

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

BETWEEN :-

MERCHANT CREDIT PRIVATE LIMITED Appellants

- and -

10 INDUSTRIAL & COMMERCIAL REALTY COMPANY LIMITED Respondents

CASE FOR THE RESPONDENTS

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1. This is an appeal from the Judgment and Order of the Court of Appeal of the Republic of Singapore (Wee C.J., Sinnathuray and Chua J.J.) dated 26th September 1980 whereby the Court allowed the appeal of the Respondents (who were the Plaintiffs in the original proceedings) from the judgment of the High Court of Singapore (Choor Singh J.) dated 30th August 1979.

20 2. In the High Court action No. 1413 of 1976 the Respondents, Industrial & Commercial Realty Company Limited, claimed the repayment from the Appellant Company, Merchant Credit Private Limited (the Defendants) of the sum of \$332, 500 together with interest thereon at the rate of 12 per cent per annum from the date of payment, namely 28th June 1973. The Appellant Company resisted this claim and by Counterclaim sought
30 a declaration that the Respondents were shareholders of the Appellant Company in respect of 332, 500 shares of \$1 each, which shares had been allotted to them on 31st March 1976, or alternatively were estopped from demanding repayment of the said sum of \$332, 500.

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3. The Appellant Company was incorporated on 7th April 1972 under the Companies Act (Cap. 185, 1970 Ed.) as a private company limited by shares. It was

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incorporated in order to carry on the businesses of merchant banking, underwriters and financiers and ancillary purposes pursuant to a Shareholders Agreement made 28th March 1972 between The Industrial & Commercial Bank Limited ("ICB") of the first part, Arthur Lipper International Limited ("ALI") of the second part and Donald Frank Harvey Sinclair ("Mr. Sinclair") of the third part (hereinafter referred to as "the Shareholders Agreement"). The Respondents are a wholly owned subsidiary of ICB.

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67- 68 4. By Clause 2(A) of the Shareholders Agreement it was agreed that the issued share capital of the Appellant Company would be held as follows :-

ICB	47.5 per cent
ALI	47.5 per cent
Mr. Sinclair	5.0 per cent

and the parties to the said Agreement undertook with each other to subscribe for further capital in the Appellant Company in such proportions as and when required. The Appellant Company's authorised share capital at the date of its incorporation was \$100,000 divided into 100,000 shares of \$1 each and this was held as follows :-

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ICB	47,500 shares
ALI	47,500 shares
Mr. Sinclair	5,000 shares

135 5. At an Extraordinary General Meeting of the Appellant Company held on 3rd May 1972 the authorised share capital was increased to \$1,000,000 divided into \$1,000,000 shares of \$1 each by the creation of \$900,000 shares of \$1 each ranking pari passu in all respects with the original shares of the said company.

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131 At a meeting of the Directors of the Appellant Company held that day 200,000 new shares of \$1 each were allotted at par for cash as follows :-

ICB	95,000 shares
ALI	95,000 shares
Mr. Sinclair	10,000 shares

138 - 139 At an Extraordinary General Meeting of the Appellant Company held on 20th June 1973 the authorised share capital of the Appellant Company was increased to \$2,000,000 divided into 2,000,000 shares of \$1 each by the creation of 1,000,000 new shares of \$1 each ranking

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23	behalf of ALI. By agreement between the Directors of the Appellant Company the new shares subscribed for	
33 - 34	were not allotted, but the moneys so paid were credited to a "share application account" in the books of the Appellant Company. It was further agreed between the Directors that the issue of shares would be deferred until the ice-skating project proved to be a going concern. The Respondents assert that it was also agreed that in the event that the ice-skating project did not proceed the moneys would be refunded, but the Appellant Company does	10
143 - 153	not admit this. Nevertheless, the said moneys were recorded in the Appellant Company's Balance Sheet as at 31st March 1974 under "Current Liabilities".	
159 - 166	9. For a variety of reasons the ice-skating project was abandoned by the Appellant Company in December 1974. At a meeting of the Directors of the Appellant Company held on 7th January 1975 it was resolved that a loan should be raised by the Appellant Company on the land in Kuala Lumpur owned by Malaysian Recreation Co. Shn.Bhd. in order to repay to the Respondents their \$332, 500. Unfortunately the Appellant Company's attempt to raise the necessary loans were unsuccessful.	20
167 - 170	10. At a meeting of the Directors of the Appellant Company held on 30th April 1975 it was resolved:-	
188	"that Mr. Crafter continues his best efforts to dispose of the land and ice-skating equipment in Kuala Lumpur as speedily as possible and that the proceeds from the sales of both land and equipment should be applied to the repayment of the funds due to The Industrial & Commercial Realty Co. Ltd. and Arthur Lipper International Ltd. presently held in the 'share application account' of the Company".	30
188 - 189	The meeting later resolved that interest should be paid on each of the two amounts of \$322, 500 received from the Respondents and ALI as from 1st December 1974.	
200 - 202	11. In June 1975 the Appellant Company acknowledged an indebtedness to the Respondents in the sum of \$13, 300 in respect of interest on the said sum of \$332, 500 for the period from 1st December 1974 to 31st March 1975. A cheque for this sum was sent to the Respondents under cover of a letter from the Appellant Company dated 22nd July 1975. The Appellant Company's Accounts for the year to 31st March 1975 again treated the	40
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said sum of \$332,500 as a current liability and moreover stated in Note 5:

'Advances from Shareholders

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Both shareholders have advanced monies totalling \$665,000 and it may be necessary to sell certain assets to repay them....."

