Republic of the Philippines
Supreme Court
Manila

FIRST DIVISION

JAMES IENT and MAHARLIKA SCHULZE, Petitioners,

– *versus* –

TULLETT PREBON (PHILIPPINES), INC., Respondent.

G.R. No. 189158

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JAMES IENT and MAHARLIKA SCHULZE, Petitioners,

– *versus* –

TULLETT PREBON (PHILIPPINES), INC., Respondent.

G.R. No. 189530

Present:

SERENO, *CJ.*,
LEONARDO-DE CASTRO,
DEL CASTILLO,
JARDELEZA,[*] and
CAGUIOA, *JJ.*

Promulgated:

JAN 11 2017

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DECISION

LEONARDO-DE CASTRO, *J.*:

In these consolidated Petitions for Review under Rule 45 of the Rules of Court, petitioners James A. Ient (Ient) and Maharlika C. Schulze (Schulze) assail the Court of Appeals Decision[1] dated August 12, 2009 in CA-G.R. SP No. 109094, which affirmed the Resolutions dated April 23,

* Per Raffle dated December 7, 2016.

1 *Rollo* (G.R. No. 189158), Vol. I, pp. 64-84; penned by then Court of Appeals Associate Justice Martin S. Villarama, Jr. (a retired member of this Court) with Associate Justices Vicente S.E. Veloso and Normandie B. Pizarro concurring.

2009[2] and May 15, 2009[3] of the Secretary of Justice in I.S. No. 08-J-8651. The Secretary of Justice, through the Resolutions dated April 23, 2009 and May 15, 2009, essentially ruled that there was probable cause to hold petitioners, in conspiracy with certain former directors and officers of respondent Tullet Prebon (Philippines), Inc. (Tullett), criminally liable for violation of Sections 31 and 34 in relation to Section 144 of the Corporation Code.

From an assiduous review of the records, we find that the relevant factual and procedural antecedents for these petitions can be summarized as follows:

Petitioner Ient is a British national and the Chief Financial Officer of Tradition Asia Pacific Pte. Ltd. (Tradition Asia) in Singapore.[4] Petitioner Schulze is a Filipino/German who does Application Support for Tradition Financial Services Ltd. in London (Tradition London).[5] Tradition Asia and Tradition London are subsidiaries of *Compagnie Financiere* Tradition and are part of the "Tradition Group." The Tradition Group is allegedly the third largest group of Inter-dealer Brokers (IDB) in the world while the corporate organization, of which respondent Tullett is a part, is supposedly the second largest. In other words, the Tradition Group and Tullett are competitors in the inter-dealer broking business. IDBs purportedly "utilize the secondary fixed income and foreign exchange markets to execute their banks and their bank customers' orders, trade for a profit and manage their exposure to risk, including credit, interest rate and exchange rate risks." In the Philippines, the clientele for IDBs is mainly comprised of banks and financial institutions.[6]

Tullett was the first to establish a business presence in the Philippines and had been engaged in the inter-dealer broking business or voice brokerage here since 1995.[7] Meanwhile, on the part of the Tradition Group, the needs of its Philippine clients were previously being serviced by Tradition Asia in Singapore. The other IDBs in the Philippines are Amstel and Icap.[8]

Sometime in August 2008, in line with Tradition Group's motive of expansion and diversification in Asia, petitioners Ient and Schulze were tasked with the establishment of a Philippine subsidiary of Tradition Asia to be known as Tradition Financial Services Philippines, Inc. (Tradition Philippines).[9] Tradition Philippines was registered with the Securities and

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2 Id. at 85-95.
3 Id. at 96-97.
4 Id. at 19.
5 *Rollo* (G.R. No. 189530), Vol. I, p. 7.
6 *Rollo* (G.R. No. 189158), Vol. I, pp. 19-22.
7 SeeTullett's 2007 General Information Sheet, id. at 112.
8 Id. at 21-22.
9 *Rollo* (G.R. No. 189530), Vol. I, p. 10.

Exchange Commission (SEC) on September 19, 2008[10] with petitioners Ient and Schulze, among others, named as incorporators and directors in its Articles of Incorporation.[11]

On October 15, 2008, Tullett, through one of its directors, Gordon Buchan, filed a Complaint-Affidavit[12] with the City Prosecution Office of Makati City against the officers/employees of the Tradition Group for violation of the Corporation Code. Impleaded as respondents in the Complaint-Affidavit were petitioners Ient and Schulze, Jaime Villalon (Villalon), who was formerly President and Managing Director of Tullett, Mercedes Chuidian (Chuidian), who was formerly a member of Tullett's Board of Directors, and other John and Jane Does. Villalon and Chuidian were charged with using their former positions in Tullett to sabotage said company by orchestrating the mass resignation of its entire brokering staff in order for them to join Tradition Philippines. With respect to Villalon, Tullett claimed that the former held several meetings between August 22 to 25, 2008 with members of Tullett's Spot Desk and brokering staff in order to convince them to leave the company. Villalon likewise supposedly intentionally failed to renew the contracts of some of the brokers. On August 25, 2008, a meeting was also allegedly held in Howzat Bar in Makati City where petitioners and a lawyer of Tradition Philippines were present. At said meeting, the brokers of complainant Tullett were purportedly induced, *en masse*, to sign employment contracts with Tradition Philippines and were allegedly instructed by Tradition Philippines' lawyer as to how they should file their resignation letters.

Complainant also claimed that Villalon asked the brokers present at the meeting to call up Tullett's clients to inform them that they had already resigned from the company and were moving to Tradition Philippines. On August 26, 2008, Villalon allegedly informed Mr. Barry Dennahy, Chief Operating Officer of Tullett Prebon in the Asia-Pacific, through electronic mail that all of Tullett's brokers had resigned. Subsequently, on September 1, 2008, in another meeting with Ient and Tradition Philippines' counsel, indemnity contracts in favor of the resigning employees were purportedly distributed by Tradition Philippines. According to Tullett, respondents Villalon and Chuidian (who were still its directors or officers at the times material to the Complaint-Affidavit) violated Sections 31 and 34 of the Corporation Code which made them criminally liable under Section 144. As for petitioners Ient and Schulze, Tullett asserted that they conspired with Villalon and Chuidian in the latter's acts of disloyalty against the company.[13]

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10 See 2008 General Information Sheet of Tradition Philippines, id. at 240.
11 *Rollo* (G.R. No. 189158), Vol. I, pp. 118-124.
12 Id. at 98-111.
13 Id. at 102-107.

Villalon and Chuidian filed their respective Counter-Affivadits.[14]

Villalon alleged that frustration with management changes in Tullett Prebon motivated his personal decision to move from Tullett and accept the invitation of a Leonard Harvey (also formerly an executive of Tullett) to enlist with the Tradition Group. As a courtesy to the brokers and staff, he informed them of his move contemporaneously with the tender of his resignation letter and claimed that his meetings with the brokers was not done in bad faith as it was but natural, in light of their long working relationship, that he share with them his plans. The affidavit of Engelbert Wee should allegedly be viewed with great caution since Wee was one of those who accepted employment with Tradition Philippines but changed his mind and was subsequently appointed Managing Director (Villalon's former position) as a prize for his return. Villalon further argued that his resignation from Tullett was done in the exercise of his fundamental rights to the pursuit of life and the exercise of his profession; he can freely choose to avail of a better life by seeking greener pastures; and his actions did not fall under any of the prohibited acts under Sections 31 and 34 of the Corporation Code. It is likewise his contention that Section 144 of the Corporation Code applies only to violations of the Corporation Code which do not provide for a penalty while Sections 31 and 34 already provide for the applicable penalties for violations of said provisions – damages, accounting and restitution. Citing the Department of Justice (DOJ) Resolution dated July 30, 2008 in *UCPB v. Antiporda*, Villalon claimed that the DOJ had previously proclaimed that Section 31 is not a penal provision of law but only the basis of a cause of action for civil liability. Thus, he concluded that there was no probable cause that he violated the Corporation Code nor was the charge of conspiracy properly substantiated.[15]

Chuidian claimed that she left Tullett simply to seek greener pastures. She also insisted the complaint did not allege any act on her part that is illegal or shows her participation in any conspiracy. She merely exercised her right to exercise her chosen profession and pursue a better life. Like Villalon, she stressed that her resignation from Tullett and subsequent transfer to Tradition Philippines did not fall under any of the prohibited acts under Sections 31 and 34. Section 144 of the Corporation Code purportedly only applies to provisions of said Code that do not provide for any penalty while Sections 31 and 34 already provide for the penalties for their violation - damages, accounting and restitution. In her view, that Section 34 provided for the ratification of the acts of the erring corporate director, trustee or office evinced legislative intent to exclude violation of Section 34 from criminal prosecution. She argued that Section 144 as a penal provision should be strictly construed against the State and liberally in favor of the

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14 Id. at 200-254 and 255-295.

