

**BRIAN MURRAY**

**RATIFICATION UNDER THE COMPANIES ACT 1993**

**AN ANALYSIS OF SECTION 177 OF THE COMPANIES ACT 1993 WITH  
REFERENCE TO THE RATIFICATION OF BREACHES OF DIRECTORS'  
DUTIES**

**LLM RESEARCH PAPER  
LAWS 523/531 CORPORATE AND BANKING LAW**

**LAW FACULTY  
VICTORIA UNIVERSITY OF WELLINGTON**

**2000**

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## ABSTRACT

*The paper examines the scope for shareholder ratification, by majority or unanimous vote, of directors' actions under s177 of the Companies Act 1993, with particular focus on actions that breach a director's duty to the company. The origins of the common law doctrine of ratification and the major issues associated with it are explored and the position summarised. The Law Commission's 1989 proposals for reform, based on a reallocation of responsibilities between directors and shareholders, are then considered before the two limbs of s177 are addressed. The scope of the first limb, defined by the powers vested in shareholders, is explored. It is concluded that the provision is not able to be used to ratify directors' usurpation of powers that shareholders might be considered to hold at common law. The paper then examines the scope of operation of the second limb, s177(4), which preserves the common law rules. The compatibility of ratification with the prohibition on indemnification under s162 is analysed and the difficulty posed by directors' duties now being specified in statute evaluated. The operation of ratification is considered in respect of the general duties contained in s131-137 and other selected duties. The effect of ratification in relation to remedies available under the Act is also analysed. The conclusion is that, although the Act has eliminated the possibility of ratification in several areas, and there is uncertainty over some aspects of its operation, the doctrine remains workable and effective. It is argued that this outcome is appropriate.*

*The text of this paper including all footnotes comprises 15,130 words.*

*The cover, contents page, abstract, and bibliography comprises 801 words.*

## I INTRODUCTION

*"It is trite law, I had thought, that if directors do acts, as they do every day, especially in private companies, which, perhaps because there is no quorum, or because their appointment was defective, or because sometimes there are no directors properly appointed at all, or because they are actuated by improper motives, they go on doing for years, carrying on the business of the company in the way in which, if properly constituted, they could carry it on, and then they find that everything has been done so to speak wrongly because it was not done by a proper board, such directors can, by making a full and frank disclosure and calling together the general body of shareholders, obtain absolution and forgiveness of their sins; and provided the acts are not ultra vires the company as a whole everything will go on as if it had been alright from the beginning."*<sup>1</sup>

*"Ratification itself is a concept which has been mistakenly transferred into the domain of corporate law. Conceptually, the idea that either a majority at the general meeting or a board of directors can extinguish a corporate right to pursue remedial action for a breach of duty owed to it does not make sense."*<sup>2</sup>

The ratification by shareholders of directors' breaches of duty owed to the company is an analytically complex subject so it is not surprising that it should also be contentious. Despite this, it is common practice to have shareholders ratify an action of the board over which some doubt may exist in the expectation that this will both bind the company to the transaction and immunise directors from suit. The effectiveness of ratification is, therefore, important to the corporate community.

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<sup>1</sup> *Bamford v Bamford* [1970] Ch 212 per Harman LJ, 237-8

<sup>2</sup> Saul Fridman, "Ratification of Directors' Breaches" (1992) 10 Co & Sec TL 252, 256

There is no general provision in New Zealand law providing expressly for the release of directors from liability through shareholder ratification.<sup>3</sup> On the contrary, s177(3) of the Companies Act 1993<sup>4</sup> empowers a court to make any order that might otherwise be available to it notwithstanding that shareholders may have ratified the board's actions under s177(1). But then there is s177(4) which appears to preserve the common law rules on ratification. At common law, the minority must submit to the majority in most circumstances and ratification will usually protect directors from action by a minority shareholder on the company's behalf. Such actions are constrained to those within the exceptions to the rule in *Foss v Harbottle*.<sup>5</sup> Further, the acceptance at common law that a shareholder generally owes no fiduciary duty to other shareholders and can therefore vote entirely in their own interests<sup>6</sup> gives majority rule special force.

There are, however, reasons to question whether ratification has this efficacy under the Act. It can be interpreted as the company indemnifying the directors, an action prohibited by s162. The Act sets out the duties directors owe to the company: can shareholders modify these statutory obligations by means of a common law doctrine? In s107 the Act specifies the process to be followed if its requirements concerning certain transactions involving shareholders' interests are to be avoided: can they also be avoided via ratification? Finally, inquiry into the origins of the Act reveals that the original architects did not envisage that shareholders should have the power to forgive directors for breaches of duty to the company.

Colouring the consideration of these issues is the remedial regime intended to provide "protection for shareholders and creditors against the abuse of management power".<sup>7</sup> In particular, the Act provides for a derivative action intended to unshackle shareholders from the bonds of the rule in *Foss v Harbottle*. An objection to common

<sup>3</sup> New Zealand follows the United Kingdom in this respect. In contrast, most states in the United States and countries in Western Europe allow by statute for directors to be released from liability for fully disclosed breaches by a simple majority vote in general meeting. See Robert R Pennington *Directors Personal Liability* BSP Professional Books, 101

<sup>4</sup> Henceforth referred to as "the Act". Section references are those contained in the Act.

<sup>5</sup> (1843) 2 Hare 461, 67 ER 189. "Ratifiability" (the possibility of the majority ratifying an action) is the foundation of the internal management limb of the rule. *McDougall v Gardiner* (1875) 1 Ch 13, per Nellish J, 25

<sup>6</sup> *North-west Transportation Company Ltd v Beatty* (1887) 12 AppCas 589

<sup>7</sup> Long Title, paragraph (d)

law ratification is that it immediately circumscribes the derivative action. A minority shareholder will fail to obtain leave to commence an action because ratification means there is no likelihood of the action succeeding.

The two facets of ratification have been adverted to. The first is the effect on the transaction involved. Usually, the issue will be whether the company is bound to an outsider. This is a subject in itself although many of the difficulties previously surrounding the matter have been removed by ss17-18. The other aspect is the accountability of directors, and the capacity of shareholders to release them from the liability that would otherwise ensue from a breach of duty. Lord Wedderburn declared that "the limits of that Rule [in *Foss v Harbottle*] lie along the boundaries of majority rule."<sup>8</sup> This paper will investigate the extent to which the Act has realigned those boundaries. It seeks to establish whether the apparent confidence in ratification under the Act is justified.

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<sup>8</sup> KW Wedderburn "Shareholders' Rights and the Rule in *Foss v Harbottle*" [1957] CLJ 194,198



## II RATIFICATION AT COMMON LAW

### A The doctrinal origins

The doctrinal foundations of ratification lie in agency, equity and partnership. Ratification is primarily an agency concept.<sup>9</sup> Directors in the nineteenth century were often thought of as agents of the corporation and by that time the law had recognised that a principal could ratify the actions of an agent acting beyond their ostensible authority.<sup>10</sup> Directors were also considered to be analogous to trustees and it was similarly well-established in equity that a fiduciary could obtain release from their strict obligations by making a full disclosure.

*"If ... Mr. Heathorn had openly and directly brought forward the matter before the body of shareholders generally, I consider it possible, if not probable, that he would have been allowed to receive, and would now have been entitled to retain all the sums in question paid for commission."*<sup>11</sup>

In explaining the origins of the internal management limb of *Foss v Harbottle*, Wedderburn says it was a partnership doctrine imported into company law.<sup>12</sup> By the early nineteenth century equity courts would only intervene in partnerships to dissolve them, the courts being wary of becoming the arbiter of every internal dispute. This attitude was extended to companies prior to the first Companies Act in 1844 and then became embedded despite partnership law moving on from this philosophical stance.

*"The law had long recognised majority rule as a fundamental principle concerning corporations, so that there was no difficulty in expressing majority rule as the justification for the refusal to interfere in internal management."*<sup>13</sup>

<sup>9</sup> RJC Partridge "Ratification and the Release of Directors from Personal Liability" [1987] CLJ 122. Partridge claims that ratification in the corporate context "has nothing to do with "ratification" as it is understood in the law of agency".

<sup>10</sup> *Irvine v Union Bank of Australia* (1887) 2 AppCas 366 where directors exceeded their borrowing powers is an early company example.

<sup>11</sup> *Benson v Heathorn* (1842) 1 Y & CCC 326, 343-4

<sup>12</sup> Wedderburn, above n8, 196

<sup>13</sup> Wedderburn, above n8, 198

## **B Policy considerations**

Wedderburn's comments suggest that the attachment to majority rule in company law is essentially policy based rather than doctrinally driven. The rule in *Foss v Harbottle* came about because of the rapid expansion in the middle of the nineteenth century in representative actions by shareholders to vindicate their general rights in relation to railway companies. A means had to be found of preventing courts from being overwhelmed: the rule in *Foss v Harbottle*, confirmed almost immediately by *Mozley v Alston*,<sup>14</sup> was that means. Concern over the pressure on court resources remains a strong influence today and judges can be susceptible to arguments that justify non-intervention, such as commercial effectiveness.

*"The liquidator or the directors are usually the people who can see the whole picture, whereas the individual shareholder or creditor often does not have all the information."*<sup>15</sup>

Danckwerts J in *Pavliades v Jensen*<sup>16</sup> opined that shareholders must accept the consequences if they choose to place their interests in the hands of "an amiable set of lunatics", a view not unrepresentative of English judges in cases up to that time.

## **C What is meant by "the company"?**

Much of the conceptual difficulty with ratification stems from the status of the company as a separate legal person<sup>17</sup> that, in its own right, is owed duties by those managing it. The problem is that the company itself cannot act directly but only through natural persons so forgiveness of breaches must be performed by somebody on its behalf. Which organ of the company should properly be regarded as competent

<sup>14</sup> (1847) 1 Ph. 790

<sup>15</sup> *Mesenberg v Cord Industrial Recruiters* (1996) 14 ACLC 519 at 525. Young J illustrates this point by saying a board might tolerate a chief executive paying themselves "some thousands of dollars in unauthorised commissions" on the grounds that the guilt complexes so generated prevented the chief executive seeking higher remuneration. It is an extraordinary example.

<sup>16</sup> [1956] 1 Ch 565

<sup>17</sup> Preserved by s26

to discharge this function – the board, the majority of shareholders, all of the shareholders or should ratification be an impossibility?

The matter forces consideration of what is “the company”. Whose interests must be taken into account before it is safe to regard the beneficiary of the duty as having waived the obligation owed to it? Do only existing shareholders need to be considered or do future shareholders enter the picture? Do non-shareholders, such as creditors, employees, or even the community, have interests that should be considered? The law’s traditional answer is that “the company” is not the commercial entity but the existing shareholders as a general body.<sup>18</sup> It follows that the shareholders, as a group, must be competent to ratify directors’ breaches.

