CORPORATE POWER, RELATED PARTY AND SHAREHOLDER RATIFICATION ISSUES IN FINANCIAL TRANSACTIONS

The Hon. Mr Justice Richard Chesterman RFD, Supreme Court of Queensland

1. Introduction, scope and assumptions

The topic is quite large and the time available to discuss it is limited so I intend to concentrate upon the question when, and if, ratification, either pursuant to the *Corporations Act* or the general law, will be efficacious to protect a security given by one company to guarantee the liabilities of another, related company.

The discussion proceeds on the basis of some suppositions, the content of which is itself a sufficient topic for one address. The suppositions are that ratification (or something like it) is necessary to preserve the validity of the security because:

(a) those acting on behalf of the security giver have acted in breach of their fiduciary duties to the company by causing it to give a guarantee or provide security which is of no financial benefit to the company; and

(b) the financier is fixed with notice of the breach of duty so that, despite having provided consideration for the transaction, it may lose the benefit of the transaction.

I do not understand that I am asked to discuss the criteria which determine whether the directors of a company have acted in breach of their fiduciary duties to the company. This is itself a substantial topic. In a nutshell a director's fiduciary duty is to exercise his powers (a) in good faith in the best interests of the corporation and (b) for a proper purpose. The same obligation is, of course, prescribed in s 181 of the *Corporations Act*. The obligation seems to be twofold, though there is considerable overlap between the two aspects of the duty. Something done in the best interests of the corporation will ordinarily be for a proper purpose though in theory the two duties are distinct and there may be cases where things are done for an improper purpose which are, nevertheless, in the best interests of the company.

A test commonly used is that advanced by Pennycuick J in *Charterbridge Corporation Ltd v Lloyds Bank Ltd & Anor*[1] which is 'whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the circumstances, have reasonably believed that the transaction was for the benefit of the company.' The test has been applied in a number of cases.[2] It has also been criticised and some see it as inconsistent with the principle expressed by Mason J in *Walker v Wimborne.*[3]

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1 [1969] 2 All ER 1185.

2 See eg *Reid Murray Holdings Ltd (in liquidation) v David Murray Holdings Pty Ltd* (1972) 5 SASR 386; *Equiticorp Finance Ltd (in liquidation) v Bank of New Zealand* (1993) 32 NSWLR 50; *Farrow Finance Co Ltd (in liquidation) v Farrow Properties Pty Ltd (in liquidation)* (1997) 26 ACSR 544.

3 (1976) 137 CLR 1.

As a general rule I think the *Charterbridge* test is both convenient and appropriate.

The second presupposition is that the financier has notice of the directors' breach of fiduciary duty. A transaction made by a company at the instigation of its directors who have failed in their fiduciary obligations is voidable and not void. It will not be avoided if a third party has acquired rights pursuant to the transaction for value and without notice of the breach. Again, what constitutes notice sufficient to make a financier liable to disgorge any benefit it has from the transaction, and/or to make it liable as a constructive trustee of the benefit conferred by the transaction is a large topic beyond the particular aspects I have been asked to consider.

Some things may be said briefly and in general. First, some transactions are themselves of such a nature as to give rise to suspicion that they confer no benefit upon the guarantor/mortgagor so that the financier is put on notice that something is amiss and that it should make inquiries, or refuse to lend. *Northside Developments Pty Ltd v Registrar- General*[4] is an example. There some of the directors of the company procured a loan to their own company which they secured over Northside's property. The borrower and the mortgagor may have been related by the common directorships but the companies were otherwise separate and their businesses distinct.

Second, there is residual doubt about the extent to which the financier (as the 'accessory' to the breach of fiduciary duty) must know that the directors had committed a breach of their fiduciary duty. Debate continues as to whether the accessory must know of the circumstances which would indicate the fact of breach to an honest and reasonable man, or whether it is sufficient that the accessory knows of circumstances which would put such a man on inquiry. The distinction is between facts which give rise to an inescapable conclusion and facts which give rise to a suspicion. There is, I think, growing support for the view that if a third party, such as a financier, is to be fixed with liability as an accessory to a breach of fiduciary duty it must be established that he acted dishonestly, which 'is to be equated with conscious impropriety'.[5]

Acceptance of the 'dishonesty' test does not relegate all the previous learning about degrees of knowledge to irrelevance. A failure to make inquiries when they are plainly called for can be convincing evidence of dishonesty. Reckless disregard for the truth is, after all, fraud.

Third, a financier can make inquiries of the security provider and/or borrower to satisfy itself that the directors have acted so as to satisfy the *Charterbridge* test or, if they have not, to decline the advance. The directors can be asked to provide an extract of the minutes in which the decision to provide the guarantee or security was given and which, hopefully, will contain a sufficient explanation for the transaction so as to show that the directors were acting in the best interests of the company and for a proper purpose. Of course the minute, or a certificate by the directors as to the reasons for the transaction, is not a panacea. If the documents do not contain a sufficient justification for the transaction, or record one which is patently false, the financier will proceed at its peril.

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4 (1990) 170 CLR 146.

5 *Royal Brunei Airlines v Tan Cock Ming* [1995] 2 AC 378 at 391 per Lord Nichols.

Fourth, there are some circumstances in which it is accepted that a company which agrees to be answerable for the debt of another, and/or provides security for the other, obtains a benefit. One such case is of a holding company guaranteeing the borrowings of a subsidiary where it is expected the profits from the transaction for which the money was borrowed will flow to the parent company. It is not so obvious that there is a commercial benefit in a subsidiary providing security for moneys borrowed by its holding company, though Brennan J in *Northside Developments* thought such an arrangement unexceptionable.[6] However, s 187 of the *Corporations Act* may be of assistance. It provides that the director of a company which is a wholly owned subsidiary is deemed to act in good faith in the best interests of the subsidiary if its constitution expressly authorises the director to act in the best interests of the holding company; and the director acts in good faith in the best interests of the holding company; and the subsidiary is not insolvent at the time.

