The Proper Purposes Doctrine – The Law and its Implications

by

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The "proper purposes" doctrine has developed primarily over the last fifteen years[1] and almost all recent developments have concerned the exercise of the fiduciary powers of directors (in relation to the issue of shares) in the face of a takeover bid. The aim of this paper is not to give an exhaustive analysis of all the problems that have arisen in this branch of the law but rather to explain the present state of the law and to criticise its application. In order to achieve this, the paper has been divided into two parts in which the following will be discussed:

(a) The development of the proper purposes doctrine and a criticism of its application;
(b) Ratification of an act done 'improperly' by the company in general meeting.

I. The Development Of The Doctrine

In *Re Smith and Fawcett Ltd* Lord Green M.R. said:[2]

> The principles to be applied in cases where the articles of a company confer a discretion on directors. . . are for the present purposes free from doubt. They must exercise their discretion bona fide in what they consider – not what a court may consider – is in the interests of the company and not for any collateral purpose. They must have regard to those considerations only which the articles on their true construction permit them to take into consideration. . .

Therefore, according to His Lordship's criteria, there were but two considerations to be canvassed when deciding whether or not a director had properly exercised the discretion given to him by the articles of association:

(a) Whether the language of the articles was sufficiently wide to allow the director to do what he had done;
(b) The director's *own* bona fides.

[1] Although *Hogg* v. *Cramphorn* [1967] Ch. 245 was not reported until 1967, the case was decided in 1963.
[2] [1942] 1 Ch. 305, 306.

However more recently, a gloss has appeared on the second of these considerations in that the courts have taken it upon themselves to decide whether or not a particular decision was made with a proper purpose in mind.[3] This gloss appears to have originated from the judgments in *Piercy* v. *S. Mills and Co.*[4] and *Punt* v. *Symonds and Co.*[5] which support the proposition that a director having such a discretion must exercise it bona fide for the purpose for which it was intended. It was once stated by Dixon J. in the High Court of Australia that:[6]

> Directors of a company are fiduciary agents, and a power conferred on them cannot be exercised in order to obtain some private advantage or for any other purpose foreign to that power.

The problem with this interpretation is that, contrary to *Smith and Fawcett* the director is no longer in sole command in judging matters which are almost entirely of a business sense. For example, let us take a company which is being threatened by a takeover bid from an undisclosed principal, acting through various nominees. In this situation the directors of the offeree company may decide honestly, and in what they consider to be the best interests of the company, to take certain defensive measures to protect the company against the person they consider to be a corporate raider. Should they do so they may leave themselves open to a later determination by the court that on the facts their decision was not bona fide in the best interests of the company. In other words, what was once seen solely as a business decision can now be taken out of the hands of the board and be reviewed by a court, which, with the benefit of both objectivity and hindsight makes what can amount to a value judgment on the desirability of those defences involved.

It is now appropriate to examine some of the leading cases in this area and to assess both their individual and collective effects on the law.

The first case to examine the proper purposes doctrine in any depth was *Hogg* v. *Cramphorn Ltd,*[7] a decision of Buckley J. Cramphorn Ltd were a long established family firm. One Baxter had been attempting to gain control of the company and there were fears that if he were successful, he would strip the company of its assets. Believing this to be the case, the directors of Cramphorn initiated a defensive scheme under which a trust was set up for employees. Subsequently 6000 shares were issued to trustees in accordance with section 64(b) of the Companies Act 1948 (U.K.).[8] Article 10 of Cramphorn's articles of association provided that:

> the shares shall be under the control of the directors who may allot. . . on such terms and conditions. . . as the directors think fit. . .

[3] E.g. *Hogg* v. *Cramphorn,* supra; *Howard Smith* v. *Ampol* [1974] A.C. 821, (P.C.).
[4] [1920] 1 Ch. 77.
[5] [1903] 2 Ch. 506.
[6] *Mills* v. *Mills* (1938) 60 L.C.R. 150, 185.
[7] [1967] Ch. 245.
[8] Companies Act 1955 (N.Z.), s.62(b).

