Singapore Journal of Legal Studies
[1997] 343 – 352

COMPENSATION FOR LOSS OF OFFICE

Grinsted v *Britannia Brands (Holdings) Pte Ltd*[1]

UNDER Section 168(1)(a) of the Companies Act[2] (hereinafter "the Act"), a company cannot, except in certain circumstances, make any payment to a director as compensation for loss of office as an officer of the company or of its subsidiaries or as consideration for his retirement as an officer of the company without the approval of its general meeting. The ambit of this section came under the review of the High Court several times recently[3] and any ambiguities relating to its interpretation appeared[4] to have been settled once and for all by the Court of Appeal in the case of *Grinsted* v *Britannia Brands (Holdings) Pte Ltd*.[5]

The appellant, Grinsted, was the regional director of the respondent company, Britannia Brands (Holdings) Pte Ltd (hereinafter "Britannia Brands"), a holding company incorporated in Singapore by two joint venture partners[6] to hold the interests of certain related companies involved in the business of manufacturing, marketing and distributing biscuits and grocery products

1 [1996] 2 SLR 97.

2 Cap 50 (1990 Ed). Section 168(1)(a) reads:

> It shall not be lawful –
>
> (a) for a company to make to any director any payment by way of *compensation for loss of office as an officer of the company* or of a subsidiary of the company or as consideration for or in connection with his retirement from any such office; ...
>
> unless particulars with respect to the proposed payment, including the amount thereof, have been disclosed to the members of the company and the proposal has been approved by the company in general meeting and when any such payment has been unlawfully made the amount received by the director shall be deemed to have been received by him in trust for the company. (emphasis mine)

3 See *Britannia Brands (Singapore) Pte Ltd* v *Sushil Premchand* [1995] 1 SLR 128, *Grinsted* v *Britannia Brands (Holdings) Pte Ltd* [1995] 3 SLR 157 and *Goh Kim Hai Edward* v *Pacific Can Investment Holdings Ltd* [1996] 2 SLR 109.

4 At the time of writing this paper, the plaintiff in *Goh Kim Hai Edward* v *Pacific Can Investment Holdings Ltd*, *ibid*, has appealed to the Court of Appeal on, *inter alia*, the issue discussed here.

5 *Supra*, note 1.

6 BSN SA, a French company and Britannia Industries Pte Ltd, a Singapore company.

in the Asia Pacific region. Before joining Britannia Brands, Grinsted was working for a competitor, also as a regional director.[7] Grinsted was persuaded by his former colleague and Britannia Brands' ex-chairman and chief executive, a Mr Rajan Pillai, to join Britannia Brands. Under the terms of the employment agreement, Grinsted was to continue to receive the remuneration he was entitled as the company's regional director for two years thereafter in the event that the agreement was terminated by the expiry of its term. This part of the remuneration was known as 'severance benefits'. Grinsted completed his extended term of employment on 12 April 1993. When he commenced proceedings against the respondents on 26 August 1993 to enforce his severance benefits, Rajan Pillai was no longer in charge of the management of Britannia Brands.

Britannia Brands then filed an application under Order 14A of the Rules of the Supreme Court 1990 for a determination whether the 'severance benefits' were compensation for his loss of office in the respondents within the meaning of Section 168 of the Act and was thus unlawful and unenforceable. The senior assistant registrar held that she was bound by the decision in *Britannia Brands (Singapore) Pte Ltd* v *Sushil Premchand*[8] and allowed the company's application. Grinsted's appeal to the High Court was dismissed by Lai Siu Chiu J.[9] On appeal to the Court of Appeal, Yong Pung How CJ, Karthigesu and LP Thean JJA overruled *Britannia Brands* v *Premchand* and allowed the appeal.

