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UNIVERSITY OF LONDON
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74149

In The Privy Council No. 12 of 1963

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES
IN ITS EQUITABLE JURISDICTION
IN APPLICATION INSTITUTED BY SUMMONS IN
PROCEEDINGS TO WIND UP No. 245 of 1961

In the Matter of

INTERNATIONAL VENDING MACHINES PTY. LIMITED (in Liquidation)
And in the Matter of the Companies Act 1936 Section 308

Between

LOUIS STEEN and JOSEPH STEEN — Appellants (Respondents)

and

CHARLES ALLEN LAW the Liquidator of INTERNATIONAL VENDING MACHINES PTY. LIMITED - - - Respondent (Applicant)

CASE FOR THE APPELLANTS

1. This is an appeal from a judgment of Mr. Justice Jacobs dated the Twentieth of December One thousand nine hundred and sixty-one and is brought pursuant to leave granted by him on the Eighteenth day of October One thousand nine hundred and sixty-two, he in each case sitting as the Supreme Court of New South Wales.

p.255
p.275

2. The questions for decision relate to the claim of the Liquidator of INTERNATIONAL VENDING MACHINES PTY. LIMITED against the Appellants as former Directors of that Company for repayment of a loan made on the authority of the Appellants as such Directors by INTERNATIONAL VENDING MACHINES PTY. LIMITED (hereinafter referred to as I.V.M. Pty. Ltd.) to a Company known as A.M. HOLDINGS PTY. LIMITED.

3. The facts briefly summarised are as follows:—I.V.M. PTY. LTD. was incorporated in New South Wales in June 1958 and until June 1959 the issued capital of the Company comprised 102 Shares of £1 each, of which the Appellants LOUIS STEEN and JOSEPH STEEN each held 46, and 10 were held by one SYDNEY STEEN. At all relevant times the Appellants were the sole Directors of the Company.

Record. p.255, ll.13-21

4. As from August or September 1958 the principal business of the Company was the sale to members of the public of automatic Vending Machines sometimes called "Coin in the Slot" Machines. In the various States of the Commonwealth where the Company made sales associated Companies had been formed (referred to in the judgment as Merchandising Companies). In return for these Merchandising Companies undertaking by Contract with the purchaser of a Machine to keep the Machine stocked and collect the coins and service and repair the Machine, and to guarantee the purchaser of a Machine 15% annual return upon the purchase price of his Machine—later increased to 20%—the Company agreed with the respective Merchandising Companies to pay to them 10% of the sale price of each Machine in respect of which that Merchandising Company so undertook the servicing and repair. These Merchandising Companies were known as AUTOMATIC MERCHANDISING (N.S.W.) PTY. LTD., AUTOMATIC MERCHANDISING (Victoria) PTY. LTD., AUTOMATIC MERCHANDISING (Queensland) PTY. LTD., AUTOMATIC MERCHANDISING (Tas.) PTY. LTD., and INTERNATIONAL AUTOMATIC MERCHANDISING (S. Aust.) PTY. LTD.

p.255, l.27 to p.256, l.2

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Record.
p.256, ll.4-6

5. The accounts for the six months ended 31st December 1958 of I.V.M. PTY. LTD. showed a nett profit of over £53,000, but by March 1959 it was apparent to the Accountants and Auditors for I.V.M. PTY. LTD. that the taxable profit of the Company for the year ending 30th June 1959 would be very large and it subsequently transpired that the nett profit disclosed for that tax year was over £263,000.

p.256, ll.25-27
ll.43-44
p.261, ll.9-10

p.263, ll.22-26
p.264, ll.24-26

6. I.V.M. PTY. LTD. had from time to time made loans without interest, and without security, to various of the said Merchandising Companies, and had also made loans without security and without interest to the said three Shareholders—the relevant Objects in its Memorandum in these respects being:

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3. The objects for which the Company is established are all or any of the following it being intended that the objects or all or any of the objects specified in each paragraph of this clause shall except and unless where otherwise expressed in such paragraph be in no way limited or restricted by reference or inference from the terms of any other paragraph or group of paragraphs of the name of the Company and shall be capable of being pursued as an independent object and either alone or in conjunction with all or any other paragraph or group of paragraphs and the discontinuance or abandoning of all or any of the business of objects hereinafter referred to shall not prevent the Company from carrying on any other business authorised to be carried out by the Company and IT IS HEREBY EXPRESSLY DECLARED that in the interpretation of this Clause the meaning of any of the Company's objects shall not be restricted by reference to any other object or by the juxtaposition of two or more objects and that in the event of ambiguity this clause shall be construed in such a way as to widen and not to restrict the powers of the Company.

