

DUTIES OF COMPANY DIRECTORS AND RATIFICATION BY GENERAL MEETINGS

WINTHROP INVESTMENTS LTD. v. WINNS LTD.

I. Introduction

*Winthrop Investments Ltd. and Another v. Winns Ltd. and Others*¹ was decided before the New South Wales Court of Appeal in 1975. It dealt with directors' power to issue shares and the power of the company in general meeting to ratify directors' acts done in breach of duty. Unfortunately, the decision is less than satisfactory, due to the Court of Appeal's reluctance to state the law, its inadequate treatment of some High Court opinions, and the different and conflicting reasons which the judges gave for their decisions.

II. Background and Facts

In March, 1975, the directors of Winns Ltd. ("Winns") learned that Winthrop Investments Ltd. ("Winthrop") were intending to take over the company. With the aim of defeating the take-over, Winns' directors entered into preliminary discussions with Burns Philp and Co. Ltd. ("Burns Philp"), concerning the possibility of Winns' acquiring six "Mates" retail stores owned by subsidiaries of Burns Philp, in return for shares in Winns. By late July, substantial agreement had been reached, and in early August, the two companies announced the proposed terms of purchase. Winns was to pay about \$3.4 million for the stores. This was to be made up partly by the issue of debentures and partly by the allotment to Burns Philp and/or its subsidiaries of 34,000 ordinary shares, 9.6% of Winns' capital. After the proposed Winns-Burns Philp agreement was made public, Winthrop was granted interlocutory injunctions by Wootten, J. to prevent Winns from concluding a binding agreement.

Winns' directors then determined to hold an extraordinary general meeting of shareholders to ratify the proposed arrangements with Burns Philp. Winthrop sought an injunction before Helsham, J. (as he then was) to prevent the holding of this meeting. His Honour refused

¹ [1975] 2 N.S.W.L.R. 666.

the injunction² on the authority of the English Court of Appeal's decision in *Bamford v. Bamford*.³

On 1st September, 1975, Winthrop made a formal take-over offer through a subsidiary to Winns' shareholders. Before the extraordinary general meeting held on 10th September, 1975, the boards of both Winns and Winthrop sent circulars recommending their respective cases to Winns' shareholders. At the general meeting, the motions put by Winns' directors were carried by substantial majorities.

A Tactical Concession

A week later, Winthrop's suit seeking permanent injunctions to replace the interlocutory injunctions previously obtained, came on for hearing before Bowen, C.J. in Equity (as he then was), as did Winns' motion for dissolution of the injunctions. When it became apparent that the case could not be heard within the allotted time, his Honour agreed to hear the motion for dissolution alone. This hearing was conducted on the basis of the concession by Winns — such was its faith in the curative effects of the resolutions of the company in general meeting — that, for purposes of argument, the decision of Winns' directors to enter into the proposed agreement with Burns Philp, and to allot 340,000 of the company's shares as part consideration, was not made *bona fide* in the interests of the company as a whole, in that it was motivated primarily by a desire to frustrate the take-over bid. Up to this stage of the hearing, this precise point had been strongly contested between the parties. It was, even now, only a tactical concession, an assumption designed to point up the arguments and to hasten a decision in the matter.

Bowen, C.J. in Equity, found for Winns⁴ following *Bamford v. Bamford*,⁵ and dissolved the interlocutory injunctions. Winthrop appealed to the Court of Appeal, which heard the case on the basis of the same concession.⁶

III. Arguments

The arguments presented by the parties were complex, but, briefly, they ran as follows: Winns contended that the resolutions passed by the shareholders in general meeting remedied any defect in the proposed transaction and ratified it, even when (as was *assumed* in this case) the directors had acted with the improper purpose of defeating a take-over bid. Winthrop rejected this contention, and argued that the resolutions would be ineffectual in any case, because there had been no full disclosure of their improper purpose by Winns' directors to the share-

² (1974-1976) 1 A.C.L.R. 219. His Honour expressly chose not to follow his own earlier decision in *Provident International Corporation v. International Leasing Corporation Ltd.* [1969] 1 N.S.W.R. 424.