15 Id. at 203-223.

accused and Tullett has failed to substantiate its charge of bad faith on her part.[16]

In her Counter-Affidavit,[17] petitioner Schulze denied the charges leveled against her. She pointed out that the Corporation Code is not a "special law" within the contemplation of Article 10[18] of the Revised Penal Code on the supplementary application of the Revised Penal Code to special laws since said provision purportedly applies only to "special penal laws." She further argued that "[s]ince the Corporation Code does not expressly provide that the provisions of the Revised Penal Code shall be made to apply suppletorily, nor does it adopt the nomenclature of penalties of the Revised Penal Code, the provisions of the latter cannot be made to apply suppletorily to the former as provided for in the first sentence of Article 10 of the Revised Penal Code."[19] Thus, she concluded that a charge of conspiracy which has for its basis Article 8 of the Revised Penal Code cannot be made applicable to the provisions of the Corporation Code.

Schulze also claimed that the resignations of Tullett's employees were done out of their own free will without force, intimidation or pressure on her and Ient's part and were well within said employees' right to "free choice of employment."[20]

For his part, petitioner Ient alleged in his Counter-Affidavit that the charges against him were merely filed to harass Tradition Philippines and prevent it from penetrating the Philippine market. He further asserted that due to the highly specialized nature of the industry, there has always been a regular flow of brokers between the major players. He claimed that Tradition came to the Philippines in good faith and with a sincere desire to foster healthy competition with the other brokers. He averred that he never forced anyone to join Tradition Philippines and the Tullett employees' signing on with Tradition Philippines was their voluntary act since they were discontented with the working environment in Tullett. Adopting a similar line of reasoning as Schulze, Ient believed that the Revised Penal Code could not be made suppletorily applicable to the Corporation Code so as to charge him as a conspirator. According to Ient, he merely acted within his rights when he offered job opportunities to any interested person as it was within the employees' rights to change their employment, especially since Article 23 of the Universal Declaration of Human Rights (of which the Philippines is a signatory) provides that "everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to

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16 Id. at 256-273.

17 Id. at 308-313.

18 Article 10 of the Revised Penal Code states:

Art. 10. *Offenses not subject to the provisions of this Code.* – Offenses which are or in the future may be punishable under special laws are not subject to the provisions of this Code. This Code shall be supplementary to such laws, unless the latter should specially provide the contrary.

19 *Rollo* (G.R. No. 189158), Vol. I, p. 312.

20 Id. at 312.

protection against unemployment."[21] He also denounced the Complaint-Affidavit and the affidavits of Tullett employees attached thereto as self-serving or as an exaggeration/twisting of the true events.[22]

In a Consolidated Reply-Affidavit[23] notarized on January 22, 2009, Tullett argued that Villalon, Chuidian, Schulze, and Ient have mostly admitted the acts attributed to them in the Complaint-Affidavit and only attempted to characterize said acts as "normal," "innocent" or "customary." It was allegedly evident from the Counter-Affidavits that the resignation of Tullett's employees was an orchestrated plan and not simply motivated by their seeking "greener pastures." Purported employee movements in the industry between the major companies are irrevelant since such movements are subject to contractual obligations. Tullett likewise denied that its working environment was stringent and "weird." Even assuming that Villalon and Chuidian were dissatisfied with their employment in Tullett, this would supposedly not justify nor exempt them from violating their duties as Tullett's officers/directors. There was purportedly no violation of their constitutional rights to liberty or to exercise their profession as such rights are not unbridled and subject to the laws of the State. In the case of Villalon and Chuidian, they had to comply with their duties found in Sections 31 and 34 of the Corporation Code. Tullett asserts that Section 144 applies to the case at bar since the DOJ Resolution in *UCPB* is not binding as it applies only to the parties therein and it likewise involved facts different from the present case. Relying on *Home Insurance Company v. Eastern Shipping Lines*,[24] Tullett argued that Section 144 applies to all other violations of the Corporation Code without exception. Article 8 of the Revised Penal Code on conspiracy was allegedly applicable to the Corporation Code as a special law with a penal provision.[25]

In a Supplemental Complaint-Affidavit[26] likewise notarized on January 22, 2009, Tullett included Leonard James Harvey (Harvey) in the case and alleged that it learned of Harvey's complicity through the Counter-Affidavit of Villalon. Tullett claimed that Harvey, who was Chairman of its Board of Directors at the time material to the Complaint, also conspired to instigate the resignations of its employees and was an indispensable part of the sabotage committed against it.

In his Rejoiner-Affidavit,[27] Ient vehemently denied that there was a pre-arranged plan to sabotage Tullett. According to Ient, Gordon Buchan of Tullett thought too highly of his employer to believe that the Tradition Group's purpose in setting up Tradition Philippines was specifically to

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21 Id. at 323.
22 Id. at 314-323.
23 Id. at 370-401.
24 208 Phil. 359 (1983).
25 *Rollo* (G.R. No. 189158), Vol. I, pp. 395-397.
26 Id. at 402-411.
27 Id. at 429.

sabotage Tullett. He stressed that Tradition Philippines was set up for legitimate business purposes and Tullett employees who signed with Tradition did so out of their own free will and without any force, intimidation, pressure or inducement on his and Schulze's part. All he allegedly did was confirm the rumors that the Tradition Group was planning to set up a Philippine office. Echoing the arguments of Villalon and Chuidian, Ient claimed that (a) there could be no violation of Sections 31 and 34 of the Corporation as these sections refer to corporate acts or corporate opportunity; (b) Section 144 of the same Code cannot be applied to Sections 31 and 34 which already contains the penalties or remedies for their violation; and (c) conspiracy under the Revised Penal Code cannot be applied to the Sections 31 and 34 of the Corporation Code.

In a Resolution[28] dated February 17, 2009, State Prosecutor Cresencio F. Delos Trinos, Jr. (Prosecutor Delos Trinos), Acting City Prosecutor of Makati City, dismissed the criminal complaints. He reasoned that:

> It is our considered view that the acts ascribed [to] respondents Villalon and Chuidian did not constitute any of the prohibited acts of directors or trustees enunciated under Section 31. Their cited actuations certainly did not involve voting for or assenting to patently unlawful acts of [Tullett] nor could the same be construed as gross negligence or bad faith in directing the affairs of [Tullett]. There is also no showing that they acquired any personal or pecuniary interest in conflict with their duty as directors of [Tullett]. Neither was there a showing that they attempted to acquire or acquired, in violation of their duty as directors, any interest adverse to [Tullett] in respect [to] any matter which has been reposed in them in confidence.
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> x x x x
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> The issue that respondent Villalon informed the brokers of his plan to resign from [Tullett] and to subsequently transfer to Tradition is not in dispute. However, we are unable to agree that the brokers were induced or coerced into resigning from [Tullett] and transferring to Tradition themselves. x x x As the record shows, Mr. Englebert Wee and the six (6) members of the broking staff who stand as [Tullett]'s witnesses, also initially resigned from [Tullett] and transferred to Tradition but backed out from their contract of employment with Tradition and opted to remain with [Tullett].
>
> Even assuming *ex gratia argumenti* that the brokers were induced by the respondents or anyone of them to leave their employment with [Tullett], such inducement may only give rise to civil liability for damages against the respondents but no criminal liability would attach on them. x x x.
>
> On the alleged inducements of clients of [Tullett] to transfer to Tradition, there is no showing that clients of [Tullett] actually transferred to Tradition. Also, the allegation that respondents orchestrated the mass

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28 Id. at 455-472.

> resignation of employees of [Tullett] to destroy or shut down its business and to eliminate it from the market in order that Tradition could take its place is baseless and speculative. Significantly, it is noted that despite the resignations of respondents Villalon and Chuidian and the majority of the broking staff and their subsequent transfer to Tradition, the business of [Tullet] was not destroyed or shut down. [Tullett] was neither eliminated from the market nor its place in the market taken by Tradition. x x x
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> In the same vein, the "corporate opportunity doctrine" enunciated under Section 34 does not apply herein and cannot be rightfully raised against respondents Villalon and Chuidian. Under Section 34, a director of a corporation is prohibited from competing with the business in which his corporation is engaged in as otherwise he would be guilty of disloyalty where profits that he may realize will have to go to the corporate funds except if the disloyal act is ratified. Suffice it to say that their cited acts did not involve any competition with the business of [Tullett].[29]

On the issue of conspiracy, Prosecutor Delos Trinos found that since Villalon and Chuidian did not commit any acts in violation of Sections 31 and 34 of the Corporation Code, the charge of conspiracy against Schulze and Ient had no basis. As for Harvey, said Resolution noted that he was similarly situated as Villalon and Chuidian; thus, the considerations in the latter's favor were applicable to the former.[30] Lastly, on the applicability of Section 144 to Sections 31 and 34, Prosecutor Delos Trinos relied on the reasoning in the DOJ Resolution dated July 30, 2008 in *UCPB v. Antiporda* issued by then Secretary of Justice Raul M. Gonzalez, to wit:

> We maintain and reiterate the ratiocination of the Secretary of Justice in United Coconut Planters Bank vs. Tirso Antiporda, et al., I.S. No. 2007-633 promulgated on July 30, 2008, thus – "*It must be noted that Section 144 covers only those provisions 'not otherwise specifically penalized therein.' In plain language, this means that the penalties under Section 144 apply only when the other provisions of the Corporation Code do not yet provide penalties for non-compliance therewith.*"
>
> A reading of Sections 31 and 34 shows that penalties for violations thereof are already provided therein. Under Section 31, directors or trustees are made liable for damages that may result from their fraudulent or illegal acts. Also, directors, trustees or officers who attempt to acquire or acquire any interest adverse to the corporation will have to account for the profits which otherwise would have accrued to the corporation. Section 34, on the other hand, penalizes directors who would be guilty of disloyalty to the corporation by accounting to the corporation all profits that they may realize by refunding the same.[31]

Consequently, Tullett filed a petition for review with the Secretary of Justice to assail the foregoing resolution of the Acting City Prosecutor of Makati City. In a Resolution[32] dated April 23, 2009, then Secretary of

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29 Id. at 467-469.
30 Id. at 469.
31 Id. at 470.
32 Id. at 85-95.