Article 13 further provided that the directors could issue new shares "upon such terms and conditions. . . as the directors determine. . ."

Thus, prima facie it did appear that the directors had sufficient power to allot the shares. In effect this meant that control of the company would remain in the hands of the existing Board. However Buckley J. took a different view and said:[9]

> It is not in my judgment open to the directors in such a case to say: "We genuinely believe that what we seek to prevent the majority from doing will harm the company and therefore our act in arming ourselves or our party with sufficient shares to outvote the majority is a conscientious exercise of our powers under the articles which should not be interfered with."

His Lordship based his decision on dicta from *Punt* v. *Symons*[10] and in particular on a passage from *Piercy* v. *Mills* in which Peterson J. had said:[11]

> . . . directors are not entitled to use their powers of issuing shares for the purpose of maintaining their control or the control of themselves and friends over the affairs of the company or merely for the purpose of defeating the wishes of the existing majority of shareholders.

It is submitted however that these cases are not on point. It is one thing to say that a director's sole motive is to retain control or to defeat the wishes of majority shareholders: it is something completely different to say that the directors did what they did because they honestly believed that it was in the best interests of the company.

Two other decisions have added to the proper purposes doctrine, although it must be stated that it is not easy to reconcile the approaches that they adopt. These cases are *Teck Corporation* v. *Millar*[12] and *Howard Smith Ltd* v. *Ampol Ltd.*[13]

In the *Teck* case a company known as Afton Mines Ltd had been trying to interest a larger company in helping them to develop mining fields in Kamloops. The joint venture had been considered because Afton lacked the necessary financial resources to develop the area. Two companies eventually showed an interest, Placer Developments Ltd and Teck Corporation. By 31 May 1972, Teck had acquired a 51 per cent shareholding in Afton and intended to call a meeting of shareholders to appoint its nominees to the Afton Board. However, on 1 June a contract was signed between Afton and Canadian Exploration Ltd (a wholly owned subsidiary of Placer Developments) by which Canadian Exploration were to be issued 1,167,437 shares in Afton if they agreed to develop the Kamloops minefields. The effect of the allotment would be to change considerably the capital structure of Afton and destroy Teck's majority shareholding. Not surprisingly, Teck Corporation claimed that the 1 June contract was not entered into bona fide in the interests of the company

[9] *Hogg* v. *Cramphorn,* supra, 268.
[10] [1903] 2 Ch. 506, 515.
[11] [1920] 1 Ch. 77, 84.
[12] (1972) 33 D.L.R. (3d.) 289.
[13] [1974] A.C. 821.

but was entered into solely to defeat Teck's majority shareholding.

In the Supreme Court of British Columbia, Teck contended that *Hogg* v. *Cramphorn*[14] was authority for the proposition that any allotment of shares made for the purpose of defeating an attempt to secure a majority is improper, even if the directors genuinely believe that it would be deleterious to the company if those seeking a majority were to obtain control. The judge, Berger J., did not agree with this contention. His Honour said:[15]

> ... the directors ought to be allowed to consider who is seeking control and why. If they believe that there will be substantial damage to the company's interests if the company is taken over, then the exercise of their powers to defeat those seeking a majority will not necessarily be categorised as improper.

And further:

> ... directors are entitled to consider the reputation, experience and policies of anyone seeking to take over the company. If they decide on reasonable grounds a takeover will cause substantial damage to the company's interests, they are entitled to use their powers to protect the company.

Therefore Berger J. did not accept the wide proposition drawn from *Hogg* v. *Cramphorn* and was prepared to say that if the directors act bona fide in what they consider to be the best interests of the company then their actions will be upheld.[16]

The other recent decision on point, *Howard Smith Ltd* v. *Ampol Ltd*[17] was a decision of the Judicial Committee of the Privy Council. In *Howard Smith* there was a struggle for the takeover of a company known as R.W. Miller (Holdings) Ltd, between the rival parties to the action, Howard Smith Ltd and Ampol Ltd. Another company, Bulkships Ltd, who held 25.1 per cent of Miller's share capital was associated with Ampol. By May Ampol had acquired 29.8 per cent of Miller's capital at $2.27 per share and therefore at that date the Ampol/Bulkships alliance held a majority 55 per cent of Miller's shares.

