Duties of Directors to Shareholders and Creditors

- Hon. Mr. Justice B.H. McPherson C.B.E.

1. The study of company law.

Time was when company law was considered one of those dull but practical subjects studied by law students and taught by law lecturers because it was necessary to know, if not something about them, then at least that they existed. Attitudes changed after the publication in 1954 of Professor L.C.B. Gower's Principles of Modern Company Law[1]. By presenting company law in a form that was intellectually challenging, he made it academically respectable and, in the years that followed, inspired a growing stream of texts, journal articles, theses, legal papers, and court judgments on company matters.

Perhaps Professor Gower did his work too well. What is surprising is how little those later publications have added to his original analysis of basic problems in this area of law. From this wholesale denigration of the efforts of others, based I suspect on an imperfect acquaintance with the range of modern legal literature, I hasten to exempt in particular the works of two authors. One is Lord Wedderburn's monumental two-part article on the rule in Foss v. Harbottle published in 1957-1958 in the Cambridge Law Journal[2]; the other, two papers by Dr L.S. Sealy, one of which was published in 1967[3] and the second delivered at a recent conference of the Australian Universities Law Schools Association[4]. On an occasion like this, one might have hoped for scholarship approaching the standards of those publications. However, for reasons which are self-evident and entirely discreditable, it is necessary to be content with something much less memorable.

2. Character of shareholders' rights.

For those whose efforts cannot impress, surprise is the natural and only refuge. The subject of this paper is the duties of company directors to shareholders and creditors. You will be surprised to hear me say both that there are no such duties, and also that there is very little, if any, place for them in modern company law. Of course, much depends on what in this context is

meant by "duty". What I mean by it is a duty that is legally enforceable by the person to whom it is owed against the person who is subject to it. A supposed legal duty that is not matched by a remedy is, as Dr Sealy has recently reminded us, "a nonsense"[5]. Duties imply correlative rights, and it is necessary to begin by segregating the rights of the corporate entity from the rights of its members or, as they usually are, shareholders. A shareholder whose individual rights as such are transgressed or disregarded by directors has his remedy; but, statute apart, it is a remedy against the company, and not, or only very rarely[6], against the directors themselves. A decision of directors that is contrary to the rights of a member may be void or may be voidable at the instance of that member. He may be entitled to have the decision declared invalid or restrained[7], or even - although this is much less clearly established - to have the appropriate decision substituted in proceedings against a company proposing to act upon that decision[8]. But when you look at what actually happens, it is against the company and not the directors that the shareholder's right subsists and is enforced.

The problem is, like most others in the law, primarily one of definition and therefore of language. Having used the expression "individual rights" of members, I am bound to define it. What I mean by it are the rights a person acquires by becoming a member of a company. One day someone will, I hope, undertake a study of precisely what those rights are. I strongly suspect that a "right" on the part of members to have their interests considered by directors in making their decisions is not among them. But for present purposes it is enough to say that the rights of members are those that result from the twin statutory contracts : (a) between the member and the company[9]; and (b) between the members <u>inter se</u>[10]. The terms of those contracts are to be found primarily if not exclusively in the provisions of the articles of association, supplemented by statute and by various implications or additions introduced by judicial exegesis[11]. A prominent instance of the latter is the supposed duty of members in general meeting to act "bona fide for the benefit of the company as a whole"[12]. That, according to Lord Evershed in <u>Greenhalgh v. Arderne Cinemas Ltd.</u>[13], does not, "at any rate in a case such as the present", mean the company as

a commercial entity distinct from the corporators. It means "the corporators as a general body"[14].

By confining it to "a case such as the present", Lord Evershed was careful to circumscribe the proposition he was stating. The case was one in which rights conferred by the articles, and thus forming terms of the member's statutory contract, were being altered. The proposition was therefore directed to defining the limits of members' powers in general meeting to alter those rights. Nothing at all was said on the subject of the duties of directors to members or to the company, whether considered as a corporate entity or otherwise. It is therefore an error to treat it as if it were a statement of general application to the exercise of directors' powers and the performance of their duties.

