THE REGISTRAR'S SHOPPING LIST — SOME PROBLEMS INTRODUCED BY THE COMPANIES (AMENDMENT) ACT 1984

THE Companies (Amendment) Act of 1984[1] looks like it was the result of drafting a shopping list. It is a collection of miscellaneous amendments that do not have one single underlying thread. Basically the amendments may be grouped under several general headings:

1. Those affecting the Registry of Companies and the Registrar's powers;
2. Those concerning dealings in a company's securities;
3. Those affecting the duties and obligations of directors;

and

4. A final miscellaneous group of amendments that defy categorisation.

For convenience all references to sections in this article are to sections in the Companies Act as amended and not to sections in the Amendment Act (unless otherwise specified).

1. *Amendments Affecting the Registry of Companies and Registrar's powers*

(1) *Housekeeping matters*

The passage of the Amendment Act must have been immensely gratifying to the Registry of Companies. A substantial number of amendments have been introduced to tidy up "housekeeping" matters: for instance, the inclusion of s. 7(8A) which gives the Registry the power to take possession and retain documents called for under s. 7(8); the enactment of s. 13A, which enables the Registrar to prescribe the "size, durability and legibility" of documents delivered to the Registry; the inclusion of s. 13B which exempts the Registry from liability for errors in respect of information provided by the Instant Information Service; the amendment of s. 269 to provide for service of summonses; and the enactment of provisions tightening up various procedural and administrative requirements of the Act — *e.g.,* ss. 8, 11, 15(b), 23, 24, 25, 26, 28, 37 and 54 of the Amendment Act.

(2) *Discretion to refuse registration of local or foreign companies*

In addition, the Registrar has been granted some important new discretions and powers. By virtue of the new ss. 16A and 332A the Registrar can refuse to register a local or foreign company if he is "satisfied" that:

a. the company "is likely to be used" for an unlawful purpose or for purposes prejudicial to public peace, welfare or good order in Singapore; or
b. it would be contrary to national security or the national interest for the company to be registered.

[1] No. 15 of 1984; in force from 15 August 1984 (See S.205/84, dated 10 August, 1984).

Similarly the Registrar also has power under s. 22 as amended to refuse to allow companies to be incorporated under names that are, in his opinion,

(a) undesirable;

(b) identical to another business or corporate name;

(c) deceptively similar to the name of another company or business.

This includes the power to require that a company change its name if that name is deceptively similar to or identical with the name of another company or business.

Nothing is said about how the Registrar may be "satisfied", or what he can take into account in arriving at his opinion. Presumably therefore the Registrar has an unfettered discretion in these matters. Appeal by dissatisfied parties will be to the Minister, whose decision is final. The aim of these finality provisions is to ensure that the Minister's decision cannot be questioned, though undoubtedly the courts would be competent to decide whether the Minister's discretion was properly exercised or not.

(3) *Power to strike off foreign companies*

Another important power is contained in the new s. 340(8), which enables the Registrar to strike off a foreign company where he is "satisfied" that that foreign company "is being" used for an unlawful purpose or a purpose prejudicial to Singapore's interests. What happens when the foreign company was used for such a purpose but is not being so used when the Registrar wishes to strike it off is not clear; presumably the Registrar will go ahead and strike off the company even though the literal words of the section do not cover this eventuality. Again there is a right to appeal to the Minister, whose decision is final.

2. *Amendments Concerning Dealings in a Company's Securities*

(1) *Rights issues and prospectuses*

The new s. 39B deals with renounceable rights issues. These are now clearly stated to be offers to the public and accordingly a prospectus will have to be registered and circulated in respect of such issues. However a full prospectus is not required. An abridged prospectus containing the matters stated in Part V of the 5th Schedule is all that is needed.

One other small amendment is made to the requirements pertaining to prospectuses. With the enactment of s. 42A a corporation that is of "both a governmental and international" character may apply for exemption from the requirement that all the directors of a company must sign a prospectus issued by the company.[2] This section is meant to apply only to what the Minister for Law has described as "inter-governmental corporations" and not to multinationals as such.[3]

[2] See s. 42(2)(a).

