



defendant on grounds it is excipiable; Whether such action can be brought relying on section 157(1)(d) of the Act without prior leave from a Court; whether a creditor can bring such an application in terms of comparison between new Act and its predecessors, whether a creditor is a genuine applicant for vindicating public interest discussed; whether directors owe a duty to creditors for purpose of section 162 relief - economic versus traditional approach discussed; whether creditor is an own interest applicant is not a matter to be decided on exception. Application for amendment allowed.

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## JUDGMENT

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### **Manoim J**

#### **Introduction**

- [1] The present matter concerns an application by the plaintiffs to amend their particulars of claim to meet an exception raised by the third defendant. The third defendant opposes the application for amendment. The case raises important issues over who has standing to enforce a novel remedy provided by the Companies Act, 71 of 2008, (the Act).
- [2] The plaintiffs are creditors of a company called Somnipoint (Pty) Ltd (now in liquidation) (“Somnipoint”). The three defendants were all directors of Somnipoint as well as companies related to it. The plaintiffs’ primary relief is to sue the defendants in their capacity as directors for losses they incurred in extending finance to Somnipoint which, due its liquidation, they have been unable to fully recover. For this reason, they have proceeded by way of action against the defendants. The amendment application does not relate to this

aspect of the plaintiffs' case. What is the subject matter of the amendment, is that as part of their relief, the plaintiffs also seek to declare the defendants delinquent directors in terms of section 162(5) of the Act. It is common cause that the plaintiffs are creditors of Somnipoint. The third defendant's exception is based on the premise that a creditor of a company has no standing to apply for a delinquency order in respect of its directors, as a creditor is not one of the categories of person who the Act gives the right to seek such relief.<sup>1</sup>

[3] In this respect the third defendant is correct. The relevant section, section 162(2), gives this right only to the following stakeholders of the company: a shareholder, director, company director, secretary or prescribed officer, registered trade union, or employee representative. Notably, a creditor of the company is not one of the stakeholders expressly mentioned in this list.

[4] Responsive to this exception the plaintiffs now seek an amendment. What the amendment seeks to do is to address this lacuna by relying on section 157(1) (d) of the Act. That section is not part of the delinquent director section of the Act. Rather it is a provision that as its heading states provides "*Extended standing to apply for remedies*". It applies without restriction to all sections of the Act where a person may utilise one of the remedies the Act provides. The only exception is section 165 of the Act, the section that deals with derivative actions. Here section 157(3) makes it clear that nothing in this section i.e., the extended standing section, would give a right to any person who may bring an action for a derivative action under section 165(1), other than those the Act mentions as entitled to make a demand under section 165(2). What is the

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<sup>1</sup> Other points of exception were raised but these have not been persisted with and I have not been called upon to decide in the present matter.

import of this express exclusion of derivative actions? It suggests that if the legislature had sought to limit the class of applicants who could bring a delinquency application in terms of section 162, to only those expressly mentioned in section 162(2), it would have made this limitation express, as it has done with section 165(2).

- [5] But section 157 is not open-ended either. It restricts the right to bring an application for remedies to four instances set out in the sub-paragraphs of section 157(1), and in terms of section 157(2), to two statutory bodies the Commission and the Panel.
- [6] Only one of those instances in section 157(1) is relevant for the purposes of this case, and that is section 157(1)(d) which states:

***“157 Extended standing to apply for remedies***

*(1) When, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person-*

*(a) directly contemplated in the particular provision of this Act;*

*(b) acting on behalf of a person contemplated in paragraph (a), who cannot act in their own name;*

*(c) acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interest of its members; or*

(d) acting in the public interest, with leave of the court."

(Emphasis added)

[7] The plaintiffs rely on section 157(1)(d) to get locus standi to seek the delinquency relief. The terms of the amendment are lengthy, but broadly speaking they attempt to set out the basis for why they contend, that they as creditors, act in the public interest to seek the relief. This has not satisfied the third defendant who is now the only one of the three defendants to oppose the amendment. Hence the need for me to decide whether the third defendant has raised grounds for the amendment to be refused.

[8] In general, as the plaintiffs argue, courts lean in favour granting an amendment. Thus, the approach, since the case of *Moolman v Moolman* is a permissive one.<sup>2</sup> However, as the Constitutional Court most recently observed in in *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH*<sup>3</sup>

*"Plainly, the permissive principle is not without limits. Pleadings that are excipiable, or, as the holding in Affordable Medicines affirmed, are introduced in bad faith, or cause an injustice that cannot be compensated by an order for costs, afford grounds for refusing a proposed amendment."*

[9] Counsel for the third defendant made it clear that he does not rely on bad faith, only that the amendment would render the pleading excipiable. Three reasons for why it would be excipiable were advanced. They are:

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<sup>2</sup> 1927 CPD 27 at 29.

