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Concurrent Session A-1: Hip-pocket injuries in workouts: Accessory liability for bankers and advisers

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1. Introduction

This paper is about the potential liability of financiers (especially banks) and advisers when they become involved in assisting or guiding a company through a period of financial difficulty. I have in mind the bank's larger corporate customers, either listed entities or large unlisted enterprises.

It can hardly be said that the topic has been overlooked in the literature of corporate law. Much has been written, not only on the general question of liability of de facto and shadow directors, but also specifically on the position of financiers and advisers. In a relatively recent article by Mark Stoney, "Borrower companies approaching insolvency -the potential liability of the lender as a de facto director", (2000) 8 *Insolvency Law Journal* 192, the author begins by citing some 10 journal articles which focus specifically on the position of banks.

On the other hand, the case law is, so far, relatively thin. As Vinelott J has remarked, "the dividing line between the position of a watch-dog or adviser imposed by an outside investor and a de facto or shadow director is difficult to draw" (*Re Tasbian Ltd (No 3), Official Receiver v Nixon* [1991] BCLC 792, at 802). Drawing the line requires not only an understanding of the scope of the statutory provisions and the principles underlying them. It requires close analysis of the facts of the cases that are most germane to the position of banks and advisers in workouts, to ascertain the factual circumstances treated by the courts as relevant to their application of the law, and the weight they have given to those factors.

There are, in fact, only a few cases that bear a reasonably close analogy with the position of banks and advisers in workouts. The leading Australian case, *Standard Chartered Bank of Australia Ltd v Antico* (1995) 38 NSWLR 290, was not about intervention by a banker or other financier *per se*: Pioneer had a combination of interests that made its position vis-a-vis Giant special and readily distinguishable from the typical situation of a bank in a workout.

My addendum to commentary in this area is justified, if at all, by three matters: first, I hope it will be useful to focus closely on the facts of selected cases that seem to me to come closest to the typical situation of a bank or an adviser in a workout; second, I wish to argue that the English cases, and some earlier Australian cases, need to be reassessed in light of the current wording of the Australian definition of "director"; third, though centrally important, exposure to liability as a de facto or shadow director is not the only risk for banks and advisers, and particular note needs to be taken of the risk of direct or accessory liability for misleading conduct, and where the borrower is a listed entity, the new accessory liability under the continuous disclosure regime.

I intend to develop the first two matters under the general heading, "de facto and shadow directorships", and the third matter under the heading "accessory and primary liability for misleading conduct and non-disclosure". But first, it is necessary to give a brief description of the kind of activities that might be involved for banks and advisers in the course of a workout for a large Australian company.

2. Financiers, advisers and workouts

When a bank finds that its corporate customer is experiencing financial difficulties serious enough to raise a real concern about solvency, it has limited options. One possibility is, of course, to extend further credit in the hope that the existing management, with realistic business plans and tight financial controls, will be able to turn the situation round. That passive approach could be expensive for the bank, if management fails. The second possibility is for the bank to exercise its security, typically by appointing a receiver and manager. It is widely believed that the very act of imposing an external administration of this kind, with attendant publicity, will depress the value of the business and its assets and necessarily make it more difficult, and perhaps impossible, for a turnaround to be achieved. If the bank's exposure is well covered by the security, the bank may nevertheless choose to pursue this option, leaving other creditors to share the deficiency. But a bank may prefer to avoid this option where the exercise of the security will not recover 100 cents in the dollar or there are other reasons, for example reputation or public relations reasons, why the bank may not wish to be seen as "pulling the plug". It is the third alternative, engineering or supporting an informal workout outside the strictures of receivership, voluntary administration and liquidation, that is receiving very considerable attention at this stage in Australia's business cycle.

There are some typical kinds of activities involved, on behalf of the bank, in an informal workout for one of its customers. Where the financier is not a bank, the range of activities is probably wider, especially where the financier is not a large bureaucratic organisation and is not subject to prudential regulation.

One thing that might already have happened, especially if the bank has equity in the customer, is the appointment of nominee directors to the company's board. There is some case law as to whether the step creates the potential liability of a de facto or shadow director for the bank. In *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 All E R 404, where the bank held 40% of the shares of the company and bank nominees were two of the five directors, the Privy Council held that the bank was not a director, as the nominee directors were bound to ignore the interests and wishes of their employer, the bank, when acting as directors, and there was no allegation that they were accustomed to act on the directions or instruction of the bank. In *Lord v Sinai Securities Ltd* [2004] EWHC 1764 (Ch), Hart J held that under the English provision it is not enough to constitute a person a shadow director that one member of the board is that person's nominee; it would have to be shown that all the directors, or at least a consistent majority of them, had been accustomed to act on the person's directions.

More typically, the bank will not have nominee board positions and will become aware of the company's difficulties through review of overdraft and similar facilities, reporting by the customer or external sources of information. An early priority is likely to be for the bank to investigate to ascertain the true position and form views about the problems and the means of rectifying them.

The bank may have its own specialists in-house to perform this work, or it may prefer to see an external adviser engaged. This is an important choice that may have liability consequences. The bank may consider it safer that any external adviser be engaged by the company rather than by the bank, so as to minimise the bank's exposure to liability as a de facto or shadow director or as an accessory under other provisions. The adviser's exposure to liability may be greater if engaged by the company than if engaged by the bank. The documentary terms of appointment and arrangements for payment, and any indemnities, will affect the characterisation of the engagement, regardless of what the parties say. For example, if the bank not only pays and indemnifies the adviser but also directs the adviser's work from day to day, it may be to no avail that the documents purport to show that the adviser was engaged by the company.

Depending on the adviser's assessment, the bank might wish to persuade the company to take immediate steps to:

- improve governance (where, for example, board meetings have been infrequent or not properly minuted);
- improve financial recording, integration and reconciliation, reporting, information flows and controls;
- replace executive staff, such as CEO and CFO.

I shall call such steps "intervention in governance" (see 3.5(a) below).

The bank may wish to set up a system of regular meetings of its representatives with executive management of the company, to develop workout proposals. This may involve discussions, in which the bank's representatives may wish to play a leading role, about such matters as:

- restructuring of business divisions;
- identifying underperforming businesses and winding them down, or preparing them for sale;
- settling published financial reports;
- establishing leaner cost structures in retained businesses, with limits on such matters as discretionary spending on expenses, advertising, telephones, credit cards etc;
- setting corporate policies and practices on pricing, margin management, cashflow etc
- developing new business plans, forecasts and KPIs.