³ [1970] Ch. 212.

⁴ (1974-1976) 1 A.C.L.R. 222.

⁵ [1970] Ch. 212.

⁶ Leave to appeal was granted on condition that, if the appeal failed, Winthrop would consent to judgment in the action.

holders. Winns replied that in the earlier proceedings Bowen, C.J. in Equity had found as a fact that the meeting had been sufficiently informed, and that his Honour's exercise of discretion pursuant to that finding, dissolving the interlocutory injunctions, ought not to be disturbed. Winthrop emphasized in argument the point, contested by Winns, that as a shareholder it had a personal right to enforce the articles of the company, and thereby to restrain an allotment of shares for a collateral purpose. Accordingly, Winthrop contended that a general meeting could not ratify such a breach of the articles, because of the directors' duty in this case was owed to the individual shareholders and not to the company alone.

IV. The Judgments

i. *Voidable Transaction*

Mahoney, J.A.⁷ considered that the transaction resulting from the exercise of the directors' power for an improper purpose would be voidable rather than absolutely void citing as authority *Bamford v. Bamford*⁸ and *Harlowe's Nominees Ltd. v. Woodside (Lakes Entrance) Oil Co. Ltd. N.L.*⁹ This view was shared by Samuels, J.A.¹⁰ on the basis of the same two cases and also *Ashburton Oil N.L. v. Alpha Minerals N.L.*¹¹ and *North-West Transportation Co. Ltd. v. Beatty*.¹² Although Glass, J.A. said nothing directly on this point, his concurrence may be inferred from his support for the principle of ratification by general meetings.

ii. *Duty owed to Company*

The question of whether the directors owe their fiduciary duty to the company, or to the individual shareholders, and hence, who has the power to avoid or affirm directors' wrongful acts, was discussed at length by Mahoney, J.A.¹³ His Honour found for the company, as opposed to any personal right in the individual shareholder, following *Bamford v. Bamford*.¹⁴ He rejected Winthrop's submission that the Court should apply the High Court decision of *Grant v. John Grant and Sons Pty. Ltd.*,¹⁵ where there are *dicta* that the duty is owed to the individual shareholders who have a personal right to enforce the articles of the company. The thrust of Winthrop's argument was, as has already been noted,¹⁶ that the company had no power to ratify an issue of shares made by the directors for an improper purpose since the directors owed a duty to each individual shareholder whose rights the company could not purport

⁷ [1975] 2 N.S.W.L.R. 666 at 688-89.

⁸ [1970] Ch. 212 at 238, 242.

⁹ (1968) 121 C.L.R. 483 at 493, 494, 500.

¹⁰ [1975] 2 N.S.W.L.R. 666 at 679-680.

¹¹ (1971) 123 C.L.R. 614 at 631, 643.

¹² (1887) 12 App. Cas. 589 at 593, 594.

¹³ [1975] 2 N.S.W.L.R. 666 at 689-703.

¹⁴ [1970] Ch. 212.

¹⁵ (1950) 82 C.L.R. 1 at 48.

¹⁶ See *supra* at 494.

to abrogate. His Honour did not satisfactorily resolve this question.¹⁷

In distinguishing *Grant v. John Grant and Sons Pty. Ltd.*,¹⁸ Mahoney, J.A. considered that the comments of Williams, J.¹⁹ in that case did not, as was alleged, support an individual right under Companies Act, 1936 (N.S.W.), s. 83 (now Companies Act, 1961 (N.S.W.), s. 155) to have irregularly allotted shares removed from the register. Williams, J., he said, left untouched the right of the company to affirm such a voidable allotment. Mahoney, J.A. considered the effect of s. 83 to be as follows:

Section 83, in my opinion, . . . operates to cut away the power which the shareholders in general meeting may otherwise have to prevent a shareholder acting as plaintiff in proceedings to have the share register rectified, even though there would be, under the general law, a wrong done to the company which would warrant the company proceeding to have the share register rectified.²⁰

Furthermore, his Honour did not agree that Williams, J. had held the company in general meeting could not prevent a shareholder having set aside an allotment of shares made for a collateral purpose. He considered firstly, that Williams, J.'s remarks were not directed to the question of affirmation or avoidance of an irregular allotment of shares, and secondly, that the allotment of shares in that case was void *ab initio*. Accordingly, Mahoney, J.A. concluded:

In my opinion, therefore, *Grants' Case* does not establish either that an allotment of shares for a collateral purpose is an infringement of any relevant right of an individual shareholder, or that the right of the company in general meeting to affirm such an allotment, if voidable, is restricted in any way relevant for the purpose of this part of Winthrop's argument.²¹

Note, however, that his Honour left undecided the matter of whether, if the directors act for an improper purpose, the members of the company in general meeting can ratify if they share that purpose, finding it sufficient "to hold that it has not been established that the resolutions were in fact affected by any such purpose".²²

Samuels, J.A. also concluded that no duty was owed to the shareholder personally,²³ citing as authority *Re City Equitable Fire Insurance Co. Ltd.*,²⁴ *Percival v. Wright*,²⁵ *Bamford v. Bamford*²⁶ and various text writers. His Honour distinguished *Grant v. John Grant and Sons Pty. Ltd.*²⁷ on the basis that the article of association in question in that

¹⁷ See *infra* 498.

¹⁸ (1950) 82 C.L.R. 1.

¹⁹ *Id.* at 31-32.

²⁰ [1972] 2 N.S.W.L.R. 666 at 696.

²¹ *Id.* at 698.

²² *Id.* at 702.

²³ *Id.* at 680-81.

²⁴ [1925] Ch. 407.

²⁵ [1902] 2 Ch. 421.

²⁶ [1970] Ch. 212.

²⁷ (1950) 82 C.L.R. 1.

case conferred upon each shareholder an individual right of action for its breach, and the Companies Act, 1936 (N.S.W.) s. 83 applied, giving the right to rectification of the register to "any member of the company".²⁸ Another High Court authority relied upon by Winthrop, *Ngurli Ltd. v. McCann*,²⁹ was distinguished by Samuels, J.A. on the grounds that it dealt with the individual statutory right to have the register rectified, and with the exception to the rule in *Foss v. Harbottle*³⁰ which arises where the majority will not allow a minority to sue in the company's name for relief against fraudulent acts.

Glass, J.A. did not expressly discuss the issue of to whom the directors owe their fiduciary duty, but his concurrence with the conclusion reached by his fellow judges may be inferred from his support for the ratification principle.

Conflict with the High Court?

The fact that the New South Wales Court of Appeal decided unanimously that directors owe their fiduciary duty to the company, and not to the individual shareholders, cannot hide the conflict among authorities and writers on this point.³¹ The Court determined the issue by resolving the conflict argued to exist between the English Court of Appeal and the High Court of Australia. But a question which may have to be settled later is whether the Court of Appeal reached an adequate resolution.

*Bamford v. Bamford*³² had facts similar to those of the present case, but there the directors sought merely to allot unissued shares: there was no acquisition of new assets. The English Court of Appeal held that, even if the directors had acted in bad faith and from an improper motive in making the share allotment, any impropriety on their part could be, and had been waived by the votes of the majority of shareholders at the company's general meeting. Harman, L.J. expressly held that the wrong was to be waived at the instance of the company only, as the wrong was

²⁸ It is implicit in Samuels, J.A.'s judgment here and also where he distinguishes *Ngurli Ltd. v. McCann* (1953) 90 C.L.R. 425, that he considered the individual statutory right to rectification inapplicable in a ratification situation.

²⁹ (1953) 90 C.L.R. 425.

³⁰ (1843) 2 Hare 461.