*“In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude.”<sup>19</sup>*

#### **D Shareholder decision-making**

It is a principle of common law that shareholders have the power to bind the company in contract by unanimous agreement, even informally.<sup>20</sup> The principle extends to breaches of duty.

*“It seems to me plain that an acknowledgement signed by the directors in relation to their own debt would be fully effective if sanctioned by every member of the company. If so sanctioned I do not see how it could be said that directors were acting in breach of their fiduciary duty.”<sup>21</sup>*

<sup>18</sup> *Greenhalgh v Aderne Cinemas Ltd* [1950] 1 Ch 286, per Evershed MR, 291

<sup>19</sup> *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4NSWLR 722, per Street CJ, 730

<sup>20</sup> *In re Duomatic Ltd* [1969] 2 Ch 365

In *Pascoe Ltd (in liq) v Lucas*<sup>22</sup> it was held that, provided they acted in good faith, where directors complied with the wishes of the sole shareholder no action could be taken subsequently by the company or the liquidator.

If the application of the unanimity principle to this area is unexceptional, the application of the majority principle is more problematic. First, the majority is clearly not "the corporators as a general body".<sup>23</sup> The interests of the majority will not necessarily be the same as those of the totality. This difficulty is overcome, however, if "the general body" is regarded as equivalent "to an individual hypothetical member".<sup>24</sup> Provided the majority does not act in some unconscionable way, the law has been prepared to accept that the course preferred by it can be safely assumed to be in the interests of that hypothetical member. Another problem with majority vote ratification is that it enabled things that would otherwise require a special resolution (because it would require amendment of the articles) to be done by ordinary resolution. Notwithstanding these objections, the common law clearly accepted the majority as competent to effect ratification, among other things.

*"A majority of shareholders in general meeting is entitled to pursue what course it chooses without the company's powers, however wrong-headed it may appear to others, provided the majority do not unfairly oppress other members of the company ..."*<sup>25</sup>

### **E Other possibilities**

In principle, at least, the board should be capable of ratification provided it acts in the best interests of the company.<sup>26</sup> Some cases appear to support this proposition, for example, *Queensland Mines Ltd v Hudson*,<sup>27</sup> although this is usually

<sup>21</sup> *In re Gee & Co (Woolwich) Ltd* [1975] 1 Ch 52, 71

<sup>22</sup> (1998) 27 ACSR 737

<sup>23</sup> *Greenhalgh v Aderne Cinemas Ltd*, above n18, 291

<sup>24</sup> *Greenhalgh v Aderne Cinemas Ltd*, above n18, 291

<sup>25</sup> *Hogg v Cramphorn Ltd* [1967] Ch 254, per Buckley J at 268

<sup>26</sup> As in many jurisdictions in the United States, above n3.

<sup>27</sup> [1978] 18 ALR 1

rationalised on the more narrow grounds of a board honestly rejecting a corporate opportunity that a director was then free to pursue.

Equally, it is possible that ratification should not be available to any organ within the company. There are two legs to this argument. The first is that "the company" should be regarded as an enterprise itself, with interests distinct from those of its proprietors. The other is that while there may be nothing wrong with the theoretical foundations of ratification, the reality in modern companies is that general meetings are easily controlled by a small minority of shareholders.<sup>28</sup>

#### *F How is ratification effected?*

The basis of ratification is the notion that if full disclosure is made the beneficiary of a fiduciary duty can release the fiduciary from their duty. It has not always been apparent that complete disclosure was made. Modern Australian authority<sup>29</sup> is helpful in this regard, establishing that full and frank disclosure is required. For a vote by the general meeting to be effective, the notice convening the meeting must set out clearly the nature of the actual or envisaged departure from the duty, state that the directors seek to be absolved from that breach and that the meeting will be asked to authorise that breach and waive its consequences.<sup>30</sup>

Another contentious matter has been the extent to which directors can vote their own shares on the resolution. There is substantial authority to say that where the breach is ratifiable, the directors may vote because in doing so they are exercising their property rights as shareholders. In this capacity, they do not owe fiduciary

<sup>28</sup> Fridman, above n2, 255

<sup>29</sup> *Kinsela*, above n19; *Winthrop Investments Ltd v Winns Ltd* [1975] 2NSWLR 666

<sup>30</sup> *Winthrop*, above n29, 674. In this case, the resolutions ratifying the board's allotment of shares motivated by an improper purpose were held ineffectual because adequate disclosure of what was involved had not been made to shareholders before they voted.

duties to other shareholders.<sup>31</sup> The danger, however, is that the directors' self-interest may infect the general meeting so that the meeting itself acts for an improper purpose or oppresses the minority.<sup>32</sup> Certainly it is safest if interested parties abstain. In the case of publicly listed companies, the Listing Rules require qualifying related party transactions to be approved by a majority of "non-associated" shareholders.<sup>33</sup>

### **G Release from liability**

There is debate on whether, at common law, ratification is an absolute release from liability or simply constrains other shareholders from initiating action.<sup>34</sup> The answer appears to be the latter because ratification is a gratuitous act; both law and equity required accord *and* satisfaction for a release to be binding. A release had to be for valuable consideration<sup>35</sup> or executed by the company under seal. Alternatively, a director might be able to argue estoppel if they had acted on a ratification to their detriment.<sup>36</sup> In the absence of any of these, the director remained exposed legally, although he or she was protected, in practice, from existing shareholders because the power to sue directors rested with the general meeting. A resolution excusing a director from liability precluded a general meeting from passing a subsequent resolution that an action be brought, thereby prevented the minority from suing.<sup>37</sup>

### **H Summary**

One conclusion that commentators seem able to agree on is that the law in this area lacks coherence. It is "singularly muddled".<sup>38</sup>

<sup>31</sup> *North-west Transportation Company Ltd v Beatty*, above n6,

<sup>32</sup> *Residues Treatment and Trading Co Ltd v Southern Resources Ltd (No4)* (1989) 14 ACLR 569

<sup>33</sup> Rule 9.3.1

<sup>34</sup> See Ross Cranston "Limiting Directors' Liability: Ratification, Exemption and Indemnification" [1992] JBL 197 and Partridge, above n9

<sup>35</sup> Professor Welling's "horse, hawk, robe or peppercorn" quoted in Fridman, above n2, 255

<sup>36</sup> Partridge dismisses this, above n9, 129

<sup>37</sup> Pennington, above n3, 102

<sup>38</sup> Cranston, above n34

"The rules regarding ratification ....have developed in a haphazard and piecemeal way. No general principle can be stated; the most that can be done is to state the position in relation to different kinds of breach or irregularity."<sup>39</sup>

The majority can ratify:

- The exercise of a power for an improper purpose, either prospectively or retrospectively (the ratio of *Bamford*<sup>40</sup>);
- The making of an incidental profit by directors (obiter in *Regal (Hastings) Ltd v Gulliver*<sup>41</sup>);
- The negligent acts of directors (*Pavlides v Jensen*<sup>42</sup>), at least where the directors have not benefited personally from the breach (*Daniels v Daniels & Ors*<sup>43</sup>).

Beyond these narrow propositions, there is ample dicta in cases declaring that the general meeting has wide powers to forgive breaches of duty.<sup>44</sup>

Generally speaking, fraud (in the equitable sense of unconscionable conduct) and misappropriation mark off breaches that cannot be ratified by a general meeting.<sup>45</sup>

The majority cannot ratify:

- The expropriation of property (including excessive remuneration) or an

<sup>39</sup> Andrew Borrowdale *Duties and Responsibilities of Directors and Company Secretaries in New Zealand* CCH, 76

<sup>40</sup> Above n1

<sup>41</sup> [1942] 1 All ER 378

<sup>42</sup> Above n16

<sup>43</sup> [1978] 2 WLR 73

<sup>44</sup> For example, Buckley J in *Hogg v Cramphorn Ltd*, above n25

<sup>45</sup> Cranston, above n34, 200 and *Gower's Principles of Modern Company Law*, 647

opportunity which belongs in equity to the company (*Cook v Deeks*,<sup>46</sup> *G E Smith, Ltd v Smith*,<sup>47</sup> *Miller (Invercargill) Ltd v Maddams*<sup>48</sup>);

- An arrangement entered into by an insolvent company to the prejudice of creditors (*Kinsela*<sup>49</sup>);
- Any transaction where the majority in general meeting acts for the same improper purpose as the directors (*Residues*<sup>50</sup>);
- A matter that is oppressive of the minority (*Hogg v Cramphorn Ltd*,<sup>51</sup> *Jenkins v Enterprise Gold Mines NL*<sup>52</sup>).

### *I The Law Commission's reform proposals*

In structure and content, the Act closely resembles the draft statute included in the Commission's report.<sup>53</sup> The Commission was particularly concerned about the misuse of the corporate form, with references to it peppering the report,<sup>54</sup> and the goal of ensuring good corporate governance was clearly a major influence in the legislation it proposed. Among the Commission's key principles were the following:

- The company should be regarded as the enterprise rather than the body of shareholders.<sup>55</sup>

<sup>46</sup> [1916] 1 AC 554

<sup>47</sup> [1952] NZLR 470

<sup>48</sup> [1938] NZLR 490

<sup>49</sup> Above n19

<sup>50</sup> Above n32

<sup>51</sup> Above n25

<sup>52</sup> (1992) 6ACSR 539

<sup>53</sup> *Company Law Reform and Restatement* New Zealand Law Commission Report No 9 (1989)

<sup>54</sup> Above n53, paragraphs 16, 20, 23, 69, 85, 134.

<sup>55</sup> Above n53, paragraphs 162, 189, 192



- Power and responsibility should be allocated between the various major interest groups according to a statutory framework rather than by a deemed contract.<sup>56</sup>
- Directors should be accorded the statutory right to manage but subject to explicit duties.<sup>57</sup>
- Shareholders should be excluded from management and dispute settlement. Their powers should be restricted to matters affecting their proprietary interests directly.<sup>58</sup>
- The courts are the proper bodies to resolve disputes. Access should be strengthened so that shareholders could enforce their rights directly.<sup>59</sup>

In its subsequent report,<sup>60</sup> the Commission proposed that certain transactions should be able to be undertaken by unanimous agreement. This became s107.

#### **J Ratification under the draft statute**

The Commission had little faith in the general meeting.

