NOTES OF CASES

COMMERCIAL CANDOUR AND INTEGRITY IN SINGAPORE

The City Country Club Case[1]

THE *City Country Club* case, more aptly called a saga, should not pass without comment in these pages. Few issues of company law are considered by the higher courts in Singapore and fewer still go to the Privy Council. Rarely does a commercial affair achieve such prolonged or recurrent notoriety in the popular press. Rarely is there such public interest in the fall from grace of not a few powerful figures and the destruction of some promising careers. The primary importance of the case is not that it breaks new ground in clarifying major legal issues. It does deal usefully with a number of technical points concerning prospectuses. It also discusses the relevant considerations where convicted persons apply to the Court for leave to be directors. These aspects are discussed later in this paper, but perhaps the main importance of the saga is in the establishment of adequate standards of candour and integrity in commercial affairs generally.

There are a number of different but related lessons here. Thus, the affair illustrates the enormous burden put upon the authorities in the process of establishing those standards, from the very first police raid, to the steeple-chase of hearings through the hierarchy of courts right up to the Privy Council. Further, it evokes the familiar issue of possible inconsistency or undue leniency in sentencing white collar criminals, who are gambling for vast profits. The Attorney-General arguing his appeal for an increase in the small fines imposed in the *City Country Club* case suggested that the offences committed were much more heinous than those of Richard Tarling. Yet while Tarling was jailed for six months,[2] these directors escaped with fines of between $500 and $2000.

The role of lawyers in ensuring commercial standards by giving clients proper, even though unwelcome advice, is also highlighted by the circumstances of the case — in particular the degree of commercial

[1] The title is taken from words used by the Court of Appeal and Privy Council who were of the view that, while there was no criminal dishonesty there was a "falling short of those standards of commercial candour and integrity which ought to be observed in Singapore by those engaged in the management of companies". The references are P.P. v. Huang Sheng Chang, [1983] 2 M.L.J. xcvi (plea in mitigation and decision of District Court on prosecutor's appeal against sentence), Huang Sheng Chang v. A.G. [1984] 1 M.L.J. 5 (applications for leave to be directors), A.G. v. Derrick Chong Soon Choy, Quek Leng Chye v. *A.G.* [1985] 1 M.L.J. 97 (appeals on leave applications), and Quek Leng *Chye* v. *A.G.* [1985] 2 M.L.J. 270 (appeal to Privy Council on leave applications).

2 See Straits Times "More Heinous Offences than Tarling Case — says A.G.", 15 March 1984, Tarling v. Public Prosecutor [1981] 1 M.L.J. 173, and Tarling's Case and Directors Liabilities in Singapore, Awther Singh, 1981, Quins Pte. Ltd., Singapore.

pressure placed on lawyers to facilitate by whatever means a doubtful deal. And the fall of the lawyer concerned is a valuable cautionary tale for all lawyers who may hope to win and keep important clients by bending with the wind and not insisting on a proper application of commercial and legal standards.

The story of the City Country Club is probably well known, at least in Singapore. It concerned a group of entrepreneurs who took part in "an ingenious scheme to unload upon unsuspecting members of the public shares in a public company thereby extracting" from them a total of $60,000,000.[3] They "intentionally and unlawfully avoided the issue of a prospectus"..."because they did not want to disclose to the buyers that the shares were being sold at an exorbitant price."[4] If the shares were successfully sold, this "would result in enormous profits (some tens of millions)". It was highly unlikely that the offer would succeed if a prospectus, disclosing the full facts, were issued.[5] So the offer was made by letter without complying with the prospectus requirements. The whirlwind that ensued comprised legal proceedings in a number of stages.

First came criminal charges under the prospectus provisions, to which all accused pleaded guilty. Following conviction they all resigned their directorships, as to continue in office or participate in management would itself be an offence under section 154 of the Companies Act. Secondly the Attorney-General appealed unsuccessfully against sentence. Thirdly the group applied to the Court for leave to be directors and managers of their companies. The Chief Justice rejected their application, but allowed them to take part in management only of companies other than the two City Country Club companies. Fourthly, the Attorney-General appealed against the decision granting them leave to act as managers. Four of them cross-appealed for leave to allow them to be directors and managers without any restriction. The Court of Appeal allowed the Attorney-General's appeal holding that the applicants were not fit to be involved in management of any company. Fifthly, two of the five appealed unsuccessfully to the Privy Council for leave to be directors and managers. Finally one may conjecture that a sixth stage was reached, namely negligence claims against the lawyers involved, but this is not the subject of any reported proceedings.

The City Country Club Scenario

Having introduced the relevant issues, and summarised the facts and subsequent legal proceedings, a fuller explanation of the circumstances of the case is essential. These facts are of course extremely complex, but the following brief account must suffice.