2. Ratification of directors' breaches of fiduciary duties

2.1 Introduction

I come now to the question I have been asked to address in depth. Assuming that the directors of a company have acted other than in its best interests and/or for an improper purpose in procuring the company to give a guarantee or provide security for the borrowings of another company in the same group, and assuming that the financier has sufficient notice of the circumstances so as to disentitle it from the benefit of the transaction which can be avoided at the suit of the company or its liquidator, can the shareholders ratify the director's breach of fiduciary duty with the result that the company, or those claiming through it, may not complain of the director's conduct? The second pre-condition I mentioned, the financier's knowledge of the directors' breach, is irrelevant to the capacity of the shareholders to ratify the breach. Ratification will only be necessary in those cases where the financier is not an innocent purchaser.

Ratification in this context is the approval of shareholders for acts done by directors for which they had no authority, or which were done in breach of their duties to be honest and to be careful. Technically ratification occurs after the event but for present purposes the approval may be given before the directors act. According to Gower and Davies *Principles of Modern Company Law* (7th ed):

> 'It is a normal principle of the law relating to fiduciaries that those to whom the duties are owed may release those who owe the duties from their legal obligations and may do so either prospectively or retrospectively, provided that full disclosure of the relevant facts is made to them in advance of the decision. Consequently it has long been recognised that an ordinary majority of the shareholders in general meeting may release the directors from many of their fiduciary duties, including duties of care and skill, provided at least that the company is a going concern.'[7]

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6 (1990) 170 CLR 146 at 183.

7 The first sentence was approved by Gleeson CJ and Heydon J in their joint judgment *in Angas Law Services Pty Ltd (in liquidation) v Carabelas* (2005) 215 ALR 110 at [32].

Despite the confidence of the statements there remains considerable uncertainty about the extent to which and the circumstances in which the directors' breach of fiduciary duties may be ratified by shareholders. There are some differences between the courts in England and those here and there is, as always, a trend towards the more complicated. There is thus a need for circumspection in the expression of any opinion.

2.2 Is the approval of all, or majority, of shareholders required?

A question which arises immediately is whether ratification, to be effective, must be by all shareholders or whether a resolution passed by a majority will suffice.

In *Bamford v Bamford*[8] Harman LJ was able to say that it was 'trite law'[9] that if directors were improperly appointed, or acted without a quorum, or acted for improper motives, they could:

> 'by making a full and frank disclosure and calling together the general body of the 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 done alright from the beginning. I cannot believe that it is not a common place of company law. It is done every day. Of course, if the majority of the general meeting will not forgive and approve, then the directors must pay for it.'[10]

The case was one in which the directors issued shares to a company to which it looked for support to resist a takeover bid. The allotment of shares was to prevent the takeover and was not in the best interests of the allotting company, hence the breach of fiduciary duty. The judgment proceeds on the express basis that a majority vote of shareholders in favour of ratification would bind the company and the minority.

Regal (Hastings) Ltd v Gulliver[11] was a case in which directors were sued for profits made from the acquisition and sale of shares that the company should have acquired. The case was one of breach of fiduciary duty from which the directors profited personally at the expense of the company. It will be recalled that the company had declined the opportunity to acquire the shares itself. Lord Russell said:[12]

> '[The directors] could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain.'

The reference to ratification by a resolution of the shareholders in general meeting clearly means that what was required was an ordinary majority in favour of the ratification.

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8 [1970] Ch 212.
9 *Ibid* at 228.
10 *Ibid* at 228.
11 [1967] 2 AC 134.
12 *Ibid* at 150.

By way of contrast Helsham J in Provident International Corporation v International Leasing Corporation Ltd[13] thought that:[14]

> '... a breach of duty owed to an individual shareholder ... could not be ratified by a majority of shareholders, any attempt by a majority to ratify a breach of a fiduciary duty by directors would be no less fraud *qua* that shareholder than was the case in the acts of the directors; it is possible that *all* the corporators might confirm the actions of the directors ... I do not think that a general meeting can resolve that the directors should act in abuse of their powers, or that such an abuse can be ratified where it has resulted in a breach of duty of a fiduciary nature owed to some person not a party to the resolution to ratify.'

The view expressed by Helsham J has not gained acceptance. It was doubted by Olsson J in *Kirton Investments Pty Ltd v CC Bottlers Ltd*[15] and by Jacobs J in *Panfida Ltd v Hartogen Energy Ltd.*[16]

There are, as well, cases in this country which have expressed the view that the duty is owed to the company which may ratify a breach. One case is *Condraulics Pty Ltd v Barry & Roberts Ltd.*[17]

Another, *Winthrop Investments Ltd v Winns Ltd*,[18] involved the issue of shares by directors to defeat a hostile takeover. Having made the questionable allotment the directors convened an extraordinary general meeting which, by a substantial majority, approved the directors' actions. It was conceded that the directors' purpose in issuing the shares was improper. The question was whether the shareholders' ratification was efficacious to overcome the breach of directors' duties. It turned in the end upon whether the directors had made full and frank disclosure of all the facts to the shareholders. A majority of the court (Samuels and Mahoney JJA) thought the disclosure was insufficient and the ratification was ineffective. Glass JA thought the disclosure was adequate. He expressly followed *Bamford.*

Samuels JA considered whether 'the power of ... affirming a voidable act of the kind in question resided not in the company, that is, a majority of the shareholders in general meeting, but in the shareholders individually.'[19] If the power rested in shareholders individually ratification, to be valid, would require the unanimous assent of all. If the power resided in the company a majority of votes cast at a general meeting would be sufficient. His Honour was prepared to accept the correctness of *Bamford* '... with all the more confidence because the ultimate conclusion ... [did] not require [him] to decide this issue.'[20]

Mahoney JA doubted whether a majority of shareholders could ratify an act of directors done for an improper purpose if the shareholders themselves were

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13. [1969] 1 NSWR 424.
14. *Ibid* at 440.
15. (1986) 10 ACLR 167.
16. (1988) 14 ACLR 601.
17. [1984] 2 Qd R 198 (Full Court, Supreme Court of Queensland).
18. (1975) 2 NSWLR 666.
19. *Ibid* at 680.
20. *Ibid* at 681.

actuated by the same improper purpose.[21] There was, however, no evidence of the shareholders' purpose in voting to ratify what the directors had done and, on that basis, Mahoney JA was prepared to find that ratification would have been valid had the shareholders been properly informed of all the relevant facts.