I shall call such steps "ongoing development and review" (see 3.5(b) below).

Exploration of such matters may lead to discussions with external parties. The bank may wish to be involved in discussions and negotiations of various kinds, for example with:

- the company's auditors;
- the company's advisers;
- major external creditors;
- suppliers and customers or their representatives;
- major shareholders, existing senior management and related creditors;
- employees or their representatives;
- regulators such as ASIC and the ACCC;
- if the company is listed, the ASX;
- ratings agencies and the media;
- (perhaps) shareholders generally.

I shall call such steps "discussions with external parties" (see 3.5(c) below).

Internal and external discussions and negotiations may make it necessary for the bank to consider taking steps such as:

- extending financial accommodation, perhaps temporarily, on conditions relating to corporate management and the implementation of workout proposals;
- providing additional funding by way of equity with or without reduction of existing entitlements to payment of interest and repayment of capital;
- exercising security by sale of businesses or assets;
- participating and perhaps sponsoring an incentive scheme for all stakeholders, including other funders, major creditors and employees;
- withdrawing support and negotiating an exit mechanism.

I shall call such steps, content is free and not entirely accurately, "workout transactions" (see 3.5(d) below).

This is not by any means an exhaustive list. Every case is different, and no doubt presents different risks, challenges and opportunities. However, every one of these steps, and any other steps a bank may take in the workout that I have not listed, will be relevant to the bank's potential liability. They will also be relevant to the position of the adviser, depending on the extent of the adviser's involvement in each step, the formal contractual framework for that involvement and the reality of the working relationships between the adviser and the company and the bank. The lawyer's task in advising the bank or workout adviser is to ascertain just what degree of involvement the client wishes to have, and to make an assessment of the impact of each factor in that involvement on the overall liability equation, having regard to the most relevant case law.

3. De facto and shadow directorships

3.1 The present definition and its significance

The definition in s 9 of the Corporations Act 2001 (Cth) is as follows:
"**director** of a company or other body means:

(a) a person who:
(i) is appointed to the position of a director; or
(ii) is appointed to the position of an alternate director and is acting in that capacity;
regardless of the name that is given to their position; and
(b) unless the contrary intention appears, a person who is not validly appointed as a director if:
(i) they act in the position of a director; or
(ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.
Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity or the person's business relationship with the directors or the company or body."

There is a note giving examples of some provisions in the Act, not presently relevant, which display a contrary intention ousting the extended definition in para (b).

The definition has immense practical as well as theoretical importance. Courts have generally not adopted a narrow approach to its construction, taking the view that the purpose of the legislation is to protect the public (*Re Lo-Line Electric Motors Ltd* [1988] Ch 477, at 489 per Browne-Wilkinson V-C). The attention of the courts and commentators has focused on the concept of shadow directorship in subparagraph (b)(ii). It has been held that the purpose of the legislation is to identify the persons (other than those whose advice is excepted) with real influence in the corporate affairs of the company, though the influence need not be exercised over the whole field of its corporate activities (*Australian Securities Commission v AS Nominees Ltd* (1995) 13 ALR 1, at 52-3 per Finn J; *Re Kaytech International plc* [1999] 2 BCLC 351 at 424 per Robert Walker LJ; *Secretary of State for Trade and Industry v Deverell* [2000] 2 All ER 365 at 376 per Morritt LJ; *Secretary of State for Trade and Industry v London Citylink Ltd* [2005] EWHC 2875 at [15] per Pumfrey J).

Professors Gower and Davies have observed (*Gower and Davies' Principles of Modern Company Law* (7th ed, 2003), page 197):
"The two potential defendants of greatest interest are ... banks and parent companies. As far as the former are concerned, the courts have so far taken a cautious line, on the grounds that the definition of a shadow director requires that the board cede its management autonomy to the alleged shadow director and that the taking of steps by a bank to protect itself does not induce such a cession, if the company retains the power to decide whether to accept the restrictions put forward by the bank, even though the company may be thought to have no practicable alternative. In relation to parent companies, such a degree of cession of autonomy by the subsidiary may be more easily found, but much will still depend upon how exactly intra-group relationships are established. The degree of control exercised by parent companies may vary from detailed day-to-day control to virtual independence, with many variations in between."

We are not concerned, here, with the parent-subsidiary relationship, but this quotation is important because it reminds us that different kinds of emphasis emerge in the case law dealing with financiers and advisers, on the one hand, and parent companies on the other. Care must be taken in transposing observations made about a parent company to a case concerning a financier or adviser. Care must also be taken not to apply the reassuring words of Professors Gower and Davies to the exposure of banks under Australian law, without reflecting first on the differences between the Australian and UK statutory language.

The statutory definition is generally relevant to the provisions of Chapter 2D (see s 179(2)), including the directors' statutory duty of care and diligence (s 180). Other provisions of Chapter 2D may be relevant, depending on the facts, but I mention s 180 in particular, because its potential application to financiers and advisers must not be overlooked.

If s 180 applies, the risk to the financier or adviser is that an action for compensation to the corporation may be brought (under the civil penalty provisions ss 1317H and 1317J(2)) by the liquidator suing in the company's name, or by ASIC. Banks and large advisory firms with professional indemnity insurance may be more attractive targets in litigation than the directors and officers of the failed entity. They would be unlikely to be in a position to take advantage of the statutory business judgment rule in s 180(2), because of the probability that they would have a material personal interest in the subject matter of the judgment.

The application of s 180(1) to a de facto or shadow director is syntactically difficult. If a financier or adviser becomes a de facto or shadow director of a corporation, and s 180(1) applies, the section will require it to exercise the powers arising out of its position of control or influence over the corporation's board with the degree of care and diligence that a reasonable person would exercise if they were a [de facto or shadow] director of a corporation in the corporation's circumstances, and occupied "the office held by, and had the same responsibilities within the corporation as" the [de facto or shadow] director. The language is odd (but not extremely odd: compare s 588G(2)(b)). It could be interpreted as creating by statute a financier's duty of care, something that the Australian case law on the mortgagee's exercise of the power of sale has hitherto skirted around. There is a possibility that the court might be persuaded not to apply the extended definition of "director" in the context of s 180, on the ground that "the contrary intention appears" in that section. But s 180 is the very next section after the statutory pronouncement, in s 179(2), that the definition of "director" is applicable in Part 2D.1.