Justice Raul M. Gonzalez reversed and set aside Prosecutor Delos Trinos's resolution and directed the latter to file the information for violation of Sections 31 and 34 in relation to Section 144 of the Corporation Code against Villalon, Chuidian, Harvey, Schulze, and Ient before the proper court. As can be gleaned from the April 23, 2009 Resolution, the Secretary of Justice ruled that:

> It is evident from the case at bar that there is probable cause to indict respondents Villalon, Chuidian and Harvey for violating Section 31 of the Corporation Code. Indeed, there is *prima facie* evidence to show that the said respondents acted in bad faith in directing the affairs of complainant. Undeniably, respondents Villalon, Chuidian and Harvey occupied positions of high responsibility and great trust as they were members of the board of directors and corporate officers of complainant. x x x As such, they are required to administer the corporate affairs of complainant for the welfare and benefit of the stockholders and to exercise the best care, skill and judgment in the management of the corporate business and act solely for the interest of the corporation.
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> x x x x
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> Respondents Villalon and Chuidian acted with dishonesty and in fraud. They went to the extent of having their several meetings away from complainant's office so as to secretly entice and induce all its brokers to transfer to Tradition. Respondents Villalon and Chuidian did not entice merely one or two employees of complainant but admittedly, the entire broking staff of the latter. This act would lead to the sure collapse of complainant. x x x.
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> Further, respondents Villalon and Chuidian acquired personal and pecuniary interest in conflict with their duties as directors of complainant. Respondents Villalon and Chuidian committed the acts complained of in order to transfer to Tradition, to have a higher salary and position and bring the clients and business of complainant with them. The fact that Tradition is not yet incorporated at that time is of no consequence.
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> Moreover, respondents Villalon and Chuidian violated Section 34 of the Corporation Code when they acquired business opportunity adverse to that of complainant. When respondents Villalon and Chuidian told the brokers of complainant to convince their clients to transfer their business to Tradition, the profits of complainant which rightly belonging to it will be transferred to a competitor company to be headed by respondents.
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> The provision of Section 144 of the Corporation Code is also applicable in the case at bar as the penal provision provided therein is made applicable to all violations of the Corporation Code, not otherwise specifically penalized. Moreover, the factual milieu of the case entitled "Antiporda, et al., IS No. 2007-633" is inapplicable as the facts of the above-entitled case is different.
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> x x x x

> As for respondent Harvey's probable indictment, aside from not submitting his counter-affidavit, the counter-affidavit of respondent Villalon showed that he is also liable as such since the idea to transfer the employment of complainant's brokers was broached by him.
>
> Anent respondents Ient and Schulze, record revealed that they conspired with respondents Villalon and Chuidian when they actively participated in the acts complained of. They presented the employment contracts and indemnity agreements with the brokers of complainant in a series of meetings held with respondents Villalon and Chuidian. Respondent Ient signed the contracts as CFO of Tradition Asia and even confirmed the transfer of respondent Villalon to Tradition. Respondent Schulze admitted that the purpose of her sojourn in the Philippines was to assist in the formation of Tradition. Thus, it is clear that their role in the acts complained of were instrumental for respondents Villalon and Chuidian to violate their duties and responsibilities as directors and officers of complainant.[33]

Ient and Schulze moved for reconsideration of the foregoing Resolution by the Secretary of Justice. Meanwhile, on May 14, 2009, two Informations, one for violation of Section 31 and another for violation of Section 34, were filed by Prosecutor Delos Trinos with the Metropolitan Trial Court of Makati City. In a Resolution dated May 15, 2009, the Secretary of Justice denied the motion for reconsideration filed by petitioners. Unsatisfied with this turn of events, petitioners Ient and Schulze brought the matter to the Court of Appeals *via* a petition for *certiorari* under Rule 65 which was docketed as CA-G.R. SP No. 109094.

In a Decision dated August 12, 2009, the Court of Appeals affirmed the Secretary of Justice's Resolutions dated April 23, 2009 and May 15, 2009, after holding that:

> Respondent Secretary correctly stressed that Sections 31 and 34 must be read in the light of the nature of the position of a director and officer of the corporation as highly imbued with trust and confidence. Petitioners' rigid interpretation of clear-cut instances of liability serves only to undermine the values of loyalty, honesty and fairness in managing the affairs of the corporation, which the law vested on their position. Besides, this Court can hardly deduce abuse of discretion on the part of respondent Secretary in considering a conflict of interest scenario from petitioners' act of advancing the interest of an emerging competitor in the field rather than fiercely protecting the business of their own company. As aptly pointed out by the private respondent, the issue is not the right of the employee brokers to seek greener pastures or better employment opportunities but the *breach of fiduciary duty owed by its directors and officers*.
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> In the commentary on the subject of duties of directors and controlling stockholders under the Corporation Code, Campos explained:

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[33] Id. at 91-93.

"*Fiduciary Duties; Conflict of Interest*

> "A director, holding as he does a position of trust, is a fiduciary of the corporation. As such, in case of conflict of his interest with those of the corporation, he cannot sacrifice the latter without incurring liability for his disloyal act. **The fiduciary duty has many ramifications, and the possible conflict-of-interest situations are almost limitless, each possibility posing different problems.** There will be cases where a breach of trust is clear. Thus, where a director converts for his own use funds or property belonging to the corporation, or accepts material benefits for exercising his powers in favor of someone seeking to do business with the corporation, no court will allow him to keep the profit he derives from his wrongdoing. In many other cases, however, the line of demarcation between the fiduciary relationship and a director's personal right is not easy to define. **The Code has attempted at least to lay down general rules of conduct and although these serve as guidelines for directors to follow, the determination as to whether in a given case the duty of loyalty has been violated has ultimately to be decided by the court on the case's own merits.**" x x x.

Prescinding from the above, We agree with the Secretary of Justice that the acts complained of in this case establish a *prima facie* case for violation of Sec. 31 such that the accused directors and officers of private respondent corporation are probably guilty of breach of *bad faith in directing the affairs of the corporation.* The breach of fiduciary duty as such director and corporate office (sic) are evident from their participation in recruiting the brokers employed in the corporation, inducing them to accept employment contracts with the newly formed firm engaged in competing business, and securing these new hires against possible breach of contract complaint by the corporation through indemnity contracts provided by Tradition Philippines. Clearly, no grave abuse of discretion was committed by the respondent Secretary in reversing the city prosecutor's dismissal of the criminal complaint and ordering the filing of the corresponding information against the accused, including herein petitioners.

As to petitioners' contention that conspiracy had not been established by the evidence, suffice it to state that such stance is belied by their own admission of the very acts complained of in the Complaint-Affidavit, the defense put up by them consists merely in their common argument that no crime was committed because private respondent's brokers had the right to resign and transfer employment if they so decide.

It bears to reiterate that probable cause is such set of facts and circumstances which would lead a reasonably discreet and prudent man to believe that the offense charged in the Information or any offense included therein has been committed by the person sought to be arrested. In determining probable cause, the average man weighs the facts and circumstances without resorting to the calibrations of the rules of evidence of which he has no technical knowledge. He relies on common sense. Thus, a finding of probable cause does not require an inquiry into whether

there is sufficient evidence to procure a conviction. It is enough that it is believed that the act or omission complained of constitutes the offense charged. Precisely, there is a trial for the reception of evidence of the prosecution in support of the charge.

Finally, the Court finds no merit in the argument of petitioners that Sec. 144 is not applicable since Sec. 31 already provides for liability for damages against the guilty director or corporate officer.

> "SEC. 144. ***Violations of the Code.*** – Violations of **any of the provisions of this Code** or its amendments **not otherwise specifically penalized therein** shall be punished by a fine of not less than one thousand (₱1,000.00) pesos but not more than ten thousand (₱10,000.00) pesos or by imprisonment for not less than thirty (30) days but not more than five (5) years, or both, in the discretion of the court. If the violation is committed by a corporation, the same may, after notice and hearing, be dissolved in appropriate proceedings before the Securities and Exchange Commission; *Provided*, That such dissolution shall not preclude the institution of appropriate action against the director, trustee or officer of the corporation responsible for the said violation; *Provided, further,* That nothing in this section shall be construed to repeal the other causes for dissolution of a corporation provided in this Code." x x x.

"Damages" as the term is used in Sec. 31 cannot be deemed as punishment or penalty as this appears in the above-cited criminal provision of the Corporation Code. Such "damage" implies civil, rather than, criminal liability and hence does not fall under those provisions of the Code which are not "specifically penalized" with fine or imprisonment.[34]

In light of the adverse ruling of the Court of Appeals, petitioners Ient and Schulze filed separate petitions for review with this Court. After requiring further pleadings from the parties, the Court directed the parties to submit their memoranda to consolidate their positions on the issues.

At the outset, it should be noted that respondent Tullett interposed several procedural objections which we shall dispose of first.