The question was addressed recently by the (NSW) Court of Appeal. The case is *Brunninghausen v Glavanics*.[22] As a result it can, I think, be said confidently that directors owe fiduciary duties to the company, not to individual shareholders, unless there are special circumstances, beyond the relationship of director and shareholder itself, which give rise to a particular fiduciary duty to the shareholder. Such special circumstances will probably be limited to cases where the shareholding is very small, the relationship between shareholders and directors is close and the directors are acting and there are dealings between them concerning the purchase or sales of shares in the company. No doubt the categories of special circumstance in which such a duty will arise are not closed but ordinarily directors will not owe fiduciary duties to individual shareholders.

If the duty is owed to the shareholders as a general body, ie to the company, and not to them individually, the shareholders in general meeting may ratify a breach of fiduciary duty. It is not necessary that the ratification be unanimous, because the duty is not owed to the shareholders individually but to them collectively and the articles regulate how the shareholders are to act collectively, ie by resolutions passed at a general meeting.

2.3 Ineffective resolutions: reconciling minority interests, and other exceptions

The judgment in *Bamford* and the cases which followed it have been criticised because of the potential of the rule which they enunciate to impinge adversely on minority shareholders' rights.[23]

It is clear that a resolution by majority shareholders ratifying a director's breach of duty will not be effective in all cases.

In *Ngurli Ltd v McCann*[24] the High Court said, quite emphatically:

> 'Attempts were made by the ... company ... to have the issues confirmed in general meeting ... As we have said, a shareholder is not a trustee of his vote and can use it to advance his own interests at a general meeting. But even in general meeting a majority of shareholders cannot exercise their votes for the purpose of appropriating to themselves property or advantages which belong to the company for that would be for the majority to oppress the minority. The right to issue new capital is an advantage which belongs to the company. Any attempt by directors or by the company to exercise this right not for the benefit of the company as a whole but so as to benefit the majority ... could be restrained in a suit brought ... against the company and the majority.'

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21 *Ibid* at 701-702.

22 (1999) 46 NSWLR 538.

23 See the discussion in 'Ratification of Directors' Acts: An Anglo-Australian Comparison' (1978) 41 MLR 161 at 165.

24 (1953) 90 CLR 425 at 447-448.

The passage talks of ratification by an ordinary resolution, that is by bare majority. This was ineffective because the duty, breach of which was the subject of the ratification, was owed to the company as a whole and the majority, who would vote for ratification were those who stood to benefit from the directors' breach of duty.

In *Ngurli* the High Court pointed out that '[v]oting powers conferred on shareholders and powers conferred on directors by the articles of association ... must be used *bona fide* for the benefit of the company as a whole.'[25] The court then described what was meant by the phrase by reference to the judgment of Evershed MR in *Greenhalgh v Arderne Cinemas Ltd*.[26] The phrase means not 'the company as a commercial entity distinct from the corporators: it means the corporators as a general body.'[27]

The power of the majority to ratify must not be exercised so as to oppress the minority or to deprive them of property to which they would otherwise be entitled. This was the point made by the High Court in *Ngurli*[28] in which shares were allotted differentially by the majority shareholder to himself with the result that the other shareholders' interests were diluted.

The prohibition on a majority of shareholders in general meeting voting 'for the purpose of appropriating to themselves property ... which belonged to the company' may have an application to circumstances with which this paper is concerned. Suppose, for example, that the directors of a company mortgaged its property to secure a loan to another company which they owned. Suppose also that the directors were majority shareholders in the mortgagor company and the minority shareholders had no interest in the borrower company. If the transaction conferred no commercial benefit on the mortgagor company the directors would have acted in breach of their fiduciary duty to that company. If the company met in general meeting to ratify the directors' conduct it is, I think, distinctly possible that the prohibition would apply because, should the mortgagor default, and the company's property be realised the minority's interest in the company would have been diminished with no corresponding benefit while the majority would have profited from the loan.

The question therefore whether majority ratification is sufficient will depend for its answer upon the circumstances. When the interests of all shareholders are the same a majority vote will be sufficient. Where the transaction entered into in breach of the directors' duties affects shareholders differentially a majority ratification will be insufficient at least where the majority has benefited from the breach and the others have not.

The demarcation between cases in which a majority of shareholders may validly ratify the directors' breach of fiduciary duty and bind the minority by that ratification and cases in which the company is not bound by a purported act of ratification by the majority of shareholders is not easy to draw. According to Gower and Davies[29] the 'most commonly formulated proposition' is that

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25 *Ibid* at 438.

26 [1951] Ch 286.

27 (1953) 90 CLR 425 at 438.

28 *Ibid* at 447.

29 7th ed at 439.

ratification will not be effective where the majority by their resolution purport to expropriate to themselves company property. They give as example the well known case of *Cook v Deeks*.[30] In that case the directors of a company acquired for themselves valuable contracts which they should have taken up on behalf of the company. They held a controlling interest in the shareholding and secured the passage of a resolution in general meeting ratifying their actions. The Privy Council held that they were constructive trustees of the benefits of the contract for the company for, being directors, and holding a majority of shares, 'would not be permitted to make a present to themselves'.[31] It will be recalled, however, that in *Regal* the House of Lords expressed the opinion that the directors would have been protected by a resolution ratifying their acquisitions.

In *North-West Transportation Co Ltd v Beatty*[32] a director who was the controlling shareholder of a company sold a steamship which he owned to the company. The price was fair and the company needed the ship. He used his majority shareholding to secure the passage of a resolution ratifying the purchase. The Privy Council upheld the resolution. In *Burland v Earle*[33] the director of a company acquired property and sold it to the company for almost three times the price he had paid, utilising his majority shareholding to secure a resolution. The Privy Council saw nothing wrong with his conduct.

Gower and Davies consider that:

> 'A satisfactory answer, consistent with common sense and with the decided cases, is difficult (and perhaps impossible) to provide, but the solution may be that a distinction is to be drawn between (i) misappropriating the company's property and (ii) merely taking an incidental profit for which the directors are liable to account to the company.'

