GORDON McGRATH

Three Aspects of the Lion Breweries Plan to Avoid a Takeover

Research Paper for Bodies

Corporate and Unincorporate

L.L.M

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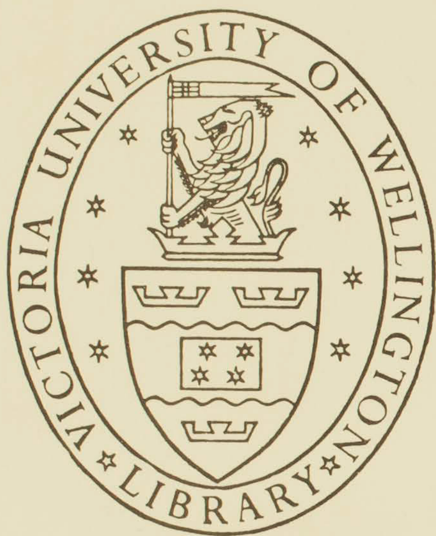
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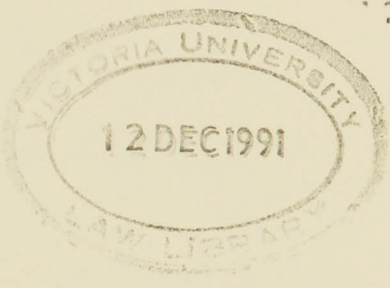
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This article proposes to look at three of the issues highlighted by the recent Lion Breweries actions in warding off a possible takeover. These are the application of S.40 of the Companies Act 1955, the question of propriety of purpose and the effect of ratification. The events leading up to the defensive manoeuvre are well known. The actual manoeuvre may well require some elucidation.

Two directors of Lion founded the Androcles Corporation. Lion then alloted 25 million ordinary shares at 50¢ each (par value) to Androcles. Androcles, a private company with a capital of 25 million dollars, comprised of 50 million 50¢ shares, paid for these Lion shares by the allotment of 25 million ordinaries at their par value of 50¢ each to Lion.

Androcles then made a further issue of 25 million 50¢ shares to its two directors, Sir Clifford Plimmer and Mr R C Bradshaw. These were unpaid. By a trust deed signed on the 6th of January 1978 these two bound themselves to hold the shares in trust for the members of Lion as at the date of distribution of the trust.

Thus we end up with Androcles owning 27% of Lion; Lion owning half of Androcles and Mr Bradshaw and Sir Clifford Plimmer owning the other half, subject to a trust for the members of Lion with reversion at some future undetermined date.

So

Lion 25m 50¢ shares →
← 25m 50¢ shares Androcles

12½m ↙ 50¢ shares Plimmer
↘ 12½m 50¢ shares Bradshaw

Thus the 2 Androcles shareholders who were also Lion directors, and Lion, controlled the total voting power at a Lion general meeting. Given the average 32-35% turnout of votes at a pre-Androcles Lion general meeting, this 27% would ordinarily be enough to control the company. This makes it extremely difficult for an outside purchaser to get control of Lion. It also makes it impossible for one to pass a special resolution

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against the wishes of the directors of Androcles. This is, of course, due to the fact that the requisite 75% majority could not be obtained against a 27% opposition.

However this move seems to be of questionable validity. The Registrar of Companies refused to register the shares on the ground that the scheme was void under Section 40 of the Companies Act; allegations of improper purpose made the directors of Lion seek and gain a ratification from the shareholders. But the twin questions of whether the ratification was necessary or effectual are still at large. This paper will look at the three questions detailed above and attempt to comment on the law, with special reference to the Lion situation.

SECTION 40 OF THE COMPANIES ACT 1955

A company may not hold shares in itself. 1. This prohibition is based on the belief that this amounts to a reduction of capital. 2.

Not fully explained

What of the situation where a company owns sufficient shares to have control of another company, or has effective control over another company without actually possessing a controlling interest, and that other company itself has de facto control over the first? The effect is that of the first company owning its own shares and yet the situation is clearly outside the rule in Trevor v. Whitworth. For the company does not own its own shares; it does, however, have all the opportunities for abuse inherent in such ownership.

Section 40 is the attempt made by the New Zealand Legislature to meet the deficiency of the common law in such a situation of incestuous ownership.

1. Trevor v. Whitworth (1887) 12 A C 409
2. Professor Gower in his 'Modern Company Law' at 112 also notes dangers of abuse by directors in this situation.

E.g.

The Structure of S.40: S.40(1) states "a body corporate cannot be a member of a company which is its holding company and any allotment or transfer of shares in a company to its subsidiary shall be void." This is subject to four

exceptions.
These are to be found in Sections 40(2)-(5).

S.40(2) excepts situations where the subsidiary is a personal representative or a trustee. Neither company is dead and neither holds shares under trust.

S.40(3) applies to allow continued membership where the subsiduary held shares prior to the coming into force of the act. This is not the situation here.

S.40(4) includes nominees for a body corporate within subsections 1 and 3 subject to 2. The position of nominees will be developed further but for the purposes of this argument it suffices to say that it certainly does not exempt Lion or Androcles here.

S.40(5) relates only to companies unlimited or limited by guarantee. Lion and Androcles are limited by shares. In summary none of the exceptions apply to exempt Lion from S.40(1).

What then is a holding company?
Section 3 of the act states that a holding company "means a holding company as defined in S.158 of this Act."

Section 158(4) reads "For the purposes of this Act, a company shall be deemed to be another company's holding company if, but only if, that other company is its subsidiary." As this is the only reference to a holding company in S.158 we must assume that this 'deeming' is the 'definition' referred to in S.2. Academic criticism apart, it suffices. However it leaves us with the question of what a subsidiary company is for the purposes of the Act.

Returning to Section 2 we find that "Subsidiary" means "a subsidiary as defined by S.158 of this Act." Back in S.158 we find that, "S.158(1) for the purposes of this Act, a company shall, subject to the provisions of subsection three of this

section, be deemed to be a subsidiary of another if, but only if:

(a) That other company either:

(i) Is a member of it and controls the composition of board of directors; or

(ii) Holds more than half in nominal value of its equity share capital as defined in subsection five of this section; or

(b) The first-mentioned company is a subsidiary of any company which is that other company's subsidiary.

Androcles and Lion are both members (i.e. shareholders) in the other. Does either control the composition of the other's board of directors?