In 1979 Chong, the general manager of a club, had his eye on a piece of land in Stevens Road owned by City Developments Limited. He thought it was ideal for development as a club. He approached Huang who had the financial resources for such a venture. A further three participants joined in, and all five became directors of a company formed for the purpose. One of them, Quek, "said that the primary objective of the project was to make money from the sale of shares

[3] Lord Diplock's words at [1985] 2 M.L.J. 270, 272.
[4] [1985] 1 M.L.J. 97, 104, 105.
[5] See findings of the Chief Justice, [1984] 1 M.L.J. 5, 12.

of the company that was going to own and manage the club."[6] A million shares paid for in cash were issued to the participants. The land was conveyed to the company and mortgaged to the finance company of a major group participating in the venture. At this stage Huang engaged Chen, a partner in a leading firm of advocates and solicitors to act on behalf of the promoters and the company. Unfortunately Chen was not a corporate lawyer, and had never undertaken prospectus or club work before, but he apparently "tried his conscientious best."[7] Huang was aware that sale of club membership would attract tax at 40%. Chen therefore instructed "one of the top revenue English Queen's Counsel" who recommended an alternative scheme by which bonus shares would first be issued to the participants. These shares would then be offered for sale to up to 2,000 selected invitees as a qualification for membership. A disposal of shares would not of course be taxable. Huang was apparently aware that this offer would require a prospectus and consulted a merchant banker who confirmed the point.[8] Further meetings were held with accountants on the tax issue. Chen, the lawyer, in his notes of one such meeting stated ominously "I am to work out the prospectus problem." Chen then instructed an Australian Queen's Counsel to advise whether an offer of the shares to selected invitees was an offer to a "section of the public",[9] thus requiring a prospectus to be issued. The Q.C. advised that he had little doubt that an offer to some thousands of club members would be an offer to a section of the public but would not be if there were only three members. His conclusion was that a prospectus was necessary in the circumstances.

Chen wrote to Huang that in view of the "uncertain position in law" it would be preferable to issue a prospectus unless exempted by the Registrar of Companies under section 46 of the Companies Act.[10] However it is clear that although the Registrar may exempt an applicant from any requirement relating to the form and content of a prospectus, he does not have power to dispense entirely with the obligation to issue a prospectus.[11]

As an Assistant Registrar of Companies was to be lunching with one of Chen's colleagues, Chen took the opportunity to see him on the matter.[12] Chen later wrote to him arguing that the scheme would not be an offer to the public as defined, but gave no details of the Q.C's adverse opinion. "Instead, he rather cleverly (or so he thought) referred the Asst. Registrar only to a passage in Palmer's Company Precedents (17th Edition) which, as Bennett Q.C. had been careful to point out to him, continued a rather doubtful proposition of law."[13] This crucial letter was first vetted in draft by Huang and Chong.[14]

6 [1985] 1 M.L.J. 97, 100.
7 [1983] 2 M.L.J. xcviii and cii. See statements of his counsel in mitigation.
8 See [1984] 1 M.L.J. 5, 8.
9 See Companies Act, Cap. 185 (1970 Rev. Ed.), 1985 reprint, s.4(6) definition of offer to the public.
10 For convenience, the section numbers of the Companies Act cited in this note are those of the 1985 reprint and not the earlier 1979 reprint under which charges were in fact laid.
11 See [1985] 1 M.L.J. 97, 101.
12 See [1983] 2 M.L.J. ciii.
13 [1983] 2 M.L.J. cvi-cvii.
14 [1985] 1 M.L.J. 97, 101.

Some five weeks later the Assistant Registrar wrote that as no fresh shares were to be issued by the company, no prospectus need be registered. This statement was manifestly incorrect as an offer for sale of existing shares attracts the prospectus provisions with the same force as a new issue. A second letter from the Assistant Registrar a month later stated that "since no invitation to the public is being made, the company is exempted" from the obligation to issue a prospectus.

Chen then informed his clients of the "decision of the Registry of Companies and advised them that the scheme could proceed."[15] He also advised his clients against advertising the offer and that only their friends should be invited to subscribe.

The scheme went ahead. The capital was increased and the company became a public company. It was resolved to issue 2,000 bonus shares to the existing shareholders. "These 2,000 bonus shares were allotted with a view to the participants offering them for sale to selected members of the public, either individuals or companies, at a total price of $30,000 per share i.e. at a premium of $25.000."[16]

A letter of invitation was prepared, stating an entrance fee of $2,000 for individuals and $3,000 for companies. To become a member it was then required to buy one ordinary share, or two shares if a company.

The participants made a list of friends and eligible contacts which grew to 390 individuals and 17 companies. The letters of invitation "baited the trap."[17] Each letter signed by Huang began as follows, "As you are known to our directors to be of high repute, we are pleased to invite you to join the exclusive City Country Club." Huang invited his daughter and his dentist.[18]

"No hint of what was to be the purchase price of the shares appeared in the letter of invitation, nor was the fact disclosed that all the shares offered for sale to 'qualified persons' belonged to the participants in the scheme, to whom they had been issued without cost as bonus shares and who had supplied them to the stockbrokers on trust to sell them at $30,000 per share and nothing less."[19]

At that time, when the shares were offered, the net tangible asset backing for each ordinary share was $7,374.[20] Were a prospectus to have been issued, the net tangible asset backing would have to have been disclosed, together with details of bonus shares issued and financing of the project. In the words of the Chief Justice,[21] "It was highly unlikely, to put it at its lowest, that all or a significant proportion of the 2,000 shares which were available to invitees under the scheme would be taken up if a prospectus in compliance with the Act were issued to each invitee." If, however, the offer were to succeed enormous profits of tens of millions of dollars would result. The invitations were sent out without an accompanying prospectus. The die was cast.