<sup>3</sup> [2022] ZACC 42 paragraph 67.

- i. Leave must be granted prior to the relief being sought;
- ii. The amendment is not genuine because a creditor does not have standing to seek disqualification relief; and
- iii. The plaintiff's cause of action is own interest not public interest litigation.

[10] Before I consider these objections some background to what is contained in the particulars of claim and the amendment is necessary.

### **Background**

[11] For technical reasons, the two plaintiffs in the case litigate as two separate entities, but for the purpose of this case they can be considered as one, and I will refer to them from now on by name, and in the singular, as Vantage. Vantage is a Fund that lent moneys to companies of which the three defendants were directors and shareholders or indirect shareholders. In 2014 Vantage provided Somnipoint, a loan facility approximating R 200 million. Somnipoint used the loan to purchase a building known as ABSA Towers located in Pretoria. As security for the loan Vantage registered a mortgage bond over the building and obtained a cession of the rentals from Somnipoint. The tenant in the building was the Unemployment Insurance Fund ("UIF") a government entity. This becomes a material fact for the purpose of Vantage's argument. Central to the claim as well, is the defendants role in another entity, a property company called Delta, of which all three defendants, at the relevant time, were directors. The defendants are accused of utilising Delta to play a

role in frustrating Vantage from exercising its rights as a creditor by engaging in various machinations, including diverting monies owing to Somnipoint.

[13] Somnipoint was unable to perform its obligations in terms of the facility. Vantage first obtained a judgment and an execution order against Absa Towers. It also attempted to exercise its cession of the rental rights but claims it was actively frustrated from doing so. Vantage then successfully applied for Somnipoint to be wound up. A section 417 enquiry followed in the course of which all three defendants testified.

[14] Vantage then brought the present action in which it sues the defendants for two monetary claims; one of R159,941,738.00; and the other of R211,540,847.00; it also, as noted earlier, sought a declaration of delinquency against all three defendants, relying on section 162 of the Act. In particular what it alleged was that the defendants had in the course of their duties as directors committed the full panoply of misdemeanours referred to in subparagraphs 162(5)(c)(i), (iii) and (iv) of the Act. Their rendition is not necessary for the purpose of this decision, but these sections deal with conduct by directors, inter alia, amounting to gross abuse of their position as directors, gross negligence and being party to acts or omissions to defraud Vantage as Somnipoint's creditor.<sup>4</sup> The exception inter alia raised the issue that a creditor did not have locus standi to apply for this relief in terms of section 162(2) of the Act. What the amendment seeks to do is not to change the relief sought – it was always there - but to ground Vantage's entitlement to seek such relief into the extended relief provided by section 157(1)(d). Thus,

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<sup>4</sup> This is set out in more detail in paragraphs 54.12 to 54.15 of the Particulars of claim.

Vantage considers that the amendment has cured the exception, and it should be allowed.

[15] The text of the amendment is lengthy and for present purposes I do not need to set it out in full, but its essential averments are this. Vantage claims to act in the public interest because of the following:

- i. The egregious nature of the defendants breach of their fiduciary duties;
- ii. The duration of these breaches;
- iii. The large sums of money involved;
- iv. the general public's interest in the management of companies that do business with organs of state in this case the UIF. The centrality of the UIF is then emphasised as a recipient and dispenser of public funds;
- v. the role of Delta, which is a public company and which Vantage describes, given the latter's business model, as the 'Government's landlord';
- vi. that Vantage and funders like it play a crucial role in providing investment, more generally in the country and thus have an interest in ensuring that directors are held accountable to ensure investor confidence;



- vii. the three defendants are directors of a large number of companies and are members of close corporations. In the case of the first defendant, 39 companies and 3 close corporations, the second defendant, 12 companies and 7 close corporations, and the third defendant, 38 companies and 2 close corporations;
- viii. the general public and creditors deserve and require to be protected in their dealings, engagements and transactions with the companies and close corporations of which the defendants are respectively directors and/or members; and
- ix. the relief will protect the public from the defendants repeating or replicating their delinquent conduct in other entities.

[16] These considerations it contends are in the public interest. Vantage also states in the amendment that the relief sought will not prolong the length and costs of the trial.

[17] Against this background I now go on to consider the three objections raised by the third defendant.