S.158(2) elucidates what control of the board of directors is 'deemed' to be. It reads "For the purposes of subsection one of this section, the composition of a company's board of directors shall be deemed to be controlled by another company if, but only if, that other company by the exercise of some power exercisable by it without the consent or concurrence of any other person can appoint or remove the holders of all or a majority of the directorships; but for the purposes of this provision that other company shall be deemed to have power to appoint to a directorship with respect to which any of the following conditions is satisfied, that is to say:

(a) That a person cannot be appointed thereto without the exercise in his favour by that other company of such power as aforesaid; or

(b) That a person's appointment thereto follows necessarily from his appointment as director of that other company; or

(c) That the directorship is held by that other company itself or by a subsidiary of it.

It can be argued that a director can be appointed to the Androcles Baord "without the exercise in his favour" of such a power in terms of (a). For if Lion abstained and the existing directors votes were used then the appointment would follow.

This could well be read as being a non-exercise of power and thus not within the section. Similarly if Lion tried to remove a director against the wishes of the existing Androcles directors then a deadlock and the status quo would result. The trust deed expressly reserves the discretion of the directors to vote independently of any "purported direction, recommendation or direction of Lion Breweries Limited or its Directors ..."

The other view is that the decision to abstain from voting is in itself an exercise of power. Thus the fact that Lion's 50% holding can block any change in the status quo is sufficient to satisfy S.158(2)a which would lead to the conclusion that Lion does indeed control the board of directors and thus Androcles is a subsidiary within the meaning of S.158.

We move on to a consideration of S.158(a) which indicated that a company will be a holding company if it"holds more than half in nominal value of its equity share capital as defined in subsection five of tis section."

Lion holds one half of the issued Androcles capital exactly. It is to be noted however that subsection five defines equity share capital as "issued share capital excluding any part thereof which, neither as respects dividends nor as respects capital, carries any right to participate beyond a specified amount in a distribution. The 25 million shares issued to the trustee/ directors are unpaid. Thus they carry no right to participate in capital or income. This raises the possibility that s.s.a applies. Further by S.40(4) a nominee is included within the taint of being a subsidiary. Thus if the directors are held to be nominees for Lion then not merely (a) of S.158(2) will be operated but also the main provision and (c).

POSITION OF DIRECTORS:

The first step in assessing whether the Androcles directors are nominees for Lion is to define the term nominee.

'Nominee' is largely a statutory term. It must therefore be

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See ITAA (Australia)

The other view is that the decision to abstain from voting is in itself an exercise of power. Thus the fact that Lion's 50% holding can block any change in the status quo is sufficient to satisfy S.158(2)(b) which would lead to the conclusion that Lion does indeed control the board of directors and thus Androcles is a subsidiary within the meaning of S.158.

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<u>POSITION OF DIRECTORS:</u>
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used in context. S.2 of the Companies Act is silent. The Shorter Oxford states that a nominee is a person named in connection with, or the recipient of an annuity grant etc.,or one who is nominated for some office. The legal dictionaries are either silent[3] or refer to old UK cases on the practice of having a nominee for lunatics. The term is used unhelpfully in the UK Finance Act 1936 C.34 S.19(2)b: the National Health Insurance Act 1936 S.32 C.2(2) and the National Health Insurance Amendment Act 1938 C.14 S.1(1). However an extensive NZ statutory definition can be found in the Overseas Investment Regulations 1974.[4]

This use is in the context of Overseas Investment and is expressly stated to be a definition "in relation to an overseas person." Nevertheless it may cast light on the subject because

(1) Both terms are used in the context of preventing avoidance of statutory provision by the use of 'nominees' and

(2) There is little else available in the way of guidelines to determine the content of the word 'nominee.'

Under Regulation 2 nominee status occurs when the nominee is "directly or indirectly controlled" (2a); or (2b) directly or indirectly controls or is interested in (beneficially or otherwise) any shares in the capital of that (overseas) person or a nominee of that (overseas) person;" or, 2(b) (ii), is entitled, directly or indirectly, to any part of the profits of the overseas person or a nominee of the overseas person; or where the acquisition of those shares or the entitlement to that part of those profits was entered into or obtained for the benefit of an (overseas) person or a nominee for an overseas person or

3. e.g. Hinde NZ Law Dictionary, Words & Phrases Legally Defined
4. In Amendment No.1. 1978/79

(c) Where there is "direction or control" whether direct or indirect, general, or specific, "whether or not the direction or control is legally enforceable; or,

(d) The person is "agent, trustee, representative or in any way acts on behalf of" or "in any way subject to the direction, control or influence of the (overseas) person whether or not in respect of the transaction, the relationship between that person and the (overseas) person or nominee is such as to confer legally enforceable rights on either party, or

(e) (i) action "jointly or in concert" takes place; or,

(ii) the person undertakes or participates in any transaction in consequence of any arrangement" applying again whether or not legally enforceable rights are conferred.

So nominee status here is incurred where (1) the principal directly or indirectly controls the nominee or the nominee is subject to influence or (2) where the nominee is interested in share capital of the principal or (3) is entitled to a share of profits of the principal or (4) where acquisition of shares or entitlement to profits of principal takes place for the benefit of the principal or where the person is agent, trustee, representative or acts in any way on behalf of the principal.

Further it would seem that it is irrelevant whether (a) the control is direct, indirect, general or specific or whether (b) legally enforceable relations exist.

With the different statutory context certain glosses will take place" 'influence' as used in 2d must mean "substantial commercial influence", the 'interest in share capital' trigger for nominee status cannot apply here for then a company could not hold otherwise than as a nominee: this is clearly inconsistent with S.40. Such a holding would probably have to be of such a size or significance to provide a substantial degree of control.

The directors of Androcles hold on a basis that fulfils nearly all of these indices of nominee status.

Indirect control is exerted by the mutual directorship they hold: the directors hold shares which are used as a part of the controlling block. The acquisition of Androcles shares, indeed the creation of Androcles, expressly took place for the benefit of the principal. Further the directors hold under trust for Lion shareholders thus fulfilling yet another of the identifying factors.[5]

The overview of the directors situation confirms the technical analysis. They are there by Lion, for Lion and of Lion. They are nominees for Lion. Thus section 158(1) and S.158(1)c are operated as well as S.158(1)a. Section 40 is in turn operated by each of the above & thus voids the share allotment from Androcles to Lion and to the directors.

Two further points arise. An exception to both S.40 and S.158 arises where the subsidiary is a trustee under S.40(2) and S.158(3)a and b. Here the subsidiary holds its shares outright.

The mischief arises with effective voting control and the wide use of staff benevolent funds under trust does not avoid this mischief.

Finally S.40 only covers two levels, a nominee for a subsidiary. By adding more companies the effect of the act can easily be evaded.

5. For the corporation is not distinct from the corporators; see page 15 post for the passage from Greenhalgh v. Aderne.

IMPROPER PURPOSE

Were the Lion directors acting within their powers in the the share swap with Androcles?