*"The general meeting has not historically operated to protect shareholders from director abuse of their powers of management but rather has often been used as a cypher by directors to absolve themselves of responsibility."*<sup>61</sup>

It considered there were more effective ways to protect shareholders and, accordingly, rejected the notion of expanding the decision making authority of shareholders in the overall scheme of powers. The greater the role of the general

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<sup>56</sup> Above n53, paragraph 10

<sup>57</sup> Above n53, paragraphs 85-93

<sup>58</sup> Above n53, paragraphs 196-213

<sup>59</sup> Above n53, paragraph 143

<sup>60</sup> Report No 16

<sup>61</sup> Above n53, paragraph 197

meeting in management, the greater the need to develop a concept of fiduciary duty owed by the majority to the minority.<sup>62</sup> Specifically, it believed the power of the general meeting to ratify director wrong doing should be removed.<sup>63</sup> Shareholder ratification should be effective only "to condone usurpation of powers reserved to shareholders and even in these cases it should not be a bar to a personal or derivative action."<sup>64</sup> It provided so, in very clear terms, in clause 136 of its draft, equating to what is now s177(1)-(3). There was no equivalent of s177(4) for obvious reasons.

The Commission's approach to shareholders power over management is seen in s109 of the Act. It empowers a meeting of shareholders to pass resolutions concerning the management of the company<sup>65</sup> but makes it clear that such resolutions are not binding on the board unless the constitution provides for them to be so.<sup>66</sup>

#### **K     *The statute as enacted***

Despite encountering opposition from the Department of Justice, the legislation that emerged from the House bears the Commission's imprint, with the scheme of responsibilities and powers, the unanimous consent provision and the remedial regime all surviving basically intact. Changes were introduced, however, to the ratification provision by the addition of s177(4). The question of whether the latter can mean what it says in the context of the other changes introduced by the Act will be considered later. First, it is appropriate to consider the scope of shareholder ratification as the Commission originally envisaged it, namely s177(1) to (3).

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<sup>62</sup> Above n53, paragraph 210

<sup>63</sup> Above n53, paragraph 86

<sup>64</sup> Above n53, paragraph 569

<sup>65</sup> Section 109(2)

<sup>66</sup> Section 109(3)

### III THE FIRST LIMB OF SECTION 177

#### A Introduction

The section provides that where, individually or collectively, directors exercise “a power vested in the shareholders” the purported exercise of the power can be “ratified or approved” in the same manner as the power could have been exercised.<sup>67</sup> Once ratified, the original exercise “is deemed to be, and always to have been, a proper and valid exercise of that power”.<sup>68</sup> The ratification does not, however, prevent a court from exercising powers that would otherwise be available to it.<sup>69</sup>

#### B “Purported exercise”

The scope of the provision is limited to where directors purport to exercise a shareholder power or, as is it sometimes put, where they “usurp” the powers of shareholders. It does not apply to the exercise of shareholder powers by shareholders themselves. It does not cover a situation where shareholders may exercise a power imperfectly, for example, by adopting a change to the constitution or approving a major transaction by an ordinary resolution. Shareholders cannot rely on s177(1) to prove the adequacy of their later action in passing a special resolution.<sup>70</sup> Equally, if the power exercised by the shareholders is truly theirs to exercise, a complaining shareholder cannot invoke s177(3) to say that a remedy is nonetheless available. In *MacFarlane v Barlow*<sup>71</sup> counsel argued that the action of the directors in using their

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<sup>67</sup> Section 177(1)

<sup>68</sup> Section 177(2)

<sup>69</sup> Section 177(3)

<sup>70</sup> The validity of the action taken would need to be evaluated in the context of the statutory provisions applicable.

majority to procure ratification by the general meeting of the salaries paid was the exercise of a shareholder power, not a purported exercise by the directors of a shareholder power. His submission that this rendered s177(3) inapplicable was accepted.<sup>72</sup>

### C “Ratified or approved”

There are no minimum requirements that must be met for ratification to be effective. Presumably, therefore, the common law continues to apply on the disclosure required and on whether the directors concerned can vote. However, it must be borne in mind that the ratification will not necessarily relate to actions that involve a breach of duty. Frequently, the ratification will relate to where directors have honestly but erroneously taken an action that, under the constitution, is reserved to shareholders. In these circumstances, the requirement for special disclosure is likely to be minimal.

The provision provides that directors' actions may be “ratified or approved”, raising the question of whether “approved” is to be regarded as included within ratification or is something distinct. In favour of the former is the way a variety of terms are used in the cases as synonyms for ratification, for example, “confirmation”, “adoption”, “affirmation” and “endorsement”.<sup>73</sup> Further, if intended to be distinct, it is difficult to determine what it means. It might be that “ratification” is intended to apply to a specific resolution to ratify whereas “approved” refers to some more generalised action such as the adoption of the directors' report. Some support for this can be drawn from Master Venning's judgment in *MacFarlane v Barlow*. In a section headed “Salaries issues/ratification” he said:

*“The evidence is that the directors' report and accounts were approved at the annual general meetings of the company for the years ending 31 March 1994 and 31 March 1995. Minutes of the meeting are before the Court. The*

<sup>71</sup> (1997) 8NZCLC 261,470

<sup>72</sup> The point was not decisive, Master Venning holding that a common law cause of action was available.

*accounts that were before those meetings include the salaries. It is the Respondents' case that as the salaries were approved by the shareholders the company could have no claim against the Respondents in respect of those salaries.*"<sup>74</sup>

Later he said:

*"On the current state of the authorities the position must be arguable that the company has a claim against the Respondents in relation to the salaries notwithstanding the approval at the annual general meeting of the accounts."*<sup>75</sup>

Reference to other parts of the Act fails to illuminate the meaning of "approved". Section 106 requires that shareholders must "approve" major transactions and amalgamations by special resolution. Unless the association of "approve" with matters subject to special resolution can in some way imply that more than a bare majority is required before an action can be "approved" under s177(1) (an unlikely conclusion) it would appear that the disjunctive framing of the provision is not significant.

#### **D** *Scope of s177(1)*

The scope of the provision is determined principally by whatever powers are "vested in shareholders". Possible sources of these are the constitution, the Act and common law. There are issues about the way the provision operates in relation to powers arising from the first two sources and a question over whether it extends to the third.

#### **E** *Powers under the constitution*

<sup>73</sup> Partridge, above n9, 122 contains citations.

<sup>74</sup> Above n71, 261,475

<sup>75</sup> Above n71, 261,475-6

A wide range of matters can be made subject to shareholder approval.<sup>76</sup> Examples include approval of change of name, borrowing, distributions, issue of shares, and directors' remuneration. Whenever directors act on any of the matters so reserved without the requisite shareholder approval it would not appear open to doubt that shareholders can ratify or approve the actions under s177(1). Few powers are, in fact, reserved to shareholders under the Act; most powers, being those needed to operate the company, are conferred on directors under s128. Therefore, powers specifically reserved to shareholders under the constitution will often be powers of management and in exercising them shareholders will be deemed to be directors, attracting the duties applicable to directors.<sup>77</sup> This would seem to mean that shareholders cannot simply "ratify" an action involving a breach of duty because they themselves would be breaching it. For example, directors may borrow at a level requiring shareholder approval. The borrowing may place the company in a position where either s135 (reckless trading) or s136 (ability to perform obligations) is breached. In these circumstances, any "ratification" of the directors action might relieve the directors of liability but would cause the shareholders themselves to breach the Act. The scope of s177(1) in respect of powers vested in shareholders under a company's constitution is probably limited in practice for this reason.

#### *F Powers under the Act over appointment and removal of directors and auditors*

Section 36 mentions five matters in respect of which a share gives the holder the right to participate in decision making. The first of these is the power, subject to any different requirement in its constitution, to appoint<sup>78</sup> and remove<sup>79</sup> directors by ordinary resolution. Similarly, only shareholders have the power to appoint auditors.<sup>80</sup> If directors attempted to appoint other directors or an auditor it would seem straightforward that shareholders can ratify by ordinary resolution, this being the means of exercising the original power.

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<sup>76</sup> Section 27

<sup>77</sup> Section 126(2)

<sup>78</sup> Section 153(2)

<sup>79</sup> Section 156(1)

<sup>80</sup> Section 196(1)

***G Powers under the Act over the constitution, major transactions, amalgamations and liquidations***

These are the other matters listed in s36. The powers can only be exercised by way of special resolution.<sup>81</sup> Given that s106(1) specifically refers to "...when shareholders exercise a power to..." it might be thought that each of the matters identified is the subject of "a power vested in a shareholder". If so, the purported exercise of the power by a director should be capable of ratification under s177(1).

One source suggests "that this is not a correct analysis".<sup>82</sup> In considering such a ratification in relation to a major transaction, the authors comment:

*"A failure to comply with s129 does not involve the usurpation of shareholder powers by directors. Rather, it involves a failure to comply with a statutory requirement. There is nothing in s177 to indicate that it extends to ratification of failures to comply with statutory requirements and while s177(4) does preserve any other rule of law relating to ratification ....there is no general rule of law which permits shareholders to ratify breaches by directors of statutory requirements."*<sup>83</sup>

This statement needs refining. It begs the question of which of the Act's provisions can be avoided by ratification. As discussed below, it is entirely possible that "failure to comply with a statutory requirement", s133 for example, can be ratified.

Even if "statutory requirement" is construed in a narrower sense as failing to satisfy a specified process, the statement is still questionable. The provisions dealing with changes to the constitution<sup>84</sup> and amalgamations<sup>85</sup> are detailed (especially the

<sup>81</sup> Section 106(1)

<sup>82</sup> Julie Crengle, Mark Russell, Geof Shirtcliffe "Update on Company Law", NZLS Seminar 2000, 25

<sup>83</sup> Above n82, 25

<sup>84</sup> Section 32

<sup>85</sup> Section 221

latter), involve parties outside the company and contain penalty provisions. These additional steps reinforce the argument that shareholders should be precluded from remedying a failure to comply with the Act by ratification. The argument does not have the same force in relation to major transactions and liquidations where the *only* requirement is that a special resolution be passed. It would seem consistent with s177(1) for a subsequent ratification by special resolution to be acceptable.

There are no penalties attached to a breach of s129 (or s241 concerning placing a company in liquidation) so it cannot be said that Parliament intended the provision to have any special governance significance. It is acknowledged that failure to comply with s129 is deemed to be conduct unfairly prejudicial for the purposes of s174<sup>86</sup> but this does not, in itself, preclude ratification. The latter, if it occurred, would be a “proper and valid” act by virtue of s177(2), reducing the scope for it to be found to be oppressive.

Finally, the Crengle analysis, if correct, would mean that ratification would only be available in respect of one of the five powers identified in s36. Yet it is clear from the Law Commission’s report that the four matters subject to s106 were considered to constitute the core of shareholders’ proprietary rights in a company.<sup>87</sup> As such, they were the precise powers intended to fall within the scope of what is now s177(1). It is doubtful whether the addition of some minimal “requirements in the form of the final legislation is sufficient to exclude the possibility of ratification.

