Being in the Minority: The Compulsory Acquisition of Shares

Michael Yew Seong Chin*

I: INTRODUCTION

> The emancipation of minority shareholders is a recent event. For most of the first century of company law they were virtually defenceless ....[1]

In 1995, the High Court of Australia delivered a corporate law decision that led to a maelstrom of publicity and controversy.[2] This was the case of *Gambotto v WCP Ltd* [3] which significantly altered the common law governing amendments to a company's articles of association. *Gambotto* ushered in a new era of minority shareholder protections by significantly restricting the ability of the majority to acquire 100 percent ownership through amending the articles of association to introduce a new clause enabling the majority to compulsorily acquire the shares of the minority. *Gambotto* introduces a new test for the validity of such amendments and remarkably, New Zealand writers have all but ignored the relevance of *Gambotto* to New Zealand. However, such ignorance is unjustified as *Gambotto*

---

* B Com(Hons) / LLB (Hons). Many thanks to Associate Professor Peter Watts.

1 Hoffmann, "Forward" in Hollington, *Minority Shareholders' Rights* (2nd ed 1994) v.

2 Ramsay, "Key Aspects of the Decision of the High Court in Gambotto v WCP Ltd" in Ramsay (ed), *Gambotto v WCP Ltd: Its Implications for Corporate Regulation* (1996) 2: "Few corporate law judgments have led to the publicity and controversy that resulted from the decision of the High Court of Australia in *Gambotto v WCP Ltd.*"

3 (1995) 182 CLR 432.

offers the common law of New Zealand an opportunity for reform which should not be dismissed without consideration.

II: THE LAW OF AMENDMENTS

The amendment of the articles of association or constitution of a company is by no means the only avenue for the compulsory acquisition of minority shares. In New Zealand, as overseas, there are three other means of compulsory acquisition.[4] First, there is the "takeover" provision which facilitates the transition from acquiring control to acquiring 100 percent ownership. Second, there are the schemes of arrangement which bind minority dissentients to court approved schemes, even if this involves a compulsory acquisition of their shares. Third, through selective capital reductions the majority is able to acquire 100 percent ownership by eliminating the shares held by the minority. Similarly, the common law protection of the minority in the exercise of the majority's power of amendment is by no means the only protection available. Both the old and the new Companies Acts, 1955 and 1993, provide minority shareholders with statutory protection against unfair prejudice or oppression.[5] Amendments of the articles of association or constitution which qualify as being unfairly prejudicial or oppressive can be struck out by the court under these provisions. Amendments which empower the majority to compulsorily acquire the shares of the minority will qualify.

The development engendered by *Gambotto* is solely concerned with the common law protection of minority shareholders in amendments of the articles of association as a means of compulsory acquisition. The power of compulsory acquisition is extraordinary, whatever the avenue. It is even more extraordinary where it is not an express term of the contract of investment entered into by shareholders, who cannot be taken to have adopted it by implication given its

---

4 Boros, *Minority Shareholders' Remedies* (1995) 261. For other possible means, at least in Australia, see Digby, "Eliminating Minority Shareholdings" (1992) 10 Company & Sec LJ 105.

5 Prior to 1 July 1994, this was provided by ss 81 and 209 of the Companies Act 1955. From 1 July 1994, this was provided by ss 81 and 209ZG of the amended Companies Act 1955. Companies re-registered and incorporated are now governed by the Companies Act 1993 which provides similar protections in ss 117, 118, 174, and 175.

extraordinary character.[6] The general statutory power of amendment[7] cannot be relied on as a term of membership which expressly recognises the power of compulsory acquisition, as the extraordinary character of this power demands the strict construction of statutory provisions said to have this effect. This general statutory power of amendment falls far short of expressly recognising its use in compulsory acquisitions, and such an exorbitant power will never be implied.[8] After all, there is a presumption that legislation does not interfere with vested property rights.[9] Further, the general statutory power of amendment for the specific purpose of compulsory acquisition of shares, and expropriation of proprietary rights attaching to shares, is beyond any purpose contemplated by the articles of association.[10] Undoubtedly, shareholders are free to enter into their investment on any terms, which includes the express power of one party to the contract to amend its terms to allow the compulsory acquisition of the other party's property. The concern of this paper, however, is with this same power of amendment in cases where there are *no* express terms to this effect, where shareholders have not expressly addressed their minds to the issue. Although amendments in general are sanctioned by statute, the specific power of compulsory acquisition through amendments is both provided for and limited by the common law as the statute fails to recognise this power expressly. The common law effectively extends the scope of the statutory power of amendment which would otherwise be limited to amendments within the objects contemplated by the

---

6 But for the express recognition of the power of compulsory acquisition in the articles of association at the date of the company's inception or at the date of a further issue of shares, shareholders are said to have an expectation that their investment will remain in the company for the life of the venture. See *Phillips v Manufacturers Securities Ltd* (1917) 116 LT 290 (CA). The only other serious challenge to this expectation rests on the nature of the shares issued. For example, holders of redeemable preference shares cannot be said to have an unconditional expectation that their investment will last in perpetuity or until they choose to sell. Therefore, unless this extraordinary power is adopted expressly, it will not be implied as a term of membership.

7 Section 24 of the Companies Act 1955. Under the new Companies Act 1993, s 32 provides for amendments to the constitution which replaces the articles of association (and memorandum) as the document governing the conduct of the company's affairs.

8 Challies, *The Law of Expropriation* (2nd ed 1963) 12-15. This explains the different approaches of the courts when dealing with amendments which expropriate shares or proprietary rights, and those which do not. In cases of the latter, the courts are inclined to imply a term in the contract of membership which allows these amendments so long as they are made bona fide for the benefit of the company as a whole. See *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 where the amendment was only to impose a lien and *Shuttleworth v Cox Brothers Co* [1927] 2 KB 9 where the party affected by the amendment was not a shareholder but a director and the amendment only cancelled his contract of employment. In cases of expropriation, the courts are not inclined to treat the use of the power of amendment for such purposes as forming an implied term of the contract of membership. See *Brown v British Abrasive Wheel Co* (1919) 1 Ch 290; *Sidebottom v Kershaw, Leese & Co* (1920) 1 Ch 154; and *Dafen Tinplate Co v Llanelly Steel Co* (1920) 2 Ch 124.

9 Pearce and Geddes, *Statutory Interpretation in Australia* (4th ed 1996) para 5.12.

10 Supra at note 3, at 445.

articles. It is the concern of this paper whether any such power at common law ought to be allowed at all, and if so, whether the restatement of this power in *Gambotto* ought to replace the current common law prevailing in New Zealand. It must be noted that this conception of the common law test as a power, and not merely a limit, is a break with tradition. This is necessary, however, if we are to remain true to the origins of such a power which the statute does not expressly recognise and which shareholders do not expressly adopt.

1. The Common Law of New Zealand and England

The prevailing power at common law in New Zealand is of English pedigree. It is submitted that this power was first recognised in England in *Brown v British Abrasive Wheel Co*[11] although the form and limits of this power first featured in *Allen v Gold Reefs of West Africa*[12] as a test of the validity of amendments to the articles of association. Amendments were found to be valid if they were made bona fide for the benefit of the company as a whole. This distinction is made between *Brown* and *Allen* because the power as it first appeared in *Allen* did not feature as a power as such but as a limit on the general statutory power of amendment. In *Allen*, the articles of association had been amended so as to impose a lien on the fully paid up shares of all shareholders who were debtors of the company. This was not an amendment for the purpose of compulsory acquisition. Thus, the use of the general power of amendment in this case was sanctioned by statute as it was for a purpose contemplated by the articles. In consequence, the power of amendment used in this fashion is a power from statute, not at common law. The requirement that the amendment is made bona fide for the benefit of the company as a whole acts as a common law limit on the use of this statutory power, aimed at curbing its abuse. As it is properly implied, it also forms part of the terms of membership and, subject to express agreement to the contrary, shareholders are taken to adopt it. It was only in *Brown* that this test of valid amendments assumed a more aggressive role. No longer was it a mere common law limit on the power of amendment founded in statute, it became the means by which amendments enabled the majority to compulsorily acquire the shares of the minority. This is because *Brown* represents the first reported instance of the use of this power of amendment as a means of compulsory acquisition and, as observed by the High Court of Australia in *Gambotto*, the use of the statutory power for such a purpose lies beyond the contemplated objects of the articles. Further, the extraordinary nature of the power of compulsory acquisition prevents it from being implied as a term of membership. Hence, there was no basis for this power in statute nor in contract. Inadvertently, the use of the common law test of the validity of

---

11 Supra at note 8.

12 Ibid, 671 per Lindley MR: "[The majority's power to amend the articles] must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded."

amendments in *Brown* led to the development of a new avenue for compulsory acquisition, one which subsists at common law. Amending the articles could now be used as a means of compulsory acquisition if the amendment was made bona fide for the benefit of the company as a whole. This test at common law became both the root of the power of compulsory acquisition through amendments and its limit.