The first point to make is that the Lion board were certainly empowered to issue shares. This is clear under the proviso to Article 48 which excepts shares swaps from the proportional allotment requirement.

The point we are dealing with here is whether the validity of their act was vitiated by an improper purpose.

It is unclear whether this should be treated as an aspect of ultra vires. As Gower notes[6] "But it makes for clarity to distinguish between an act ultra vires the directors because they have usurped a power they never had, and an act which prima facie is within the powers delegated to them but which they have abused by exercising it for an improper purpose."

Gower goes on to state[7] as an example of an improper purpose, "Thus directors will normally be authorised to issue further capital but they will be liable if they exercise this or any other power for the purpose of maintaining their control of the company." Gower is unclear here because in none of the UK or commonwealth decisions can any trace of liability attaching to the directors be found: the result is for their action to be voidable. However his statement otherwise reflects an important question: which purposes are proper in the context of the directors exercising their fiduciary power to issue shares?

The question of improper purpose for a share issue arose in Punt v. Symons & Co Ltd[8]. There the directors had issued shares with the object of creating a sufficient majority to pass a special

6. In his Modern Company Law (3rd Edition) at Page 512.
7. Ibid P.512
8. (1903) 2 Ch.506

resolution depriving other shareholders of rights conferred under the articles. Byrne J. set forth a test for proper purpose[9] ".... primarily it is given then for the purpose of enabling them to raise capital when required for the purposes of the company." There may be occasions when the director may fairly and properly issue shares in the case of a company constituted like the present for other reasons. For instance, it would not be at all an unreasonable thing to create a sufficient number of shareholders to enable statutory powers to be exercised: but when I find a limited issue of shares to persons who are obviously meant and intended to secure the necessary statutory majority in a particular interest, I do not think that is a fair and bona fide exercise of the power."

It could be deduced from this case that:

(1) A power to issue shares is given mainly for the purpose of raising capital

(2) Other reasons connected with the efficient running of the company may also be allowable

(3) An exercise of the power to alter the balance of power is bad.

The case of Piercy v. S Mills & Co Ltd[10] seems to carry the third proposition even further. There the directors had issued shares with the object of creating a sufficient majority to enable them to block the election of 3 additional directors who would have put the existing 2 in a minority.

Peterson J[11] stated ".... directors are not entitled to use their powers of issuing shares merely for the purpose of maintaining their control or the control of themselves and their

9. Ibid at 515
10. 1920 1 Ch. 77
11. Ibid at 84

friends over the affairs of the company, or merely for the purpose of defeating the existing majority of shareholders."

This passage would seem to indicate that the third proposition could be extended to a situation where the directors did not contravene the wishes of an existing majority but reinforced the power of that majority. It must be admitted that the case was an attempt by a minority to issue shares to retain power and thus the phrase is dicta. The better view is still that the word 'or' is used disjunctively and maintenance of control and defeating the wishes of an existing majority are two distinct improper purposes. But are the board restricted only this far?

The limits of shareholders protection were thoroughly canvassed in the Savoy Hotel case. The facts are complex and will be set out at length here. The investigation was made under s.165(b) of the UK Companies Act 1948. The case never reached court and the Board of Trade[12] report by E Milner Holland Q.C. is all we have on this situation.

<u>DRAMATIS PERSONAE:</u>

<u>Savoy Hotel Ltd</u>: Public company incorporated in 1889. It had an authorised capital of 250,000 pounds of 1 pound 7% non-cumulative preference shares: 753,699 pounds of 1 pound ordinary stock and 96,301 pounds of 1 pound ordinary shares. All the preference and ordinary stock had been issued and was fully paid up. No ordinary shares had been issued. Under the articles each ordinary share had one vote.

<u>Berkely Hotel Ltd</u>: Public company incorporated in 1896. Its capital structure consisted of:

30,000 5% 1 pound preference shares
40,000 6% 1 pound 2nd preference shares
60,000 1 pound ordinary shares

12. HMSO 1954

All had been issued, paid up, and owned by Savoy Hotel Ltd since 1901.

Under the articles the business of the company was managed by the directors and the board could exercise all powers of the company subject to the regulations made in general meeting. The Directors of the Berkely were the same as those of the Savoy bar 1 (a Mr Hannay) who was on the Savoy Board but not the Berkely.

NEW CLARIDGES LTD: Public company incorporated in 1894. Its capital of 150,00 pounds was divided into 15,000 shares of 10 pounds each. All of this was issued, paid up and had been owned by the Savoy since 1889. Again the boards were co-extensive except for the absence on the New Claridge Board of Mr Hannay.

Beaufort Construction Ltd: Public company incorporated in 1948. It had an authorized and issued capital of 1,000 pounds comprised of 600 1 pound 5% preference shares and 800 10 shilling ordinary shares. Again these were entirely owned by Savoy. The company were builders and did maintenance on hotels owned by the group.

Worcester Buildings Company (London) Ltd: Incorporated in 1953. It had a capital of 650,000 pounds comprised of 540,000 1 pound 1st preference shares, 100,000 2nd 1 pound preference shares and 200,000 ordinary shares of 1 shilling each.

The 2nd preference and ordinaries conferred votes but the 1st preference shares did not except when their rights were affected by a proposed change in the company's regulations. Thus 540,000 pounds of a total capital of 650,000 pounds was excluded from the decision-making process. Messrs Thornwill and Hannay(both on the Savoy board) were directors.

The circumstances of the creation of this last company were that the hotel properties were undervalued on the books and producing low earnings. Stock in Savoy was being acquired by unidentified buyers. A takeover bid was in the offing.

The Scheme: Having incorporated Worcester the Savoy/Berkely directors sold the Berkely to Worcester with the consideration being given in shares. Specifically 323,000 3½% 1st preference shares and 65,000 6% 2nd preference shares. There was an immediate 50 year lease back. The lease contained two covenants, vital to the scheme. These were (1) to retain the hotel and restaurant portion of the premises as such, and (2) not to use the ground floor and basement otherwise than as restaurant, kitchens etc without written permission of Worcester.

A similar operation took place between Worcester and Simpsons-in-the-Strand. This time the covenant in one of the leases was to retain the use of Stone's Chop House as a restaurant.

A further divesting operation took place between Beaufort and Worcester on a Cornwall Road property.

There the covenant was for written consent prior to a change from use of the premises of carpentry, upholstering and other hotel maintenance ancillaries. There the consent was not to be unreasonably withheld, a stipulation not extant in the other two leases.

This left ownership of the properties in Worcester and most of the share capital of Worcester in the hands of the Hotel companies. In view of the unbalanced capital to voting structure it is important to see the kinds of shares the companies received.