[3] See the statement of the Minister for Law at columns 8 & 9 of Appendix V to the Report of the Select Committee on the Companies (Amendment) Bill (12 June 1984).

(2) *Insider trading*

There have been significant amendments to s. 132A, which deals with insider trading. Firstly, the section has been extended to cover substantial shareholders.[4] The persons who are caught by the section now are:[5]

(a) directors;

(b) secretaries;

(c) a receiver and manager of the company, not appointed by the court;

(d) a liquidator appointed by the members of the company in a voluntary winding-up;

(e) employees;

(f) bankers;

(g) solicitors;

(h) auditors;

(i) accountants;

(j) stockbrokers;

(k) agents; and

(l) substantial shareholders.

As far as directors, bankers, solicitors, auditors, accountants and stockbrokers are concerned the section also applies to persons who have served in such a capacity within the preceding twelve months. For convenience all these persons will be referred to compendiously as "insiders".

Secondly, the new amendments make it an offence to use "special confidential information", acquired by the insider in his capacity as an insider, when dealing in the shares of the company. The term used by the old section was "specific confidential information"; one can only speculate why the change was made. Whatever the reason for the change, "special confidential information" is now defined to mean "any confidential fact or circumstance of whatever nature that would affect the price of the securities of the corporation". The amendment does not appear to change the law significantly. It does make clear that the information used must be "confidential", whatever that might mean. Presumably an informed guess or deduction based on publicly known facts and circumstances would not be caught.

A more significant change is the deletion of the words "on a stock exchange" in the ninth line of s. 132A(1). The aim and effect of this is to make s. 132A applicable to insider trading in non-listed securities as well.[6] The full ramifications of this change are yet to be explored. Companies without a listing on the stock exchange are generally under no obligation to publicise matters which might affect the price of their securities. As long as there is no offer of sale to the public a prospectus

[4] A substantial shareholder is a person who has an interest in 5% or more of the voting shares of a company: s. 69C.

[5] The definition of "officer" in s. 4 should be kept in mind.

[6] See the remarks made by Professor S. Jayakumar, the acting Minister for Labour, at column 15 of Appendix V to the Select Committee's Report.

is not required. The usual principle that has been applied is caveat emptor; let the buyer beware.

In the light of this change in s. 132A it may be that some obligation to disclose price-sensitive information may be imposed on insiders seeking to sell even non-listed securities.

Under the old section the limitation period for commencement of civil actions in respect of insider trading was two years from the date of the dealing. The Amendment Act includes a new s. 132A(3), which gives an alternative limitation period of "six months after the discovery of the relevant facts in relation to the dealing". Unfortunately this amendment is far from clear. If a person discovers the facts within, say, two weeks of the dealing, does he have only six months from that date to commence an action, or can he take advantage of the whole two-year limit? Conversely, supposing a victim discovers the facts thirty months after the dealing; does he have a further six months in which to commence proceeding? The all-important words "whichever is sooner" (or "later", as the intention of the legislature may have been) seem to have been left out.

Finally the new s. 132A(9) imposes criminal liability on "tippees", *i.e.,* persons who obtain "special confidential information" from insiders and use that information to gain a benefit for themselves. As drafted, the section requires the following before a person is within its ambit:

(a) the alleged tippee must obtain, directly or indirectly, special confidential information from an insider;

(b) the alleged tippee must actually know (or reasonably ought to know) that the special confidential information was obtained by the insider in his capacity as such; and

(c) he must make use of that information to gain a benefit for himself.