3. A duty to "the company".

Greenhalgh v. Arderne Cinemas Ltd.[15], or what was said in it, nevertheless appears to be the principal source in recent times of the notion that directors owe a duty to the members. Dr Sealy introduces a section in his most recent paper[16] with a reference to Lord Greene's formulation in Re Smith & Fawcett Ltd.[17] Directors, said his Lordship in that case[18], "must exercise their discretion bona fide...in the interests of the company, and not for any collateral purpose". Having referred to it, the learned author is content to accept[19] Professor H.A.J. Ford's exposition[20], which is that "the company" in this context is not "the abstract entity" but the associated membership - "the members as a whole in their capacity as associated persons". With respect, the judgment in Re Smith & Fawcett Ltd. gives no support to that hypothesis. On the contrary, concerned as it is with the discretion of directors to refuse registration of a share transfer in a proprietary company, Lord Greene's judgment is directed primarily to emphasising the limited extent to which corporate interests may be permitted to impede the exercise by a member of his individual rights represented by the proprietary interest he possesses in his shares. The notion that directors of modern companies owe enforceable duties to the members, in whose interests they are required to act, is a relic of the early history of company law; but, as was demonstrated by Dr Sealy in

the first of his two papers[21], such a conception of the fiduciary duties of directors is "an out of date assumption"[22].

The reason why the assumption is outmoded is that, considered from a legal rather than economic standpoint, the single most striking innovation of mid-nineteenth century companies legislation was not freedom to trade with limited liability but freedom to trade in corporate form. Despite some false starts[23], the independent corporate personality of trading companies was acknowledged[24] well before Salomon v. Salomon & Co. Ltd.[25], which, contrary to textbook tradition, did no more than illustrate its capacity to resist attempts to undermine it. Approaching 150 years after the first general Companies Act, it is scarcely necessary to be reminded that in law a corporation is a separate entity distinct from the individual members that constitute or comprise it[26]. That is not only an elementary but the fundamental proposition of company law, to which all other rules are related and must conform. Because of it, the rule is that it is the company and not the members, either individually or collectively, that owns its property; the members themselves do not have even so much as an insurable interest in it[27]. It is the explanation for the first aspect of the rule in Foss v. Harbottle[28], which requires that, for a wrong done to the company, the only proper plaintiff is the company itself[29]. Hence, too, comes the rule that liabilities incurred by the company attach to it and not to the members or directors[30]. Just as corporate assets belong to the company, so do corporate liabilities.

Reduced to bare essentials, company law comprises little more than (1) a series of rules concerning corporate assets and powers, and the uses to which they may properly be put; and (2) a further and separate series of rules defining the structure that controls those assets and powers, in particular by ordering the internal distribution of authority between management and membership. In the course of the twentieth century the balance of power has moved emphatically to the board of directors. Directors are appointed by the general meeting; but, once in office, it is they and not the members who exercise the powers of the corporation.

4. Corporate powers and purpose.

Corporate powers are powers over or in relation to corporate assets. To everyone, whether member, director, employee or creditor, what matters most are the corporate assets and his particular rights or claims in relation to them. Textwriters and even judges continue to say that directors "are regarded as trustees...of the company's property"[31]. That is another out of date fallacy. Directors owe duties, some of them fiduciary, but they owe them to the corporation[32]; it is only by using metaphorical and inexact terminology that they can be described as trustees of company property. Corporate assets are vested in the company and not in the directors as trustees, who in relation to those assets possess no more interest in them at law or in equity than do company members. The passage quoted above continues to appear in a section of the current edition of Gower's book that discusses remedies against directors for misappropriating company property; it is related to an earlier section of the same chapter on "Directors' Duties" previously subtitled "Other secret profits" but now "Use of corporate property"[33]. What at that point the author is engaged in analysing is Regal (Hastings) Ltd. v. Gulliver[34] and other decisions about the duty of directors to treat as corporate property any assets or advantages that come to them in virtue of their office as directors. That is an area in which company law is deservedly expansive; but, the circumstance that company directors are in law bound to restore or account for company property and profits of office provides no justification in law for saying they are "trustees".

In any event, we are on this occasion less concerned to know what the corporate assets are than to know what may properly be done with them. In seeking an answer to that question, the first and critical consideration is that the assets are property of the corporation. It necessarily follows that they must be applied only for corporate purposes, or at least that they should not be applied for non-corporate purposes. At one time it was thought that, in order to identify corporate purposes, it was necessary and sufficient to look at the objects specified in the company's memorandum of association. To apply company property

to non-specified purposes was to act ultra vires. Acts of that kind would be restrained at the suit of a member, and the recipient of property, whether a director, member, creditor or complete stranger, could be forced to restore what he had received.