#### ***H Other powers under the Act***

The powers listed in s36(1) appear to be illustrative rather than exclusive. It is, however, only on the matters listed that shareholders are specifically empowered by the Act to decide a matter affecting the company. Shareholders do have the ability to bypass the Act’s requirements by acting unanimously under s107. Is it possible for directors to “usurp” this power such that shareholders might ratify the action under

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<sup>86</sup> Section 175(1)(l)



s177(1)? The answer would seem to be no. The formalities surrounding the use of the s107 mechanism are such that it is not meaningful to speak of directors exercising this power. Moreover, the agreement or concurrence must be between all entitled persons, not just shareholders.

### *I Powers at common law*

Shareholders can be regarded as having various “powers” at common law, the ability to ratify directors’ breaches being one. The obvious question is whether the power to ratify is itself a “power” within s177(1)? A board might review its decision to undertake an action that breaches the directors’ duties to the company, possibly because of objections raised by a director. In “confirming” the previous decision are they purporting to exercise the power of ratification that only shareholders can validly exercise? If so, shareholders could then ratify it in terms of s177(1).

At common law, shareholders are also entitled to exercise management powers when directors are unable or unwilling to do so.<sup>88</sup> Can a director seize control of a company in a deadlock, relying on the ability of shareholders generally to ratify his or her actions subsequently because the intervention was something that shareholders could have done? One view is that shareholders should look to the court or the constitution in such circumstances, with the primary recourse being an application to court under s154 for directors to be appointed.<sup>89</sup> However, s154 applies where there are no directors or the number is insufficient directors to constitute a quorum and it is not possible to appoint directors under the constitution. It may not be available where directors are at loggerheads.

<sup>87</sup> Above n53, paragraphs 213, 371,372

<sup>88</sup> *Marshall's Valve Gear Co Ltd v Manning, Wordle & Co Ltd* [1909] 1 Ch 267

<sup>89</sup> *Morisons Company and Securities Law*, paragraph 24.2.

### *J Common law powers excluded*

It is submitted that these powers do not fall within s177(1). Firstly, the powers are not the type of required for a company's normal operation. They are in the nature of residual powers that shareholders can exercise in extraordinary circumstances. As such, they are not powers directors can be considered capable of using. Secondly, the examples cited can only come within s177(1) on an extremely broad interpretation of the term "powers" that cannot be justified on the construction of the Act. There is a sub part within Part VII of the Act headed "Powers of Shareholders". Within it, s104 concerning the exercise of powers reserved to shareholders deals with only two categories of powers, namely, those reserved by the Act and those reserved by the constitution. The conclusion must be that Parliament intended that only powers vested in shareholders by the Act or constitution should be within the scope of s177(1).

A contrary view is possible, based on the difference in wording between s104 and s177(1). The former refers to "powers *reserved* to the shareholders" whereas the latter concerns a "power *vested* in the shareholders". The argument can be made that the term "vested" carries the implication that powers can be derived from various sources and there is no necessary reason to limit these to the two mentioned in the Act. It can also be argued that section 177(1) could easily have added the words "by the Act or constitution" to make its scope clear. However, it is suggested that, in the absence of any provision clearly supporting such an interpretation, the shareholder "powers" subject to s177(1) must be confined to those in the Act or the constitution.

#### IV THE SECOND LIMB OF SECTION 177

##### A Introduction

The first limb concerns transactions entered into in excess of authority. There is seldom any question that directors are acting within their authority to bind the company and therefore outside the scope of s177(1). Difficulties normally only arise because they exercise their powers improperly, in breach of their duty to the company. The question then is whether ratification is effective in releasing directors from liability to the company. This falls to be determined under s177(4) which declares that nothing in the section "limits or affects any rule of law relating to the ratification or approval by (shareholders) of any act or omission by a director or the board". It might seem a reasonable conclusion that the broad sweep of common law concerning ratification continues to apply in New Zealand.

##### B Origins

Although elegant in its simplicity, the provision has the character of an afterthought. Efforts to establish the its origins have been unsuccessful<sup>90</sup> although the following passage provides an explanation:

*" (S)ubmissions were made to the Select Committee that ratification of breaches of directors' duties, at least where all shareholders had condoned a breach, should be retained in the law. The basic argument is that so long as the company is solvent at the time, it would be unjust for shareholders to have forgiven a breach, only to have them, or a liquidator, some time down the*

<sup>90</sup> The author contacted Frank Riley, Parliamentary Counsel, and a member of the team within the Law Reform Division of the Justice Department that worked on the legislation. Although unable to recall the precise reasons for the provision's inclusion, he did confirm that there would exist a departmental report to the Select Committee on the topic. Presumably this is archived and would be an appropriate starting point for any further research on this topic.

*track later sue for the breach. The result was a change to clause 150 of the Companies Bill, which later became s177(4)....*"<sup>91</sup>

The provision is cast in broad terms and is not, on its face, restricted to circumstances where ratification is by unanimity.

### C Implications

There is some speculation in the literature about the possibility of the exceptions to the rule in *Foss v Harbottle* surviving.<sup>92</sup> If ratification is to have its common law significance, the corollary may be that breaches that are not ratifiable may still be actionable at common law. If this were the case, a plaintiff would avoid the procedural requirement of obtaining the court's leave to commence a derivative action. No cases directly support the proposition although *Re Northwest Forest Products Ltd*<sup>93</sup> left open the possibility that the common law action remained available despite the British Columbian statute saying specifically that ratification was merely a factor that the court might have regard to in deciding whether to grant leave to bring a statutory derivative action. *Hetherington v Carpenter*<sup>94</sup> does say that the exceptions to *Foss v Harbottle* are still available in New Zealand to an overseas registered company. The matter has been considered recently in one of the first reported cases<sup>95</sup> under the provisions establishing the statutory derivative action in Australia.<sup>96</sup> It was held that the new provisions prevented any potential recourse to the common law causes notwithstanding that such a right may have accrued to the plaintiff at the time they came into effect. Although the formulation of the prohibition is different in the two countries it is highly unlikely that a New Zealand court would recognise an action based on any of the exceptions to *Foss v Harbottle*.

<sup>91</sup> Hugh Rennie QC and Peter Watts, "Directors' Duties and Shareholders' Rights" NZLS Seminar Aug-Sept 1996, 71

<sup>92</sup> A Fraser "The Companies Act 1993: Shareholders' Remedies" (1994) 7 AULR 739, 741

<sup>93</sup> 1975 WWR 724

<sup>94</sup> [1997] 1 NZLR 699

<sup>95</sup> *Karam v ANZ Banking Group Ltd* (2000) 18 ACLC 590

<sup>96</sup> Sections 236 and 237 Corporations Law

### *D Relationship to s177(3)*

The most obvious problem with s177(4) is its relationship to s177(3). It would present less difficulty if it were subject to s177(3) meaning the court would have the power to intervene notwithstanding any ratification. The problem can be illustrated in the following way.

Every exercise of a power within the scope of s177(1) will involve the breach of at least one duty, namely, that of complying with the Act or constitution.<sup>97</sup> Beyond that, the offending action may involve breaches of other duties. Directors may have been appointed or shares issued contrary to the constitution to ward off a takeover, (an improper purpose). An incompetent or even fraudulent director may have been appointed by the board, involving a lack of reasonable skill and care. Purporting to put a company into liquidation other than by a special resolution might be regarded as incompetence, the facts speaking for themselves. A major transaction subject to a ratification as discussed above may be revealed later to have been influenced by self-interest. Notwithstanding that ratified acts are deemed to be a valid and proper exercise of the power infringed from the beginning, s177(3) appears to mean that any ratification by shareholders will not preclude the court making an award in the event that a shareholder brings a derivative action based on the directors' breach.

This conclusion conflicts with the one produced by analysis under s177(4). Nothing in s177(3) limits the power of shareholders at common law to ratify the acts of directors. At common law, shareholders may well be able to ratify the breaches instanced, meaning the court is excluded from making an order in relation to the breach. That this outcome was contemplated by Parliament seems highly unlikely. One view is that s177(4) must be read "in conjunction with" s177(3).<sup>98</sup> However, if this implies that the latter overrides s177(4) it is incorrect. Section 177(4) cannot be read as subject to s177(3); on the contrary, it is the superior provision.

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<sup>97</sup> Section 134

<sup>98</sup> Susan Watson and Owen Morgan, "A matter of balance: the statutory derivative action in New Zealand" *The Company Lawyer* Vol 19 No 8 236, 243

### **E Relationship to s107**

The mechanism in s107 enabling the modification or avoidance of the statutory requirements is an embodiment of the unanimity principle. It has, however, been restricted in several ways, one of which is its extension to require the approval of entitled persons.<sup>99</sup> Given its very precise terms, s107 does not permit approval of the transactions covered in any other way, including by unanimous shareholder agreement. What are the implications for transactions not covered? Clearly, if a matter is not listed within s107 the section cannot be used to vary or negate the Act's requirements: shareholders cannot, for example, vary directors' responsibilities under s131 via s107. It does not mean, however, that the unanimity principle is not otherwise available in relation to these duties. Section 107 may be regarded as a particular expression of the unanimity principle applicable to transactions that pose compliance problems for small companies. Its existence should not carry any special significance for the ability of shareholders to exercise powers over other matters by unanimous agreement.

<sup>99</sup> Robert Dugan, *Companies Act 1993: Governance Issues for Closely Held Companies*, Ch 6, 33-42

## V INDEMNIFICATION

### A Prohibition on indemnification

Ratification pursuant to s177(4) faces the objection that it is inconsistent with the Act's provisions governing indemnification of directors. Section 162(1) is a general prohibition on indemnification or insurance of directors, other than as specifically permitted by the other provisions of the section. Under s162(4), a company may indemnify directors for liability and costs in respect of liability to a third party (but not to the company) provided it is not for criminal liability or a breach of s131 (the duty to act in good faith and in the best interests of the company). Further, the constitution must specifically allow this.

### B History

Section 162 is the successor of s204 in the 1955 Act which, in turn, was similar if not identical to the United Kingdom provision.<sup>100</sup> The prohibition was recommended by the Greene Committee in order to stop the burgeoning practice of limiting director liability via provisions in the articles. Such a provision had determined the outcome of *Re City Equitable Fire Insurance Co Ltd*,<sup>101</sup> notwithstanding Romer J's finding that some directors had breached their duties under the general law. It has been unclear whether the prohibition extended to ratification by virtue of the phrase "or otherwise".<sup>102</sup> The commonly held view was that, under generally accepted rules of statutory interpretation, these words were insufficient to evidence an intention by Parliament to displace an accepted doctrine like ratification. Another persuasive factor was that no objection was taken on this ground to ratification being effective in *Regal (Hastings) v Gulliver*.<sup>103</sup>

<sup>100</sup> Now s310 of the Companies Act 1985.