Given the extraordinary character of this power at common law, it is not surprising that the courts have taken care in defining the nature and width of valid amendments. The amendment must go no further than what is necessary to yield benefits to the company as a whole.[13] Otherwise, the alteration cannot be said to be *for* the benefit of the company as a whole. For example, where minority shareholders compete with the company, an alteration which specifically allows for the compulsory acquisition of the shares of competing shareholders has the appropriate scope as it goes no further than what is necessary to avoid the detriment of minority competition. An alteration that goes further, and expropriates the shares of *any* minority shareholder even those not in competition, is not *for* the benefit of the company as it goes beyond what is necessary to yield benefits to the company from eliminating minority competition.[14]

The English cases are evenly divided over whether the test is purely subjective or two pronged - subjective and objective. The purely subjective test is concerned with the criteria as a whole and whether the majority has acted bona fides. Cases supporting this position include *Sidebottom v Kershaw, Leese & Co Ltd*,[15] and *Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd*,[16] although the Court in the latter case recognised the objective element in the determination of subjective good faith. Hence, *mala fides* would be shown if the proposal was incapable of benefiting the company, or if no reasonable person would have considered it for the benefit of the company. The two pronged test separates the "bona fides" from the "benefit of the company as a whole", with the former being subjective and the latter objective. English cases supporting this approach are *Brown*[17] and *Dafen Tinplate Co Ltd v Llanelly Steel Co (1907) Ltd.*[18] *Re Bugle Press Ltd*[19] expressed the assumption prevailing since the decisions in these cases, that the expropriation of minority shares can only be justified if the minority is acting in a way that is destructive or highly damaging to the interests of the company or for some personal motive.

In 1930, the English common law power was adopted in New Zealand by Reed J in *Geary v Melrose Co-operative Dairy Co Ltd.*[20] In *Geary*, the majority had

---

13 *Brown v British Abrasive Wheel Co Ltd*, supra at note 8.
14 *Dafen Tinplate Co Ltd v Llanelly Steel Co (1907) Ltd*, supra at note 8.
15 Supra at note 8.
16 Ibid.
17 Ibid.
18 Ibid.
19 [1961] Ch 270 (CA).
20 [1930] NZLR 768.

amended the articles so as to deprive a certain class of shareholders of their entitlement to interest on capital. Although the facts before Reed J did not involve amendments for the expropriation of shares, it is submitted that it did involve the expropriation of proprietary rights attaching to shares, using the distinction drawn by the High Court of Australia in *Gambotto*.[21] This was a use of the power of amendment for a purpose beyond the contemplated objects of the articles. As such, this power does not exist in statute. In the absence of express adoption by shareholders, neither does it exist in contract. Through the agency of *Geary*, New Zealand adopted the common law power of compulsory acquisition through amendment of the articles of association. As Reed J preferred the power as defined in *Shuttleworth*,[22] it is the subjective version of this power which currently prevails in New Zealand.

With the corporate law reforms of 1993, articles of association have been replaced by what is termed the constitution. Although this issue has yet to be decided by the courts in New Zealand, Beck argues strongly that the common law governing amendments of the articles should be discarded with the change in the corporate law regime.[23] There are good grounds to disagree with Beck and it is submitted that the test of bona fide for the benefit of the company as a whole as a limit on the general statutory power of amendment continues to apply.[24] However, this common law *limit* must not be confused with the common law *power* of bona fides. As this paper is concerned with the use of the power of amendment as a

---

21 Supra at note 3, at 445. The interest on capital functions as a dividend.

22 Supra at note 8.

23 Beck, "Constitution" in *Morison's Company and Securities Law* (1995) para 9.13.

24 In answer to the arguments put forward by Beck, ibid, it is submited that the bona fides test is applicable to companies governed by the new legislation because:

(i) Although the new Companies Act 1993 does not include the test, the Law Commission's original draft did contain a provision expressly dealing with this issue and excluding the common law test. As Beck acknowledges, the failure to carry that provision through to the 1993 Act might be interpreted as an intention to retain the common law test. Ibid, para 9.13 n 3.

(ii) Although one of the aims of the 1993 Act has been to improve accessibility of the law, another aim of corporate law reform has been to improve the protections of minority shareholders. See Jones, *Company Law in New Zealand* (1993) 133.

(iii) The primary remedy for the change in the company's activities and shareholder rights is the appraisal or minority buy-out right in ss 110-118 of the 1993 Act. This is not an appropriate remedy where minority shareholders resist compulsory acquisition through amendments of the constitution and choose to remain shareholders. The buy-out right is for shareholders who wish to leave.

(iv) Although the remedies under the 1993 Act are an improvement over the Companies Act 1955, it is submitted that the improvements do not go far enough to warrant the elimination of the common law test. In support of this submission, consider the primary remedy in dealing with oppression under the new Act. It is s 174 which is in essence s 209 of the 1955 Act, with relatively few amendments. Section 174 is essentially the same as the old provision which had an undisputed shared existence with the common law test. Even the most significant amendments are of limited improvement. For example, s 175, which deems the alteration of shareholders' rights to be unfairly prejudicial conduct for the purposes of s 174, is an illusory protection against amendments to the

means of compulsory acquisition, it is the common law power that is of interest. Hence, Beck's submissions are not on point as the learned author is concerned with the ordinary use of the statutory power of amendment where the common law only functions as a limit and not a power. It is submitted that the common law power of amendment in compulsory acquisitions continues to apply.

However, this is not to say that it *should* apply. The power, as defined in terms of bona fide for the benefit of the company as a whole, is wholly inadequate. The author agrees with Mitchell that it should be abandoned, as first, it is inappropriate in dealing with disputes between shareholders[25] and second, a fundamental flaw exists in the very words of the test: *bona fide for* the *benefit* of the *company* as a whole. The first element, "bona fides", leaves the test too much in the favour of majority shareholders as all that is required is that they reach their decision honestly. Only in cases where decisions are dishonest or though honest, bizarre, would the court intervene. The second element, "for", has led to two alternative interpretations. On the one hand, Ford equates it with "tend" as in tending to benefit the company.[26] On the other hand, the New South Wales Court of Appeal in *Gambotto* preferred a test of "intent" to "tend". This would have made the test more stringent as "intent" denotes purpose or design behind the amendment of the articles, with the purpose being the benefit of the company as a whole. "Tend" merely requires that the amendment is inclined to benefit the company as a whole. Thus with "tend", the benefit to the company does not have to be the purpose of the amendment, and it would suffice if benefits did arise as a by-product of the amendment. The third element, "benefit", as seen in the original formulation of the test in *Allen*[27], has been applied in at least three ways. First, Latham CJ adopts the exact word "benefit".[28] Second, Ford uses "interest" in place of "benefit".[29]

---

constitution as courts are not inclined to treat such amendments as an alteration of shareholders' rights. This can be seen in the traditionally restrictive construction of what actually constitutes an alteration of rights. For example, in the case of compulsory acquisition by way of a reduction of capital, the English courts have held the repayment of paid-up capital on preference shares with a prior right of return of capital on a winding up is a fulfilment of rights, and not an alteration. See *Re Saltdean Estate Co Ltd* [1968] 1 WLR 1844 and *House of Fraser plc v ACGE Investments Ltd* [1987] AC 387 (HL).

(v) Although the bona fides test was developed before the introduction of statutory remedies, it survived their introduction and the numerous statutory amendments which could have easily eliminated it. In particular, the provision specifically excluding it in the draft 1993 Act was not carried through to the end product, the Companies Act 1993. As Beck acknowledges, this might be interpreted as Parliament's intention to retain it.

It must be noted that there are no provisions in the Companies Act 1993 which prevent the application of common law tests of validity of amendments of the constitution.

25 Unlike the United States, shareholders in Australia and New Zealand do not owe fiduciary duties to one another.

26 Ford and Austin, *Ford's Principles of Corporations Law* (6th ed 1992) 594.

27 Supra at note 8, at 671.

28 *Peter's American Delicacy Co Ltd v Heath* (1938) 61 CLR 457.

29 Supra at note 26, at para 1435.

Third, Farrar uses "good" in place of "benefit".[30] Finally, the fourth element, "company", has been interpreted in two ways. First, as referring to the company as a separate legal entity,[31] and second, as referring to shareholders in aggregate.[32] "Company" has even been used to include creditors.[33] Therefore, taken in total, the test is both inappropriate in the context of shareholders and, in any event, fundamentally flawed, primarily for want of consistency in its application. In consequence, this test *should not* continue to apply in New Zealand.[34]

The common law test, however, is not without support. In this respect, the economic position taken by Whincop must be considered. Whincop argues that the bona fides test is sufficiently flexible to allow alterations for the benefit of the company while striking down abuses of this power.[35] The author draws a distinction between cases where the use of this power had been merely to redistribute wealth and cases where the power was used correctly, in a productive way. By this distinction, Whincop attempts to explain that the test would be inappropriate when used to address pure conflicts of interests where the power merely redistributes wealth from the minority to the majority. The test would be economically correct when addressing cases where there are actual benefits to be made. This is because the test expressly recognises benefits as a basis for allowing compulsory acquisitions and this accords with the goal of value maximisation which ought to take priority over other goals in the company law context. After all, companies differ from other institutions as their primary function and *raison d'etre* are economic. Therefore, Whincop argues that the test is economically correct although not always appropriate.

It is submitted that the major weakness of Whincop's position is his own criticisms that the courts, in particular the High Court in *Gambotto*, are economically illiterate. If courts are economically illiterate, it is unlikely that the earlier cases he calls on in support were decided along economic lines. Further, if the courts are "economically challenged", the test of bona fides will not be consistently used to give effect to economic policies. This is particularly the case if one considers the ambiguities present in the test, noted by Mitchell above. These ambiguities would enable the court to give effect to any policy it chose, not only economic theory. Therefore, even if Whincop is right that the test is economically correct, it is still practically inoperable and in any event inappropriate where conflicts of interests predominate, as conceded by Whincop. In cases of compulsory acquisition, such conflicts would be hard to avoid.[36]

30 Farrar, *Farrar's Company Law* (3rd ed 1991) 189.

31 *British Equitable Assurance Company Ltd v Bailey* [1906] AC 35, 39.

