LIMITATIONS ON THE POWER OF AN ALBERTA CORPORATION TO PROVIDE GUARANTEES AND OTHER FINANCIAL ASSISTANCE: SECTION 42 OF THE (ALBERTA) BUSINESS CORPORATIONS ACT

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There appears to be a number of difficulties with s. 42 of the Alberta Business Corporations Act, which is similar to s. 42 of The Canadian Business Corporations Act. The authors highlight these difficulties and recommend a solution, which includes repealing s. 42.

One of the greater irritants in corporate finance at this time in Alberta is s. 42 of the Business Corporations Act of Alberta (the "Act").[1] To a lawyer, s. 42 is complex and becomes more so on closer examination. To many corporate and banking clients, s. 42 is frustrating, without any worthy basis and promotes additional cost and delay. Whether or not those clients are right, any lawyer with a corporate, commercial or corporate-finance practice should become familiar with the problems created by s. 42 of the Act. Many barristers may have to become familiar with s. 42 because of likely future litigation involving the section.

Attached as Appendix 1 are ss. 1(a.1), 1(c), 2, 15(1), 18, 42 and 113 of the Act, being the sections primarily relevant to the following review. Any reference in this article to a corporation means a corporation as defined in the Act.

Section 15 of the Act essentially abolishes the doctrine of ultra vires in relation to a corporation. Reading ss. 15 and 42 together leads us to conclude that under the Act, a corporation has the power to provide financial assistance to any person by means of loan, guarantee or otherwise, subject to the limitations in s. 42(1) of the Act.

Section 18(f) of the Act precludes a corporation, a guarantor of the obligations of a corporation or a person claiming through a corporation from asserting against a person dealing with a corporation that the financial assistance referred to in s. 42 is not properly authorized. However, authorized or not, any financial assistance provided by a corporation contrary to s. 42 (and to which s. 42(3) does not apply) will not be enforceable as it is presumably beyond the powers of the corporation.[2]

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1. R.S.A. 1980, c. B-15.
2. See *Royal Bank of Canada* v. *Stewart* (1979) B.C.L.R. 349, 8 B.L.R. 77; affd 31 B.C.L.R. 33 (C.A.).

Excluding for the moment the possible continued application of certain common law principles to financial assistance granted by a corporation to another, it would appear that any type of financial assistance given by a corporation that is not within s. 42(1)(a), (b) or (c) is not controlled by the Act and may be given by a corporation. However, if the type of financial assistance to be given by a corporation is within s. 42(1)(a), (b) or (c) of the Act, the corporation is prohibited from giving the financial assistance unless:

(1) the corporation can satisfy the tests in both paragraphs (d) and (e) of s. 42(1); OR

(2) the type of financial assistance is permitted under s. 42(2).

If one reads s. 42(2) in isolation, without regard to s. 15(1) of the Act, one may be tempted to take the initial view that financial assistance is therefore only permitted to those persons and in those circumstances specified in s. 42(2) and not otherwise. Such a view ignores s. 15(1) which sets the whole scheme of the Act, and which is necessarily one's starting position: "A corporation has the capacity, and subject to this Act, the rights, powers and privileges of a natural person", and we would note that the phase "subject to this Act" in s. 15(1) does not precede "capacity" but only precedes "rights, powers and privileges".

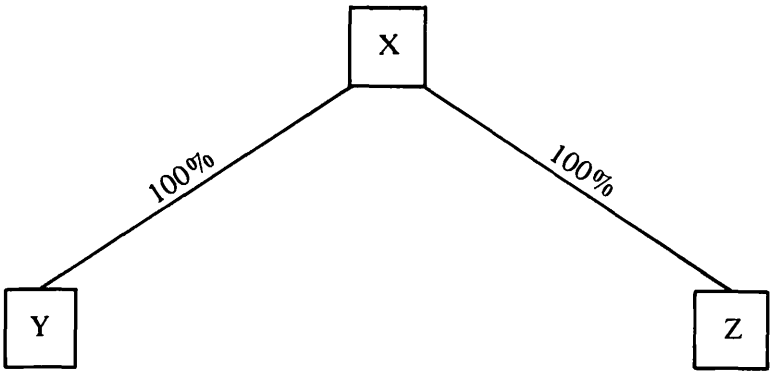
We take the position that the prohibitions of the type identified in s. 42(1)(a), (b) and (c) are only against giving financial assistance if the corporation cannot meet the liquidity and solvency tests (in s. 42(1)(d) and (e)), and conversely does not prohibit financial assistance otherwise — in other words, does not proscribe financial assistance to a person not covered by s. 42(1)(a), (b) and (c), the liquidity and solvency tests therefore in these instances being inapplicable.