It is tolerably clear that a majority of shareholders is sufficient to ratify the breach of a director's fiduciary duties but the restricted circumstances in which such a resolution will be effective suggest that as a matter of convenience and caution those who seek the protection of a ratifying resolution should obtain one from all shareholders. There is no doubt that, as will appear, such a resolution is effective if the company is solvent and there is no fraud.

It is also clear that in voting in favour of approving the actions of directors the shareholders may have regard to their own interests. That is, the doubts expressed by Mahoney JA as to the limits of a shareholder's right to vote in such a way as to prejudice the company are misplaced. The two decisions of the Privy Council I just mentioned, *Beatty* and *Burland*, express that very point and quite bluntly.

In *Rolled Steel Products (Holdings) Ltd v British Steel Corporation*[34] Slade LJ (with whom the other members of the court agreed) thought that shareholders could ratify an act done by directors for an improper purpose, even though they

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30 [1916] 1 AC 554.
31 *Ibid* at 564.
32 (1887) 12 App Cas 589.
33 [1902] AC 83.
34 [1986] Ch 246.

shared that purpose, as long as the impugned transaction did not involve a fraud on creditors and was within the power of the company. Street CJ seems to have been of the same view in *Kinsela v Russell Kinsela Pty Ltd (in liquidation)*.[35] The Chief Justice said:

> 'If, as a general body, [shareholders] authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done.'[36]

Gower and Davies wrote:[37]

> '... shareholders are not subject to fiduciary duties (even of a less extensive kind than those applying to directors) when voting on resolutions to ratify the directors' actions and, furthermore, it is open to the directors who are in breach of duty to cast their votes as shareholders in favour of the forgiveness of the breaches of duty committed by them as directors. ... Votes are proprietary rights, to the same extent as any other incidents of the shares, which the holder may exercise in his own selfish interests even if these are opposed to those of the company.'

The authorities cited for this last proposition are *Beatty, Burland, Goodfellow v Nelson Line (Liverpool) Ltd*[38] and *Northern Counties Securities Ltd v Jackson & Steeple Ltd*.[39] To the same effect is the passage in the judgment in *Ngurli* which I quoted earlier.

The shareholders of a company cannot give their consent to their own actions which would otherwise amount to a fraudulent disposition of the company's property. The authority is *Macleod v The Queen*.[40] The case was, obviously, a criminal one. Macleod was the only shareholder and director of a company which solicited investments from the public for the purpose of producing cinematic films. The investments were said to attract substantial taxation benefits and over $6,000,000 was paid to Macleod's company. $718,000 was applied to film production. Over $2,000,000 was applied for Macleod's personal benefit. The investors were misled as to the profitability of their investments and the application of their moneys. Promises that the money would be held in trust accounts until their application on film production were broken.

Against this background it is not surprising that Macleod was convicted on a charge that he, 'being a director ... fraudulently [took or applied] for his own benefit ... any of the property of such ... company ...'.[41] Macleod's primary defence was that as the only director and shareholder of the company he had consented to, and on behalf of the company authorised, his own actions of applying its property to his own benefit. It was, he argued, not a dishonest taking because the company had consented to it.

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35 (1986) 4 NSWLR 722.
36 *Ibid* at 730.
37 7th ed at 438.
38 [1912] 2 Ch 324.
39 [1974] 1 WLR 1133.
40 (2003) 214 CLR 230.
41 *Crimes Act* 1900 (NSW), s 173.

The argument was rejected. Gleeson CJ, Gummow and Hayne JJ in their joint judgment said:[42]

> 'The self interested "consent" of the shareholder, given in furtherance of a crime committed against the company, cannot be said to represent the consent of the company.'

McHugh J said that the consent of a sole shareholder could not cure what would otherwise be a fraudulent taking of the company's property, and that the directing minds of a company which themselves commit a crime against it cannot rely upon their own misdeeds as authorising the misapplication.[43]

Macleod was not a case of ratification but it is clear from the judgments that had Mr Macleod convened a meeting of shareholders and formally proposed and passed a resolution approving his application of the company's property it would have been of no effect.

2.4 The requirement of solvency

The discussions so far upon the limits on the powers of a company to ratify improper acts of its directors have not mentioned the obvious qualification that for a ratification to be effective the company must be solvent. If it is not, neither directors nor shareholders can apply its property other than for the benefit of the company and its creditors. The purported ratification by shareholders of the actions of directors dealing with the company's property for an impermissible purpose will not be effective to validate the act or exonerate the directors from liability for breach of fiduciary duty. The authority is the well known case of *Kinsela*. Street CJ said, in a now classic passage:[44]

> '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. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending ... liquidation ...'.

The reason why shareholders are incapable of ratifying a breach of duty by directors is that the duties are not owed to them, or not only to them. The duties must be exercised for the benefit of creditors, of with their interests in mind. It follows that, from general principles, that the creditors are necessary parties to any ratification.

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42 (2003) 214 CLR 230 at 240.
43 *Ibid* at 250 and 254.
44 (1986) 4 NSWLR 722 at 730.

If therefore a lender is contemplating an advance to a company to be secured by another company's assets any ratification of the transaction by that company will be worthless unless it be solvent.

The lender can ask to see the company's financial statements which may or may not be sufficiently recent and comprehensive to allay fears of insolvency. The lender may also insist upon a certification by the directors that the company is solvent. If the certificate is inaccurate and the company is in fact insolvent the certificate will not save the ratification but may provide a remedy against the directors.

One can avoid the difficulty of knowing whether a resolution by a majority of shareholders ratifying a breach of directors is valid in particular circumstances by insisting upon a unanimous resolution of all shareholders. There is no doubt that, in a solvent company, and where the ratification is not itself a fraud upon the company, as it would have been in *Macleod's case*, the ratification would be valid. That was the clear opinion of Street CJ in *Kinsela* which I have just cited. It was the opinion of Slade LJ in *Rolled Steel*. His Lordship said:[45]

> '... the clear general principle is that any act which falls within the corporate capacity of a company will bind it if it is done with the unanimous consents of all the shareholders or is subsequently ratified by such consents: ... this ... principle ... is not ... unqualified ... it will not enable the shareholders ... to bind the company ... to a transaction which constitutes a fraud on its creditors ... But none of the authorities which have been cited ... have convinced me that a transaction which (1) falls within ... the powers ... of a company ... and (2) does not involve a fraud on its creditors, and (3) is assented to by all shareholders, will not bind a fully solvent company merely because the intention of the directors, or the shareholders, is to effect a purpose not authorised by the memorandum.'