**(i) Leave must be sought first**

[18] I will refer to this as the sequencing issue. The third defendant argues that when section 157(1(d) states '*with leave of the court*' this means the party seeking such relief must first apply to court to seek such leave. In essence the third defendant reads in the word '*prior*' into the sub-section even though that

word does not appear there. But, argues the third respondent, there is a purposive interpretation that justifies the reading in of the requirement for prior leave. The argument is that a section 157(1(d) remedy, grounded as it is in the public interest, is akin to a class action. A class action in our law it is common cause requires a prior application from the court to certify it.<sup>5</sup> The purpose for this is so that it can be managed. *A fortiori*, a section 157(1(d) application, which like a class action is animated by the public interest, must also require management. Since management is required, this means a prior application. The third defendant does not have any authority for this proposition in the case law but seeks to rely on an article written by former Constitutional Court judge Jafta in which he expresses this view. As he puts it:

*“However, the exercise of this right to standing is subject to a prior approval by a competent Court. This means that before a party launches an application in the public interest, it must apply for leave to do so from the Court. This requirement places the Court in control of the application that is instituted in the public interest so as to determine in advance whether an applicant is entitled to institute the proceedings.”<sup>6</sup>*

[19] Judge Jafta’s piece is directed as a critique of the legislation which he considers will open the floodgates to parties seeking to exercise this type of remedy. That is his primary focus, rather than an attempt to grapple with the interpretation of what leave of the court means in the present situation where the court is faced in action proceedings with an application to amend.

<sup>5</sup> *Children’s Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA).

<sup>6</sup> See Justice C. Jafta “*Critical analysis of the extended legal standing provisions under section 157(1) of the Companies Act 71 of 2008 to apply for legal remedies.*” (2015) 1(1)) CCL&P 35, page 41.

[20] Nor is this issue novel. The very same issue came up in two cases that have been decided subsequent to the publication of that article. In the first of these, the *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC (REDISA)*<sup>7</sup> Henney J, considered an argument that the court should follow the approach adopted in class interest litigation where courts have required prior certification. Henney J observed that the situations were not analogous:

*“In my view these cases are distinguishable from the present, even though they deals with the question of extended standing.”*<sup>8</sup>

[21] After analysing the two cases he had been referred to, he concluded:

*“Further, what clearly makes this case different from the Children's Resource Centre case and the Mukaddam case is that both those cases dealt with class actions which would require a much more controlled manner of certification than a case where standing would be found on the basis of public interest.”*<sup>9</sup>

[22] The decision of Henney J in REDISA was overturned on appeal to the SCA, but this part of the reasoning was not criticised. Although Henney J was dealing with the consequences of the sequencing approach for motion proceedings, and with another provision of the Act, not section 162, his

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<sup>7</sup> 2018 (3) SA 604 (WCC)

<sup>8</sup> At paragraph 184.

<sup>9</sup> Supra, paragraph 190. The two cases are *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) and *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA)

approach was nevertheless followed in a case that dealt, as in *casu*, both with action proceedings and a declaration of delinquency. In *Organisation Undoing Tax Abuse NPC and Another v Myeni and Another*, Tolmay J considered a similar argument that arose in action proceedings where the defendant director had raised the issue by way of a special plea. Tolmay J followed the reasoning in *REDISA* and commented on what 'getting leave' meant and came to the conclusion that. "*How leave should be obtained i.e., by way of application, a point in limine or a special plea should be determined by the circumstances of each case. In this instance I am of the view that in the light of the allegations made in the particulars of claim, read with the special plea and admissions made in the plea, this Court can determine this aspect by way of a special plea, and there exists no requirement that leave should have been obtained prior to the institution of the action*".<sup>10</sup>

[23] I am in respectful agreement with this approach. The argument pressed by counsel for the third defendant relying on Jafta J's article that these applications need management needs closer interrogation. If you are an applicant for a delinquency application and you are a member of the class of applicants specifically named in section 162(2), there is no requirement for prior court management of that application. Thus, the only difference between those persons and the applicant under section 157(1)(d), is the need for the latter to establish that they act in the public interest. But this is a single enquiry of fact and not the multiple enquiry required of an applicant in a class action.<sup>11</sup> This suggests that the need for the court to engage in prior

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<sup>10</sup> *Organisation Undoing Tax Abuse NPC and Another v Myeni and Another (15996/2017) [2019] ZAGPPHC 957 (12 December 2019) unreported paragraph 25*

<sup>11</sup> By way of contrast, in *Childrens Resource Centre*, *supra*, the court identified seven requirements for certification of a class action.

management is not as compelling under section 157(1)(d) as Judge Jafta suggests. There is no reason then for the requirement that there must be a prior application, and like Tolmay J, I consider that this aspect can be determined by way of a special plea.

