tentative view that a company which genuinely entered into a transaction in its own commercial interest and not *merely* to put the intending purchaser in funds would not be contravening the prohibition. I endorse this.

142 To this extent, *Belmont Finance* is one in a line of cases which hold that the mere fact that there has been an actual or potential diminution of the assets of the company even if this occurs in

connection with the acquisition of the company's shares does not necessarily result in the conclusion that there has been unlawful financial assistance.

143 Of direct relevance to me in this connection, is the decision of the Court of Appeal in *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1995] 1 SLR 313 ("*Multi-Pak*"). That case involved the appellants acquiring shares in the respondents for a consideration that entailed the assignment of some receivables owing to the appellants by certain companies. The debts in question were owed by entities that were owned or controlled by those who also had substantial interests in the respondent. The argument that there was prohibited financial assistance stemmed from the fact that the debts were of doubtful worth at the time of the assignment as the debtors were technically insolvent.

144 The Court of Appeal held that there was no prohibited financial assistance on the basis that:

(a) the substance of the transaction was a subscription for consideration other than cash and this was not in itself prohibited, even though the debts were quite worthless, as the directors had taken a view on reviving the debtor (*Multi-Pak* at 323, [25] to 324, [27]); and

(b) the transaction was entered into *bona fide* in the commercial interest of the company.

145 There is a further line of cases dealing with the situation where the company is already subject to an obligation that has crystallised and it performs that obligation in the context of an intended acquisition of its shares. Here also, the transaction will not be construed as the giving of financial assistance even if its result is to financially enable the acquisition. Whether this is because it is within a company's legitimate interests to fulfil its obligations that have crystallised or it is because a company that pays a due debt simply cannot be said to be giving financial assistance is immaterial.

146 This explains the decision in *Burton* where, as noted above, it was held that nothing in the prohibition required a company to refrain from doing that which it was obliged to do.

147 Similarly in the South African decision of *Gradwell* to which I have already referred, the same principle is inherent in the following passage from the judgment of Schreiner JA at 426:

> Where there is an anticipation of the date when a debt becomes due and payable the position may possibly be different, but where the debt is presently due and payable and the debtor can have no answer to the creditor's demand for payment, it would be straining the language to hold that by paying his debt the debtor gives financial assistance.

148 This also explains the decision of the English High Court in *Armour Hick Northern Ltd v Armour Trust Ltd* [1980] 3 All ER 833 ("*Armour Hick*") where Mervyn Davies QC sitting as a judge of the High Court, cited from the same passage from *Gradwell* that I have referred to and then reasoned as follows at 837:

> Thus, if Hick Partners had paid its own debt to Armour Trust, it would have given no financial assistance within s 54, the reason being, as I understand, that such a payment does not alter the financial position, *save to the extent that a debt due from the debtor is paid by the debtor, so that no help or assistance is given. There is merely a due discharge of a debt*. But Hick Northern paying the Hick Partners debt is a horse of another colour. Hick Northern was not paying off its own debt. It may have been making merely a voluntary payment. Accordingly, the payment may have been financial assistance within s 54. [emphasis added]

149 It may be noted from this passage that the learned judge in *Armour Hick* considered whether

the assistance was financial in nature by reference to whether the financial position of the company was affected other than by a transaction in the ordinary course such as the discharge of a debt that is presently due and owing. This is consistent with the depletion of assets test laid down in *Burton* with due allowance for payments that are made in the ordinary course of the company's business.

150 The last case I need refer to on this point is the recent decision of the English High Court in *Anglo Petroleum v TFB (Mortgages) Ltd* [2006] EWHC 258 in which Peter Smith J recognised the same principle noting as follows at [138]:

> It seems to me as a matter of common sense that if it is lawful for a company to repay its own indebtedness and there is a genuine commercial justification it must also equally be lawful to the company to assist that repayment by providing security.

151 Accordingly, I conclude that in order to establish that a company has given *financial* assistance it will be *necessary* to establish that there has been a depletion of the assets of the company in the way I have described it at [107] above. But this may not always be *sufficient* to warrant the conclusion that the transaction is in substance one involving the giving of financial assistance as seen in the cases I have just reviewed. In the case before me, the fact that financial assistance was given in connection with the acquisition was not disputed. The key issue was whether it was given by a prohibited entity and I have therefore focused on determining what must be shown to warrant a finding that a particular entity is in fact the entity giving *financial* assistance. But the section is ultimately there to protect the company and its creditors. It would be wrong then to approach the section in a way that would stifle legitimate commercial activity that is in the interests of the very company the section is meant to protect, or that would encourage creative but ultimately pointless efforts to get out of transactions that were entered into in good faith but which turn out later to have been less beneficial than expected, *Multi-Pak* being perhaps the clearest illustration of this. Companies and their boards should not be discouraged from pursuing attractive business opportunities or from honouring obligations already incurred for fear of being found to have contravened the section. I simply cannot see that placing a construction on s 76 which would have such a chilling effect on legitimate business falls within the legislative intent underlying that section. I would also reiterate the observations of Goldberg J in *Milburn* which I have summarised at [116] above.

152 Lastly, I would note that there is a great variety of ways in which such assistance can be given. Examples include *Darvall* (entering into a joint venture agreement); *Belmont Finance* (contemporaneous purchase of another asset); *Armour Hick* (voluntary payment by a subsidiary); *Independent Steels Pty Ltd v Ryan* [1990] VR 247 (payments under a contemporaneous consultancy agreement); *ZBB* (deposit of subscription monies); *Re National Mutual* (substitution of securities). It is important in my view that one not be distracted by the particular form that the transaction takes in any given case. Human ingenuity is well nigh boundless and the more it is thought that the ambit of the prohibition is obscure, the more this will encourage the wasteful application of such ingenuity in search of a design that might be passed off as defensible. The best assurance against this is to analyse the substance of each transaction that is challenged from the viewpoint of the company said to be giving the financial assistance in question, and to adopt a construction of the section which can be applied and understood reasonably well. I accept that the ambit of the section is wide. However, the difficulties caused by that width need not be compounded by uncertainty.