The definition unambiguously applies, importantly, for the purposes of the directors' duty to prevent insolvent trading by a company (s 588G). Civil contravention occurs if:
(i) the financier or adviser is a de facto or shadow director of a company for a period of time (s 588G(1)(a));
(ii) the company incurs a debt during that time (s 588G(1)(a));
(iii) the company is insolvent at that time, or becomes insolvent by incurring the debt, or debts including that debt (s 588G(1)(b));
(iv) at that time, there are reasonable grounds for suspecting that the company is insolvent or would so become insolvent (s 588G(1)(c));
(v) the financier or adviser fails to prevent the company from incurring the debt (s 588G(2));

(vi) either the financier or adviser is aware at that time that there are such grounds for suspecting, or a reasonable person in a like position in a company in the company's circumstances would be so aware (s 588G(2)(a) and (b));
(vii) the financier or adviser does not prove any of the defences, such as that

- at the time it had reasonable grounds to expect, and did expect, that the company was solvent at that time and would remain solvent even if the company incurred the debt and other debts incurred at that time (s 588H(2));
- the financier or adviser had reasonable grounds to believe, and did believe, that a competent and reliable person (the "other person") was responsible for providing adequate information to it about whether the company was solvent, and that the other person was fulfilling their duty, and that it expected on the basis of information so provided that the company was solvent and would remain so (s 588H(3));
- the financier or adviser took all reasonable steps to prevent the company from incurring the debt (s 588H(5) and (6)).

The financier or adviser commits a criminal offence under s 588G(3) if it actually suspected insolvency and its failure to prevent the company incurring the debt was dishonest. There is potential accessory liability under the Criminal Code (Cth) for the directors and officers of the financier or adviser who are involved in the contravention.

Section 588G(2) is a civil penalty provision (s 1317E(1)(e)). In addition to the prospect of a declaration of contravention, a pecuniary penalty order and a disqualification order, the financier or adviser may be subject to a compensation order under s 1317H on the application of the company or ASIC (s 1317J(1) and (2)). Where the company is being wound up, the liquidator may take proceedings against the financier or adviser, as a de facto or shadow director, under s 588M. The financier or adviser also has potential civil liability for damages payable to creditors under s 588J. If the company is being wound up, creditors may directly sue only with the consent of the liquidator or under the special circumstances identified in s 588T.

In order to consider whether the defendant is a director of a company for any of these statutory purposes, in circumstances where the defendant has not been appointed as a director and has not acted as a director, but may have influenced the directors, the definition in s 9 requires us to consider:
(i) who are the directors of the company;
(ii) whether the defendant has "acted in the position of" a director;
(iii) what are the defendant's relevant "instructions or wishes";
(iv) whether there is evidence that the directors have acted in accordance with such instructions or wishes;
(v) whether that evidence establishes that the directors are "accustomed" to act in accordance with the defendant's instructions or wishes;
(vi) whether the instructions or wishes of the defendant, in accordance with which the directors have acted, constitute "advice" given by the defendant;
(vii) if so, whether the advice was given by the defendant in the proper performance of functions attaching to his or her professional capacity, or his or her business relationship with the directors or the company.

In the Australian literature, reliance is often placed on UK cases and older Australian cases, as expositions of the current law. The underlying assumptions, that the concept of shadow directorship is the same in Australia and the United Kingdom, and that it has not changed over time in Australia, are both wrong. As Bryson J observed, in *Omnicon Video v Kookaburra Productions* (1995) 13 ACLC 1795 at 1796, that:
"Statutory provisions which extend for various purposes the range of persons who are to be treated as if they were directors by reference to their taking part in management are common in contemporary companies legislation. ... Notwithstanding the similarity of concept, care should be used .... [P]rovisions differ in their purpose and also in their detailed expression, and their application must always be affected by the instant facts."

I note, for the benefit of New Zealand participants in the conference, that the provisions of the Companies Act 1993 (NZ), s 126, are different in potentially significant ways from both the Australian and UK counterparts. I shall not explore the position under the New Zealand provisions in this paper.

3.2 History and Australian idiosyncrasies

Some brief observations on the development of the Australian legislation are therefore necessary.

The idea of extending the definition of "director" beyond those formally designated as directors is very old. In the Companies Clauses Consolidation Act 1845 (Imp), "directors" were defined to include those acting "under the name of directors, managers, committee of management, or under any other name" (s 3). The Joint Stock Companies Acts of 1856 and 1862 (Imp) did not contain a definition of the word "director", but a definition was introduced by the Companies Act 1900 (Imp), s 30, which said that the expression "director" includes any person occupying the position of director by whatever name called.

The concept of shadow directorship has appeared in every UK Companies Act since the Companies Act 1929 (UK), which extended the definition of "director" to include a person "in accordance with whose directions or instructions the directors of the company are accustomed to act". It was adopted in the companies legislation of the Australian states. Thus, in the Uniform Companies Acts 1961, the definition in s 5 included both a person occupying the position of director of a corporation by whatever name called, and a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act.

The wording of the definition of "director" has been changed relatively frequently in Australia since the enactment of the Uniform Companies Acts in 1961. Three amendments are of particular significance for present purposes, one to the concept of de facto director and two to the concept of shadow director.

I turn, first, to de facto directorship. The definition in the 1961 Act was as follows:
"**Director** includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act."

In *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236 the High Court held that the part of the 1961 definition that referred to a person "occupying the position of a director of the corporation by whatever name called" extended to a de facto director who continued to act as such after his appointment came to an end. The concept of "de facto director" expounded by the High Court is the same as the concept explained by Millett J in *Re Hydrodam (Corby) Ltd* [1993] 2 BCLC 180. In the latter case his Lordship said (at 183):

"A de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of the company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level.

"A de facto director, I repeat, is one who claims to act and purports to act as a director, although not validly appointed as such. A shadow director, by contrast, does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company."

These observations were approved by the English Court of Appeal in *Re Kaytech International plc* [1999] 2 BCLC 351. The effect is to give the concept of de facto directorship a relatively narrow scope in the United Kingdom.