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(j) To carry on the business of money lender and for this purpose to obtain all necessary licenses and to loan money and negotiate loans to draw accept endorse and discount bills of exchange promissory notes or other securities.

(k) To establish Companies and Associations for the prosecution or execution of undertaking a works projects or enterprises of any description whether of a private or public character in the Commonwealth of Australia or elsewhere and to acquire and dispose of shares and interests in such Companies or Associations or in any other Companies or Associations or in the undertakings thereof.

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(ss) To invest and deal with the monies of the Company in such manner as may from time to time be determined and loan money to any person or Company corporation or public body with or without security and on such terms as may seem expedient.

(aaa) To carry out all or any of the foregoing objects as principals or as agents for or any partnership or in conjunction with any person public authority or Company and in any part of the world and to aid or subsidise any other person public authority or Company in carrying out any of such objects. 10

(bbb) To do all such acts matters and things as the Company may think incidental or conducive to the attainment of the above objects or any of them.

7. Under the Income Tax and Social Service Contribution Act 1936-1959 of the Commonwealth Companies deriving profit in Australia were liable to a flat rate of tax per pound of taxable profit, usually called primary tax. If a Company were, as defined in Division 7 of Part III of that Act, a private Company, it was liable for additional tax in respect of such of its distributable income as defined in such 20 Division, in excess of an authorised retention allowance, as it did not distribute in Dividend in the year of income. I.V.M. PTY. LTD. as such a private Company for purposes of Commonwealth Income Tax would, if nothing had been done prior to the 30th June 1959, have been heavily taxed in respect of its profits so far as not distributed by way of Dividend and, in so far as distributed by way of Dividend, the said three Shareholders would have been taxed.

Record. p.95, 1.32 et seq. p.96 ll.1-17

8. The Appellants and their advisers had in mind that the success of I.V.M. PTY. LTD. in the Vending Machine business would, in the future, justify passing the control of the entire group consisting 30 of I.V.M. PTY. LTD. and the Merchandising Companies to a Public Company quoted on the Stock Exchange, and the Appellants wished also to bring all the Merchandising Companies under control of one Company.

p.256, ll.7-42

9. Following upon a letter to I.V.M. PTY. LTD. in March 1959 from the Company's Accountants and Auditors a conference was held with the Appellants at which reference was made to the taxation difficulties, and the Accountant was authorised to seek expert advice.

p.257, ll.45-46

10. Thereafter two conferences were held between the Company's advisers and a Mr. Challoner, an Accountant and Specialist 40 in Taxation matters, at which, although the Appellants were not present, various proposals were discussed including one that a Com-

p.258, ll.26-33

pany be formed and that the Shares in I.V.M. PTY. LTD. be sold by the three Shareholders to such new Company which would be one having a sufficient number of members and with voting rights suffi-

ciently distributed to make it non-private for tax purposes. I.V.M. PTY. LTD. thus becoming a Subsidiary of a Company, public for tax purposes, would itself for such purpose be treated as non-private and therefore not liable to undistributed profits tax.

Record. p.258, ll.29-33

In order to enable the new Company to purchase the Shares in I.V.M. PTY. LTD. it was proposed at the second of such conferences that I.V.M. PTY. LTD. lend to the new Company the necessary monies. Notes of such conferences were made by Mr. Challoner. Such notes relating to the second conference on 4th May 1959 were tendered by the Appellants but rejected by His Honour, this document being M.F.I. (1).

p.56-57

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11. Section 148 of the Companies Act 1936 provided:—

148. (1) Subject to the provisions of this section, it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company:
Provided that nothing in this section shall be taken to prohibit—
(a) where the lending of money is part of the ordinary business of a company, the lending by a company of money in the ordinary course of its business;
(b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase by trustees of fully-paid shares in the company to be held by or for the benefit of employees of the company, including any director holding a salaried employment or office in the company;
(c) the making by a company of loans to persons, other than directors, bona fide in the employment of the company with a view to enabling those persons to purchase fully-paid shares in the company to be held by themselves by way of beneficial ownership.