On 6 July Miller made an allotment of 4,500,000 shares to Howard Smith Ltd at $2.30 per share; the effect of this allotment was to destroy the combined majority of Ampol and Bulkships. It is also interesting to note that earlier Ampol had made an offer of $2.27 per share for the remaining Miller's shares but this offer had been rejected by the Miller's Board.

In the Supreme Court of New South Wales there had been an important finding of fact. Street J. found that Miller's directors were not motivated by personal gain or advantage, or by any desire to retain their position on the Board.[18] Street J. had also framed the question of law to be decided as

[14] Supra.
[15] *Ibid.*, 315.
[15a] *Ibid.*, 317.
[16] C.f. *Re Smith and Fawcett*, supra. Berger J's judgment appears to revert back to that principle. See also pp.307-308 ante.
[17] Supra.
[18] Cf. this finding of fact with the *dicta* in *Punt* v. *Symonds*, supra, and *Piercy* v. *Mills*, supra which were relied upon for the decision in *Hogg* v. *Cramphorn*, supra.

whether the primary purpose of the majority of directors in allotting the extra shares was to satisfy Miller's need for capital or whether it was to destroy Ampol's and Bulkships' existing majority shareholding.

The decision of the Privy Council was delivered by Lord Wilberforce who accepted both the finding of fact and the question of law as stated by Street J. Article 8 of Miller's articles of association stated that the issue of shares was to be under the control of the directors who could allot them on such terms as they thought fit. Lord Wilberforce accepted that the allotment was intra vires but also said that because the directors' powers to issue shares are fiduciary, the exercise of those powers could be attacked on the grounds that they had been used for an improper purpose.[19] His Lordship then discussed the opposing arguments which had been put to the Board. These arguments were summarised as follows:[20]

1. To be valid the power must be exercised bona fide in the interests of the company. Therefore, once it has been established that the directors were not motivated by self interest, the court should not inquire further into the matter.
2. The purpose for which the power was conferred was to raise capital for the company and once it is shown that the issue was not made for that purpose, invalidity must follow.

Lord Wilberforce however, accepted neither submission *in toto.* In his view the court, having defined on a fair view the nature of the power in issue, should then examine the substantial purpose for which the power was exercised. Finally, the court should make a decision as to whether, on the facts of the case, that substantial purpose is, or is not proper.[21] His Lordship further stated that it must be:

> . . . unconstitutional for directors to use their fiduciary powers over shares in a company purely for the purpose of destroying an existing majority or creating a new majority which did not previously exist. To do so is to interfere with that element of the company's constitution which is separate from and set against their powers.

Another authority in this area, *Harlowe's Nominees Pty Ltd,*[22] a decision of the High Court of Australia, appears to lean towards the *Teck* reasoning.[23] Barwick C.J., McTiernan and Kitto JJ. in a joint judgment said:[24]

> The principle is that although primarily the power is given to enable capital to be raised when required by the company, there may be occasions when the directors may fairly and properly issue shares for other reasons, so long as those reasons relate to a purpose of benefitting the company as a whole, as distinguished from a purpose, for example, of maintaining control of the company. . . Directors in whom are vested the right and duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of considerations, and their judgment if exercised in good faith, and not for irrelevant purposes is not open to review in the courts.

Let us now look at the two differing views as to whether a power has been exercised 'properly'.

[19] *Howard Smith* v. *Ampol,* supra, 834.
[20] *Idem.*
[21] *Ibid.*, 835.
[22] (1968) 42 A.L.J.R. 123.
[23] Discussed at pp.309-310 ante.
[24] *Harlowe's Nominees,* supra, 125.

First, there is what may be called the traditional approach,[25] which in essence is a three step test:

(a) Did the directors have sufficient power under the articles of association to do what they did?
(b) Was the action taken bone fine in what the directors considered to be the interests of the company?
(c) Did the directors have reasonable grounds for believing that their actions were in the interests of the company?

