REGISTRAR OF COMPANIES v. BRIERLEY [1965] N.Z.L.R. 809

REGULATING THE ACCURACY OF COMPANY PROSPECTUSES

The decision in *Registrar of Companies v. Brierley* [1965] N.Z.L.R. 809 concerned the extent of criminal liability for misstatements in prospectuses. Two distinct questions were involved; the first whether under s.54 of the Companies Act 1955 there was liability for a prospectus accurate at the time it was filed in the Companies Office and first circulated but later misleading; the second whether such liability attached, on the facts, to advertised invitations to the public to lend money to a company under s.48A of the Companies Act 1955 (as inserted by s.2 of the Companies Amendment Act 1960). The argument in the Supreme Court turned on the precise meaning of the word "issue" since it was this term which determined the scope, in point of time, over which s.54 ranged. Liability under s.54 was liability for the *issue* of a prospectus containing untrue facts. The facts were never established since counsel for Brierley early took the objection that no offence could be established as a matter of law. There-after the proceedings resembled the old demurrer procedure. The indictment charged that an assertion in the prospectus that "shareholders' funds thus exceed £30,000 and will shortly be augmented" and other assertions as to capital backing were untrue and it can be inferred from the indictment (if the prosecution could establish their case) that the defendant republished facts which may have been true on the registration of the prospectus but were no longer true when he published verbatim copies of the prospectus in newspapers some months later.

SECTION 54 – THE "ISSUE" OF A PROSPECTUS

Hutchison J. in reaching his conclusion in *Brierley's* case (ibid, at 812) states that before the word "issue" first received statutory definition in the amending Act it was not a technical word. This view is clearly supported by the difficulty in reconciling the various parts of the Act where "issue" and "publication" are used virtually interchangeably. He recognises that issue is more than publication, thus answering most of the appellant's submissions. Hutchison J. concludes (at foot of 812) that "issue" bears an inclusive meaning covering the registration, publication

and *first* distribution of a prospectus.

It is not difficult to accept the view that "issue" includes publication and registration, though these operations could as easily be conditions precedent to the issue. But with respect, his Honour produces little argument in support of what is the vital part of his decision; that issue refers only to the *first* distribution.

Some arguments adopted by the Court deserve critical appraisal. One such argument, relied on by the Court, was that since the Australian legislature preferred to use the word "issue" in substitution for the word "publication", used in a corresponding section by the English legislature, this points to the two terms having the same meaning. The desirability of uniform commonwealth legislation was advanced to support this argument. Though not denying the efficacy of preferring an interpretation which is consonant with commonwealth uniformity in resolving an ambiguity, it is incongruous in this context. The very point to be decided is whether, when the Australian legislature changed the wording of the English section, it intended to change the law, and relying on the desirability of uniformity to equate the two concepts is unconvincing.

In attempting to find what the legislature meant by "issue" counsel cited examples of its use in other parts of the Act. It is a moot point whether such argument is helpful in determining if the legislature "intended" to cover a circumstance which it seems obvious was not considered when the statute was drafted. The very difficulty in construing the term points to this. Many jurists question the validity and meaning of "legislative intention", [1] this ex post facto tabulation of hundreds of individual intentions which must at best be guesswork. It may therefore be difficult to apply s.5 (j) of the Acts Interpretation Act 1924 to an Act without sufficient recent "mischief" by which this intention can be ascertained.

It is submitted that the common law presumption which would require a strict interpretation of s.54, since it is a penal provision, can no longer give an easy solution to an embarrasingly ambiguous provision. It is no longer satisfactory to state that because there is an ambiguity the would-be wrong-doer is not clearly shown to be liable and must therefore be discharged. This is especially so where, as in *Brierley's* case, the provision is mainly regulative and carries only a fine for those who are in breach. With the trend of modern authority the presumption is at a low ebb. For instance, the English Court of Appeal in *R. v. Oakes* [1959] 2Q.B. 350, in construing the Official Secrets Act 1920 was prepared to read the word "and" for the word "or" to get an intelligible meaning from a penal enactment and thus hold the appellant criminally liable. Where there is a possibility of s.5 (j) being applied this will clearly prevail over the common law presumption. [2]

If the arguments based on usage in the Act do have any value then the verbal argument with most force is that s.57 (4) refers to a "first issue" of a prospectus. This indicates that the draftsman contemplated issue as an act which could not be completed in one finite performance; in other words either there could be a number of issues of one prospectus or, and this point is not canvassed in *Brierley's* case, issuing may be a continuing act which does not terminate till complete distribution of the prospectus or its withdrawal.