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(2) The aggregate amount of any outstanding loans made under the authority of paragraphs (b) and (c) of the proviso to sub-section one of this section shall be shown as a separate item in every balance-sheet of the company.

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(3) If a company acts in contravention of this section the company and every officer of the company who is in default shall be guilty of an offence.
Penalty: One hundred pounds.

Record.
p.258, ll.33-37
p.259, ll.31-35
p.265, ll.1-14

12. Though this Section was considered at the second of the conferences referred to in Paragraph 10 above the evidence of the Appellants and Mr. Purcell of the Accountants' Staff, who thereafter conveyed the advice to the Appellants, was that no reference was made to that Section or to any possible illegality in the making of such a loan in any discussion with the Appellants. This evidence by the Appellants and Mr. Purcell was not accepted by Mr. Justice Jacobs as establishing that the Appellants acted without knowledge of Section 148 if the onus were on the Appellants to prove their ignorance. If the onus were upon the Liquidator to prove this knowledge, then His Honour considered there was no evidence. 10

p.258, ll.43-45

13. After the second of the conferences referred to in Paragraph 10 the said Mr. Purcell spoke to the Appellants and in June 1959 the proposal was carried out as follows:—

p.259, ll.37-40

(a) The new Company was formed called A.M. HOLDINGS PTY. LIMITED of which the Appellants were the first Directors.

p.260, ll.6-9

(b) Each of the Appellants and the said SYDNEY STEEN applied for and was allotted by A.M. HOLDINGS PTY. LIMITED a small parcel of £1 convertible Preference Shares 20 and a small parcel of £1 Ordinary Shares.

p.260, ll.17-24

(c) I.V.M. PTY. LTD. lent £205,000 to A.M. HOLDINGS PTY. LIMITED from which that Company paid £90,000 to each of the Appellants for their Shares in I.V.M. PTY. LTD. and £20,000 to the said SYDNEY STEEN for his Shares in I.V.M. PTY. LTD.

p.260, ll.24-26
p.260, ll.38-42

(d) The said three Steens paid the monies so received by them to I.V.M. PTY. LTD. thereby extinguishing their Loan Accounts and placing each of their accounts with that Company in credit. 30

p.260, ll.9-13

(e) Twenty-five persons applied for and were each allotted in A.M. HOLDINGS PTY. LIMITED 50 redeemable Preference Shares. These twenty-five persons did not include the Appellants or the said SYDNEY STEEN.

p.260, ll.30-35
p.260, ll.35-37

(f) Each of the Appellants applied to A.M. HOLDINGS PTY. LIMITED for 22,500 £1 convertible Preference Shares and the said SYDNEY STEEN applied for 5,000 of such Shares. All such Shares were allotted. Payment in each case was made from the Applicant's account with I.V.M. PTY. LTD. which was in credit. A.M. HOLDINGS PTY. LIMITED 40 then applied to I.V.M. PTY. LTD. and was allotted 50,000 £1 Shares.

14. One result of these steps was that A.M. HOLDINGS PTY. LIMITED became for tax purposes a non-private Company, and I.V.M. PTY. LTD. as its Subsidiary also became non-private for tax purposes.

Record.
p.262, ll.43-47,
p.263, ll.1-3
p.271, ll.35-45

15. On the profits of I.V.M. PTY. LTD. as returned for Income Tax for the years ending 30th June 1959 and 30th June 1960 the difference between the tax to which the Company was liable and the tax to which it would have been liable had it remained for tax purposes a private company amounted to £101,073/5/6.

p.261, ll.5-8
p.271, ll.45-47
p.272, l.1

16. The Appellants and the said SYDNEY STEEN pursuant to an Agreement made in May 1960 sold their interest in A.M. HOLDINGS PTY. LIMITED to a Company in which none of them had any shareholding or other interest though, until after the 30th June 1960, the Appellants continued as Directors of I.V.M. PTY. LTD. 10

p.3, ll.15-18
pp.1-2

17. On the Eighth day of May 1961 an Order for the winding up of I.V.M. PTY. LTD. was made by the Supreme Court of New South Wales and on the Seventeenth day of May 1961 the Liquidator issued the Summons against the Appellants which originated these proceedings.