The decision in Ashbury Carriage Company v. Riche[35] conceived of the matter as one of corporate capacity or power wholly divorced from a consideration of the good faith, knowledge or beliefs of those involved. In retrospect, it can be seen that the decision moved the law in the wrong direction. The result was to bring the doctrine of ultra vires into such disrepute as to make it for a time the only aspect of company law considered worthy of academic study. Despite attenuation of the doctrine in Australia and elsewhere, memories of its acknowledged evils tend to obscure the fact that some conception of corporate purpose is inherent in all powers exercisable on behalf of the company. Without it, there is no reason why corporate assets should not be freely dissipated. The underlying conception must, however, be understood as a measure only of the propriety of dispositions of corporate assets. It does not function as a test of corporate capacity to make the disposition[36]; for that would mean the revival of the old doctrine of ultra vires. I do not know of anyone, at least in Australia, who wants that.

5. Power to dispose of corporate assets.

The conception of which I speak is capable of explaining some apparently disparate decisions concerning the misappropriation or misapplication of corporate property[37]. Their underlying thesis is that there are purposes for which the assets of any and all companies may not properly be applied by those exercising power to dispose of them. Companies are incorporated with a view to using their assets for the purpose of carrying on business, and not, unless that is their business, for the purpose of making gifts of them to members or other persons[38]. The most obvious illustration is paying dividends out of capital. The original companies legislation of the mid-nineteenth century said little on the subject. The prohibition was a judicial implication arrived at by generalising from particular statutory provisions that were seen as maintaining

company capital as a guarantee fund for creditors[39]. To reach such a result required an expansive interpretation of the scheme and intention of early companies legislation. It was a further step, although a short one, for the House of Lords in Trevor v. Whitworth[40] to hold that a purchase by the company of its own shares came within the implied prohibition. After that, judicial creativity seems to have dried up. Statute was needed to extend the prohibition to applying corporate funds to assist the purchase of shares in the company. No one who has had to grapple with it or its judicial offspring could account the legislation a success.

The speeches in Trevor v. Whitworth contain references to Ashbury Carriage Co. v. Riche and the ultra vires doctrine. But the fundamental objection was identified by Lord Macnaghten in that case when he said that, for a company to invest capital in purchasing its own stock, or to return any portion of its capital to any shareholder, was quite simply "contrary to the plain intention of the Act of 1862, and inconsistent with the conditions upon which, and upon which alone" Parliament had granted the right of trading with limited liability[41].

The notion that companies legislation embodies implied conditions that are fundamental to corporate activity is, I believe, not confined to dispositions of company "capital" in anything like its technical sense. No one supposes that Trevor v. Whitworth is limited in that way, or that a company is, without more, entitled to purchase its own shares from profits rather than capital. Likewise, when it is said that dividends may not be paid out of capital, the word "dividends" is not used only in its primary sense of a money payment but extends to dispositions of company property in specie[42]. Standard textbook treatment of the topic nevertheless assumes that there exists, more or less in isolation, a series of special rules relating to company "capital" in an accounting or bookkeeping sense; and that the sole function of those rules is to preserve capital as a guarantee fund for creditors. Shareholders, however, seldom have the interests of creditors in mind when, as sometimes happens, they succeed in restraining payment of "dividends" out of "capital"[43]. Cases like that reveal the true function of those rules. They serve as a particular illustration of a

general prohibition against misusing corporate power to dispose of corporate assets. Because those responsible for such depredations are usually the majority or controlling shareholders, who nowadays are usually directors, improper dispositions of that kind tend to pass under the description "fraud on the minority". As such, they are treated in the texts as an aspect of "controlling shareholders' duties", where they are confusingly lumped together with the duties inter se of shareholders in general meeting[44]. The truth is that in such cases "the majority" are practising a fraud on the company[45], which, as we all know, can, under an exception to the rule in Foss v. Harbottle[46], be redressed in a representative or "derivative" form of proceeding to which the company itself must be made a defendant party[47]. Its presence is necessary in order to ensure that a successful judgment for restoration of corporate assets operates in favour of the company and not of those members who are plaintiffs[48]. If it were not for this requirement, the effect of the judgment would in many cases be to distribute a dividend to the successful plaintiffs. That would be objectionable on two counts : in some cases the distribution might be effected out of a capital asset; invariably it would benefit only those of the shareholders who had elected to become plaintiffs. In this way, the procedural mechanics of the action demonstrate and confirm the rule of substantive law, which is that the assets belong not to the members but to the corporate entity, in whose interests alone they may be used.

