



# WMH Law Corporation

*Advocates & Solicitors*

12 Eu Tong Sen Street, #07-169, The Central, Singapore 059819

Author's Details:-



## **Mark LEE**

- Joint Managing Director
- Head of Corporate & Commercial Dispute Resolution Practice

HP: (+65) [9182 9643](tel:91829643)

Office: (+65) [6514 6352](tel:65146352)

Email: [mark.lee@wmhlaw.com.sg](mailto:mark.lee@wmhlaw.com.sg)

[www.wmhlaw.com.sg](http://www.wmhlaw.com.sg)

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## **Power to Grant Relief – Directors' Liability**

Civil Litigation Practice Series





**“Forgiveness for a director’s negligence, default, breach of duty or breach of trust”**

## **Power to Grant Relief; Section 391 of the Companies Act**

### **Onerous Duties of a Director and a Statutory Counterbalance?**

In our previous article, we touched on the various duties and obligations imposed upon a director both by statute and under general law.

In this installment, we touch on Section 391 of the Companies Act (Cap 50) (“the Act”); which provides the Court a power to relieve directors from the consequences of their negligence, default, breach of duty or breach of trust.

In this article, we seek to provide a brief snapshot of the ambit of such a power of the Court which reads as follows:-

*“Power to grant relief  
391.—(1) If in any proceedings for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken*

*that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.*

*.  
. .*

*(3) The persons to whom this section applies are —*

*(a) officers of a corporation;*

*(b) persons employed by a corporation as auditors, whether they are or are not officers of the corporation;*

*(c) experts within the meaning of this Act; and*

*(d) persons who are receivers, receivers and managers or liquidators appointed or directed by the Court to carry out any duty under this Act in relation to a corporation and all other persons so appointed or so directed.”*

## How will Section 391 of the Act be applied by the Courts?

The Court's power to relieve directors from the consequences of their negligence, default, breach of duty or breach of trust prima facie appears to be at odds with the need for checks and balances to mitigate the risk of mismanagement by directors.

As such, Section 391 will only be judiciously granted after careful consideration of the facts in each case and guided by the following principles:-

- a) The court may exercise its power to relieve a director either in proceedings brought against him or prospectively, before any proceedings are brought.
- b) Directors may only apply for relief under Section 391 of the Act against potential claims brought by the company or on the company's behalf. An application for relief under section 391 of the Act is **not** available for proceedings brought by third parties other than the company.
- c) In order for relief under Section 391 to be obtained three things must be shown: (a) that the director acted honestly; (b) that he acted reasonably; and (c) that it is fair to excuse him having regard to all the circumstances of the case.

- d) The burden is on the director to show and prove that he acted honestly and reasonably.
- e) Whether a director acted "**honestly**". Acting "honestly" has been equated with the absence of moral turpitude, i.e. without deceit or conscious impropriety; without intent to gain an improper benefit or advantage; and without carelessness or imprudence that negates the performance of the duty in question. It has also been stated that the inquiry is objective. However, a person's subjective intent constitutes evidence from which a conclusion may be drawn about whether he acted honestly. (**Long Say Ting Daniel v Merukh Nunik Elizabeth (personal representative of the estate of Merukh Jusuf, deceased) (Motor-Way Credit Pte Ltd, intervener)** [2012] SGHC 250)
- f) Whether a director acted "**reasonably**". In **Long Say Ting Daniel v Merukh Nunik Elizabeth (personal representative of the estate of Merukh Jusuf, deceased) (Motor-Way Credit Pte Ltd, intervener)** [2012] SGHC 250, the High Court explained as such; "*In determining whether or not the director has acted reasonably, one consideration is whether the director acted in the affairs of the company as he would have done in relation to his own affairs. ... The experience and qualifications of the person in question are relevant ...*".

**"Judicious application of Section 391"**



### Example of a successful application of Section 391 of the Act;

**(Long Say Ting Daniel v Merukh Nunik Elizabeth (personal representative of the estate of Merukh Jusuf, deceased) (Motor-Way Credit Pte Ltd, intervener) [2012] SGHC 250)**

The Applicant and the deceased were the two directors of the Merukh Singapore Properties Pte Ltd ("the Company"). The deceased was the sole shareholder of the Company. The Respondent, is the daughter of the deceased, and defends in her capacity as the personal representative of her father's estate ("the Estate").

After the deceased passed away, the Applicant conducted property sales of three properties on behalf of the Company in his capacity as director. The Estate threatened to commence legal action against the Applicant due to the sale of the properties.

The legal threats from the Estate caused the plaintiff to apply to the court for prospective relief under section 391(2) of the Companies Act.

The High Court granted the Applicant prospective relief under the Act:-

*"68 In the present case, I did not find the plaintiff's breach of s 160 of the Act so egregious as to make a grant of relief a disservice to the administration of company law ... . Neither did I find his breach flagrant or deceitful, ... . The consequence of the breach was not severe as the defendants could hardly be said to have suffered losses, the sale prices secured for each of the Three Properties not falling more than \$150,000 short of the minimum prices stipulated in the defendant's letter of 8 September 2012, and in any case higher than the original purchase prices. ... ."*



For more information on the article, or if you wish to learn more about the topics discussed, please contact:-

### **Mark LEE**

Joint Managing Director

HP: (+65) 9182 9643

Office: (+65) 6514 6352

Email: [mark.lee@wmhlaw.com.sg](mailto:mark.lee@wmhlaw.com.sg)

[www.wmhlaw.com.sg](http://www.wmhlaw.com.sg)

### **Wilbur LIM**

Joint Managing Director

HP: (+65) 9838 2910

Office: (+65) 6514 6351

Email: [wilbur.lim@wmhlaw.com.sg](mailto:wilbur.lim@wmhlaw.com.sg)

[www.wmhlaw.com.sg](http://www.wmhlaw.com.sg)

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