32 *Greenhalgh v Arderne Cinema Ltd* [1956] 1 Ch 286, 291.

33 *Kinsela & Anor v Russell Kinsela Pty Ltd (in liq)* (1986) 10 ACLR 395.

34 For an extensive analysis of the difficulty in applying the bona fides test, see Rixon, "Competing Interests and Conflicting Principles: An Examination of the Power of Alteration of Articles of Association" (1986) 49 Modern L Rev 446.

35 Whincop, "Gambotto v WCP Ltd: An Economic Analysis of Alterations to Articles and Expropriation Articles" (1995) 23 Aust Bus L Rev 276, 285.

36 Arvanitis, "Gambotto & Anor v WCP Ltd" (1995) 13 Company & Sec LJ 326, 327: "Such a test is

2. The Common Law of Australia

Prior to *Gambotto*, the Australian common law power of amendment as a means of compulsory acquisition was of the English variety: bona fide for the benefit of the company as a whole. In *Gambotto*, all three courts - the Court at first instance,[37] the New South Wales Court of Appeal,[38] and the High Court of Australia[39] - held that the test of bona fide for the benefit of the company as a whole was inappropriate, primarily because compulsory acquisitions involve a conflict of interests which the test could not address.[40] This test would be more appropriate for directors who owe fiduciary duties to the company. Shareholders are not fiduciaries of the company, nor of one another, and can legitimately look after themselves by voting in their own interests.[41] As a result, the High Court of Australia introduced a new test or form of the common law power of amendment.

(a) Gambotto

The facts of *Gambotto* are essentially this. About 99.7 percent of WCP Ltd's issued shares were held by wholly owned subsidiaries of Industrial Equity Ltd ("IEL"), the majority shareholder. Mr Gambotto, and other dissenting minority shareholders, held 0.1 percent of the issued shares in WCP Ltd. On 15 April 1992, WCP Ltd notified all members of a general meeting, to be held on 11 May 1992, for the purpose of considering a special resolution for the amendment of the articles of association. This would have seen the introduction of a new article 20A. This new article would empower any member entitled to ninety percent or more of issued shares to compulsorily acquire the remaining shares. Compulsory acquisition was to be at $1.80 per share and before 30 June 1992. The notice of the meeting was accompanied by a report valuing WCP Ltd's shares at $1.365 per

---

clearly not appropriate in cases such as this, where there are conflicting interests within the company." This has the support of Spender, "Compulsory Acquisition of Minority Shareholdings" (1993) 11 Company & Sec LJ 83, 85.

37 (1992) 10 ACLC 1046, 1049 per McLelland J who observed that it was not an exclusive and conclusive test.

38 (1993) 30 NSWLR 385 per Meagher JA (with whom Cripps JA concurred).

39 Supra at note 3.

40 Note the observation of Boros, "The Implications of Gambotto for Minority Shareholders" in Ramsay (ed) supra at note 2, at 84. Boros draws attention to the possibility that the old common law test continues to apply in cases where there is no conflict of interests and advantages between shareholders and all shareholders are treated equally. This is because the courts did not address their minds to such situations, namely demutualisations.

41 In this regard, it must be noted that the position in the United States differs markedly from that in England, Australia, and New Zealand. In the United States, the majority or controlling shareholder *does* owe fiduciary duties to the minority: O'Neal, *"Squeeze-Outs" of Minority Shareholders* (1975) 508. The more minority oriented stance in the United States may be explained by its pro-minority history: see Spender, supra at note 36, at 85.

share on a net asset value basis.[42] At the meeting of 11 May 1992, the special resolution was passed unanimously. Neither the majority shareholder IEL, who attended the meeting, nor the dissenting minority shareholders (including Mr Gambotto), who failed to attend the meeting, voted. The dissenting minority was absent presumably because they had objected to the proposed amendment from the outset and had received an indication that the majority would likely vote in favour of the amendment.

(i) The New South Wales Supreme Court

Mr Gambotto and another minority shareholder commenced proceedings against WCP Ltd on 6 May 1996, alleging inter alia that the amendment of the articles constituted an oppression of the minority. They submitted that this oppression resulted in the power of amendment being exercised beyond the scope and purpose of the power conferred by s 176 of the Corporations Law. Their submissions were successful before McLelland J. His Honour held that the resolution was invalid and ineffective as the immediate purpose and effect of the amendment was to permit majority shareholders to expropriate the shares of the minority and this amounted to unjust oppression of the minority.

(ii) The New South Wales Court of Appeal

WCP Ltd then appealed to the New South Wales Court of Appeal. The Bench unanimously upheld the appeal in favour of the majority shareholder IEL. The amendment of the articles of association was held not to be oppressive. The Court reached this decision primarily on the basis that the value placed on the shares was accepted by the parties as a fair valuation. Further, there were considerable tax advantages and administrative benefits to be made if WCP Ltd became a wholly owned subsidiary of IEL. The Court rejected the notion that the expropriation of shares whether beneficial to the company or not is a *malum in se*[43] and as such, always enjoinable. After all, the Australian Corporations Law expressly permits expropriations in the context of takeover schemes, compromises, and schemes of arrangement. Further, articles of association regularly provided for liens leading to the forfeiture of shares. If the articles had contained a compulsory acquisition provision at the time of the company's incorporation, similar to that introduced by the amendment, it would have been difficult to see how anyone would have objected to it.[44] In any event, the minority knew, or should have known, that the membership of the company was bound by resolutions duly passed by the members in general meeting. Thus, divestment arising from such a resolution is

42 See Jones, supra at note 24, at 82.

43 "Acts which are wrong in themselves, such as murder", Burke (ed), *Jowitt's Dictionary of English Law* (2nd ed 1977) 1135 under "mala inse".

44 Supra at note 38, at 389.

not, in a real sense, a divestment against the shareholders' will.[45]

(iii) The High Court of Australia

On appeal to the High Court of Australia by Mr Gambotto, who represented himself, the judges of the High Court unanimously held in his favour. The High Court reversed the decision of the Court below and provided a definitive restatement of the general law doctrine of fraud or oppression. The High Court devised a new two limb test for the validity of an alteration to the articles which allowed for the expropriation by the majority of minority shareholders' shares or proprietary rights. All members of the High Court held that such an alteration is allowed only if the majority shareholder(s) affirmatively prove that:

(i) The power of amendment is exercised for a proper purpose; and
(ii) The expropriated minority is not oppressed.

It is to be noted that the High Court reversed the pre-existing onus of proof and placed the burden on the majority. Further, it must be noted that this new test of validity only applies to the use of amendments as a means of expropriation of shares or proprietary rights. In all other cases, the use of amendments would be governed by tests of the purposes contemplated by the articles, or oppression, as this expression is understood in corporate law.[46] It is submitted that this distinction between the type of use made of the power of amendment is justified; technically, the first functions as a common law power, the second as a common law limit on statutory power. As a power, care ought to be taken to define it narrowly given its extraordinary nature. As to the first limb, the majority held that:

(i) Where the alteration is aimed at mitigating or eliminating a reasonably apprehended detriment arising from the continued shareholding of the minority; and
(ii) Where the expropriation was a reasonable means of avoiding this detriment, it would qualify as a proper purpose.

---

45 Ibid, 386. Although shareholders can be taken to know, or in fact ought to know, that they are bound by resolutions duly passed, they cannot be taken to know that the general power of amendment can be used as a means of compulsory acquisition given the extraordinary character of such a power. To hold otherwise would be to imply a term to that effect in their contract of membership. However, this is exactly what the New South Wales Court of Appeal did by holding that shareholders knew or ought to have known that they were bound by resolutions duly passed, even if these resolutions lead to the compulsory acquisition of their shares. It is submitted that the Court is in error as it ignored the extraordinary character of such a power. As will be seen, the High Court of Australia was under no illusions as to the basis of such a power. Clearly it could not be found in contract nor in statute.

46 Supra at note 3, at 445.

The mere securing for the majority shareholder of the benefit of a corporate structure which could lead to some new commercial advantage, would not qualify as a proper purpose.[47] On this basis, the alteration in the case was held to have been for an improper purpose by the majority of the High Court, as it only secured administrative and taxation savings. The majority reasoned that such benefits accrue in almost all cases of expropriation and to allow the gaining of such benefits to qualify as a proper purpose would negate the greater protections afforded minorities under the other heads of compulsory acquisition.[48] Only expropriations which mitigate or eliminate detriment to the company from the continued shareholding of the minority would qualify as a proper purpose. The majority of the High Court offered, as an example of detriment which would satisfy the test, minority shareholders who were competing with the company. Another example offered by the Court was the continued membership of foreign minority shareholders which prevented compliance with the regulatory regime governing the company's principal business, where the company's very existence is dependant on compliance.[49] These examples illustrate that the detriment from continued minority shareholding which satisfies the proper purpose test is not limited to that which arises from minority shareholders' "wrongdoing". Therefore, the expropriation of "innocent" minority shareholders is valid if the mere fact of their continued membership in the company, for whatever reason, causes detriment to the company. As will be discussed in Part V, this has valuation implications when determining the "fair" price to be paid for the shares of expropriated minority shareholders.