- 10 12. By a letter to the Appellant Company dated 5th July 1975 the Respondents again requested repayment of the said sum of \$332,500 together with interest at 12 per cent per annum from the date the money was paid to the Appellant Company until the date of settlement. By letters to the Respondents dated 22nd July and 26th July 1975, the Appellant Company responded by denying any liability to pay interest on the said sum of \$332,500 in respect of the period prior to 1st December 1974. On 26th August 1975 the Respondents by their solicitors again demanded repayment of the said sum of \$332,500 and by a letter of 8th September 1975 threatened proceedings for recovery.
- 20 13. By a letter to the Respondents' solicitors dated 9th October 1975 the solicitors acting for the Appellant Company asserted for the first time that the Respondents were not entitled to ask for repayment of the said sum on demand and argued that the Respondents were estopped from demanding repayment. The said letter claimed that "the funds were intended for the share capital of the Company and not simply as an ordinary loan repayable on demand". On 28th October 1975 the Respondents' solicitors replied to the aforementioned letter, rejected these assertions and demanded repayment of the said sum \$332,500 together with interest thereon from the date of payment within 14 days, failing which the Respondents would institute proceedings.
- 30 14. At a meeting of the Directors of the Company held on 25th November 1975 the Directors purported to resolve by a majority of two votes to one, Mr. Ong Bee Kok (who had by that time replaced Mr. Y. K. Hwang as the nominee of ICB) opposing, that 332,500 shares be issued and allotted to the Respondents and to ALI. The Minutes of the said meeting record:-
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"All previous resolutions referring to the share application account repayment plans to be revoked."

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It will be contended by the Respondents that the aforementioned resolution was purportedly passed without reference to or compliance with the provisions of Section 132D of the Companies Act Cap. 185 and was accordingly void and of no effect.

15. At a meeting of the Directors of the Company held on 28th November 1975 the Directors resolved that an Extraordinary General Meeting of the Company be held on Tuesday 16th December 1975 immediately prior to the Company's Annual General Meeting to be held that day for the purpose of considering and, if thought fit, passing the following resolution :- 10

"That the Directors be and are hereby authorised to allot 665,000 Ordinary Shares of \$1 each in the capital of the Company at par to the undermentioned parties in the following proportions :-

<u>Name</u>	<u>No. of shares of \$1 each</u>	
1. Arthur Lipper International Limited, c/o Deacons, Union House, 6th Floor, Chater Road, Hong Kong.	332,500	20
2. Industrial & Commercial Realty Company Limited, Industrial & Commercial Bank Building, 2 Sherton Way, Singapore 1.	332,500	30
	<u>665,000</u>	
	\$ 665,000 "	

226 - 227 The Secretary of the Company was instructed to give Notice of the said meeting accordingly.

16. It appears that the Extrarodinary General Meeting of the Company fixed for 16th December 1975 to approve the afore-mentioned resolution was not held. In fact, no attempt was made to pass such a resolution until 31st March 1976. On that day an Extraordinary General Meeting of the Appellant Company was held at 265 - 266 40

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of the said sum of \$332,500 together with interest thereon from 28th June 1973, and

- (iii) in any event were the 332,500 shares allotted to the Respondents validly issued having regard in particular to the requirements of Section 132D of the Companies Act Cap. 185.

19. The Respondents submit that the principles of law to be applied to a contract to subscribe for shares in a company are no different from those applicable to any other contract:-

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Re Florence Land and Public Works Company:

Nicol's Case (1885) 29 Ch.D. 421 at 426. If a person applies for shares but withdraws his application before the Company has accepted his offer there is no binding contract in existence. If the Company thereafter proceeds to allot the shares to that person and puts his name on its Register of Members he is entitled as a matter of law to have his name removed as he never agreed to become a member:-

Re Brewery Assets Corporation : Truman's Case
[1894] 3 Ch. 272.

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20. The Respondents submit that they withdrew their application for the 332,500 shares in the Appellant Company on or about 7th January 1975 and that thereafter the Appellant Company was not entitled to accept their previous offer for shares which had been revoked.