The Decision of the High Court

To fully appreciate the decision of the Court of Appeal, the arguments put forth by the parties and Lai Siu Chiu J's decision in the lower court should

7 International Nabisco Inc.

8 *Supra*, note 3. In this related case, the present respondents' subsidiary sued Premchand who at the material time was the company's director and managing director. The terms of his employment also included a severance package which, *inter alia*, gave him an option to purchase the company car should his service be terminated as a result of the occurrence of any of the stipulated events. One of such stipulated events was that the company could terminate the agreement at any time giving Premchand 90 days' prior written notice. The company subsequently terminated Premchand's service with notice for alleged misconduct and demanded the return of, *inter alia*, the vehicle. Premchand refused and purportedly exercised the option to purchase the car at its book value. The company sued for delivery up of the vehicle contending that the severance package had not been disclosed to the members of the company and approved by them in general meeting and was thereby unlawful and unenforceable under S 168(1)(a) of the Act. Goh Joon Seng J ruled in favour of the company.

9 *Ibid.*

first be looked at. Counsel[10] for Grinsted had an uphill task of convincing the court in view of Goh Joon Seng J's decision in *Britannia Brands* v *Premchand*. In *Premchand*, His Honour rejected Premchand's defence that Section 168 applied only to a situation where compensation is to be made to a director for loss of office of director as in the Australian case of *Lincoln Mills (Australia) Ltd* v *Gough*[11] and the Privy Council's decision in *Taupo Totara Timber Co Ltd* v *Darcy Kevin Rowe*.[12] The learned Judge referred to Associate Professor Walter Woon's *Company Law*[13] and held that unlike the corresponding Section 129 of the Australian Companies Act,[14] Section

[10] The same firms of solicitors in the present case represented Britannia and Premchand in the earlier case of *Britannia Brands* v *Premchand.*

[11] [1964] VR 193. In *Lincoln Mill* the defendant was a director as well as the managing director of the plaintiff company. The terms for employment as the managing director provided that the company would pay him a lump sum of £21,000 if the agreement was validly terminated in certain circumstances. The agreement was so terminated and the defendant was paid the agreed sum. Subsequently, however, the plaintiff brought an action for a declaration that the defendant held the money in trust for the plaintiff, or alternatively, for its return. Hudson J held that the defendant held two offices in the company, namely, that of a director and managing director. The payment to him was in compensation for his uncompleted term as managing director and was not an unlawful payment to him under Section 129 of the Australian Companies Act.

[12] [1978] AC 537. This was an appeal from the Court of Appeal of New Zealand. In *Taupo* the respondent was to serve the appellant company as its managing director for five years under a service contract. The service contract provided, *inter alia*, that the respondent was entitled to resign should the company be taken over during the period of his appointment and upon resignation he should be entitled to a lump sum payment. The company was taken over during the effective period and the respondent resigned. The company however refused to pay the lump sum and the respondent brought an action for its recovery which was dismissed. On appeal, the New Zealand Court of Appeal reversed the decision. The company subsequently appealed to the Privy Council. The Privy Council applied the decision in *Lincoln Mill* and upheld the Court of Appeal's decision. It held that, despite the difference in wording between the two statutes, Section 191 of the New Zealand Companies Act only restricted payments to directors in connection with the office of director and did not apply to payments made by the company to a director in connection with some employment held by him. In addition, the Privy Council also held that the section applied to uncovenanted payments to the directors and did not apply to payments which the company was contractually bound to make.

[13] Walter Woon, *Company Law* (1988), at 174.

[14] Section 129 of the Australian Companies Act reads:

> It shall not be lawful –
>
> (a) for a company to make to any director any payment by way of *compensation for loss of office as a director of that company* or of a subsidiary of that company or as consideration for or in connection with his retirement from any such office; ....
>
> unless particulars with respect to the proposed payment (including the amount thereof) have been disclosed to the members of the company and the proposal has been approved by the company in general meeting and when any such payment has been unlawfully made the amount received by the director shall be deemed to have been received by him in trust for the company. (emphasis mine)

191 of the New Zealand Companies Act or the English Companies Act 1948,[15] Section 168 of the Act refers to 'compensation for loss of office *as an officer of the company*.'[16] (emphasis mine) It is thus not restricted to compensation for loss of office as a director. Therefore, the severance package payable to Premchand, a director, in connection with his employment as a managing director was compensation for loss of office as an officer of Britannia and was unlawful within the meaning of Section 168.