Justice McHugh, in the minority, differed by choosing not to differentiate between the avoidance of detriment and the gaining of a positive benefit. In his view, the objective of achieving either or both of the above would qualify as a proper purpose. By his definition, either or both the protection or promotion of the company's interest would qualify as a proper purpose for the expropriation.[50] Hence, McHugh J reasoned that the majority shareholder had discharged its onus of showing that the alteration was for a proper purpose. This satisfied the first limb of the test. After all, the company would have saved approximately $4.2 million in taxes by the expropriation. However, he drew a distinction between *internal* and *external* benefits; a savings in administrative costs which is an *internal* benefit could never by itself justify an alteration for the purpose of expropriation.[51] Therefore, the further savings of $4,300 per annum in administrative costs was in itself an insufficient basis to found a proper purpose.

---

47 Ibid.

48 Ibid, 446.

49 Ibid, 445.

50 Ibid, 453. This has the support of Taylor, "Minority Shareholders in the High Court" (1995) 10 International Commercial Litigation 26, 27.

51 Supra at note 3, at 455.

Even where an alteration is for a proper purpose, minority shareholders must not be oppressed. This was defined to mean fair treatment in the expropriation. This is the second limb of the test to be satisfied by the majority shareholder. The High Court defined "fairness" as consisting of procedural and substantive fairness.

Procedural fairness involves the disclosure of all relevant information and valuation by an independent expert. It may also involve the majority's abstinence from voting although this issue has yet to be decided by the court.

Substantive fairness requires fairness in the terms of expropriation and more specifically, the price placed on expropriated shares. Although McHugh J differed from the majority in his view of the first limb of the test, he agreed with the majority's view of the principles underlying the second limb. As a result, he reached the same decision as the majority of the High Court in striking out the amendment to the articles but did so on the basis that the majority shareholder had failed to prove procedural and substantive fairness. IEL had failed to discharge their onus of showing that the minority had been dealt with fairly and provided with full disclosure, and had failed to prove that the price was fair. His Honour drew on the United States' authority of *Weinberger v UOP Inc*[52] which defined fairness as consisting of fair dealing and fair price. The Australian manifestation of these elements of fairness is the concern with procedural and substantive fairness.

In summary, the effect of the new test in *Gambotto* is that compulsory acquisitions through amendment of the articles of association are allowed *only if* the amendments were made for a proper purpose, satisfying the first limb in *Gambotto.* By definition, proper purposes are limited to the avoidance of the detriment from continued minority shareholding, whether or not the fault of the expropriated minority. On satisfaction of the first limb, the second limb then requires the expropriated minority to be treated fairly. Fair treatment involves both procedural and substantive fairness. Procedural fairness requires adequate disclosure. Substantive fairness requires "fair" prices. Only compulsory acquisitions allowed by the first limb, and which satisfy the standards of fairness of the second limb, are valid. Put differently, as the common law of amendments as a means of compulsory acquisition is a common law *power,* and not merely a limit on statutory power, the adoption of *Gambotto* would see a considerable restriction on this power. Majority shareholders will only have the power to amend the articles for the purpose of compulsory acquisition if they do so for a proper purpose and treat the minority fairly.

A central question for New Zealand securities law is: should *Gambotto* lead the way? Put differently, should each limb of *Gambotto* be adopted in its entirety or in a modified form? Before any attempt can be made to resolve this question, an underlying issue of fundamental importance must be addressed. As the power of expropriation is extraordinary, it must be expressly recognised by statute or

52 457A 2d 701 (Del Supr 1983).

contract in order to have its basis in statute or contract, respectively. The general statutory power of amendment falls short of such recognition. Assuming that shareholders have not expressly recognised this power in their articles of association or constitution, the power of compulsory acquisition through amendments exists only at common law. This then raises the issue of the acceptability of such an extraordinary power at common law. Should minority shareholders be subject to a power of expropriation which is not an express term of their contract of membership and which is not expressly provided for by statute? This issue is explored in the next part. It is only with the resolution of this fundamental issue that the adoption of *Gambotto* can be considered.

III: THE PRINCIPLE OF COMPULSORY ACQUISITION

Much has been written on the power of compulsory acquisition and yet the most fundamental issue has been ignored: is the principle of compulsory acquisition acceptable? Its acceptability has traditionally been treated as a given.[53] Only if the principle of compulsory acquisition is found to be acceptable will some form of compulsory acquisition be justified and the common law of compulsory acquisition through amendments be allowed.

It is submitted that the principle of compulsory acquisition is acceptable. This is primarily because to argue otherwise would be to subscribe to absolutely indefeasible property rights. Such a position is untenable on grounds of efficiency. As Barzel observes, even in capitalist market economies, property rights are limited.[54] The learned author reasons that such limitations are necessary for the sake of efficiency. Support for this submission can be gained from the survivorship principle or economic Darwinism.[55] This principle suggests that practices with economic consequences are efficient if they survive over time, as the scarcity of resources demands the adoption of increasingly efficient alternatives.[56] Given that some form of compulsory acquisition has survived for centuries, and there is even an example of it in the Bible,[57] the power of compulsory acquisition is said to be efficient. Further support for this contention is derived from the United States experience. DeMott observes that in the United States, absolutely indefeasible property rights, termed the "property rule", have long been discarded in favour of a form of defeasible property rights, termed the

53 Spender, supra at note 36, at 93.

54 *Economic Analysis of Property Rights* (1989) 85.

55 Alchian, "Uncertainty, Evolution and Economic Theory" 58 J Pol Econ 211.

56 Scarcity is a universal "plague" of all societies. This is because "scarcity" is defined as limited means in the face of unlimited wants. The discipline of economics rests on the notion of scarcity for, without scarcity, there will be no need to *economise*. See Harvey, *Modern Economics: An Introduction for Business and Professional Students* (5th ed 1988) 3.

57 Challies, supra at note 8, at 1.

"liability rule", as indefeasible property rights impinged upon business efficiency.[58] On closer examination, there are good reasons why the power of compulsory acquisition results in efficiency. First, without the power of compulsory acquisition, the transfer of property will always lead to one-to-one negotiations. In the case of companies with a large number of minority shareholders this will result in an increase in this method of negotiation. This will generate a massive transaction cost, which is a claim against society's scarce resources. Second, without the power of compulsory acquisition, wrongdoing shareholders cannot be sanctioned through expulsion. This provides them with the incentive to misbehave. Worse, this provides them with the further incentive to escalate their wrongdoing as the greater the damage to the company posed by their actions, the higher the price that will be paid for the acquisition of their shares. Aside from being a costly, yet unproductive, exercise a focus on redistribution is at the cost of pursuing value maximising activity.

Notwithstanding the proprietary nature of shares,[59] to argue against compulsory acquisition would be to argue for indefeasible property rights. This would see the elevation of shares as a form of property beyond even the status enjoyed by realty. This cannot be right.

Popular arguments in support of the principle of compulsory acquisition are that this power prevents greenmailing and free-riding by the minority. Greenmail is the term ascribed to the bargaining behaviour of minority shareholders who have a strategic bargaining position by holding the last parcel of shares which prevents the majority from gaining full ownership. It is considered an "evil" like blackmail. Free-riding describes the act of hold-out by the minority who prefer to remain in the company as this allows them to share in the gains of restructuring without having to bear the associated costs and risk. Both greenmailing and free-riding are said to discourage the pursuit of value maximising projects by the majority. Free-riding, in particular, is said to lead to the failure of such projects by depriving the majority of the necessary votes. It is submitted that both arguments, though popular, are misconceived, and as a consequence, provide no support for the principle of compulsory acquisition. To consider both greenmailing and free-riding as problems to be remedied by compulsory acquisition is illusory.

Greenmailing as a problem is a fiction as it is an emotive overstatement of otherwise acceptable bargaining behaviour. The term "greenmail" attempts to attract ill will by its semantic association with blackmail. This is unjustifiable as

---

58 DeMott, "Proprietary Norms in Corporate Law: An Essay on Reading Gambotto in the United States" in Ramsay (ed), supra at note 2, at 99-100. The "property rule" gives the minority shareholder an absolute veto over the transfer of their shares. The "liability rule" only requires the majority shareholder to show entire fairness if the compulsory acquisition of minority shares is challenged.

59 Shares are a form of personal property. See Hammond, *Personal Property: Commentary and Materials* (2nd ed 1992) 123. In *Gambotto*, supra at note 3, at 446, shares are said to have inherent worth and are more than just a capitalised dividend stream.

greenmail lacks the necessary element of a threat which is at the core of blackmail. This emotive overstatement of greenmail as a problem is further fuelled by incorrect assumptions, said to originate from the recommendations of the Greene Committee, set up by the United Kingdom Board of Trade and reporting in 1928, on the appropriateness of compulsory acquisition.[60] The report of the Greene Committee, which advocated compulsory acquisition, rested on the assumption that dissenting shareholders are greedy and apathetic and, that the majority desire to gain full ownership was legitimate. These assumptions may be explained by the history of the Anglo-Australian law governing compulsory acquisitions which developed differently from its United States counterpart. In the past, the majority in England and Australia had free reign, as the minority was believed to have the ability to divest should they dissent.[61] These false assumptions of the Greene Committee are further reinforced by the incorrect belief that resolutions carried by a super-majority are fair as they appeal to the vast majority of shareholders. Hence, amendments to the constitution are fair as these require the support of a seventy-five percent majority. This belief is wrong, as shareholders often vote in approval for reasons other than fairness[62] and in any event, this belief rests on the misconceived assumption that the votes cast in favour of the resolution are by independent parties. There is no present requirement at law that interested parties abstain from voting on special resolutions which amend the constitution. A major reason for the bad press received by greenmailing is the perception of greenmail as a form of oppression of the majority by the minority.[63] This perception is false and worse, hypocritical, as the same strategic bargaining behaviour by land owners holding the last parcel of land needed in a real estate development project is considered acceptable.[64] Land and shares are not so inherently different that the bargaining behaviour of land owners should be viewed differently from the same type of bargaining behaviour of shareholders. Fridman's attempt to draw such a distinction on the basis of valuation[65] is erroneous. The author reasons that shares do not provide their owners "consumer surpluses" which represent the subjective value placed on shares by owners in excess of the objective market value. Without consumer surpluses, the objective market value is said to be an accurate measure of the true worth of shares and this justifies compulsory acquisitions, as one-to-one negotiations in voluntary transactions to determine the value of shares is unnecessary. The fallacy of this submission is the assumption that shareholders have no attachment to their shares which would yield consumer surpluses.