<sup>101</sup> [1925] 1 Ch 407

<sup>102</sup> The prohibition applied to "any provision, whether contained in the articles of a company or in any contract with a company or otherwise...."

<sup>103</sup> Cranston, above n34

### C *Position in Australia*

The issue received detailed consideration in *Miller v Miller*.<sup>104</sup> The case involved the validity of dispositions under a will. The testator gifted property to the company of which he was a director and to which he was indebted provided the company gave his estate a complete release from liability. One of the arguments against validity was that the company could not provide the release sought because of s241(1) of the Corporations Law 1992. It reads:

(1) [Prohibition] A company or a related body corporate must not:

- (a) indemnify a person who is or has been an officer or auditor of the company against a liability incurred by the person as such an officer or auditor; and
- (b) exempt such a person from such a liability.

(1A) [Void indemnities] A memorandum, articles or any other instrument, or an agreement or arrangement, is void in so far as it provides for a body corporate to do something that subsection (1) prohibits.

Santow J referred to ratification's "long history of co-existence with the various forms of s241" before stating:

*"Ratification can never be a blanket indemnification or exemption on a prospective basis, clearly prohibited by s241 as such would be. Rather it is a specific absolution, afforded usually though not always, retrospectively, but necessarily for specific and properly disclosed infractions of the director's duties and subject to certain limitations..... The essence of ratification is that the release so given obviates the liability, so far as any right to enforce it by existing shareholders is concerned."*<sup>105</sup>

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<sup>104</sup> (1995) 16 ACSR 73



The judge concluded that a documented formal deed of release following a valid ratification did not constitute an indemnity in terms of s241(1)(a). It was a complete surrender of the company's right to pursue a claim and therefore did more than "merely "indemnify" against the consequences of such a claim being brought".<sup>106</sup> He had more difficulty reconciling the testator's requirements with the prohibition on exempting from liability under subsection (b), however, on the grounds that "exempt" involved the notion of "to free from an obligation or liability". While the company could bind itself at law not to bring a claim and remain within s241, it was questionable whether it could purport to free the director from the underlying liability on which such a claim would have been based. In the end, Santow J took a broad approach, holding that while conceptually distinct, release and exemption amounted to the same thing as far as s241 was concerned.

*"The clear policy of s241, as evinced in its earlier reference to "indemnify", is to deal with the consequences of breach of obligation owed to the company, not the release of rights which give rise to those obligations. There is a long history, known to the legislature, of ratification of such releases. One would not have expected that history to have been expunged with no reference in any explanatory memorandum or ministerial speech, or in the words of s241 itself. Section 241 is concerned with "blank cheque" indemnification and exemption, while ratification requires specific release after full disclosure of the particular cause for claim."*<sup>107</sup>

The validity of the gifts was upheld.

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<sup>105</sup> Above n104, 87

<sup>106</sup> Above n104, 88

<sup>107</sup> Above n104, 88

### *D Implications of Miller for New Zealand*

The foregoing comments are not only clear but also forceful and it might be thought that a New Zealand court would reach the same conclusion. However, an examination of s162 discloses reasons to query this.

Firstly, section 162 contains a definition of "indemnify". This is not the case with the Australian provision and consequently Santow J resorted to dictionaries for assistance. The definition in the Act is not an exclusive one, giving scope for a wide interpretation. The term "includes relieve or excuse from liability, whether before or after the liability arises". The logic of *Miller* does not fit well with the precise wording of the definition, being based on the conclusion that a "release" falls outside the scope of an indemnity. Is there really any difference between "relieve" (the term in s162) and "release"? If not, it would seem that a "release" as interpreted by Santow J would fall within the scope of the section.

Secondly, the inclusion of the phrase "or after" strengthens the argument for the prohibition to extend to ratification. As Santow J observed, ratification is almost always occurs after a breach of duty.

Thirdly, there are two reasons to suggest that it was Parliament's intention to include ratification within the scope of s162. The first is "in the words of (s162) itself" to echo Santow J. The 1955 provision did not include the words "or after" and they have particular relevance to an area where there was doubt about its applicability. The second is the legislation's history. In keeping with its strict view on the need to protect the company from abuse of its form by delinquent directors, the Commission considered that the existing prohibition on indemnifying directors should be continued but that the opportunity should be taken to remove some uncertainties that had arisen.<sup>108</sup> One of these measures was to add a definition of "indemnify" in the following terms:

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<sup>108</sup> Above n53, paragraph 560

*"Indemnify" includes relieve or excuse from liability."*

The words "whether before or after the liability arises" were added during the course of the Bill's passage in the House. It is reasonable to suggest that these words were added to clarify, and perhaps reinforce, the ineffectiveness of ratification other than in respect of usurpation by directors of shareholders powers.

Finally, it should be borne in mind that *Miller* concerned the validity of a testamentary disposition. It is an area where Santow J acknowledged that he should seek an interpretation that would uphold the testator's intentions if it were open to him to do so. The case did not involve consideration of any specific actions of directors in breach of a duty to the company. If it had, the view formed of the gravity of the breach may well have an influence on the outcome. This is not to say the judgment is unsound. It would, however, be of greater force if the conclusions had emerged from a case in which real breaches were in issue.

For these reasons, there is scope for a New Zealand court to reach a different conclusion about the scope of s162 in comparison to s241 of the Corporations Law. Having acknowledged that, the more likely conclusion, given the long history of the indemnity provisions in statute, is that ratification will be found consistent with s162.

## VI RATIFICATION OF BREACHES OF STATUTORY DUTIES

### A Directors' duties specified

The effectiveness of ratification of breaches of duty also faces a challenge from the inclusion in the Act of the duties required of a director. The general duties are found in s131 to 137 while duties imposed relating to specific types of transactions appear throughout the Act. It is a general proposition of law that a statutory provision replaces the common law and the following is a representative view of writers:

*"The duties owed by directors are now statutory and it is questionable whether liability for breach of a statutory duty can be condoned by the shareholders in the absence of statutory authority."*<sup>109</sup>

Section 177(4) may be a statutory "recognition" of ratification but, given its unvarnished form, it is doubtful whether it can be regarded as "statutory authority" to excuse breaches of the duties contained in the Act. The opening words say "(N)othing in this section limits or affects ...": they do not say "nothing in this Act". In the absence of any elaboration in the provision itself of the significance of ratification its effect must be judged within the overall scheme of the Act.

### B Objections to ratification of statutory duties

In addition to the general point of legal principle, ratification potentially excludes the application of statutory remedies. Professor Baxt points to the inconsistency of ratification and injunction.<sup>110</sup> If ratification is effective, the court's

<sup>109</sup> Andrew Beck, Andrew Borrowdale, Lindsay Trotman, David Wishart *New Zealand Company Law and Practice* 1999 CCH Vol 1, 10-895

<sup>110</sup> Robert Baxt *Duties and Responsibilities of Directors and Officers* 16<sup>th</sup> ed. 2000 Australian Institute of Company Directors" 90

power to grant an injunction preventing a breach of the statute<sup>111</sup> or otherwise to order directors to comply<sup>112</sup> is negated. The ability to provide consequential relief, such as damages, is removed.<sup>113</sup> Beyond that, the objection to ratification is readily appreciated when the breach of duty attracts a criminal sanction. In such instances, it can be assumed that Parliament did not intend that the enforcement regime should be negated by means of ratification.<sup>114</sup> However, of the duties covered in ss131 to 149 only a breach of s140(4) (relating to failure to disclose interest in a transaction) attracts a penalty for breach under ss373 or 374.

### *C Is the Act a code?*

Commentators attach significance to the fact that the Bill originally provided for directors' duties at common law to continue alongside those specified in the legislation.<sup>115</sup> However, this was not in the legislation as enacted, indicating that "the Act has moved away from common law notions".<sup>116</sup>

The Law Commission itself did not claim that its proposals amounted to a codification. It used phrases such as "a fuller restatement in the statute of the duties and powers of directors"<sup>117</sup> to describe them. Moreover, the Act does not provide a comprehensive regime of remedies, remaining silent on what remedy is to apply to particular breaches.<sup>118</sup> It can be contended, therefore, that the inclusion of the duties in the Act does not make them "statutory" in the sense of excluding the common law. If the provisions are simply declaratory of the common law, it can be assumed that Parliament intended them to be modifiable in the manner achievable at common law.

<sup>111</sup> Section 164(1)

<sup>112</sup> Section 170

<sup>113</sup> Sections 164(3) and 170

<sup>114</sup> In *Miller*, above n104, at 89 Santow J said that ratification might "remove from the scope of technical dishonesty such actions as issuing shares for a purpose which is not a proper one, in the sense of not being for the benefit of the company as a whole."

<sup>115</sup> For example, see Andrew Beck "Enforcing directors' duties – where are the remedies?" *New Zealand Business Bulletin*, No 1 1994, 2 and *Morison's Company and Securities Law*, Butterworth's, Wellington 2000 at paragraph 23.2. However, also see the contrary view that "the mere removal of a savings provision from legislation cannot repeal the common law" in Rennie and Watts, above n91, 2.

<sup>116</sup> Beck, above n115, 2

<sup>117</sup> Beck, above n115, 1

*"The 1993 Act adopts many of the common law duties imposed on directors. To refer to this adoption as a "codification" is not entirely appropriate because while the treatment of some aspects of common law duties appears to be exhaustive (e.g., the duty to avoid conflicts), in large part the duties included in the statute are general standards. This means the Courts continue to have a wide discretion in the manner in which the duties are applied to the conduct of directors."*<sup>119</sup>

Farrar, in discussing s137, makes the following comments.

*"The relationship of s137 to the common law and equity is unclear. On the face of it, it seems to restate the case law, and not necessarily to supersede it."*<sup>120</sup>

*"Section 137 of the New Zealand Act, unlike s232(11) of the Australian Act, does not clearly preserve the common law and equity. Nevertheless, the assumption is that the case law survives, and coexists."*<sup>121</sup>

These comments suggest that the statute has not displaced the common law as it applies to breaches of duties but do not answer the question of what the limits of its operation under the Act may be.