It should be noted that nothing is said about the state of mind of the insider. Clearly if the tippee is tipped off by the insider, that tippee is caught by the section. However the section seems wide enough to cover a situation where the tippee stumbles across the special confidential information, for instance by overhearing it in a lift, or by listening to a garrulous insider at a social function. It is suggested that it cannot have been the intention of the legislature to cover the latter situation. Some sort of guilty mind must be required. There are several possibilities:

(a) The insider deliberately gives the tippee the information;

(b) The tippee deliberately obtains the information from the insider without the insider's collusion;

(c) The tippee accidentally obtains the information from the insider without the insider's collution (the garrulous insider situation).

It is suggested that only the first two situations should be covered, bearing in mind that this is a penal provision. As for "sub-tippees", *i.e.,* persons who obtain special confidential information from tippees, the section is wide enough to catch them. Such persons may be said to have obtained such information "indirectly" from the insider. However in the case of a sub-tippee it would be a defence to show that either he did not know that the information was "special confidential information" or that he did not know that it had been obtained from an insider in his capacity as insider.

A tippee is not exposed to civil liability, unlike an insider. Whether this is deliberate or an oversight one cannot tell. An interesting problem may arise when an insider tips off someone else, who uses the inside information to make a profit at the expense of an unsuspecting victim. If the Insider did not "make use of" the information, he will not be civilly liable to the victim. The tippee, who is *ex hypothesi* the villain, will not be civilly liable either. It is unlikely that there can be recovery for breach of statutory duty on analogy to a breach of s. 39,[7] as it cannot be said that s. 132A implicitly contemplates civil liability on the part of the tippee. What happens to the tippee's gains is not stated. Presumably the fine imposed would be designed to negate any benefit the tippee obtained. It is also possible that the trial court might order compensation to the victims (if they could be identified) under s. 400(l)(b) of the Criminal Procedure Code.[8]

(3) *Take-overs*

Sections 179 of the Act has been repealed and replaced by the Amendment Act. The most significant changes are:

(a) The new section 179 applies to natural persons as well as to corporations.

(b) The term "offeree corporation" in the old section has been changed to "offeree company" in the new section. The effect of this apparently is to restrict the operation of s. 179 to situations where a Singapore-incorporated company is the target of the take-over. Whether this was the intention behind the change does not appear from the Amendment Act.

(c) The threshold figure that is deemed to confer effective control of a company has been increased from 20% to 25%.

(d) It is made clear that s. 179 does not apply to take-overs of private companies.[9]

(e) The new s. 179(5B) prohibits the making of bluffing offers by persons who have no real intention of taking over a company.

(f) The new s. 179(5C) allows people who have accepted offers to buy shares under an abortive take-over to avoid the contract of sale.

(g) The Securities Industry Council is now conferred the power to investigate any breaches of the Take-over Code or misconduct in relation to a take-over.

Provisions are made in the new s. 179A for variations of take-over offers.

7 See *Re South of England Natural Gas & Petroleum Co. Ltd.* [1911] 1 Ch. 573.
8 Cap. 113.
9 See remarks made by Professor S. Jayakumar at column 20 of Appendix V to the Select Committee's Report.

3. *Amendments Affecting the Rights and Obligation of Directors*

(1) *Loans to directors*

A loophole has been plugged in s. 133, which provides that loans by a company to its directors or directors of a related corporation are illegal. The new s. 133(6) makes it clear that a loan to a director's spouse or children is also within the ambit of the section.

Amendments have also been made to a related section, s. 133A. This prohibits a company from giving loans to other companies in which its directors have a 20% or greater interest.[10] It is now provided that if the directors of the lending company can in any way control the borrowing company (the borrowing company not being limited by shares), no loan can be made.

Certain exceptions are made:

(a) An exempt private company may make any such loans (this harmonizes s. 133A with s. 133).

(b) A company can always lend to a related company as defined in s. 6.

(c) Banks, finance companies and insurance companies may make such loans, provided that the loans are made in the ordinary course of business.

To ensure uniformity with s. 133, it is also provided that an interest of a director's spouse or children will be treated as that director's interest. An important provision is found in the new s. 133A(6); like its counterpart s. 133(5), this new subsection provides that the loan is not invalidated, nor is the lending company precluded by public policy from recovering the amount loaned.