At the hearing before the High Court in *Grinsted* v *Britannia Brands (Holdings)*,[17] the counsel for Grinsted, in addition to the same arguments put forward in the *Premchand*'s case, tried to argue that Section 168(1)(a) applies only to uncovenanted payments which the company, though not obliged, proposes to make but not to contractual obligations, as in the present plaintiff's case. Lai Siu Chiu J, approving Goh Joon Seng J's interpretation of Section 168(1)(a), held that the 'severance benefits' contravened Section 168. In addition, she held that Section 168 was wide enough to cover compensation paid pursuant to a contract as well as uncovenanted payments.

The Decision of the Court of Appeal

On appeal, the Court of Appeal helpfully laid down the guidelines for the application of Section 168. Karthigesu JA, in delivering the judgment of the court, said that

> In applying s 168 two considerations should be borne in mind. Firstly, not every person employed in an executive position by the company would be caught by the sanctions of s 168(1)(a) of the Act. He would also have to be a director of the company for what is not lawful by the section is 'for a company to make to any director any payment....' In other words he must be a director of the company as well as being employed by the company in an executive position, *ie*, an officer of the company, as a managing director of the company would be and as the appellant was in the respondents. Secondly, not every payment made to a director upon the cessation of his employment with the company would fall within s 168(1).[18]

[15] Section 191 of the New Zealand Companies Act and the Companies Act 1948 (UK) read: It shall not be lawful for a company to make to any director of the company any payment by way of *compensation for loss of office*, or as consideration for or in connection with his retirement from office, without particulars with respect to the proposed payment (including the amount thereof) being disclosed to members of the company and the proposal being approved by the company in general meeting. (emphasis mine)

[16] *Supra*, note 3, at 133-134.

[17] *Supra*, note 3.

[18] *Supra*, note 1, at 107.

On the first point, the Court of Appeal and the judges in the lower Court were probably correct on strict interpretation that Parliament intended to give section 168 a wider scope than that given to its Australian counterpart by *Lincoln Mills* when Parliament changed the words, 'for loss of office *as a director of that* company' in Section 129(1)(a) of the Australian Act to read, 'for loss of office *as an officer* of *the* company' in Section 168(1)(a) of the Act. However, there is still a question left unanswered as to why a broader scope was necessary, if it was ever intended.[19] The relevant Parliamentary Debates on the readings of the Companies Bill when it was passed shed no light on the rationale behind the change.[20] The argument against the wider interpretation is that if the law makes a distinction between remuneration paid to a director as a director and that paid to a director for services performed other than as a director, a similar distinction should be made between compensation for loss of office as a director and that for loss of office other than as a director. Remuneration paid to a director *qua* director is set by the general meeting and under Section 169(1) of the Act, a company cannot provide or improve emoluments for a director in respect of his office unless the provision is approved by a resolution that is not related to other matters. Therefore, it only follows that a director should not be compensated for loss of office as a director unless it has been approved by the company in general meeting. On the other hand,