#### **D Issue undecided**

It is clear that the issue of codification has not been settled judicially. In *Taurus Transport v Taylor & Ors*,<sup>122</sup> an application to strike out the plaintiff's reliance on two common law causes of action was refused. The issue of whether the Act is a code so that common law claims against directors was precluded was held to

<sup>118</sup> Beck, above n115, 1-2

<sup>119</sup> D O Jones *Company Law in New Zealand: A Guide to the Companies Act* Butterworth's 1993, 113

<sup>120</sup> John H Farrar "The Duties of Care of Company Directors : One or Many, Delegation and Business Judgment" *New Zealand Business Law Quarterly* Vol 5 204, 206

<sup>121</sup> Above n120, 208-9

be in the nature of a test case. New Zealand courts have continued to see directors as fiduciaries and evaluate their actions in the context of the common law on fiduciary obligations and the remedies that flow therefrom.<sup>123</sup>

### *E Modification of statutory duties*

There is, in any event, judicial support for this proposition that statutory duties are capable of modification. In *Pascoe*,<sup>124</sup> the court did not have to consider whether it should exercise its discretion to relieve a director of liability under s1318 of the Corporations Law because it held that he had not breached any duty. DeBelle J did, nevertheless, make the following observation:

*"There is, however, a nice question whether shareholders can relieve a director from a breach of his statutory duties. But, as the statutory duties reflect the duties of the director at common law and in equity, I do not think there is any impediment to a shareholder excusing a breach of statutory duty."*<sup>125</sup>

DeBelle J did not distinguish between an excusal before or after the event: his comment is broad enough to apply to both. The question of an excusal prior to a breach was addressed by the High Court of Australia in *Whitehorse v Carlton Hotel Pty Ltd*.<sup>126</sup> The court's dicta supports the proposition that shareholders can redefine the duties of directors in appropriate circumstances so as to forgive potential breaches of statutory duties. The ratification works prospectively on the basis that it determines the duty. The comments are consistent with the broader proposition advanced by DeBelle J. Baxt criticises both analyses as "not correct".<sup>127</sup> He also recognises, however, that the point is undecided.

<sup>122</sup> HC, 22 May 200 Master Thomson, Napier CP 33/99

<sup>123</sup> *Macalister Apparel Ltd v Ishizuka* (1998) 8NZCLC 261,663, an action claiming oppression based on breach of fiduciary duty, is an example.

<sup>124</sup> Above n22,

<sup>125</sup> Above n22, 772

<sup>126</sup> (1987) 162 CLR 285; 70 ALR 251

<sup>127</sup> Above n110, 90

## VII THE GENERAL DUTIES EXAMINED

An Australian text advances the suggestion that ratification of a statutory duty will be effective where the content of the statutory and common law duty is the same.<sup>128</sup> This offers a possible solution to the problem. Ratification might be considered effective in respect of those duties in the Act entirely congruent with a common law duty. It is useful to examine the duties covered in ss131-137 to see whether the Act has made any changes to the duties that would render ratification impossible or inappropriate.

### A *The duty to act in good faith and in the best interests of the company*

Section 131 embodies the key fiduciary duty of loyalty to the interests of the company, of placing the company's interest above the director's own. Ratification of a breach is possible at common law. In *Furs Ltd v Tomkies*<sup>129</sup> a managing director used his knowledge of secret manufacturing processes, property belonging to the company, to secure employment with the firm purchasing the company's business. The selling company was deprived of the benefit of these assets in the purchase price. The director was found to have breached his fiduciary duty but it was clearly stated that his actions could have been authorised by the general meeting or by all shareholders acquiescing.

It is possible that the Act has changed the common law duty by the use of the word "best". The argument is that, whereas previously the obligation was only to act in what directors subjectively believed to be in the company's interests,<sup>130</sup> the requirement to act in its *best* interests imports an obligation to exercise reasonable skill and care.<sup>131</sup> This might make a difference in a case like *Re Welfab Engineers Ltd*<sup>132</sup> where the court tolerated the directors' refusal to accept the highest offer for the

<sup>128</sup> *Ford's Principles of Corporations Law*, paragraph 8.385

<sup>129</sup> (1936) 54 CLR 583

<sup>130</sup> Based on the formulation of Lord Greene, MR in *Re Smith & Fawcett Ltd* [1942] Ch 304,306

<sup>131</sup> Discussed by Watts in Rennie and Watts, above n91, at 7-9.

<sup>132</sup> [1990] BCLC 833



company's land in favour of one that was more likely to see the business continue, thereby protecting the employees. (Such an outcome appears, on the facts, to be open to directors under s132.) The implication might be that as an element of objectivity has been introduced into the duty Parliament can be taken to have intended that shareholders would not be competent to ratify breaches. However, given that the duty in s131 is framed subjectively, it is difficult to see that the inclusion of "best" makes any difference at least as long as the directors honestly hold the belief. A court will not reach a conclusion different from that which it would under common law. Ratification should therefore continue to be available.

The other possible objection is that the meaning of "the company" has been extended from what it was at common law. Although the Law Commission may have sought to change the construct of the company in this way, it is not a conclusion that the Act requires.

There seems no reason, therefore, why ratification should not operate under s131 as it has at common law. Although theoretically available to the majority, the reality is that courts are reluctant to accept breaches of fiduciary duty. Some objection is frequently found. The meeting may have been inadequately informed (*Winthrop*<sup>133</sup>), or infected by the same improper purpose pursued by the directors (*Residues*<sup>134</sup>), or have acted oppressively (*Jenkins*<sup>135</sup>). Although the issue involved a shareholders' vote to discontinue a representative action rather than ratification of directors' duties, Sir Robert Megarry held that the majority's vote could be an abuse of power in the absence of evidence that the meeting had ever adequately considered what was for the company's benefit.<sup>136</sup> In practice, therefore, very clear shareholder confirmation of the breach will be required. The ratification should be by all shareholders wherever possible and interested directors should refrain from voting.

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<sup>133</sup> Above n29

<sup>134</sup> Above n32

<sup>135</sup> Above n52

### **B The duty to use powers for a proper purpose**

The application of this duty at common law has been confined within narrow limits, with almost all cases involving dealings in the company's shares.<sup>137</sup> The leading authority is the Privy Council decision in *Howard Smith Ltd v Ampol Petroleum Ltd*<sup>138</sup> the ratio of which is usually interpreted as being restricted to situations where share issues alter the balance of control among shareholders. There is no reason why the cases concerning ratification of share issues<sup>139</sup> should not remain applicable in this context. Whether courts will extend the scope of the duty remains to be seen.<sup>140</sup> The duty is, however, closely related to the duty under s131. The Law Commission did not include it as a separate duty in its draft statute presumably because it considered it contained within the good faith/best interests duty. If ratification is available for a breach of s131, it should also be available under s133.

### **C The duty to comply with Act and constitution**

A declaration that directors must obey the Act would seem superfluous and a formal requirement to comply with the constitution only slightly less so. It might be assumed that such transgressions would inevitably involve infractions of other duties, particularly the duties of good faith and care, or that any remedy sought would be based on whatever specific breach was alleged. There is no duty formulated in the terms of s134 at common law so it would seem to be a statutory duty.

*"As this is a statutory duty, failure to comply with it will mean that one of the statutory remedies can be invoked."*<sup>141</sup>

<sup>136</sup> *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 All ER 437

<sup>137</sup> Rennie and Watts, above n91, 22

<sup>138</sup> [1974] AC 821

<sup>139</sup> *Bamford v Bamford* above n1; *Hogg v Cramphorn Ltd* above n25,

<sup>140</sup> It was pleaded in *MacFarlane v Barlow*, for example, in respect of directors' decisions over salaries and loans to related parties.

<sup>141</sup> *Morison's Company and Securities Law*, paragraph 24.16

Morison, and Watts,<sup>142</sup> point variously to injunctions (s164), orders against directors and the company (ss170 and 172) and to actions for oppression (s174) as being available for a breach of the duty. It is unclear to the writer how s134 could be the basis of an application for relief in its own right without it being necessary to plead the precise breach. The provision seems less of a separate duty and more of an exhortation. It is not identified in s169(3) as a duty owed by directors to the company.<sup>143</sup> (Nor is it subject to penalties under ss373 and 374.) It is suggested that it is unlikely that a breach of the provision, on its own, could be the basis of an action and the issue of ratification is of little relevance.

**D     *The duties concerning reckless trading and incurring obligations.***

At common law, creditors came into consideration once a company was insolvent or nearly so. The responsibility to creditors can be analysed as a duty to creditors directly; a separate duty to the company; a subsidiary part of the duty to act in the interests of the company; or simply a limitation on directors powers rather than a specific duty.

*"It is clear that the duty to take into account the interests of creditors is merely a restriction on the right of shareholders to ratify breaches of the duty owed to the company. The restriction is to be found in cases involving fraud on the minority. Where a company is insolvent or nearing insolvency, the creditors are to be seen as having a direct interest in the company and that interest cannot be overridden by the shareholders."*<sup>144</sup>

Whatever the correct analysis, it is clear that, at common law, shareholders could not ratify actions that might prejudice the interests of creditors once insolvency loomed. Whether this situation has been materially changed depends on the interpretation given to ss135 and 136, provisions that are complex and subject to

<sup>142</sup> Above n91, 30

<sup>143</sup> Watts, above n91, at 31 says it is "logical" to regard it as being owed to both, an assertion that is surely questionable.

criticism. Section 135 concerning carrying on business “in a manner likely to create a substantial risk of serious loss to the company’s creditors” may pose a problem. The issue is the extent to which it may come into play beyond the usual circumstances of a company in significant, and more than short term, financial trouble. How far does it apply to transactions that could possibly result in the liquidation of an otherwise sound company? Opinion on this is divided, particularly in respect of how far it inhibits risk taking,<sup>145</sup> and will only be resolved by a body of case law. To the extent the provision is given a wide scope, so will the interests of creditors be enlarged and the possibility of effective ratification be restricted.

### *E The duty of care*

*Pavlides v Jensen*<sup>146</sup> remains authority for the proposition that the general meeting can ratify by majority the actions of directors that are negligent but not fraudulent. The ratio was distinguished in *Daniels v Daniels*<sup>147</sup> where it was held that ratification was not possible where the negligence benefited the negligent directors. (In *Daniels* the land sold to one of the directors increased in value 28-fold within four years.)

Section 137 is generally considered to have changed the common law by imposing an objective test of care. It might be argued that, by this change, the legislature consciously created a separate statutory duty different from the common law. Conversely, it could be said that by 1993 the common law was in the process of moving from a position where the test was a subjective one set at a low level, towards an objective test.<sup>148</sup> The enactment of the objective test in s137 may itself have perfected that evolution at common law as well. If so, the standard of care required of directors of bodies incorporated outside the Act is the same for directors subject to the Act. If ratification is available in the former, why should it not be available under the Act as well?

<sup>144</sup> *Sycotex v Baseler* 13 ACSR 766, 785 per Gummow J

<sup>145</sup> Compare *Morison* at 24.16 with *Watts* above n91 at 36.