15 [1984] 1 M.L.J. 5, 9.
16 [1985] 2 M.L.J. 270, 272.
17 *Ibid.* at 272.
18 [1983] 2 M.L.J. cvi at xcviii.
19 [1985] 2 M.L.J. 270, 272.
20 [1985] 1 M.L.J. 97, 102.
21 [1984] 1 M.L.J. 5, 12.

There followed the criminal prosecution, pleas of guilty, convictions, and the Attorney-General's unsuccessful appeal against sentence. The applications for leave to be directors then took two and a half years, before the Privy Council finally rejected their appeal in July 1985.

Points on Prospectuses

Though the participants in the scheme wrestled with the problem of prospectuses for many months, the question did not long delay the Courts. Several useful points can however be derived from the judgments.

First, section 46 "does *not* empower the Registrar of Companies to exempt anyone from the obligation to issue a prospectus where a prospectus is required by the Act."[22] This section in terms of the marginal note gives "exemption from requirements as to form and content of prospectus." Inserted in 1973, it appears to be a locally drafted section enabling the Registrar to exempt an issue from including any of the Fifth Schedule information where its inclusion would be "unduly burdensome."

Secondly, a point never really at issue, is that by section 52 offers for sale to the public of shares already issued to the offerer are fully subject to the prospectus requirements. The point was not appreciated by the unfortunate Assistant Registrar who wrote saying that as no fresh shares were being issued, the prospectus requirements would not apply.

Thirdly, the court of original criminal jurisdiction had to consider the effect of section 45(5) of the Act which provides a director with some sort of a defence to the strict liability offences connected with prospectuses. This subsection says that if the non-compliance or contravention related to a non-disclosure which the offending director "was not cognisant of," or arose from an honest mistake, or was immaterial or ought reasonably to be excused, then the director "shall not incur any liability." From the District Court Judge's notes,[23] it appears that counsel argued that this meant that their clients were guilty of the offences but were not liable to punishment. However the judge was of the view that the circumstances set out in the subsection appeared to "emphasise the creation of defenses and not the mere presence of mitigating factors." He concluded, "To reduce the harshness of the strict liability created by subsection 4, subsection 5… proceeds to set out three specific circumstances, the presence of any one of which, in my view, affords a complete defence to non-compliance."

Fourthly, the principal question in the case was whether or not the shares were being issued to the *public,* for only then would the prospectus provisions have to be complied with. What constitutes an offer to the public is defined in section 4(6) in circular fashion. It includes an offer to "any section of the public, whether selected as clients of the person issuing the prospectus or in any other manner." This ill-defined terminology is the watershed from which criminal consequences of failing to issue a prospectus will or will not flow.

22 [1985] 1 M.L.J. 97, 101.
23 [1983] 2 M.L.J. xcvi and xcvii.

Yet there is remarkably little authority [24] on what is an offer to the public. Those accused in this case of course pleaded guilty and did not seek to dispute before the Court that the offer to their friends as "qualified persons" was not an offer to a section of the public. They had dallied long with the idea that a limited and unadvertised offer among friends might not be an offer to the public, though their professional advice was to the contrary. It is now useful to have the Court of Appeal's confirmation that the "letter of invitation was without doubt an offer to the public to purchase shares in the Company."[25]

Finally, the imprecision of the "public offer" test is disturbing. It is an unreliable standard on which to determine whether a prospectus must be issued. It does not in any way focus upon the primary question as to whether individual investors require the provision of adequate information. One may also feel a twinge of concern at the possible feelings of the five participants that this offence was a legal technicality, out of touch with commercial reality. In Singapore clubs habitually offer their memberships for huge entry fees, but there is no obligation to disclose masses of information relating to the Club. In good times membership is snapped up by a willing public. Why, in the event of choosing a share offer as a vehicle, should this practically similar transaction become a heinous crime? As counsel suggested, by getting a share as well as membership an invitee was getting equity participation in a possibly premier club at a prime site with transferable membership. The "history of clubs in Singapore shows what that means."[26] Indeed the same club in its later name of the Pinetree Club, has since quite lawfully offered membership to a list of 1000 invitees at $35,000 for individuals and $70,000 for companies.[27] Yet because no share was offered the statutory obligations of disclosure by way of prospectus did not apply.

However one's conclusion must be that the participants chose a formal legal regime by offering shares, and so owed a strict duty to conform to the obligations imposed by the legislation. Secondly, and on a broader theme, the primary concern of policy makers might be not that such a "share offer" is caught, but that certain offers of investments and quasi-investments, remain outside the regulatory net.[28] Whether it be offers of franchises, timeshares or the more eccentric investments such as the purchase of a maritime container to be managed by the vendor, the making of investment offers is difficult to regulate. How fine therefore should the net be?

Singapore's Companies Act Part IV Division 6, "Interests other than shares, debentures, etc.", deals primarily with regulation of unit trusts but also has a usefully wide application. For instance a company

[24] See *Government Stock and Other Securities Investment Co. Ltd.* v. *Christopher* [19S6] 1 All E.R. 490. For an important recent Australian appeal case on the meaning of offers to a "section of the public" see *Australian Central Credit Union* v. *C.A.C.* (1985) 3 A.C.L.C. 434.

[25] [1985] 1 M.L.J. 97, 102.

[26] [1983] 2 M.L.J. xcvi at xcix.

[27] See Straits Times, 29 November 1985, "International management firm to run Pinetree Club". See also Business Times, 28 March 1986, "Pinetree Club membership fee", giving details of a 40% cut in the entry fee.