[19] On this point, there are actually two schools of thought. The Cohen Committee, on whose recommendations the English section is based, suggested that the section be expressly restricted by referring specifically to 'loss of office as director' and loss of 'such office' as they did not see that the evil of restricting the ambit of the section would be so great as to warrant a wider interpretation; see Report of the Committee on Company Law Amendment (Cmnd 6659) para 92. The English Parliament, in enacting the section, did not adopt the recommended restriction. It has therefore been suggested by scholars such as Professor Farrar that the English draftsman did not intend Section 191 of the 1948 UK Act to be restricted only to loss of office as director. See Farrar, Furey and Hannigan, *Farrar's Company Law* (3rd ed, 1991), at 633. This restriction, however, was adopted by the Australians when they enacted Section 129. On the other hand, the Jenkins Committee in 1962 understood that the wording of the English provision only covered the narrower sense. They therefore recommended that the provisions be expressly extended to loss of any office in connection with the management of the affairs of the company or any subsidiary, and to payments to former directors. See Report of the Company Law Committee (Cmnd 1749) para 93. This suggestion, however, was again not adopted by the English Parliament. The situation in England is thus not finally settled, bearing in mind that *Taupo* was a Privy Council decision. The decision in *Taupo* has been described by Professor Gower as a 'ridiculous decision'. See Gower, *Gower's Principles of Modern Company Law* (5th ed, 1992), at 741.

[20] A possible explanation for the deviation from the Australian Companies Act was the decision of the Singapore draftsman to adopt the recommendation of the Jenkins Committee instead of that of the Cohen Committee, although this was not pointed out in the Parliamentary Debates, see *ibid*. It would prevent the use of severance benefits as a poison pill to takeover bids.

remuneration paid to a director for services rendered for the company other than as a director, including the position as a managing director, is usually paid pursuant to a service contract. Such contracts are usually made by the board of directors on behalf of the company. Since payment under the service contract is outside the scope of Section 169 and need not be approved by the company,[21] it seems strange that compensation for the loss of such service would require the company's approval. Further, such severance benefits are usually part and parcel of the remuneration package offered to the director under the service agreement, as in the cases of *Grinsted* and *Premchand*. It would be unusual that one part of the service agreement is subject to approval while the other is not. The reason behind the various provisions in the Act restricting the right of a director, including Section 168, is to ensure that the director does not take undue advantage of his position as a director in the company. However, if the director wears a second hat, with regard to his executive position, the law treats him like any other employee in the company. An ordinary employee would be allowed to enter into a service agreement containing a severance package should he resign without the need to obtain the approval of the general meeting. It is hard to see why the same should not apply to a director who is also in an executive position with the company. Having said that, it must however be admitted that the section can be subjected to abuse if a narrower interpretation is given. There can be cases where a so-called 'service contract' is entered into with an executive director with the very intention of terminating the contract and paying compensation in the form of capital and not of income, thus contravening the rules on maintenance of capital.[22] In this way, the requirements under Section 168(1)(a) would be circumvented should the section refer to loss of office as director only. However, as pointed out by the Cohen Committee,[23] this would be a rare situation and if a board actually decides that in dispensing with the services of an executive director, it is to the advantage of the company to negotiate a resignation by paying compensation rather than to dismiss the executive director and face legal proceedings, then it is the prerogative of the board to do so, subject to their duties to the company.

Nevertheless, the Court of Appeal managed to find that Section 168 did not apply to the severance benefits in this case under the second limb of

[21] See Walter Woon, *Company Law* (1988), at 176. However, sometimes the company may require that the director obtain the consent of the company in general meeting if he were to hold any other office of profit under the company except that of managing director or manager. For example, see art 72(h) of Table A, Fourth Schedule.

[22] This possible form of abuse was suggested by the Cohen Committee; see *supra*, note 19.