³¹ As Samuels, J.A. said: "There are many more cases which can be cited on both sides of the question" [1975] 2 N.S.W.L.R. 666 at 681. See also, C.J.H. Thomson, "Share Issues and the Rule in *Foss v. Harbottle*" (1975) 49 A.L.J. 134; K.E. Lindgren, "The Fiduciary Nature of a Company Board's Power to Issue Shares" 10 *Univ. W.A.L.R.* 364; H. Lesser, "Organising Resistance to Take-over Bids — The Legality of Strategic Allotments of Shares" [1969] C.L.J. 198; K.W. Wedderburn, "Shareholders' Right and the Rule in *Foss v. Harbottle*" [1957] C.L.J. 194; H. H. Mason, "Take-overs and Disputed Share Issues — Ratification of the Directors' Acts" (1977) 51 A.L.J. 89; W.J. Neill, "Companies: Ratification of Directors' Act" [1976] A.C.L.D. 2; Professor Baxt has written a number of comments on the cases in this area: see, on *Winthrop v. Winns* (1976) 47 *The Chartered Accountant in Australia* 46; on *Hogg v. Cramphorn Ltd.* [1966] 3 W.L.R. 995, (1967) 41 A.L.J. 96; on *Bamford v. Bamford* [1968] 3 W.L.R. 317 (Plowman, J.), (1969) 43 A.L.J. 116.

³² [1970] Ch. 212.

done to the company and no one else.³³ The case, therefore, supports the view of the New South Wales Court of Appeal, and was accordingly so cited.

Nevertheless, the case is not unanimously supported, and has been strongly criticised both for its reasoning³⁴ and on policy grounds.³⁵ Such criticism of the *Bamford* approach makes the New South Wales Court of Appeal's treatment of the High Court authorities, especially *Grant v. John Grant and Sons Pty Ltd.*³⁶ of added importance. That case concerned questions related to the issue of shares, the transfer of shares and the appointment of directors, all of which were determined by the Court with reference to the articles of association and relevant sections of the Companies Act, 1936 (N.S.W.). Both Mahoney, J.A. and Samuels, J.A. distinguished it on the facts, as shown above.³⁷ However, the Court of Appeal does not appear to have come to terms with the following *dictum* of Fullagar, J. expressed therein:

. . . any member of the company who has not assented to such breaches [that is, breaches of the articles of association] is entitled to enlist the aid of the courts for the purpose of undoing the effect of such breaches. . . . A general meeting has no power to override articles of association.³⁸

Neither Glass, J.A. nor Samuels, J.A. considered this *dictum*. Mahoney, J.A., having noted it, did not say whether or not he thought it was correct. His Honour merely stated:

However, whether articles of association generally operate to confer personal rights upon shareholders, at least of such a kind as to support a proceeding such as the present, is not clear.³⁹

and later:

Even if there were a personal right in shareholders to enforce the observance of all articles, the practical effect of it in a particular case would have to be measured according to the extent to which the article, and the breach of it, would permit of ratification or rectification by the majority of the company.⁴⁰

In short, Mahoney, J.A. considered it was not clear whether the individual shareholder enjoyed a personal right, but thought that, even if such a right did exist, ratification may still be possible. Both these points are in clear disagreement with Fullagar, J.'s *dictum* which has not been adequately disposed of. It is submitted that Mahoney, J.A.'s reasoning may be questioned as follows:

If there is a fiduciary duty owed by the company directors to the

³³ *Id.* at 238.

³⁴ See C.J.H. Thompson, *supra* n.31 at 142.

³⁵ See H. Lesser, *supra* n.31 at 200.

³⁶ (1950) 82 C.L.R. 1.

³⁷ See *supra* at 495.

³⁸ (1950) 82 C.L.R. 1 at 48.

³⁹ [1975] 2 N.S.W.L.R. 666 at 691.

