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Abstract

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Keywords

corporations law, executive officers, liability, fiduciary obligations

THE LIABILITY OF EXECUTIVE OFFICERS UNDER THE *CORPORATIONS LAW*

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Introduction

Historically lawyers have focused on the legal obligations of directors of companies. Senior employees have generally not been the subject of detailed investigation, prosecution, or academic comment.¹ One not surprising reason for this has been the fact that the articles of the company have placed the management powers on the directors,² and the courts have naturally given full legal force to such a clear statement of directors' powers. For example, in *Horn v Henry Faulder and Co Ltd*³ Neville J considered the effect of an agreement made between the company and the manager of the company's confectionery business and department which granted the manager full power to conduct its business. He concluded that the agreement was ultra vires the articles because the agreement was 'a very substantial parting with the control and management of the business by the governing directors'.⁴ He held that any attempt to appoint persons who were to have a share in the management of the company independently of the control of the directors would amount to an infringing by the majority on the rights of the

1 One exception has been *Gower, Cronin, Easson and Lord Wedderburn Gower's Principles of Modern Company Law*, 4th ed Stevens (1979) at 574.

2 For example article 66(1) provides: 'Subject to this Law and to any other provision of these regulations, the business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and forming the company, and may exercise all such powers of the company as are not, by the Law or by these regulations, required to be exercised by the company in general meeting.

3 (1908) 99 LT 524.

4 Above at 525. The article provided inter alia 'that the department and all extensions of the same should be under the sole management of the manager in all respects, and he should have full power to conduct in a reasonable manner the practical and commercial business of the same without in any way being interfered with by the governing directors or board of directors'.

The manager sought an injunction preventing interference by the directors in accordance with the above agreement. The defences raised were that the agreement was ultra vires the company or that alternatively the board of directors had no power to make the agreement. The articles stated that the conduct of the business of the company was to be exclusively vested in the directors, and that certain governing directors were to have the supreme control in the management of the business and affairs of the company.

minority who were entitled to have the whole business managed by the governing directors. Even if the company had power to enter the agreement, its directors would not have had because they lacked the power to further delegate their authority.⁵

Lawyers speak of the corporate trilogy: the company, the directors, and the members in general meeting. But the corporate game is being played by a quaternary, the fourth and most important group being the senior executives, some, but not all of whom, may be counted amongst the ranks of the directors. The group will be led by a general manager (by whatever name called) who will possess extensive power. Any analysis which ignores the role of those who make up this all powerful executive can be likened to an examination of Westminster government without proper consideration of the role of Cabinet. This paper aims to redress this imbalance by examining the obligations of senior employees of large corporations as fiduciaries and as executive officers under the *Corporations Law*. It does not purport to examine their liabilities where they are also directors.

Power Structures within Large Corporations

The National Companies and Securities Commission pointed out in its submission to the Senate Standing Committee on Legal and Constitutional Affairs that 'recognition has been given in recent years to the considerable power which executive officers can exercise in the management of companies vis-a-vis that of directors.' The Committee then commented:

The NCSC suggested that the trend towards more powerful executive officers had increased in recent years 'as directors, particularly of large corporations, have become more concerned with broadbrush issues and executives are employed for their expertise in particular areas of management.'⁶

The Committee noted that this was understandable given the preponderance of non-executive directors in Australia's boardrooms.

Gower also recognised this possibility in discussing the English position:

But the modern tendency seems to be towards a clearer distinction between the management which runs the business and the board of directors which oversees the management and lays down broad lines of policy. This may, in time, lead to the practice of delegating managerial powers to professional managers without seats on the board.⁷

A stronger statement comes from Eisenberg in discussing the position in the United States:

Under the received legal model of the corporation, the board selects officers,

5 Above at 526.

6 Senate Standing Committee on Constitutional Affairs 'Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors' Australian Parliamentary Paper No 395 of 1989, paras 7.9, 7.10, and 7.16.

7 Gower, Cronin, Easson and Lord Wedderburn *Gower's Principles of Modern Company Law*, 4th ed Stevens (1979) at 574.

sets policy, and generally manages the corporation's business. Under the working model, however, the board normally performs none of these functions. To begin with, in practice the board seldom manages the business of a corporation. Under the system of directorates which has developed in this country among large, listed companies, directors are unable to 'manage' corporations in any narrow interpretation of the word.... Directors do not and cannot 'direct' corporations in the sense of operating them. Instead, in small, closely-held corporations the business is typically managed directly by owner-managers, while in large, publicly-held corporations the business is typically managed by the top executives.⁸

Eisenberg later suggests that many legal rules have been designed on the assumption 'that the board manages the corporation's business in fact as well as in law.' He gives as an example the rules relating to the authority of officers which he believes result in a 'unrealistically restrictive view of an officer's power of position' and concludes that standards of care seem to be pitched to the outside director rather than the executive, 'as if the former were really running the business.'⁹

Posner is even more direct. In relation to United States corporations he states categorically:

The board does not manage the firm. Composed usually of representatives of management plus outsiders who, having full-time employment elsewhere, devote only sporadic attention to the corporation's affairs, normally the board ratifies the actions of management. The importance of the board lies in the fact that it, and through it the shareholders, can fire the existing managers and hire new ones who will be more attentive to the shareholders' interests.¹⁰

The various commentators quoted are referring to quite senior executives in corporations, and as noted before, many of these may well occupy positions on the board. A critical question is whether the senior executives who are not on the board are bound in a similar way to those who are. Distinctions based on whether the directors are board members or not are unlikely to make sense if they occupy a position of significant power and influence. It is likely the case that at this very senior level similar obligations are held.