[28] Pyramid selling is already a ground for winding up under section 254(1)(L). See Multi-Level Marketing and Pyramid Selling (Prohibition) Act No. 50 of 1973.

offering sale of 'interests' to the public must first comply with the prospectus requirements and issue a special Seventh Schedule prospectus.[29] 'Interests' means a right to participate in any profits or assets of a business in Singapore or elsewhere, in any common enterprise from which rent or profits are expected, or in any investment contract. The definition is broad and has implications for offerors of timeshares,[30] and franchise agreements,[31] even if not for those who choose to sell club membership without offering its shares. Thus there is a wide range of statutory provisions regulating investment offers. But inevitably the law is formalistic and the layman will be surprised when one fish is caught in the net, while another of different hue slips through. The law has to draw a line somewhere.

Applications for Leave to be a Director

Section 154 of the Companies Act says that a person convicted of any offence in connection with the promotion, formation or management of a corporation, commits an offence if, without leave of the Court, he is "director or promoter of or is in any way whether directly or indirectly concerned or takes part in the management of a company," at any time within five years of his conviction.

Hence the five participants, following their convictions, resigned all of their directorships, and presumably refrained from participation in the management, (whatever that may mean) of any "company". In passing it is noteworthy that although conviction in connection with management of a "corporation" results in disqualification, the offender is only disqualified from management of "companies". According to the statutory definitions "corporation" is a broad term including foreign corporations. But "company" includes only companies incorporated under the Singapore Companies Act. Thus the convicted persons could continue to be directors and managers of any companies in their group which are incorporated abroad. If those companies have a place of business in Singapore, despite the protective policy of the section, they could lawfully direct or manage that foreign company's business here.

This is a legislative anomaly. When a person is prohibited from being a director by reason of his own bankruptcy he may not direct or manage "any corporation".[32] If he is a director of two companies that wind up when insolvent, or if he is persistently in default in filing documents so as to attract the prohibition, then he is likewise prohibited

[29] Companies Act s. 113.

[30] At least one timeshare has been advertised in Singapore offering units in a holiday resort in Johore, Malaysia. If a company, (as specially defined by s. 107 to mean a public company incorporated in Singapore of in a country Gazetted by the Minister) or its agent offers a timeshare agreement, this might seem to be an offer of an interest attracting the prospectus provisions under s. 113. It is perhaps an offer of "assets... of a business undertaking in Singapore or elsewhere" or "a common enterprise with an expectation of profits or rent". Extreme care would be needed to take the scheme outside this broad definition. Only 'companies', *i.e.* public companies, may offer interests to the public (s. 112). However no penalty is mentioned in the section, thus invoking the standard penalty in section 407. The maximum fine of $1,000 is hardly a significant deterrent, a point the authorities might consider in their current review of the Act.

[31] See Choong, "Franchising Schemes in Singapore — Legal Aspects of Public Offers," (1984) 26 Mai. L.R. 256. For a recent Australian case holding a franchise offer not to be an "interest", see *Streeter* v. *Pacific-Seven Pty. Ltd.* (1985) 2 A.C.L.C. 430.

[32] S. 148(1).

from managing foreign corporations.[33] Of the four automatic "disqualification" provisions, section 154 is thus the odd one out in leaving convicted persons free to run the Singapore branch of a foreign company.

Nonetheless despite their luck in this limited respect, the five saw fit to apply to the Court for leave. The Chief Justice refused them leave to be directors or managers of the two club companies, but gave them leave to take part in management only of the numerous companies of which they were directors before their convictions. The Court of Appeal however did not accept that the applicants had proved themselves fit to be concerned in management of the companies and allowed the Attorney General's appeal. The Privy Council likewise refused to give them leave to be directors or managers. For five years until the early months of 1988, the five are therefore excluded from directing or managing Singapore companies.

The case is useful in setting out the factors which may be taken into account when considering an application for leave. The Chief Justice followed the approach of the Australian courts to their equivalent section, relying in particular on the case of *Re Magna Alloys & Research Pty. Ltd.*[34] The Court of Appeal later affirmed the approach in that case which can be summarised as follows. The policy of the section is not to punish but to protect shareholders, creditors and others against the corporate structure being used in a manner contrary to proper commercial standards. An applicant for leave bears the onus of

[33] Sections 149 (double insolvency) and 155 (persistent default) prohibit direction or management of a "company", which under those sections includes (see s. 149(3) and s. 155(11)) an "unregistered company" within the meaning of s. 350(1). "Unregistered company" (defined by s. 350) includes a foreign company. Thus the sections also prohibit direction and management of foreign companies.