21. The Respondents further contend that at all times from 28th June 1973 the sum of \$332,500 constituted a loan by them to the Appellant Company, though had the ice-skating project in Kuala Lumpur proceeded the said moneys would have been applied in payment for the 332,500 shares. The Court of Appeal upheld this view in the following passage from its Judgment:-

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"In giving our decision we were firmly of the view that the proper inference to be drawn from the undisputed facts was that the [Appellant] company had treated the monies of the [Respondents] (and of ALI) in the share application account as a loan to the [Appellant] company. We accept that when the [Respondents] in June 1973 applied for 332,500 shares in the [Appellant] company, it was agreed upon by the directors that the shareholders

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would subscribe for further shares in the [Appellant] company, to increase the issued share capital of the [Appellant] company to \$1 million. But no shares were issued to the [Respondents] (or to ALI). Y.K. Hwang explained that no allotment was to be made unless the ice-skating project was a going concern, and that the directors were agreed that if for any reason the project was not proceeded with, the money was to be refunded. Indeed, after the project was abandoned the [Appellant] company accepted the position, it accepted the liability to repay to the [Respondents] the sum of \$332,500. On these facts, in our judgment, the [Appellant] company cannot be allowed to contend that it was legally entitled in March 1976 to issue to the [Respondents] 332,500 shares".

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22. In support of their contention that the said 332,500 constituted a loan to the Appellant Company at all times from the date of payment, 28th June 1973, the Respondents submit that this is apparent from the manner in which the said payment was treated in the books of account of the Appellant Company. The Respondents will refer to the Appellant Company's Accounts and Balance Sheets for the years ended 31st March 1974 and 31st March 1975 which recorded the said indebtedness of the Appellant Company to the Respondents under "Current Liabilities".

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23. The Respondents further submit that at all times from 7th January 1975, when the Respondents demanded repayment of the said sum of \$322,500, the Appellant Company was estopped from denying its liability to refund the Respondents: Hughes v. Metropolitan Railway Company (1877) 2 App. Cas. 439 at 448; Erikom Investments Ltd. v. Carr [1979] QB 467. At all times from 7th January 1975 until the Appellant Company's solicitors' said letter dated 9th October 1975 the Appellant Company fully accepted its liability to repay to the Respondents the said sum of \$322,500 on demand. The resolution of the Directors of the Appellant Company to allot 332,500 shares to the Respondents on 25th November 1975 was passed solely for the purpose of seeking to avoid this obligation to repay.

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24. With regard to Section 132D of the Companies Act Cap. 185, the Respondents will contend that the Appellant Company failed to comply with the requirements of the

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224 - 226 said Section when issuing and allotting the said shares. The resolution to issue and allot to the Respondents the 332,500 shares which was purportedly passed at the meeting of the Directors held on 25th November 1975 was invalid and of no effect by reason of the fact that the Directors of the Appellant Company failed to obtain the prior approval of the Appellant Company in general meeting to the exercise of the power to issue shares. Furthermore, although the approval of the Appellant Company in general meeting was belatedly obtained on 265 - 266 31st March 1976, thereafter no resolution of the Directors of the Appellant Company was passed to issue and allot the said shares to the Respondents, reliance apparently being placed on the resolution passed by the Directors on 25th November 1975. The Respondents will refer to the minutes of the Directors' meeting held on 264 31st March 1976 for their full terms and true effect. In any event by 31st March 1976 the Appellant Company had been aware for a very considerable period of time (fifteen months) of the Respondents' refusal to take the said shares and the withdrawal of their offer in relation thereto. 10 20

25. In all the circumstances it is respectfully submitted that the Appellant Company's appeal should be dismissed for the following (among other)

R E A S O N S

- (a) BECAUSE the Respondents revoked their application to subscribe for shares in the Appellant Company on or about 7th January 1975, a considerable period of time before the Appellant Company agreed to accept such application. 30
- (b) BECAUSE the Respondents advanced the sum of \$322,500 to the Appellant Company on 28th June 1973 on condition that no shares would be allotted before the ice-skating project was a going concern and that if it did not proceed the said moneys would be repaid by the Appellant Company.
- (c) BECAUSE the said ice-skating project did not proceed.
- (d) BECAUSE during the period from 7th January 1975 until 9th October 1975 the Appellant Company repeatedly acknowledged its liability to the Respondents to repay the said sum of \$322,500. 40

- (e) BECAUSE the said sum of \$322,500 at all times from 28th June 1973 constituted a loan by the Respondents to the Appellant Company and was recorded as such in its records and Accounts.
- (f) BECAUSE the purported allotment and issue to the Respondents of the said 332,500 was made by the Appellant Company in contravention of the provisions of Section 132D of the Companies Act Cap. 185 and/or without the necessary authority of the Board of Directors of the Appellant Company.
- 10 (g) BECAUSE the Judgment of the Court of Appeal was right and ought to be upheld.

LESLIE KOSMIN

Counsel for the Respondents.

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FROM THE COURT OF APPEAL OF THE
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B E T W E E N :

MERCHANT CREDIT PRIVATE
LIMITED

Appellants

- and -

INDUSTRIAL & COMMERCIAL
REALTY COMPANY LIMITED

Respondents

CASE FOR THE RESPONDENTS

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Agents for the Respondents
(Ref: GHF/24/A.142968)