An amendment was made upon the enactment of the Companies Code in 1981, said in the explanatory memorandum (clause 31) to be in response to Drysdale. The amendment extended the definition to "any person occupying or acting in the position of director of the corporation, by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position".

This extension of the definition is very important, because it directs the court's inquiry to the question whether the defendant has acted in the position of an individual director, whether or not the company has authorised or held the person out to do so. This is a wider concept than the one expounded by Millett J. Under the Australian definition, the question is whether the defendant has in fact joined with the other directors in making board decisions for the management of the company. It may be easier for the plaintiff to show that the defendant is a de facto director in this sense, than to establish a shadow directorship, which involves proving some form of dominance of the defendant over the board rather than mere conjoint decision-making (see *Harris v S* (1976) 2 ACLR 51, at 63 per Wells J and at 71 per Sangster J (noting that the decision was before *Drysdale*); *Bluecorp Pty Ltd (in liq) v ANZ Executors & Trustee Co Ltd* (1994) 13 ACSR 386, at 402-3 per Mackenzie J).

By and large, the English decisions have concentrated on shadow directorship. This is not surprising, since the UK definition of "director" does not have any equivalent of our post-*Drysdale* extension and has the more restricted meaning expounded by Millett J. In Australia, there is a growing recognition of the breadth of our de facto directorship concept, illustrated by such cases as *Deputy Commissioner of Taxation* *v Austin* (1998) 28 ACSR 565, applied in *Natcomp Technology Australia Pty Ltd v Graiche* [2001] NSWCA 120.

The two changes to be noted to the shadow directorship concept relate to "advice" and "instructions".

First, following the lead given by the UK legislation, the Uniform Companies Acts 1961 offered some protection for the company's advisers. Section 5(2) said:
"For the purposes of this Act a person is not to be regarded as a person in accordance with whose directions or instructions the directors of a company are accustomed to act by reason only that the directors act on advice given by him in a professional capacity".

The definition was revised on the enactment in 1981 of the Companies Codes of the Australian States. For present purposes, the important change was an extension of the protection afforded when the company acted on advice. Under the 1981 provision (Companies Code, s 5(2)):
"For the purposes of this Act, a person shall not be regarded as a person in accordance with whose directions or instructions the directors of a body corporate are accustomed to act by reason only that the directors act on advice given by that person in the proper performance of the functions attaching to his professional capacity or to his business relationship with the other person."

Amendments in 1983 made it clear that the business relationship could be one between the directors and the person, or between the company and the person. The concept has remained since that time, though the wording has been revised. Its importance for the prospective liability of banks and other financiers is obvious, but the protection is available only in respect of "advice" (note the discussion of this word in *Secretary of State for Trade and Industry v Deverell* [2000] 2 All ER 365). There is no equivalent provision in the UK legislation. I am not aware of any Australian cases explaining the meaning of the change.

It would appear that the banker-customer relationship is a business relationship for this purpose. Identifying the functions attaching to the banker's position seems to be a question of fact, influenced by the documents bearing on the relationship in the instant case, and (subject to that) such matters as the general practices of bankers. One would expect that a bank's functions would usually include reviewing and evaluating the company's businesses so as to decide whether to provide or extend credit or to take steps to protect the security or exercise it. Whether a banker's functions would, in normal circumstances, extend to altering and developing the borrowing company's businesses by means of a workout plan seems to be a moot question. The answer might depend on how closely connected the bank's activities are to the protection of its security.

The other important change is that the reference to "directions or instructions" in the old legislation was altered, by amendment made in the Corporate Law Economic Reform Program Act 1999, to "instructions or wishes". This seems to mean that the present Australian section is wider in scope than the UK provision: the Companies Act 1986 (UK), s 251, used the words "directions or instructions", as did the older

Australian legislation. As far as I am aware, there is no case law explaining the significance of the amendment or the meaning of the word "wishes" in this context.

3.3 Case law relevant to bankers and other financiers

In the leading Australian case, *Standard Chartered Bank of Australia Ltd v Antico (Nos 1 & 2)* (1995) 38 NSWLR 290, Hodgson J did not find it necessary to draw any sharp distinction between the de facto and shadow branches of the definition of "director". On the special facts of that case, he reached the conclusion (at 327-8) that Pioneer was a director of Giant because Pioneer, through its representatives, either acted in the position a director or controlled the Giant board. At the time, the insolvent trading provision applied to anyone who took part in the management of the company, and Hodgson J held that Pioneer took part in the management of Giant, quite apart from his decision that Pioneer was a director of Giant.

There is one observation in his Honour's judgment that has some general relevance to workouts. He said (at 327):
"I accept that a holding company is not a director of its subsidiaries, merely because it has control of how the boards of its subsidiaries are constituted; that it is not uncommon for lenders to impose conditions on loans, including conditions as to the application of funds and disclosure of the borrower's affairs; and that it is even less uncommon for lenders to require security for a loan, and then to require the sale of property over which this security is given. Certainly, these factors on their own would not amount to assuming the position of a director, or taking part in the management of a borrower company."

As mentioned earlier, it is of assistance, where the principles are stated in broad terms, to examine their application in cognate fact situations. I have selected several cases reasonably close, factually, to the involvement of bankers and (in the next section) advisers in workouts. I am not attempting any comprehensive presentation of the case law.

In *Re MC Bacon Ltd* [1990] BCLC 324 the question was whether a debenture granted by a company to a bank to secure existing indebtedness was a voidable preference under the Companies Act 1986 (UK). Under that legislation the court could not make an order in respect of a preference given to any person unless the company which gave the preference was influenced in deciding to give it by the desire to put the person receiving the preference in a better position in the company's winding up than the person would have been in if nothing were done. Millett J (as his Lordship then was) held on the facts that the company was not influenced by the desire to confer a preference on the bank, because it had no choice but to grant the bank security if it wanted to continue to trade. That finding is not immediately relevant.