Anent respondent's contentions that the present petitions (assailing the issuances of the Secretary of Justice on the question of probable cause) had become moot and academic with the filing of the Informations in the trial court and that under our ruling in *Advincula v. Court of Appeals*[35] the filing of a petition for *certiorari* with the appellate court was the improper remedy as findings of the Secretary of Justice on probable cause must be respected, we hold that these cited rules are not inflexible.

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34 Id. at 81-83.

35 397 Phil. 641 (2000).

In *Yambot v. Tuquero*,[36] we observed that under exceptional circumstances, a petition for *certiorari* assailing the resolution of the Secretary of Justice (involving an appeal of the prosecutor's ruling on probable cause) may be allowed, notwithstanding the filing of an information with the trial court. We reiterated the doctrine in *Ching v. Secretary of Justice*[37] that the acts of a quasi-judicial officer may be assailed by the aggrieved party through a petition for *certiorari* and enjoined (a) when necessary to afford adequate protection to the constitutional rights of the accused; (b) when necessary for the orderly administration of justice; (c) when the acts of the officer are without or in excess of authority; (d) where the charges are manifestly false and motivated by the lust for vengeance; and (e) when there is clearly no *prima facie* case against the accused.

In the case at bar, it is unsettling to perceive a seeming lack of uniformity in the rulings of the Secretary of Justice on the issue of whether a violation of Section 31 entails criminal or only civil liability and such divergent actions are explained with a terse declaration of an alleged difference in factual milieu and nothing further. Such a state of affairs is not only offensive to principles of fair play but also anathema to the orderly administration of justice. Indeed, we have held that where the action of the Secretary of Justice is tainted with arbitrariness, an aggrieved party may seek judicial review via *certiorari* on the ground of grave abuse of discretion.[38]

We likewise cannot give credit to respondent's claim of mootness. The "moot and academic" principle is not a magical formula that can automatically dissuade the courts in resolving a case.[39] The Court will not hesitate to resolve the legal and constitutional issues raised to formulate controlling principles to guide the bench, the bar, and the public, particularly on a question capable of repetition, yet evading review.[40]

As for the assertion that the present petitions are dismissible due to forum shopping since they were filed during the pendency of petitioners' motion to quash and their co-accused's motion for judicial determination of probable cause with the trial court, we hold that there is no cause to dismiss these petitions on such ground.

Forum shopping is an act of a party, against whom an adverse judgment or order has been rendered in one forum, of seeking and possibly getting a favorable opinion in another forum, **other than by appeal or special civil action for *certiorari***. It may also involve the institution of two or more actions or proceedings grounded on the same cause on the

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36 661 Phil. 599, 606 (2011).
37 517 Phil. 151, 170 (2006).
38 *Ty v. De Jemil*, 653 Phil. 356, 369 (2010).
39 *Funa v. Villar*, 686 Phil. 571, 583 (2012).
40 *Deutsche Bank AG v. Court of Appeals*, 683 Phil. 80, 88 (2012).

supposition that one or the other court would make a favorable disposition.[41] There is no forum shopping where the suits involve different causes of action or different reliefs.[42]

Jurisprudence explains that:

> A motion to quash is the mode by which an accused assails, before entering his plea, the validity of the criminal complaint or the criminal information filed against him for insufficiency on its face in point of law, or for defect apparent on the face of the Information. The motion, as a rule, hypothetically admits the truth of the facts spelled out in the complaint or information. The rules governing a motion to quash are found under Rule 117 of the Revised Rules of Court. Section 3 of this Rule enumerates the grounds for the quashal of a complaint or information. x x x.[43] (Citation omitted.)

On the other hand, the action at bar is a review on *certiorari* of the assailed Court of Appeals decision wherein the main issue is whether or not the Secretary of Justice committed grave abuse of discretion in reversing the City Prosecutor's dismissal of the criminal complaint. These consolidated petitions may proceed regardless of whether or not there are grounds to quash the criminal information pending in the court *a quo*.

Neither do we find relevant the pendency of petitioners' co-accused's motion for judicial determination of probable cause before the trial court. The several accused in these consolidated cases had a number of remedies available to them and they are each free to pursue the remedy which they deem is their best option. Certainly, there is no requirement that the different parties in a case must all choose the same remedy. We have held that even assuming separate actions have been filed by different parties involving essentially the same subject matter, no forum shopping is committed where the parties did not resort to multiple judicial remedies.[44] In any event, we have stated in the past that the rules on forum shopping are not always applied with inflexibility.[45]

As a final point on the technical aspects of this case, we reiterate here the principle that in the exercise of the Court's equity jurisdiction, procedural lapses may be disregarded so that a case may be resolved on its merits.[46] Indeed, where strong considerations of substantive justice are manifest in a petition, the strict application of the rules of procedure may be

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41 *People v. Grey*, 639 Phil. 535, 545 (2010).
42 *Chavez v. Court of Appeals*, 624 Phil. 396, 400 (2010).
43 *Los Baños v. Pedro*, 604 Phil. 215, 227-228 (2009).
44 *Development Bank of the Philippines v. Court of Appeals*, 526 Phil. 525, 548-549 (2006).
45 *London v. Baguio Country Club Corp.*, 439 Phil. 487, 492 (2002).
46 *Superlines Transportation Co., Inc. v. Philippine National Construction Co.*, 548 Phil. 354, 362 (2007).

relaxed.[47] This is particularly true in these consolidated cases where legal issues of first impression have been raised.

We now proceed to rule upon the parties' substantive arguments.

The main bone of disagreement among the parties in this case is the applicability of Section 144 of the Corporation Code to Sections 31 and 34 of the same statute such that criminal liability attaches to violations of Sections 31 and 34. For convenient reference, we quote the contentious provisions here:

> SECTION 31. *Liability of Directors, Trustees or Officers.* — Directors or trustees who willfully and knowingly vote for or assent to patently unlawful acts of the corporation or who are guilty of gross negligence or bad faith in directing the affairs of the corporation or acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees shall be liable jointly and severally for all damages resulting therefrom suffered by the corporation, its stockholders or members and other persons.
>
> When a director, trustee or officer attempts to acquire or acquires, in violation of his duty, any interest adverse to the corporation in respect of any matter which has been reposed in him in confidence, as to which equity imposes a disability upon him to deal in his own behalf, he shall be liable as a trustee for the corporation and must account for the profits which otherwise would have accrued to the corporation.
>
> SECTION 34. *Disloyalty of a Director.* — Where a director, by virtue of his office, acquires for himself a business opportunity which should belong to the corporation, thereby obtaining profits to the prejudice of such corporation, he must account to the latter for all such profits by refunding the same, unless his act has been ratified by a vote of the stockholders owning or representing at least two-thirds (2/3) of the outstanding capital stock. This provision shall be applicable, notwithstanding the fact that the director risked his own funds in the venture.
>
> SECTION 144. *Violations of the Code.* — Violations of any of the provisions of this Code or its amendments not otherwise specifically penalized therein shall be punished by a fine of not less than one thousand (₱1,000.00) pesos but not more than ten thousand (₱10,000.00) pesos or by imprisonment for not less than thirty (30) days but not more than five (5) years, or both, in the discretion of the court. If the violation is committed by a corporation, the same may, after notice and hearing, be dissolved in appropriate proceedings before the Securities and Exchange Commission: *Provided*, That such dissolution shall not preclude the institution of appropriate action against the director, trustee or officer of the corporation responsible for said violation: *Provided, further*, That nothing in this section shall be construed to repeal the other causes for dissolution of a corporation provided in this Code.

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47 *Victorio-Aquino v. Pacific Plans, Inc.*, G.R. No. 193108, December 10, 2014, 744 SCRA 480, 499.

Petitioners posit that Section 144 only applies to the provisions of the Corporation Code or its amendments "not otherwise specifically penalized" by said statute and should not cover Sections 31 and 34 which both prescribe the "penalties" for their violation; namely, damages, accounting and restitution of profits. On the other hand, respondent and the appellate court have taken the position that the term "penalized" under Section 144 should be interpreted as referring to criminal penalty, such as fine or imprisonment, and that it could not possibly contemplate "civil" penalties such as damages, accounting or restitution.

As Section 144 speaks, among others, of the imposition of criminal penalties, the Court is guided by the elementary rules of statutory construction of penal provisions. First, in all criminal prosecutions, the existence of criminal liability for which the accused is made answerable must be clear and certain. We have consistently held that "penal statutes are construed strictly against the State and liberally in favor of the accused. When there is doubt on the interpretation of criminal laws, all must be resolved in favor of the accused. Since penal laws should not be applied mechanically, the Court must determine whether their application is consistent with the purpose and reason of the law."[48]

Intimately related to the *in dubio pro reo*[49] principle is the **rule of lenity**. The rule applies when the court is faced with two possible interpretations of a penal statute, one that is prejudicial to the accused and another that is favorable to him. The rule calls for the adoption of an interpretation which is more lenient to the accused.[50]

In American jurisprudence, there are two schools of thought regarding the application of the rule of lenity. Justice David Souter, writing for the majority in *United States v. R.L.C.*,[51] refused to resort to the rule and held that lenity is reserved "for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." Justice Antonin Scalia, although concurring in part and concurring in the judgment, argued that "it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history... The rule of lenity, in my view, prescribes the result when a criminal statute is ambiguous: The more lenient interpretation must prevail."[52] In other words, for Justice Scalia, textual ambiguity in a penal statute suffices for the rule of lenity to be applied. Although foreign case law is merely persuasive authority and this Court is not bound by either legal perspective expounded in *United States v. R.L.C.*, said case provides a useful

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48 *People v. Valdez*, G.R. Nos. 216007-09, December 8, 2015.