It should also be recognised that not all corporate structures are the same. Potentially there are as many types of organisational structures as there are companies. These will vary with size, management and parent group philosophy, nature of the goods or service provided and sold and so on. Management of the organisation may be carefully controlled at the top or be largely decentralized so that significant power is held at much lower levels in the organisation. In small companies one would expect a simple structure, with a great deal of authority vested in one person. In a 'machine bureaucracy,' obvious in some larger organisations, very tightly controlled and formalised company policy manuals containing detailed rules and

8 Eisenberg MA 'Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants' (1975) 63 Cal LR 375 at 376.

9 Above at 384.

10 Posner RA *Economic Analysis of Law* 3rd Ed Little Brown and Co at 384.

regulations reduce the discretion held by any one employee. Such organisations are also characterised by standard operations.¹¹ Other companies may exhibit these characteristics and/or be dominated by a divisional structure vesting extensive power in divisional managers.¹² Each divisional head may well have the same level of power as would the board of a subsidiary company running that same organisation, but not necessarily be on the board of directors. On the other hand, a company structure may be closer to an adhocracy where the traditional distinctions and divisions of power are blurred.¹³ Robbins and Barnwell draw this distinction between bureaucracies and adhocracy:

The key difference is that the professional bureaucracy, when faced with a problem, immediately classifies it into some standard programme so that the professionals can treat it in a uniform manner. In an adhocracy, a novel solution is needed so standardisation and formalisation are inappropriate.

Decision making in adhocracies is decentralised. This is necessary for speed and flexibility and because senior management cannot be expected to possess the expertise necessary to make all decisions.¹⁴

These examples demonstrate an obvious proposition. Organisational structure will have an important impact on the degree of independence possessed by an employee. As will be seen below this can, in turn, effect the scope of any fiduciary obligations owed and the likelihood that a person may be seen as an executive officer of the company.

Fiduciary Obligations of an Employee

All employees have some level of obligation to their corporate employer, but one which, as may be expected, varies considerably with their duties, status and power within the organisation. Speaking of the potential width of the powers held by a company officer, Mr Justice Wells of the Supreme Court of South Australia commented:

The degree of accountability (amounting in some cases to subservience) may vary enormously; the limits of the control exercised over the officer may be prescribed by law, or fixed by contract or other private instrument; accordingly, the officer may, in effect, be a servant, with little independent authority and discretion; a senior officer or manager, with wide authority and discretion; or a director or governor, with supreme executive powers.¹⁵

Breach of an employee's common law duties to obey lawful commands and to show due care in the performance of duties will render the employee liable

11 Robbins SP and Barnwell NS *Organisational Theory in Australia* Prentice Hall 1989 at 187.

12 Robbins and Barnwell give the following examples of divisional structure in Australia: BHP, CSR, Boral, Australian National Industries, Coles Myer and the ANZ Bank. Above at 193.

13 Above at 198-199.

14 Above at 199.

15 *Harris v S* (1975-1976) CLC 40-263 quoted in *R v Scott* (1990) 8 ACLC 752 at 757.

for damages to the employer.¹⁶ There are also duties of fidelity and confidentiality,¹⁷ breach of which often accompany a claim that the person has also breached fiduciary duties.¹⁸

The duty owed by employees is often a fiduciary one.¹⁹ In *Hospital Products Ltd v United States Surgical Corporation*²⁰ there are a number of obiter statements made concerning the fiduciary duties owed by employees to their employers. Gibbs CJ after commenting that the archetype of a fiduciary is the trustee states:

...it is recognized by the decisions of the courts that there are other classes of persons who normally stand in a fiduciary relationship to one another - e.g., partners, principal and agent, director and company, master and servant, solicitor and client, tenant for life and remainderman.²¹

Later in his judgment he noted that not every case where there is a duty to be performed will create a fiduciary obligation. One example of this was a duty arising under an ordinary commercial contract. Mason J also included employee and employer in a similar list²² as did Dawson J.²³ After referring to Moulton LJ's 'celebrated example' of the errand boy in *Re Coomber*²⁴ Mason J concluded:

It is now acknowledged generally that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case.²⁵

Despite the inclusion by the three judges in *Hospital Products* of employees in a list of relationships which are generally fiduciary in nature, one should be hesitant in concluding that all employees are always in a fiduciary relationship. There are many statements by the courts indicating judicial reluctance to define the parameters of a fiduciary

16 *Lister v Romford Ice and Cold Storage Co Ltd* [1957] 1 All ER 1250.

17 For example in *Robb v Green* [1895] 2 QB 315 an employee compiled a list of customers from the order book of his employer, left his employment and set up his business using these names. The employee was liable to the employer for damages and required to return the list.

18 See for example *Pacifica Shipping Co Ltd v Anderson* (1985) 2 NZCLC 99.306; *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488; *SSC & B: Lintas New Zealand Ltd v Murphy* (1982) 1 NZCLC 98.384 and *Green v Bestobell* (1982) 1 ACLC 1.