To the same effect are the judgments in *Multinational Gas & Petrochemical Co v Multinational Gas & Petrochemical Services Ltd.*[46]

2.5 Conclusion

If we pause here it is, I think, apparent that the shareholders of a company may ratify the acts of directors done in breach of their fiduciary duty to deal with the company's property for a proper purpose and for the benefit of the company as a whole if:

(a) the company is solvent;

(b) the act being ratified is not a fraud upon the company or a dishonest misappropriation of its property; and

(c) the ratification is the unanimous act of all shareholders.

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45 [1986] Ch 246 at 296.

46 [1983] Ch 258 at 269 per Lawton LJ and 280 per May LJ.

It would follow that if a lender took a guarantee or security from a company to support the repayment by another company of an advance made to it the transaction might not be impugned by the company which provided the guarantee or security if the three conditions just identified are satisfied.

A lender who has the benefit of a resolution supported by all shareholders approving the provision of security should be safe from an attack on its security even where its provision conferred no commercial benefit upon the mortgagor as long, as I say, that the company was solvent and the transaction is not a fraud upon the company. The second requirement I think can be ignored. Such cases are rare and a situation in which a reputable lender would involve itself in dishonesty will be most unlikely. The lender can make a reasonable fist of satisfying itself that the company is solvent.

3. Ratification of directors' breaches of *Corporations Act* duties

Is this halcyon picture changed by the fact that directors owe their companies statutory as well as equitable duties and that a company in general meeting cannot ratify an act which constitutes a breach of statutory duties? This is now clear law as I will shortly mention. The statutory duties are found principally in ss 180 and 181 of the *Corporations Act.* Section 181 obliges directors to exercise their powers in the best interests of the company and for proper purposes. A director who acts otherwise contravenes the section as does anyone who:

(a) aids, abets, counsels or procures the contravention;

(b) induces the contravention;

(c) is in any way directly or indirectly knowingly concerned in the contravention; or

(d) conspires with others to effect the contravention.[47]

Because the content of the statutory duty is the same as the equitable duty owed by directors to the company it might be thought, as Debelle J did in *Pascoe Ltd (in liquidation) v Lucas,*[48] that there is no impediment to shareholders 'excusing a breach of statutory duty', just as they can a breach of the fiduciary duty. That view has, however, not won acceptance. Santow J in *Miller v Miller*[49] thought that:

> '... ratification cannot cure a breach of statutory duty, more especially one imposing criminal liability.'

Though pointing out that the judge had cited no authority for the proposition the (NSW) Court of Appeal accepted its correctness in *Forge v Australian Securities and Investments Commission.*[50] Most authoritatively of all the High

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47 *Corporations Act* 2001 (Cth), s 79.

48 (1998) 27 ACSR 737 at 772.

49 (1995) 16 ACSR 73 at 89.

50 (2004) 213 ALR 574 at 655.

Court said the same in *Angas Law Services Pty Ltd (in liquidation) v Carabelas*.[51]

This principle is obviously of importance to directors and even shareholders but it does not, it seems to me, have real significance for lenders. The reason is that the consequence of a contravention of s 180 and/or s 181 is that the directors become liable to:

(a) pay damages to compensate the company for losses occasioned by their breaches of duty; and

(b) the imposition of a pecuniary penalty order pursuant to s 1317G of the *Corporations Act*; and

(c) pay compensation in an amount equivalent to the loss suffered by the company, or the profit made by the director, from the breach, pursuant to s 1317H.

It is not a consequence of a breach of statutory duty that a transaction entered into in breach of that duty is voidable, or may be avoided, or set aside by the company, or the court. The inability of the shareholders to exonerate their directors from breach of statutory duty does not have implications for the validity of the transactions entered into, by definition, for improper purposes. Their vulnerability to that remedy is to be found under the general law which, as I have said, permits ratification.

Despite this displacement from the point of interest for this paper *Carabelas* is nevertheless of considerable importance to it. The case is a curious and rather sad one. It appears to have been litigated, until it got to the High Court, upon a mistaken view of the facts. When properly analysed the facts showed that the action should never have been brought.

Mr & Mrs Carabelas were the only directors and shareholders of a number of companies whose principal activity was acquiring and developing properties. One of the companies, Angas Law Services, owned a property encumbered by a mortgage debt of approximately $435,000. Mr Carabelas borrowed $1,750,000 from the Commonwealth Bank of Australia and caused Angas Law Services to provide security for the loan. He used part of the advance to repay Angas Law Services' mortgage debt. The result was that the company owed Mr Carabelas about $435,000. Later the company sold another property for around $910,000 which went to reduce Mr Carabelas' debt to the bank. After adjustments for the debt owed by the company by Mr Carabelas the latter now owed the company about $475,000. At the time of these transactions Mr & Mrs Carabelas and their companies were solvent. Angas Law Services' contingent liability to the bank never became an actual liability and the value of its equity in the property sold was replaced by a debt of the same amount owed to it by Mr Carabelas who, as I said, was good for the money.

The case was prosecuted on the basis that Mr & Mrs Carabelas had caused a number of their companies to enter into an agreement between them and Angas Law Services by which Mr Carabelas' debt to that company was replaced by

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[51] (2005) 215 ALR 110 at 121.

debts from other companies which, in the aggregate, came to the same total. These companies were insolvent and in the end Angas Law Services wrote off the debts as irrecoverable.

Mr Carabelas was prosecuted for breach of s 229(2) and (4) of the Companies Code and for compensation under s 229(7)[52] on the basis of the 'novation' which deprived Angas Law Services of a valuable chose in action, namely the debt owed to it by Mr Carabelas.