49 This Latin legal maxim translates into "when in doubt, [rule] for the accused."

50 *Intestate Estate of Manolita Gonzales Vda. de Carungcong v. People*, 626 Phil. 177, 200 (2010).

51 503 U.S. 291, 305-308 (1992).

52 Id. at 307-308.

framework in our own examination of the scope and application of Section 144.

After a meticulous consideration of the arguments presented by both sides, the Court comes to the conclusion that there is textual ambiguity in Section 144; moreover, such ambiguity remains even after an examination of its legislative history and the use of other aids to statutory construction, necessitating the application of the rule of lenity in the case at bar.

Respondent urges this Court to strictly construe Section 144 as contemplating only penal penalties. However, a perusal of Section 144 shows that it is not a purely penal provision. When it is a corporation that commits a violation of the Corporation Code, it may be dissolved in appropriate proceedings before the Securities and Exchange Commission. The involuntary dissolution of an erring corporation is not imposed as a criminal sanction,[53] but rather it is an administrative penalty.

The ambivalence in the language of Section 144 becomes more readily apparent in comparison to the penal provision[54] in Republic Act No. 8189 (The Voter's Registration Act of 1996), which was the subject of our decision in *Romualdez v. Commission on Elections*.[55] In that case, we upheld the constitutionality of Section 45(j) of Republic Act No. 8189 which made any violation of said statute a criminal offense. It is respondent's opinion that the penal clause in Section 144 should receive similar treatment and be deemed applicable to any violation of the Corporation Code. The Court cannot accept this proposition for there are weighty reasons to distinguish this case from *Romualdez*.

We find it apropos to quote Sections 45 and 46 of Republic Act No. 8189 here:

> SECTION 45. *Election Offense.* — **The following shall be considered election offenses under this Act:**
>
> a) to deliver, hand over, entrust or give, directly or indirectly, his voter's identification card to another in consideration of money or other benefit or promise; or take or accept such voter's identification card, directly or indirectly, by giving or causing the giving of money or other benefit or making or causing the making of a promise therefor;

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53 Criminal penalties are generally understood to be limited to imprisonment or a fine. In Article 25 of the Revised Penal Code, penalties for lighter crimes may include suspension, destierro, public censure and a bond to keep the peace.

54 We are aware of the existence of other penal/penalty provisions in various civil statutes. However, as the constitutionality and proper interpretation of these provisions vis-a-vis criminal law principles have not been specifically dealt with in jurisprudence, it is neither necessary nor practical to analyze and discuss here the variances in wording or syntax of every penal/penalty provision in our jurisdiction. The validity, scope and application of each penal/penalty provision should be raised and decided in the proper case.

55 576 Phil. 357 (2008).

b) to fail, without cause, to post or give any of the notices or to make any of the reports required under this Act;

c) to issue or cause the issuance of a voter's identification number to cancel or cause the cancellation thereof in violation of the provisions of this Act; or to refuse the issuance of registered voters their voter's identification card;

d) to accept an appointment, to assume office and to actually serve as a member of the Election Registration Board although ineligible thereto; to appoint such ineligible person knowing him to be ineligible;

e) to interfere with, impede, abscond for purposes of gain or to prevent the installation or use of computers and devices and the processing, storage, generation and transmission of registration data or information;

f) to gain, cause access to, use, alter, destroy, or disclose any computer data, program, system software, network, or any computer-related devices, facilities, hardware or equipment, whether classified or declassified;

g) failure to provide certified voters and deactivated voters list to candidates and heads or representatives of political parties upon written request as provided in Section 30 hereof;

h) failure to include the approved application form for registration of a qualified voter in the book of voters of a particular precinct or the omission of the name of a duly registered voter in the certified list of voters of the precinct where he is duly registered resulting in his failure to cast his vote during an election, plebiscite, referendum, initiative and/or recall. The presence of the form or name in the book of voters or certified list of voters in precincts other than where he is duly registered shall not be an excuse hereof;

i) The posting of a list of voters outside or at the door of a precinct on the day of an election, plebiscite, referendum, initiative and/or recall and which list is different in contents from the certified list of voters being used by the Board of Election Inspectors; and

j) Violation of any of the provisions of this Act.

SECTION 46. *Penalties.* — Any person found guilty of any Election offense under this Act shall be punished with imprisonment of not less than one (1) year but not more than six (6) years and shall not be subject to probation. In addition, the guilty party shall be sentenced to suffer disqualification to hold public office and deprivation of the right of suffrage. If he is a foreigner, he shall be deported after the prison term has been served. Any political party found guilty shall be sentenced to pay a fine of not less than One hundred thousand pesos (₱100,000) but not more than Five hundred thousand pesos (₱500,000).

The crux of the Court's ruling in *Romualdez* is that, from the wording of Section 45(j), there is a clear legislative intent to treat as an election offense any violation of the provisions of Republic Act No. 8189. For this reason, we do not doubt that Section 46 contemplates the term "penalty" primarily in the criminal law or punitive concept of the term.

There is no provision in the Corporation Code using similarly emphatic language that evinces a categorical legislative intent to treat as a criminal offense each and every violation of that law. Consequently, there is no compelling reason for the Court to construe Section 144 as similarly employing the term "penalized" or "penalty" solely in terms of criminal liability.

In *People v. Temporada,*[56] we held that in interpreting penal laws, "words are given their ordinary meaning and that any reasonable doubt about the meaning is decided in favor of anyone subjected to a criminal statute." Black's Law Dictionary recognizes the numerous conceptions of the term penalty and discusses in part that it is "[a]n **elastic term** with many different shades of meaning; it involves idea of punishment, **corporeal or pecuniary, or civil or criminal**, although its meaning is generally confined to pecuniary punishment."[57] Persuasively, in *Smith v. Doe*,[58] the U.S. Supreme Court, interpreting a statutory provision that covers both punitive and non-punitive provisions, held that:

> The location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one. In *89 Firearms,* the Court held a forfeiture provision to be a civil sanction even though the authorizing statute was in the criminal code. The Court rejected the argument that the placement demonstrated Congress' "intention to create an additional criminal sanction," observing that **"both criminal and civil sanctions may be labeled 'penalties.'"** (Emphasis supplied.)

Giving a broad and flexible interpretation to the term "penalized" in Section 144 only has utility if there are provisions in the Corporation Code that specify consequences other than "penal" or "criminal" for violation of, or non-compliance with, the tenets of the Code. Petitioners point to the civil liability prescribed in Sections 31 and 34. Aside from Sections 31 and 34, we consider these provisions of interest:

> SECTION 21. *Corporation by Estoppel.* — **All persons who assume to act as a corporation knowing it to be without authority to do so shall be liable as general partners for all debts, liabilities and damages incurred or arising as a result** thereof: *Provided, however*, That when any such ostensible corporation is sued on any transaction

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56 594 Phil. 680, 739 (2008).

57 Black's Law Dictionary, 6th edition (1990), p. 1133.

58 *Smith v. Doe*, 538 U.S. 84, 94-95 (2003); citing *U.S. v. One Assortment of 89 Firearms*, 465 U.S. 354, 364–365, 104 S.Ct. 1099 (1984).

entered by it as a corporation or on any tort committed by it as such, it shall not be allowed to use as a defense its lack of corporate personality.

One who assumes an obligation to an ostensible corporation as such, cannot resist performance thereof on the ground that there was in fact no corporation.

SECTION 22. *Effects of non-use of corporate charter and continuous inoperation of a corporation.* — **If a corporation does not formally organize and commence the transaction of its business or the construction of its works within two (2) years from the date of its incorporation, its corporate powers cease and the corporation shall be deemed dissolved.** However, if a corporation has commenced the transaction of its business but subsequently becomes continuously inoperative for a period of at least five (5) years, the same shall be a ground for the suspension or revocation of its corporate franchise or certificate of incorporation.

This provision shall not apply if the failure to organize, commence the transaction of its business or the construction of its works, or to continuously operate is due to causes beyond the control of the corporation as may be determined by the Securities and Exchange Commission.

SECTION 65. *Liability of directors for watered stocks.* — **Any director or officer of a corporation consenting to the issuance of stocks for a consideration less than its par or issued value or for a consideration in any form other than cash, valued in excess of its fair value, or who, having knowledge thereof,** does not forthwith express his objection in writing and file the same with the corporate secretary, **shall be solidarily liable with the stockholder concerned to the corporation and its creditors for the difference between the fair value received at the time of issuance of the stock and the par or issued value of the same.**

SECTION 66. *Interest on unpaid subscriptions.* — **Subscribers for stock shall pay to the corporation interest on all unpaid subscriptions** from the date of subscription, if so required by, and at the rate of interest fixed in, the by-laws. If no rate of interest is fixed in the by-laws, such rate shall be deemed to be the legal rate.