19 Austin notes: 'It is well established in the Commonwealth and in the United States that senior employees are fiduciaries whether or not they have been appointed to the board. RP Austin 'Fiduciary Accountability for Business Opportunities' in PD Finn (Editor) *Equity and Commercial Relationships* Law Book Company (1987) 141 at 142.

20 (1984-1985) 156 CLR 41.

21 Above at 68.

22 Above at 96.

23 Above at 141.

24 [1911] 1 Ch 723. Fletcher Moulton LJ stated: 'Fiduciary relationships are of many different types: they extend from the relationship of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him' (at 728).

25 Above at 102.

relationship too closely.²⁶ The courts have stressed that each case has to be determined on its merits and this may also be necessary even in the established categories. Thus Gibbs CJ in *Hospital Products* was able to include principal and agency in his list of fiduciary relationships, but later argued that a statement that every agent is a fiduciary is open to some doubt.²⁷

It is not difficult to understand why Fletcher Moulton LJ's errand boy was properly described as a fiduciary in the particular transaction: he had to account to his beneficiary (Fletcher Moulton) for the funds entrusted to him. In specific circumstances such as these or where an employee or consultant has been appointed an agent²⁸ the fiduciary duty will be obvious. In the latter situation, the normal agency rules apply:

Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge.²⁹

The passage indicates that the parties can 'otherwise agree'. The fiduciary relationship described is one which is dependent on the contractual relationship created between principal and agent. To some extent, this must also be true for the employment contract. The extent to which the contract grants an employee independence (Finn's final and decisive characteristic³⁰) in the carrying out of his/her tasks may well regulate the degree to which obligations of a fiduciary nature are applicable.

This paper is not directed to an examination of specific fiduciary obligations in agency situations *per se*. The primary concern is to examine those members of corporate management who can be described as fiduciaries, so that their activities are generally subject to the strict equitable obligation. Once a relationship is established as being fiduciary in nature, the commensurate obligations are of more significance than a mere employer /

26 See for example in *Hospital Products Ltd v United States Surgical Corporation* Gibbs CJ at 68, Mason J at 96, Dawson at 141. In *New Zealand Netherlands Society 'Oranje' Incorporated v Kuys* [1973] 1 WLR 1126 Lord Wilberforce noted that the precise scope of the obligation not to profit from a position of trust must be moulded according to the nature of the relationship.

27 Above at 72. He referred to *McKenzie v Mc Donald* [1927] VLR 134 at 144 in this context.

28 See, for example, the application of the agency rule in *Pacifica Shipping Co Ltd v Anderson* (1985) 2 NZCLC 99.306 where Davidson CJ of the New Zealand High Court used it to establish that a consultant (Johnson) employed two days a week by Pacifica had used information gained by him whilst in the service of Pacifica for his own purposes in usurping an opportunity otherwise available to Pacifica.

29 The American Restatement of the Law of Agency (2nd Ed) sec 395, cited with approval by Gowans J in *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37 at 42 and by Davidson CJ in *Pacifica Shipping Co Ltd v Anderson* (1985) 2 NZCLC 99.306 at 99.320.

30 Finn P *Fiduciary Obligations*, Law Book Co, 1977 at 13

employee relationship under contract law, not only because the duties and obligations operate at a higher level, but also because equity may grant relief where none would have been available for breach of contract.³¹ The difficulty that exists in this area of law is not in accepting the fact that in modern corporations fiduciary obligations do not cease at the board level. Rather, the issue is one of determining when an employee's obligations are merely contractual and when they assume a fiduciary character.

A valuable demonstration of the fiduciary obligations of senior officers of a company is the Supreme Court of Canada's decision in *Canadian Aero Service Ltd v O'Malley*.³² The judgment of the Court (Martland, Judson, Ritchie, Spence and Laskin JJ) was delivered by Laskin J. The two main defendants were O'Malley and Zarzycki who had acted as president (and chief executive) and vice president of Canadian Aero Service Ltd (Canaero) respectively. Zarzycki was also a director of Canaero from March 1965 to August 1966. O'Malley had been appointed a director in 1950, but according to the court, nothing turned on their status as directors:

Like Grant J, the trial judge, I do not think it matters whether O'Malley and Zarzycki were properly appointed as directors of Canaero or whether they did or did not act as directors. What is not in doubt is that they acted respectively as president and executive vice-president of Canaero for about two years prior to their resignations. To paraphrase the findings of the trial Judge in this respect, they acted in those positions and their remuneration and responsibilities verified their status as senior officers of Canaero. They were 'top management' and not mere employees whose duty to their employer, unless enlarged by contract, consisted only of respect for trade secrets and for confidentiality of customer lists. Theirs was a larger, more exacting duty which, unless modified by statute or by contract (and there is nothing of this sort here), was similar to that owed to a corporate employer by its directors. I adopt what is said on this point by Gower, *Principles of Modern Company Law*, 3rd ed (1969), at p 518 as follows:

... these duties, except in so far as they depend on statutory provisions expressly limited to directors, are not so restricted but apply equally to any officials of the company who are authorised to act on its behalf, and in particular to those acting in a managerial capacity.³³

O'Malley and Zarzycki had been extensively involved and in charge of Canaero's negotiations relating to a proposed contract to carry out topographical mapping in Guyana. They had pursued this contract up to July 25, 1966. On August 16, 1966 they, along with a solicitor, Wells, incorporated a company Terra Surveys Limited (Terra). This company and Wells, who had been an inactive director of Canaero, were also named as defendants. Terra tendered for the Guyana contract shortly after the resignations of O'Malley and Zarzycki from Canaero. The contract was awarded to Terra in November 1966. The court found that the proposal by Terra was the same business opportunity that Canaero had sought and held

31 This is demonstrated by *Green v Bestobell* (1982) 1 ACLC 1 considered below.

32 (1974) 40 DLR (3d) 371.