18. The Summons was issued under Section 308 of the said Companies Act which provides as follows:

308. (1) If in the course of winding up a company it appears that any person who has taken part in the formation 20 or promotion of the company, or any past or present director, manager, or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator, or officer, and compel him to repay or restore the money or property or any 30 part thereof respectively with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance, or breach of trust as the court thinks just.

(2) This section shall extend to and in respect of the receipt of any money or property by any director of the company during the two years preceding the commencement of the winding up, whether by way of salary or otherwise, appearing to the Court to be unfair 40 or unjust to other members of the company.

(3) The provisions of this section shall have effect notwithstanding that the offence is one for which the offender may be criminally liable.

(4) Where an order for payment of money is made under

this section, the order shall be deemed to be a final judgment.

19. The matter having been heard Mr. Justice Jacobs by his judgment delivered on the 20th of December 1961 held as follows:—

Record. p.264, ll.10-31 and ll.40-41

(a) That the loan transaction attacked was not within the first proviso to Section 148 and that a breach of that Section had occurred.

p.264, ll.32-39

(b) That it was not material to the question of liability of the Appellants whether or not they knew of Section 148 or that what they proposed to do would be in breach of that Section. 10

p.267, ll.35-39 p.268, ll.11-13

(c) That where the act of Directors complained of was ultra vires the Company the Directors who knew the circumstances and participated in the decision were liable even if they so acted bona fide and in reliance upon expert advice that such conduct was within power.

p.268, ll.26-29 p.268, ll.43-46 p.269, ll.7-10

(d) That though the Court has a discretion under Section 308 to order repayment of less than the loss to the Company the onus was upon the Appellants to show reasons why they should be relieved of any part of the loss to the Company.

(e) That the discretion referred to above should not be exercised 20 in favour of the Appellants because—

p.269, ll.11-36

(I) Though the Appellants regarded both I.V.M. PTY. LTD. and the Merchandising Companies as one group, they took no steps to set aside funds to meet the Merchandising Companies' guarantee to Machine purchasers of 20% return and yet disbursed by loan without security a very large sum to a Company with no separate assets.

p.269, ll.37-47 p.270, ll.1-6

(II) The Appellants themselves received the benefit of substantially the whole of the monies illegally disbursed and no other action would lie against any person or Company 30 for recovery of the monies.

p.270, ll.7-21

(III) When regard was had to the burden of Company Income Tax (even on the basis of a non-private Company) the Directors could not in law have distributed the monies in question, and they gave no attention to the question of whether in a business sense the monies could properly be distributed.

p.271, ll.35-47 p.272, l.1

(f) That in computing the loss to the Company, though regard should, in the circumstances, be had to the £50,000 which 40 was subscribed indirectly from the loan monies to I.V.M. PTY. LTD., no regard should be had to any tax saving for the year ending 30th June 1960 from the change of I.V.M. PTY. LTD. for tax purposes from private to non-private Company.

p.272, ll.1-17

(g) That no regard should be had to the reduced tax payable by I.V.M. PTY. LTD. for the year ended 30th June 1959

in computing the loss of the Company on the ground that a similar saving could have been achieved without the making of the illegal loan, and that it was immaterial that the Directors were never aware of any such alternative course.

Record. p.272, ll.19-43

(h) That no relief should be afforded to the Appellants under Section 361 of the Companies Act 1936 since they had received the benefit of the transaction to the extent of the Company's loss, and, but for the illegality of the transaction arising from Section 148, the Appellants as recipients of the monies would have been liable merely as recipients of traceable monies. 10

The said Section 361 provides as follows:—

361.(1) If in any proceeding for negligence, default, breach of duty, or breach of trust against a person to whom this section applies it appears to the court hearing the case that that person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with 20 his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him, either wholly or partly, rfom his liability on such terms as the court thinks fit.

(2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the Court for relief, and the court on any such appli- 30 cation shall have the same power to relieve him as under this section it would have had if it had been a court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought.

(3) Where any case to which subsection one of this section applies is being tried by a judge with a jury, the judge, after hearing the evidence may, if he is satisfied that the defendant ought in pursuance of that subsection to be relieved either in whole or in part 40 from the liability sought to be enforced against him, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwies as the Judge may think proper.