Secondly, there is the more 'active judicial approach' adopted by Lord Wilberforce in *Howard Smith* v. *Ampol*[26] and involving the following steps:

(a) a consideration of the power in issue;
(b) a decision on a fair view what the substantial purpose of exercising the power was;
(c) a decision whether or not that substantial purpose was proper.

Is it possible to reconcile these two different approaches? First, in *Howard Smith,* Lord Wilberforce did not expressly say that the *Teck* decision was wrong. Instead, His Lordship preferred to say that in *Teck* the directors were merely trying to secure the best possible contract for their company, and in doing so they also destroyed the *Teck* majority. However Lord Wilberforce did not seem to regard that as the same thing as deliberately setting out to dilute a majority shareholding, as in *Howard Smith.*[27] His Lordship also appeared to emphasise the fact that in Canada contracts such as the one between Afton Mines and Canadian Exploration invariably contained provisions concerning the issue of shares to the purchaser.[28] Thus, it could be said that Lord Wilberforce envisaged two distinct fact situations for which different tests would be applicable: (1) situations where the issue was solely to destory an existing majority, as in *Howard Smith*; (2) situations where what was done destroyed the majority indirectly or the destruction was merely a collateral purpose, as in *Teck.* The first category would be decided on the *Howard Smith* test of constitutionality and the second on the *Teck* test of the directors' bona fide decision made on reasonable grounds.

Superficially this appears to be an acceptable distinction between the two cases, but on a closer examination of the facts the distinction once again becomes blurred. In both cases the decision which changed the company's capital structure was made after the offeror company had gained a majority shareholding and likewise in both cases it was apparent that it was only a matter of time before the new majority shareholder called a meeting of the company to appoint its nominees to the board.

[25] See *Teck* and *Harlowe's Nominees,* supra.
[26] Supra, 835.
[27] *Ibid.,* 836-837.
[28] *Ibid.,* 836.

Perhaps the one issue that may have tipped the scales was that in *Howard Smith* the allotment made by Miller to Howard Smith was made at a price only three cents per share higher than the offer made by the Ampol/ Bulkships alliance some three weeks earlier, and which Ampol may have been expected to counter with a better offer had they been given the opportunity. If this was the ground on which the two cases differed, it is interesting to speculate as to whether or not the issue to Howard Smith would have been valid had Ampol/Bulkships owned only 49 per cent of Miller's share capital at the date of issue, and not 55 per cent, assuming of course that the Miller's board would know that the alliance would soon obtain the remaining shares to give it a majority. On those facts it is difficult to see how such an allotment could be 'unconstitutional' in terms of Lord Wilberforce's judgment because the issue would not in fact destroy an existing majority since no majority existed to be destroyed. Admittedly it would be open to the court to decide the case along similar lines to *Howard Smith* by considering the matter on the grounds of fairness as between shareholders[29] and regarding it as a question of degree. However it is submitted such a finding should not be supported because of the subsequent uncertainty that could well enshroud commercial dealings as a result.

Therefore, it appears that although *Teck* was not expressly said to be wrong by the Privy Council, there are difficulties in drawing a satisfactory distinction between the two cases. It is perhaps unfortunate that Lord Wilberforce in *Howard Smith* did not consider the well reasoned judgment of Berger J. worthy of more than a half page comment.[30] It is contended that *Teck* may still be regarded as good law in spite of the Privy Council's judgment and that future cases may well centre around the failure of the Board to explain adequately the difference between the two cases.