---

60 Spender, supra at note 36, at 87.

61 Ibid, 85.

62 Grave, "Compulsory Share Acquisitions: Practical and Policy Considerations" in Ramsay (ed), supra at note 2, at 28.

63 Kent and Vary, "Compulsory Acquisition of Shares" (1991) 9 Company & Sec LJ 261.

64 Supra at note 58, at 96-97.

65 Fridman, "When Should Compulsory Acquisition of Shares be Permitted, and if so, What Ought the Rules be?" in Ramsay (ed), supra at note 2, at 126-132.

Yarrow's position challenges Fridman's assumption.[66] Yarrow reasons that shareholders do enjoy consumer surpluses. The author is inclined to agree, as shares in different companies are not perfect substitutes. The inability to substitute means that the shares' uniqueness provides the shareholder with his or her consumer surplus. The objective market price will not reflect the added subjective value placed on shares, and the expropriation of shares leads to an expropriation of consumer surpluses; it ignores the subjective valuation of shareholders, otherwise assessable in voluntary one-to-one negotiations. It is ironic that the majority's desire of gaining full ownership reduces the substitutability of shares from different companies, as this desire imbues the minority parcel of shares with strategic worth. This reinforces the uniqueness of shares and diminishes support for compulsory acquisition. DeMott strengthens Yarrow's position by observing that smaller financial markets provide fewer opportunities for reinvestment or fewer substitutes.[67] As a result, shares traded in smaller markets are more likely to yield consumer surpluses. This implies that shares traded in New Zealand yield consumer surpluses, as the New Zealand market is small in comparison with the United States. Therefore, shares are not so distinct from land that the bargaining behaviour of the minority should be viewed as an oppression of the majority. In any event, the claim that greenmailing is oppressive should be dismissed as being far-fetched if the majority is large, commercial and informed, and if it is not acting out of necessity or engaged in good works.[68] Such would be the status of majority shareholders in most cases, as it takes the kind of wealth only such entities can muster in order to acquire a majority stake in publicly listed companies.

Free-riding, as a problem, is similarly illusory. Free-riding is only a problem when a rational minority has the incentive to withhold the support necessary to carry a resolution because this would yield them greater gains. In resolutions passed to amend the articles of association or constitution as a means of compulsory acquisition there is no incentive to withhold support. The minority cannot hope to remain in the company to share in the gains of restructuring by free-riding on the vote of the majority who support the resolution, as a successful resolution would see their expulsion which is at the very heart of amendments as a means of compulsory acquisition.

Not all writers are in favour of the principle of compulsory acquisition. One concern is the effect this power has on derivative financial markets.[69] Part of an

---

66 Yarrow, "Shareholder Protection, Compulsory Acquisition and the Efficiency of the Takeover Process" (1985) JIE 3, 12.

67 Supra at note 58, at 100.

68 *ANZ Executors & Trustees Ltd v Humes Ltd* [1990] VR 615, 633: "Now that group was not in *necessitous circumstances* or engaged in *good works*. It was not a *charity* or other deserving cause but the owner of *a multi-million dollar commercial enterprise* which was used to looking after itself and no doubt used to having available to it the best of *legal and other expert advice*" (emphasis added).

69 Supra at note 63, at 266-267.

option's value is dependent on the length of its life span. The greater the time to the expiration of the option, the higher its value.[70] The compulsory acquisition of the underlying share abruptly shortens an option's life span, as it places the underlying share beyond the reach of the parties to the option contract. This depresses the price of the option. It is submitted that participants in options markets cannot complain as they participate knowing the risk, and must be taken to bear the risk of compulsory acquisition.

Another concern is with the legitimacy of the power of compulsory acquisition through amendments to the constitution. It is argued that this power should only be allowed if expressly recognised by statute, as historically such a power came about only through carefully initiated government reviews.[71] In contrast with the other means of compulsory acquisition, the general statutory power of amendment falls short of an express recognition of such a power. Admittedly, this argument does have merit. However, it assumes that it is Parliament's intention that the express means of compulsory acquisition function as an exhaustive code. This is disputable as there is no indication in the statute that favours this premise. It might even be submitted that the express means of compulsory acquisition function as mere examples of a power which Parliament approves of generally.[72]

There is, however, a sound argument against the principle of compulsory acquisition. Compulsory acquisitions are said to violate the autonomy and volition of minority shareholders as freethinking agents in a capitalist society. After all, compulsory acquisitions are, by definition, coercive.[73] Fortunately, this argument may be able to accommodate some form of compulsory acquisition. Where minority shareholders are expropriated for conduct unbecoming, it may be said that these shareholders have acted in a way deserving of compulsory acquisition and have made a *constructive election* to sever ties with the company.[74] This amounts to constructive volition and it could be argued that the expropriation of their shares does not violate their autonomy and volition unless *constructive* volition is viewed as a legal fiction. If the first limb of *Gambotto* is adopted without modification, not all expropriations will involve wrongdoing minority shareholders; compulsory acquisitions are allowed whenever the continued membership of the minority proves detrimental to the company, whatever the cause. In such cases, the expropriated innocent minority cannot be said to possess constructive volition as the expropriation of their shares will sully the virtues of autonomy and volition. This would be unacceptable if autonomy and volition were the only principles in contention in an examination of the acceptability of the

---

70 For a more detailed discussion of option valuation see Hull, *Options, Futures and Other Derivative Securities* (2nd ed 1993) 152.

71 Supra at note 35, at 279.

72 Mitchell, "Gambotto and the Rights of Minority Shareholders" (1994) 6 Bond L Rev 92, 102.

73 Spender, supra at note 36.

74 Sirianos, "Problems of Share Valuation under section 260 of the Corporations Law" (1995) 13 Company & Sec LJ 88, 113-122.

principle of compulsory acquisition. As they are not the only consideration and do not necessarily take precedence, this limited violation of autonomy and volition represents a compromise that accommodates other principles, such as the need for defeasible property rights. As will be examined in Part V, this breach of autonomy and volition will require compensation and the price paid for the shares of innocent and wrongdoing shareholders should differ for this reason.

In summary, the principle of compulsory acquisition is acceptable on an assessment of competing arguments. This is justification for some form of power at common law which extends the general statutory power of amendment in the absence of express agreement, or express statutory recognition. Shareholders remain free to negative or vary this power by contract and it is acceptable that they do so; contracting parties are in a better position to reach an efficient arrangement, as they possess knowledge of facts unique to their circumstances. However, in every other case, where shareholders have failed to address this issue, there are grounds for recognising the principle of compulsory acquisition at common law.

IV: THE FIRST LIMB OF GAMBOTTO: THE PROPER PURPOSE TEST

The proper purpose test is more restrictive, and more favourable to the minority, than the common law test currently applied in New Zealand – the test of bona fide for the benefit of the company as a whole. While the bona fides test allows all expropriations which benefit the company, the proper purpose test only allows expropriations which benefit the company by avoiding the detriment from the fact of minority shareholding. The bona fides test can be said to subsume the proper purpose test. It is submitted that there are good reasons for preferring the more restrictive proper purpose test.

1. Competing Interests

The bona fides test represents a delicate balance between competing interests. On the one hand, it is in the interest of minority shareholders not to have their shares compulsorily acquired as it violates their autonomy, volition, and property rights. On the other hand, it is in the interest of majority shareholders not to be held to ransom by a small minority offered a respectable price.[75] If these were the only competing interests, not even the more restrictive proper purpose test would be justified. Although some form of compulsory acquisition should exist, it would have to be even more narrowly defined. This is because the power of compulsory

75 Supra at note 63.

acquisition is extraordinary as it involves coercion. This coercion can only be justified by the good of the whole community or the public good. While compensation balances the acquisition, only the public good balances the compulsion.[76] On this basis, society has a legitimate stake in the balance struck where there are benefits to society of compulsory acquisition.