The UK legislation created a presumption that the company had been influenced by the desire to confer a preference if the person receiving the preference was a director or shadow director of the company. Initially the liquidator alleged that the bank was a shadow director of the company. The bank sought an order striking out that claim as disclosing no cause of action, but Knox J refused the bank's application

(*Re A Company, ex parte Copp* [1989] BCLC 13). The judgment is curious because, after setting out the facts and the law on summary dismissal of claims, his Lordship simply stated his conclusion that the "shadow directorship" contention was not obviously unsustainable, and declined to give his reasons (at 21). When the case came before Millett J for final hearing, the contention based on shadow directorship was withdrawn after six days of oral evidence. Millett J noted this ([1990] BCLC at 326) and merely remarked, without extrapolation, that the shadow directorship claim was "rightly abandoned".

Consequently the facts of the case, given in detail in the judgment of Millett J, are an illustration of intervention by a bank falling short of creating a shadow directorship, though the judgments do not tell us just what it was that led to a conclusion in favour of the bank.

The company had been trading profitably until its major customer withdrew. Shortly afterwards the two long-standing directors, Mr Creal and Mr Glover, decided to retire and leave the management of the business to Mr Creal's son Martin. By that time the company had reached its overdraft limit with the bank. The bank manager was unhappy with the change of control and he commissioned a report from the bank's financial services section. He also exerted pressure on the directors to grant a debenture in favour of the bank to secure the existing indebtedness.

The report by the financial services section called for further information including a business plan and an integrated profit and loss and cashflow forecast. It recommended that Mr Glover should undertake the role of managing director for a short period in substitution for Martin, and that the company should consider recruiting an outsider. In fact the arrangements implemented as a result of the report were that Martin continued with the title of managing director but was subject to directions by Mr Glover, who accepted responsibility "without portfolio". The bank offered continuation of the overdraft facility on the condition that a first mortgage debenture be granted over the company's fixed and floating assets.

Shortly afterwards the bank manager lost all confidence in the company's management and wrote to Martin. The letter said that the bank would extend the overdraft facility for a further two months, during which time he hoped the company's sale would be concluded. It stipulated that the bank's continuing support was subject to the opening of a separate wages and salaries account. It recommended that the directors seek advice as to their liability under the Insolvency Act given the position portrayed in the report of the financial services section. Millett J said he was satisfied that Mr Glover, Mr Creal and Martin all knew that the company was actually or virtually insolvent at all relevant times, and that if the bank withdrew its support the company would be forced into immediate liquidation.

I suggest that the factors leading Millett J to conclude that the shadow directorship allegation had been rightly abandoned included the following:

- the bank's actions were all consistent with the objective of recovery of the amount owing to it and protection and enforcement and security;
- the bank did not seek to negotiate any additional advantage beyond obtaining and then enforcing the debenture with a view to recovery of the amount lent;

- the report was prepared by the bank's own financial services section and its contents were clearly recommendations, except to the extent that the bank adopted particular recommendations as conditions for continuation of the overdraft facility;
- some of the recommendations in the report were in fact not implemented by the company;
- the evidence did not show that the bank manager moved outside his role as banker and into co-management of the company's affairs with the directors.

It seems to me likely that the same result would have been reached and if the current Australian provisions had been applicable. Analytically, the fact that the bank was purporting to act as creditor to protect and enforce its security would not be an obstacle to the conclusion that the directors were accustomed to act in accordance with the bank's instructions or wishes. Indeed, evidence of that kind might support such a conclusion. But other factors pointed against the bank being a shadow director. The report by the bank's financial services section contained some expressions of opinion that could be regarded as the bank's "wishes", though the only parts of the report that became "instructions" were those that became conditions for continued support. Significantly, some of the matters in the "wishes" category were not implemented by the company. Therefore, on the evidence, it could not have been said that the directors of the company were accustomed to act in accordance with the bank's wishes.

Additionally, the bank's conduct seems on the facts to have been entirely referable to its position as creditor of the overdraft debt. It was not adopting a role of continuous and ongoing input into the company's affairs, and it was not seeking to extract some additional advantage not flowing from its commercial position as creditor. Therefore:

- to the extent that the directors acted in accordance with the demand made by the bank manager for the execution of a debenture, it was not a case where directors were "accustomed" to act in accordance with the instructions of another, but simply a case where the bank manager was using the commercial leverage provided by the company's circumstances to improve the bank's security as creditor;
- to the extent that the directors acted in response to the recommendations in the financial services section's report, they were responding on a single occasion to a particular report rather than exhibiting a custom of acting in accordance with the bank's instructions or wishes; and further, they were responding to advice given by the bank in the proper performance of functions attaching to the bank's business relationship with the company.

In *Re PFTZM Ltd (in liq), Jourdain v Paul* [1995] 2 BCLC 354, the company conducted a hotel and country club. It entered into a financing arrangement with Humberclyde by way of lease and leaseback of the hotel premises. The rental payable by the company represented interest for the first five years, and thereafter interest and capital repayments. After some years the managing director of the company informed Humberclyde that, based on future bookings and general interest, the forecast profits would not be enough to service the rent. After discussions with Humberclyde, it was agreed that the managing director would remain in office but would draw no salary until the project started to show a profit; there would be weekly management meetings attended by representatives of Humberclyde; and all of the revenues of the hotel and country club were to be paid into an account in the name of Humberclyde, which would authorise withdrawals on a four-weekly basis upon receipt of a certificate from the financial controller of the company as to the company's payment needs, subject to a right of veto on the part of Humberclyde; the company's capital expenditure program, and staff changes, had to be approved by Humberclyde.

The issue before the court was whether questions that the company's liquidator proposed to ask officers of Humberclyde in an examination were oppressive, so that the Registrar's order for the examination should be set aside. The court set aside the order. Judge Paul Baker QC said (at [368]:
"It is admitted that the applicants are not directors. The examination is directed to show that they are shadow directors. I find that there is no prima facie case made out, and it is unlikely that further information will come to light to show that they are shadow directors. The central point, as I see it, is that they were not acting as directors of the company, they were acting in defence of their own interests. This is not a case where the directors of the company, Steven and his colleagues, were accustomed to act in accordance with the directions of others, ie the applicants here. It is a case here where the creditor made terms for the continuation of credit in the light of threatened default. The directors of the company were quite free to take the offer or leave it."

As in the *MC Bacon* case, it is not easy to see why the fact that Humberclyde was acting in defence of its own interests was an obstacle to the conclusion that the directors were accustomed to act in accordance with Humberclyde's instructions.