Although *Teck* has been criticised as being too favourable to management[31] it is submitted that the approach adopted there is better than the *Howard Smith* approach, and should be accepted as law in New Zealand. It recognises that a businessman is in a better position to judge matters of commercial concern than is a court. The *Howard Smith* approach however, could become nothing short of a complete usurpation of the directors' rights to make decisions concerning the welfare of the company, should it be used indiscriminately. Without intending disrespect to the judiciary, the world of corporate takeovers is a highly skilled one about which few lawyers have a high degree of knowledge. The easiest way for the commercial world to lose confidence in the law is for lawyers to start telling directors how they should have made decisions, particularly as many corporate cases coming to court would involve decisions which had

[29] *Ibid.*, 835.
[30] *Ibid.*, 836-837.
[31] Prof. J.S. Ziegel [1974] J.B.L. 85, 88.

to be made under pressure. It is unfair on the directors if their decisions, which were made on reasonable grounds and in what they considered to be the best interests of the company, can be challenged on any other grounds than that they were made mala fide or ultra vires.[32] In many cases a decision as to how a company should react in relation to a takeover bid is just as much a business decision as is a decision to issue a dividend. Let us consider a hypothetical example. In the following set of facts should the directors of X Co. be able to make an allotment of shares?

> Y Co. has been buying shares in X Co. on the share market, both in its own name and through nominees, for about one year. The directors of X Co. now realise that Y Co. and its nominees now own 51 per cent of X Co.'s share capital. The directors of X Co. honestly believe that Y Co. intends to strip X Co. of its assets once it appoints its nominees to the Board. This belief is held on reasonable grounds. X Co. then approaches Z Co. who some months earlier showed a passing interest in X Co.'s business. The directors issue sufficient shares to Z Co. to change the nature of Y Co.'s shareholding and render it no longer a majority shareholder.

On these facts it is submitted that providing the directors honestly believe on reasonable grounds that they are acting in the best interests of the company by thwarting a potential asset stripping venture, then the issue should be valid. Further, if the matter was brought to trial the facts may be shown to be quite different in the presence of hindsight and objectivity. The time at which the directors should be judged is as at the date of the issue.

The views of the writer are perhaps best summed up in the words of Dr L.S. Sealy:[33]

> . . . the purpose for which a power is conferred ought to be for the directors acting bona fide to determine and should not be a question of law.

II. Ratification By The General Meeting

The next question to be considered is whether the directors, having exercised their powers for (what will be presumed to be) an improper purpose, can go back to the company in general meeting and have their actions ratified.

The leading case on point is *Bamford* v. *Bamford*.[34] There the directors of a company attempted to allot 500,000 unissued shares in order to thwart a takeover bid. Two shareholders then began proceedings against the company claiming that the allotment was invalid because the directors had not acted bona fide in the interests of the company. As a result, the directors called a general meeting of the company to ratify the allotment. The 'ratification' was effected by a simple majority. The preliminary question of law before the court was whether this ratification was valid, assuming that the directors had acted in bad faith. Both Plowman J. in the High Court, and the Court of Appeal held it was valid although they

[32] C.f. N.C.A. Franzi (1975-76) 10 Melbourne University L.R. 392.
[33] Dr L.S. Sealy [1967] C.L.J. 83, 95.
[34] [1970] Ch. 212.

arrived at their respective conclusions by different routes.

Plowman J. said that the company in general meeting could ratify the allotment because of a residual power of allotment vested in it.[35] His Honour said:

> ... where, under the articles, a limited power of borrowing or contracting is given to the board and the board borrows or [contracts] in excess of its powers, its action can be ratified or approved by the company in general meeting by virtue of the residual power remaining in the company... Whether any such residual power does or does not exist in any particular case will depend not only on the general law but also on the memorandum and articles of association of the company in question.

The Court of Appeal however, rejected this reasoning. Their Lordships began by regarding an allotment which was not made bona fide in the interests of the company, as being voidable and not void *ab initio* and thus saw the company in general meeting as being the organ of the company which must avoid or ratify the transaction. As Harman L.J. said:[36]

> The only question is whether the allotment having been made... in bad faith is voidable and can be avoided at the instance of the company – at their instance only and of no one else, because the wrong, if wrong it be, is a wrong done to the company.

Whichever reasoning is preferred, it is submitted that the *ratio decidendi* of the case is that if a director misuses his powers and does not act bona fide in the interests of the company, the company can still opt by ordinary resolution in general meeting, not to sue the director and thereby ratify his actions.