⁴⁰ *Id.* at 692.

individual shareholder personally, the breach of that duty could not be ratified by the members of the company in general meeting, for such ratification would constitute the abrogation of the individual shareholder's personal rights.

It seems, therefore, that the New South Wales Court of Appeal has not determined beyond doubt to whom directors owe their duty. Until a clear and definitive statement emerges from the High Court of Australia, whether directors' fiduciary duties are owed to the company or individual shareholders will remain clouded.

iii. Ratification

The conclusions that directors' acts are voidable, and that it is the company to whom directors owe their fiduciary duty, form the basis of the decision on the issue of ratification. All three judges agreed that a general meeting of the shareholders of a company to whom full disclosure of all relevant facts was made,⁴¹ may ratify an act done for an improper purpose by the company directors. Mahoney, J.A. concluded:

The defendants' main argument upon this point was simple. They argued that, if the transaction (if entered into) would be voidable, it could then be affirmed or avoided by the company, and that the power to affirm or avoid it could be exercised by the shareholders in general meeting. This, they argued, had been decided by the Court of Appeal in England in *Bamford v. Bamford*. Once the transaction, affirmed, became valid and not voidable, it would be, they argued, beyond attack by a shareholder on the ground of the directors' collateral purpose . . . *Bamford v. Bamford* supports the defendants' argument, both in what it expressly decides and in what it infers . . . the decision in *Bamford v. Bamford* should be followed by this court, in so far as it establishes principles relevant for the present case.⁴²

Glass, J.A. was more cursory:

There is no reason in principle why the general meeting may not bind the company by an expression of its will which the board has intentionally solicited.⁴³

Samuels, J.A., however, was not as firm as the other judges in his expression of this principle. It appears that his Honour only assumed the principle to be correct. There is, with respect, a lack of precision in the judgment. In one place his Honour said:

. . . the ultimate conclusion to which I have come does not require me to decide this issue. I will, therefore, assume, at all events, that a majority of the shareholders in general meeting have the power to affirm a decision of their directors, otherwise voidable because in breach of a fiduciary duty owed to the company.⁴⁴

⁴¹ On disclosure, see *infra* at 500.

⁴² [1975] 2 N.S.W.L.R. 666 at 689-690.

⁴³ *Id.* at 674.

⁴⁴ *Id.* at 681.

At the end of the judgment the point is reiterated:

Whether this assumption is well or ill-founded may yet arise: and I expressly do not decide the question.⁴⁵

Yet, earlier, his Honour had stated, apparently without qualification:

The general meeting has . . . power to ratify an act of the directors done in breach of their duty, or to authorize the doing of an act which would be in breach of duty.⁴⁶

Presumably his Honour's final comment that "I expressly do not decide the question" is to be taken as his decision on the point.

iv. *Prospective Ratification*

The principle of ratification is not limited to approval of acts already done by directors: a general meeting may give advance authority for an exercise of power which would otherwise involve a breach of fiduciary duty to the company. Glass, J.A. expressed it thus:

. . . the general meeting could validly authorise the board to implement the proposal. . . . Exonerated of any duty by the decision of the general meeting, no breach could possibly arise.⁴⁷

Once again, however, Samuels, J.A. assumed the point rather than deciding it:

I am prepared to assume that the shareholders in general meeting have a dispensing power which they may use to validate, retrospectively, or prospectively, an improper act of the directors.⁴⁸

Mahoney, J.A. did not decide the point, although he appeared to support the proposition in general terms:

. . . In determining whether (if it be relevant) Winthrop had made out the relevant chance of success at the hearing . . . and whether the balance of convenience lay in the maintaining or a dissolution of the existing interlocutory injunction . . . the judge would be entitled to act upon the basis of such a probability of the otherwise voidable contracts being affirmed and so placed beyond this attack of the plaintiff. . . .⁴⁹

v. *Duty of Disclosure*

There is no unanimity amongst the judges on this point. Mahoney, J.A. held there was full and proper disclosure concerning the profitability of the stores which were to be purchased, and commented:

. . . inadequacy of disclosure by directors is not, of itself, sufficient to render a resolution ineffective; the matter must be determined in the light of the material, whether provided by the directors or their opponents, which was before the shareholders.⁵⁰

As to disclosure of the directors' purpose, his Honour concluded:

⁴⁵ *Id.* at 685.