One wonders how important it was that, in the judge's view, the directors were free to reject Humberclyde's offer. It appears that if they had done so, Humberclyde would have enforced its security earlier than it did, and the company would have ceased to trade or its business would have been sold. In a sense, therefore, the directors had no choice but to accept the terms laid down by Humberclyde. They were in the same position as the directors of MC Bacon.

Humberclyde had quite a substantial level of participation in the management of the company's business. It seems to me that the requirement that receipts be paid into a Humberclyde account, though a great intrusion into the company's business, is not problematic for a financier because it is clearly directed towards recovery and protection of security. The same can be said of the right to review and veto the capital expenditure program. Humberclyde's right of veto over staffing changes seems less clear, because it seems to amount to involvement in general management. The participation of Humberclyde's representatives at weekly management meetings seems decidedly risky, although we have no evidence in the case as to just what the Humberclyde representatives did. That, presumably, was what one of the matters the liquidators wished to explore. The judge's finding that it was unlikely that further information would come to light to show that they were shadow directors suggests that even if it had emerged that the Humberclyde representatives had had a very active participation in matters of management during those meetings, their activity would not have brought Humberclyde (or themselves) within the definition of "director". I wonder whether Judge Baker QC might have gone too far in this respect.

Under the Australian definition, there would be scope for arguing that Humberclyde had become a de facto director because, though not validly appointed to the board, it acted in the position of a director. It did so by reviewing with other directors the position of the managing director, by participating in weekly management meetings (assuming this was full, voting participation), controlling disbursement of the company's funds, and approving the capital expenditure program and staff changes. There would be even greater scope for arguing that Humberside was a shadow director, because the level of involvement that I have outlined suggests not merely participation in directors' decisions, but control over management of the corporation's affairs. I find it difficult, with respect, to support Judge Baker's conclusion that there was not even an arguable case for this view.

3.4 Case law relevant to advisers in a workout

Re Tasbian Ltd (No 3), Official Receiver v Nixon [1993] BCLC 297 was a case about the position of an adviser. The question was whether leave should have been granted to the Official Receiver to apply out of time for a disqualification order against the adviser, Mr Nixon. That depended upon whether there was a fairly arguable case that Mr Nixon was a de facto or shadow director of Tasbian.

Tasbian was formed in 1981. Its business was manufacture and retail sale of electronic components. Castle Finance Ltd was the majority shareholder and also lender to Tasbian, on the security of a debenture. Tasbian also obtained a loan from the bank. The company never made a profit. In 1985 Castle introduced Nixon to the company. He was a chartered accountant and an experienced company director. Tasbian retained him as a consultant, to report on the company's financial position and to advise and assist in its recovery. He negotiated an informal moratorium of Tasbian's creditors. He negotiated on the company's behalf with the Department of Trade and Industry in the Inland Revenue. He became a necessary signatory on the company's bank account. He devised and advised on the implementation of a scheme whereby the company's labour force was transferred to a subsidiary.

Vinelott J held that there was a fairly arguable case that Mr Nixon was a de facto or shadow director. In the Court of Appeal, Balcombe LJ (with whom Lord Donaldson MR and Stuart-Smith LJ agreed) upheld Vinelott J's decision. Balcombe LJ observed (at 303) that little weight should be attached to Mr Nixon's role in negotiating a moratorium with creditors. He also expressed the view that Mr Nixon's motive of protecting the interests of Castle was irrelevant (at 304). The issue to be decided at the hearing would be "whether, for whatever purpose, he was controlling the company's affairs in a manner going beyond the province of a company's professional adviser". In his Lordship's view several factors were significant.

First, the company's arrangements with its bank for signing cheques, under which cheques were required to be signed by two directors and countersigned by Mr Nixon or one of his partners, enabled Mr Nixon to exercise the degree of control over the company's finances. Balcombe LJ referred to a letter by the company's managing director, written after Mr Nixon refused to sign certain salary cheques, in which he said he had placed in great deal of trust in Mr Nixon and had given him sufficient freedom to do his work. His Lordship observed that this letter may have been evidence that the directors were complaining that Mr Nixon was usurping their functions. A letter from Castle to the managing director spelled out the dire consequences that would arise if the company chose to counteract Mr Nixon's "instructions" and renege on verbal agreements made. Balcombe LJ concluded that Mr Nixon decided which cheques drawn by the company could and which could not be submitted to the bank, and therefore he was concerned with which of the company's creditors were to be paid and in which order, and to that extent it would appear that he was able to control the company's affairs.

Secondly, in Balcombe LJ's view Mr Nixon's participation in the transfer of employees to a subsidiary was a "weighty matter" (at 304) making it fairly arguable that he was a de facto or shadow director. The full evidence on this matter is not disclosed in the report.

Under the present Australian law, the conclusion in *Tasbian* would be reinforced by the statutory wording, which makes relevant the "wishes" as well as the instructions of the adviser. The Court of Appeal's reasoning does not distinguish between factors going to the establishment of a de facto directorship and factors going to the establishment of a shadow directorship. The emphasis placed by Balcombe LJ on Mr Nixon's position as co-signatory of cheques seems principally directed to de facto directorship. In the case of a shadow directorship, the question is whether the directors are accustomed to act in accordance with his or her wishes. The correspondence referred to by Balcombe LJ suggests that this was the case for the directors of Tasbian, and the facts show that Mr Nixon's involvement went beyond giving advice in the proper performance of the functions attaching to his professional capacity as a consultant.

3.5 Application to bank workouts

What follows are just some brief notes about the issues that may arise in applying the current Australian definition to the case of a bank engaging in the categories of activities outlined under heading 2. I am conscious of the difficulty that can be created when a judge throws away some extra-curricular obiter dicta without the benefit of the careful and specific reflection that (hopefully) has gone into the legal advices that are no doubt current on these questions today. I shall raise questions, and leave the reader to answer them, perhaps influenced by the general themes I have introduced.

<u>(a) intervention in governance</u>

(i) By intervening in these ways, has the bank "acted in the position of" a director?
(ii) Has the bank communicated "instructions or wishes" to the directors on governance matters?
(iii) If so, have the directors acted in accordance with those instructions or wishes?
(iv) If so, does this show the exercise of real influence over the corporate affairs of the company, though not over the whole field of corporate activities, so as to establish that the directors are accustomed to act in accordance with the bank's instructions or wishes (see *AS Nominees*, per Finn J)?
(v) Are the bank's communications on corporate governance properly to be characterised as "advice"?