In the context of the proper purposes doctrine the most important question raised by the *Bamford* decision is whether it is competent for a company in general meeting to 'ratify' something hitherto improper. There are two theories as to why a transaction such as in *Bamford* should be capable of ratification. First, it could be said that the allotment of shares for an improper purpose is not an unlawful action but merely an unauthorised one. Thus, the company in general meeting has power to remedy any defect in actions made by the directors providing that those actions were not ultra vires the company. This was clearly stated in an article by Professor Aharon Barak:[37]

> The power to waive can be exercised both prospectively and retrospectively, for all that the general meeting is authorised to do is waive the protection of the law; it cannot itself carry out the unlawful act... Hence the real issue is not whether the general meeting is itself competent to do the particular act that the directors are unable to do validly, but whether the company is; and provided that the directors have not done something ultra vires the company, the answer is clear.

Second, it could be said that since the company in general meeting represents all interests, any ratification must be in the interests of the company because it is the 'company' which has ratified the action and thus no question of the propriety of the action can be raised.

[35] *Ibid.*, 227.
[36] *Ibid.*, 238.
[37] (1970) 5 Israeli L.R., 249, 252-253.

Against this view it can be said that if the act done is "unconstitutional" (to use Lord Wilberforce's expression) then why should the company in general meeting be able to ratify the directors' actions? If the act is unconstitutional under the company's articles, it must be equally unconstitutional for that act to be done by the directors or by the company in general meeting. However, as Lord Wilberforce's view on the constitutionality of the power was expressed for the first time in 1974, this question has not yet been argued before the courts, but since the constitution of the company not only governs the powers of directors but also the company in general meeting it certainly may be regarded as a strong argument.

It is submitted however that the former view must prevail and that there must be an organ within the company framework that is capable of ratifying such action. As Professor Barak points out all the general meeting is doing when it "ratifies" is waiving the protection of the law against the directors who did the initial act[38] and is not purporting to do the act itself. Therefore, provided the matter is not ultra vires the company, the general meeting should be able to ratify.

The more difficult question however, has two aspects:

(a) If the directors own shares themselves in the company should they be allowed to vote them at a general meeting called to ratify their actions?

(b) Should the allottee of the shares in dispute be allowed to vote at the general meeting?

In *Hogg* v. *Cramphorn* Buckley J. did not allow the allottee of the shares issued to vote at the general meeting but he did not see any reason to disfranchise any other shareholders; therefore the directors could vote their shares. Buckley J. gave no reason for the decision[39] so that the matter remains open. In *Bamford* the matter was not discussed mainly because of the moot-like way the matter came before the court. There seems no logical reason why a director should not be able to vote those shares which he held prior to the allotment if the mater came before the company for ratification. To hold otherwise would mean that in a company where there were two directors who held between them say a 75 per cent shareholding, the minority of 25 per cent would be able to dictate to the majority of 75 per cent as to whether the company should or should not ratify the directors' actions. This may even be the case where through the improper allotment the directors have indirectly secured a benefit. It is suggested that if there is any question of oppression between shareholders in this sense, the minority shareholder still has the option to

[38] *Idem.*
[39] *Hogg* v. *Cramphorn,* supra, 272.

sue, alleging that there has been a fraud on the minority.[40]

Equally, the allottee should not be allowed to vote because assuming that the allotment has been made for an improper purpose, i.e. to defeat an existing majority, it would be absurd to allow the new majority to decide whether or not they were to retain the shares which they had just been issued. Thus, it would appear that the correct course for the former majority shareholder to adopt would be to call an Extraordinary General Meeting to decide whether or not the issue was valid.