In the High Court it was realised that there had been no novation and that Mr Carabelas still owed the company $475,000.

Of present importance Gleeson CJ and Heydon J (with whom the other members of the court agreed) said:[53]

> 'The question whether corporate transactions of guarantee or third party mortgages involve breaches of directors' duties, or the particular kinds of breach referred to in s 229(2) ... usually turn upon a close examination of the commercial context in which they occur ... The unanimous informed consent of the shareholders of ALS, the solvency of ALS and Mr Carabelas, and the absence of any adverse effect on the interests of third parties, were facts relevant to the propriety of the mortgage transaction ... [T]he Full Court's conclusion that ... there was no impropriety, and no want of reasonable care, has not been shown to be in error.'

When discussing the hypothesis on which the case had mistakenly been conducted their Honours said:[54]

> 'If a novation ... had occurred, then it would have involved a contravention of s 229(4) ... It would have involved a discharge of [Mr Carabelas'] liability to ALS, and a substitution of the liability of a number of insolvent companies. Clearly, that would have been improper. That is not something that could have been ratified effectively by Mr and Mrs Carabelas ... [I]t would have involved the expropriation of the property of ALS ... : a form of abuse of power that could not have been ratified by the self-interested consent of Mr Carabelas and ... Mrs Carabelas ... While, in some circumstances, the informed assent of all the shareholders to a transaction might be a fact relevant to a question of impropriety, the provisions of s 229 creating offences operate according to their terms ... The shareholders of a company cannot release directors from the statutory duties imposed by ... s 229. In a particular case, their acquiescence in a course of conduct might affect the practical content of those duties. It might, for example, be relevant to a question of impropriety. A company's right to recover under s 229(7) depends upon the existence of a contravention. If such a contravention has occurred, the question whether a company has lost its right of action under s 229(7) because of some binding decision on the part of its shareholders to release the

52 The equivalent provisions in the *Corporations Act* are ss 180, 182 and 1317H.
53 (2005) 215 ALR 110 at [29].
54 *Ibid* at [32].

> potential defendants is another matter, and one that did not arise in this case.'

These passages say several things. They are:

(a) Where a company is solvent and the interests of creditors do not intrude, the unanimous informed consent of the shareholders to the provision of a guarantee or third party mortgage, where the principal debtor is also solvent, will not constitute a breach of duty to take reasonable care in the exercise of powers and would not be an improper use of power.

(b) Conduct by directors that does amount to a contravention of the statutory duties to take reasonable care and act in good faith cannot be ratified by the shareholders. That is to say the acts which constitute the contravention retain that character despite what the shareholders might say or do. They cannot release the directors from the obligation to perform their statutory duties.

(c) A company's right to recover compensation under (now) s 1317H may be lost if the shareholders had given their unanimous informed approval to the directors' conduct which amounted to a contravention.

This last proposition was left open by the High Court but an answer to it is suggested by *Eastland Technology Australia Pty Ltd v Whisson.*[55] The case concerned a dispute between a company and two of its directors about whether the directors had misapplied the company's intellectual property for their own benefit. Litigation was commenced but compromised by deed which contained a clause releasing the directors from all further actions. The company later commenced proceedings to set aside the compromise and to pursue its original action. It was argued that the directors had contravened s 232 of the *Corporations Law* and that such a breach could not be the subject of a release by the company. The case was not one in which a company sought to ratify a director's breach of the section but there is some similarity between *Angus* and *Eastland.*

The court held that the company had validly released the directors from all claims for monetary compensation consequent upon their breaches of duty. The right to compensation was conferred by s 1317HD,[56] and not by s 232, breach of which could not be condoned by agreement or ratification. The effect of s 1317HD could be so overcome.

The case says nothing about ratification but does suggest that an agreement, either under seal or for valuable consideration, between a company and (for example) a financier, the terms of which were that the company would not pursue any claims it might have had to set aside a security provided at the instigation of its directors in breach of their statutory duties, would be effective.

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55 (2005) 223 ALR 123 (Full Court of the Supreme Court of Western Australia); special leave refused: [2006] HCATrans 261.

56 This section has no counterpart in the *Corporations Act*. It provided that a person who contravened a civil penalty provision must account to the corporation for profits made, or losses occasioned, by the contravention.

To return to *Carabelas* Gummow and Hayne JJ agreed in the judgment of the Chief Justice and Heydon J. Importantly, in answer to a submission that it was 'a basic principle of corporate law' that a company's assets be dealt with for its purposes and not for the purposes of appropriation by those who controlled the company and owned its shares, their Honours said that:[57]

> 'This proposition ... insufficiently allows for the significance from case to case of the commercial context, and assumes a standard of conduct that is inflexible. The starting point must be the general duty of a director to act in the best interests of the company ...
>
> ...
>
> In the present case, the mortgage was granted by ALS while it was solvent and at a time when there appeared to be no real chance of insolvency ... Further, the granting of the mortgage was authorised by the shareholders of ALS. The combination of these two factors, solvency and authorisation, indicates that the standards of propriety expected of the directors was not breached.'

This is a clear statement that it is not improper for directors of a company to mortgage its assets to secure another's indebtedness where the company is solvent, there is no foreseeability of insolvency and where the shareholders unanimously assent to the transaction. There will, in these circumstances, be no breach of directors' duties whether fiduciary or statutory and no scope for the company later to complain of the transaction.

The case is of great significance to lenders.

4. Related party transactions under Chapter 2E of the *Corporations Act*

4.1 The general prohibition

I turn now to consider the application of Chapter 2E of the Corporations Act. In essence it prevents a public company from providing a financial benefit to a related party except with the approval of the shareholders. According to s 207 of the Act the prohibition is designed to protect company resources which are available to creditors and members by requiring that financial benefits be provided by the company to related parties only with the prior approval of the members.

Section 208 contains the general prohibition. It provides that before a public company, or an entity which the public company controls, gives a financial benefit to a related party it must have obtained the approval of the members 'in the way set out in sections 217-227', and have given the benefit within 15 months of obtaining the approval.