(2) *Prohibition on resignation*

The Registry apparently has been having trouble with directors who bail-out when their companies are in trouble, leaving the Registry with no one to hold accountable for any misdeeds. The new s. 122(6) cures this mischief. A director may not resign or vacate his office if that would leave the company with only one director. In other words, once a company is left with two directors, those directors are stuck with the company for richer or for poorer, till death (their own and presumably the company's) them do part. It also appears that since companies must have one director "ordinarily resident" (whatever that might mean) in Singapore, the last such director would also be prohibited from resigning or vacating his office.

The section does not apply to directors who are disqualified under sections 124 (failing to obtain the requisite share qualification); 125 (undischarged bankrupts); 125A (see below); 130 (disqualification on conviction of certain offences) or 130A (see below); or under certain provisions of the Insurance Act,[11] the Banking Act,[12] or Finance Companies Act.[13]

[10] For the definition of "interest" see s. 6A.

[11] Cap. 193.

[12] Cap. 182.

[13] Cap. 191.

(3) *Automatic disqualification of directors of insolvent companies*

Probably the most controversial portion of the Amendment Act is the new s. 125A.

Section 125A provides as follows:

Powers to restrain directors of companies that have been liquidated

125A — (1) Where a person —

(a) is or has been a director of a company which has at any time gone into liquidation (whether while he was a director or at any tune within three years of his ceasing to be a director) and was insolvent at that tune; and

(b) is or has been a director of another such company which has gone into liquidation and was insolvent at that time within five years of the date on which the first mentioned company went into liquidation,

and that person within a period of five years after the other such company referred to in paragraph (b) has gone into liquidation, without the leave of the Court, is a director or promoter of, or is in any way whether directly or indirectly concerned or takes part in the management of a company, he shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding two years or to a fine not exceeding ten thousand dollars or to both such imprisonment and fine.

For practical purposes this means that if a company goes into liquidation and is insolvent, every director of the company[14] should examine the history of any companies in which he was a director within the last eight years. If any of these companies want into liquidation, an amber light should flash; if the liquidation was within the last five years a red light should flash; and if the company that went into liquidation was insolvent, it is time to press the panic button.

It will be seen that the marginal note to the section is inaccurate. The section does not confer a power to restrain directors of companies that have been liquidated; the section automatically disqualifies such persons without the necessity of any person or body applying for the disqualification. The unfortunate thing about this section is that it is for the erstwhile director to show his fitness, not for the Registrar or the Attorney-General or the Official Receiver to demonstrate his unfitness. This conies uncomfortably close to presuming a man guilty until he proves himself innocent. Until that man proves his innocence, he is disqualified from participating in the management of any company.

The section is apparently based on s. 9 of the English Insolvency Act 1976.[15] The difference is that the English statute places the onus of applying for the disqualification on the Official Receiver. There the Official Receiver must show that the director's conduct "makes him unfit to be concerned in the management of a company";[16] here it is

[14] The extended definition of "director" in s. 4 should be noted.
[15] 1976 c. 60.
[16] Section 9(1)(b) of the Insolvency Act 1976.

for the director to satisfy the Court "that his conduct as a director of any of those companies... did not make him unfit to be concerned in the management of a company".[17]

The mischief that this section is designed to cure was stated by Professor S. Jayakumar, the acting Minister for Labour, in Appendix III to the Select Committee's Report on the Amendment Bill:[18]