[23] *Ibid*.

its two-prong approach to the section. The Court quoted with approval the following passage from Hudson J's judgment in *Lincoln Mills*:

> The question whether [Section 129 of the Australian Companies Act] applies in any particular case must, in my view, be determined by inquiry as to the true nature of the payment that has been made. Assuming it has been made to a person who has held and has ceased to hold office as a director by reason of removal or retirement, it cannot be postulated in every such case that the payment falls into the category of those rendered unlawful by section 129(1)(a). The nature and circumstances of the payment must be looked at with a view to determining its true character. If as a result of investigation it becomes apparent that it is a compensation for loss of office of director or as consideration for retirement therefrom it will be unlawful unless the sanctions of a general meeting has been obtained. If, on the other hand, the payment appears to have been made as a result of other considerations, then, even though it may be coincident with the loss of or retirement from office as a director, the payment will not fall within those prohibited by the section...[24]

The Court looked at the nature and circumstances of Grinsted's remuneration and held that the severance benefits were a part and parcel of the remuneration package. The severance benefits were thus not intended to be paid with the object of compensating Grinsted for loss of office or in consideration for his retirement therefrom. They were payments which Britannia Brands agreed to make and were liable to make to Grinsted in the event that his employment was terminated according to the terms in the agreement. Therefore such severance benefits did not fall within Section 168(1).

The Court did not suggest whether a distinction should be made between covenanted and uncovenanted payments. Rather, the emphasis was on the object of the payment. With respect, the Court, in trying to do justice to Grinsted,[25] appeared to be drawing a fine line between severance benefits and compensations. Both are to be paid to a director upon the termination of his employment. Both can exist at the time when the remuneration to be paid to the director is negotiated so as to become part and parcel of the remuneration package. Both can be *covenanted payments*, that is, payments which the company has agreed to make and is thus liable to make to the

[24] *Supra*, note 1, at 106-107.

[25] The Court seemed to be influenced in its decision by the fact that Grinsted was 'enticed' to join the respondent from its competitor, see *ibid*.

director in the event that his employment is terminated according to the terms of his employment agreement. How then is one able to ascertain whether a sum payable on cessation of office is to be considered a severance benefit or compensation? Arguably, the only distinction that may be visible between the two payments is that the former is payable on the occurrence of a stipulated event leading to the resignation or dismissal of the director regardless of the culpability of the director. Compensation generally refers to payment made to make amends for loss or injury to person or property, or as recompense for some deprivation. Therefore, to be entitled for compensation, a person must have suffered some loss or be deprived of his legal right. In the case of a director, it would have to be a situation where he is wrongly removed from his office so that he has suffered a loss. Even if there is a difference between severance benefits and compensations, the severance benefits should rightly be said to have been paid 'in connection with' the director's retirement from any such office. Therefore, it would still fall under the second limb of Section 168(1)(a).

Finally, the Court held that the severance benefits in question were in any case excluded by Section 168(5)(d)[26] as a '*bona fide* payment by way of pension or lump sum payment in respect of past services' which were payable during a two-year period after Grinsted's retirement on the expiry of the agreement or the expiry of any renewal as long as it did not exceed his total emoluments in the three years preceding his retirement. Therefore Britannia Brands could not rely on the defence raised by invoking Section 168 and the case would have to go to trial on the other defences.

The Court did not touch on two other points raised in the High Court. In the High Court, Lai Siu Chiu J had held that Section 168(1)(a) applies to compensation paid pursuant to a contract as well as uncovenanted payments. She apparently did not agree with the Privy Council in *Taupo*. In *Taupo*, Lord Wilberforce pointed out that

[26] S 168(5)(d) reads:

> Any reference in this section to payments to any director of a company by way of compensation for loss of office or as consideration for or in connection with his retirement from office shall not include –
>
> ...
>
> (d) any *bona fide* payment by way of pension or lump sum payment in respect of past services, including any superannuation or retiring allowance, superannuation gratuity or similar payment, where the value or amount of the pension or payment, except in so far as it is attributable to contributions made by the director, does not exceed the total emoluments of the director in the 3 years immediately preceding his retirement or death;
>
> ...