The relevance of the phrase "Except as permitted under subsection (2)" in s-s. (1) and the inclusion of s-s. (2) is simply to provide a list of instances (in s-s. (2)) where one need not satisfy the liquidity and solvency tests, and is not a method of stating that there are two closed lists of permissible financial assistance: one in s-s. (1) where one must satisfy the liquidity and solvency tests, and the other in s-s. (2) where one need not. There are other instances which fall entirely outside s-ss. (1) and (2) and which are therefore not proscribed by the Act. For example: two unaffiliated corporations with unrelated shareholders (that is, not affiliated as defined in s. 1(a.1) and not associated as defined in s. 1(c) of the Act) involved in a joint business venture can guarantee each other's obligations without being affected by s. 42.

Section 42(3) of the Act protects a lender for value in good faith without notice of a contravention of s. 42(1). We suggest few lenders should feel comfortable with the protection provided by s. 42(3) since lenders will normally receive and review so much of the financial and asset information of their customers that it would be difficult to consider such lenders as being "in good faith without notice of the contravention".

To clearly understand the extent of the application of s. 42 the following examples might be of assistance:

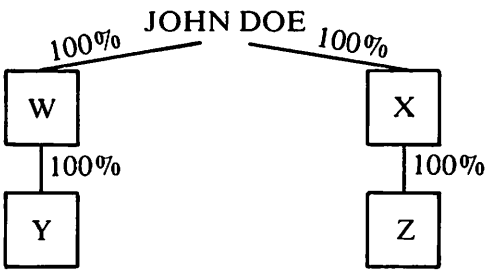
Example 1



Analysis:

1. If Y and Z (corporations) are wholly owned by X then either Y or Z could guarantee the obligations of X but only if X is itself a body corporate. A guarantee by either Y or Z of X would be, at the outset, prohibited by s. 42(1)(a), but permitted by s. 42(2)(c) as an express exemption if X is a body corporate. It is noteworthy that the exception provided for in s. 42(2)(c) only applies to a parent corporation, as opposed to an individual who may own all of the shares of the corporation that is providing the financial assistance.
2. Assuming X is a corporation, X should be able to guarantee the liabilities of either Y or Z without being affected by s. 42. Certainly that would be the case if Y and Z were subsidiaries of X because of the exemption contained in s. 42(2)(d). Note that for the purpose of this exemption (as contrasted with s. 42(2)(c)) it is not necessary that Y or Z be a wholly owned subsidiary of X. However, it is suggested that s. 42(2)(d) is redundant as, on a reasonable interpretation, a guarantee by X of Y or Z is not caught by s. 42(1)(a), (b) or (c) in any event.
3. Z could not guarantee Y nor could Y guarantee Z without meeting the tests contained in s. 42(1)(d) and (e). A guarantee by Y of Z or vice versa would be caught by s. 42(1)(b) because Y is an associate of a shareholder of Z and Z is an associate of a shareholder of Y. There is no exemption in s. 42(2) for such financial assistance.
4. Consider the situation if X were to provide a guarantee of all of the debts and liabilities (present and future, contingent or otherwise) of Y to the lender for Y, and Z further guaranteed all of the debts and liabilities (present and future, contingent or otherwise) of X to the lender for X (assuming that each of X, Y and Z all have the same principal lender). The guarantee by parent X of subsidiary Y's debts and liabilities is expressly permitted by s. 42(2)(d) and the guarantee by subsidiary Z of the debts and liabilities of parent X is also expressly permitted by s. 42(2)(c). Technically, the foregoing scenario would seem to fit within the express exemptions contained in s. 42(2), but arguably would result in indirect financial assistance being provided by subsidiary Z in favour of subsidiary Y.