The basis for allowing recovery in cases of fraud on the minority has not always been uniform nor has it been uniformly stated. Sometimes the ultra vires doctrine is invoked eo nomine[49]; sometimes it is rested on the traditional ground that a return of capital to members is involved[50]; more commonly nowadays the transaction is likely to be struck down as an abuse of directors' powers[51]. In whatever form it is expressed, the practical effect is to protect the assets from dissipation for improper or non-corporate purposes. This in turn suggests that an incidental purpose of preventing "fraud on the minority" is to maintain corporate assets as a guarantee fund for creditors. It is not only members who suffer if company property is misapplied or misused. It must surely be contrary to the "plain

intention" of the Companies Act that corporate powers should be used, whether with or without the assent or acquiescence of some or of all the members, to misappropriate corporate assets[52].

Something more fundamental is involved than the interests of members alone. That is why there can be no cakes and ale "except such as are required for the benefit of the company"[53]. Lord Justice Bowen's famous aphorism to that effect comes close to encapsulating all that can and need be said on the subject of corporate assets and the power to dispose of them. It is at this point that attempts to identify "the company" as the "associated membership" rather than the corporate entity irretrievably break down. If benefit to members is the sole criterion, it is difficult to discover any limit in law to the quantities of cakes and ale that directors are justified in distributing. But the protection of corporate assets is not left to the mercy of the greatest happiness of the greatest number of members. Difficult though it may be to express with precision, the underlying principle is that corporate assets must be applied for corporate purposes, and not for the benefit of other persons, whether they are shareholders or strangers, and whether few or many. The functions and consequently the duties of directors take form and character from this paramount consideration.

6. Other corporate powers.

This "fundamental condition" or underlying principle of corporate behaviour is capable, with more or less facility, of being applied to all powers exercised by directors. In some instances, like issuing shares[54] or approving share transfers[55], the interests of the company viewed as a corporate entity may be affected only at the periphery. That is because, objectively considered, it is for the most part a matter of indifference to the inanimate corporate entity who are the persons that hold its shares or control the voting in general meeting. But that is by no means always the case; and in any event it does not follow that, because corporate interests are not vitally involved, directors are justified in exercising corporate powers affecting shares for the non-corporate purpose of capturing or retaining control of the power structure of the company. Experience in

legal practice suggests that the major problem in advising directors intent on using new share issues as a response to takeover proposals is to elicit some plausible corporate-oriented reason, other than a subjective belief in the superiority of their own management skills, for the defensive measures they have in mind. If there is no corporate advantage to be had, it is seldom possible for directors to offer a legitimate reason for exercising their powers at all.

Exercising corporate powers of making contracts involves special legal problems of its own; in particular, the fiduciary character of directors' duties to the corporation attracts restrictions on their power to engage in transactions with the corporation, which, according to the current of contemporary authority, can be prospectively or retrospectively waived by a resolution of the company passed by means of the votes of those directors themselves[56]. Such a result is a consequence of the indisputable character of voting power in general meeting as a species of property which as proprietor a shareholder may use as he pleases[57]. It follows that a power that is exercisable in the hands of a director only for corporate purposes may in the end be used in the interests of a controlling majority. Such a state of affairs is frequently, and I think rightly, regretted[58]; but it may be a consequence of the form in which the governing structure of companies is arranged. When the board is not free to act, power reverts to the general meeting where the directors resume the character of shareholders.

7. The interests of creditors.

If it is necessary in the interests of minority shareholders that corporate assets should be protected against the depredations of the majority, it must, as I have already suggested, logically also be necessary to preserve those assets in the interests of creditors, who have "no debtor but that impalpable thing the corporation, which has no property except the assets of the business"[59]. It is impossible to suppose that creditors lose their protection simply because the assent or acquiescence of all members is given for their application for improper purposes. That is demonstrably not so in the case of payments out of capital, for in Trevor v. Whitworth the articles

of association expressly authorised the purchase by the company of its own shares[60]; and in Australia there is now clear authority for saying that directors may not properly apply the corporate assets of a company in paying the debts of another. In Walker v. Wimborne[61], Mason J, with the concurrence of Barwick C.J., spoke of "the fundamental principles" that each of the companies "was a separate and independent legal entity, and that it was the duty of [the company] to consult its interests and its interests alone in deciding whether payments should be made to other companies"[62].