33 Above at 381.

that there were 'no obstructing considerations to the conclusion that O'Malley and Zarzycki, continued after their resignations, to be under a fiduciary duty to respect Canaero's priority, as against them and their instrument Terra, in seeking to capture the contract for the Guyana project.'³⁴

It is important to understand the basis of this judgment of the Supreme Court of Canada. Laskin J, having quoted from Gower, above, stressed the distinction between agents and servants:

Although they were subject to supervision of the officers of the controlling company, their positions as senior officers of a subsidiary, which was a working organisation, charged them with initiatives and with responsibilities far removed from the obedient role of servants.

It follows that O'Malley and Zarzycki stood in a fiduciary relationship to Canaero, which in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self-interest. Descending from the generality, the fiduciary relationship goes at least this far: a director or a senior officer like O'Malley or Zarzycki is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company.³⁵

The West Australian Supreme Court decision in *Green v Bestobell Industries Pty Ltd* followed *Canadian Aero Services Ltd v O'Malley*. Green was the manager of the Victorian branch of the insulation division of Bestobell. That company operated in the building industry in most states of Australia. There were four divisions: Insulation, Engineering, Merchandising, and Manufacturing. Wickham J concluded that the 'divisions and their branches in the various states, and within a state, were separate as between themselves. In the area of management each had a degree of autonomy'.³⁶ Kennedy J noted that as Victorian Manager, Green's duties and responsibilities were 'the complete control of all human financial and contractual resources within the branch', he was involved in the total operations of the branch, including the seeking out of contracts, estimating, tendering, the supervision of contracts and sales follow-up, and he was obviously concerned with profitability.³⁷

Green, while still an employee of Bestobell, successfully tendered in competition with Bestobell for a job in Western Australia. This was done through the medium of his company Clara Pty Ltd. Bestobell was also beaten by another company for this tender. Any action against Green for damages for breach of his contract of employment was questionable because as Wickham put it 'the breach did not necessarily cause damage to his employer'.³⁸ The action was therefore brought on the basis that Green owed

34 Above at 391.

35 Above 381-382.

36 Above at 5.

37 Above at 10

38 Above at 7

much higher duties. The point is made most obviously by Kennedy J:

To paraphrase the words of Laskin Jin *Canadian Aero Service Limited v O'Malley* (1974) SCR 592 at pp 605-606, the first appellant's responsibilities verified his status as a senior officer. He was 'top management' and not a mere employee, whose duty to his employer, unless enlarged by contract, consists only of respect for trade secrets and the confidentiality of customer lists. His was a larger more exacting duty which was similar to that owed to a corporate employer by its directors.³⁹

All three judges held that Green was a fiduciary and was therefore bound to account for profits made in a situation where he had placed himself in a position where his duties and his own interests conflicted, or where there was a real and possible likelihood of conflict. He was also unable to hide behind his company, Clara, because it had knowingly and for its own benefit participated in Green's breach of fiduciary duty.

These two decisions are of obvious importance to senior executives of corporations and suggest that they do owe fiduciary obligations to their corporate employer. The fundamental matter stressed in *Canaero* is that although the fiduciaries were theoretically subject to supervision, their positions as senior officers of a subsidiary gave them high levels of initiative and responsibility, not commensurate with the obedient role of a servant. In *Green v Bestobell* Green had complete control of all human financial and contractual resources within the branch.

Welling,⁴⁰ after an examination of Finn's three determining characteristics of a fiduciary,⁴¹ concluded that Canadian corporation managers meet these tests. Finn's 'final and decisive characteristic' is the degree of independence exercised by the person, so that the person is 'not controlled by, the person for whose benefit he acts'⁴². Welling further suggests that the development of fiduciary duties amongst officers is unlikely to 'be impeded by the label 'senior' but will proceed by fixing the duty where it belongs, on those individual corporate officers who, as a matter of fact, exercise genuine power over long or short range corporate destiny.'⁴³

Austin also concentrates on independence. He suggests that the senior full time non director executive has a position of discretion and responsibility similar to executive directors and notes that they are subject to the same fiduciary duties.⁴⁴ He also raises the difficulty of definition:

39 Above at 12

40 Welling B *Corporate Law in Canada: The Governing Principles*, Butterworths, (1984), at 375.

41 Finn P *Fiduciary Obligations*, Law Book Co, (1977) pp 9-14. According to Finn the position must be one where the fiduciary has bound himself in some way to protect and/or advance the interests of another, the fiduciary's power is more easily identifiable if it comes from an outside source rather than by agreement, and the final characteristic is the degree of independence exercised by the person.

42 Above at 13.

43 Above at 376.

44 RP Austin 'Fiduciary Accountability for Business Opportunities' in PD Finn (Editor) *Equity and Commercial Relationships* Law Book Company 1987 p141 at 171.