Example 2

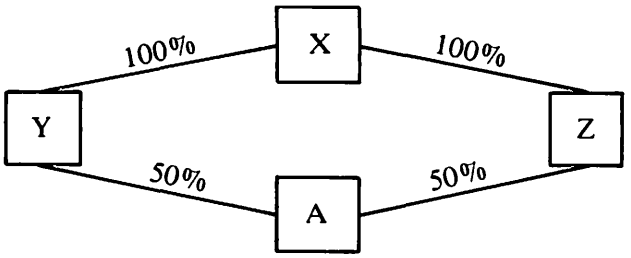


W, X, Y and Z are all corporations.

Analysis:

1. W and X are in the same position as Y and Z in example 1 and thus could not guarantee each other without meeting the tests in s-ss. 42(1)(d) and (e).
2. Assuming that Y and Z are affiliated (based on a deemed affiliation as a result of a possible interpretation of s. 2(1)(b) of the Act), Y cannot guarantee Z or vice versa without meeting the same tests.
3. Neither Y nor Z could guarantee the obligations of John Doe without meeting the tests because John Doe is a shareholder of an affiliated corporation. However, Y could guarantee W, and Z could guarantee X without meeting the tests because of the exemption in s. 42(2)(c). Also, W could guarantee Y, and X could guarantee Z, because of the exemption set forth in s. 42(2)(d).

Example 3



Assume that the financial assistance in this example is being sought from corporation A for the liabilities of X, Y and Z, or any of them.

Analysis:

1. Without satisfying the tests in s-ss. 42(1)(d) and (e), A cannot provide a guarantee with regard to the obligations of Y or Z, as neither Y nor Z wholly owns A (which would be required to fit within the exemption in s. 42(2)(c)).
2. Similarly, A may not be in a position to provide a guarantee of the obligations of X (without satisfying the tests) as A similarly is not a wholly owned subsidiary of X, unless the language of ss. 2(4)(a) and 42(2)(c) of the Act is capable of being extended to include an "indirectly" wholly owned subsidiary.

The foregoing examples illustrate some of the problems with the application of s. 42 to certain simple corporate structures. The problems in the application of s. 42 multiply exponentially when one is faced with a

complex corporate structure involving numerous related corporations, and become increasingly more difficult to assess with the varying forms of financial assistance that may be encountered. For example, s. 42 would also have to be analyzed in the context of letter of credit financings, transactions involving the issuance of term preferred shares where financial assistance is being provided, and multi-stage transactions involving, for instance, put options and the like, where each stage of a transaction must be reviewed to ensure compliance with s. 42. The concerns arising from the foregoing examples are amplified by an examination of the meaning of some of the words used in s. 42:

1. "corporation" is defined in the Act as a body corporate, incorporated or continued under the Act. Thus, the prohibitions in s. 42(1) do not apply to Alberta companies which have not yet been continued under the Act or to extra-provincial corporations.
2. The words "directly or indirectly" are used in s. 42(1) in respect of financial assistance together with the words "loan, guarantee or otherwise". The words "indirectly" and "otherwise" tend to give s. 42(1) an extremely broad application which, although perhaps intended, does create some unusual problems. For example, if Y and Z in example 1 above entered into a joint and several obligation and each provided collateral security, would this constitute indirect financial assistance which would fit into the "otherwise" category? The problem is amplified if (in the corporate structure of example 1) X, Y and Z all entered into the joint and several obligation and each provided collateral security.
3. Does "shareholder" mean the registered owner of a share, or does it include the beneficial owner, especially where a lender knows of the trust relationship?
4. The scope of affiliation among corporations is set forth in s. 2(1) of the Act and is very broad. When corporate shareholders are considered in the context of affiliated corporations or associates of corporate shareholders of the corporation or associates of affiliated corporations, as referred to in s. 42(1), the extent of the application of the section is far reaching, complex, and not beyond doubt.
5. The term "associate" is defined in s. 1(c) of the Act and would encompass situations involving registered shareholders holding shares in trust for other persons, and situations whereby control may be exercised by a person holding or controlling, through intervening corportions, more that ten per cent of the voting shares in the corporation granting the financial assistance in the particular case.
6. The term "liabilities" is defined to a limited extent in s. 1(k) of the Act, but that definition does not purport to be exhaustive. The Alberta Court of Appeal, in the case of *J.D. McArthur Co. Ltd.* v. *Alberta and Great Waterways Railways Company*,[3] adopted the following definition for "liability" appearing in Sweet's Law Dictionary:

> The term "liability" has a broader meaning than the term "debt" and has been interpreted as the condition of being actually or potentially subject to an obligation or in a more special sense as denoting inchoate, future unascertained or imperfect obligations

3. (1924) 2 W.W.R. 1.

as opposed to "debts" — the essence of which they (debts) are generally ascertained and certain.

7. The words "realizable value" in s. 42(1)(e) are also not defined in the Act. It is perhaps as to the realizable value of the corporation's assets that a lender may gain some comfort from s. 42(3), such that a lender could in good faith rely on advice from the corporation's officers as to what the "realizable value" of the corporation's assets is.

If a corporation's proposed action is within s. 42(1)(a), (b) or (c) and is not permitted under s. 42(2), what exactly is required to meet the tests in s. 42(1)(d) and (e)?

With respect to the test in s. 42(1)(d), it is perhaps simple to apply where the financial assistance is in the form of a loan, but we suggest this test is ambiguous if the financial assistance consists of a guarantee. Does the word "liabilities" include contingent liabilities? When does a guarantee become "due", especially where many forms of guarantees do not require any actual demand but make the guarantor liable concurrently with the primary debtor? How is one to determine whether or not the corporation would be able to pay such a liability on becoming "due"? One suggested interpretation of this test is that a contingent liability should not be considered as part of the corporation's "liabilities" since a guarantee is not, at the time of the granting of it, due and may never become due, and therefore would never affect the corporation's ability to pay its liabilities as they become due. Another interpretation of this test, considered from the standpoint of a lender, would be that as long as the lender receiving the guarantee does not have "reasonable grounds", at that point in time, for believing that the guarantee in question would ever be called by it, then on that basis, and placing some reliance on s. 42(3), the amount of the guarantee could be excluded from "liabilities" in the test.

With respect to the test in s. 42(1)(e), one must arrive at a positive figure after deducting from the realizable value of the corporation's assets:

(i) the amount of any financial assistance in the form of a loan, *or in the form of assets pledged or encumbered to secure a guarantee*;

(ii) the aggregate of the corporation's liabilities (and in this case, to make any sense at all, liabilities must surely exclude the contingent liability on the guarantee referred to in (i) above); and

(iii) the stated capital of all classes.

It is important to note that unless the corporation giving the financial assistance is already insolvent, the test in s. 42(1)(e) would have no application where the financial assistance consisted of an unsecured guarantee. If security is provided collateral to the guarantee, it may become very difficult to determine what the extent of the deduction should be in respect of "the form of assets pledged or encumbered to secure a guarantee". For example, what if the security collateral to the guarantee consisted of a debenture containing a floating charge on all of the assets of the corporation? We suggest, in such a case, that the most reasonable interpretation is to require deduction of the value of the pledged or encumbered assets only to the extent of the liability under the

guarantee or security instrument. In other words, one should not deduct more than the amount of the guarantee if the guarantee is for a limited amount or more than the amount of the debt owed by the primary debtor if the guarantee is unlimited. The latter suggestion may be subject to some criticism since guarantees to lending institutions are often of a continuing nature and the guaranteed debt may fluctuate. We suggest that the best one can do is to consider that the tests in s. 42(1)(d) and (e) require that basically a "snapshot" be taken of the corporate picture at the time the financial assistance is given.