The claim in Walker v. Wimborne was determined in misfeasance proceedings in winding up. In the event of corporate insolvency, it is creditors who have the only legitimate interest in the assets. The difficulty is to find a remedy at a time before the ultimate failure of the company as a trading venture is demonstrated by its winding up. In the case of creditors there appears to be nothing resembling the shareholders' derivative suit for fraud on the company[63]. That is surprising if it is the function of company capital to serve as a guarantee fund for creditors; but in Mills v. Northern Ry. Co. of Buenos Ayres[64] persons claiming to be creditors of a company were refused an injunction to restrain payments alleged to involve misapplication of company capital in payment of dividends to preference shareholders. This attempt by a creditor to invoke the court's assistance on the ground that he was "about to be defrauded by reason of their [scil. the company's] making away with their assets" was peremptorily despatched by Lord Hatherby L.C. as "hardly capable of argument"[65]. It would, he thought, be "fearful" for the court to assume such an authority; "it would be called on to interfere with the concerns of almost every company in the Kingdom against which a creditor might suppose he had demands"[66]. A similar fate befell the application of a secured debenture holder in the later case of Lawrence v. West Somerset Mineral Ry.[67]. It is relevant to add that in the first of the two cases the plaintiff's claim to be considered a creditor was in dispute; and that in the second his debt was admittedly not yet due and payable. On proof of corporate insolvency, those plaintiffs might, in the capacity of a contingent or of a prospective creditor, now succeed in having

the company wound up, which adds contemporary force to the Lord Chancellor's remark in Mills v. Northern Ry. Co. that the only remedy of an unpaid creditor is judgment and execution or winding up.

It remains to be seen whether the development of the Mareva injunction is capable now of producing a different result in cases of this kind. It will not alter the fundamental proposition that the only duty owed to a creditor is to pay his debt, or that it is a duty owed by the company. That is the direct consequence of extending the privilege of incorporation to trading enterprises. Liabilities are incurred by the company and by no one else. Contrary to what is often said, it is necessary to emphasise that the companies legislation of the mid-nineteenth century did not in terms confer on company members the privilege of limited liability. What it did was to allow trading in corporate form but subject to the imposition on members of a liability to contribute to a fund for payment of corporate debts[68]. Admittedly the liability imposed was limited, but it was and is nonetheless an imposition and not a reduction or limitation of liability; without it, there would be no liability at all. Debts incurred by the company remain debts of the corporate entity; absent the statutory duty to contribute, and there is no liability whatever on the part of company members for corporate debts[69].

8. Corporate power to incur liabilities.

It is profligate use of corporate power to incur liabilities that presents both courts and legislatures with the most pressing contemporary problem in company law. It would require bold interpretation of the underlying thesis of companies legislation for a court to condemn as legally improper the exercise of corporate power to accumulate liabilities once it was evident that the company could never succeed in discharging them. So far, no reported decision appears to go this length, and such authority as there is suggests that liability does not attach to directors for incurring corporate liabilities in the face of impending corporate insolvency[70]. Legislation was needed to impose what is now known as fraudulent trading.

It may have been considerations like these that prompted

Cooke J in Nicholson v. Permakraft (N.Z.) Ltd.[71] to say that, because the duties of directors are owed to the company, they may be required to consider creditors' interests before disposing of the assets in conditions of corporate insolvency or near-insolvency. I see no difficulty in regarding that as a species of misapplication or misfeasance; there is already authority for saying that authorising preferential payments to particular creditors before winding up may produce personal liability on the part of directors[72]. But actions of that kind involve a disposition of corporate assets[73]. It is not the question that is now being considered, which is the impropriety of continuing to incur corporate liabilities in the face of impending insolvency. That was, however, another of the matters referred to in Nicholson v. Permakraft (N.Z.) Ltd., where Cooke J suggested "an action by a particular creditor against the directors or company for breach of a particular duty of care arising on ordinary negligence principles"[74]. The sentence following that remark makes it clear that His Honour's observations were directed to a liability for corporate indebtedness and not simply to the use of corporate assets for its discharge. The example given in the judgment is that of directors who "obtain credit for the company when they ought to know that the creditor incorrectly understood a valuable asset to belong to the company"[75].