	1st preference	2nd preference
Berkely	323,000	65,000
Simpsons-in-the-Strand	130,000	25,000
Beaufort Construction Ltd	67,000	10,000
	520,000	100,000

Worcester had issued all but 20,000 1st preference shares and all 2nd preference shares. This left 200,000 1 shilling ordinaries, carrying the bulk of voting control. Of these, 4 were taken up

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by the subscribers to Worcester and the rest were issued for cash as one holding in joint names to Wontener, Sir Alan Smith and Dr Gordon. Dr Gordon was the hotel doctor, Sir Alan Smith a senior partner in the hotel's auditors while Wontener was the chairman of the Savoy.

For may years Savoy had set aside funds for "staff superannuation and benevolent" purposes. This money was, however, the absolute property of the company. A declaration of trust was made and the money was transferred to them as trustees. They used this money to purchase the Ordinaries. Thus the trustees held voting control of Savoy subject only to a duty to the beneficiaries. This raises an interesting possibility that they would have breached their trust by refusing a huge offer for those shares. This did not here arise.

The vital point to realise was that the effect of these transactions was to deprive a majority shareholding in Savoy of the right to change use of the buildings. Such a power rested in the trustees of the staff fund who had control of Worcester. As the profit in a takeover depended on changing the use of well-positioned buildings with low earnings this effectively made such an offer unattractive.

E Milner Holland's conclusions on the facts were[13]
(1) The object of the scheme was to deny a majority of Savoy shareholders the power to change the business or sell the hotels.
(2) The directors believed the action was for the benefit of stockholders.
(3) He was satisfied that the scheme was not implemented for any reasons of personal gain on the part of the Savoy directors.

There was little doubt that, apart from the improper purpose possibility, the scheme was valid as the articles provided[14]

13. Ibid at page 22
14. Article 83

for the delegation of management of the business to the board and (Article 84) that the board could dispose of the company's undertaking for such consideration as the directors saw fit. Property and rental prices were fixed by valuers and there was no question of bad faith there.

On the question of bona fides counsel for the directors came up with a very broad interpretation of bona fides in the "best interests of the company."

He argued that "the company" does not mean the sectional interest or some or a majority of present members or even all or present members but covered present and future members of the company on the footing that it would be continued as a going concern balancing a long term view against short term interests or present members."

There is no doubt that "the best interests of the company" is not interpreted in this country in the extreme realist sense of economic advantage for the entity. Evershed M R noted that the phrase "the company as a whole" does not, at any rate in such a case as the present, mean the company as a commercial entity as distinct from the corporators," in Greehhalgh v. Arderne Cinemas[15] E Milner Holland did not disagree with this view. It would seem that the actions of Lion expressly aimed at protecting future shareholders were"bona fide in the best interests of the company as a whole " and made on the basis of the correct test.

On the question of whether the articles were used for a proper purpose Mr E Milner Holland Q.C. found against the company, starting from the basis of Piercy v. S Mills & Co Ltd[16] where

15. (1951) Ch D CA at 291
16. (1920) 1 Ch 77

a power to issue shares given to raise capital was improperly used to affect control, he examined the present situation. As Samuel (the offeror) did not have control of the company there was no question of affecting an existing majority. What he found as the purpose of the powers exercise here was[17]

> "The exercise of the directors powers was therefore used in order to render irrevocable for all time the policy view of the present Board."

He continued[18] "In my opinion, such a use of the director's powers is in principle not distinguishable from an issue of shares to affect voting power, and, however proper the motive behind it, is not a purpose for which those powers were conferred on the Board."

From this we can see that Holland saw the entrenchment of a policy as an improper purpose and on a par with the issue of shares to affect voting power. Holland's most definitive statement[19] on this category of improper purpose is "powers conferred by the shareholders on directors for the purpose of managing the business of the company cannot be used for the purpose of depriving those shareholders of such control as under the regulations of the company they may have over the company's assets."

Although this extension of the category of improper purposes is not within the formal precedent system it nevertheless ties in well with the statement of Byrne J in Punt v. Symons[20] which limited the proper purposes of a general power to issue shares to the raising of capital and certain ancillaries.

The most important case in the area is <u>Howard Smith Ltd v. Ampol Petroleum Ltd</u>.

17. At page 27 of the Board of Trade Report
18. Idem
19. Idem
20. Cited at Footnote 9

Two companies Ampol and Bulkships held 55% of the issued capital of Millers. Ampol made an offer for all the shares but another company Howard Smith Limited announced its intention to make a higher offer. Millers directors recommended the rejection of the Ampol offer. Howard Smith Limited applied to the directors for an allotment of 4½ million ordinary shares when Ampol and Bulkships stated their intention to reject any offer for their shares. The directors of Millers issued the shares to Howard Smith Limited.

This meant 1) Millers gained needed capital

2) Ampol and Bulkships lost their majority: it was reduced from 55% to 36.6%

3) Howard Smith Limited was placed in a position of strength, allowing it to make an effective takeover offer.

Ampol Petroleum Limited challenged the validity of the issue on the grounds of an improper purpose motivating issue. The judge at first instance agreed and Howard Smith Limited appealed. Lord Wilberforce delivering the judgment of the Privy Council started by stating the findings of fact made by Street J. at first instance. The first of these was that the Millers directors "were not motivated by any purpose of personal gain or advantage or by any desire to retain their position on the board"[22] The second important point was that the company was in a situation of tight liquidity but had a policy of loan rather than share financing and was not in a situation of crisis or pressing need. The finding of fact as to the purpose motivating the issue was:[23]

> "The conclusion I have reached is that the primary purpose of the four directors in voting in favour of this allotment was to reduce the proportionate contained shareholdings of Ampol and Bulkships in order to induce Howard Smith Limited to proceed with its takeover offer ..... Their intention was to destroy its character as a majority and (at M) The ultimate purpose was to procure the continuation by Howard Smith's of the takeover offer made by that company."

21. 1974 A.C. 821

22. Ibid at 831 D to E

23. Per Street J. cited at first instance at 833F.

Their Lordships said: [24]

> "In their Lordships opinion it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged to examine the substantial purpose for which it is exercised, and to reach a conclusion whether that purpose was proper or not."

This test represents an astonishing jump in sophistication as compared with the earlier tests.[25] In the writer's opinion this stems from the developments in the concept of ultra vires in administrative law and may well presage further borrowings. As an example of this it is instructive to compare the breadth of the view of the power inherent in this test with Lord Reid's celebrated test in Ridge v Baldwin.[26] Although Lord Wilberforce spends page 836 on a rationalisation of the old cases with the new approach it is easy to see that the concentration on the nature of the power as defined by its limits owes far more to Lord Reid's judgment and subsequent developments than to the pedestrian Punt v Symons concentration on some notional purposes for which a power given by an article should be used.