There is not the same cogency in the respondent's argument that in the schedules to the Act many matters are required to be done before "issue". When the non-technical nature of the term is considered the legislature may well have meant that these were conditions precedent, literally, to "any issue". This is quite common usage. For example it would be common parlance to say "all persons must get a licence before they can drive a motor vehicle". It would plainly be ridiculous to expect a person to sit the exam for a new licence on every occasion he wishes to drive.

It is possible that the confusion arises because two separate concepts are confused in the Act. One meaning of "prospectus" is an individual document which is given out or "issued" to the public. The same term "prospectus" is used collectively to refer to the registration and distribution of a great number of these documents, and the word "issue" is used for this also as if it is synonymous with the other meaning. In fact the distinction is vital in determining at what point of time issue does in fact take place.

With the greatest respect, it is difficult to see the relevance of the analogy the learned Judge purports to draw from s.53 (ibid, at 813) in support of his view of the meaning of "issue". In s.53 there is good reason for limiting civil liability to the period up to the time of allotment of shares [3] and for making directors liable only for statements they knew to be false before the time of allotment.[4] That reason is that civil liability is based only on a false statement *which induces someone to subscribe* (i.e. the damage, to be actionable, must reasonably flow from the false inducement) – once the shares have been allotted they have already been sold, there is no question of the prospectus then inducing the person to subscribe for the shares and no civil liability arises. But for criminal liability to arise under s.54 there is no necessity for anyone to have been induced by the false statement – the crime is in publishing and issuing the false statement simpliciter. Therefore it is invalid to draw an analogous limit for the period of criminal liability. The omission of such references in s.54 shows (if it shows anything, which it probably does not) that criminal liability may last longer than civil liability.

In effect the decision in *Brierley's* case is left only with the basis of the slim authority of a brief and unreasoned statement by a textbook writer [5] and a tacit acceptance that there is a widely recognised plain meaning of this word "issue". This it is submitted, is a subjective and unreliable argument. First it has already been demonstrated that the Courts have been faced with an uncertain and double meaning and second there is the obiter dictum of Viscount Sumner in *Nash v. Lynde* [1929] A.C. 158, 168, which was summarily rejected by the Court in *Brierley's* case. Viscount Sumner's reference (ibid) to a need for some "measure of publicity" to constitute issue, if it proves nothing else, at least shows that his lordship could contemplate a different meaning. For, if publicity is required to make an issue, how can a prospectus be said to be issued on the mere formal publication, registration and very first distribution? An interesting observation is that the learned Judge himself uses the term "first issue" (ibid, 815 one line from last) – how does that fit in with his general theory and assertion as to the clarity of the term "issue"?

A further argument which supports an extension of liability to cover statements true when first circulated but later false presents itself. This argument is admittedly at a tangent to the approach of counsel in the Supreme Court and by the Court itself. It depends on a wide interpretation of the word "context" in s.56 (a). If this is read to include not only the surrounding words of the prospectus but also the time and place where it appears (provided, of course, the person issuing the prospectus in some way warrants its truthfulness in this context) then much the same effect is achieved as by s.48A. It is submitted that it is entirely reasonable to give this meaning to the word "context". The truthfulness of any prospectus or inducement cannot be determined in the abstract without reference to such factors external to it as the time and place of its appearance.

SECTION 48A – PROSPECTUS PROVISIONS WIDENED s.48A of the Companies Act 1955 (as inserted by s.2 of the Companies Amendment Act 1960) extends the scope of the prospectus provisions to cover any invitation to the public to deposit money with or to lend money to a company – it thereby extends the operation of s.54 to these invitations.

Now such invitations are "deemed for the purposes of this [amending] act to be a *prospectus issued* [emphasis added] by the company . . . " There is no doubt that Brierley's newspaper advertisement was inviting the public to invest in a company; it was in the same form as the original prospectus and there is no question of it being by s.48A (3) an "advertisement designed only to make the public aware of any such invitation".

Therefore by s.48A (2) this is deemed to be an *issued* prospectus. Brierley clearly authorized the issue and the matter should have been submitted back to the Magistrate's Court to decide whether the advertisement when it was given out to the public (i.e. "issued" under s.48A (2)) included "any untrue statement" within the meaning of s.54 (1).