Notwithstanding the difference between compulsory acquisitions and takeovers, the former facilitating the acquisition of full ownership and the latter control, the benefits to society from takeovers are said to form part of the benefits to society from compulsory acquisition. This is Boros' submission.[77] This submission, however, is not without controversy. First, Spender challenges the view that there are in fact benefits from takeovers, as empirical studies conducted to prove that these benefits do in fact exist have failed to definitively resolve the issue.[78] At this point, all that can be said of these benefits is that they at least exist in *theory,* where the threat of takeovers is believed to ensure that companies perform well. Poorly performing companies attract takeovers as there are gains to be made by acquiring shares in a value-reduced state, making improvements in the company, which could include a change of management, and then on-selling at improved prices.[79] Second, Spender also challenges the view that the benefits from takeovers should form a part of the benefits from compulsory acquisition. Boros justifies this inclusion by arguing that the power of compulsory acquisition promotes takeovers.[80] This would explain the inclusion of s 208 of the 1955 Companies Act and Rule 21 of the draft Takeovers Code 1993 in provisions governing takeovers. Boros reasons that takeovers promote compulsory acquisitions by enabling the acquiring company to prevent the remaining minority shareholders from free-riding on the improvements made. Further, the resulting full ownership simplifies the task of managing the company in the interests of the company group. For example, the transfer of funds intra-group. Compulsory acquisitions are also said to promote takeovers by facilitating the strategies of the acquiring company through a reduction of the threat to the security and confidentiality of the company's business plans and product development. This is especially so if the minority represents competing interests in the industry. Finally, the power of compulsory acquisition promotes takeovers by offering the acquiring company the benefits from full ownership such as tax[81] and administrative savings.[82] These benefits add to the potential benefits from

76 Spender, supra at note 36.

77 Boros, supra at note 4.

78 Spender, supra at note 36, at 89.

79 Supra at note 66.

80 Boros, supra at note 4.

81 In Australia, tax savings are dependant on 100 percent ownership (s 80G of the Australian Income Tax Assessment Act 1936 (Cth)). In England, 100 percent ownership is not a necessary precondition to the gaining of tax savings (s 413 of the Income and Corporation Taxes Act 1988 (UK)).

82 For example, the rationalisation of inter-company personnel and resources as suggested by Kirby

takeovers as, on the gaining of control, the acquiring company is in a good position to gain full ownership.[83] In short, the benefits of compulsory acquisition act as an incentive to the gaining of control and this enables the inclusion of the benefits from takeovers when considering the benefits to society of compulsory acquisitions.

It is submitted that the delicate balance struck by the bona fides test is incorrect. In weighing up the competing interests, the major justification for society's stake in the outcome - tax savings on full ownership - is illusory. Tax savings do not benefit society as they merely represent a redistribution of wealth amongst different segments of society. Funds otherwise available for government spending are channelled into the pockets of company shareholders. Tax savings may even be a cost to society as the exercise of avoiding tax is itself costly. Further, the channelling of funds to company shareholders would see a flow of resources out of the country where not all shareholders are domestic. In combination, the exercise of saving on taxes acts as a cost, and not as a benefit, to society. In any event, claims of tax savings on full ownership in New Zealand are illusory as the specific provisions of this country's tax legislation employ a much lower threshold: a sixty-six percent majority would be sufficient.[84] Taken as a whole, a balance more in favour of the minority should be struck. This is accentuated by the "secondary effect" of disproving the claim that tax savings benefit society and showing that tax savings in New Zealand are not contingent on full ownership. The "secondary effect" results from the weakening of the connection between compulsory acquisitions and takeovers. Compulsory acquisitions are said to promote takeovers as the benefits of full ownership act as an incentive to the gaining of control. Where the benefits of full ownership are shown to be exaggerated, the incentive it offers to takeovers is shown to be overstated. The weakening of these incentives weakens the ability of compulsory acquisitions in promoting takeovers and this weakens the connection between the two. As a result, the benefits of compulsory acquisition are twice reduced, first by losing the significant contribution of tax savings and second, by losing the significant contribution of the benefits from takeovers. The "secondary effect" would see a further shift in the balance; the new balance should be even more restrictive of the power of compulsory acquisition. The present balance struck by the bona fides test is too lackadaisical and it is submitted that the proper purpose test should be preferred as it is more restrictive of the power of compulsory acquisition.

ACJ in *Elkington v Shell Australia Ltd* (1993) 32 NSWLR 11, 16-17 (CA). Another example would be the savings in secretarial and share registry expenses as in *TNT Ltd v NCSC* (1986) 11 ACLR 59, 62.

83 Boros, supra at note 4, at 306-307.

84 See s IG1(1) of the Income Tax Act 1994.

2. Consistency with the Other Means of Compulsory Acquisition

The power of compulsory acquisition through amendments to the constitution does not function in isolation. It is one of four main means of compulsory acquisition; the other three are compulsory acquisitions on takeovers, schemes of arrangement, and selective reductions of capital. A consistency in the degree of restriction of the power of compulsory acquisition amongst the alternatives is desirable. A rational majority will always prefer the easiest route to gaining full ownership. As a consequence, the more restrictive means of compulsory acquisition become obsolete. It is submitted that the more restrictive proper purpose test be preferred as the current common law test is less restrictive than the other means of compulsory acquisition. The proper purpose test will minimise the differential in restriction between the power of compulsory acquisition through amendment and the other means of compulsory acquisition. The failure to adopt this test will result in the obsolescence of the other means of compulsory acquisition and a reduction in the overall level of minority protection. This submission has the support of Bryson J in *Nicron Resources Ltd v Catto*,[85] who held that there ought to be a level playing field between the alternative means of compulsory acquisition. Further support can be found in the High Court decision of *Gambotto* where the bona fides test was rejected and where the proper purpose test was defined to exclude the pursuit of benefits which advance the company's interest. The Court reasoned that this restriction of proper purposes was necessary to avoid defeating the minority protections afforded by the other means of compulsory acquisition.[86] DeMott suggests that this approach rests on an implicit doctrine of interdependence which favours substance over form.[87] Yeung can also be taken to support the submission that there ought to be consistency between the alternative means of compulsory acquisition in her critique of the New South Wales Court of Appeal decision in *Gambotto*.[88] This support can be seen from our shared belief that the inconsistency is a problem as it leads to the obsolescence of the other means of compulsory acquisition and an overall reduction in minority protections. The only difference lies in the approach taken to prevent this obsolescence. While the author proposes the adoption of a new common law test which is more restrictive so as to minimise this inconsistency, Yeung suggests the adoption of a new common law test of validity which assesses the motives of the majority in their choice of amendments as a means of compulsory acquisition. Amendments are invalid if they were chosen for the purpose of avoiding the greater minority protections of the other means of compulsory acquisition.

---

85 (1992) 10 ACLC 1186, 1198.

86 Supra at note 3.

87 Supra at note 58, at 93.

88 Yeung, "WCP Ltd v Gambotto and Anor" (1993) 11 Company & Sec LJ 323, 326.

The submission that the proper purpose test be adopted to address the problem of inconsistency is not necessarily free from opposition. This submission might be challenged by an attempt to disprove the alleged inconsistency and would involve the observation that under the new corporate law regime, the other means of compulsory acquisition afford the minority fewer protections.[89] This effectively eliminates the inconsistency by lowering the overall level of minority protections. Although the corporate law reforms of 1993 have reduced the restrictions of the other means of compulsory acquisition, save for selective reductions of capital, an inconsistency persists, should the bona fides test continue to apply to amendments as the restrictions on amendments remain comparatively weak. This is because amendments as a means of compulsory acquisition only require the support of a seventy-five percent majority and this is facilitated by not requiring interested shareholders to abstain from voting. And in New Zealand, the bona fides test is of the subjective variety which is easier to satisfy. In contrast, the proposed power of compulsory acquisition in the yet to be adopted Takeovers Code 1993 can only be triggered by the satisfaction of the higher threshold of ninety percent. Under the 1993 Act, schemes of arrangement continue to require court involvement. Selective capital reductions, however, no longer exist as a means of compulsory acquisition as this is not expressly recognised by the 1993 Act. Another challenge to the submission that a more restrictive test of amendments be adopted comes from the question posed by Fridman : "On what basis can or ought judges limit the scope of a power [to alter the articles of association] that is granted with no express limitation?"[90] In answer, reference should be made to the extraordinary character of the power of compulsory acquisition and to the authorities which support a restrictive interpretation of statutory provisions said to have this effect. Such a power must be expressly recognised; it is never implied. As the general statutory power of amendment does not expressly recognise the power of compulsory acquisition through amendments, it has been submitted that the use of amendments for expropriations lies beyond the scope of the provision. Put differently, there is no statutory basis for this power and it exists at common law. Given its extraordinary character, the limits placed on this power are justified.

There exists another good reason for consistency between the alternative

---

89 The ninety percent majority required by the compulsory acquisition provision in takeovers, (s 208 of the Companies Act 1955) has now been redefined by Rule 21 of the Draft Takeovers Code 1993 to include the shares held by the majority (interested) shareholder. The three stage process of schemes of arrangement as set out by s 205 of the 1955 Act is now essentially only one stage under s 236 of the 1993 Act. Given the court discretion inherent in both Acts, the reduction of three stages to one effectively ensures that minority protections are no greater and possibly less under the 1993 Act. Selective capital reductions, however, represent the anomaly. Under the 1955 Act, it was a four stage process. Under the 1993 Act, there is no express recognition of this power as s 52 has not been worded to specifically allow for selective capital reductions against the will of the minority. Further, s 60 applies only to voluntary reductions, involving as it does the words "make an offer".

90 Supra at note 65, at 125.

means of compulsory acquisition. Apart from avoiding obsolescence, the adoption of a more restrictive test of validity of amendments is desirable if the greater restrictions of the other means of compulsory acquisition represent well thought out and coherent legislative policies.[91] In a detailed analysis, Yarrow concludes that in England the express statutory power of compulsory acquisition which accompanies takeovers represents an economically optimal equilibrium between the costs of reduced business efficiency of having greater minority protections and the costs of increases in the cost of capital of having fewer minority protections. It is an efficient solution to the problem of free-riding by minorities who choose not to accept the takeover offer.[92] However, this submission must be tempered by Digby's view that these other means of compulsory acquisition afford the minority too much protection and ought not to be used as a benchmark.[93] Digby has the support of the Australian Legal Committee of the Companies and Securities Advisory Committee ("CASAC")[94] and Harding, who concludes that the current state of the law in Australia affords the minority too much protection and may not survive the scrutiny of the law reformers.[95] It must be noted, however, that even if one were to prefer Digby and Harding's views over those of Kevans and Yarrow, this does not detract from the first argument that the proper purpose test ought to be adopted as it minimises the existing inconsistency. This first submission is not dependent on the appropriateness of the restrictions in the other means of compulsory acquisition, but on the mere fact of the inconsistency leading to their obsolescence. The first submission is premised on the obsolescence of the other means of compulsory acquisition denying Parliament its intentions. If Parliament had not intended that the restrictions of the other means of compulsory acquisition were to be effective, it would not have enacted them.