[34] (1974-76) 1 A.C.L.R. 203. The *Magna Alloys* case is a saga in itself, centering round Leon Richardson, who was financial correspondent for the Singapore Monitor at the time of its demise. He and his co-directors were prosecuted in 1973 for a company scheme under which employees of other corporations or public authorities who placed contracts to buy from Magna were given personal prizes or inducements. This was not unlike the free flight allowances often given to individuals who book their business travel with that carrier. After a trial of 73 days the directors were convicted and given nominal fines. They all resigned from the board, and two of them acted as "advisers" to the company. ([1980] 11 A.T.R. 276 at p. 197). To fill the void in management one of them applied to the Court for leave which was granted, (18 Oct. 1973, Street C.J. in Eq.). When he, soon after, parted ways with Richardson, another of the ex-directors, Richardson's son-in-law then applied. At this five day hearing he was given conditional leave by Street C.J. whose dicta were approved in the *City Country Club* case. The field day for the lawyers was not yet over. The enormous legal costs of the trial and the applications for leave were paid by the company but disallowed as an expense of the business by the Commissioner of Taxation. There then followed an appeal to the court which accepted the deductibility of the costs of the application (see *Magna Alloys & Research Pty. Ltd.* v. *Federal Commissioner of Taxation, 9* A.T.R. 188). However the Court rejected the deductibility of the criminal costs. The company then appealed this point to the Federal Court and was ultimately successful. The two tax reports run to 48 pages of close type and give much intricate detail on the background of events leading to the leave application. Richardson did not stay out of the news however. While resident in Hong Kong, he was kidnapped in 1981 in Guatemala and held in a cage by hooded captors for 100 days before being released unharmed. A multi-talented man of great personality, his face still appears regularly on Singapore breakfast tables. As money correspondent for Asia Magazine, he was described as "one of the world's most distinguished technical lecturers who has addressed more than 3000 seminars around the world".

showing that in his case the Court ought to make an exception to that policy and allow him to be a director. The Court should consider the nature of the offence, and the applicant's involvement in it, the applicant's character, the structure of the business in respect of which he seeks leave, the interests of the public, members, creditors and employees, and the risks generally of allowing him to be a director. These factors have been broadly endorsed by the Australian Courts, though it seems that they should not be necessarily regarded as comprehensive or exclusive of other factors.[35]

The Court of Appeal[36] went on to add that the Court is not bound by what took place in the criminal proceedings and may view them differently to the Court of trial. The onus of proof is reversed and the issues are much wider in a leave application. Neither the applicant nor the Attorney General is confined to the circumstances of the offence. An applicant may raise any matter to show that he is a fit person and the Attorney General may likewise raise anything to prove the contrary.

One factor considered by the Chief Justice[37] was the point that prohibition would cause financial hardship to the applicants and would cause management or financial problems for their companies. He concluded that Parliament must have recognised this probable effect and that the need to protect the public outweighs any punitive effect. However this should not be taken to mean that hardship can never be a relevant factor. Proof of greater than usual hardship may assist an applicant in proving that an individual exception to the general policy ought to be made. Hardship to the applicant personally is probably a marginal factor only. Potential harm to the company, its shareholders, creditors and employees, if deprived of the services of a key executive, has however been held to be an important factor.[38] Since the section is intended to protect the company, it would be counter-productive if harm were to be caused by that person's exclusion from management. In most of the Australian cases hardship of one form or the other has generally been pleaded, which is put in the balance along with the other factors. In a smaller commercial community like Singapore where it may be more difficult to replace specialised management expertise without harmful consequences to the company and to the economy, this factor may be more strongly arguable.

The Court of Appeal was particularly concerned that allowing the applicants to be managers only would effectively allow them to 'drive from the back seat.' "More and more in the management of companies, employees in managerial positions are exercising as much power in the management of companies as are exercised by directors of companies."[39]

35 See for example *Re Zim Metal Products Pty. Ltd.* (1977) 2 A.C.L.R. 553 and *Zuker* v. *Commissioner for Corporate Affairs* [1981] V.R. 72, an appeal case approving *Magna Alloys. Zuker's* case at p. 78 suggests that other matters may also be taken into account. A further gloss is added by *Chew* v. *N.C.S.C.* (No. 2) (1985) 3 A.C.L.C. 212 at p. 215 where the Court was of the view that the policy of the section was not only protective but probably also for deterring would-be offenders.

36 At 103. They relied on the Australian cases of *Re Macquarie Investments* and *Re Marsden.* See note 42 below.

37 At p. 12. The same point was made in *Re Maelor Jones Pty. Ltd.,* (1974-76) 1 A.C.L.R. 4 at pp. 13-14.

38 See comments of Olney J. in *Chew* v. *N.C.S.C.* (No. 2) (1985)) 3 A.C.L.C. 212 at 216.

39 [1985] 1 M.L.J. 97, 105.

They therefore refused them leave to take part in management. Their decision was perhaps influenced by the fact that the applicants were director/proprietors of the companies and so would be able, as mere managers, to exert considerable influence in their affairs. The position might perhaps be very different in the case of a convicted person who is not a major shareholder seeking leave to be a manager. In the *Magna Alloys* case for example, the second applicant was given leave to take part in management only. Leave was given on condition that he be employed subject to the directions of a board controlled by directors who were not employees and who were not relatives of Richardson, the dominating force in the group.[40] With adequate independent supervision, and especially where the applicant is not also a proprietor and so a potential back seat driver, applications to take part in management may thus remain feasible, despite the Court of Appeal's comments.

The appeal to the Privy Council was on limited grounds only. One ground was that the Court of Appeal should not have dismissed the appeal without accepting the applicants' offer to be cross-examined on their affidavit evidence. This stated that they relied on legal advice in deciding not to issue a prospectus. Lord Diplock's view[41] was that "if the Court of Appeal were going to accept as facts which justified refusal of their applications matters that were denied in their affidavit evidence, the appellants were entitled to be so informed and to be given an opportunity of answering them." However Lord Diplock went on to say that none of the applicants was prepared to swear to the fact that it had never crossed his mind that non-disclosure of the huge premium to be paid for the shares would have a discouraging effect. Their falling short of the appropriate standards of commercial candour and integrity which ought to be observed in Singapore justified the refusal of orders giving leave.