The suggestion (which is by no means explicit in the remark made by Cooke J) that a general duty of care may be owed by company directors to creditors has not been received with universal enthusiasm[76]. There are objections of principle to such a form of personal liability. One is that it contradicts the whole concept of limited liability trading. Until quite recently it was possible under the companies legislation to incorporate a company having directors whose liability was unlimited. It need hardly be said that in practice such companies were unheard of, and the Australian uniform Companies Code does not now trouble to refer to them. A more cogent objection is that the creditor trusts to the company and not to the directors to pay him. The work, said Lord Hatherby L.C. in Mills v. Northern Ry[77] "is done simply on the credit of the company", with the consequence that the creditors of a company

must look for payment to their corporate debtor. To that objection it may be rejoined that it is the incurring of the indebtedness rather than its subsequent non-payment that attracts the duty of care. But that would be highly artificial. It is payment of liabilities that creditors look for, not duties of care in incurring them[78]. In any event, the duty thus sought to be imposed on directors is not matched elsewhere in comparable areas of the law. If, acting as my agent, you incur liabilities on my behalf knowing I will probably not discharge them, you are not in consequence in breach of any general duty of care to the unpaid creditor with whom you have dealt. An agent impliedly warrants his authority but not his principal's solvency. The legal position of directors in this respect does not differ from that of an agent, no matter how much they or he may know about the principal's financial condition.

As a matter of principle it is difficult to identify any general duty of care in negligence on the part of directors, or any other agent or instrumentality, to refrain from using powers of incurring liabilities on behalf of others that are unlikely to be discharged. Except in respect of the statutory liability for fraudulent trading, company law proceeds on the acknowledged basis that corporate debts are liabilities of the corporation and not of anyone else. Protection for the creditor is left to free enterprise economics. It is commercially imprudent to extend credit to a company without better assurance than the bare promise of the company to pay. No legal duty of care is capable of protecting a creditor half as well as his own commercial judgment. It is a different matter altogether if corporate assets otherwise available for payment of creditors are diverted to non-corporate objects. That involves the directors in exercising corporate powers contrary to their duty to use them only for the proper purposes of the corporation. In that event they may expect to incur personal liability to the extent not of the unpaid debts, but of the assets improperly disposed of.

9. Conclusions.

Considerations of the foregoing kind combine to show that directors owe enforceable duties only to the corporate entity of

which they are directors. The conclusion follows rationally and, I believe, inescapably from the fact that the law regards the company as an independent legal entity. As such, it owns the corporate property over which directors exercise their powers of management and control. There is nothing at all radical in the notion that a person's property may not properly be used for the benefit of others except with the consent of the property owner. Directors' powers and duties take their character from that elementary legal proposition. In the case of companies, the only difference is that, except as recognized by legislation, consent is irrelevant. In the exercise of corporate powers, corporate assets may properly be disposed of only for corporate and not non-corporate purposes. To say that company property may be dissipated with the assent of directors or members is inconsistent with "the plain intention" of the Companies Act and with the unstated but fundamental conditions on which Parliament permits corporate trading to be carried on. To adopt any other attitude would be to sanction wholesale thieving of company property.

If directors owe enforceable duties only to the corporate entity, it follows that they owe no such duties to members, creditors or others. It is impossible at one and the same time to owe and discharge similar enforceable duties to different persons whose interests in the assets are actually or potentially in competition[79]. That is, however, not to deny that in making decisions affecting the corporation they are expected to take into account the likely impact of their decisions on shareholders, creditors, employees, and even the public in general. If they do not, the consequences for themselves, and ultimately for the corporation, are likely to prove detrimental. After acknowledging in Walker v. Wimborne the fundamental principle that the duty of directors is to the "separate and independent legal entity", and to it alone, Mason J continued -

> "In this respect it should be emphasized that the directors of a company in discharging their duty to the company must take account of the interests of its shareholders and its creditors. Any failure by the directors to take into account the interest of creditors will have adverse consequences for the company as well as for them"[80].

The supposed "duty" of directors to shareholders and creditors

extends so far, but it goes no further. It can scarcely be capable of legal enforcement by awarding damages, or even by the rather rudimentary means in which administrative or statutory discretion is controlled by the courts.

Social, political and economic considerations of all kinds exert conscious or subconscious influences on the attitudes of directors in making their decisions. Such factors ought not and, in any event, cannot be excluded. Personal considerations also play their part. I have yet to meet the director who believes that the interests of the company are not best served by leaving its affairs under his administration. That is why, in judging the propriety of exercising directors' powers, the composite "bona fide for the benefit of the company" offers only limited objective guidance. In the end, the paramount and only consideration capable of recognition by the law is the welfare of the company viewed as a corporate entity. Like guardians of human individuals, directors owe their legal duties to their charge and not to those others, numerous though they may be, who have an interest in its welfare. Some who adopt a different view of the duties of directors are troubled by images of the modern corporation as an artificial entity dedicated primarily to increasing its economic power, and devoid of those endearing sentiments that distinguish the human race. But that is exactly what companies are. It would be a mistake for the law to regard them as something else.