SECTION 67. *Payment of balance of subscription.* — Subject to the provisions of the contract of subscription, the board of directors of any stock corporation may at any time declare due and payable to the corporation unpaid subscriptions to the capital stock and may collect the same or such percentage of said unpaid subscriptions, in either case with interest accrued, if any, as it may deem necessary.

Payment of any unpaid subscription or any percentage thereof, together with the interest accrued, if any, shall be made on the date specified in the contract of subscription or on the date stated in the call made by the board. **Failure to pay on such date shall render the entire balance due and payable and shall make the stockholder liable for interest at the legal rate on such balance, unless a different rate of interest is provided in the by-laws, computed from such date until full**

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payment. If within thirty (30) days from the said date no payment is made, all stocks covered by said subscription **shall thereupon become delinquent and shall be subject to sale** as hereinafter provided, unless the board of directors orders otherwise.

SECTION 74. *Books to be kept; stock transfer agent.* — Every corporation shall, at its principal office, keep and carefully preserve a record of all business transactions, and minutes of all meetings of stockholders or members, or of the board of directors or trustees, in which shall be set forth in detail the time and place of holding the meeting, how authorized, the notice given, whether the meeting was regular or special, if special its object, those present and absent, and every act done or ordered done at the meeting. Upon the demand of any director, trustee, stockholder or member, the time when any director, trustee, stockholder or member entered or left the meeting must be noted in the minutes; and on a similar demand, the *yeas* and *nays* must be taken on any motion or proposition, and a record thereof carefully made. The protest of any director, trustee, stockholder or member on any action or proposed action must be recorded in full on his demand.

The records of all business transactions of the corporation and the minutes of any meeting shall be open to the inspection of any director, trustee, stockholder or member of the corporation at reasonable hours on business days and he may demand, in writing, for a copy of excerpts from said records or minutes, at his expense.

Any officer or agent of the corporation who shall refuse to allow any director, trustee, stockholder or member of the corporation to examine and copy excerpts from its records or minutes, in accordance with the provisions of this Code, shall be liable to such director, trustee, stockholder or member for damages, and in addition, shall be guilty of an offense which shall be punishable under Section 144 of this Code: *Provided*, That if such refusal is pursuant to a resolution or order of the board of directors or trustees, the liability under this section for such action shall be imposed upon the directors or trustees who voted for such refusal: and *Provided, further*, That it shall be a defense to any action under this section that the person demanding to examine and copy excerpts from the corporation's records and minutes has improperly used any information secured through any prior examination of the records or minutes of such corporation or of any other corporation, or was not acting in good faith or for a legitimate purpose in making his demand.

Stock corporations must also keep a book to be known as the "stock and transfer book", in which must be kept a record of all stocks in the names of the stockholders alphabetically arranged; the installments paid and unpaid on all stock for which subscription has been made, and the date of payment of any installment; a statement of every alienation, sale or transfer of stock made, the date thereof, and by and to whom made; and such other entries as the by-laws may prescribe. The stock and transfer book shall be kept in the principal office of the corporation or in the office of its stock transfer agent and shall be open for inspection of any director or stockholder of the corporation at reasonable hours on business days.

> No stock transfer agent or one engaged principally in the business of registering transfer of stocks in behalf of a stock corporation shall be allowed to operate in the Philippines unless he secures a license from the Securities and Exchange Commission and pays a fee as may be fixed by the Commission, which shall be renewed annually: *Provided*, That a stock corporation is not precluded from performing or making transfer of its own stocks, in which case all the rules and regulations imposed on stock transfer agents, except the payment of a license fee herein provided, shall be applicable.

Section 22 imposes the penalty of involuntary dissolution for non-use of corporate charter. The rest of the above-quoted provisions, like Sections 31 and 34, provide for civil or pecuniary liabilities for the acts covered therein but what is significant is the fact that, of all these provisions that provide for consequences other than penal, only Section 74 expressly states that a violation thereof is likewise considered an offense under Section 144. If respondent and the Court of Appeals are correct, that Section 144 automatically imposes penal sanctions on violations of provisions for which no criminal penalty was imposed, then such language in Section 74 defining a violation thereof as an offense would have been superfluous. There would be no need for legislators to clarify that, aside from civil liability, violators of Section 74 are exposed to criminal liability as well. We agree with petitioners that the lack of specific language imposing criminal liability in Sections 31 and 34 shows legislative intent to limit the consequences of their violation to the civil liabilities mentioned therein. Had it been the intention of the drafters of the law to define Sections 31 and 34 as offenses, they could have easily included similar language as that found in Section 74.

If we were to employ the same line of reasoning as the majority in *United States v. R.L.C.*, would the apparent ambiguities in the text of the Corporation Code disappear with an analysis of said statute's legislative history as to warrant a strict interpretation of its provisions? The answer is a negative.

In his sponsorship speech of Cabinet Bill (C.B.) No. 3 (the bill that was enacted into the Corporation Code), then Minister Estelito Mendoza highlighted Sections 31 to 34 as among the significant innovations made to the previous statute (Act 1459 or the Corporation Law), thusly:

> There is a lot of jurisprudence on the liability of directors, trustees or officers for breach of trust or acts of disloyalty to the corporation. Such jurisprudence is not, of course, without any ambiguity of dissent. Sections 31, 32, 33 and 34 of the code indicate in detail prohibited acts in this area as well as consequences of the performance of such acts or failure to perform or discharge the responsibility to direct the affairs of the corporation with utmost fidelity.[59]

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[59] *Rollo* (G.R. No. 189158), Vol. I, p. 1454. Record of Batasan (R.B.), November 5, 1979, p. 1214.

Alternatively stated, Sections 31 to 34 were introduced into the Corporation Code to define what acts are covered, as well as the consequences of such acts or omissions amounting to a failure to fulfil a director's or corporate officer's fiduciary duties to the corporation. A closer look at the subsequent deliberations on C.B. No. 3, particularly in relation to Sections 31 and 34, would show that the discussions focused on the civil liabilities or consequences prescribed in said provisions themselves. We quote the pertinent portions of the legislative records:

On Section 31

(Period of Sponsorship, December 4, 1979 Session)

MR. LEGASPI. x x x.

In Section 31 page 22, it seems that the proviso is to make the **directors or the trustees who willfully and knowingly vote for or assent to patently unlawful act or guilty of gross negligence or bad faith in directing the affairs of the corporation would be solidarily liable with the officers** concerned.

Now, **would this**, Your Honor, **not discourage the serving of competent people as members of the Board of Directors, considering that they might feel that in the event things would do badly against the corporation, they might be held liable personally** for acts which should be attributed only to the corporation?

MR. MENDOZA. Your Honor will note that the directors or trustees who are held liable must be proven to have acted willfully and knowingly, or if not willfully and knowingly, it must be proven that they acted with gross negligence or bad faith. It must also be demonstrated that the acts done were patently unlawful. So, the requirement for liability is somewhat serious to the point of, in my opinion, being extreme. It will be noted that this provision does not merely require assenting to patently unlawful acts. It does not merely require being negligent. The provision requires that they assent to patently unlawful acts willfully and with knowledge of the illegality of the act.

Now, it might be true, as Your Honor suggested, that some persons will be discouraged or disinclined to agree to serve the Board of Directors because of this liability. But at the same time **this provision – Section 31 – is really no more than a consequence of the requirement that the position of membership in the Board of Directors is a position of high responsibility and great trust.** Unless a provision such as this is included, then that requirement of responsibility and trust will not be as meaningful as it should be. For after all, directors may take the attitude that unless they themselves commit the act, they would not be liable. But the responsibility of a director is not merely to act properly. The responsibility of a director is to assure that the Board of Directors, which means his colleagues acting together, does not act in a manner that is

unlawful or to the prejudice of the corporation because of personal or pecuniary interest of the directors.[60] (Emphases supplied.)

(Period of Amendments, March 11, 1980 Session)

MR. MILLORA. On line 16, Section 31, referring to the phrase "patently unlawful acts." Before I introduce my proposed amendment to delete the word "patently" is there a reason for placing this adjective before the word "unlawful", Your Honor?

MR. ABELLO. Probably the one who prepared this original draft of Cabinet Bill No. 3 wanted to make sure that a director or trustee is not [made] liable for an act that is not clearly unlawful, so he used a better word than "clearly," he used the word "patently."

MR. MILLORA. So, in that case, Your Honor, **a director may not be liable for certain unlawful acts.** Is that right, Your Honor?

MR. ABELLO. **Yes, if it is not patently unlawful**. Precisely, the use of the word "patently" is also **to give some kind of protection to the directors or trustees. Because if you will hold the directors or trustees responsible for everything, then no one will serve as director or trustee of any corporation.** But, he is made liable so long as he willfully and knowingly votes for or assent to patently unlawful acts of the corporation. So it is also to protect the director [or] trustees from liability for acts that was not patently unlawful.

MR. MILLORA. With that explanation, Your Honor, I will not proceed with my proposed amendment.[61]

<u>On Section 34</u>

(Period of Sponsorship, November 5, 1979 Session)

MR. NUÑEZ. x x x

May I go now to page 24, Section 34.

"Disloyalty of a Director -- Where a director by virtue of his office acquires for himself a business opportunity which should belong to the corporation thereby obtaining profits to the prejudice of the corporation, he must account to the latter for all such profits, unless his act has been ratified by a vote of the stockholders owning or representing at least two-thirds (2/3) of the outstanding capital stock. This provision shall be applicable notwithstanding the fact that the director risked his own funds in the venture."