Cross-examination is of course of crucial importance in establishing that the applicant is a fit and proper person to be a company director or manager. In *Re Macquarie Investments Pty. Ltd.* Wootten J. went so far as to say[42] that whereas in criminal proceedings the accused can stay out of the witness box without exposing himself to any adverse comment "it is almost inconceivable that a person would be given leave of the Court under s. [154] of the Companies Act if he were not prepared to give evidence and be cross-examined in support of his case." This, he said, is necessary to assess the applicant's role in the crime, his present character, his demeanour, his commercial and general morality and general fitness to take part in management. In the *City Country Club* case the applicants did not apparently give evidence under cross-examination but only by affidavit, a fact which appears to have counted against them.

An important aspect of the *City Country Club* case in Singapore is therefore that it serves to recognise and apply the extensive Australian

[40] See (1974-76) 1 A.C.L.R. 203 at p. 207. The writer was told by Richardson that to fulfill the condition of a board independent of himself and his relatives, Baffsky, the company's lawyer named in the report, and one other were nominated as directors. With the applicant as general manager, and a group of tame non-executives on the board, the degree of independent supervision in such a case might be nominal only.

[41] Lord Diplock at 274.

[42] (1974-76) 1 A.C.L.R. 40 at 43.

case law[43] on applications for leave. There is little of relevance in the English law reports. The original section 188 of the Companies Act 1948 and the current English provisions[44] rely not on automatic disqualification but require an application by the authorities for a Court order of disqualification. Since the burden on the authorities is considerable, applications rarely came before the Courts[45] and have not been reported as fully as in Australia. In England the length of the disqualification order seems to be one of the main issues argued.[46]

In England both the Report of the Review Committee on Insolvency. Law and Practice, (the Cork Report),[47] and the English Parliament have rejected the idea of automatic disqualification other than in the case of bankruptcy.[48] Singapore's approach is diametrically

[43] *Re Kingsgate Rare Metals Pty. Ltd.* 1940 Q.W.N. 42, *Re Altim Pty. Ltd.* [1968] 2 N.S.W.L.R. 762, Ke Ferrari *Furniture Co. Pty. Ltd.* [1972] 2 N.S.W.L.R. 790, Ke *Macquarie Investments Pty. Ltd.* (1974-76) 1 A.C.L.R. 40, *Re Maelor Jones Pty. Ltd.* (1974-76) 1 A.C.L.R. 4, *Re Magna Alloys & Research Pty. Ltd.*, 18 Oct. 1973, Street C.J., unreported, *Re Magna Alloys & Research Pty. Ltd.* (1974-76) 1 A.C.L.R. 203, *Re Zim Meted Products Pty. Ltd.* (1976-77) 2 A.C.L.R. 553, *Zuker* v. *Commissioner for Corporate Affairs,* [1981] V.R. 72 (Full Court), (Otherwise *Re Record Leather Manufacturers (Aust) Pty. Ltd.* (1980-81) 5 A.C.L.R. 19), *Re Minimix Industries Ltd.* (1982) 1 A.C.L.C. 511, *Re Wallace* (1983-84) 8 A.C.L.R. 311, *Re Leomund Properties Pty. Ltd.* (1983) 1 A.C.L.C. 1370, *Re Carey* (1984) 2 A.C.L.C. 470, *Chew* v. *N.C.S.C.* (1984) 2 A.C.L.C. 676, *Chew* v. *Hamilton* (1985) 3 A.C.L.C. 205, *Chew* v. *N.C.S.C. (No. 2)* (1985) 3 A.C.L.C. 212, *Re Alford* (1984) 2 A.C.L.C. 815, *Alford* v. *Commissioner for Corporate Affairs* (1985) 9 A.C.L.C. 183. See also Enright (May 1978) *Aus. Current Law Digest,* D.T. 105, "Management of a Company by Persons Convicted of Certain Offences", and Corkery, 1983 *Company and Securities Law Journal* 153, "Convicted Offenders and Section 227 of the National Companies Code: Restriction on Certain Persons Managing Companies".

[44] Now found in sections 295-299 and Schedule 12 of the English Companies Act 1985, as amended by the Insolvency Act 1985 ss. 12-14, (see Schedule 6). The most significant innovation is that by s. 18 of the Insolvency Act 1985 a person is personally responsible for all the "relevant debts of a company" if, in contravention of a disqualification order, he is "involved in the management of a company". These sections from the Companies and Insolvency Acts have just been consolidated as the Company Directors Disqualification Act 1986.

[45] From 1977-79 no disqualification orders were made in U.K. under Companies Act 1976, s. 78 (persistent default) and Insolvency Act 1976, s. 9 (double insolvency). From 1970 to 1978 there were 121 disqualification orders made following convictions, pursuant to Companies Act 1948 s. 188, an average in total of only 13.44 per year. See (1980) 1 Bus. L.R. 15 reporting the answer to a question in Parliament.