The practical effect of this is to give us a test that can be applied to the muddy area first defined in Punt v Symons where Byrne J. stated that the purpose of a power to issue shares was to raise capital but that an undefined field where shares could properly be issued for other reasons existed[27]. Although his example of such a case,

24. Ibid at 835 F
25. e.g. Rut v Symons, Hogg & Cromphorn, Bamford v Bamford cited post
26. 1964 AC 40
27. Cited at footnote 9

the creation of a sufficient number of shareholders to enable statutory powers to be exercised, seemed to have very narrow parameters it nevertheless led to the emphasis being placed on those purposes which are improper rather an those which are proper.

This led to the conceptual difficulty in this field being one of polarisation.

The cases in this area concentrate on building a body of case-law on what purposes the directors may not have thus encroaching on the "other reasons" phrase used by Byrne J. but never providing a means of dealing with this no-mans land. The approach laid down by Lord Wilberforce can be used to rationally attack situations where the directors have in good faith exercised a power to issue shares with a purpose other than the raising of capital but which is not tainted as an improper purpose under the present case-law.

A thorny problem arises in the effect of a power being one of management. The rule in Automatic Self Cleansing Filter Syndicate Co Limited v Cunningham [28] is that a majority of shareholders cannot control the directors in the exercise of a management power.

The cases of Harlowe's Nominees Limited v Woodside (Lakes Entrance) Oil Co. N.L.[29] and of Teck Corporation Limited v Millar[30] were distinguished in the Ampol case on the basis of lack of management consideration Lord Wilberforce states[31] "By contrast to the cases of Harlowe and Teck, the present case on the evidence, does not, on the findings, of the trail judge, involve any considerations of management, within the proper sphere of the directors." Both cases were held to be cases where the directors acted with a proper purpose. It would seem that some sort of a distinction in the purpose required is made between management and non-management use of a given power.

28. (1906) 2 Ch. 34
29. (1968) 121 CLR 483
30. (1972) 33 DLR (3d) 288
31. at 837 C

This is supported by Lord Wilberforce's statement[32] that a court "will respect their (the directors) judgment as to matters of management" and most strongly of all, in his statement[33] "Their Lordships accept that such a matter as the raising of finance is one of management within the responsibility of the directors: they accept that it would be wrong for a court to substitute it's opinion for that of management, or indeed to question the correctness of the management's decision on such a question, if bona fide arrived at. There is no appeal from management decisions to courts of law; nor will courts of law presume to act as some kind of supervising board over decisions within the powers of management honestly arrived at."

This statement would seem to indicate that where a given power is expressedly used for management purposes, and raising finance is one of these on the authority of the passage quoted above,- the courts cannot question purposes but only bona fide.

Furthermore, paragraph G indicates that bona fides can be questioned if the directors are wrong in their decision. This would seem to conflict directly with the statement that the court cannot question bona fide decisions of directors, for that is required before reaching a conclusion that they were wrong and using this to discount the directors bona fides.

On examination of Tech and Harlowe it seems that management purposes may well be another name for proper purposes. This reduces the statement on P. 8 line 32 to a tautology.

However taking the other approach and trying to draw a distinction between fiduciary and management powers is not helpful, for[34] "the directors power under this article is a fiduciary power" referring to the power to issue shares, and [35] "Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors."

32. At 835 G
33. At 832 G
34. At 834 B
35. At 832 E

From this one would deduce that the courts will interfere with the exercise of a power when it does not appear to have been exercised for management purposes.

But what are management purposes? On the authority of Punt v. Symons and indeed Ampol itself they go farther than the raising of finance[36] but nowhere are they defined. Indeed Lord Wilberforce having distinguished Tech and Harlowe[37] then abandons the management term and returns to the policy of accretions to the meaning of the phrase "improper purpose" to deal with the matter at hand.

Indeed the term "management purpose" was unhelpful until the Ampol case. It was there given force within a broader constitutional analogy. This will be discussed later. The point to note here is that up to Ampol the phrase was a source of confusion. This was reflected in Ampol itself. However, a method of using the distinction was provided there.

Can we now reach any synthesis of the above cases to lay down an algorithm for the determination of whether in any given case a power to issue shares is exercised for a proper purpose?

Because of the polarised development of law in this area such an exercise must be defined in three parts: purposes which are expressly within the scope of a general power to issue shares: purposes expressly without and the area of purposes which, so far, are in neither camp.

Examining purposes which have been held to be proper in this context we start with the Punt v. Symons rule: the power to issue shares is mainly for the purpose of raising finance. Tech's case added to this in that Berger J found[38] "their purpose was to obtain the best agreement they could while still in control.

36. See 835c
37. At 847c
38. At 328

Does this follow?

Their purpose was, in that sense to defeat Tech. But, not to defeat Tech's attempt to obtain control, rather it was to foreclose Tech's opportunity of obtaining for itself the ultimate deal. That was ... no improper purpose."

The reason that the allotment was made with a proper purpose here was presumably that the power to contract is a management one thus the courts will allow shares issued for the purpose of avoiding forced entry into a contract. This was certainly how the Privy Council treated the case in Ampol.

On the other hand we have the Punt v. Symons formulation "to secure a majority" used in the sense of altering the balance of power, being bad. This was extended to include maintaining control by directors and friends in Piercy v S Mills and avoiding a takeover, at least where this was done by rendering a policy view irrevocable or depriving the shareholders of such control as they may have under the articles under the reasoning in the Savoy Hotel case. In Mills v. Mills[39] it was accepted in the High Court of Australia that an issue merely for the purpose of altering voting power was invalid.

Finally we have the leading case. Howard Smith v. Ampol which sets out the approach to the ground between these two bodies of case-law. This is to consider the nature of the power, its possible limits, then to make an objective evaluation of the substantial purpose for which it is exercised and a determination of whether that exercise is within the limits.

This approach is in itself inadequate. Ampol gave force to it through the importation of the constitutional analogy. This is done[40] where Lord Wilberforce says "And, though the reported decisions, naturally enough, are expressed in terms of their own facts, there are clear considerations of principle to support the trend they establish.

39. 60 CLR 150

40. At 837E

The constitution of a limited company normally provides for directors, with powers of management, and shareholders, with defined voting powers having power to appoint the directors, and to take, in general meeting, by majority vote, decisions on matters not reserved for management."
and[41] "... it must be unconstitutional for directors to use their fiduciary powers over the shares in the company purely for the purpose of destroying an existing majority, or creating a new majority which did not previously exist. To do so is to interfere with that element of the company's constitution which is separate from and set against their powers."