153 Applying the approach I have concluded is appropriate, it will be noted in the present case that the financial assistance in question took the form of a perfectly straightforward loan from Compart Mauritius to Mr Lew and then to Mr Tan. There was initially no dispute that the money in question belonged to Compart Mauritius and in spite of Mr Ng's later attempt to retreat somewhat from this, it is clear in my judgment that this cannot be disputed. It was reflected at such in the relevant financial

statements. I have noted above that each of the charges is framed in terms of a loan being made by Compart Mauritius to Mr Lew. Further, Mr Shanmugam drew my attention to the Statement of Agreed Facts which includes the following paragraphs:

> 36. In view of the delay, Mr Wong suggested that *Mr Lew take a director's loan of S$4.2 million from [Compart Mauritius]*, for the purpose of financing Mr Tan's subscription of the first tranche of 20 million new BIGL shares. *Mr Lew agreed to take on the loan from [Compart Mauritius]* and to extend it to Mr Tan for the agreed purpose.
>
> 37. On 13 February 2004, [Compart Singapore]'s and *[Compart Mauritius]'s accounts assistant* one Lee Seet Cheng ("Ms Lee"), acting on instructions, *checked [Compart Mauritius]'s accounts* and made arrangement to transfer required S$4.2 million. A total amount of S$4,199,960/-, sent in 2 batches, was *transmitted from [Compart Mauritius]'s bank account held in a Hong Kong bank* …
>
> 3 8 . *The Board of Directors of [Compart Mauritius],* comprising Mr Wong, Mr Ng Ah Hoy (a Singaporean), Mr Tommy Lo Seen Chong (a Mauritius citizen) and Mr York Shin Lim Voon Kee (a Mauritius citizen), *passed a resolution authorising the loan from [Compart Mauritius] to Mr Lew* …
>
> [emphasis added]

154 Moreover during the course of Mr Ng's opening address, the following exchange took place between him and me:

> Court: Mr Ng, can I just understand, just for clarity and again, if you are not in the position to tell me the answer straightaway, you can hold it back until the evidence comes out.
>
> Ng: Yes, your Honour.
>
> Court: Is there any suggestion that [Compart Mauritius] was not in a position, with its own funds, to make this advance at the time of this suggestion?
>
> Ng: No, your Honour, we will adduce evidence to show that [Compart Mauritius] has funds to give the loan, but we will try to adduce evidence to show that the manner in which the loan was taken was done solely at the call of Mr Wong, the 2nd accused.
>
> Court: Yes, I understand that. .. So plainly these are [Compart Mauritius'] funds, right, there's no dispute about that?
>
> Ng: No.

155 This was also borne out in Mr Wong's long statement.

156 This brings to the fore the tension in the Prosecution's case that I have alluded to above at [55]. The Prosecution in supplementary submissions filed in response to certain queries I raised took the position that the money belonged "at least notionally (i.e. on paper)" to Compart Mauritius but that this could not be "confirmatory or definitive [of that fact] at all times" because of the following:

> (a) Compart Mauritius had been incorporated merely to serve as the trading arm of the BIGL Group for tax reasons.

(b) The accounts of Compart Mauritius are consolidated into the Group's accounts.

(c) The money when repaid by Mr Lew was credited into an account of Compart Singapore with only book entries being made to effect an inter-company transfer of the payment to Compart Mauritius.

(d) The money represented the proceeds of trading of the BIGL Group.

157 On this basis, it was submitted that in substance these were "group funds". This was a return to the position Mr Ng had taken when opening his case and in my judgment that position remained as unsatisfactory at the end as it was at the beginning.

158 In this regard, I accept entirely the remarks made by Mr Shanmugam on this very issue when he said:

> Sir, I don't understand this theory of group. I understand companies, and I understand separate legal entities; it's the first tier of Company Law.

159 None of the factors enumerated above that were relied upon by the Prosecution can displace or is even relevant to the conclusion that the money in question belonged to Compart Mauritius. It is certainly irrelevant to the Prosecution's case that Compart Mauritius was established with tax planning in mind. It has existed for years and the finances of the various companies in the Compart Group have been organised on this basis. The fact that the Compart Mauritius accounts are consolidated within the group's accounts is equally irrelevant (see [203] below). Similarly, the fact that the money, when it was repaid by Mr Lew to Compart Singapore, was transferred by book entry to Compart Mauritius if anything, bears out the fact that the company's assets were treated and accounted as belonging to it. So that too does not assist Mr Ng. Lastly, the money was the proceeds of trading conducted through Compart Mauritius albeit for tax reasons. There is no suggestion that Compart Mauritius was not the principal contracting party to the transactions in question. This also is therefore irrelevant and of no help to Mr Ng. It would follow that the resources used in the giving of financial assistance were those of Compart Mauritius and not of the company; and therefore that the financial assistance itself was given by Compart Mauritius and not by BIGL.

160 Since Compart Mauritius is a foreign corporation, it is not caught by the prohibition contained in s 76(1)(*a*)(i)(B) against a subsidiary *company* giving financial assistance in connection with the acquisition of the shares of its holding company (see [58] above). Moreover, Mr Ng expressly stated that the Prosecution was not relying on that limb of s 76 and the charge itself makes it clear that the Prosecution's case rested on the financial assistance having been given by BIGL.

161 My conclusion as aforesaid would therefore be fatal to the Prosecution's case unless it can be showed that:

(a) the giving of financial assistance by a subsidiary directly is *ipso facto* equivalent to the giving of such assistance by the holding company *indirectly*; or

(b) the prohibition on giving assistance *indirectly* in some way allows me to ignore the separate legal personality between BIGL and its subsidiaries.

162 I turn to consider these points.

Giving financial assistance *indirectly*

163 Before taking on these two issues I would like first to make a basic point as to the meaning and intent of the word "indirectly" in this context. In my view, the words "directly or indirectly" do not alter the substance of what is prohibited by the section, namely, the giving of financial assistance by the prohibited entity. In the case of s 76(1)(*a*)(i)(A) the prohibited entity is the target company, while under s 76(1)(*a*)(i)(B), it is a subsidiary of the target company. To make out a contravention of the prohibition, in my judgment, there must first be shown to have been a giving of financial assistance by the company subject to the prohibition. The word "indirectly" does not displace this requirement. Rather, it addresses the manner in which the financial assistance is given. It need not be given *directly* to the recipient of the financial assistance whoever that may be. It can be given *indirectly*. But what must nonetheless be given is financial assistance by the company that is subject to the prohibition. This is consistent with the approach taken to construing the word "indirectly" in *ZBB* (see the passage quoted at [109] above) and in *Arab Bank plc v Merchantile Holdings Ltd* [1994] Ch 71 ("*Arab Bank*") (see the second paragraph in the passage quoted at [182] below.

164 This is a significant point that bears reiteration because the Prosecution appears to have proceeded on a different basis. The Prosecution's position was that if the assets of the prohibited company were used or put at risk then it would be a case of direct financial assistance whereas if the assets of some other company were used then it would be a case of indirect financial assistance. This was insupportable in my view in the light of the *dicta* I have just referred to in *ZBB* and in *Arab Bank*. It was also untenable in the light of the view I have taken as to what must be shown in order to establish that there has been *financial* assistance.

165 The Prosecution submitted that BIGL did not have to be the party giving the loan if it was shown that it had control over the funds of Compart Mauritius, and those funds were advanced to Mr Tan. It was put by the Prosecution thus: "BIGL is said to have provided financial assistance by means of the**making** of a loan. In a nutshell, BIGL made the loan possible" [emphasis in original].