> The policy in this section is that the public must be safeguarded against persons who by their conduct have shown themselves to be unfit to manage the affairs of a company with limited liability. There is nothing in the law at present to prevent a person trading through the vehicle of one or more companies and allowing such a company to become insolvent and then establish a new company to carry on trading all the while leaving a trail of unpaid creditors. This is not an uncommon occurrence. *You will note that in the Companies Act there are other provisions dealing with fraudulent trading,* such as section 304, *by directors as distinct from incompetent directors who are unfit to manage their companies. This section is aimed at the latter category... . The formulation adopted in this section is designed to ensure that it would be more difficult for those with poor commercial track records to recommence trading under cover of limited liability.* We recognize that the section could in its operation cause some inconvenience and cost to some persons who have been unfortunate in their trading activities as distinct from those who are unfit to manage companies in that both categories of persons need to satisfy the Court of their fitness to manage companies after they have been concerned in two insolvent liquidations. But we see no great injustice, however, in such a provision when weighed against the need to protect dissatisfied and unpaid creditors.... We have also considered [the] suggestion that simultaneous liquidations be deemed to be one liquidation for the purpose of this section. But we are not in favour of accepting this suggestion because it would defeat the purpose of this section if a director is trading through one or more companies in the same group where two of the companies go into liquidation. *The evil that the section aims at is the same, i.e., unpaid and dissatisfied creditors due to the unfitness of the directors to manage these companies effectively.* It may well be that on an application for leave to the Court, the Court would take these circumstances into account when deciding whether or not to give leave to a director to continue to manage the company."[19]

It will be seen from the statements of the Minister that the section is aimed not so much at dastards as at fools. The Court is given the unenviable task of determining not just the moral fitness of a person to be a director, but his competence. How a person will show that he is not unfit to participate in the management of a company is an open question. One can predict quite confidently that this section is going to be a fertile field for litigation. In this respect our courts are on their own; in the eight years since the enactment of s. 9 of the

[17] Section 125A(2)(b).
[18] Concerning the use of such reports as an aid to the interpretation of statutes see *Black Clawson International Ltd.* v. *Papierwerke Waldhof-Aschaffenburg A.G.* [1975] 1 All **E.R.** 810 (House of Lords).
[19] Pages B18-B19 of the Select Committee's Report (emphasis mine).

Insolvency Act there does not seem to have been a single reported decision concerning the section.

Whatever the dissatisfactions with s. 125A, it will have to be lived with until the powers-that-be see fit to repeal it or modify it. Several points should be noted about the section:

(a) It does not matter whether the companies that go into liquidation are public or private; nor does it matter whether it is a private or public company that the erstwhile director wishes to manage or direct. If the aim of the section is to "ensure that it would be more difficult for those with poor commercial track records to recommence trading under cover of limited liability", the disqualification must cover both private and public companies.

(b) The disqualification cannot be meant to cover participation in the management of foreign companies that do not do business here. That would be extra-territorial legislation of the most outrageous sort. But it is unclear whether the insolvent companies must be Singapore companies, or whether foreign companies that do not operate here are also included. The word "company" in the Act means a company incorporated under the Act or under the predecessor legislation.[20] However s. 125A(3) provides that the section covers unregistered companies within the meaning of s. 314. This includes foreign companies, whether they do business here or not.

As this section is penal, according to normal canons of construction the more restrictive meaning should be preferred; that is, a person will not be disqualified unless the insolvent companies of which he was a director were either incorporated here or doing business here (which would necessitate that they be registered under Division 2 of Part XI of the Act). However until a court has decided to this effect, the counsel of prudence is to assume that the section covers all companies, local or foreign, whether they do business here or not.

(c) For some unexplained reason the time a liquidation is deemed to commence for the purposes of s. 125A is different from that stipulated in the provisions pertaining to winding up. Sections 219(1) and 255(6) provide that where there has been a resolution to wind up, the winding up is deemed to commence at the time of the passing of the resolution. This accords with s. 125A(3). But when the winding up is by the Court, s. 219(2) provides that the time of commencement of the winding up is the time the petition is presented, while s. 125A(3) provides that the material date is the date the winding-up order is made. There may very well be quite a delay between the two dates.

(d) The disqualification applies to persons who have been directors of the insolvent companies, as well as to those who are directors at the time of the winding up. If company *A* goes into liquidation on say, 1 January 1984, and company *B* goes into liquidation on 31 December 1988, the following persons will be caught by the section:

[20] See s. 4.