(4) The persons to whom this section applies are the following:—

(a) directors of a company;
(b) managers of a company;
(c) officers of a company;
(d) persons employed by a company as auditors, whether they are or are not officers of the company.

(i) That the Appellants were accordingly liable jointly and severally to repay to the said Company the sum of £150,000 with interest from the 25th day of June 1959 to date of repayment at the rate of Five per centum per annum, and that the Appellants should pay the costs of the Appellant on such Summons. 10

Record. p.272, ll.44-47 p.273, ll.1-2

20. The Appellants submit that the judgment of Mr. Justice Jacobs is incorrect and should be reversed for the following amongst other

REASONS

(1) because His Honour erred in finding that the sum of £200,000 being part of the sum of £205,000 paid by I.V.M. PTY. LTD. to A.M. HOLDINGS PTY. LIMITED was applied in breach of Section 148 of the Companies Act 1936.

(2) Because His Honour was in error in holding that the words "its business" in Proviso (a) to Section 148 (1) of the said Act meant "the ordinary business of the Company". 20

(3) Because His Honour should have found that the numerous loans by I.V.M. PTY. LTD. both to the Merchandising Companies and to the Shareholders having been made without interest and without security it was not relevant to a determination of whether the loan of £200,000 came within Proviso (a) to Section 148 (1) that it was without interest and without security. 30

(4) Because His Honour should have found that the loan of £200,000 was made in the ordinary course of the business of I.V.M. PTY. LTD. inter alia on the grounds—
  (a) That such loan was to a Company brought into existence for the purpose of being associated with the Lending Company and the Merchandising Companies.
  (b) That such loan was made to enable that association to be achieved thereby strengthening the association between the Lending Company and the Merchandising Companies. 40
  (c) That such loan was made to enable the Lending Company to arrange its affairs so as not to attract certain taxes.

(5) Because His Honour should have found that the loan in question was made by I.V.M. PTY. LTD. in the "ordinary course of its business" within the meaning of Proviso (a) to Section 148 (1) of the said Act.

(6) Because His Honour should have held that any infringement of Section 148 did not render the loan monies irrecoverable.

(7) Because His Honour erred in deciding that the Directors were liable on the basis that the payment of £200,000 from I.V.M. PTY. LTD. to A. M. HOLDINGS PTY. LTD. was ultra vires the Company irrespective of whether—
  (a) They were aware of the provisions of Section 148 of the said Act, or
  (b) They participated in such transaction pursuant to competent advice, or 10
  (c) They were guilty of any negligence mala fides or independent wrong doing.

(8) Because His Honour should have held that before any liability could be found against a Director the Court should inquire into his conduct and the Liquidator must establish, even if the transaction attacked be ulra vires the Company, that the Director participated therein—
  (a) With knowledge of the illegality, or
  (b) With knowledge that the transaction was ultra vires 20 the Company, or
  (c) Negligently or mala fide.

(9) Because His Honour should have held that a Director who participates in an act ultra vires the Company is only liable for misfeasance if it be established by the liquidator that all the answers to questions of fact were known to the Director upon which would depend the question of whether the transaction was or was not ultra vires the Company.

(10) Because His Honour ought to have upheld the submission that the question of whether there was a breach of Section 30 148 of the said Act involved a question of fact as to what comprised the ordinary course of the business of I.V.M. PTY. LTD.

(11) Because His Honour should have found that he was not satisfied that the Appellants knew all the answers to questions of fact upon which would depend the question of whether the transaction was or was not in breach of the said Section 148.

(12) Because His Honour should have held that a Director guilty of misfeasance is only liable for loss to the extent 40 of such monies as the Liquidator proves the Company would not otherwise have paid away by the adoption of some other course not involving misfeasance.

(13) Because His Honour should have found—
  (a) That had the plan adopted not been followed some sums would have been distributed by way of Dividend, or

(b) That the Liquidator had not proved that no Dividend would have been declared.

(14) Because His Honour should have found that there was no loss proved by the Liquidator or, alternatively, that there was no evidence as to what the loss was.

(15) Because His Honour should have upheld the submission that the principle of British Transport Commission v. **Gourley** (L. R. 1956 A.C. 185) applied, and that accordingly the tax saved should be brought into account in computing the loss of the Company. 10

(16) Because His Honour erred in refusing to take into account the tax saved by the Company on the ground that there were other courses open to the Company which would have saved the tax without the making of the loan.