166 In my view, leaving to one side for the moment the question of whether the separation in the corporate personalities of BIGL and its subsidiary is to be ignored, this submission is incorrect in law. The critical gap in the reasoning upon which it is advanced is the failure to consider the distinction between the company giving *financial* assistance on the one hand and on the other, the company giving *any other type* of assistance.

167 Where the company gives any other type of assistance that is not financial assistance, it is simply not within the prohibition. It matters not that such other assistance is given with a view to facilitate the intended acquisition; or that it is given to facilitate or induce someone else to give financial assistance in order to facilitate the intended acquisition. To say that such assistance without more is to be treated as indirect financial assistance is to place upon the section a construction that was never intended in my view, namely, that the company shall not provide any assistance of any sort if that assistance directly or indirectly results in the purchaser being financially assisted even by some entity not within the prohibition. This also ignores the principle I have referred to above at [116(b)] which is that the question whether financial assistance has been given must be examined from the point of view of the *company giving* rather than from the point of view of the *intending purchaser receiving* such assistance. Once the view point is shifted away from the company giving the assistance, it leads to precisely this sort of confusion. The temptation in doing this is to focus on the fact that the purchaser has been financially assisted. That is not prohibited and in transactions of any size, purchasers frequently will be.

168 I would briefly mention here the judgment of Mahoney JA in *Burton* where a similar point is made at 492–493 as follows:

> The fact that a company undertakes obligations, absolute or contingent, in connection with the proposal for the transfer of its shares does not of itself constitute the giving of financial assistance. As I have said, the fact that a company facilitates a proposal for such a transfer will not involve it necessarily in a contravention of s 67. Thus a company may answer requests for information relevant to the proposed transfer knowing that it does so in circumstances such that it will be liable for damages if, for lack of care, the information is incorrect … But, by answering such requests, the company does not thereby give financial assistance.
>
> There may, of course, be circumstances in which the obligations entered into by a company are entered into for a collateral purpose: in such circumstances it may be that the company will, in the particular case, be giving financial assistance …
>
> … Similarly, a warranty given with the intention that the company will be called upon to pay damages and to provide funds in connection with the transfer of its shares will contravene the section.

169 Mahoney JA's observations highlight several key points relevant to this issue:

(a) The assistance from the prohibited company must in substance be *financial*.

(b) The company's facilitation of the acquisition even by undertaking obligations that are not fairly to be considered financial in nature will not amount to financial assistance even if the obligation should it be breached might coincidentally expose the company to a financial liability in damages.

(c) But if the substance of the company's action is the giving of financial assistance, it will be caught by the prohibition regardless of the form of the transaction *eg* where a warranty is entered into intending that it be breached so as to give rise to an obligation to pay damages that are then to be used to finance the acquisition.

170 These all point back to the primary requirement that in order to come within the section, it must first be established that the company has given financial assistance. The fact that the section will be contravened if such assistance has been given indirectly means only that there is no need to demonstrate a single, direct, uninterrupted causal link between the company and the recipient of the financial assistance; and that the inquiry is ultimately directed at the substance and not the form of the transaction. Thus, the section will be contravened as long as financial assistance is given by the company even though it is given through numerous intermediaries and in a form that does not fall within a conventional understanding of that term.

171 Before leaving this, I can quickly dispose of two other points made by the Prosecution in a similar vein. Reliance was placed upon s 76(3) and it was submitted that this was a deeming provision that if financial assistance was given for purposes that included the relevant purpose (*ie* for the acquisition of the company's shares) as a substantial purpose "financial assistance [shall be deemed] to have been given". With respect, I think this misses the point. Nothing in s 76(3) deems financial assistance to have been given. Section 76(3) only comes into play after it has been shown that financial assistance has been given by the prohibited company. The Prosecution must therefore prove that financial assistance has been given by BIGL for purposes that included the relevant purpose as a substantial purpose. If it is not shown that BIGL has given financial assistance then the Prosecution's case does not get off the ground and s 76(3) is simply not relevant.

172 The next submission which rests on s 76(4) of the Act is unfortunately at least as flawed.

Section 76(4) so far as material provides:

> (4) For the purposes of this section, a company shall be taken to have given financial assistance in connection with an acquisition … referred to in subsection 1(*a*) if, when the financial assistance was given to a person, the company was aware that the financial assistance would financially assist —
>
> (*a*) the acquisition by a person of shares in the company …

173 On this basis, the Prosecution submitted in effect that knowledge on BIGL's part that Mr Tan had received assistance that would financially assist him in his acquisition of BIGL shares was sufficient to constitute the offence. It was submitted that s 76(4) is a deeming provision such that once the requisite conditions were shown to have been met, assistance is deemed to have been provided.

174 In my view, it is plain as day that s 76(4) does not have the effect contended by the Prosecution. Firstly, this sub-section is not to be read in isolation without regard to the rest of the section. Hence, the reference in s 76(4) to "the financial assistance" is clearly to such financial assistance as has been referred to in s 76(1) having been given by the company. Secondly, the extent to which the section has a deeming effect is in providing when the giving of the financial assistance shall be deemed to have been in connection with the acquisition.

175 Both s 76(3) and s 76(4) are directed to the latter limb of what must be shown, namely the purpose or object for which the financial assistance is given. But absent a showing that the company has given financial assistance this is irrelevant (see [89] above where I have quoted from the judgment of Hoffman J in *Charterhouse*).

176 I now return to the two remaining issues set out in [161] above.

177 The first of these issues is whether the giving of financial assistance by a subsidiary directly *ipso facto* constitutes the giving of such assistance indirectly by its holding company. I can deal with this quite shortly because this was considered and rejected by Millett J (as he then was) in the English High Court decision in *Arab Bank*. Mr Shanmugam and Mr Hwang both placed great reliance upon this decision. The brief facts of the case concerned the giving of financial assistance by a subsidiary incorporated in Gibraltar in connection with the acquisition of the shares in its English holding company.

178 The provision in question there was somewhat wider than the corresponding section in our Act. Specifically s 151 of English Companies Act 1985 (c 6) provides as follows:

> (1) Subject to the following provisions of this chapter, where a person is acquiring or is proposing to acquire shares in a company, it is not lawful for the company or any of its subsidiaries to give financial assistance directly or indirectly for the purpose of that acquisition before or at the same time as the acquisition takes place.

179 On the face of it, the term "subsidiary" could have covered a foreign corporation unlike s 76(1)(*a*)(i)(B) of our Act which as I have noted above, uses a different formulation and expressly does not apply to such corporations at all.

180 It is true that the focus of the argument was directed at whether the English provision should be construed as covering the giving of assistance by foreign subsidiaries. Nonetheless the question

whether this *ipso facto* constituted the giving of assistance by the holding company was considered by Millett J and answered convincingly in the negative.