It is to be noted that a public company which gives a financial benefit in contravention of the section does not commit an offence, and the contravention does not affect the validity of any contract or transaction which gives effect to the benefit.

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57 (2005) 215 ALR 110 at [67] and [69].

One should however note that any person who is involved in a contravention of s 208 contravenes s 209(2), and the person commits an offence if the involvement and contravention is dishonest. 'Involvement' is defined by s 79 of the Act.

The consequences of a contravention of section 209 are spelt out in s 1317E which enables the court to make a declaration of contravention if 'a person has contravened s 209(2)'. The consequence of that is that the person may be ordered to pay a pecuniary penalty of up to $200,000 to the Commonwealth[58] and the person involved in the contravention may be ordered to compensate the corporation for damage suffered by it as a result of the contravention.[59]

Chapter 2E does not contain a comprehensive definition of what is meant by 'giving a financial benefit'. Section 229 however gives several examples. They are:

> '(a) giving or providing the related party finance or property;
>
> (b) buying an asset from or selling an asset to the related party;
>
> (c) leasing an asset from or to the related party;
>
> (d) supplying services to or receiving services from the related party;
>
> (e) issuing securities or granting an option to the related party;
>
> (f) taking up or releasing an obligation of the related party.'

In determining whether a financial benefit has been given by a public company to a related party one is required 'to give a broad interpretation ... even if criminal or civil penalties may be involved' and one is obliged to have regard to 'the economic and commercial substance of conduct' rather than its 'legal form'.[60]

Section 228 defines related parties. Any entity controlled by a public company is related to it. Directors of the public company are related parties as are directors of any entity that controls the public company. Spouses and *de facto* spouses of such directors are themselves related parties, as are any persons who 'make up' a controlling entity of the public company if that entity is not itself a corporation. Parents and children of the directors and their spouses are related parties and an entity controlled by a related party is itself a related party.

Subsections 5, 6 and 7 of s 228 extend the net even wider. An entity is a related party of a public company if it believes or has reasonable grounds to believe that it is likely to become a related party, or if it acts in concert with a related party 'on the understanding that the related party will receive a financial benefit'.

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58 Section 1317G.

59 Section 1317H.

60 Section 229(1).

4.2 Exceptions

Sections 210 to 216 contain a number of defined benefits that are exempted from the general prohibition set out in s 208. Members' approval is not required if:

(a) the financial benefit is given on terms that would be reasonable in the circumstances if the public company and related party were dealing at arms' length, or the terms are no less favourable than would be reasonable in such circumstances;[61]

(b) the benefit is remuneration given to the related party in their capacity as an officer or employee of the public company or an entity that it controls or is controlled by it, and the remuneration is reasonable;[62]

(c) the benefit is given by way of payment for expenses incurred by a related party in performing duties as an officer or employee of the public company, or an entity that it controls or is controlled by it, and the amount is reasonable;[63]

(d) the benefit is given to a related party who is an officer of the public company and the benefit is an indemnity, or insurance premium, or legal costs, paid in respect of a liability incurred in the role of officer, and the amount is reasonable;[64]

(e) the financial benefit is small ($2,000 or less) and is paid to a director of the public company or the director's spouse;[65]

(f) the benefit is given to or by a 'closely held subsidiary' which means, in effect, wholly owned subsidiaries;[66]

(g) the benefit is given to a related party in his capacity as a member of the public company and the benefit does not discriminate unfairly between members;[67] and

(h) the benefit is given pursuant to an order of the court.[68]

The provisions are clearly of importance to financiers. A guarantee or security given by a public company to a financier to support a loan made to its parent company for example will constitute 'giving a financial benefit' by the public company to a related company. The transaction will come within the prohibition of s 208 unless shareholder approval is obtained or the financial benefit is within one of the exceptions. The latter is not likely to be the case.

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[61] Section 210.
[62] Section 211(1).
[63] Section 211(2).
[64] Section 212.
[65] Section 213.
[66] Section 214.
[67] Section 215.
[68] Section 216.

4.3 The position of intra group guarantees

Something should perhaps be said about the exception which appears in s 210, that the benefit be given on terms that would be reasonable if the public company and related party were dealing at arms' length. Is it possible that a guarantee given by one company in a group to support the borrowings of another company can fall within the exception? Windeyer J thought that such guarantees 'would be quite unlikely to be able to be brought within' the cognate provision of the *Corporations Law*.[69] His Honour gave no reasons and did not elaborate his opinion. The same opinion is repeated by the authors of *Ford's Principles of Corporations Law*,[70] again without elaboration.

Palmer J noted that s 210 has not been the subject of any judicial decision.[71] His Honour pointed out that 'in applying the test the court is required to assess the terms of the subject transaction against objective standards' ie what would be reasonable in an arms' length transaction? Such a transaction is one in which the public company is:

- unrelated to the other party;
- free from any undue influence or pressure;
- has directors who are knowledgeable about the circumstances of the transaction, experienced in business and well advised so as to be able to form a sound judgment; and
- concerned only to achieve the best available commercial result for itself.

Palmer J also pointed out that honest and experienced commercial minds might legitimately differ about what is a reasonable commercial result from the transaction.

I would accept that Palmer J's comparison affords a good working hypothesis for the application of s 210 to particular facts. I am not sure that it inevitably leads to the result that no intra group guarantee can come within the exception. I think the observations that fell from the High Court in *Carabelas,* that there is no impropriety where one company in a group assumes obligations to benefit another where the companies are solvent, the shareholders give their unanimous informed consent and there is no adverse effect on the interests of third parties, make it difficult to say that all intra group guarantees are beyond the protection of s 210.

It is a matter about which one cannot be dogmatic and one should proceed with caution.

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69 *Bridge Oil Pty Ltd v Parker & Parsley Petroleum (Australia) Pty Ltd* (1994) 15 ACSR 240 at 245.

70 At [9.530].

71 *Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd (No. 2)* (2005) 53 ACSR 305 at [455].

4.4 Obtaining members' approval to the giving of a financial benefit

Division 3 sets out the procedure which must be followed to obtain members' approval to the giving of a financial benefit. At least 14 days before giving notice convening a meeting to approve the financial benefit the company must lodge with ASIC:[72]

(a) a proposed notice of meeting setting out the text of the proposed resolution;

(b) a proposed explanatory statement; and

(c) any other document that the company proposes to give to members.