For the reasons given above, it is submitted that the proper purpose test ought to be adopted in place of the prevailing bona fides test. However, it will be necessary to modify the proper purpose test so as to avoid the flaw inherent in its conception. By drawing a distinction between avoiding a detriment, which is a proper purpose for an amendment, and the gaining of a benefit which is an improper purpose, the proper purpose test in *Gambotto* has been criticised on the

---

91 Kevans, "Oppression of Majority Shareholders by a Minority? Gambotto v WCP Ltd" (1996) 18 Sydney L Rev 110, 118. This is also the tacit position of Yeung, supra at note 88. This has the support of Australian Lavarch Committee which produced a report in November 1991 calling for schemes of arrangement to be treated in the same manner as compulsory acquisitions under the Australian takeover provisions. See Spender, supra at note 36, at 84-85.

92 Supra at note 66.

93 Digby, supra at note 4, at 123-124.

94 Australian Legal Committee of the Companies and Securities Advisory Committee, *Compulsory Acquisitions Issue Paper* (March 1994) 3. The Committee expresses the view that in some respects the existing compulsory acquisition provisions may be too restrictive and the prerequisites of these provisions may be relaxed without sacrificing the objectives of equity and fairness. See Elliot, "WCP Ltd v Gambotto & Anor: Expropriation of Minority Shareholding is not a malum in se" [1993] 19 Melbourne Univ L Rev 776, 779 n 22.

95 Harding, "Mopping Up Minority Shareholdings" (1995) International Corporate Law 34, 35.

grounds that avoiding a detriment is a benefit and forgoing a benefit is a detriment.[96] The distinction drawn by the High Court is a distinction without a difference[97] and tenuous at best. By adopting Arvanitis' suggestion, proper purposes ought to be redefined as the preservation of the status quo.[98] This avoids the difficulties of trying to limit proper purposes to the gaining of a benefit of a certain kind - the avoidance of detriment from the continued membership of the minority.

V: THE SECOND LIMB OF GAMBOTTO: FAIR PRICES

A unique feature of *Gambotto* is its introduction of an additional limb that must be satisfied for compulsory acquisitions to be valid and which only becomes an issue once the first limb has been met. Failure to meet the first limb will force the majority shareholder to the negotiating table, as they will not have the power of compulsory acquisition. This dispenses with the need to rely on a court-determined fair price. The second limb of *Gambotto* requires the fair treatment of the minority in the majority exercise of the power of compulsory acquisition. Fair treatment requires the payment of a fair price to the expropriated minority and fairness is not constrained by market prices.[99] It is submitted that the second limb should be adopted, as its requirement of a fair price will ensure the appropriate compensation of the expropriated minority.

1. The Premium for Coercion

The market price does not include a premium for coercion and therefore does not compensate for it. This is because the market price alone is insufficient compensation for failing to recognise the element of coercion in compulsory acquisitions. The market price is determined between willing, but not anxious, buyers and sellers[100] while compulsory acquisitions involve unwilling sellers.[101] Autonomy and volition are assumptions which underpin the market price and which are clearly inappropriate in cases of compulsory acquisition. This remains true regardless of the degree of market efficiency subscribed to when relying on the price of shares traded in the stock market as an indication of the true value of shares.[102] The same holds true when relying on valuation techniques in the absence

96 Kevans, supra at note 91, at 113.

97 Taylor, supra at note 50, at 27.

98 Arvanitis, supra at note 36, at 328.

99 See the decision of McHugh J of the High Court in *Gambotto v WCP Ltd*, supra at note 3, at 457. The role of the court is in the determination of fair not market prices. See supra at note 74.

100 *Hatrick v Commissioner of Inland Revenue* [1963] 2 NZLR 641 (CA).

101 *Lusk v Archive Security Ltd* (1991) 5 NZCLC 66,979.

102 The view that the market price is merely a record of the last trade susceptible to the size of the parcel

of an actively traded market for the share in question. In New Zealand, this has the support of Gallen J in *Lusk v Archive Security Ltd.*[103] Extrajudicial support for the premium can be found in the works of Challies.[104]

Once the legitimacy of a premium is accepted, its size must be determined. The premium is the value placed on human autonomy and volition, and guidance can be gained from cases awarding such compensation. In *Lusk v Archive Security Ltd,*[105] Gallen J awarded a share price of $300,000 which was said to include compensation for coercion. This represents a premium of, at most, thirty-one percent by adopting as the true market value the lower of two estimates made by independent valuers. Given the inherent inaccuracies of estimates, it would not be unlikely that the actual premium paid was only in the region of fifteen percent. A similar estimate of the premium can be found on the facts of *Gambotto* where the shares had an estimated market price of $1.365 and an offer, considered fair by the parties, of $1.80 was made.[106] This represents a premium of not more than thirty-two percent or a probable premium of fifteen percent after accounting for the potential inaccuracies of estimation. Support for a premium of fifteen percent exists in English and Canadian jurisprudence where a figure of ten percent had been preferred after rejecting the original figure of fifty percent for being excessive.[107] In 14th century France, a figure of twenty percent was the norm.[108]

The submission that a premium ought to be paid is not without opposition. The traditional argument is that compensation was said to exist as a result of the majority paying the market price and by ignoring the minority discount otherwise applicable to a minority parcel of shares. Ignoring the minority discount has been the practice in New Zealand, England, Canada, and Australia.[109] This practice is

---

of shares traded has a ring of truth. However, market efficiency would also suggest that it is in the latest trades that new information is impounded into share prices. In any event, the market's ability, or lack of, in measuring true worth, is irrelevant for the purposes of this paper as market prices invariably only involve voluntary transactions and this fails to recognise the coercive element of compulsory acquisitions.

103 Supra at note 101.

104 Challies, supra at note 8, at 224: "Even when compensation has been calculated and awarded for property taken and for incidental damage, comprising such items as injurious affection, it must not be forgotten that the owner is in most cases *extremely unwilling* to part with his property and is *entitled to be indemnified* for the fact that his property has been taken from him *against his will*" (emphasis added).

105 Supra at note 101.

106 It is important to note that although McHugh J in *Gambotto* found the amendment of the articles to have been invalid on grounds of fairness or for failing the second limb of the new test, this does not mean that the price offered was in fact unfair if the compulsory acquisition of minority shares was allowed having satisfied the first limb of the new test. All this means is that the majority shareholder had not discharged its onus of showing fairness of price and this was to be expected as the majority was caught off guard by this reversal of onus. After all, the parties had agreed that the price offered in the compulsory acquisition was fair and this was not contested.

107 Supra at note 104, at 225.

108 Ibid, 222.

109 *Coleman v Myers* [1977] 2 NZLR 225 (CA); *Holt v Holt* [1987] 1 NZLR 85 (CA); and Sirianos, supra at note 74, at 113-122.

erroneous because even in the hands of a minority shareholder, the minority parcel of shares will confer strategic advantages in the face of a majority plan to acquire full ownership. Further, the minority discount is especially illusory in cases of compulsory acquisition as the acquirer is the majority, and in the hands of the majority, this parcel yields advantages such as tax savings of full ownership which represent the very reason for compulsory acquisition. There is support for this submission in New Zealand case law.[110] In any event, cases which apply the minority discount should be distinguished where they involve minority buy-outs and court orders compelling the majority purchase of shares as a remedy for minority oppression.[111] These cases are inherently different; the former involves the coercion of the majority as it is the minority which compels the majority to buy their shares; the latter involves the dual coercion of both the majority and the minority as the majority is directly coerced by the court order while the minority is constructively coerced by the oppression they suffer. Neither involves the extreme of the sole coercion of the minority which is typical in cases of compulsory acquisition and this would explain the practice of ignoring the minority discount in those cases. Further, care should be taken to distinguish cases of compulsory acquisition which follow on from takeovers. The courts in New Zealand,[112] England, and Australia[113] prefer a noninterventionist stance in such cases, as the greater minority protections afforded raise the presumption that the price offered is fair. The courts are inclined not to question the fairness of price and demand the payment of a premium.

2. The Distinction between the Wrongdoing and Innocent Minority

It is submitted that fair prices should make a distinction between "wrongdoing" and "innocent" minority shareholders. This distinction results from the way the proper purpose test is defined. The first limb of *Gambotto* allows the expropriation of shares when the amendment of the constitution is for a proper purpose, which is defined as avoiding the detriment from continued minority shareholding, whatever the cause. This test would see the expropriation of minority shareholders whose conduct causes detriment to the company and those who are innocent of any such conduct but whose continued membership of the company causes it harm for some reason outside their control. An example of wrongdoing is minority competition with the company and an example of innocence is a change in the regime regulating the principal business of the company that requires a reduction in the number of shares held by the foreign minority. The distinction drawn between the

110 Ibid.

111 The latter is an application of the statutory unfair prejudice or oppression remedy. In New Zealand, this was s 209 of the Companies Act 1955. Presently, it is provided by s 174 of the Companies Act 1993.