My question, Your Honor, is: **is this not the so-called corporate opportunity doctrine found in the American jurisprudence**?

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60 Id. at 1480; R.B., December 4, 1979, p. 1614.

61 Id. at 1563-1564; R.B., March 11, 1980, pp. 2349-2350.

MR. MENDOZA. Yes, Mr. Speaker, as I stated many of the changes that have been incorporated in the Code were drawn from jurisprudence on the matter, but even jurisprudence on several matters or several issues relating to the Corporation Code are sometimes ambiguous, sometimes controversial. In order, therefore, to clarify those issues, **what was done was to spell out in statutory language the rule that should be applied on those matters and one of such examples is Section 34.**

MR. NUÑEZ. Does not His Honor believe that to codify this particular document into law may lead to absurdity or confusion as the cited doctrine is subject to many qualifications depending on the peculiar nature of the case?

Let us suppose that there is a business opportunity that the corporation did not take advantage of or was not interested in. Would you hold the director responsible for acquiring the interest despite the fact that the corporation did not take advantage of or was not interested in that particular business venture? Does not His Honor believe that this should be subject to qualifications and should be dealt with on a case-to-case basis depending on the circumstances of the case?

MR. MENDOZA. If a director is prudent or wise enough, then he can protect himself in such contingency. **If he is aware of a business opportunity, he can make it known to the corporation, propose it to the corporation, and allow the corporation to reject it, after which he, certainly, may avail of it without risk of the consequences provided for in Section 34.**

MR. NUÑEZ. I see. So that the position of Your Honor is that the matter should be communicated to the corporation, the matter of the director acquiring the business opportunity should be communicated to the corporation and that if it is not communicated to the corporation, the director will be responsible. Is that the position of His Honor?

MR. MENDOZA. In my opinion it must not only be made known to the corporation; the corporation must be formally advised and **if he really would like to be assured that he is protected against the consequences provided for in Section 34,** he should take such steps whereby the opportunity is clearly presented to the corporation and the corporation has the opportunity to decide on whether to avail of it or not and then let the corporation reject it, after which then he may avail of it. Under such circumstances I do not believe he would **expose himself to the consequences provided for under Section 34.**

Precisely, the reason we have laid down this ruling in statutory language is that for as long as the rule is not clarified there will be ambiguity in the matter. And directors of corporations who may acquire knowledge of such opportunities would always be risking consequences not knowing how the courts will later on decide such issues. **But now with the statutory rule, any director who comes to know of an opportunity that may be available to the corporation would be aware of the consequences** in case he avails of that opportunity without giving the corporation the privilege of deciding beforehand on whether to take advantage of it or not.

MR. NUÑEZ. Let us take the case of a corporation where, from all indications, the corporation was aware of this business opportunity and despite this fact, Your Honor, and the failure of the director to communicate the venture to the corporation, the director entered into the business venture. Is the director liable, Your Honor, despite the fact that the corporation has knowledge, Your Honor, from all indications, from all facts, from all circumstances of the case, the corporation is aware?

MR. MENDOZA. First of all, to say that a corporation has knowledge is itself a point that can be subject of an argument. When does a corporation have knowledge – when its president comes to know of the fact, when its general manager knows of the fact, when one or two of the directors know of that fact, when a majority of the directors come to know of that fact? So that in itself is a matter of great ambiguity, when one says it has knowledge.

That is why when I said that **a prudent director, who would assure that he does not become liable under Section 34**, should not only be sure that the corporation has official knowledge, that is, the Board of Directors, but must take steps, positive steps, which will demonstrate that the matter or opportunity was brought before the corporation for its decision whether to avail of it or not, and the corporation rejected it.

So, under those circumstances narrated by Your Honor, it is my view that the director will be liable, unless his acts are ratified later by the vote of stockholders holding at least 2/3 of the outstanding capital stock.

MR. NUÑEZ. Your Honor has already raised the possible complications that may arise out of this particular provision. My question is: how can we remedy the situation? Is there a necessity, Your Honor, of a formal notice to the corporation that it should be placed in the agenda, in a meeting or a special or regular meeting of the corporation that such a business venture exists, that the corporation should take advantage of this business venture before a director can be held not responsible for acquiring this business venture?

MR. MENDOZA. Well, I believe, as I have stated, Mr. Speaker, that is what a prudent director should do. If he does not wish to be in any way handicapped in availing of business opportunities, he should, to the same degree, be circumspect in accepting directorships in corporations. If he wants to be completely free to avail of any opportunity which may come his way, he should not accept the position of director in any corporation which he may anticipate may be dealing in a business in connection with which he may acquire a certain interest.

The purpose of all these provisions is to assure that directors or corporations constantly – not only constantly remember but **actually are imposed with certain positive obligations** that at least would assure **that they will discharge their responsibilities with utmost fidelity**.[62]

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62 Id. at 1457-1459; R.B., November 5, 1979, pp. 1217-1219.

(December 5, 1979 Session)

MR. CAMARA. Thank you, Your Honor. May we go to page 24, lines 1 to 20, Section 34 – Disloyalty of a director.

Your Honor, it is provided that a director, who by virtue of his office acquires for himself a business opportunity which should belong to the corporation thereby obtaining profits to the prejudice of such corporation, must account to the corporation for all such profits unless his act has been ratified by a vote of the stockholders owning or representing at least two-thirds (2/3) of the outstanding capital stock.

However, Your Honor, the right to ratification would serve to defeat the intention of this provision. This is possible if the director or officer is the controlling stockholder.

It is, therefore, suggested, Your Honor, that the twenty per cent (20%) stockholding limit be applied here in which case, over twenty per cent limit, said director or officer is disallowed to participate in the ratification. And this is precisely the point I was driving at in the previous section, Your Honor.

MR. ABELLO. Your Honor, I see the point that Your Honor has raised and that will be considered by the committee at an appropriate time.

MR. CAMARA. Thank you, Your Honor.

Further, under the same provision, it is not clear as to what "account to the corporation" means or what it includes. Is the offender liable for the profits in favor of the corporation?

MR. ABELLO. Yes, that is what it means.

MR. CAMARA. Or he be merely made to account?

MR. ABELLO. **Well, Your Honor, when the law says "He must account to the latter for all such profits," that means that he is liable to the corporation for such profits.**

MR. CAMARA. Who gets the profits then, Your Honor?

MR. ABELLO. The corporation itself.

MR. CAMARA. The corporation?

MR. ABELLO. Correct.

MR. CAMARA. Thank you, Your Honor.

Supposing under the same section, Your Honor, the director took the opportunity after resigning as director or officer? It is suggested, Your Honor, that this should be clarified because the resigning director can take the opportunity of this transaction before he resigns.

MR. ABELLO. If Your Honor refers to the fact that he took that opportunity while he was a director, Section 34, would apply. But if the action was made after his resignation as a director of the corporation, then Section 34 would not apply.[63]

(Period of Amendments, March 11, 1980 Session)

MR. CAMARA. This is on Section 34, page 24, line 15, I propose to insert between the word "profits" and the comma (,) the words BY REFUNDING THE SAME. So that the first sentence, lines 11 to 18 of said section, as modified, shall read as follows:

> "SEC. 34. *Disloyalty of a director.* -- Where a director by virtue of his office acquires for himself a business opportunity which should belong to the corporation thereby obtaining profits to the prejudice of such corporation, he must account to the latter for all such profits BY REFUNDING THE SAME, unless his act has been ratified by a vote of the stockholders owning or representing at least two-thirds (2/3) of the outstanding capital stock."

The purpose of this amendment, Mr. Speaker, is to clarify as to what to account to the corporation.

MR. ABELLO. Mr. Speaker, the committee accepts the amendment.[64] (Emphases and underscoring supplied.)

Verily, in the instances that Sections 31 and 34 were taken up on the floor, legislators did not veer away from the civil consequences as stated within the four corners of these provisions. Contrasted with the interpellations on Section 74 (regarding the right to inspect the corporate records), the discussions on said provision leave no doubt that legislators intended both civil and penal liabilities to attach to corporate officers who violate the same, as was repeatedly stressed in the excerpts from the legislative record quoted below:

On Section 74:

(Period of Sponsorship, December 10, 1979 Session)

MR. TUPAZ. x x x I guess, Mr. Speaker, that the distinguished sponsor has in mind a particular situation where a minority shareholder is one of the thousands of shareholders. But I present a situation, Your Honor, where the minority is 49% owner of a corporation and here comes this minority shareholder wanting, but a substantial minority, and yet he cannot even have access to the records of this corporation over which he owns almost one-half because, precisely, of this particular provision of law.[65]

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63 Id. at 1498; R.B., December 5, 1979, p. 1633.