Earlier in this article, we indicated we were considering s. 42 excluding any possible continued application of common law principles to financial assistance granted by a corporation. Although we feel that the Act has essentially occupied the field as far as the power and the limitations thereon of a corporation to give financial assistance, there is no case authority supporting that position. Under the Companies Act of Alberta (s. 20(1)(k)), a company could provide intercorporate financial assistance if it had either:

(a) commercial business relations with the company to which financial assistance was being provided; or

(b) shares, securities or other obligations of the company to which financial assistance was being provided.

It is the view of many lawyers, however, that under the Companies Act, there must also be a bona fide business purpose for providing the financial assistance such that it could reasonably be said that the provision of the financial assistance benefited the company granting it or enhanced the carrying on of one or more of its objects.[4] It is possible that this "business purpose" test could still exist and in effect be overlaid on s. 42 of the Act.

What, if anything, should be done in respect of s. 42 of the Act?

In the report of the Alberta Institute of Law Research and Reform, issued in August of 1980, the following is stated:[5]

> In general, we think that creditors do not need extra protection against loans or guarantees for the benefit of present or prospective insiders. It does seem to us that loans and guarantees by a subsidiary to its parent on improvident terms could be used to abuse creditors of the subsidiary; but we were persuaded that a prohibition of such loans and guarantees would, to meet a largely theoretical danger, inhibit legitimate transactions in which related groups of companies, for their common benefit, join in obtaining common lines of credit from their financers.

The report went on to indicate that different considerations applied to the position of shareholders outside the control group. The report recognized that an oppressed shareholder would be able to apply for leave to bring a derivative action under s. 232 of the Act and would probably have a personal action under s. 234 of the Act on the grounds that there was oppression or unfair disregard of the interest of the

4. See *Mt. View Charolais Ranch, Lynch* v. *Haverland* (1974) 2 W.W.R. 289; *Charterbridge Corporation Ltd.* v. *Lloyds Bank Ltd.* [1969] 2 All E.R. 1187; *Re Introductions Ltd.* [1969] 1 All E.R. 887; *Sparks* v. *Sparks* (1981) 119 D.L.R. (3d) 330; and *Central and Eastern Trust Company* v. *Irving Oils Ltd.*, 10 B.L.R. 42 (S.C.C.).

5. *Proposals for a New Alberta Business Corporations Act* (Institute of Law Research and Reform 1980) 2 at 78.

shareholders not in the control group. The report indicates that these remedies appear to be sufficient, and that the shareholder should also be provided with a mechanism by which he will be notified that there is an abuse or potential abuse that requires a remedy. The authors of the report went on to express the view that the proposed Act should require the corporation to make individual disclosure of financial assistance of the kinds described in s. 42(1). That position seems to have been implemented in s. 42(4).

However, whatever may have been the intent, we suggest that s. 42 tends to protect primarily creditors of a corporation. There are references to "director" in s. 42(1)(a) and (b), but it is such a simple task to alter directors (especially on a temporary basis while the "snapshot" is taken) that the key word must be "shareholder". Thus, we suggest that the primary thrust of s. 42 is to ensure that creditors will get paid before shareholders. Monies or assets of a corporation committed to the benefit of a shareholder are essentially treated as being in the same category as dividends. The tests in s. 42(1) are substantially the same as the tests required to be met before a dividend is paid under s. 40 of the Act. We suggest, however, that the effect of the limitations in s. 42 is so great, and the consequences of a breach so devastating, that in many cases it acts to the detriment of creditors and shareholders of corporations because of the hesitancy of lending institutions to provide financing where the validity and enforceability of security is questionable because of s. 42.

It is also noteworthy that a corporation has, under the provisions of s. 42, the ability to grant financial assistance if it is able to pass the financial tests described therein. If one of the main purposes of s. 42 is to protect minority shareholders from the consequences of the corporation providing loans and guarantees to related corporations on improvident terms, this section does not prevent that event from taking place as long as the improvident loans or guarantees do not take the corporation beyond the brink of insolvency. In other words, to the extent that the corporation is healthy and has additional value beyond the "break even" point, the corporation may, subject to the remedies contemplated in ss. 232 and 234 of the Act, provide financial assistance which could strip away the excess value of the corporation bringing it to the brink of insolvency.