[46] The Company Lawyer has from time to time summarised unreported English disqualification cases; (1980) 1 Co. Law 202, double insolvency, 5 years disqualification; (1981) 2 Co. Law 129, persistent default, 2 years disqualification; (1981) 2 Co. Law 174, persistent default, 4 years disqualification; (1982) 2 Co. Law 263, double insolvency, 4 and 2½ years disqualification; (1982) 3 Co. Law 220, persistent default, 4 years disqualification; (1986) 7 Co. Law 27, persistent default, no disqualification order.

[47] Cmnd. 8558. In a letter to *The Times* of London (2 February 1985), P.J. Millett Q.C., a member of the Cork committee, wrote, "The Committee was strongly opposed... to automatic disqualification which it considered wrong in principle.... The Committee considered that no one should be disqualified from being a director unless he had been positively found by the court to be unfit to be concerned in the management of a company or guilty of wrongful trading."

[48] The British Government went beyond the Cork recommendations and proposed three years' automatic disqualification for direction of insolvent companies wound up by the Court. (A Revised Framework for Insolvency Law, Feb. 1984, Cmnd. 9175 at p. 11). Clause 7 of the Insolvency Bill 1985 provided for automatic disqualification on the making by the Court of a winding up order against a company where the order is made on certain grounds. However the Government was defeated in the Lords and the highly controversial element

opposite as all four provisions of the Act, leading to disqualification following bankruptcy, convictions, double insolvency and persistent default in filing documents cause automatic disqualification for five years. The Singapore Court however has no statutory power to order disqualification, unlike the English Court, which in certain circumstances can disqualify for up to fifteen years.[49] If the protective policy of the Act is to remove offending directors from management, automatic disqualification for five years only, without a Court power to increase the period, seems a relatively short period of protection.

The Court of Appeal in the *City Country Club* case was of the view that "the applicants are not the sort of persons who can be trusted to manage companies candidly and honestly."[50] Yet by early 1988 they will be assumed to have reformed and be free to direct and manage companies again. Without intending in any way to suggest that an extension of the five year disqualification would have been appropriate in this particular case, it is arguable that the Singapore Courts should have a statutory power to impose a further period of disqualification where the circumstances leading to the disqualification were particularly heinous.

Another question of interest is the extent to which the factors for relief approved in the *City Country Club* case are relevant also to disqualifications on other grounds. The Australian cases are largely applications following disqualification for criminal convictions. Some are applications following bankruptcy,[51] in which the managerial competence of the bankrupt must be a primary factor. Where the ground for disqualification is double insolvency[52] competence will again be relevant. If disqualified for persistent default in filing documents then the factors must be somewhat different, namely the likelihood of the offender staying on the straight and narrow and keeping up his filing obligations in the future.

Finally it is worth noting that in England, during the process of assimilating and regurgitating the Insolvency Bill as the much-amended Insolvency Act 1985, the whole issue of disqualification was highly controversial. The view was strongly expressed that the new provision empowering the Court to disqualify a director of an insolvent company, where his conduct as a director makes him unfit to be concerned in management, should include criteria for determining his unfitness. Thus section 14 of the Insolvency Act 1985 requires the Court, in considering whether a person's conduct makes him unfit to be a director, to have regard to the criteria set out in Schedule 2. These criteria include breaches of duty, misapplication of property, responsibility for transactions defrauding creditors, responsibility for causing the insolvency of the company, and responsibility for various breaches of statutory provisions including various formal secretarial requirements. While of course not obliged to do so, a Singapore Court might well

of automatic disqualification was dropped from the new provisions in the 1985 Act. See note 43 above.

[49] The English High Court can disqualify for up to 15 years following conviction of an indictable offence on double insolvency, or for fraud in winding up: Companies Act 1985 s. 295(2)

[50] [1985] 1 M.L.J. 97 at 105.

[51] See for example *Re Kingsgate Rare Metals Pty. Ltd.* and *Re Altim Pty. Ltd.*

[52] See Woon "Disqualification for Unfitness under Section 149 of the Companies Act" (1985) 27 Mal. L.R. 149 at p. 157.

use this Schedule as a useful additional checklist in considering an application for leave, especially in the case of double insolvency.

Appealing a Discretionary Decision

The first of the grounds of appeal before the Privy Council in the *City Country Club* case was whether on the material before it the Court of Appeal was entitled to interfere with the way the Chief Justice had exercised his discretion in considering the leave applications. Lord Diplock approved the Court of Appeal's approach in allowing the Attorney-General's appeal. This was that the Chief Justice in permitting the applicants to be managers only, had not given due regard to the fact that managers, like directors, are in a position of power to manipulate the corporate structure to their own interest. In Singapore's circumstances managers must have "a particular social responsibility to act with the utmost candour in the management of companies".

The Victorian Full Court in *Zuker* v. *Commissioner For Corporate Affairs*[53] regarded the power to give leave granted by the section as the exercise of a discretion, which was subject to review "upon the well-known principles relating to appeals against such judgments." It referred to the case of *Lovell* v. *Lovell*[54] which reviewed the authorities, making it clear that the appeal court will not make a fresh decision as if exercising the discretion at first instance. It will only reverse the judge's decision if it comes clearly to the conclusion that the judge was plainly wrong. This might be because he has given weight to irrelevant or unproved matter or has ignored or given insufficient weight to relevant considerations.