The proposed explanatory statement must be written and must set out details of the parties to whom the financial benefit is to be given, the nature of the financial benefit and a statement by each director of the company stating why he (or she) recommends or does not recommend that members approve the giving of the benefit. The statement must also contain a declaration by each director saying whether or not he has any interest in the outcome of the proposed resolution and, if he has an interest, what it is.

The statement must also contain information which would allow the members to make an intelligent decision whether to support or oppose the resolution. This information will typically be the potential costs and detriments of giving the financial benefit from an economic and commercial point of view. The costs are to include opportunity costs, taxation consequences and benefits foregone by the donor of the benefits.

The notice of meeting given by the company must comply exactly with the notice lodged beforehand with ASIC.[73] The company cannot vary the proposed resolution notice of which was given.[74] At the general meeting of the company called to consider whether approval should be given to the proposed benefit the recipient of the benefit and all associates of the recipient may not vote.[75]

If the resolution is passed notice of the fact must be lodged with ASIC within 14 days.[76] By s 227 the court may declare that the conditions necessary for the passing of a resolution described by division 3 'have been substantially satisfied'.

4.5 Protection only for Chapter 2E prohibitions: directors beware

Significantly s 230 provides that:

> 'A director is not relieved from any of their duties under this Act (including sections 180 and 184), or their fiduciary duties, in connection with a transaction merely because the transaction is

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72 Section 218.
73 Section 221.
74 Section 223.
75 Section 224.
76 Section 226.

> authorised by a provision of this Chapter or is approved by a resolution of members under a provision of this Chapter.'

This section is important. Compliance with chapter 2E will not save a transaction which the directors of a company have entered into in breach of their obligations, statutory or fiduciary, to act in the best interests of the company. If such a transaction is to be saved one must have regard to the considerations which were addressed earlier in this paper. Compliance with chapter 2E will only preserve a transaction which is the subject of a prohibition found within that chapter. It deals with a separate layer of statutory restrictions specifically directed towards related party transactions.

It is important to recall that a contravention of the provisions of chapter 2E does not invalidate a transaction but it exposes those who were party to the contravention to penalties and orders for compensation.

4.6 Application to managed investment schemes

Chapter 5C of the Corporations Act regulates managed investment schemes. You are all as familiar with these schemes as I am. Part 5C.7 applies the related party transactions rules found in chapter 2E, with some modifications, to the activities of managed investment schemes. Section 601LA provides that chapter 2E applies to registered schemes as if:

(a) references to a public company were references to the responsible entity for the scheme;

(b) references to a benefit being given to or received by a related party of a public company were references to a benefit being given to or received by the responsible entity or a related party;

(c) references to a resolution of a public company were references to a resolution of the members of the scheme;

(d) references to a general meeting were references to a members' meeting of the scheme;

(e) references to members of a public company were references to members of the scheme;

(f) references to the company's best interests were references to the best interests of the scheme's members.

Section 601LC modifies the application of s 208 to fit schemes. It provides that if a financial benefit is given by the responsible entity of a registered scheme, or an entity that controls the responsible entity, or an agent of the responsible entity, and the benefit comes from scheme property or could endanger that property, and is given to one of the entities just mentioned, or the agent, or a related party of one of those, then, before the gift is lawful the scheme members must have given their approval no earlier than 15 months prior to the giving of the benefit.

The exemptions provided by sections 213 and 214 have no application to managed investment schemes. The other exemptions do apply. The restrictions on voting contained in s 224 do not apply. Instead the restrictions imposed by s 253E are relevant. The effect is much the same.[77]

The consequences for contravention of the related party transactions as they relate to managed investment schemes are the same as for corporations to whom chapter 2E applies. Additionally s 601MA provides that a member of a registered scheme who suffers loss by reason of the responsible entity's contravention of the related party transactions may recover the amount of the loss by an action against the responsible entity.

4.7 Financiers' accessory liability for breaches of ss 180, 181 and 208 of the *Corporations Act*

Something should be said about the possibility that a financier might, by reason of its dealings with a corporation who borrows from it, become involved in a contravention either of s 180 or s 181 or s 208 of the Act. I have set out the terms of s 79 which describes the means by which one might become a party to a contravention.

One cannot:

(a) aid, abet, counsel or procure a contravention; or

(b) induce a contravention; or

(c) conspire with others to effect the contravention,

unless one intentionally does the act which constitutes aiding, inducing or conspiring and one knows of the essential facts which go to make up the contravention.[78]

Before a financier may be guilty of being involved in a contravention the financier must know, for example, that the directors are not acting with respect to a particular transaction for a proper purpose, or for the benefit of the company, and the financier must know the facts which give rise to that conclusion. With that knowledge the financier must act in an intentional way to assist the contravention, or induce it, or conspire with others to bring it about.

The fourth manner in which one may be involved in a contravention requires a slightly different analysis. One is involved if one 'has been in any way, by act or omission, directly or indirectly, knowingly concerned in the contravention'. To be 'concerned' in the contravention means taking part or participating in the activities which constitute the contravention. It is not necessary that the person be involved in all aspects of it, but he must take part in some aspect of the activity which constitutes the breach of duty by the directors or the giving of a financial benefit in circumstances which amount to a contravention of s 208.[79] To be knowingly concerned the participant must know of the existence of the facts which constitute the contravention. It is not necessary that he know that

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[77] Section 601LD.

[78] *Yorke v Lucas* (1985) 158 CLR 661.

[79] *Tannous v R* (1987) 10 NSWLR 303.

those facts amount to a contravention of the Act. Otherwise he cannot be 'knowingly' concerned in it.[80]

When one speaks of the 'financier' being involved in a contravention one means the senior managers or officers of the financier, which will invariably be a corporation, whose mind and will are to be assimilated to the mind and will of the corporation.[81]

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80 *Yorke v Lucas* (1985) 158 CLR 661.

81 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705; *Hamilton v Whitehead* (1988) 166 CLR 121.