<sup>146</sup> Above n16

<sup>147</sup> Above n43

There is no doubt that the lifting of the duty of care was one of the key measures considered necessary to procure better corporate governance. However, there is nothing in the Act which requires that it be considered any differently from the other principal duties in terms of the capacity of shareholders to ratify breaches. In any event, the practical significance of ratification of such breaches may have reduced since the Court of Appeal decision in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*.<sup>149</sup> The Court<sup>150</sup> identified three types of breaches of duty of care. In the first two (direct losses to trust property and breach of loyalty) the fiduciary will be held to account on a restitutionary basis; in the third, where the relationship between the parties is incidental, the rules applicable in contract and tort will apply. The view of commentators<sup>151</sup> is that breaches of the duty of skill and care by directors will fall into the third category, meaning causation and remoteness will be determined as in law rather than equity.

## F Summary

The conclusion is that there is nothing in ss131-137 which renders ratification of directors' breaches by shareholders, either by majority or unanimity, inapplicable.

<sup>148</sup> *Daniels v Anderson* (1995) 16 ACSR 607, 652 but cf the Privy Council in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513

<sup>149</sup> [1999] 1 NZLR 664

<sup>150</sup> Per Tipping J, 687

<sup>151</sup> Crengle et al, above n82, 6 and *Morison*, 24.10

## VIII RATIFICATION OF BREACHES OF OTHER DUTIES

### A General

Sections 139 to 144 deal comprehensively with transactions in which a director may have an interest. The meaning of "interested" is defined, the disclosure required specified, and the impact on third parties covered. Failure to disclose constitutes an offence.<sup>152</sup> Although a director remains subject to other duties, particularly s131, the conclusion must be that the Act has effectively provided a code in respect of this duty, the requirements of which can only be avoided by the agreement of all entitled persons under s107(3). Ratification will not excuse a director of liability for a breach, even if unanimous. The latter may be of some use as a protection against an action for oppression by a shareholder who subsequently changes their view.

### B Corporate opportunities

One area where the common law on ratification has not always been clear relates to where directors have taken advantage of opportunities available to them by virtue of their position with their company. In some cases<sup>153</sup> directors have not been found in breach despite the general proposition established by *Cooks v Deeks*.<sup>154</sup>

The Act does not enunciate any duty on directors in respect to the use of corporate opportunities as such but it does regulate the use of company information. Section 145 prohibits a person disclosing, using or acting on information obtained in their capacity as a director and it would seem clear that any situation where a director seeks to exploit a "corporate opportunity" would entail the use of information so acquired. A procedure is available under s145(3) whereby the board may authorise

<sup>152</sup> Section 140(4)

<sup>153</sup> *Queensland Mines Ltd v Hudson* above n27, *Peso Silver Mines Ltd v Cropper* (1966) 58 DLR (2d) 1

<sup>154</sup> Above n46

the use of the information provided disclosure is recorded in the interests register and the use will not prejudice the company. Although prejudice is not defined, it would appear that the Act imposes a strict regime based on the common law under which directors will be required to disgorge profits made even where the company itself for various reasons may be unable to take advantage of the opportunity.<sup>155</sup>

Section 145 is silent on whether shareholders can authorise a director to act on information in circumstances where that will prejudice the company. Can shareholders, via s177(4), authorise a use when directors cannot? Harris<sup>156</sup> suggests reference to the common law is open in such a case. The case law does, however, yield the answer that the breach would not be ratifiable by the majority at common law so the outcome is the same as if ratification were not available under the Act. Harris does suggest<sup>157</sup> that the breach could be ratified effectively by shareholders acting unanimously, citing *Furs Ltd v Tomkies*<sup>158</sup> and *Re Gee & Co (Woolwich) Ltd.*<sup>159</sup>

This assertion is in line with the general principle of unanimity discussed above. However, it can be challenged on the following grounds. Section 145 concerns directors' conflicts of interest. Although the transaction under the section will not constitute a transaction in which a director is interested under s140 (because the company is not a party to the transaction) both provisions involve similar issues about the directors' fiduciary duty of loyalty to the company's interests. Unlike s140, however, s145 is not within the scope of s107. Given the similarity of the underlying issue, it is to be assumed that the exclusion was intentional, Parliament having marked off s145 (and s162 concerning insurance and indemnification) from s140.

The counter argument is that this attaches too much significance to s107 which should be regarded as making available as means of avoiding administratively cumbersome transactional requirements. Harris's view is probably correct.

<sup>155</sup> *G E Smith, Ltd v Smith* above n47

<sup>156</sup> Bede Harris "Fiduciary duties of directors under the Company Act 1993" 1994 NZLJ 242,243

<sup>157</sup> Harris, above n156, 243

<sup>158</sup> Above n129, 592

<sup>159</sup> Above n21, 71

### **C** *Duty to disclose dealing in shares*

Sections 147 to 149 impose obligations on directors to disclose their shareholdings and may only acquire or dispose of shares for fair value when in possession of information material to the assessment of the value of shares. Liability is to a third party in the case of acquisition. The situation is similar to that with self-interest transactions under ss139-144 although the provisions are not as comprehensive. It is suggested that ratification is not available or relevant to the operation of these provisions.

### **D** *Ratification and transactions within s107*

For the reasons given in *IV E* it must be assumed that the transactions listed in s107 are not amenable to ratification in the normal sense. They must be approved by the full majority of entitled persons in the manner laid down. Even in relation to the duties covered by s107, however, ratification may have an influence. The test under these sections is basically fairness to the company.<sup>160</sup> In two instances, the transactions must also be in the best interests of the company.<sup>161</sup> These obligations rest with directors, and cannot be transferred to shareholders. The test is also an objective one, so the transaction must be capable of withstanding review by a court. It is suggested, nonetheless, that a ratification by a simple majority will be persuasive evidence of fairness in any subsequent challenge. The shareholders resolution will need to comply with the common law requirements in that the use of voting power does not itself represent a fraud on the minority. Provided it does, the ratification should serve to fortify directors.

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<sup>160</sup> Section 55(2)(a) re discount schemes, s60(3)(b) re self purchase of shares, s69(2)(b) re share redemptions, s76(2)(c) re financial assistance to purchase shares, s161(1) re remuneration and s141(2) re self-interested transactions.



## IX RATIFICATION AND THE STATUTORY REMEDIES

### A Injunctions

A shareholder can seek injunctions and orders to enforce compliance with the Act or constitution.<sup>162</sup> A director is exposed to a claim for damages in a case where an injunction is granted.<sup>163</sup> Ratification should be sufficient to satisfy the court that the act or omission complained of did not breach either the Act or the constitution.

### B Oppression

The leading case on the meaning of “oppressive, unfairly discriminatory, or unfairly prejudicial”<sup>164</sup> remains *Thomas v H W Thomas Ltd*,<sup>165</sup> and in particular the judgment of Richardson J, as he then was.

*“The statutory concern is directed to instances or courses of conduct amounting to an unjust detriment to the interest of a member or members of a company. It follows that it is not necessary for a complainant to point to any actual irregularity or to an invasion of his legal rights or to a lack of probity or want of good faith towards him on the part of those in control of the company.”*

It follows that actions under s174 do not necessarily depend upon directors’ breaches of duty to the company but often will.<sup>166</sup> Remedies are not infrequently sought under both s165 and s174 on the same facts.<sup>167</sup> Ratification may, therefore, be relevant to whether directors were acting in compliance with this duty. Alternatively,

<sup>161</sup> Section 69(2)(a) re redemption of shares and s76(2)(b) re financial assistance.

<sup>162</sup> Sections 164, 170, 172

<sup>163</sup> Section 164(3)

<sup>164</sup> Section 174(1)

<sup>165</sup> [1984] 1 NZLR 686

<sup>166</sup> In *Macalister*, above n123, the plaintiff’s claim of oppression was based on breach of fiduciary duty.

<sup>167</sup> *Baker v Perry CMHC New Plymouth*, Master Kennedy-Grant, CP27/98 is an example.

if the complaining shareholder voted to ratify an act or course of conduct upon which he or she subsequently seeks to base a claim, the ratification is likely to diminish their chance of success.

The use of voting power at a general meeting to pass a resolution that the minority opposes will not, in itself, amount to oppression.<sup>168</sup> However, ratification may itself be an act of oppression.

*"..(T)he holding of a general meeting of shareholders for the purpose of remedying oppression does not work where the oppressor effectively controls the voting power of such meeting. The meeting itself works further oppression."*<sup>169</sup>

### **C Derivative action**

Ratification is likely to be of greatest relevance in a derivative action.<sup>170</sup> Before a court can grant leave, it must be satisfied that either the company does not intend to bring an action or that it is not in the interests of the company to leave the proceedings in the hands of the directors or shareholders.<sup>171</sup> Ratification will be confirmation of the former so, technically at least, it would seem that where it occurs a court has jurisdiction under s165. Its discretion to grant leave is unfettered although it must consider the four factors in s165(2). Of these, "the likelihood of the proceedings succeeding"<sup>172</sup> is probably the most important. The standard required for leave has not been particularly high.<sup>173</sup> A clear demonstration of shareholder

<sup>168</sup> *Re Empire Building Ltd* [1972] NZLR 683 (involving a building on the site of the BNZ building in Willis Street).

<sup>169</sup> *Jenkins v Enterprise Gold Mines NL*, above n52, 560.

<sup>170</sup> Sections 165-166

<sup>171</sup> Section 165(3)

<sup>172</sup> Section 165(2)a)

<sup>173</sup> It has been sufficient for there to be "an arguable case". *Thorrington v McCann* (1998) 8 NZCLC 261,564; *Baker*, above n167; *MacFarlane v Barlow*, above n71

approval, either by unanimity or majority vote, should determine the matter in the directors' favour on the basis that the action for which leave is sought could not succeed.

Even if this were not conclusive, it is submitted that a ratification should usually be a powerful argument under s165(2)(d). Here, the court must consider the interests of the company in the proceedings proposed. The purpose would appear to be to allow broad considerations about the impact of the proceedings on the company to be taken into account in the judgment whether to grant leave. None of the New Zealand cases on s165 have attached much weight to such factors. In *Vrij v Boyle*,<sup>174</sup> "the prospect of a meritorious claim" rendered the granting of leave affirmatively in the company's interests. In similar circumstances in *Thorrington v McCann*,<sup>175</sup> Laurenson J thought it was in the interests of the company that the matter of the duty claimed to be owed to the company be resolved "as a matter of principle".<sup>176</sup> In *MacFarlane v Barlow*<sup>177</sup> it was claimed that it would be disruptive of the small company's association with its French supplier if there were a liquidation or substantial internal dispute between shareholders. This was dismissed, the comment being that directors could not shelter behind such an argument.