181 Millett J's reasoning was to some degree shaped by the language of the statute that was before him. Moreover in so far as his central holding was that the English Act does not forbid the foreign subsidiary of an English company from providing financial assistance for the acquisition of shares in its holding company the position in Singapore does not appear to be controversial given the express choice of the term "company" as opposed to "corporation" in identifying the entities subject to the prohibition in s 76(1)(*a*)(i)(B) of our Act. It would be untenable in my view to effect a change to the effect of the express language chosen by the Legislature by construing "company" as though it meant "corporation". Millett J held that the English Legislature could not have intended to regulate foreign persons outside the jurisdiction notwithstanding that the literal language used in the statute suggested otherwise. He did so for the very good reasons set out in his judgment which I respectfully endorse. To his credit, Mr Ng did not seek to suggest otherwise. Indeed, he was at pains to remind all concerned that the Prosecution was not proceeding on the basis of s 76(1)(*a*)(i)(B) which is the prohibition applicable to a subsidiary company.

182 Of more interest to the issue before me was this passage from the judgment in *Arab Bank* at 80:

> *Does the mere giving of financial assistance by the subsidiary ipso facto also constitute the giving of such assistance by the parent company?*
>
> In my judgment the answer is plainly "No." The prohibition is, and always has been, directed to the assisting company, not to its parent company. If the giving of financial assistance by a subsidiary for the acquisition of shares in its holding company necessarily also constituted the giving of financial assistance by the holding company, section 73 of the Act of 1947 would not have been necessary. Moreover, sections 153 to 158 of the Act of 1985 are clearly predicated on the assumption that it is the conduct of the subsidiary alone which needs statutory authorisation.
>
> This is not to say that the giving of financial assistance by the subsidiary may not involve unlawful conduct on the part of the parent. If the acts of the subsidiary are in breach of section 151, the conduct of the parent in procuring them will constitute an offence. And even if the section does not apply to foreign subsidiaries, the hiving down of an asset by an English company to such a subsidiary in order to enable it to be made available to finance a contemplated acquisition of shares of the English company would clearly contravene the section: it would constitute the indirect provision of financial assistance by the English company.

183 There are two distinct parts in the answer given by Millett J to the question posed. In the first part, Millett J gives an unhesitating and unreserved answer rejecting the notion that the giving of financial assistance by the subsidiary *ipso facto* also constitutes the giving of such assistance by the parent. I too have no hesitation in arriving at the same conclusion for similar reasons as Millett J. It seems to me there can be no doubt that in the ordinary case the relevant act of the subsidiary, in this instance the giving of financial assistance, remains the act of that entity only. This follows firstly from the basic doctrine underlying all of company law, that each company is a legal person separate and distinct from every other company and this is no less true just because the companies in question happen to be related in some way.

184 In the context of the prohibition on a company giving financial assistance for the acquisition of its shares, the Legislature has made its intention clear that the doctrine of separate legal personality is to apply with the full force by enacting separate provisions that prohibit a company giving financial

assistance in the acquisition of its own shares and that prohibit a subsidiary company from giving financial assistance in the acquisition of shares in its holding company.

185 To this, I might add a further point urged on me by Mr Hwang. He submitted that if one started from the premise, as I accept one must, that a foreign subsidiary is not itself within the prohibition in s 76(1)(*a*)(i)(B), then it would be illogical to hold that the holding company of such a subsidiary should somehow itself be found to have contravened the prohibition in s 76(1)(*a*)(i)(A) by virtue of an action of the subsidiary that was not prohibited. I accept Mr Hwang's submission on this.

186 However, the matter does not end there. As Millett J himself recognised in the second part of his answer to the question, the fact that the giving of financial assistance by the subsidiary does not *ipso facto* constitute the giving of such assistance by the parent, is not to say that it would *never* amount to such. Millett J identified two possible situations where the holding company might be found to have engaged in unlawful conduct even though the financial assistance was given by a subsidiary:

(a) where the act of the subsidiary is itself a breach of the prohibition then to the extent that breach was procured by the holding company it would constitute an offence (quite possibly by abetment); and

(b) where the English holding company hived down its assets to a foreign subsidiary in order to enable the asset or its equivalent to be made available to finance a contemplated acquisition, there would be the indirect provision of financial assistance by the parent in contravention of the prohibition.

187 Mr Hwang and Mr Shanmugam accepted the suggestion I made in arguments that the two situations mentioned by Millett J should not be construed as an exhaustive list of the circumstances in which a holding company may be found to have committed an unlawful act and I myself approach the point on the basis that Millett J was leaving open some possibilities without necessarily closing others.

188 The issue before me is a criminal charge that alleges that BIGL has given financial assistance even though the loan was advanced by its subsidiary. The issue I need to consider therefore is when the giving of financial assistance by a subsidiary will also constitute the giving of financial assistance by the holding company. I pause to note that this is a narrower question than faced by Millett J because in *Arab Bank*, the company was seeking to render the mortgage illegal and although the primary assault was mounted on the basis that the transaction allegedly involved unlawful financial assistance, the company would have been indifferent if the same result were reached on the basis of some other transgression. This explains Millett J's approach to the second part of the answer where he was envisaging "unlawful conduct on the part of the parent" which could be found if it had procured its subsidiary to do some illegal act, or if it had itself indirectly given financial assistance. Unlike Millett J, I am only concerned with the circumstances in which I can find that BIGL the parent company has also given financial assistance.

189 Once this is understood, the answer becomes clear: BIGL will be found to have given financial assistance if its assets have been used or placed at risk in order to enable the financing of the contemplated acquisition of its shares. If this is achieved by BIGL making its assets available to its foreign subsidiary which actually makes the loan to the intended purchaser then even though the foreign subsidiary may also have given financial assistance whether prohibited or not, BIGL itself will be found to have given such assistance indirectly. The key to note is that the prohibition is contravened in such a case because BIGL has given the assistance, albeit that it has done so indirectly. Those are not the facts before us and so I can leave that to one side.

190 During the arguments, I suggested to Mr Shanmugam and Mr Hwang that the same result might be reached in different ways. Clearly, it is not necessary in my view that there be a hiving down of the holding company's assets as was mentioned in the example put forth by Millett J. It would suffice if for instance the holding company guaranteed a loan taken by the foreign subsidiary the proceeds of which were then made available to the intended purchaser of the holding company's shares. Both Mr Hwang and Mr Shanmugam were prepared to accept this, in my view correctly.

191 In my judgment, it may not necessarily be the case that the risking of the company's assets for the purposes of the intended acquisition of its shares has to be the result of a contractual undertaking. A holding company which misappropriates an asset belonging to its subsidiary and uses it to finance the intended acquisition would seem itself to fall within the prohibition. Mr Shanmugam at least, felt able to accept the proposition that a holding company which so involved itself in the relevant acts of the subsidiary in giving the loan in question that it undertook either an *obligation* or a *liability* to pay damages to the subsidiary as a result may well be found to have contravened the section.