No question with respect to issue was left by the legislature for the Court to decide.[6] It is respectfully submitted that his Honour's statement (ibid 815) cannot be supported:

> If the appellant is to succeed in this argument it must be because of some provision in subs.(2) which differentiates this case from the case of a prospectus inviting persons to subscribe debentures in a company, with which case I have already dealt on the first point argued.

There is an ambiguity because the word "inviting" is used but it appears to mean an invitation in the sense used for prospectuses before the amending Act. It is difficult to see why any differentiation must be shown. Rather the legislature has laid down that any such invitation must be true and at the peril of the person authorizing the issue. This in no way depends on any significance which may be attached to the invitation being a newspaper advertisement.[7] In the middle of page 815 the very point of s.48A (2) is glossed over in the judgment. It is stated:

> Under subs. (2) any invitation issued to the public to deposit money with or lend money to a company is deemed to be a prospectus. So far that is of no significance.

His Honour had only to consider the following few words in the section: The prospectus is deemed "to be a prospectus *issued by the company*" and thus change the entire purport of the section.[8]

The learned Judge criticizes the argument that the words in s.48A (2) mean that all the requirements in the fourth schedule by virtue of s.48A (1) and the requirements of registration in s.51 (1) apply to such informal invitations "so far as they are applicable" (subs.(2)). He considered that these provisions applied only to the first issue of the invitation. Subsequent invitations were simply republications of the original invitation and the provisions of s.48 (1) and s.51 (1) could have no application to them. But if the learned Judge's view is accepted when would s.48A ever apply? If the specific issue in question has been registered it will come under the law before the amendment, if not it will not be registered and therefore not issued on the learned Judge's interpretation of the word (but see infra). But this advertise-

ment registered or not is deemed to be an issue of a prospectus and therefore it is not incongruous to give this meaning to the words "so far as they are applicable". This is made easier to reconcile by remembering that s.48A is mainly concerned with extending liability under sections 53 and 54 so as to protect the public, rather than being concerned with the formal requirements of the other prospectus provisions. On any view s.48A cannot leave the position as it was before the amending act [9] because "issue" is defined by s.48A (1) as including published or circulated or distributed – i.e. any one of these on its own may constitute an issue.

The clearest indication against the Court's view in interpreting s.48A is s.5 (j) of the Acts Interpretation Act 1924. Before 1960 invitations to deposit or lend money to a company did not attract liability. By s.48A the legislature clearly intended to cure this mischief by making such "invitations" to the public attract the liability of s.54 (1). What possible difference could it make to this principle if some months earlier a true prospectus was registered and circulated? The Court was bound by s.5 (j) to strive to achieve this result so as to give the provision "such fair large and liberal construction and interpretation as will best ensure the attainment of the object of the Act ..." In applying s.5 (j) the directive of Wilson J. in *Union Motors Ltd. v. Motor Spirits Licensing Authority* [1964] N.Z.L.R. 146, 150 could well have been applied.

> In accordance with the ordinary rules of construction the object of the legislation according to its true intent meaning and spirit must be ascertained by reading the Act as a whole. Pursuant to s.5 (j), individual provisions of the Act are to receive such fair, large and liberal construction as will best attain that object. The Court may not, of course, disregard the plain words used by the Legislature, because it is the intention as expressed in those words which it must declare; but so long as the words used will fairly bear a meaning which will best ensure the attainment of the object of the Act and of the provision under consideration, the Court is commanded by s.5 (j) to give them that meaning, and is not to be deterred therefrom by any Common Law canon of construction, or by any ineptitude in draftmanship.

If this directive is applied it is difficult to see why on the facts of *Brierley's* case s.48A and therefore s.54 was not applied.

PROTECTION OF THE PUBLIC

Brierley's case gains significance if it is read in the context of the general

protection given to the investing public. Civil protection is often inadequate. The remedies are limited and individual investors will in most cases, lack the incentive or resources of large companies to fight civil claims. Damage will often be extremely difficult to prove. Gower, *Modern Company Law* (1957 2nd Ed.), 315 observes in a footnote that from the time of the war until the publication of his book no action was brought on the English equivalent of s.53. He concludes his discussion of prospectuses by saying:

> [The investor's] real protection is initial screening . . . thanks largely to the issuing houses and to the discipline of the stock exchanges this screening does take place and is generally effective.

In New Zealand there are no equivalents to the issuing houses, though germs of such associations exist between stockbrokers; the Registrar of Companies seems unenthusiastic about any but cursory screenings of prospectuses and it is difficult to see that the stock exchanges have the time or the qualified people to screen prospectuses or, indeed, why they should be expected to fulfil such a quasi-judicial function. Where a stock exchange quotation is not sought then any protection it might afford to the public is removed.