**Does a creditor have standing under section 157(1) (d)?**

[24] I accept that this case is distinguishable from the *Myeni* case in that there the applicant was a non-profit organisation and not a creditor. But that does not mean that the third defendant should succeed on this point alone.

[25] Three arguments were advanced by third defendant to argue that creditors do not have standing under section 157(1)(d) to bring an action under section 162. The first argument is based on statutory interpretation. The third defendant argues that each successive Companies Act, commencing with the 1926 Companies Act, has created and extended powers to penalise delinquent directors. But while section 162 of the 2008 Act creates extended standing to a far broader class of persons connected to administration of the company it specifically excluded the class of "creditors" who previously had standing in terms of section 423 of the 1973 Companies Act. In other words what is argued is that the legislature against this backdrop of history intended to exclude creditors from the class of applicants who could apply for disqualification.

[26] But as counsel for Vantage argues, this assumes that section 162 of the 2008 Act and section 423 of its predecessor, serve the same purpose. But although the latter refers to delinquent directors its purpose is to make the miscreant

director restore assets or monies to the company. It is clear that this is not analogous to the remedies consequent on being declared a delinquent director in terms of section 162, where the remedies provided are not intended to be restorative to the company. Rather, their intention is to impose various disqualifications on the person declared delinquent. I do not find that the statutory comparison excludes a creditor from seeking a remedy under section 162.

[27] The second argument the third defendant makes is that the amendment is not genuine because a creditor does not have standing to seek disqualification relief. It is not clear on what this contention is based. It would appear that this comes from the language in two judgments dealing more generally with the public interest. In *Ferreira v Levin No & Others; Vryenhoek & Others v Powell No & Others* and *Lawyers for Human Rights* the courts had to consider whether an assertion by a party that it was acting in the public interest was genuine. The approaches differed. In *Ferreira* the court said considerations included:

*“...whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court.”*

[28] In *Lawyers for Human Rights* the approach to genuineness was to make a distinction between:

*"(...) the subjective position of the person or organisation claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O'Regan J help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important in the analysis."*

[29] The third defendant seeking to invoke the approach in *Ferreira* argued that there are other bodies which could bring the application for disqualification such as the Commission or the Panel and hence there is no need for a creditor to do so. But the fact that another body may also have the right to bring such an application and that such a body may be regarded, as with the Commission or the Panel, as a repository of the public interest, does not exclude a private party seeking to act in this capacity as well. There is no suggestion that this right is exclusive to these parties and cannot be exercised

by any other party. Clearly if one of these parties chose to do so, the court in exercising its discretion to grant leave, could take this factor into account. But that is not a justification for refusing a party such as a creditor from applying for leave to act in the public interest. Moreover, there is no indication that any of these bodies is seeking to act in terms of section 162(2) in this particular case. Vantage has pleaded a case to indicate why it is uniquely placed to do so because the actions it seeks to rely on, involve its interactions with the defendants *qua* creditor.

[30] The third argument was that the danger of giving the creditor such standing was that it could use the threat of a delinquency declaration to squeeze the proverbial *few extra bob* out of the directors and hence is not genuine but opportunistic.

[31] There may be validity to arguments around genuineness in some cases. But it does not follow that this applies in every case where a creditor seeks leave under section 157(1)(d). There may be no other party willing to vindicate the public interest. Nor does it automatically follow that because a creditor is also suing the directors at the same time for damages, as well as seeking a delinquency declaration, that they must be acting cynically and opportunistically. That will depend on the facts of each case. In this case Vantage has advanced arguments for why it is acting in the public interest. These can be tested if challenged but they are not a basis for so extreme a finding that a creditor can never be a genuine applicant to vindicate the public interest and hence as a ground of exception the amendment should be denied.



[32] Finally, an argument was made based on traditional company law that company directors owe no duty to creditors. As authority for this reliance was placed on a recent judgment in *BTI 2014 LLC v Sequana SA and others*, by Lord Reid in the United Kingdom's Supreme Court where he stated that the traditional approach was:

*"It is firmly established that the directors of a company do not owe any duty to its creditors, absent special circumstances giving rise to such a duty..."*<sup>12</sup>

[33] However, Lord Reid in this passage is doing no more than discuss what the traditional approach was. He goes on in his judgment to take a more economic approach which leads him to a different conclusion. Thus, in relation to changing nature of a company's interests depends on commercial circumstances as the following passage illustrates:

*"The treatment of the company's interests as equivalent to the shareholders' interests can therefore be regarded as justifiable while the company is financially stable, since it results in the directors being under a duty to manage the company in the interests of those who primarily bear the commercial risks which the directors undertake; and, as explained in para 47 above, creditors are also protected. But that ceases to be true when the company is insolvent or nearing insolvency. To treat the company's interests as equivalent to the shareholders' interests in that situation encourages the taking of commercial risks which*

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<sup>12</sup> [2022] UKSC 25 at paragraph 25.