(i) a person who was a director of *A* on 1 January 1984 and was a director *B on* 31 December 1988;

(ii) a person who had been a director of *A* within three years of 1 January 1984 and was a director of *B* on 31 January 1988;

(iii) a person who had been a director of *A* within three years of 1 January 1984 and who had at some time been a director of *B*.

Theoretically, category (iii) might include some persons who resigned from *B* before *A* went into liquidation!

One can only speculate as to the economic impact of this section. Conceivably it could work great injustice during a recession when a company might become insolvent through no fault of its management. The existence of the section might also deter innovators and inventors from exploiting their ideas here. The Select Committee apparently received a "rather lengthy and worried representation from the Economic Development Board suggesting either that the proposed [section] be completely deleted or suitably amended."[21] Unfortunately that representation was not included in the final report of the Select Committee. It would have been interesting to see what the Economic Development Board had to say on the matter. What is certain is that people will no longer accept nominal directorships so lightly. As every director, executive or non-executive, is caught by the section, it behoves even a nominal director to attend all meetings and keep abreast of matters in the company. Even though legally the standard of diligence required of a non-executive director is ridiculously low,[22] self-preservation should dictate that such persons show more interest in the management of companies than they have hitherto. Only time will tell whether s. 125A is a stroke of genius or a misguided flop.

(4) *Disqualification for "persistent default"*

Section 130A provides that where a person has been in "persistent default" with respect to the requirements of the Act, that person is disqualified from being a director or promoter of a company and from participating in the management of a company for five years. Persistent default is conclusively proved by having been convicted thrice for infringements of sections of the Act prescribing the filing of any return, account or document or prescribing the giving of notice to the Registrar. The sole criterion of persistent default is three such convictions, though this does not appear explicitly in the section.[23] A persistent defaulter may only participate in the management of companies with the leave of the court. This section is less objectionable than s. 125A in that it requires a prior conviction by the court; only the guilty (one hopes) will suffer, not the innocent as well.

The section is based on s. 93 of the U.K. Companies Act 1981.[24]

[21] See page D6, column 12 of the Select Committee's Report.
[22] As to directors' duties of diligence, see s. 132(1) and *Re City Equitable Fire Insurance Company* [1925] Ch. 407.
[23] See the remarks made by Professor S. Jayakumar at column 12 of Appendix V to the Select Committee's Report.
[24] 1981 c.62.

4. *Miscellaneous Amendments*

The more significant of the amendments that defy categorisation are as follows:

(a) After the commencement of the Amendment Act, no company may be limited by both shares and guarantee. An existing company limited both by shares and guarantee has two years to convert to one limited either by shares or by guarantee: s. 14(6).

(b) New provisions are introduced to govern the conversion of unlimited companies to limited companies and vice-versa: s. 25.

(c) All equity shares in public companies or subsidiaries of public companies now carry only one vote per share, irrespective of the amount paid-up on such shares: s. 55(1). Thus weighted voting as in *Bushell* v. *Faith*[25] will not be possible, at least where public companies and their subsidiaries are concerned.

(d) It may now be provided that preference shares shall carry no voting rights. This removes an inconsistency that existed between s. 148(2) and the definition of "preference shares" in s. 4. However, preference shares issued after the commencement of the Amendment Act shall carry the right to vote when the preference dividend is in arrears, upon a resolution to wind up the company and where a resolution is proposed affecting the rights attached to such shares: s. 148(2).

It is impossible to make a neat summary of this particular Act. Some of the amendments are undoubtedly beneficial and will contribute to the smoother running of companies. Others are more controversial. One thing can be said: the original aim of company law — to provide businessmen a convenient vehicle for the pursuit of wealth — has largely been lost sight of. This Act only emphasises how much company law has become an arcane mystery comprehensible to only a few initiates.

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[25] [1970] 2 W.L.R. 272.