With the lack of supervisory provisions and the inadequacy of civil remedies the criminal sanctions still constitute a most important protection against inaccurate prospectuses. Section 250 of the Crimes Act 1961 gives one source of liability but actual fraud must be proved (which may be very difficult) and the Crown may be reluctant to prosecute under this section for a technical breach. *Brierley's* case, if it represents the law, involves a considerable curtailment of the small existing area of liability for false prospectuses which are not deliberately and criminally fraudulent. In particular it strikes a blow at the effectiveness of the Companies Amendment Act 1960. If *Brierley's* case does not represent the law, then the law should be changed.

One solution, though it is too narrow to be completely satisfactory, is the immediate implimentation of the Jenkins Committee's recommendation. The Jenkins Committee recommended that there should be no allotment more than three months "from the date on which the prospectus is *first* issued" [10] but with provision for renewal. At the time of writing the New Zealand legislature appears to be in the process of substantially accepting this recommendation in the Companies Amendment Bill (1966) Clause 2; [11] a period of six months has however been substituted for the recommended three months. Even in the shorter time a prospectus can become totally inaccurate. The Act should be altered to put the onus on the person issuing the prospectus to withdraw or amend it when inaccuracies arise of which he should know. But this will not solve the fundamental problem; to make sure that the public

get full and accurate information about companies in which they are asked to invest whether or not any inaccuracy in a prospectus is in itself actionable. [12] It is pertinent to notice the stress the Jenkins Committee put on the disclosure of full and accurate information, and the recommendation by the Committee that power be given to the Registrar to refuse registration and regulate advertising. [13]

Mr. Hanan, the Attorney-General, recently indicated that he was considering the possibility of establishing in New Zealand an authority on the lines of the United States Security and Exchange Commission. In the United States under two main federal statutes the Commission is given wide powers of supervision. [14] It controls not only initial distribution of securities and the requisite registration and supply of information but also subsequent trading. Certain information must be registered with the commission (including the prospectus) and it has twenty days in which to stop the issue of a security after which the security automatically becomes effective.

The expense of administering a Securities Exchange Commission may be prohibitive in New Zealand, but even allowing for the difficulties and expense it seems to this writer that some authority should be established to fill the vacuum of control in a field where public confidence is essential to effective movement of capital resources.

The fundamental reason for the prospectus provisions is to give the public accurate information. The deterrent effect of a possible punishment seems unnecessarily tenuous if it is at all possible to have a direct check on the accuracy of information such as that provided by immediate inspection. Even an authority with considerably narrower powers than the Securities and Exchange Commission would be desirable in New Zealand.

FOOTNOTES

1. On this see Cross, *Precedent in English Law* (1961), 171; Hart, *The Concept of Law*, 248.

2. In *Police v. Christie* [1962] N.Z.L.R. 1109, 1112, Henry J., though admittedly in an oral judgment, referred to it as "the cardinal rule of statutory construction in New Zealand . . . . " See also *McCullough v. Anderson* [1962] N.Z.L.R. 130.

3. cf. s.53 (2) (c); s.53 (2) (e) (ii); s.53 (3) (b); s.53 (3) (c).

4. cf. s.53 (2) (d).

5. Palmer's Company Precedents Vol. 1 (16th ed. 1951) 116.

6. If the learned Judge's interpretation of the meaning of "issue" was accepted then this was a separate issue and it must have been a separate statutory prospectus; on any other view it may be another issue of a similarly worded prospectus or a re-issue of the same prospectus.

7. His Honour suggests ibid, 814 last paragraph that the Appellant's argument put great stress on the word "advertisement" as appearing in the section.

8. Emphasis added.

9. As is suggested in *Brierley's* case (ibid, 815).

10. Emphasis added; citation from para. 252 (c) Report of the Company Law Committee (Cmnd. 1749) 92. Note also the use of "first issue".

11. House of Representatives, 6th October 1966. (The Clause has now been enacted as s.2 of the Companies Amendment Act 1966).

12. Parliament should not attempt to take away from the citizen "his inalienable right to make a fool of himself". It should simply attempt to prevent others from making a fool of him . . . . cf 1935 *Report of the* [*Canadian*] *Royal Commission on Price Spreads, 38.*

13. Cmnd. 1749 (1962) paras. 251, 257, 494.

14. For a detailed exposition of the U.S. position see L. Loss, *Securities Regulation* (1951), particularly at 83ff.