64 Id. at 1565; R.B., March 11, 1980, p. 2351.

65 Mr. Tupaz's interpellation centered on the proviso in Section 74 that it is a defense under said section that the person demanding to see the corporation's records has improperly used any

> MR. MENDOZA. He will not have access if the grounds expressed in the proviso are present. It must also be noted, Mr. Speaker, that the provision before us would, let us say, make it very difficult for **corporate officers** to act unreasonably because they **are not only subject to a suit which would compel them to allow the access to corporate records, they are also liable for damages and are in fact guilty of a penal act under Section 143.**[66]
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> MR. TUPAZ. That is correct, Your Honor.
>
> MR. MENDOZA. So that when corporate officers deny access to a shareholder, they do so under very serious consequences. If they should err in making that decision and it is demonstrated that they have erred deliberately, they **expose themselves to damages and even to certain penal sanctions.**
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> x x x x
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> As I said, Your Honor, I think it is fair enough to assume that persons do not act deliberately in bad faith, that **they do not act deliberately to expose themselves to damages, or to penal sanctions.** In the ultimate, I would agree that certain decisions may be unnecessarily harsh and prejudicial. But by and large, I think, the probabilities are in favor of a decision being reasonable and in accord with the interest of the corporation.[67] (Emphases and underscoring supplied.)

Quite apart that no legislative intent to criminalize Sections 31 and 34 was manifested in the deliberations on the Corporation Code, it is noteworthy from the same deliberations that legislators intended to codify the common law concepts of corporate opportunity and fiduciary obligations of corporate officers as found in American jurisprudence into said provisions. In common law, the remedies available in the event of a breach of director's fiduciary duties to the corporation are civil remedies. If a director or officer is found to have breached his duty of loyalty, an injunction may be issued or damages may be awarded.[68] A corporate officer guilty of fraud or mismanagement may be held liable for lost profits.[69] A disloyal agent may also suffer forfeiture of his compensation.[70] There is nothing in the deliberations to indicate that drafters of the Corporation Code intended to deviate from common law practice and enforce the fiduciary obligations of directors and corporate officers through penal sanction aside from civil liability. On the contrary, there appears to be a concern among the drafters of the Corporation Code that even the imposition of the civil

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information secured through any prior examination or was not acting in good faith or for a legitimate purpose.

66 This was renumbered as Section 144 when the Corporation Code was enacted.

67 *Rollo* (G.R. No. 189158), Vol. I, pp. 1515-1516; R.B., December 10, 1979, pp. 1695-1696.

68 *See* Fletcher Cyclopedia of the Law of Corporations, 3 Fletcher Cyc. Corp. § 837.60, September 2016 update.

69 *See* 3A Fletcher Cyc. Corp. § 1343.

70 *See* 5A Fletcher Cyc. Corp. § 2185.

sanctions under Section 31 and 34 might discourage competent persons from serving as directors in corporations.

In *Crandon v. United States*,[71] the U.S. Supreme Court had the occasion to state that:

> In determining the meaning of the statute, **we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy**. Moreover, because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage. To the extent that the language or history of [the statute] is uncertain, this "time-honored interpretive guideline" serves to ensure both that there is **fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability**. (Citations omitted; emphases supplied.)

Under the circumstances of this case, we are convinced to adopt a similar view. For this reason, we take into account the avowed legislative policy in the enactment of the Corporation Code as outlined in the Sponsorship Speech of Minister Mendoza:

> Cabinet Bill No. 3 is entitled "The Corporation Code of the Philippines." Its consideration at this time in the history of our nation provides a fitting occasion to remind that **under our Constitution the economic system known as "free enterprise" is recognized and protected**. We acknowledge as a democratic republic that the individual must be free and that as a free man – "free to choose his work and to retain the fruits of his labor" – he may best develop his capabilities and **will produce and supply the economic needs of the nation.**
>
> x x x x
>
> **The formation and organization of private corporations,** and I underscore private corporations as distinguished from corporations owned or controlled by the government or any subdivision or instrumentality thereof, **gives wider dimensions to free enterprise or free trade.** For not only is the right of individuals to organize collectively recognized; the collective organization is vested with a juridical personality distinct from their own. Thus "the skill, dexterity, and judgment" of a nation's labor force need not be constricted in their application to those of an individual or that which he alone may assemble but to those of a collective organization.
>
> **While a code**, such as the proposed code now before us, **may appear essentially regulatory in nature, it does not, and is not intended, to curb or stifle the use of the corporate entity as a business organization.** Rather, the proposed code recognizes the value, and seeks to inspire confidence in the value of the corporate vehicle in the economic life of society.[72] (Emphases supplied.)

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71 494 U.S. 152, 110 S.Ct. 997, 1001-1002 (1990).

72 *Rollo* (G.R. No. 189158) Vol. I, p. 1452; R.B., November 5, 1979, p. 1212.

The Corporation Code was intended as a regulatory measure, not primarily as a penal statute. Sections 31 to 34 in particular were intended to impose exacting standards of fidelity on corporate officers and directors but without unduly impeding them in the discharge of their work with concerns of litigation. Considering the object and policy of the Corporation Code to encourage the use of the corporate entity as a vehicle for economic growth, we cannot espouse a strict construction of Sections 31 and 34 as penal offenses in relation to Section 144 in the absence of unambiguous statutory language and legislative intent to that effect.

When Congress intends to criminalize certain acts it does so in plain, categorical language, otherwise such a statute would be susceptible to constitutional attack. As earlier discussed, this can be readily seen from the text of Section 45(j) of Republic Act No. 8189 and Section 74 of the Corporation Code.

We stress that had the Legislature intended to attach penal sanctions to Sections 31 and 34 of the Corporation Code it could have expressly stated such intent in the same manner that it did for Section 74 of the same Code.

At this point, we dispose of some related arguments raised in the pleadings.

We do not agree with respondent Tullett that previous decisions of this Court have already settled the matter in controversy in the consolidated cases at bar. The declaration of the Court in *Home Insurance Company v. Eastern Shipping Lines*[73] that "[t]he prohibition against doing business without first securing a license [under Section 133] is now given penal sanction which is also applicable to other violations of the Corporation Code under the general provisions of Section 144 of the Code" is unmistakably *obiter dictum*. We explained in another case:

> An *obiter dictum has been defined as an opinion expressed by a court upon some question of law that is not necessary* in the determination of the case before the court. It is a remark made, or opinion expressed, by a judge, in his decision upon a cause *by the way*, that is, *incidentally* or *collaterally*, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. **It does not embody the resolution or determination of the court, and is made without argument, or full consideration of the point. It lacks the force of an adjudication, being a mere expression of an opinion with no binding force for purposes of *res judicata*.**[74] (Emphasis supplied.)

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73 208 Phil. 359, 372 (1983).

74 *Ocean East Agency, Corp. v. Lopez*, G.R. No. 194410, October 14, 2015.

The issue in the *Home Insurance Company* case was whether or not a foreign corporation previously doing business here without a license has the capacity to sue in our courts when it had already acquired the necessary license at the time of the filing of the complaints. The Court ruled in the affirmative. The statement regarding the supposed penal sanction for violation of Section 133 of the Corporation Code was not essential to the resolution of the case as none of the parties was being made criminally liable under Section 133.

As for respondent's allusion to *Genuino v. National Labor Relations Commission*,[75] we find the same unavailing. *Genuino* involved the appeal of an illegal dismissal case wherein it was merely mentioned in the narration of facts that the employer-bank also filed criminal complaints against its dismissed corporate officers for alleged violation of Section 31 in relation to Section 144 of the Corporation Code. The interpretation of said provisions of the Corporation Code in the context of a criminal proceeding was **not** at issue in that case.

As additional support for its contentions, respondent cites several opinions of the SEC, applying Section 144 to various violations of the Corporation Code in the imposition of graduated fines. In respondent's view, these opinions show a consistent administrative interpretation on the applicability of Section 144 to the other provisions of the Corporation Code and allegedly render absurd petitioners' concern regarding the "over-criminalization" of the Corporation Code. We find respondent's reliance on these SEC opinions to be misplaced. As petitioners correctly point out, the fines imposed by the SEC in these instances of violations of the Corporation Code are in the nature of administrative fines and are not penal in nature. Without ruling upon the soundness of the legal reasoning of the SEC in these opinions, we note that these opinions in fact support the view that even the SEC construes "penalty" as used in Section 144 as encompassing administrative penalties, not only criminal sanctions. In all, these SEC issuances weaken rather than strengthen respondent's case.

With respect to the minutiae of other arguments cited in the parties' pleadings, it is no longer necessary for the Court to pass upon the same in light of our determination that there is no clear, categorical legislative intent to define Sections 31 and 34 as offenses under Section 144 of the Corporation Code. We likewise refrain from resolving the question on the constitutionality of Section 144 of the Corporation Code. It is a long standing principle in jurisprudence that "courts will not resolve the constitutionality of a law, if the controversy can be settled on other grounds. The policy of the courts is to avoid ruling on constitutional questions and to

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[75] 564 Phil. 315 (2007).

presume that the acts of the political departments are valid, absent a clear and unmistakable showing to the contrary."[76]

WHEREFORE, the consolidated petitions are **GRANTED**. The Decision dated August 12, 2009 of the Court of Appeals in CA-G.R. SP No. 109094 and the Resolutions dated April 23, 2009 and May 15, 2009 of the Secretary of Justice in I.S. No. 08-J-8651 are **REVERSED and SET ASIDE.**

SO ORDERED.

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

WE CONCUR:

MARIA LOURDES P. A. SERENO
Chief Justice
Chairperson

MARIANO C. DEL CASTILLO
Associate Justice

FRANCIS H. JARDELEZA
Associate Justice

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

76 *Mirasol v. Court of Appeals*, 405 Phil. 760, 774 (2001)

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

MARIA LOURDES P. A. SERENO
Chief Justice