⁴⁶ *Id.* at 683.

⁴⁷ *Id.* at 674.

⁴⁸ *Id.* at 681.

⁴⁹ *Id.* at 704.

⁵⁰ *Id.* at 705.

In my opinion, the requirement that this assumption be made, [that is, the assumption by the court at the request of the parties that Winns' directors acted for an improper purpose] renders the resolutions unsatisfactory as a basis upon which to deal with the dissolution application.⁵¹

It would, nonetheless, appear that, on the basis of his earlier comments quoted above, Mahoney, J.A. may not consider it obligatory that the directors themselves reveal their improper purpose to the general meeting, provided that the improper purpose is actually revealed. Glass, J.A. clearly considered the revelation of impermissible purposes unnecessary:

In determining whether a resolution of this kind was validly passed, it would still have been necessary to consider whether all material facts had been disclosed to the meeting. But it would have been unnecessary to consider whether the directors had fully revealed their (assumed) impermissible purposes and had obtained advance dispensation for nurturing them.⁵²

Samuels, J.A.'s view is in direct conflict here:

I would myself have thought it clear beyond argument that, the purpose of the meeting being to excuse the directors, that purpose must have been clearly stated, and the nature of the contemplated breach of duty clearly disclosed by the directors seeking to be absolved. . . . To my mind there was one material fact which was essential for the shareholders to know. That was that the directors were proposing to act in breach of their duty. The necessity for this disclosure is made clear by Harman, L.J. in *Bamford v. Bamford*. This fact the directors ought to have disclosed. But they did not do so. Accordingly, in my view, the shareholders never had before them the information which they required and which the law demands.⁵³

Nor did his Honour consider it sufficient that Winthrop, through its circulars, informed the meeting of the directors' improper purpose.⁵⁴

That left it to the shareholders to decide which faction was right. And in reliance upon their own directors' statements they might well have come to a conclusion contrary to the truth which we are asked to assume. In that event they could have had no proper appreciation of what they were being asked to do, and there can be no waiver without knowledge: *Craine v. Colonial Mutual Fire Insurance Co. Ltd.*⁵⁵

There is no doubt that all three judges agree that there should be full and proper disclosure to a general meeting before that meeting is capable of ratifying improper acts of the directors. The disagreement lies in what con-

⁵¹ *Id.* at 706.

⁵² *Id.* at 674.

⁵³ *Id.* at 684-85.

⁵⁴ [1975] 2 N.S.W.L.R. 666 at 685.

⁵⁵ (1920) 28 C.L.R. 305 at 326.

stitutes such disclosure. It is unavailing to speculate as to which view will be followed. Perhaps it is sufficient to say that the opinion of Samuels, J.A. appears to be preferable. It seems dubious that the view of Glass, J.A. that the purposes of directors do not have to be revealed could be good law.

vi. *The Tactical Concession Fatal to Winns' Case*

The problem of the nature of the disclosure required reveals the full effect of the tactical concession made by Winns. The result of the concession was to leave the validity of the resolutions passed by the general meeting as an open question rather than one which would have been decided in the defendants' favour. As Mahoney, J.A. concluded:

If the resolutions be a general expression of the present wishes of the shareholders concerning the affirmation or avoidance of the proposed transaction, then it would not be safe to infer that, because the shareholders expressed such wishes upon the basis of the directors' repeated assurances that their purpose was a proper one, they would have the same wishes or would vote to affirm the transaction when told ultimately that the directors' purpose had been a collateral purpose, and particularly if they were told ultimately that, if such be the effect of the assumption, the directors had deliberately misled them as to their purpose. Whether the shareholders would determine, whether to avoid or affirm the transaction, once it was entered into, would be sufficiently uncertain to require that the status quo be preserved by continuing the interlocutory injunction.⁵⁶

Samuels, J.A. decided the case on the basis that there had not been full and proper disclosure by the directors.⁵⁷ This decision would not have been possible had Winns made no concession and continued to argue the directors acted for a proper purpose which had been revealed to the meeting. It is obvious that the concession was responsible for the majority's decision against Winns, and thus for Winns' losing the case.