It will of course be necessary for courts to draw a line between the senior executive who is subject to the full rigour of fiduciary responsibility, and the ordinary employee whose fiduciary duties are much narrower and who on most matters is not a fiduciary at all. The question should be whether on the particular facts the employee holds a position of decision making discretion and responsibility concerning matters of management of the company and its affairs.⁴⁵

There may be circumstances where an employee who appears to be relatively junior (at least from his or her given title) may also be found to have breached a fiduciary duty. In *Timber Engineering Co Pty Ltd v Anderson*⁴⁶ Mr Justice Kearney of the New South Wales Supreme Court had no difficulty in finding that the New South Wales manager of a company and a sales representative owed fiduciary duties to their employer. He did not elaborate on his reasons for this apart from saying that 'during their employment they have clearly been in a position imposing on them fiduciary duties towards TECO'⁴⁷ (their employer). One can surmise that one reason why this was so clear to the court was that the New South Wales subsidiary only had four employees. Apart from the two who were the subject of the action, the other employees were a part-time bookkeeper and a secretary / receptionist. The directors of the company were not in New South Wales. Arguably, these matters put the two defendants in a senior position in the company and one in which there appears to have been little supervision of their activities. In any event it appears from the judgment that the question whether fiduciary duties did or did not exist was not in issue between the parties.

The case demonstrates that title alone is of little value if the position is one affording sufficient independence or if what has been done indicates that the employee has assumed powers well beyond the title itself or control of property outside his or her given authority.⁴⁸ This is particularly so in relation to the sales representative, it being reasonably obvious that the other defendant, described as the 'New South Wales manager' would normally occupy a position where one would assume fiduciary obligations exist.

As indicated above corporate structures will vary and the determination of the existence of fiduciary obligations will depend on the particular facts of the case. One influencing factor will be the nature of the management structure in the company. In decentralised organisations, extensive fiduciary obligations are more likely to be found across wider levels of management. In these organisations, decision making power over a range of important

45 Ibid at 172.

46 [1980] 2 NSWLR 488.

47 Ibid at 493.

48 A similar point was made in the context of a non director assuming the tasks of a director in *Consul Development Pty Ltd v DPC Estates Pty Ltd* [1974-1975] 132 CLR 373 at 394 by Gibbs CJ: 'It is well settled that a director stands in a fiduciary position in relation to his company and in my judgement a person who though irregularly appointed assumes the position of director and on behalf of the company performs the tasks of finding, investigating and reporting upon properties suitable for purchase by the company owes a fiduciary duty to the company with which his private interests cannot be allowed to conflict'.

issues may be held by employees who are not senior in relation to the company as a whole, yet the scope for conflict between self interest and the interest of the company is extensive. In more rigidly controlled organisations only quite senior employees will have independence in decision making. Most employees will face little in the way of obligations which could be described as fiduciary, apart from the obligation to account for property under their immediate control.

Statutory Definitions of 'Officer' and 'Executive Officer'

Section 9 of the *Corporations Law* provides:

'officer', in relation to a body corporate, includes:

(a) a director, secretary, executive officer or employee of the body;

This is a broader definition than that contained in earlier English legislation: Employees of a body corporate are now 'officers' under the *Corporations Law*. The definition expressly excludes receivers who are not also managers, a court appointed receiver and manager, and a liquidator appointed by a court.

Section 232 (1) contains a definition of 'officer' for the purposes of that section which includes the term 'executive officer':

Section 232(1): 'In this section, 'officer', in relation to a corporation, means -

(a) a director, secretary or executive officer of the corporation;

This definition does not catch employees. Nevertheless, they are expressly caught under sub-s 232(5) and (6), but not under the honesty and reasonable degree of care and diligence provisions in s 232(2) and (4).

'Executive officer' is defined in s 9:

'executive officer', in relation to a body corporate, means a person, by whatever name called and whether or not a director of the body, who is concerned, or takes part, in the body's management

The language used is similar (but not identical) to that in s 188(1) of the *Companies Act 1948* (UK). The relevant parts of s 188 state:

Where (a) a person is convicted on indictment of any offence in connection with the promotion, formation or management of a company; or (b) in the course of a winding up it appears that a person (i) has been guilty of any offence.... under s 332 'which is concerned with the fraudulent trading of a company, 'or (ii) has otherwise been guilty, while an officer of the company, of any fraud in relation to the company or of any breach of his duty to the company; the court may make an order that that person shall not, without the leave of the court, be a director of or in any way, *whether directly or indirectly, be concerned or take part in the management of a company* for such period not exceeding five years as may be specified in the order.

In the English decision, *R v Cambell*,⁴⁹ Cambell was made subject to an

49 [1984] BCLC 83.

order under s188 of the *Companies Act* 1948 that he should not without leave of the court in any way take part in or be concerned in the management of a company for five years. The conviction against which Cambell appealed arose out of the affairs of Colgryp Castor and Pressings Co Ltd. The Crown argued that Cambell had taken part in the management of that company, had acted as adviser and had helped it out of financial difficulties. The appellant claimed that he was an independent management consultant, not a director or officer of the company and could not commit any offence under s 188 since he did not control the decision making process.