The previously pointless term "management powers" is now given a new function in the context of a separation of powers and the constitutional analogy is continued with the adoption of an approach from administrative law. The evil is seen as an interference with the right of a shareholder to decide to whom he shall sell his shares or the price he sets[42] It should be noted that the fact that the shareholders were in a majority plays no part in this reasoning although anomalously a majority can ratify. This seems to be the meaning of the statement[43] The right to dispose of shares at a given price is essentially an individual right to be exercised on individual decision and on which a majority, in the absence of oppression or similar impropriety, is entitled to prevail." The question of ratification will be looked at in greater detail later.

It should be noted that the exercise here is one of interpretation of articles. A presumption exists that a general power to issue shares exists mainly for the raising of capital. Should this be negatived in the memorandum or even the articles then the above caselaw simply would not apply. In the Lion situation no such contrary statement exists. Article 47 simply confers a power to issue shares. The presumption applies.

41. At 837
42. At 838A
43. At 837H

What then were the director's purposes in the issue? In the first letter to shareholders dated 17 January 1978 paragraph 3 ready "The Board of Lion Breweries Limited is deeply conscious of the interests of the general body of shareholders and has taken these steps to safeguard those interests."

This however seems to reflect motive rather than purpose. In paragraph 7 the Chairman states two purposes: the first to prevent overseas control and the second to protect ordinary shareholders.

In Sir Clifford's letter to the stock exchange of 9 January 1978 he states, at paragraph 5, "In making these arrangements the Directors of Lion Breweries Limited have acted, in their view, in the best interests of shareholders as a whole to safeguard their interests against the possibility of asset stripping operations which might deny shareholders the ability in the long term to profit from the strong backing of the company's shares" and at para. 7 "The Directors consider that they should act to prevent a takeover by inches at prices substantially less than the fair value of the company."

There can be no doubt that the purposes of the move were to influence the balance of power, to maintain a present majority by the issue of capital purely to affect voting power, to discourage a takeover bid and possibly to maintain the present policies of the board of directors. These are all improper purposes by the previous argument. There can equally be no doubt but that the directors acted in good faith. This is irrelevant to the impropriety of purpose.

Thus the share allotment was bad

SCOPE OF THE INVALIDITY

What of the ancillaries to the allotment? This category would include the creation of Androcles, the allotment of Androcles shares and trust deed.

In Hogg v. Cramphorn[44] the directors allotted 5,707 shares to newly created trust for the benefit of employees paid for by interest free loan from the comapny. The trustees were the defendant directors. Later the Board advanced 28,293 pounds to the trustees for purchase of preference shares from shareholders. The original allotment was to secure control for the director/trustees. An attempt to attach extra votes to the shares was inconsistent with the articles and void. However the advance was to[45]

> "forestall criticism by preference shareholders of the directors having burked an opportunity for them to dispose of their preference shares at the admittedly advantageous price of 25 shillings a share, and to obtain for the trustees the votes attached to these shares as a further means of procuring for the board the support of a controlling interest in the company."

He then stated that the transaction was tainted using the test of "an integral part of the scheme." Here both allotments and the trust deed would fall. Androcles itself was not formed by Lion so will survive. Its substratum would, however, vanish.

In summary, the allotment to Androcles is voidable as is the allotment of Androcles shares to its directors and the trust deed they held under. Apart from its position on actions related to the scheme, Hogg v. Cramphorn agreed with the Punt v. Symons and Piercy v. S Mills Ltd view quoting both cases extensively. It did not mention the Savoy Hotel case. In Hogg v. Cramphorn, however, the action was stood over to allow time for ratification by a general meeting. A condition imposed by Buckley J was that the 5,707 new shares should not vote. The ratification was obtained and there the matter ended.

44. (1967) Ch. D. 254
45. Per Buckley J at 270

RATIFICATION

This raises the possible validating line of ratification. The Lion directors opted to try this and the general meeting convened for the purpose overwhelmingly ratified on 29 June 1978. The effect of this will now be discussed.

Actions of directors which are beyond their power through being made for an improper purpose yet are within the powers of the company can be ratified by ordinary resolution at a general meeting. The Lion directors took this option and received ratification. What is the effect of this? The first question is as to the duty on the members when voting.

Lord Lindley M.R. in Allen v. Gold Reefs of West Africa[46] stated that shareholders had to exercise their votes "bona fide for the benefit of the company as a whole" importing the same rules as for the directors.

This view would render most ratifications voidable as the shareholders vote on the same issues and often for the same purposes as the directors. However a strong contrary line of authority contends that shareholders are simply not subject to such a duty: votes are proprietary rights and can be exercised in any manner and from any motive the holder wishes - Burland v. Earle[47] PC, Goodfellow v. Nelson Line[48].

It can be seen that we have two fundamentally opposing principles. The first is that the shareholders are constrained by a fiduciary duty to the company when voting; the second, that a voting right is a proprietary right, rather like the amount issued on dividend, and the shareholder can do what he pleases with it.

46. (1900) 1 Ch. at 671
47. (1902) AC 83 PC
48. (1912) 2 Ch 324

Mahoney J in Winthrop v. Winns[49] expressed a doubt as to whether the issue had yet been clearly settled[50]. "It has not yet been settled whether, if the purpose of that majority be that which the directors are here assumed to have, viz, the defeating of the Winthrop take-over, that will be an improper purpose of that majority within the principles adverted to in Ngurli v. McCann."[51]

He then proceeds to note that Bamford v. Bamford is silent on the question and that a "serious question" remains to be argued. But what will the situation be if the Ngurli and Mahoney J line is adopted.

The first is that a fiduciary duty between the shareholder and company must be created. This would appear to have the same effective content as that owed to the company by the directors. Both must act "bona fide with regard to the interests of the company as a whole."

This would effectively end ratification for a ratification would usually be for the same improper purpose as that of the director. It is possible to imagine a situation where the shareholders, acting with a proper purpose, would ratify the actions and improper purpose of the board. It is difficult to imagine such a situation in the takeover field.

The second problem lies in the difficulty of ascertaining the purposes of the shreholders in voting. Any attempt to apply the same objective test as is applied to directors would sink in sordid seas of evidence (e.g. Oh, I always vote for Sir Clifford, he has such a nice face x 18000 shareholders). Thus one is inevitably in the situation of applying two different tests. The only possible merit of the Allen Rule, symmetry, is apparent but not real.