V. Lacunae

It is thought that the Court of Appeal has exhibited what must be described as a puzzling reticence to declare the law in this area. Consider, for instance, the statement of Glass, J.A.:

I do not think that it is necessary, nor would I feel competent, to disentangle the many threads of principle in this tangled skein, and to reform them in a consistent pattern.⁵⁸

If his Honour's judgment then appears to be the most lucid, it may be because he has elected to reach his conclusions by short-cuts, by-passing the thorny legal arguments requiring resolution. Samuels, J.A. declined to state the law on ratification being satisfied with assumptions on the ground that his ultimate conclusion did not demand his decision on that

⁵⁶ *Id.* at 706.

⁵⁷ *Id.* at 685.

⁵⁸ *Id.* at 671.

issue. Mahoney, J.A. is also not beyond criticism. His Honour raises two major issues, yet seems to go to some length to avoid deciding them. They are:

1. Whether directors' actions are necessarily invariably defective if the object forming the basis of the impugned actions is designed to defeat a take-over bid,⁵⁹ and
2. Whether, if the directors act for an improper purpose, the members can ratify if they share the same purpose.⁶⁰

Deficiencies such as these justify criticisms, such as that made by W.J. Neill,⁶¹ of the lack of development of the law by the Court.

VI. The Ratio Decidendi of *Winthrop v. Winns*

Perhaps the most important question to be answered in a discussion of this case is: for what is it authority? Each of the judges decides the case on a different basis. Glass, J.A. is in the minority; he rejected the appeal, holding that there had been full and proper disclosure to the general meeting of Winns' shareholders, who were capable of ratifying the exercise of power by the directors for an improper purpose. In allowing the appeal, Samuels, J.A. reached the opposite conclusion: there had not been full and proper disclosure by the directors, who were the persons responsible for making such disclosure. Mahoney, J.A. also allowed the appeal, but on another ground. His Honour considered the assumption which the Court was required to make rendered the resolutions of the general meeting unsatisfactory as a basis upon which to deal with an application for the dissolution of the interlocutory injunction. In his view, Winns' tactical concession made mandatory the conclusion that there had been a misrepresentation to shareholders in general meeting. Because of this, there had been "an appropriate case made out for Winthrop's success at the hearing of the proceeding".⁶² Such misrepresentation would have rendered effective ratification impossible.

The only issue upon which there is agreement amongst the judges is that a company in general meeting to whom full and proper disclosure has been made may ratify directors' acts which constitute a breach of fiduciary duty to the company. The case may, therefore, be cited as authority for that principle in New South Wales. However, the ingredients of full and proper disclosure are not agreed upon, and in view of the Court's incomplete examination of conflicting High Court *dicta*, *Winthrop v. Winns*' authority on the principle of ratification may well be challengeable.

Postscript⁶³

Perhaps surprisingly, this litigation went no further. Although neither

⁵⁹ *Id.* at 688.

⁶⁰ *Id.* at 702.

⁶¹ W.J. Neill, *supra* n.31 at 3.

⁶² [1975] 2 N.S.W.L.R. 666 at 709.

⁶³ This information came from an interview kindly granted by the defendants' solicitors.

party wished to incur further costs, the main reason the case came to rest where it did was commercial necessity. There was not time to wait for the decision of a higher court. In fact, as it happened, Winthrop decided not to proceed with its take-over, and disposed of the shares it controlled. Winns merged with another retail group and continued trading as Winns.

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