The court held that he had contravened the s 188 order. The judgment of the Court of Appeal was delivered by Beldam J. After having examined the activities of Cambell the court stated:

For those reasons we consider that this appeal fails, but before departing from the appeal we should add this. We have said that if anything the construction placed by the learned judge on s 188 was too favourable and too narrow. We said that for this reason. In the course of a submission that there was no case to answer the learned judge, who had apparently been referred to statutes from the Commonwealth in which the phrase 'concerned in or take part in' had been used, concluded that in the context of s 188 the words 'be concerned in' means exactly the same as 'take part in'. He went on: '... This is an example of the style of legal drafting where synonymous phrases are put together simply for the sake of clarity and emphasis or hoping to achieve clarity and additional emphasis'.

It is the opinion of this court that in so deciding the learned judge was placing too restrictive a view on the words of s 188. Not only would it be difficult to take that view by reference to s 187 and to the proviso of s 187, but if one looks at s 188 the wording is so widely cast that it is the opinion of this court that it is intended to insulate persons, against whom an order of disqualification has been made, from taking part in the management of company affairs generally. It is cast in the widest of terms '... in any way, whether directly or indirectly, be concerned or take part in the management ...' It would be difficult to imagine a more comprehensive phraseology designed to make it impossible for persons to be part of the management and central direction of company affairs.⁵⁰

The section under discussion in *R v Cambell* differs in that it uses the phrase 'in any way directly or indirectly' and on this basis one may be able to argue that the wide approach adopted by the court should not be adopted in the interpretation of 'executive officer' in the *Corporations Law*. However, it is not readily apparent that the court in *R v Cambell* actually relied on 'indirect' participation by the management consultant in reaching its conclusion. The decision therefore stands in contrast to the earlier decisions on the meaning of the term 'manager' and raises the spectre of a far broader definition, and one which is capable of catching wider levels of management and 'outside' advisers. Such advisers do not appear to be exempted under s 9 of the *Corporations Law* from the definition of 'executive officer' though

50 Above at 88.

they are excluded by s 60(2) from the definition of 'director'.⁵¹

There have been two recent Australian decisions which have considered the meaning of the words 'taking part in the management of a corporation' in the context of s 227 and 562A of the *Companies Code* (ss 229 and 600 of the *Corporations Law* respectively). Subject to three possible qualifications, these cases will be quite persuasive in the interpretation of 'executive officer'. The first is that courts are likely to be influenced by the word 'executive' itself, which may tempt them to draw the line at a very senior level, above that drawn in the cases which follow. The second caution is that the sections under consideration are seen as more protective of investors rather than penal. Finally, in a criminal prosecution of an executive officer for failing to meet the standard of honesty in s 232(2), very strict tests are likely to be applied to show beyond reasonable doubt that the person is an executive officer. In this context it should be stressed that ss 229 and 600 do not use identical wording to the definition under consideration. The words are potentially wider in scope. Section 91A defines what constitutes 'managing a corporation' for the purposes of ss 229, 230, 599, and 600. For example, s 91A(2) provides: 'A person manages a local corporation if the person, in this jurisdiction or elsewhere, is a director or promoter of, or is in any way (whether directly or indirectly) concerned in or takes part in the management of the corporation'.

Section 229(1) provides: 'An insolvent under administration must not, without the leave of the Court manage a corporation.' Section 229(3A) applies the s 91A definition of the expression 'manage' cited above.

Section 600 gives the Commission power to make certain orders prohibiting persons who have been the subject of a liquidator's report under s 533 from managing a corporation without the leave of the Court. Section 600(6) applies the s 91A definition of the expression 'manage'.

In *CCA v Bracht*⁵² Mr Justice Ormiston of the Victorian Supreme Court noted that the prohibition in s 227 of the *Companies Code* (s 229 of the *Corporations Law*) was directed towards 'the exercise of managerial control, not confined to the level of the board of directors but extending to all who perform management functions.'⁵³ Management 'comprehends activities which involve policy and decision making, related to the business affairs of a corporation, affecting the corporation as a whole or a substantial part of that corporation, to the extent that the consequences of the formation of those policies or the making of those decisions may have some significant bearing on the financial standing of the corporation or the conduct of its affairs.'⁵⁴

Ormiston J discussed the degree of participation in management prohibited in s 227 and held that the expression 'whether directly or indirectly' (which does not appear in the definition of 'executive officer') only qualifies the:

51 Note the possibility discussed later that to be an 'executive officer' one must also be an 'officer'. It is submitted that this is not the case.

52 (1989) 7 ACLC 40.

53 Above at 47.

54 Above at 48.

words 'be concerned in' and cannot qualify or expand the meaning of the expression 'take part in'. He thought that the former expression had a wider application: 'being concerned in' connotes participation at a variety of levels and at differing intensities' and followed the decision in *R v Newth*⁵⁵ (considered below) in describing the section as 'protective', and one which prohibits a person from taking any hand in the real business affairs of a company. To him the prohibition in the section was seen:

as covering a wide range of activities relating to the management of a corporation each requiring an involvement of some kind in the decision making processes of that corporation. That involvement must be more than passing, and certainly not of a kind where merely clerical or administrative acts are performed. It requires activities involving some responsibility, but not necessarily of an ultimate kind whereby control is exercised. Advice given to management, participation in its decision making processes, and execution of its decisions going beyond the mere carrying out of directions an an employee, would suffice.⁵⁶

A matter which troubled Mr Justice Ormiston was the degree to which participation in central management and central control was necessary before one could be said to be taking part in management. After reviewing the English authorities he stated:

There must be an element of decision making, which affects the corporate enterprise as a whole, but those responsible need not form part of the board, nor even need they be executives directly communicating with the Board.