192 Mr Shanmugam of course noted that this was not the case the Prosecution presented and to remove any doubt I twice asked Mr Ng if there was anything to suggest in any way in the circumstances of this case, that BIGL could be liable in damages to Compart Mauritius. He twice stated that the Prosecution was not suggesting this. In the premises, it is not necessary for me to express a concluded view on this. I will simply make the point that the principle articulated by Mr Shanmugam seems attractive and seems consistent with the situation identified in *Burton* of a company that gives a warranty for a collateral purpose intending that it will be called upon to pay damages which would then provide funds in connection with the acquisition (see [168] above). However, on the facts before me, this line of inquiry holds no promise for the Prosecution.

193 The only other possibility then is if it be found that the corporate veil between BIGL and the subsidiary in question is to be pierced. In such a case, the separation of legal personality is ignored. The acts of the subsidiary are treated as the acts of the holding company.

194 I turn to this issue by first stating two general propositions which appear to me to be firmly established.

(a) The owner of a company does not own the company's assets. The company owns its assets. It would follow that the holding company has no direct proprietary interest in the assets of its subsidiaries: see *Halsbury's Law of Singapore* vol 6 (Butterworths Asia, 2006 Reissue) at para 70.065; *The Maritime Trader* [1981] 2 Lloyd's Rep 153.

(b) Each company is a separate legal entity in its own right. A company and its owner are two separate entities. The acts of the former will not be imported to the latter as a general rule: see *Salomon*.

195 These principles present a considerable obstacle in the way of the Prosecution since at the root of the charge is the assertion that the act of Compart Mauritius in advancing its funds to enable the acquisition of the BIGL shares is to be taken as the giving of financial assistance by BIGL.

196 Mr Hwang and Mr Shanmugam both submitted that these principles are not displaced even if the shareholder controls the company in question; or if one is looking at the situation of a group of companies.

197 In my view, it is necessary to consider just a handful of cases to assess this.

198 I begin with *Salomon*, a case which, in Mr Shanmugam's words, is at the first tier of company law. Lord Halsbury LC had this to say at 32–34:

> I find all through the judgment of the Court of Appeal a repetition of the same proposition to which I have already adverted – that the business was the business of Aron Salomon, and that the company is variously described as a myth and a fiction …
>
> …
>
> … [T]he truth is that the learned judges have never allowed in their own minds the proposition that the company has a real existence. *They have been struck by what they have considered the inexpediency of permitting one man to be in influence and authority the whole company* …
>
> [emphasis added]

199 Lord Herschell noted at 42 as follows:

> I am at a loss to understand what is meant by saying that A. Salomon & Co., Limited, is but an "alias" for A. Salomon. It is not another name for the same person; the company is ex hypothesi a distinct legal persona. As little am I able to adopt the view that the company was the agent of Salomon to carry on his business for him. In a popular sense, a company may in every case be said to carry on business for and on behalf of its shareholders; but this certainly does not in point of law constitute the relation of principal and agent between them or render the shareholders liable to indemnify the company against the debts which it incurs. Here, it is true, Salomon owned all the shares except six, so that if the business were profitable he would be entitled, substantially, to the whole of the profits. The other shareholders, too, are said to have been "dummies," the nominees of Salomon. But when once it is conceded that they were individual members of the company distinct from Salomon, and sufficiently so to bring into existence in conjunction with him a validly constituted corporation, I am unable to see how the facts to which I have just referred can affect the legal position of the company, or give it rights as against its members which it would not otherwise possess.

200 These extracts are self-explanatory and the principle that a company is a separate legal entity from its owner is trite. As to whether that is affected because the companies operate as part of a "group", this too has been considered in a number of cases.

201 In *Walker v Wimborne* (1975) 137 CLR 1 ("*Wimborne*") three members of the Wimborne family had caused the company of which they were directors to make payments to other companies that were related to it. The company went into liquidation and the liquidator brought a claim against the directors for misfeasance. The judge at first instance disallowed the claim and appeared to have been influenced in this respect by the fact that the payments were to a related company and in some way worked to the benefit of the group as a whole. The following passage from the judgment of Mason J at 6–7 speaking for the majority in the High Court of Australia is instructive:

> [T]he emphasis given by the primary judge to the circumstance that the group derived a benefit from the transaction tended to obscure the fundamental principles that each of the companies was a separate and independent legal entity, and that it was the duty of the directors of Asiatic to consult its interests and its interests alone in deciding whether payments should be made to other companies … The creditor of a company, whether it be a member of a "group" of companies in the accepted sense of that term or not, must look to that company for payment.

202 Although the companies in question in *Wimborne* were not in fact organised as a group in the strict sense, the thrust of the judgment was to the effect that there was nothing in such relationships that dispensed with the need to view and understand each entity in the group as a separate legal entity.

203 The same point was reiterated by the High Court of Australia in *Industrial Equity Ltd v Blackburn* (1977) 17 ALR 575 ("*Industrial Equity*"). That was a case where a company declared a special distribution. The company's articles of association limited dividends to what was payable out of the profits of the company. It was argued by the appellant that profits in the company's subsidiaries could be utilised for this purpose because these were within the disposition of the holding company which by virtue of its capacity to control a general meeting of each of its subsidiaries could ensure the distribution of profits to it by declaration and payment of dividends. It was thus contended that the profits of the subsidiaries were in effect the profits of the holding company. The High Court unanimously rejected this contention and once again the decision of Mason J, who issued the principal judgment of the court, is instructive in what he said at 583–584:

> In the first place, it is a natural consequence of the recognition of the separate personality of each company, a recognition which derives from *Salomon v Salomon & Company Ltd* [1897] AC 22, and which has been confirmed by *Lee v Lee's Air Farming Ltd* [1961] AC 12. It has been said that the rigours of the doctrine enunciated by *Salomon v Salomon & Company Ltd* have been alleviated by the modern requirements as to consolidated or group accounts introduced in the United Kingdom by the Companies Act 1948 and in New South Wales by the Companies Act 1961 (NSW) … But the purpose of these requirements is to ensure that the members of, and for that matter persons dealing with, a holding company are provided with accurate information as to the profit or loss and the state of affairs of that company and its subsidiary companies within the group, information which would not be forthcoming if all the shareholders received was limited to the accounts of the holding company disclosing as assets the shares which its holds in its subsidiaries. It is for this purpose that the Companies Act treats the business group as one entity and requires that its financial results be incorporated in consolidated accounts to be circulated to shareholders and laid before a general meeting …
>
> *However, it can scarcely be contended that the provisions of the Act operate to deny the separate legal personality of each company in a group. Thus, in the absence of contract creating some additional right, the creditors of company A, a subsidiary company within a group, can look only to that company for payment of their debts. They cannot look to company B, the holding company, for payment[.]*
>
> [emphasis added]

204 It is thus clear that reliance upon the fact of control and of consolidation of group accounts is misplaced if it is thereby sought to be suggested that the doctrine of separate legal personality is something displaced in a group setting. I mention here that in a short submission made by Mr Amarjit Singh, the learned Deputy Public Prosecutor who appeared with Mr Ng, it was made clear that the fact of control was the central basis upon which the Prosecution maintained its position that BIGL had given financial assistance even though the loan had been made by Compart Mauritius. However, control is simply not a sufficient basis upon which to reach this conclusion.