(17) Because His Honour erred in finding that the existence of any such other courses was relevant to his decision that the tax saved should not be taken into account in the absence of evidence—

(a) That such other courses were known to the Appellants to be available, and 20

(b) That such courses were courses which the Appellants as Shareholders and the said SYDNEY STEEN would have been prepared to adopt.

(18) Because His Honour erred in finding that there was no such relationship between the loan and the saving of tax as would enable it to be said that the result of the loan was the saving of tax.

(19) Because his Honour ought specifically to have made a finding accepting the evidence of Mr. Challoner as to the two conferences held upon the ground that no challenge 30 was made to his evidence by Counsel for the Liquidator and that his evidence of such conferences was accepted by such Counsel and that His Honour invited Counsel for the Appellants not to lead the witness Mr. Purcell through evidence of such two conferences.

(20) Because His Honour erred in law in rejecting as inadmissible in evidence the statement dated the Fourth of May One thousand nine hundred and fifty-nine marked for identification (1) and that His Honour should have admitted the said document into evidence. 40

(21) Because His Honour ought to have found:

(a) That the suggestion for the carrying out of the tax saving plan in a manner involving a loan by the Company for the purpose of enabling the purchase of the Shares in I.V.M. PTY. LTD. by the Company proposed to be formed and made a non-private Company for taxation purposes originated with Mr. Challoner.

(b) That the said suggestion in no way originated from any of the three Steens.

(c) That the formation of A. M. HOLDINGS PTY. LIMITED and the carrying out of the transaction involved in the plan, including the loan by the Company to A. M. HOLDINGS PTY. LIMITED were in accordance with the advice of the Company's Accountants, Auditors and Advisers.

(d) That the advice referred to in (c) was accepted by the Directors of the Company. 10

(e) That any error with regard to the applicability and effect of Section 148 of the Companies Act 1936 was an error on the part of the Company's Accountants, Auditors and/or Advisers.

(f) That it was reasonable for Directors to act upon the advice of the Company's Accountants, Auditors and/or Taxation experts with regard to accountancy, auditing and taxation matters, and unreasonable not so to do.

(22) Because, in so far as His Honour declined to exercise his discretion under Section 308 on the ground that there was no evidence that the Appellants considered prior to the loan whether they could safely disburse such money either as dividends or loan, His Honour applied a wrong test since His Honour should have found that it was the intention of the parties and formed part of the series of contemplated dealings that the money disbursed should be returned to the Company by loans from the members so that no question arose of whether the monies could at the date of the loan be safely disbursed. 20

(23) Because, in so far as His Honour declined to exercise his discretion on the ground that when account was taken of Company Taxation the loan monies could not have been wholly distributed in law His Honour erred in not having regard to the intention that such monies should be returned by the Shareholders to the Company. 30

(24) Because in so far as His Honour declined to exercise his discretion under Section 308 on the ground that the transaction being ultra vires it was only the added feature of illegality which would have prevented I.V.M. PTY. LTD. tracing the monies into the hands of the Appellants His Honour— 40

(a) Erred in adopting the view that I.V.M. PTY. LTD. could have traced these monies into the hands of the Appellants and obtained any order against them, or

(b) Had no evidence before him from which he could hold that I.V.M. PTY. LTD. could have traced.

(25) Because His Honour ought to have found that the tax saving plan was entered into bona fide for the interest and welfare of the Company.

(26) Because His Honour ought to have found that the transaction including the formation of A. M. HOLDINGS PTY. LIMITED was for the benefit of the Company and for the benefit of the Shareholders and was not designed to affect the interest of Creditors.

(27) Because His Honour should have exercised his discretion, at least to the extent of not ordering the Appellants to repay £20,000 being the amount received by the said SYDNEY STEEN. 10

(28) Because His Honour ought to have exercised his discretion under Section 308 of the said Act so as to require the Appellants to restore less than any proved loss to the Company.

(29) Because His Honour applied the wrong principles in exercising his discretion under Section 361 of the said Act and ought to have excused the Appellants—

(a) Wholly, or 20

(b) In part.

(30) Because His Honour erred in ordering that the Appellants pay the costs of the said Summons and should have ordered that the Summons be dismissed an dthat the Liquidator pay the costs of the Appellants.

C. L. B. MEARES

FORBES OFFICER