He went on to say that in small companies the conduct of those directly responsible to the directors 'may amount to "management" because he viewed these people as likely to have as significant effect on the business and financial performance of the company, a critical part of his interpretation of a section which was protective of creditors and shareholders. He was thus able to conclude that those involved in 'large, discrete parts of a corporation's business, who although not participating in the central administration of that corporation, nevertheless are involved in its management to the extent that their policies and decisions have a significant bearing on its business and its overall financial health.'⁵⁷

The second decision is the New South Wales Supreme Court decision in *Cullen v Corporate Affairs Commission*⁵⁸. This was an appeal against a decision made under s 562A of the *Companies Code* (s 600 of the *Corporations Law*) that Cullen should not be involved in the management of corporations for a period of five years. Having reviewed a number of cases including *CCA v Bracht*, Mr Justice Young concluded:

From all this one can say that one looks to see somebody making decisions as to the direction of the corporation though one does not necessarily look for someone who is making decisions at the highest level, nor is it necessarily so

55 [1974] 2 NZLR 760.

56 Above at 49.

57 Above at 48.

58 (1989) 7 ACLC 121.

that the manager's decisions will not be subject to obtaining the approval of some higher officer. However, even though a person may be described as a manager if that person is merely carrying out the policy of the corporation in charge of a branch or division of the business and not making decisions as to its direction then probably that person is not taking a management role in the corporation.⁵⁹

In an earlier New Zealand decision, *R v Newth*,⁶⁰ Quillian J in considering the meaning of the words 'directly or indirectly takes part in or is concerned in the management of, any company' in s 188(1) of the *Companies Act 1955 (NZ)* adopted a test based on the 'real business affairs of the company'

I have no doubt that the object of the statutory provision is not the punishment of the bankrupt but the protection of the commercial community and I think it is this principle which points clearly the way in which the section is to be interpreted. It is not, of course, an offence for an undischarged bankrupt to be employed by a company in a minor capacity, for instance, as typist or clerk or on routine duties, but I think the section prohibits such a person from taking any hand in the real business affairs of the company and the expression 'concerned in the management' is, in my view, to be regarded in that way, that is, the inquiry should be whether, upon the evidence, the accused took a hand in the real business affairs of the company.⁶¹

The term 'executive officer' is of recent origin. Earlier legislation used the term 'manager', a term which received a narrow interpretation in the courts. In *Registrar of Restrictive Trading Agreements v WH Smith and Son Ltd*⁶² the Registrar of Restrictive Trading (UK) had applied for an order to examine on oath branch managers of certain companies. The *Restrictive Trade Practices Act 1956 (UK)* allowed the examination of 'any director, manager, secretary, or other officer of that body corporate': (s 15(3)). This section was based on s 270 of the *Companies Act 1948 (UK)*. The interpretation of these words was considered by Lord Denning to be very important because of their repeated use in a number of Acts.⁶³ The Registrar argued that the word 'manager' should be widely interpreted: 'It is wide enough, he says, to cover, not only the general manager of a company, but also a divisional manager, a branch manager, a local manager, and it may be, he suggests, a shop manager'.⁶⁴ Lord Denning interpreted these words in the context, as he saw it, of an 'abhorrence' in English Law of inquisitorial power. He relied on two earlier company law decisions in coming to a narrow interpretation of the term:

In *Gibson v Barton* (1875) LR 10 QB 329 at p 336 Blackburn J said: 'We have to say who is to be considered a manager. A manager would be, in ordinary talk, a person who has the management of the whole affairs of a company; not an agent who is to do a particular thing, or a servant who is to obey orders, but

59 Above at 126.

60 [1974] 2 NZLR 760.

61 Above at 761.

62 [[1969] 3 All ER 1065.

63 Above at 1069.

64 Above at 1069.

a person who is 'entrusted with power to transact the whole of the affairs of the company'.

That passage was no doubt in the mind of Jenkins, LJ, in *Re B Johnson and Co (Builders), Ltd* [1955] 2 All ER 775 at p 790 where he said: '... the phrase 'manager of the company', prima facie, according to the ordinary meaning of the words, connotes a person holding, whether de jure or de facto, a position in or with the company of a nature charging him with the duty of managing the affairs of the company for the company's benefit ...'

That is the meaning of the word 'manager' in the Companies Acts and we should apply it here also. The word 'manager' means a person who is managing the affairs of the company as a whole. The word 'officer' has a similar connotation. 'Officer' may include, of course, a person who is not a manager. It includes a secretary. It would also include an auditor, and some others. But the only relevant 'officer' here is an officer who is a 'manager'. In this context it means a person who is managing in a governing role the affairs of the company itself.

Applying this interpretation the local managers, Mr Walker and Mr Vaughan, do not manage the affairs of the company. They are only local.

Fenton Atkinson LJ and Megan LJ agreed with Lord Denning.