205 In *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549 ("*James Hardie*") Rogers A-JA who was in the majority of the New South Wales Court of Appeal reviewed the law in this area and made the following observations:

(a) there is no common unifying principle which underlies the occasional decision of the courts to ignore the doctrine of separate legal personality and to pierce the corporate veil (at 567);

(b) in the light of the explicit statements in *Salomon* it has been a matter of extreme difficulty for the common law to make even a slight inroad into the principle of separate legal personality by holding that the company was acting as an agent for its shareholders (at 569);

(c) to the extent it was suggested in *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852 ("*DHN*") that there is a general tendency to ignore the separate legal entities of various companies within a group and to look at the economic entity of the whole group, there were in fact "no special circumstances in the facts of [that] case which differentiated it from the ordinary relationship of parent and fully owned and controlled subsidiary. Rare indeed is the subsidiary that is allowed to run its own race". The actual decision in *DHN* was considered doubtful by Lord Keith of Kinkel who delivered the judgment of the House of Lords in *Woolfson v Strathclyde Regional Council* (1978) 38 P&CR 521 (at 572).

206 Rogers A-JA then noted as follows at 576–577:

Although the *Companies Act* 1961 called for the bringing into existence of consolidated or group accounts and although for income tax purposes it was possible to look to some degree of recognition of the existence of a group of companies, absent legislation, the court maintained the strict separation between a subsidiary and a holding company. *Thus, although the holding company had full and effective control over the funds of the subsidiary and the way that they could be dealt with, nonetheless, the High Court held that the profits to which it could look for the purposes of declaration of dividends were confined to those already within the holding company …*

In the result, as the law presently stands, in my view the proposition advanced by the plaintiff that the corporate veil may be pierced where one company exercises complete dominion and control over another is entirely too simplistic. The law pays scant regard to the commercial reality that every holding company has the potential and, more often than not, in fact, does, exercise complete control over a subsidiary. If the test were as absolute as the submission would suggest, then the corporate veil should have been pierced in the case of both Industrial Equity *and* Walker v Wimborne.

[emphasis added]

207 In my view, these principles articulated by Rogers A-JA are well founded and are consistent also with the position that is reflected in English as well as in our jurisprudence. Turning briefly to the English cases, my attention was drawn to the decision of the Court of Appeal in *Bank of Tokyo Ltd v Karoon* [1987] AC 45. That was a case where proceedings were commenced in New York and in England against related companies within the same group.

208 An application was brought to restrain the plaintiff proceeding with the New York action. Dismissing the application, Ackner LJ had this to say at 54:

I can see no valid basis, and certainly no authority was provided to us by Mr. Hoffmann, for the contention that we must ignore the separate legal existence of B.T.T.C. Once the corporate distinction in law between B.T. and B.T.T.C. has to be recognised, the foundation of Mr. Hoffmann's submission that there is an English rule of public policy which requires that this

action should not be allowed to be brought disappears.

209 Robert Goff LJ was even more blunt at 64:

> Mr Hoffmann suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here by bridged.

210 In *Adams v Cape Industries plc* [1990] Ch 433 ("*Adams*") the defendant was an English company at the head of a group with many wholly owned subsidiaries some of which mined and marketed asbestos. The plaintiffs obtained damages in a Texas Court in a claim for personal injury against several parties one of which was a subsidiary of the defendant in the case. Slade LJ delivered the decision of the Court of Appeal. He started with the premise that each company in a group is a separate legal entity before analysing the authorities. He noted at 536:

> To the layman at least the distinction between the case where a company itself trades in a foreign country and the case where it trades in a foreign country through a subsidiary, whose activities it has full power to control, may seem a slender one.

211 He then made the following observation on a related point at 544:

> [W]e do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) … will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law. Mr. Morison urged on us that the purpose of the operation was in substance that Cape would have the practical benefit of the group's asbestos trade in the United States of America without the risks of tortuous liability. This may be so. However, in our judgment, Cape was in law entitled to organise the group's affairs in that manner and … to expect that the court would apply the principle of *Salomon v A. Salomon & Co. Ltd.* [1897] A.C. 22 in the ordinary way.

2 1 2 *Adams* was followed in Singapore by Judith Prakash J in *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd* [2000] 2 SLR 98 ("*Win Line*"). Prakash J also affirmed the principle embodied in many of the authorities to which I have referred that the doctrine of separate legal personality is not displaced simply by virtue of the fact that the companies in question are organised as a single economic unit.

213 I am satisfied therefore that the proposition submitted by Mr Hwang and Mr Shanmugam at [196] above is well founded.

The Prosecution's case

214 Faced with this considerable weight of authority, Mr Ng maintained nonetheless that the financial assistance in question was also given by BIGL. He based this on six factual points and essentially on one legal submission.

215 I first deal with the six factual points:

(a) Mr Wong was the executive chairman of BIGL and was in control of the operations of

BIGL and its subsidiaries.

(b) Mr Wong in fact was able to and did arrange the loan by virtue of his control over BIGL and Compart Mauritius.

(c) The purpose of the loan was solely to enable the acquisition of the BIGL shares.

(d) Mr Wong in doing this was acting in BIGL's interest and on behalf of BIGL.

(e) Compart Mauritius had an ineffectual board and Mr Wong was instrumental in the making of the loan. Indeed, the loan would not have been possible without Mr Wong.

(f) Compart Mauritius funded the loan from its working capital but it was merely a tool used by Mr Wong.

216 To make out these facts, Mr Ng relied variously on matters covered by the Statement of Agreed Facts or on responses contained in the long statements taken from the two accused persons. Inevitably, there was some debate as to how I should approach the matters contained in these statements. Mr Ng submitted that at the end of the Prosecution's case where I was deciding whether to call on the accused persons to enter their defence, I should heed only those portions of the long statements that were incriminatory in nature and ignore those which might be exculpatory.

217 Mr Shanmugam who led the charge for the defence on this issue took exception with that and suggested it was untenable that a court would look at parts of a statement that were out of context or incomplete.