The rejection of the argument was probably justified on the facts of the latter case, although the company's success seems to have been largely due to its exclusive agency. The other cases also concerned incorporated partnerships where the interests of the company as a separate entity may be minimal. For a larger company, the consequences of a derivative action may be serious. In addition to having to meet both its own and the plaintiff's costs, the company faces the indirect cost of management time being diverted from ongoing activities. If the claim is large, it may paralyse the enterprise as it avoids taking new risks. It may damage the reputations of both the company and its directors in the market place. Management may leave to

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<sup>174</sup> [1995] 3 NZLR 763

<sup>175</sup> Above n173

<sup>176</sup> Above n173, 261,571

avoid being ensnared in the turmoil. For the company, all the pressures are towards settling, rather than risk the damage that a court case may cause. For these reasons, and without supporting Young J's example in *Mesenberg*,<sup>178</sup> it is suggested that the implications of proceedings for the company should be given serious consideration.<sup>179</sup> Ratification, if it occurs in this context, should be very influential. In *Smith v Croft*,<sup>180</sup> Walton J gave detailed consideration to the views of the disinterested shareholders on the issues on which the derivative action was based and these were decisive in his reaching the conclusion that the action should not proceed. In summary, courts will need to be cognisant of the scale of the company concerned in evaluating its interests in a derivative action.

#### **D Liquidation**

Like its predecessor (s320 in the 1955 Act) s301 is generally considered a procedural provision, conferring on a shareholder, creditor or liquidator the right to sue but not itself establishing a basis of liability. The court's power under s301 is very broad and the question is whether it is limited by s177(4) such that the court is prevented from making an order on the application of a shareholder or liquidator where a director's breach has been ratified.

#### **E The need for a formal release?**

The position at common law appears to be that a director remains exposed when control of a company changes, such as in a liquidation.

*"In truth what ratification achieves, generally speaking, is to block action by*

<sup>177</sup> Above n71

<sup>178</sup> Above n15

<sup>179</sup> As it was in relation to an application under s18 of the Securities Amendment Act 1988 in *Colonial Mutual Life Assurance Society Ltd v Wilson Neill Ltd (No 2)* [1993] 2NZLR 617

<sup>180</sup> [1986] 1 WLR 580

*the minority shareholders, leaving vulnerability still to new controllers in the event of a future change of control; see for example Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134N. That is why one would expect the directors relying on ratification would also want a documented formal deed of release from the board.*"<sup>181</sup>

It is unclear whether this is the case in New Zealand. A literal reading of s177(4) points to such a conclusion, in which case directors who have secured ratification may not be as well protected as they believe. In cases where the ratification happened well before liquidation, injustice could result. It is suggested, on grounds of general principle,<sup>182</sup> that a formal release should certainly not be necessary in cases where the ratification has been by unanimity unless there is some reason to believe the ratification was motivated by a desire to defeat creditors. This, in fact, is what s177(4) appears to have been designed to achieve.<sup>183</sup> It is further suggested that ratification by majority should also be conclusive if otherwise sound. The legislature having recognised the ability of shareholders to act on behalf of the company via ratification, the courts should accept that it serves the purpose of curing the breach.

<sup>181</sup> *Miller v Miller*, above n104, 87 and see Part II G

<sup>182</sup> *Pascoe*, above n22, also provides support.

<sup>183</sup> *Watts*, above n91

## X CONCLUSION

### A Summary of ratification under s177

The first limb dealing with ratification of directors' exercise of shareholders' powers is restricted to powers vested in shareholders by the Act and the constitution and does not extend to powers that might be regarded as exercisable by shareholders at common law. It is likely to permit ratification of directors' acts that fail to comply with s129 concerning major transactions and s221 concerning amalgamations provided the ratification is effected by a special resolution.

Section 177(3) preserving the court's power to make orders notwithstanding any ratification under s177(1) must be read as subject to s177(4). Any breach of duty involved in the action falling within s177(1) is ratifiable by shareholders by majority or unanimous vote.

The inclusion of directors' general duties in the Act does preclude breaches of them being ratified. Ratification is not available, however, in respect of the duties covered by ss139-149 except that all shareholders may be able to authorise a use of company information that would otherwise contravene s145.

The Act's requirements in relation to those transactions listed in s107 can only be avoided via the use of s107. Failure to comply with the requirements cannot be cured by ratification.

Even if ratification is not treated as eliminating the possibility of a successful action against directors, it will be a significant factor in actions under ss165 and 174. A ratification of an action by a fully informed and disinterested majority is likely to be treated as conclusive evidence of the best interests of the company in relation to a derivative action and is likely to be a highly persuasive answer to allegations of oppression.

There are three areas where the law is unclear, namely:

- The compatibility of ratification with s162;
- Whether a formal release is required to protect directors absolutely;
- Whether interested directors who are also shareholders can vote on the resolution.

These are matters on which legislative clarification would assist.

Within these bounds, ratification remains effective. According to ratification its common law significance is compatible with the statutory regime; it is workable and does not violate any core principles. The position in New Zealand is correctly summarised as follows:

*"In general, including the case of companies under the 1955 Act, a transaction that requires ratification (such as for directors' breach of fiduciary duty) is ratifiable by a bare majority of shareholders, unless the transaction itself would amount to a fraud on a minority"*<sup>184</sup>

Although the Act has reduced the scope of ratification in certain areas, such as directors' remuneration, it remains a valuable mechanism. The corporate lawyer's faith in it is justified.

### **B The role of shareholders**

Whether this constitutes an appropriate state of affairs depends on whether shareholders are seen as capable of playing a role in the management of a company. The origins of ratification lie in simple concepts well known to the law and with obvious appeal from a policy perspective. The problem is not the concept itself but its

<sup>184</sup> *The Laws of New Zealand*, Vol 6 Companies, paragraph 209

application in a company context, particularly given the realities of the large, modern company characterised by the separation of ownership and control. The principal objection is that directors are able to control the general meeting with far less than 50% of the voting power. Thresholds in takeover laws around the world suggest little more than 30% is required and at this level it is too easy for directors to treat the general meeting as a “cypher”.<sup>185</sup> In this situation, the minority shareholder is vulnerable and deserves the protection of recourse to the courts.

In seeking to relegate shareholders from a role in management the Law Commission may have over reacted to the excesses of the 1980's. These were perpetrated by a few, admittedly powerful, large corporations. Yet, by far the majority of entities using the corporate form are small. In these, the shareholders very definitely are “the company”. Here, ratification serves a sensible and useful purpose, providing the company with a means of remedying the problems which, through inexperience, will inevitably occur. It ensures that “everything will go on as if it had been alright from the beginning”.<sup>186</sup> If a problem exists, it is in the Act's “one size fits all” approach.

Even in larger companies there may be grounds for having somewhat more faith than the Law Commission in the general meeting. It is only seven years since the Act was passed but even in that time developments have occurred. Institutions are more active as shareholders than they have been traditionally and shareholder activism is increasing. Electronic communications, particularly via the Internet, may make shareholder participation in polling far more practical. Finally, there is always the remedy under s174, the ultimate backstop of an unhappy minority shareholder.

The extent to which shareholders should be capable of ratifying directors' breaches will remain controversial. No doubt the next cycle of corporate excess will stimulate calls for stricter director accountability and a reduction in, if not the elimination of, shareholders powers of ratification. For the present, there is no indication that the law as it currently stands is failing in any significant respect.

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<sup>185</sup> Above n61

<sup>186</sup> *Bamford v Bamford*, above n1



## BIBLIOGRAPHY

### Texts

Robert Baxt *Duties and Responsibilities of Directors and Officers* (16<sup>th</sup> edition)  
Australian Institute of Company Directors 2000

Andrew Beck, Andrew Borrowdale, Lindsay Trotman, David Wishart *New Zealand Company Law* 1999 CCH

Andrew Borrowdale, *Duties and Responsibilities of Directors and Company Secretaries*, CCH

Paul L Davies, *Gower's Principles of Modern Company Law* (6<sup>th</sup> edition) Sweet & Maxwell 1997

Robert Dugan, *Companies Act 1993 Governance Issues for Closely Held Companies*  
Victoria University of Wellington Law Review

HAJ Ford, RP Austin and IM Ramsay, *Ford's Principles of Corporations Law*  
Butterworth's 1995

Stephen Griffin, *Personal Liability and Disqualification of Company Directors* Hart  
Publishing, Oxford 1999

Michael Harris, *The Laws of New Zealand Vol 6 Companies*, Butterworths

DO Jones, *Company Law in New Zealand; A Guide to the Companies Act*  
Butterworth's 1993

*Morison's Company and Securities Law* Butterworths 2000

Robert R Pennington, *Directors' Personal Liability* BSP Professional Books

R Tomasic, J Jackson and R Woellner, *Corporations Law, Principles, Policy and Processes* (3<sup>rd</sup> edition) Butterworth's 1993

### Articles

R. Baxt, "Judges in their Own Cause: The Ratification of Directors' Breaches of Duty" (1978) 5 Monash ULR 16

Andrew Beck, "Enforcing directors' duties – where are the remedies?" New Zealand Business Bulletin No 1 1994

Ross Cranston, "Limiting Directors' Liability: Ratification, Exemption and Indemnification" [1992] JBL 197

Julie Crengle, Mark Russell, Geof Shirtcliffe "Company Law Update" NZLS Seminar May 2000

John H Farrar, "The Duties of Care of Company Directors: One or Many, Delegation and Business Judgment", 1999 5 NZBLQ 204

A Fraser, "The Companies Act 1993: Shareholders' Remedies" (1994) 7 AULR 739

Saul Fridman, ""Ratification of Directors' Breaches" (1992) 10 Co & Sec LJ 252

Ross Grantham, "When Does Unanimous Consent Not Have to be Unanimous?" 1995 1 NZBLQ 42

Bede Harris, "Fiduciary duties of directors under the Companies Act 1993, 1994 NZLJ 242

RJC. Partridge, "Ratification and the Release of Directors from Personal Liability" [1987] 46 CLR 122

Hugh Rennie QC and Peter Watts, "Directors' Duties and Shareholders' Rights" NZLS Seminar August-September 1996

Susan Watson and Owen Morgan "A matter of balance: the statutory derivative action in New Zealand" *The Company Lawyer* Vol 19 No 8 236

Peter Watts, "Company Law" [1999] *New Zealand Law Review* 1

KW Wedderburn, "Shareholders' Rights and the Rule in *Foss v Harbottle*" [1957] CLJ 194 and [1958] CLJ 93

KW Wedderburn, "Shareholders' Control of Directors' Powers: A Judicial Innovation?" (1967) 30 MLR 77

K Yeung, "Disentangling the Entangled Skein: The Ratification of Directors' Actions" (1992) 66ALJ 343

### Reports

New Zealand Law Commission, *Company Law Reform and Restatement*, (1989) Report No 9

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Peter Watts, "Company Law" [1999] New Zealand Law Review 1

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KW Wedderburn, "Shareholders' Control of Directors' Powers: A Judicial Innovation?" (1967) 30 MLR 77

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