AUTHORITY OF OFFICERS AND OBLIGATIONS OF COMPANIES TO CREDITORS

QUESTIONS AND ANSWERS

Question - Roger Drummond (Bell Gully Buddle Weir, Wellington):

I would like to ask his Honour in view of the recent Court of Appeal decision involving the Kinsela case whether he believes that different standards of duty of care are placed upon directors to creditors depending on the different industries in which those companies may be operating?

Response - Mr Justice Young:

I don't really think so. I think that the principle is a general one and that directors of companies, no matter what the company is, if they can see that their actions can affect the creditors of the company, must consider the creditors of the company as well as the shareholders when going about considering what is for the benefit of the company as a whole. They can't only consider the shareholders. It is a different matter of course if the company is so fabulously solvent that nothing that they can do can really affect the creditors' position.

Question - Cathy Walter (Clayton UTZ):

A question for Professor Ford. You mentioned that if there is a specific restriction on a power then the power should not be used in breach of that restriction. I wonder if you consider there is a restriction constituted by a situation that I am about to describe. If there is a power given to guarantee and one often sees the power to guarantee coupled with a power to guarantee and indemnify, do you think that if you take an indemnity where there is not a specific power given to indemnify that the limited guarantee power can be read as a restriction against an indemnity power? The first question should be do you understand the question!

Response - Professor Ford:

It is noteworthy that when the Code refers to restriction that may be placed on the exercise of a power of the company it refers to an express restriction or an express prohibition, and it is not entirely clear why it is put that way. So there may be some scope for relying on the use of the word "express" to say that there is not a restriction, there is not a prohibition arising

just by implication. And it may be that the object of shifting the balance in favour of outsiders which is evident in this part of the Companies Code explains why the adjective "express" was used. Now if it is in a statement of objects although the reference to restrictions is qualified by the word "express" the reference to statement of objects is similarly qualified. So that if it is a statement of objects you might have to worry about implied limitations in the statement of objects. So there seems to be a distinction contemplated between an express restriction or prohibition on the one hand and a statement of objects on the other and an implied limitation in a statement of objects may still be significant.

Question - Peter Doyle (Mallesons):

Professor Ford spoke about s.68A(4) and the question of actual knowledge and you mentioned a particular provision in the Conveyancing Act which might confine that concept to knowledge acquired in the course of a specific transaction. I would like to ask do you think that there is any scope for the courts to develop a broader doctrine of transaction specific knowledge? I think in the case where, for example, an officer of a bank acquires actual knowledge of a restriction in a particular transaction and then five years later there is another transaction with the same company, a different officer of the bank is involved and there is not an inspection of the memorandum and articles, do you think the court would say in that circumstance that the bank had actual knowledge or might it limit it to the transaction in question?

Response - Professor Ford:

The section I cite is s.164 of the Conveyancing Act, I think s.199 of the Victorian Property Law Act. That was passed to overturn case law. And it seems to have been passed as legislation so that clients would have the benefit of going to the best advisers. The best advisers would be acting for a lot of people. The best advisers would have much more notice than other advisers. And so it was really to make the services of the popular advisers, if I can put it that way, still available. Now it took legislation to do that in the 19th century. My guess is that it would probably in the 20th century still take legislation but one now of course has to reckon with the fact that the object of legislation can be more influential when the object can be seen with the aid of extraneous material and it may be that the position is different from the 19th century in that respect.

Comment - Mr Justice Young:

Modern legislation usually leaves a lot to the judges to work out how it applies. This is typical example. I do hope that the first case where this point arises that both borrower and lender have very competent counsel to argue the matter so that we can see all the pros and cons of the various approaches and make a sensible decision.