218 Three cases were cited to me (*Chan Kin Choi v PP* [1991] SLR 34; *PP v Abdul Rashid* [1993] 3 SLR 794; and *PP v IC Automation (S) Pte Ltd* [1996] 3 SLR 249 ("*IC Automation*"). In my judgment, the position is clear and it is spelt out most clearly in the judgment of Yong Pung How CJ in the last of these cases, *IC Automation*, where in dealing with the approach to be taken to the evidence at the close of the Prosecution's case, he said as follows at 255:

> All that is required at this stage of the proceedings is a minimum evaluation of the evidence as a whole (also see *Ng Theng Shuang v PP* [1995] 2 SLR 36) . *The totality of the prosecution evidence must be considered. This requirement did not entail picking out all the plums and leaving the duff behind. If the evidence of the witness upon which the prosecution case depended on was self contradictory and out of all common sense or reason, the court is entitled to reach the conclusion that there is no evidence to support an essential ingredient in the charge; alternatively, the evidence may be said to be so inherently weak that it is inherently incredible or manifestly unreliable*. [emphasis added]

219 It follows that in applying the oft-cited test prescribed by Lord Diplock in *Haw Tua Tau v PP* [1980–1981] SLR 73 at 79–80, [17] at the close of the Prosecution's case, I should look at such evidence as there is in its totality. In the present case, having regard to the actual extracts in question from the long statements, there was even less of an issue because it was not so much a case of exculpatory statements or protestations of innocence that were contradictory to statements that were incriminatory. Rather, it was a case of answers in response to a given question being explained when asked a further question. This is even more clearly a situation where it would be incorrect to disregard parts of the statement just because we were only at the close of the Prosecution's case.

220 I return to the factual points listed at [215] above. Taking the Prosecution's case at its highest and assuming all the factual assertions were true, I simply cannot see how that renders the giving of the loan by Compart Mauritius the giving of financial assistance by BIGL. The key to note here is that Compart Mauritius was a *bona fide* company established years before this transaction for perfectly valid and legitimate tax reasons. There can be no doubt that Compart Mauritius was not a sham or façade. It was not even a wholly owned subsidiary of BIGL. It was incorporated in Mauritius for good commercial reasons and the Compart Group had been run in this way for years. The assertions in these factual points in fact go no further than to say that Compart Mauritius was amenable to control by its parent company and Mr Wong. If the Compart Mauritius board was in fact ineffectual and the directors acted otherwise than in that company's interest then those directors may well face a liability for breach of their fiduciary duties. However, that would not render the actions in question anything other than those of Compart Mauritius.

221 The fact that the loan was given at the request or even following strong pressure from BIGL (assuming this is so for the moment) makes no difference because the commercial reality is that a subsidiary company is often liable to act in line with the wishes of its parent company. Yet the case law including in particular *Salomon*, *Wimborne*, *Industrial Equity*, *James Hardie*, *Adams* and *Win Line* all establish that this is not sufficient to ignore the separation of legal personalities.

222 Furthermore, the evidence was that the board of Compart Mauritius treated this as a loan to a director. The Defence submitted that such a loan was permitted as a matter of Mauritian law and there was nothing to suggest the contrary. As has been noted, at some stage a resolution of the Compart Mauritius board was passed authorising the loan. The evidence indicates this was done after the fact but that is irrelevant in my view for two reasons. First, it was at least ratified by the board and there is no suggestion that the board could not ratify such a transaction.

223 Mr Shanmugam also referred me to para 38 of the Statement of Agreed Facts (see [153] above).

224 As against this, Mr Ng submitted on the authority of *Yeow Fook Yuen v Regina* [1965] 2 MLJ 80 ("*Yeow Fook Yuen*") that ratification was irrelevant because a criminal act could not be decriminalised by subsequent approval. In *Yeow Fook Yuen*, two officers of a trade union were charged with offences relating to the misappropriation of trade union funds. The defence argued these were loans that were approved by the council albeit after the fact. This was rejected on the basis that the council had no power or authority to condone the criminal offences already committed.

225 Though bearing a superficial similarity to the case at hand, *Yeow Fook Yuen* is in my view not relevant. In *Yeow Fook Yuen* the key finding of the trial court was that the money was taken initially without the approval of the council and hence dishonest misappropriation was established. The real issue was whether the fact that the victim was prepared, after the fact, to forgive the wrong gave rise to a defence. Wee Chong Jin CJ held that it did not. The issue before me is quite different. Putting the Prosecution's case at its highest, the disbursement of the loan was authorised by Mr Wong. At the material time, he was a director of Compart Mauritius and it was within his authority to effect the transfers. There is no suggestion that he misappropriated the funds. The narrow question before me is whether this act was that of Compart Mauritius or that of BIGL. In short, it is in fact an issue of agency that is raised. The Prosecution's case is that Mr Wong was acting as the agent of BIGL in disbursing the loan. This gives rise to some conceptual difficulties. However, leaving these to one side, the case for the Defence is that Mr Wong was acting on behalf of Compart Mauritius.

226 In my view, seen as an issue of agency, there is no reason why the board of directors could not

ratify Mr Wong's decision to disburse the money to Mr Lew and on the face of the resolution, this is precisely what they appear to have done. Mr Hwang referred me to the English decision in *Hooper v Kerr, Stuart & Co Limited* (1900) 83 LT 729 to show this was not only permissible but had the effect of retrospectively clothing an initially unauthorised act with the requisite authority and though this is likely in this case to be governed by Mauritian law, there is nothing to suggest the position there is otherwise.

227 Mr Ng submitted that I cannot treat the resolution as valid. He based this on the fact that the resolution was backdated; that there was no evidence as to how the directors had come to pass the resolution; and that no explanation has been given for the decision by Compart Mauritius to waive the interest payable by Mr Lew. I see no force in this at all. A primary reason of having a board resolution is to avoid investigating the background facts leading to its being passed. The resolution in that sense speaks for itself. If the loan was ratified by the board, then I do not see how it should be of concern to me to go behind that and examine the subjective motives of the directors in passing the resolution. If the actions of the directors are found to have been wanting, it is a matter for the company to bring an action against the defaulting directors. However, none of the factors cited by Mr Ng affords the least basis for my ignoring the fact that there is a resolution of the board of directors authorising the loan to Mr Lew. This resolution, the authenticity of which was not challenged by the Prosecution, certainly points to the conclusion that the loan was eventually authorised by the board and it was therefore the act of Compart Mauritius.

228 Secondly, and perhaps more fundamentally, if the remittance was not authorised by the board at the time and if it is suggested that there could be and has been no effective ratification subsequent to that date (and in my view there is no basis to suggest this) it would mean that the remittance remains an unauthorised act by Mr Wong.