> [Section 191] as a whole read with .... the words "proposed payment" and "proposal" point to a prohibition of uncovenanted payments as contrasted with payments which the company is legally obliged to make. Their Lordships note that this contrast is drawn by the authoritative Report of the Jenkins Committee (1962) (Cmnd 1749), para 93; there is also textbook support for it...[27]

Lai Siu Chiu J rejected the above argument as

> accepting that argument would again allow the plaintiff to circumvent the mischief the section is aimed at, namely, to prevent secret payments/ golden handshakes to directors and other executives of companies; surely what must be considered is the nature of the contractual obligation – if it amounts to compensation for loss of office, it is prohibited unless approved by a company's members.[28]

With respect, it is suggested that the view adopted by the Privy Council in *Taupo* is preferred for the reasons stated by his Lordship. The Section should be restricted to only uncovenanted payments, whether they are known as severance benefits or compensations. Payments which the company is legally obligated to pay is in any way excluded by Section 168(5)(c) which provides that the Section shall not include 'any bona fide payment by way of damages for breach of contract'.[29]

The other point that was brought up in the High Court was whether Section 168(1)(a) allows *ex post facto* approval. On the facts, there were two other senior executives, one Huffman and one Packer, who were given similar employment agreements as that received by Grinsted. It is not clear from the facts whether they were directors in Britannia Brands as well, but presumably they were. Britannia Brands chose to honour Huffman and Packer's agreements notwithstanding that the same did not have shareholders' approval. Lai Siu Chiu J held, quoting a passage from Walter Woon's *Company Law*, that it was within the prerogative of the company to approve the contracts with Huffman and Packer retrospectively to satisfy Section 168, although this would not change Grinsted's case.[30] Although the Court of Appeal expressed no opinion on this point, it is submitted that the learned judge's (and for that matter, the learned author's) in-

[27] *Supra*, note 12, at 546.
[28] *Supra*, note 3, at 168.
[29] This was in fact what the Jenkins Committee thought that S 194(3) of the 1948 UK Act, which is similar to our S 168(5)(c), covered. See *supra*, note 19.
[30] *Supra*, note 3, at 168-169.

terpretation of the section is plausible. What Section 168(1)(a) is trying to prohibit is payment to directors without the knowledge and approval of the shareholders. Therefore, it should not matter whether the approval is given before or after the payment is made. Should the shareholders decide that they would not approve of the payment after it has been made to the director, the director would hold the payment on trust for the company.

Conclusion

Grinsted v *Britannia Brands* was undoubtedly an interesting case. The Court of Appeal might have surprised quite a number of people when it overruled Goh Joon Seng J's judgment in *Premchand* case.[31] In holding that our Section 168(1)(a) is wider in scope than its Australian, New Zealand or English counterparts, the Court was probably correct on a strict interpretation of the Section, although it is questionable as to the real mischief behind the wider meaning. However, by trying to draw a distinction between 'compensation' and 'severance benefits', the Court was perhaps paying too much attention to semantics. The Court could in any case have reached the same conclusion by ruling that the present situation fell under the exceptions to section 168 without having to resort to distinguishing between the two terms. It is a pity that the Court did not comment on whether Section 168 applies to both covenanted as well as uncovenanted payments; nor did it express its opinion on whether Section 168 applies to *ex post facto* approval by the shareholders. However, in leaving some questions unanswered, it opens up the opportunity for future discussion when Section 168 is once again brought before the Court of Appeal, which may only be too soon.[32]

LAN LUH LUH*

[31] Two other High Court judges actually based their decision on Goh Joon Seng's judgment: Lai Siu Chiu J in *Grinsted* v *Britannia Brands* and Judith Prakash J in *Goh Kim Hai Edward* v *Pacific Can Investment Holdings Ltd*, *supra*, note 3.

[32] As in *Goh Kim Hai Edward* v *Pacific Can Investment Holdings Ltd*, *supra*, note 3.

* LLB (Hons) (NUS); LLM (Cantab); Advocate & Solicitor (Singapore); Lecturer, Faculty of Business Administration, National University of Singapore. I thank my colleague Ms Susanna Leong for her valuable comments on an earlier draft of this paper. All errors and omissions remain mine.