Accordingly, in view of the foregoing observations, we suggest that the best course of reform with respect to the provision of intercorporate financial assistance would be to repeal s. 42, and consider legislating a "corporate business purpose test", together with maintaining the disclosure requirements now implemented in s. 42(4) of the Act. We think this suggestion is consistent with the stated position of the Alberta Institute of Law Research and Reform as set out in its report on the proposed Act, and would contribute to stimulating, rather than restricting, the commercial and economic environment.[6]

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6. The authors would refer interested persons to the paper: *Business Corporations Act, Section 42: Ripe For Reform*, prepared by Frank P. Layton and Jeananne Kathol for the 1985 Mid-Winter Meeting of the Alberta Branch of the Canadian Bar Association. The recommendations for reform put forth by Mr. Layton and Ms. Kathol are somewhat less severe than those recommended here.

APPENDIX 1

1. In this Act,

(a.1) "affiliate" means an affiliated body corporate within the meaning of section 2(1);

(c) "associate", when used to indicate a relationship with any person, means

(i) a body corporate of which that person beneficially owns or controls, directly or indirectly, shares or securities currently convertible into shares carrying more than 10% of the voting rights under all circumstances or under any circumstances that have occurred and are continuing, or a currently exercisable option or right to purchase those shares or those convertible securities.

(ii) a partner of that person acting on behalf of the partnership of which they are partners,

(iii) a trust or estate in which that person has a substantial interest or in respect of which he serves as a trustee or in a similar capacity,

(iv) a spouse of that person, or

(v) a relative of that person or his spouse if that relative has the same residence as that person;

(c.1) "auditor" includes a partnership of auditors;

2(1) For the purposes of this Act,

(a) one body corporate is affiliated with another body corporate if one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person, and

(b) if 2 bodies corporate are affiliated with the same body corporate at the same time, they are deemed to be affiliated with each other.

(2) For the purposes of this Act, a body corporate is controlled by a person if

(a) securities of the body corporate to which are attached more than 50% of the votes that may be cast to elect directors of the body corporate are held, other than by way of security only, by or for the benefit of that person, and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body corporate.

(3) For the purposes of this Act, a body corporate is the holding body corporate of another if that other body corporate is its subsidiary.

(4) For the purposes of this Act, a body corporate is a subsidiary of another body corporate if

(a) it is controlled by

(i) that other,

(ii) that other and one or more bodies corporate, each of which is controlled by that other, or

(iii) 2 or more bodies corporate, each of which is controlled by that other,

or

(b) it is a subsidiary of a body corporate that is that other's subsidiary.

15(1) A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.

18 A corporation, a guarantor of an obligation of the corporation or a person claiming through the corporation may not assert against a person dealing with the corporation or dealing with any person who has acquired rights from the corporation

(a) that the articles, by-laws or any unanimous shareholder agreement have not been complied with,

(b) that the persons named in the most recent notice filed by the Registrar under section 101 or 108 are not the directors of the corporation,

(c) that the place named as the registered office in the most recent notice filed by the Registrar under section 19 is not the registered office of the corportion,

(c.1) that the post office box designated as the address for service by mail in the most recent notice filed by the Registrar under section 19 is not the address for service by mail of the corporation.

(d) that a person held out by the corporation as a director, an officer or an agent of the corporation

(i) has not been duly appointed, or

(ii) has no authority to exercise a power or perform a duty which the director, officer or agent might reasonably be expected to exercise or perform,

(e) that a document issued by any director, officer or agent of the corporation with actual or usual authority to issue the document is not valid or not genuine, or

(f) that financial assistance referred to in section 42 or a sale, lease or exchange of property referred to in section 183 was not authorized,

unless the person has, or by virtue of his position with or relationship to the corporation ought to have, knowledge of those facts at the relevant time.