*are borne primarily not by the shareholders but by the creditors, who will recover less in a winding up if the company's assets have been diminished or if it has taken on additional liabilities. In economic terms, treating the company's interests as equivalent to the shareholders' interests in a situation of insolvency or near-insolvency results in the externalisation of risk: losses resulting from risk-taking are borne wholly or mainly by third parties.*<sup>13</sup>

(Emphasis provided)

[34] Thus, if anything, this approach would favour treating the position of a creditor of an insolvent company or near insolvent company as being different to that of a company which is financially stable. In the present case it is common cause that Somnipoint has been wound up. Prior to that at the time the defendants are alleged to have acted contrary to their duties in terms of section 162(5)(c) it is alleged the company was near insolvency. But even if this is a dispute of fact this does not amount to a proper point of exception. Moreover, this economic, as opposed to traditional approach, adopted by Lord Reid, is consonant with the purpose of the 2008 Companies Act. In the Headnote to the Act, there is a reference to one of its aims as being to “(...) *provide appropriate legal redress for investors and third parties with respect to companies:*”.

[35] In section 7 where the purposes are more fully set one of these objective states:

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<sup>13</sup> Supra, paragraph 59

7(b)(iii) “(...) *encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation.*”

[36] This reading of the policy approach in the 2008 Act suggests two things: that investors and third parties are to be provided with greater remedies in relation to companies; and that high standards of corporate governance are expected. Any reading of section 157(1)(d) read with section 162 which seeks to categorically deny a creditor these rights seems contrary to the spirit of the Act. I am not suggesting that a creditor always has this right. Only that *per se*, as a category of person, it cannot be denied this right without the further enquiry as to whether it acts in the public interest and that is an enquiry dependent on the facts in each case.

**The plaintiff's cause of action is own interest not public interest litigation**

[37] The third defendant argues that it is clear from the particulars of claim that Vantage has brought this case in its own interest as it seeks to hold the defendants liable for a monetary claim. It therefore has a commercial interest in the litigation that is distinct from the public interest that it seeks to rely on to invoke section 157(1)(d). The third defendant argues that there is nothing in the notice of amendment to indicate that it is acting in the public interest and that it represents a group of persons who are vulnerable or in need of protection.

[38] Whether this legal test is correct or not, or whether the third defendant has posited the correct test for invoking the public interest, is a matter of fact; and hence not an appropriate argument to raise now in opposing an amendment. As Cameron J has stated in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd*

*"Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed."*

[39] *Giant Concerts* is the case that the third defendant places reliance on to oppose the amendment on the grounds that it is an exercise of own interest not public interest. But if each case must depend on its own facts this is not the basis for a true exception but can form part of a special plea. This ground of exception must fail as well.

### **Conclusion**

[40] The third defendant has failed in its opposition to the opposed amendment for the reasons given. What remains for me to consider is whether there is a basis for Vantage to claim, as it has, attorney client costs. I do not consider that there is any basis for a punitive award. The third defendant has in fact through its exception assisted Vantage in bringing its claim within the correct enabling provision in the Act. The fact that once the amendment had been made the third defendant continued with its opposition, does not mean, as

counsel for Vantage pressed me to find, that the third defendant is “*frustrating the efficient conduct of the litigation*” or that the third defendant “*treats the litigation as a game.*” As I noted earlier the reliance of a creditor on section 157(1)(d) as a gateway to exercising rights in terms of section 162(2) is novel, and the third defendant was entitled to exercise its right to oppose the amendment without being mulcted with a punitive costs order.<sup>14</sup> Party and party costs will suffice but I will include the costs of two counsel given the matter was complex.

**ORDER: -**

[41] In the result the following order is made:

1. The plaintiffs are granted leave to amend their particulars of claim in accordance with their Uniform Rule 28 notice of intention to amend, dated 8 March 2023.
2. The third defendant is ordered to pay the costs of the application on a party and party scale, including the costs of two counsel.

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**N. MANOIM  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION  
JOHANNESBURG**

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<sup>14</sup> As the authors of one company law text have noted: “*Section 162(2) is a new remedy.*” See “*The New Companies Act unlocked*” C. Stein and G Everingham, 2011 page 227,

Date of hearing: 01 November 2023

Date of judgment: 24 November 2023

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