NOTES

1. London, Stevens & Sons; 1st ed., 1954.
2. K.W. Wedderburn : "Shareholders' rights and the rule in Foss v. Harbottle" : [1957] C.L.J. 194; [1958] C.L.J. 93.
3. L.S. Sealy : "The Director as Trustee" : [1967] C.L.J. 83.
4. L.S. Sealy : "Directors' 'Wider' Responsibilities - Problems Conceptual, Practical and Procedural".
5. Ibid, at 11.
6. Allen v. Hyatt (1914) 30 T.L.R. 444; Coleman v. Myers [1977] N.Z.L.R. 225.
7. Salmon v. Quin & Axtens Ltd. [1909] 1 Ch. 311; affd. [1909] A.C. 442; Hickman v. Kent or Romney Marsh Sheep Breeders' Association [1915] 1 Ch. 881.
8. cf. Rayfield v. Hands [1960] Ch. 1.
9. Hickman v. Kent etc. Association, above.
10. Rayfield v. Hands, above.
11. Wedderburn, op. cit., at 209-215.
12. Allen v. Gold Reefs of West Africa Ltd. [1900] 1 Ch. 656, at 671; Ngurli Ltd. v. McCann (1953) 90 C.L.R. 425, at 438.
13. [1951] 1 Ch. 286.
14. Ibid, at 291.
15. [1951] 1 Ch. 286.
16. Sealy : "Directors' Wider Responsibilities", op. cit., para. 9, at 2.
17. [1942] Ch. 304.
18. Ibid, at 306.
19. Loc. cit.
20. H.A.J. Ford : Principles of Company, 4th ed., para. 1507.
21. Above, n.3.
22. [1967] C.L.J. 83, at 90.
23. Oakes v. Turquand (1867) L.R. 2 H.L. 325, at 374-377.
24. Sealy : "Directors' Wider Responsibilities", op. cit., para. 5, at 1.

25. [1897] A.C. 22.

26. Salomon v. Salomon [1897] A.C. 22, at 51.

27. MacAura v. Northern Assurance Co. [1925] A.C. 619.

28. (1843) 2 Hare 461; 67 E.R. 189.

29. Wedderburn, op. cit., [1957] C.L.J. 194, at 196.

30. Salomon v. Salomon & Co. Ltd. [1897] A.C. 22, at 51, per Lord Macnaghten.

31. Gower : Principles of Modern Company Law, 4th ed. 1979, at 608, citing Re Forest of Dean Coal Mining Co. (1878) 10 Ch.D. 450, at 453.

32. Percival v. Wright [1902] 2 Ch. 421; Re Horsley & Weight Ltd. [1982] Ch. 442, at 454; Nicholson v. Permakraft (NZ) Ltd. [1985] 1 N.Z.L.R. 242, at 249.

33. Gower, op. cit., 3rd ed., at 535; 4th ed., at 591.

34. [1942] 1 All E.R. 378.

35. (1875) L.R. 7 H.L. 653.

36. Rolled Steel Ltd. v. British Steel Corporation [1986] Ch. 246, at 288, per Slade L.J.

37. Hutton v. West Cork Ry. Co. (1883) 23 Ch.D. 654; Re Lee, Behrens & Co. [1932] 2 Ch. 46; Parke v. Daily News Ltd [1962] Ch. 927; Re Day-Nite Carriers Ltd. [1975] 1 N.Z.L.R. 172; Walker v. Wimborne (1976) 137 C.L.R. 1; Ring v. Sutton (1980) 5 A.C.L.R. 546; Re Halt Garage (1964) Ltd. (1982) 3 All E.R. 1016; Re Horsley & Weight Ltd. [1982] Ch. 442; Russell Kinsela Pty Ltd. v. Kinsela (1983) 8 A.C.L.R. 384; affd. (1986) 10 A.C.L.R. 395.

38. Hutton v. West Cork Ry. Co.; Park v. Daily News Ltd., above; cf. also Lee v. Neuchatel Asphalte Co. (1889) 41 Ch.D. 1, at 17, per Cotton L.J.

39. Re Mercantile Trading Co., Stringer's Case (1869) L.R. 4 Ch. App. 475, at 488; Lee v. Neuchatel Asphalte Co. (1889) 41 Ch.D. 1, at 20-21, per Lindley L.J. Gower, op. cit., 4th ed., at 229.

40. (1887) 12 App. Cas. 409.