(vi) If so, is it advice given by the bank "in the proper performance of functions attaching to [its] business relationship" with the directors or the company?

<u>(b) ongoing development and review</u>

(i) Do activities of this kind, added to the intervention in governance (category (a)), make it more likely that the bank will be held to have acted in the position of a director?
(ii) Do they make it more likely that the bank is exercising real influence over the corporate affairs of the company, thus supporting the conclusion that the directors are accustomed to act in accordance with the instructions or wishes of the bank?
(iii) Can the bank's participation in a committee dealing with such matters realistically be classified as giving "advice"?
(iv) If so, is it advice given by the bank "in the proper performance of functions attaching to [its] business relationship" with the directors or the company?

<u>(c) discussions with external parties</u>

Essentially, the same questions arise as under heading (b), although the circumstances to which those questions are applied are quite different circumstances. Note, also, the risk of civil liability for misleading conduct that arises as soon as dealings with third parties are involved (see 4.1 below).

<u>(d) workout transactions</u>

(i) Do the observations of Hodgson J in the *Standard Chartered Bank* case (at 327, quoted at 3.3 above) mean any conduct of the bank by way of extending financial accommodation on conditions, or exercising security, cannot contribute to the overall conclusion that the bank is a shadow director?
(ii) Is the bank necessarily at greater risk of being a shadow director if, as part of the workout arrangements, it takes equity either by way of capitalisation of existing debt or the injection of new funds?
(iii) Can sponsoring an incentive scheme for the benefit of all stakeholders, including suppliers, customers, employees, management and shareholders, ever be regarded as merely the giving of advice in the proper performance of functions attached to the bank's business relationship with the company?

4 Accessory and primary liability for misleading conduct and non-disclosure

This is a very large topic. Adequate treatment would require a much fuller exposition than is appropriate in this paper. For a fuller exposition, please refer to RP Austin, HAJ Ford and IM Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Butterworths 2005), paras [13.32]-[13.43] and [13.45]-[13.48].

Primary or accessory liability for misleading conduct can arise out of any of the activities of a bank or other financier, described under heading 2 this paper, if misleading conduct (including the making of misleading representations) is involved. Advisers are unlikely to be subject to primary liability, but they are at risk of accessory liability.

In order to give the issue some focus, I shall deal with some hypothetical facts relating, respectively, to liability for misleading conduct and liability under the continuous disclosure regime. I shall not comment specifically on the adviser's position, which can generally be inferred from my discussion of the position of the bank.

4.1 Misleading conduct

Suppose that as part of a workout, an ad hoc management committee is established, in which the bank's representatives participate. The directors agree not to implement decisions on certain subjects without the approval of the committee. The management committee, at a meeting attended by bank representatives, approves a recommendation of the directors for the issue of an information memorandum for the sale of a subsidiary which carries on a separate business. The information memorandum contains financial statements for the last financial year. The company's executive directors persuade the management committee that it is appropriate for the financial statements to accrue revenue from unbilled services, on the basis that these bills have not been rendered because of a glitch in the billing system. But all members of the management committee know that the bills relate to services performed many months previously. These matters are not adequately disclosed in the information memorandum. A purchaser acquires the business in reliance on the information memorandum, including the financial statements, and later discovers that revenue and EBITDA have been inflated by inclusion of the unbilled services, after it has sent out in bills for the services but then found them to be irrecoverable because of the age of the transactions.

The company has sold the shares in its subsidiary, which are securities and financial products for the purposes of s 1041H(1) of the Corporations Act (see the definition of "financial product" in s 764A(1)). Causing the distribution of the information memorandum is conduct in relation to those financial products. The conduct is misleading or likely to mislead (and may be deceptive or likely to deceive) because of the inaccuracies in the financial statements. The information memorandum is not a fundraising document for the purposes of Chapter 6D and its distribution does not contravene s 728, and so the exception in s 1041H(3) does not apply. Therefore every person who engaged in the conduct of causing the distribution of the misleading information memorandum has committed a contravention of s 1041H(1).

It is irrelevant to inquire whether those who did so intended to mislead, or whether anyone was actually misled by the conduct (although on the present facts, the purchaser was misled), or whether those who engaged in the conduct did so honestly and reasonably or by failing to take reasonable care (see Austin, Ford and Ramsay at [13.32]). That being so, if the bank has engaged in misleading conduct by virtue of its participation in the management committee, it has contravened s 1041H(1). That would be so even if (contrary to our hypothetical facts) its representatives were completely unaware that unbilled data had been brought to account - that is, even if the bank was "innocent" in moral terms.

A person who suffers loss or damage by conduct of another person that was in contravention of s 1041H(1) may recover the amount of the loss or damage by action against that other person or against "any person involved in the contravention" (s 1041I). Section 79 of the Corporations Act explains when a person is "involved" in such a contravention. Included are those who have aided, abetted, counselled or procured the contravention; induced the contravention; conspired with others to effect the contravention; or have been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to the contravention. If the bank's participation in the management committee meeting does not amount to engaging in the conduct of causing distribution of the misleading information memorandum, and is therefore not a contravention of s 1041H(1), it may nevertheless be exposed to civil liability for damages in an action by the purchaser of the business, if it has been "knowingly involved" in the contravention by those who distributed the document, in any of the ways defined in s 79.

Knowledge is an essential ingredient of this accessory liability. In *Yorke v Lucas* (1985) 158 CLR 661, Mr Lucas, the director of an incorporated land agent acting for the vendor of a business, supplied misleading turnover figures to the purchasers, when acting as director of the agent. He obtained the vendor's written confirmation of the accuracy of the figures on at least three occasions, and was not aware and had no reason to suspect that the information was incorrect. The High Court held that he was not liable under the accessory provisions in s 75B of the Trade Practices Act, because he was unaware of the circumstances that made the turnover figures misleading. This was so even though Mr Lucas's company, the agent, had direct primary liability notwithstanding its lack of knowledge. The company, but not Mr Lucas, had directly engaged in misleading conduct.