The Privy Council in an earlier appeal from Singapore in 1980, *Malayan Plant (Pte.) Ltd.* v. *Moscow Narodny Bank Ltd.*,[55] an appeal against the making of a winding up order, also considered the basis on which it should review the exercise of a discretion. It took the approach that it should not interfere with a decision unless satisfied that "a discretion has obviously been misused" and "unless fully satisfied that the exercise of the discretion has effected a substantial injustice to one or other of the parties."[56]

It would therefore seem on principle that an applicant refused leave at first instance will have to think twice before appealing that decision. Nonetheless appeals do appear to succeed. In the *City Country Club* case it was of course the Attorney-General's appeal that succeeded, thus denying the offenders the right to be employed as managers. In *Zuker's* case the Victoria Full Court again allowed an appeal, this time in the applicant's favour, giving him leave to be a director. So perhaps this may suggest that appeal courts may not in fact; be so reluctant to regard a decision at first instance as plainly wrong and to reverse it one way or the other.

53 [1981] V.R. 72 at 79.
54 (1950) 81 C.L.R. 513 at 532-4.
55 [1980] 2 M.L.J. 53. For a recent case see also *G.* v. *G.* [1985] L.S. Gaz. 2010 H.L.
56 Tests derived from *Odium* v. *Vancouver City* [1915] 85 L.J.P.C. 95 at 98 and *Short* v. *A.G. of Sierra Leone* [1961] 1 W.L.R. 1427 at 1433.

A Cautionary Tale For Lawyers

Professional people have the highest responsibility for ensuring proper legal and commercial standards whenever they are able to influence the course of events. If they fail to do so they have the furthest to fall. They stand to lose their greatest and irreplaceable asset, their professional integrity.

A lawyer may readily dance to the tune of a major commercial client in return for substantial fees. But if this means compromising proper legal and professional standards he should stand firm. Sadly, as in the Carrian case in Hong Kong and the *City Country Club case* in Singapore, one sees professionals in the dock alongside their clients.

In the *City Country Club* case, Chen, the lawyer was told by his clients to "work out" the prospectus problem. He was not an initiator of the scheme and had no financial interest in it, except in sharing his professional fees with his partners. Yet he was given the highest sentence of $4000 and 6 months prison in default, way ahead of Huang, the "ring leader",[57] fined $1000, and the others fined $500 each.[58] The learned District Court judge said that Chen "must accept absolute responsibility for the present predicament that he and the other accused persons now find themselves in".[59] Though subsequent courts were inclined to apportion more blame to the others, the case serves as a clear reminder that counsel may, like Chen, be painted as "the principal villain in the whole affair".[60]

Many offences that a lawyer advises against are technical in nature. It may be hard for the client to see them as other than an unnecessary obstacle in the way of an important commercial transaction. An example is that under section 76 it is an offence for a company to give financial assistance by way of security for the purchase of its own shares. It is sometimes a hard job to persuade a client to take this provision seriously. If for instance he buys a building, he may mortgage it to the bank to secure the necessary finance. But if, to save stamp duty and conveyancing costs, he arranges to buy the shares of the shell company that owns the building, he will take some convincing that the building is not available as security for the purchase of the shares. Yet the lawyer is obliged not to condone any such illegal transaction, which the client may see as a mere technicality.

A final point relates to the unfortunate role of the Assistant Registrar of Companies in the *City Country Club* case. Law has been said to be a prediction of what the judges will do. In this case the

[57] Lord Diplock's term at [1985] 2 M.L.J. 274.

[58] This can not have been because the entrepreneurs all stood to be disqualified from their many directorships, while Chen may have held no directorships. As disqualification is not punitive, the consequence of disqualification should not be taken into account in mitigating the level of sentencing. *Chew* v. *Hamilton* (1985) 3 A.C.L.C. 205 at p. 212.

[59] [1983] 2 M.L.J. xcvi at p. cvi.

[60] Sinnathuray J.'s colourful phrase, [1985] 1 M.L.J. 97 at 104. In this case faulty legal advice was not accepted as a ground for granting leave to be a director but it was apparently accepted as a factor in *Chew* v. *N.C.S.C. (No. 2)* (note 38 *supra)* at 216, even though the applicant was a legal practitioner. The Court thought he should not have made such an error of law (relating to a proposed take-over) but concluded that his conduct did not suggest a tendency to act contrary to the law.

Assistant Registrar's view of the law was taken to be law. Predictions of what administrators will do, including their own guidelines, predictions or practices, should not however be elevated to the status of law. In a jurisdiction where applications to the Court to review administrative action are rare, predictions of the administrator's view of the law assume the utmost importance. But they should not be regarded as law itself as even officials can be wrong.

Conclusion

The sorry tale of the *City Country Club* has therefore raised a number of significant legal points on prospectuses, and on disqualification of directors. In the wider context the case is important in helping to establish higher standards of commercial integrity in Singapore. One hopes that its lessons for professionals and entrepreneurs will not easily be forgotten. In the words of the Court of Appeal,[61] "It is essential... that managers of companies, like directors, are persons of integrity. In rapidly changing economic, financial and social circumstances in Singapore, directors of companies as well as managers have a particular social responsibility to act with the utmost candour in the management of companies." Yet, the circumstances surrounding a number of the more spectacular of corporate failures in Singapore since the boom conditions of the early eighties do not lead one to conclude that all of those lessons have yet been fully learned.

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[61] [1985] 1 M.L.J. 97, 105.

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