49. 1975 2NSWLR 666
50. Ibid at 707D
51. 1953 90 CLR 425

The second test could be provided by looking at the material put before the shareholders by directors. Presumably material put forward by the offeror would not count on the basis that shareholders may doubt its credibility. This would accord with the decision on the relevance of material supplied by third parties in Winthrop.

However the material must disclose the actual improper purpose for a ratification to be valid. But if it does, then a court is likely to find that the shareholders have voted for this purpose. Even if the directors circulate a memorandum saying "we issued these shares for the improper purpose of avoiding a takeover. However our company also needs funds and we suggest that you think of this as you cast your votes" a court will look at the purpose of the exercise of power objectively and is very likely to find that the ratification was made for the improper purpose. The power to ratify is again effectively removed by this absurd situation.

However the horrors do not end here. The duty is owed to the company as a whole. This definition received an expanded definition in the Savoy Hotel case and will now probably include future shareholders providing for a balancing of interest between future and present shareholders. Present shareholders become a factional interest who must vote with regard to the interests of future shareholders. Could a company ever be wound up without breaching a fiduciary duty to future shareholders? Under what conditions could alienation of assets take place?

One approach to the evidentiary problem involved can be found in Lord Evershed M R's judgment in Greenhalgh v. Arderne Cinemas Ltd[52].

52. (1951) Ch. D 286.

He tells us to take the case of a hypothetical member[53].
"That is to say the case may be taken of an individual hypothetical member and it may be asked whether what is proposed is in the honest opinion of those who voted in its favour, for that person's benefit."

The case of Clemens v. Clemens[54] appeared to extend this hypothetical member to mean any member. An honest belief that her vote would be in the interests of the plaintiff was required of the majority shareholder.[55]

But this argument ignores the qualifying statement Lord Evershed M.R. himself made immediately after proposing the hypothetical member test[56].

> "I think that the matter can in practice be more accurately and precisely stated by looking at the converse and by saying that a special resolution of this kind would be liable to be impeached is the effect of it were to discriminate between the majority shareholders and the minority shareholders, so as to give the former advantage of which the latter is deprived."

So even Evershed in essence sees this nebulous duty on shareholders as nothing more or less than the doctrine of oppression, albeit approached by a circuitous route.

Further ground for arguing that the existence of a duty on shareholders is unhelpful here comes from Evershed M.R.'s statement[57] "it is no ground for impeaching the resolution that they are considering their own position as equals."

What kind of fiduciary duty allows the trustees to act with regard to their own interests? If it is not an improper purpose to consider one's own interests then can there ever be an improper purpose apart from cases of oppression? If not is there any point in the exercise at all? It would seem not. If there is a fiduciary duty on shareholders it is diffuse to the point of gaseousness. If not then nothing is lost for

Footnotes

53. Ibid at 291

54. 1976 2 ALL ER 268

55. Ibid at 281 G

56. Greenhalgh at 291

57. Ibid at 291

the doctrine of oppression covers the same field.

It would seem likely that the courts will adopt the Burland v. Earle principle that a vote is a proprietary right and not subject to any fiduciary duty governing its exercise.

Extent of the Requirement of Disclosure

A more difficult question as to the validity of the ratification arises with regard to the requirement of disclosure. A general meeting can only ratify to the extent of its knowledge. Does this mean that the impropriety must be disclosed or will disclosure of the purpose suffice it? A director would not want to disclose impropriety expressly. The Lion notice to shareholders certainly made no reference to it. The argument against requiring both disclosures is that the shareholder knows that the actions taken were made for an improper purpose or in some other way beyond the powers of the directors from the mere fact the ratification is requested.

This view has the defect that the average shareholder in a large public company makes no such inference. He will take the situation as presented. The much vaunted press is no help. At least one commentator was impressed with the Lion 'offer' to disband Androcles if ratification was not forthcoming.

However it received an airing in the case of Grant v. UK Switchback Railways Co[58]. In that case the articles of T company authorized

58. 1889 40 Ch. D.135

the sale of part of its undertaking but prohibited directors from voting in respect of contracts in which they were interested.

The directors of UK Switchback entered into a contract to sell part of T company's undertaking to the UK company. Four members of each board were in common out of the 5 T directors and six U directors.

A general meeting was called of T company to consider a resolution approving and adopting the agreement but the notice did not state a ground for the meeting being necessary. The meeting passed an ordinary resolution rectifying the action and a shareholder sued. On the question of the validity of ratification Cotton L H (Lindley & Bowne LJJ agreed on this point) stated "It was argued that the meeting was not good because the notice conveying it gave no intimation that the contract was one which could not be carried into effect without the sanction of a general meeting. I think that the difficulty was sufficiently suggested by the mere fact of a meeting being called, for had it not been for the fact that the directors were interested, no meeting would have been necessary.

But it is unnecessary to enter into that. A majority of the meeting called with due notice of the object for which it was called could make this a contract of this company and it would be wrong for the court to interfere with the proceedings of a general meeting as to an act within the powers of the comapny."

This view ignores the fact that the average shareholder is not an expert in corporate law and does not realize that ratification is a requirement for a voidable act to be made good. He is likely to believe that he is being graciously invited to express his opinion. The second problem with this view is that it concentrates on ratification of the acts. What is at issue is the impropriety of purpose. Without knowledge of the impropriety of purpose there can be no ratification.

In Irvine v. Union Bank of Australia[59] the directors had exceeded a limited power to borrow. This was ratified but later disputed on the question of knowledge. Article 25 required that a notice shall be sent to each shareholder stating the day and place of business and also the business proposed to be transacted therein.

Sir Barnes Peacock delivered their lordships' judgment, stating[60] "But however this may be their Lordships are of opinion that there was no evidence to show that any sufficient notice of substance or effect of the reports which were intended to be presented at the half-yearly meetings above referred to, was given th the shareholders of the company in pursuance of the 25th clause of the articles of association so as to lead the absent shareholders to know or even to imagine that the directors intended to report that they had exceeded their authority, or that, by the adoption of the report of the directors, to be laid before the meeting an act of the directors in excess of their authority could be rendered binding on all the shareholders."

The ratification in question was thus not effective. It would be argued that article 25 made the difference here. Yet by far the more persuasive argument would appear to be that the rationale, allowing all shareholders to know that what their directors have been doing is beyond their powers is necessary to receive a valid ratification, applies to all cases.

The case of Bamford v. Bamford[61] is discouraging to this view. There a company with an authorized capital of 1 million, divided into 5 million 1 shilling shares of which 4½ million had been issued, allotted the rest at par to one of the company's major distributors. At this stage a bid had been received. The power to issue unallotted shares was vested in the directors by article 12.