Recent decisions have also indicated that equitable principles will be seen as relevant by the courts and from these decisions it appears that the minority shareholder is to be given more consideration than in the past.[41] In *Clemens* v. *Clemens Bros Ltd*[42] the two shareholders of the company were aunt and niece. The aunt was a director of the company but the niece was not. The aunt and the other directors decided to implement a scheme whereby the niece's shareholding would be reduced to below 25 per cent. At the date of the proposal the aunt held 55 per cent of the company's share capital and the niece held 45 per cent. The niece brought an action for a declaration that the resolutions passed (by reason of the aunt's majority shareholding) were oppressive on her and should be set aside. The defendant argued that if two shareholders hold differing opinions the view of the majority should prevail. The Court held that the action was oppressive in that the resolutions in effect meant that the niece could never obtain control of the company. Foster J. said:[43]

> They [the resolutions] are specifically and carefully designed to ensure not only that the plaintiff can never get control of the company but to deprive her. . . of her negative control. . . A court of equity will, in my judgment regard these considerations as sufficient to prevent the consequences arising from Miss Clemens using her legal right to vote the way that she has and it would be right for a court of equity to prevent such consequences taking effect.

What effect could this decision have on the principles relating to "ratification" of an improper allotment? The most significant possibility is that the majority shareholder may have to take into consideration the consequences that his action will have on the minority and on the company in general. Thus, should the majority consist of the directors and their like interests, they would have to consider precisely how their votes would affect other shareholders. For example, if there has been a bid by the prospective "asset stripper", how many of the minority would prefer to accept the offer rather than look at the long term prospects of the

[40] See Gower, *Modern Company Law* (3rd ed), 579-580, for a summary of the instances when a minority shareholder may sue for a fraud on the minority. See also the recent decision of *Daniels* v. *Daniels* [1978] 2 W.L.R. 73, 79-80.

[41] E.g. *Ebrahimi* v. *Westbourne Galleries* [1973] A.C. 360, 379 (P.C.). See also *Coleman* v. *Myers* [1977] 2 N.Z.L.R. 225 where Mahon J. at first instance held that a fiduciary duty existed between a director and shareholder. Although the Court of Appeal did not uphold this finding as a general principle, it did find that on the facts a fiduciary duty existed.

[42] [1976] 2 All E.R., 268,

[43] *Ibid.*, 282.

company. In contrast, there could arise a situation where (as in *Teck* and *Howard Smith*), the bidder holds a majority shareholding and has to consider the long term prospects of the company if the bidder's proposals were not implemented, and balance the two views before voting. The situation is not made easier by Foster J.'s refusal to state a principle because "the circumstances of each case are infinitely varied".[44]

It is submitted however that until these broad equitable considerations receive appellate approval the *Clemens* case should be treated with caution. In effect, Foster J. derived his decision from a Privy Council case involving the "just and equitable" winding up of a company,[45] and it could be doubted whether that decision involved a principle wide enough to be applied to the *Clemens* situation. It is suggested therefore, that the *Clemens* decision be restricted to cases of similar fact, i.e. small family concerns where the minority shareholder is intended to have a greater say in the running of the business than would be expected in larger enterprises.

III. Conclusion

Although it has been impossible to consider all aspects of the law relating to proper purposes, it is possible to draw the following conclusions from the narrow scope of this paper.

The test of a "proper purpose" in New Zealand is uncertain. The conflicting tests proposed in *Teck* and *Howard Smith* appear to be irreconcilable. It is submitted that although *Howard Smith* is a decision of the Privy Council there is sufficient unexplained conflict between it and the well reasoned judgment in *Teck*, for a New Zealand court to adopt the more liberal (to management) approach of the Canadian and Australian authorities.

By virtue of *Bamford* v. *Bamford* and *Hogg* v. *Cramphorn* it seems clear that a company in general meeting can validate the actions of a director even though that director acted with an improper purpose. However it should be remembered that this approach has not yet been tested by the effect of Lord Wilberforce's "constitutionality" argument in *Howard Smith*. Finally, it appears that although a director may vote those shares held by him (other than the issue of shares in question) at a general meeting called to ratify his acts, the allottee of the issue in question may not.

[44] *Idem.*

[45] *Ebrahimi* v. *Westbourne Galleries*, supra, 379 where Lord Wilberforce remarked on the effect of the just and equitable winding up provision.