41. Ibid, at 433.

42. Australasian Oil Exploration Ltd. v. Lachberg (1958) 101 C.L.R. 119.

43. Ibid.

44. Gower, op. cit., 3rd ed., at 535ff.; contrast Gower, op. cit. 4th ed., at 614ff.; but cf. Re Halt Garage (1964) Ltd. [1982] 3 All E.R. 1016, at 1029-1030 per Oliver J, approved in Rolled Steel Ltd. v. British Steel Corporation [1986] Ch. 246, at 294, per Slade J.

45. Wallersteiner v. Moir (No. 2) [1975] Q.B. 373, at 390; Gower, op. cit., 4th ed., at 616 n.17.

46. Above, n.28.

47. Clarkson v. Davies [1923] A.C. 100; Ferguson v. Wallbridge [1935] 3 D.L.R. 66, P.C.

48. Wedderburn, op.cit., [1957] C.L.J. 194 at 196.

49. Re National Funds Assurance Co. (1878) 10 Ch.D. 118, at 127.

50. Australasian Oil Exploration Ltd. v. Lachberg (1958) 101 C.L.R. 119; Re Halt Garage (1964) Ltd. [1982] 3 All E.R. 1016.

51. Miller's (Invercargill) Ltd. v. Maddams [1938] N.Z.L.R. 490, at 491.

52. Cf. Re George Newman Ltd. [1895] 1 Ch. 674.

53. Hutton v. West Cork Ry Co. (1883) 23 Ch.D. 654, at 673, per Bowen L.J. "The money which is going to be spent is not the money of the majority...It is the money of the company...": ibid, at 671.

54. Ngurli v. McCann (1954) 90 C.L.R. 425; Harlowe's Nominees Pty. Ltd. v. Woodside (Lakes Entrance) Oil Co. NL (1968) 121 C.L.R. 483; Howard Smith Ltd. v. Ampol Petroleum Ltd. [1974] A.C. 821.

55. Re Smith & Fawcett Ltd. [1942] Ch. 304.

56. Bamford v. Bamford [1970] Ch. 212; Winthrop Investments Ltd. v. Winns [1975] 2 N.S.W.L.R. 666.

57. Menier v. Hooper's Telegraph Works (1874) 9 Ch. App. 350, at 354; North West Transportation Co. v. Beatty (1887) 12 App. Cas. 589.

58. See (1977) 51 A.L.J. 460.

59. Re Exchange Banking Co., Flitcroft's case (1882) 21 Ch.D. 519, at 533-534.

60. See (1887) 12 App. Cas. 409, at 432-433.

61. (1976) 137 C.L.R. 1.

62. Ibid, at 6-7.

63. Contrast the attitude of French law : see Andre Tunc (1982) 45 M.L.R. 1, at 6.

64. (1870) L.R. 5 Ch. App. 621

65. Ibid, at 627.

66. Ibid, at 628. Contrast Re Mercantile Trading Co., Stringer's Case (1869) L.R. 4 Ch. App. 475, at 488.

67. [1918] 2 Ch. 280.

68. Cf. McPherson : Law of Company Liquidation (3rd ed. 1987, by J. O'Donovan), at 289-293.

69. Webb v. Whiffin (1872) L.R. 5 H.L. 711, at 725; Salomon v. Salomon & Co. Ltd. [1897] A.C. 22, at 51; Risdon Iron & Locomotive Works v. Furness [1906] 1 K.B. 49.

70. Multinational Gas & Petrochemical Co. Ltd. v. Multinational Gas & Petrochemical Services Ltd. [1983] Ch. 258.

71. [1985] 1 N.Z.L.R. 242, at 249-250.

72. See Re Washington Diamond Mining Co. [1893] 3 Ch. 95; Re Yorke (Stationers) Pty Ltd. [1965] N.S.W.R. 446.

73. Kinsela v. Russell Kinsela Pty. Ltd. (1986) 10 A.C.L.R. 395.

74. [1985] 1 N.Z.L.R. 242, at 250.

75. Ibid.

76. L.S. Sealy, op. cit., paras. 46-60, at pp. 14-19.

77. (1870) L.R. 5 Ch. App. 621, at 628; Salomon v. Salomon & Co. Ltd. [1897] A.C. 22, at 53.

78. In any event, the extent of a tortfeasor's duty to those having purely contractual rights is, in Australia, not unlimited : see Caltex Oil Australia Ltd. v. The Willemstad (1976) 136 C.L.R. 529, at 544-556.

79. Cf. L.S. Sealy, op. cit., paras. 39, 57, at pp. 12-18.

80. 137 C.L.R. 1, at 7.