Accessory liability for involvement in a contravention arises only when it is shown that the defendant had knowledge of the essential elements of the contravention. But it is not necessary to prove that the defendant knew that the facts were capable of being characterised as misleading conduct under the statute. In *Heydon v NRMA Ltd* (2000) 36 ACSR 462, the Court of Appeal of New South Wales reached the conclusion that a prospectus which claimed that shares offered in a demutualisation would be "free" was not thereby misleading (disagreeing with the earlier decision of the Full Federal Court in *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452). However, both Malcolm AJA (at 559-60) and McPherson AJA (at 600) said that if, contrary to their view, the prospectus had been misleading, the lawyers who advised favourably on it would have been involved in the contravention, even though they believed that the contents of the document were not misleading.

Obviously it will be important to determine whether the bank has engaged in misleading conduct directly, or has merely been involved in misleading conduct undertaken by other members of the management committee. The answer will depend on a close analysis of the bank's role.

In *Hamilton v Whitehead* (1988) 166 CLR 121 a company contravened the corporations legislation by offering interests in a managed investment scheme to the public when it was not a public company and had not complied with the disclosure requirements. The wrongful conduct was actually performed by its director, Whitehead, who was found to be its "directing mind and will". The High Court said that the primary contravention of the corporations legislation was by the company, and additionally, Whitehead was liable as an accessory. He had acted in two capacities, first as the embodiment of the company and secondly as an individual knowingly concerned in the company's act.

Applying this law, it is arguable that the embodiment of the company is its board of directors, not an ad hoc management committee in which the bank participates, and consequently the bank's liability is accessory liability, which will arise only if it has the requisite knowledge. But it will be important to look closely at how the management committee is structured, and its relationship to the board, both in a documentary sense and operationally.

The wise course for banks would seem to be:

- to structure their participation so as to minimise the risk that they might be held to be in anything greater than an accessory position with respect to any misleading conduct that might occur, and
- to install protocols for participation in workouts to ensure that any situations where the bank's representatives might become aware of misleading documents or misleading conduct are identified and managed, with appropriate legal advice.

4.2 Contravention of the continuous disclosure law

This problem arises only if the company with which the bank is dealing is a disclosing entity. The most common example of a disclosing entity is, of course, a listed entity. A listed disclosing entity is subject to Chapter 3 of the ASX Listing Rules and in particular, the general disclosure requirement in Listing Rules 3.1, 3.1A and 3.1B.

Suppose that in the course of its investigations, the bank becomes aware of some material price-sensitive information about the value of the company's quoted securities - for example, a report provided to the managing director, substantially downgrading the value of the company's mining tenements because of very steep and unexpected increases in extraction and transportation costs. The bank knows that neither the report nor the cost increases have been released to the market.

Listing Rule 3.1 would require the listed entity to disclose this information to ASX. Since the report was provided to the managing director, the listed entity is aware of the information contained in it (Listing Rule 19.12). It is information that a reasonable person would expect to be disclosed. There is no basis for saying it is confidential information or a trade secret. Disclosure would not involve any breach of the law. It is not information about an incomplete proposal or negotiation and does not comprise matters of supposition or matters insufficiently definite to warrant disclosure. It is not information generated for internal management purposes. Therefore the exception to the disclosure obligation in Listing Rule 3.1A does not apply.

Under listing rule, the disclosure obligation is imposed on the listed entity. The obligation is reinforced by s 674(2) of the Corporations Act. Under this provision, failure to notify the ASX of information that is required to be disclosed under the Listing Rules is a contravention if the information is not generally available, and is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the entity's quoted securities. The contravention is a criminal offence by the entity (s 1311(1)), and is also subject to the civil penalty provisions (s 1317E(1)(ja)).

As a result of amendments made by the CLERP 9 legislation of 2004, the law now provides that a person who is involved in a listed disclosing entity's contravention of s 674(2) also commits a contravention of a "financial services civil penalty provision" (ss 674(2A), 1317DA and 1317E). Thus, a person involved in a listed entity's failure to make timely disclosure under the Listing Rules is exposed to a variety of civil consequences including a declaration of contravention, a pecuniary penalty order, and a compensation order (see s 1317HA).

"Involvement in a contravention" for the purposes of s 674(2A) is defined in s 79, briefly discussed above. Liability depends upon knowledge of the essential elements of the contravention by the listed entity. In our hypothetical example it seems that the bank has that knowledge. Merely knowing the disclosable information does not make the bank liable as an accessory, but if, through participation in a management committee or discussions with the directors or executive management or in some other wire, the bank is privy to discussions about the disclosable information and there is no decision to disclose it, the bank might come to be knowingly concerned in the failure to disclose. It is not necessary, for liability, for the bank to participate in a decision not to disclose, because the listed entity's contravention is its failure to disclose information of which it is aware, whether or not there is a formal decision not to disclose.

The bank's defence is in s 674(2B), which provides:
"A person does not contravene subsection (2A) if the person proves that they:
(a) took all steps (if any) that were reasonable in the circumstances to ensure that the listed disclosing entity complied with its obligations under subsection (2); and
(b) after doing so, believed on reasonable grounds that the listed disclosing entity was complying with its obligations under that subsection."

There is as yet no clarity as to the steps that must be taken in order to have the benefit of this defence. One would expect, however, that a bank that becomes aware of disclosable information would have sufficient leverage with the directors to ensure that disclosure is made, and consequently the practical effect of subsection (2B) will be that the bank must require disclosure even where disclosure is likely to reduce the value of the bank's security. Oddly, the defence is not available if the accessory does what it can to persuade the directors to disclose but (2 the knowledge of the accessory) the directors refused to do so. That is an incentive for the bank to be very persuasive.

A lesson to be drawn is that banks need to have in place sound protocols for their participation in workouts of listed entities, to ensure that their representatives identify disclosure issues which the bank can then manage, with appropriate advice.

5. Conclusions

Once a company is placed in some form of external administration, the liabilities of those who have dealt with the company, and who continue to do so, are comparatively clear, because of the accumulated experience of the law. Informal workouts are not governed by any separate chapter of the law. Those involved in a workout must be aware that various laws can impinge on their activities, and that there is no special statutory protection for them. The three areas explored in this paper seem to me to be amongst the most obvious areas of risk. But the risks are not insuperable. The wise course is for banks and other financiers, and workout advisers, to tread carefully and to take advice.