112 *Re Sheldon; Re Whitcoulls Group Ltd* (1987) 3 NZCLC 100,058.

113 See Bond, "The Statutory Protection of Minority Shareholders" (1984) 5 Company Law 155.

wrongdoing and innocent minority for the purpose of valuation is premised on the absence or presence of coercion. In assessing the laws of England[114] and Canada,[115] Sirianos draws the conclusion that minority shareholders should not be compensated for coercion if guilty of conduct deserving compulsory acquisition.[116] The learned author reasons that such conduct constitutes a constructive election to sever ties with the company. This amounts to constructive volition and there is no need to compensate for coercion as *constructively* there is none. As innocent minority shareholders have not behaved in a way deserving of compulsory acquisition, they are not held to have *constructive* volition and this necessitates the payment of compensation for coercion. In consequence, the fair price paid should distinguish between wrongdoing and innocent minority shareholders with the payment of a premium made only to the innocent minority. Minority discounts should be ignored as they have been shown to be misconceived. The payment of a pro rata price to wrongdoing minority shareholders is consistent with the earlier submission, in Part III of this paper, that the principle of compulsory acquisition is justified as a means of sanctioning bad behaviour. The payment of a premium on the expropriation of these shareholders will be an inappropriate reward for bad behaviour and the incentive to damage the company continues to exist, although in a reduced state, as fair prices in compulsory acquisitions are nowhere near the magnitude of negotiated prices in voluntary acquisitions. It is further submitted that fair prices should not distinguish between active and passive minority shareholders as regardless of the degree of participation; the expropriation of an innocent minority is coercive and the expropriation of a wrongdoing minority is *constructively* not. This has the support of Sirianos[117] and the law in Canada.[118] The law of England[119] differs on this point.

The payment of a fair price in compulsory acquisitions must not be confused with the payment of a negotiated price in voluntary acquisitions, the result of a failure to satisfy the first limb of *Gambotto* - the proper purpose test. In voluntary acquisitions, the majority is forced to bargain with the minority and the Coase Theorem[120] suggests that the minority is in a position to negotiate a price far in excess of any fair price awarded by the courts. In theory, the negotiated price could well be just short of consuming all the profits to be made from full ownership. This assumes that the property rights of shareholders are well defined and that transaction costs are negligible. It is for this reason that Arvanitis' criticism of the minority in *Gambotto* is untenable. He describes the price offered

---

114 *Re Bird Precision Bellows Ltd* [1984] 1 Ch 419, 430 per Nourse J.

115 *Re Mason and Intercity Properties Ltd* (1987) 38 DLR (4th) 681, 692-694.

116 Supra at note 74, at 113-122.

117 Ibid, 122.

118 Supra at note 115, at 696, per Blair JA who disagreed with Nourse J, supra at note 114. Blair JA confines the use of minority discounts to unusual circumstances.

119 Supra at note 114, at 431.

120 DeSerpa, *Microeconomic Theory: Issues and Applications* (1985), 513.

of $1.80 as being exorbitant as the shares were valued at $1.365 and alleged that the minority was guilty of greenmailing or oppressing the majority. As the majority in *Gambotto* had failed to satisfy the proper purpose test as defined by the majority of the High Court, they did not have the power to compulsorily acquire the shares of the minority. In consequence, they were bound to negotiate a voluntary transfer of minority shares. In light of the Coase Theorem, such voluntary transfers could well see the minority negotiating a price just short of consuming all the gains to be made on full ownership. On the facts of *Gambotto*, this would have resulted in negotiated prices in excess of $250. This is the price per share if virtually all the gains from tax savings, which was estimated at over $A 4 million, were concentrated in the hands of the minority who held approximately 16,000 shares. Clearly, the offer price of $1.80 is *not* excessive and Arvanitis is in error.[121] If nothing else, it amounts to a dramatic understatement. The share price $1.80 might be viewed as fair *if* the majority in *Gambotto* had satisfied the proper purpose test and acquired the power of compulsory acquisition; but on the findings of the majority of the High Court, they had not.

3. Incentives

Fair prices should be able to address the concerns of having a court set a price higher than the objective market value in compulsory acquisitions. Such prices might provide shareholders with improper incentives. First, a higher than market price might act as a disincentive to the majority in its pursuit of value-maximising projects.[122] Second, the minority might have the incentive to hold out for the higher price likely to be paid in compulsory acquisitions as there is a premium for coercion. Third, minority shareholders might have the incentive to pursue unmeritorious litigation, as the fair price awarded by the court has the tendency to be generous.

It is submitted that the first concern can be addressed by ensuring that the fair price paid to the minority does not exceed the expected gains to be made, leaving a reasonable margin for the risk that the gains may never eventuate. This should retain a sufficient incentive for the majority to pursue value-maximising projects.[123] The second concern rests on an expectation that the minority's hold-

---

121 This is based on the observation by Arvanitis that an even distribution of the $4 million tax savings between all shareholders would have resulted in a twenty-five cents rise in share value. If all or almost all of these gains were to be concentrated in the hands of the 0.1 percent minority shareholding, they would receive the $4 million tax saving on about 16,000 shares or $250 per share. This would raise minority shareholders' share price by $250 to a price of over $250. See Arvanitis, supra at note 36, at 328.

122 Fischel and Easterbrook, *The Economic Structure of Corporate Law* (1991) 118.

123 In terms of finance, the project still yields a positive Net Present Value ("NPV") to the majority shareholder. The premium paid to minority shareholders acts as a cost or negative cash flow incurred at the start which reduces the net positive cash flows then discounted by the required rate of return (or cost of capital) in determining NPV.

out behaviour will deprive the majority of the support necessary to pass the special resolution required to amend the constitution for the purpose of gaining full ownership. This leads to a failure of the value-maximising project. Each minority shareholder will reason that his or her decision has a negligible effect and hopes to free-ride on the acceptances of the approving majority. Even if these shareholders are aware of the effect their decision will have on the success of the project, they will not be inclined to support the resolution for the reason that they do not wish to be taken advantage of by other minority shareholders who free-ride. As a solution, the fair price paid should not distinguish between approving and resisting innocent shareholders. Both groups of innocent shareholders ought to be paid the same price. While this overcompensates the approving minority, this blanket payment will eliminate the incentive to hold-out while recognising the value of autonomy.[124] In any event, the problem of hold-out may be overstated as it assumes that the majority does not already have the necessary support when in reality the majority, like that in *Gambotto,* usually holds the requisite super-majority and is not required by law to abstain from voting. The third concern, that the minority might become overly litigious, is a concern with the costs of litigation. It is submitted that fair prices should have the potential of being either less, equal, or more than the price offered so as to discourage unmeritorious litigation. This flexibility of pricing by the court would ensure that only shareholders with substantial claims would litigate as they would have grounds to believe that they would succeed in getting a higher price on their shares. This flexibility of pricing would also be consistent with the principle that the court ought to determine a "fair" price objectively, and this may well result in a lower price being paid. Further, the majority shareholder would have the incentive to price "fairly" as this might very well be upheld by the court or even reduced. In practice, a generous price might avoid litigation altogether which is costly to the majority and the company. Thus, pricing could include the savings on the potential costs of litigation, bearing in mind that should litigation proceed, the costs of litigation may be offset by the court setting a lower "fair" price. This is especially likely if the price is seen as being generous and the dissenting shareholders unmeritorious. This is consistent with Sirianos' approach where he favours avoiding litigation which is costly.[125]

---

124 See supra at note 66, at 10, for a mathematical representation of this argument. Note that the offer price, regardless of acceptance or coercion is the same. If the price of compulsory acquisition was higher, there would be an incentive to hold-out and "free ride". Yarrow's model would suggest a shareholders' preference for compulsory acquisition in such cases.

125 Supra at note 74, at 113-114.

In summary, it is submitted that the second limb of *Gambotto* should be adopted as its emphasis on fair price allows the recognition of a premium for coercion, when appropriate, and has the flexibility to distinguish between wrongdoing and innocent minority shareholders. Further, fair prices have the flexibility to produce the right incentives by rewarding the majority who pursue value-maximising projects, awarding all innocent minority shareholders (approving and resisting) the same price and discouraging unmeritorious litigation.

VI: CONCLUSION

The time has come to seriously question the acceptability of the extraordinary power of compulsory acquisition through amendments to the constitution. No illusions should be held as to the origins of this power. In the absence of any express recognition of this power by statute or contract, it will continue to exist at common law, extending rather than limiting the bare statutory power of amendment in cases of compulsory acquisition of shares and the expropriation of proprietary rights. The controversial decision of the High Court of Australia in *Gambotto* reformed the common law of compulsory acquisition. At the heart of this decision lies a considerable shift in philosophy with a new balance struck in the favour of the minority shareholder. The minority gained a clear victory. The High Court has chosen to limit and refine the nebulous power of compulsory acquisition at common law.

Notwithstanding the corporate law reforms in 1993, the old common law test of the validity of amendments, which is of English pedigree, continues to apply in New Zealand. The High Court of Australia chose to abandon it in favour of a new two limb test. It is time that the New Zealand judiciary considered following the approach taken by the High Court of Australia in attacking the problems posed by this test and reform the common law in a principled fashion. It is the submission of this paper that the new test in *Gambotto* be adopted with modifications. The first limb - proper purposes - better reflects the balance to be struck between the competing claims of the majority, minority, and society. The second limb - fair treatment - better guarantees the proper compensation of the expropriated minority. The adoption of this test will herald a better tomorrow for minority shareholders ever labouring under the yoke of majority oppression.