229 Mr Ng in fact suggested that this was so and that in such circumstances, Mr Wong should be taken to have been acting *qua* a director of BIGL and that his action should therefore be attributed to BIGL. He submitted this was so because the financial assistance was given in the interests of BIGL. However, I do not follow this because:

(a) Mr Ng accepted that it was also in the interests of Compart Mauritius to advance the loan to save BIGL and that on the basis of *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62, it would have been legitimate for Compart Mauritius to have made the loan if it had in fact acted on this premise. Mr Ng submitted that there was no evidence that the board in fact had acted on this basis. That may be so but equally there is no evidence that Mr Wong at the material time was acting solely in the interests of BIGL and not also in the interests of Compart Mauritius and it would be extremely artificial in my view to ignore these overlapping interests. There is certainly nothing to suggest that he was mandated by BIGL to misappropriate the funds of Compart Mauritius. It is not reflected as such in the way the charges were formulated. Both the charges state that Mr Wong "authorised a S$4.2 million loan from [Compart Mauritius]" and this only makes sense if it is understood to mean that he was acting as a director of Compart Mauritius; and

(b) It would be wrong in any event to hold that this was the action of BIGL. This is because, as I have already noted, this argument rests on the assumption that Compart Mauritius never at any time authorised the actions of Mr Wong. It is the wrongful act of Mr Wong that Mr Ng says should be attributed to BIGL. Leaving aside the considerable conceptual complexities surrounding the question whether BIGL could be found vicariously responsible for such a wrongful act, it is in any case inconsistent with Mr Ng's acceptance that there was no basis for Compart Mauritius to bring a claim against BIGL for any wrongful action.

230 In my view, if this was at all times an unauthorised act (and I reiterate that there is nothing to suggest this), then it was one done by Mr Wong *qua* a director of Compart Mauritius in which case he may if at all be liable for breach of the fiduciary duties he owed to that company in authorising the loan or in later waiving the interest.

231 For these reasons, I do not think the factual assertions go towards showing that the financial assistance as a matter of law should be taken as having been given by BIGL. To the extent it is suggested that BIGL through Mr Wong prevailed upon Compart Mauritius to give the assistance then again as a matter of law this could not constitute the giving of assistance by BIGL where no part of BIGL's assets were used or risked and the only assets used were those of Compart Mauritius – a fact implicit in the last of the factual assertions set out at [215].

232 I turn finally to the one legal submission that was made and it rested upon s 76(5) which provides that where the prohibition is contravened the company shall not be guilty of an offence but the officers in default shall. Mr Ng submitted that this provision revealed a legislative intent to "pierce the corporate veil with regards to the offence under Section 76". No authority was cited in support of such a broad proposition. It could not possibly have meant that by virtue of s 76(5), I could disregard the doctrine of separate legal personality in this context. The weight of authority that underlies the fundamental principle that the company has its own legal personality as well as the reasons I have given for accepting Millett J's approach to the question of whether the giving of financial assistance by the subsidiary is *ipso facto* the giving of such assistance by the parent (see [183]–[185] above) would apply to dispose summarily of such a notion.

233 The narrower way to understand this is to treat the submission merely as saying that the individuals concerned may be penalised if the section is contravened and they may not hide behind the corporations involved. To that extent, the proposition is unexceptional but it would not be of any assistance to the Prosecution.

234 The submission for the Prosecution was in fact made in the following terms:

> [T]he defaulting officer (in this case the 2nd Accused) of the company (in this case BIGL) should not be able to escape liability by asserting that though the share acquisition was for the company (of which he is the Executive Chairman), he is not liable because he secured financial assistance for the benefit of the company (i.e. BIGL) from a subsidiary (of which he is also a director and the use of that subsidiary's funds is controlled by him).

235 I have three short points to make in relation to this. First, the fact that the financial assistance was secured for the benefit of BIGL is at best totally irrelevant to the present charges for the reasons I have already articulated. At worst it is somewhat ironic, having regard to the mischief that is the object of the prohibition, that this prosecution has been launched on the back of a transaction that apparently was to benefit the very company the provision was designed to protect.

236 Second, the fact that the money came from a foreign subsidiary that is acknowledged to be outside the ambit of the prohibition is directly to the point. The fact that Mr Wong was able to exercise control over the operations of that company and to direct the use of its fund within and in accordance with the relevant mandates notified to the banks does not alter the fact that the funds used belonged to a legal entity that was not caught by the prohibition.

237 Third, for Mr Wong to be found liable under s 76(5) it must first be shown that the company *ie* BIGL contravened the prohibition by giving financial assistance. If the Prosecution fails to show that, then Mr Wong is not liable.

238 Accordingly, in my view, this submission also fails.

Conclusion

239 There was no dispute in the case before me that Mr Tan had received financial assistance in connection with the subscription for 20 million BIGL shares. This by itself does not pose a problem. It only becomes a problem if the financial assistance was given by an entity that was within the prohibition contained in s 76. It was also not in dispute that to the extent Compart Mauritius gave financial assistance, there would be no violation of s 76 because that was a foreign corporation not caught by any of the prohibitions.

240 In order to sustain the charges, the Prosecution had to show that BIGL also gave financial assistance. That indeed is how the charge was framed.

241 However, the Prosecution faced a considerable difficulty in the fact that no part of BIGL's assets were used, encumbered or in any way put at a risk by the transaction. The fact that the internal controls or corporate governance may have been thought wanting is not to the point given the nature of the charges that were brought. Nor is the fact that Mr Tan received financial assistance or that Mr Wong appeared to be a key player in facilitating this. Until and unless financial assistance was given by BIGL, there was never going to be a violation of s 76.

242 Limited liability companies are critical vehicles for the pursuit of free enterprise and the Companies Act must be interpreted with due regard to commercial reality. There are of course numerous ways in which s 76 can be violated (see [152] above). In evaluating any given case, one should not allow the appearances to obscure the substance. This cuts both ways. That which is in substance a prohibited instance of financial assistance should not be overlooked because it does not appear to be so in the conventional way in which such assistance is given. On the other hand that which in substance is not within the prohibition should not be forced into it on account of the trappings that surround the transaction.

243 In the present circumstances, I am satisfied as a matter of law and taking the Prosecution's factual case at its highest that:

(a) no financial assistance was in fact given by BIGL;

(b) the relevant financial assistance was given by Compart Mauritius;

(c) there was no prohibition on Compart Mauritius giving the financial assistance in question;

(d) there is no basis at law to sustain any contention that the financial assistance given by Compart Mauritius is to be attributed to BIGL; and

(e) nor could such financial assistance as was given by Compart Mauritius constitute the indirect giving of financial assistance by BIGL within the meaning of s 76(1).

244 It follows that as the Prosecution has failed to make out a key element of the charge namely that BIGL gave the financial assistance in question, no case has been made out against either accused which if unrebutted would warrant his conviction. Mr Wong and Mr Lew are therefore acquitted of the charges brought against each of them.