42(1) Except as permitted under subsection (2), a corporation shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise

(a) to a shareholder or director of the corporation or of an affiliated corporation,

(b) to an associate of a shareholder or director of the corporation or of an affiliated corporation, or

(c) to any person for the purpose of or in connection with a purchase of a share issued or to be issued by the corporation or an affiliated corporation,

if there are reasonable grounds for believing that

(d) the corporation is, or after giving the financial assistance would be, unable to pay its liabilities as they become due, or

(e) the realizable value of the corporation's assets, excluding the amount of any financial assistance in the form of a loan or in the form of assets pledged or encumbered to secure a guarantee, after giving the financial assistance, would be less than the aggregate of the corporation's liabilities and stated capital of all classes.

(2) A corporation may give financial assistance by means of a loan, guarantee or otherwise

(a) to any person in the ordinary course of business if the lending of money is part of the ordinary business of the corporation,

(b) to any person on account of expenditures incurred or to be incurred on behalf of the corporation,

(c) to a holding body corporate if the corporation is a wholly owned subsidiary of the holding body corporate,

(d) to a subsidiary body corporate of the corporation, or

(e) to employees of the corporation or any of its affiliates

(i) to enable or assist them to purchase or erect living accommodation for their own occupation, or

(ii) in accordance with a plan for the purchase of shares of the corporation or any of its affiliates to be held by a trustee.

(3) A contract made by a corporation in contravention of this section may be enforced by the corporation or by a lender for value in good faith without notice of the contravention.

(4) Unless disclosure is otherwise made by a corporation, a financial statement referred to in section 149(1)(a) shall contain the following information with respect to each case in which financial assistance is given by the corporation by way of loan, guarantee or otherwise, whether in contravention of this section or not, to any of the persons referred to in subsection (1)(a), (b) or (c), if the financial assistance was given during the financial year or period to which the statement relates or remains outstanding at the end of that financial year or period:

(a) the identity of the person to whom the financial assistance was given;

(b) the nature of the financial assistance given;

(c) the terms on which the financial assistance was given;

(d) the amount of the financial assistance initially given and the amount, if any, outstanding.

113(1) Directors of a corporation who vote for or consent to a resolution authorizing the issue of a share under section 25 for a consideration other than money are jointly and severally liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the share had been issued for money on the date of the resolution.

(2) Subsection (1) does not apply if the shares, on allotment, are held in escrow pursuant to an escrow agreement required by the Commission and are surrendered for cancellation pursuant to that agreement.

(3) Directors of a corporation who vote for or consent to a resolution authorizing

(a) a purchase, redemption or other acquisition of shares contrary to section 32, 33 or 34,

(b) a commission on a sale of shares not provided for in section 39,

(c) a payment of a dividend contrary to section 40,

(d) financial assistance contrary to section 42,

(e) a payment of an indemnity contrary to section 119, or

(f) a payment to a shareholder contrary to section 184 or 234,

are jointly and severally liable to restore to the corporation any amounts so paid and the value of any property so distributed, and not otherwise recovered by the corporation.

(4) A director who has satisfied a judgment rendered under this section is entitled to contribution from the other directors who voted for or consented to the unlawful act on which the judgment was founded.

(5) If money or property of a corporation was paid or distributed to a shareholder or other recipient contrary to section 32, 33, 34, 39, 40, 42, 119, 184 or 234, the corporation, any director or shareholder of the corporation, or any person who was a creditor of the corporation at the time of the payment or distribution, is entitled to apply to the Court for an order under subsection (6).

(6) On an application under subsection (5), the Court may, if it is satisfied that it is equitable to do so, do any or all of the following:

(a) order a shareholder or other recipient to restore to the corporation any money or property that was paid or distributed to him contrary to section 32, 33, 34, 39, 40, 42, 119, 184 or 234;

(b) order the corporation to return or issue shares to a person from whom the corporation has purchased, redeemed or otherwise acquired shares;

(c) make any further order it thinks fit.

(7) A director is not liable under subsection (1) if he proves that he did not know and could not reasonably have known that the share was issued for a consideration less than the fair equivalent of the money that the corporation would have received if the share had been issued for money.

(8) A director is not liable under subsection (3)(d) if he proves that he did not know and could not reasonably have known that the financial assistance was given contrary to section 42.

(9) An action to enforce a liability imposed by this section may not be commenced after 2 years from the date of the resolution authorizing the action complained of.