59. 1877 2 A.C 366 PC
60. Ibid at 378
61. (1969) 2 WLR 1107

A general meeting was called after the plaintiffs had issued a writ. The plaintiffs then issued another writ claiming that any resolution would be anullity. The meeting passed the resolution by a substantial majority.

The Court of Appeal treated ratification as a magic word which dissolved all evils. They dealt with another issue then decided in favour of the defendant directors on the basis of the ratification. There was no consideration of the extent of ratification at all. This seriously weakens the force of this judgment.

An argument for this approach in the present situation can be expressed as follows.

The shareholders know the improper purpose, which was to stave off a takeover bid.

They (presumably) approved of it as they voted overwhelmingly to ratify the action of the board. Whether or not they know that the action was improper in a technical sense as being outside the scope of the article conferring the power is unlikely to have affected the voting.

The court should not therefore demand knowledge of the legal impropriety of purpose before regarding a ratification of the purpose itself as being valid.

The case of Winthrop v. Winns[62] gives support to the concept that disclosure of impropriety of purpose is required. Mahoney J referred to it[63] "...can the resolution be now treated as affirming or evidencing an intention to affirm, a voidable transaction when the existence of the basis upon which it would be voidable, viz. the directors collateral purpose was strenuously denied by the directors who promoted the resolutions?

62. Cited at Footnote 49

63. Ibid at 706c

In my opinion, the requirement that this assumption be made renders the resolutions unsatisfactory as a basis upon which to deal with the dissolution application."

The dissolution application was directed at an injuction restraining Winns proceeding with a deal which involved Winns Ltd issuing shares to subsidiaries of Burns Philp Ltd in exchange for retail shares. This would have had the effect of rendering the offeror's bid impractical. The offeror/plaintiff had already acquired 14.54% of the issued capital.

The plaintiff then moved to obtain an injunction preventing the deal on the grounds of improper purpose motivating the share issue. Winns Ltd held an extraordinary General Meeting which passed resolutions approving the deal then applied for and received a dissolution of the injunction. Winthrops Ltd appealed this. For the purposes of the case it was assumed that the purposes motivating issue were indeed improper.

Thus it can be seem that the question of dissolution of the injuctions rested on the validity of the ratification and MahoneyJ's passage quoted above refers to the resolution.

Samuels J makes a similar statement[64] "But if the directors are to get the protection which they seek, the resolutions must reach well beyond any question of commercial interest. They are ineffective, unless they can be regarded as having authorized a breach of duty, or as having waived its consequences. I would myself have thought it was clear beyond argument that, the purpose of the meeting being to excuse the directors, that purpose must have been clearly stated, and the nature of the contemplated breach of duty clearly disclosed by the directors seeking to be absolved."

64. At 684E

This passage shows clearly that Samuels J saw the nature of the breach and the purpose of the meeting being absolution as being two separate elements of purpose and impropriety both of which had to be disclosed for effective ratification. He cited Kaye v. Croydon Tranways[65] in support of this argument. In that case there was a statutory requirement that the notice of extraordinary general meeting should "specify the purpose for which the meeting is called." The Court of Appeal held that it did not and that[66] "...it is too clear, I think for arguemnt, that it there are several purposes, then the notice will not be sufficient in respect of any purpose which is not indicated in the notice at all."

Samuels J did not advert to the significance of the statutory requirement at all. Indeed it seemed to carry no weight in his view of the case and he reaches a conclusion on the matter which requires disclosure of impropriety rather than the actual purpose[67].

"To my mind there was one material fact which was essential for the shareholders to know. That was that the directors were proposing to act in breach of their duty.

On the basis of this case and of the prior argument it seems probable that a ratification requires both disclosures for validity. Absolution goes only as far as the confession.

How does the present situation with regard to the second, and it is submitted, more accurate, view?

The Lion directors did not mention the impropriety of purpose in the notice of meeting or in the supplementary notice sent out with it.

65. (1895) i Ch 358
66. Ibid at 373 Per Rigby L J
67. Winthrops At 685D

The letter of Sir Geoffrey (I am a plain man, not too well versed in the intricacies of the law) Roberts admitted that the legal situation was ambivalent but stated "That in no way discounts the validity of your Directors action (Para. 6). The thrust of my argument here is that the meeting could not ratify the impropriety of purpose for the issue was never put before it. Indeed it would seem that they were misled on the point. Therefore the action of the directors in issuing shares to Androcles remains voidable. The ratification was of no effect on the impropriety of purpose vitiating the original action.

Furthermore, even on the Bamford line or argument, we find that ratification only extends to the share allotment in the terms of the resolution itself. Under the previous argument based on Hogg v. Cramphorn all other elements in the transaction would still remain void.

Two further points arise from the Winthrop case. Neither have direct relevance to the Lion situation in that they are concerned with prospective ratifications. However they are of relevance in the general defensive share issue context. Glass J dissented stating that in his opinion there had been full disclosure here. His reasoning is summed up[68] "The board on this view was not craving forgiveness for a contemplated breach of duty. Exonerated of any duty by the decision of the general meeting, no breach could possibly arise." He felt that the prospective ratification fell within the reserve capacity of the company[69]. "A reserve capacity to exercise the powers of the company would include a reserve capacity to authorize the exercise of those powers by the board." Nevertheless it would be reasonable to assume that impropriety must be disclosed for such exoneration on the previous argument.

Samuels J raised an interesting point regarding the limits of ratification. He felt that there could be no prospective ratification if that involved the shareholders trespassing on management areas. His reasoning was that the shareholders could

68. Ibid at 674F
69. Ibid at 674C

not make a valid exercise of power in the management area because the directors were not bound to take the shareholders advice. Therefore, "They were not acts in the law and could have no effect."[70]

This line of reasoning accords ill with the assumption he made for the purposes of the hearing, that there is such a thing as prospective ratification. However it should be noted that he excludes the doctrine of residual powers from consideration and leaves open the point of its application to the present situation[71]. This may well provide a point of distinction.

In summary, it would seem that the allotment was void under S.40 because of the application of S.158. Further the allotment was voidable as involving the exercise of a fiduciary power for improper purposes and that the ratification did not cure this for want of disclosure of impropriety. However no defect in the ratification was caused by any mythical duty owed by shareholders.

It is a matter of record that those examining takeovers exhibit a special glee in their work absent from much academic writing[72].

This is probably due to the subject matter. Corporate raiding is the most exciting field of business today.

And because the Androcles scheme took place in the context of a real corporate struggle the harsh assessment of its validity above must be tempered with one overriding consideration. Lion needed time. The Androcles scheme bought it for them.

70. Ibid at 684A
71. At 682 C and F
72. E G LCB Gower in his concluding paragraph in his note on the Savoy Case at 1955 68 Harvard Law Review 1176.

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