In *Grain Sorghum Marketing Board v Supastock Pty Ltd* [1964] 58 QJPR 95 the evidence of the general manager that he was the directing mind and will of the company and had the sole control of the company, subject to the board of directors was accepted. Hence his instructions (which had been disregarded) to the branch manager at Warwick not to buy sorghum in Queensland except from the Grain Sorghum Marketing Board were enough to protect the company from criminal prosecution.

The analyses in *Registrar of Restrictive Trading Agreements v WH Smith and Son Ltd* and *Grain Sorghum Marketing Board v Supastock Pty Ltd* demonstrate judicial reluctance to bring criminal liability too far down the line. This is achieved by stressing that a manager means a person who is managing the affairs of the company *as a whole*. Obviously in modern corporate structures very few people could ever meet this test. Taken literally it would mean that heads of divisions could not be managers because whilst they managed a separate part of the company they could never be responsible for its whole operation. These cases can be contrasted to the cases which follow, including the judgment of Margo J in the South African decision *L Suzman (Rand) Ltd v Yamoyani*:⁶⁵

However, I have difficulty in accepting that the concept of a manager in s 184 (1) is limited to one who is or has been managing the affairs of the company as a whole: There is nothing in the section to that effect, and such an interpretation would impose an unwarranted restriction on an important part of these provisions. There is no reason why, if a company may have several promoters, directors, liquidators, or officers within the meaning of s 184 (1), it

65 [1972] 1 SALR 109.

may not also have several managers; and there is no reason why there should not be a division among such managers of the managerial control and administration of the company's affairs and property. That is a common situation in the management of large companies in this court, and it is a development which pre-dated the enactment of our Companies Act in 1926. As simple examples of such division of management one might refer to the manager of a company's administrative activities at its head office in Johannesburg, and the manager of its mines several hundred kilometres away; or to the production manager of a company, controlling all its factors, and its sales manager, in control of all distribution and receipts. In my view, all such managers would fall within the intended scope of s 184 (1).

Whether or not a person is or was a manager, in the sense of exercising the requisite degree of managerial control and administration of the company's affairs or property, in whole or in part, is a matter which must depend on the facts of each case.⁶⁶

Wells J in the Ontario High Court adopted a similar approach in *Re Canadian General Electric Co Ltd*:⁶⁷

I should perhaps first say that it is submitted by counsel for the Union that the words 'to exercise managerial functions' should be interpreted as meaning to be able to formulate, effectuate, decide and implement management policies, since 'managerial' in this, as in all other contexts, means pertaining to or characteristic of a manager. With respect, it would appear to me that this definition lays too much emphasis on authority and is too narrow.

In my view exercising managerial functions must include planning and laying out methods of work. It may be that to do this it is necessary to gather information but I would question whether the mere gathering of information apart from any planning or organising of work indicates the exercise of a managerial function, certainly not unless it is so intertwined with planning and laying out of methods of manufacture that it cannot be disentangled from the exercise of the other functions. While all management implies some authority, there must be different degrees of authority, and even although proposals and plans as to how work be done may have to be approved by those higher in the organisation of a company's management, it would seem to me that the right to lay out plans and to formulate them is essentially part of the work of management, and an exercise of its functions even if done at the lowest level. Under those circumstances they are perhaps on the outer fringe of the exercise of managerial functions, but I think they can still be fairly included within that description.⁶⁸

In the Canadian decision of *Shou Yin Mar v Royal Bank*⁶⁹ O'Halloran JA commented:

'The term 'Manager' in itself implies certain control and authority. That he had

66 Above at 114-115 per Margo J.

67 (1956) 4 DLR (2d) 243.

68 Above at 251-252.

69 (1940) 3 DLR 331.

no subordinates does not imply he had not certain control and authority in respect to Chinese business. That he was subordinate to the branch manager and the accountant is not inconsistent with the possession of certain control and authority in respect to Chinese business.⁷⁰

It is possible that the courts may read down the definition of 'executive officer' in a manner approximating *Registrar of Restrictive Trading Agreements v WH Smith and Son Ltd*, but this is likely to miss the obvious statutory intent. It seems that parliament has seen fit to extend liability to those who manage a part or the whole of a company's operations.

While *Canaero* and *Green v Bestobell Industries Pty Ltd* were not decisions on the interpretation of 'executive officer' they offer a guide as to at least one level in a company's hierarchy that would meet the test. It may also be the case that the search for those below directorate level who generally owe criminal and civil obligations as executive officers will closely approximate those who owe fiduciary obligations because of their position as senior officers of the company. The duties owed by high ranking employees can be placed at a much higher level than those owed simply at contract law. Green was the manager of the Victorian branch of the insulation division of Bestobell a company with four divisions: Insulation, Engineering, Merchandising, and Manufacturing. Green's duties and responsibilities included the 'complete control of all human financial and contractual resources within the branch', he was 'involved in the total operations of the branch, including the seeking out of contracts, estimating, tendering, the supervision of contracts and sales follow-up', and he was obviously concerned with profitability.⁷¹ There is little doubt that Green would have met the tests in *Cullen v Corporate Affairs Commission* and *CCA v Bracht*, though he would have failed the test in *Registrar of Restrictive Trading Agreements v WH Smith and Son Ltd*.

Another case which provides some insight into the approach courts may take in the interpretation of the term 'executive officer' is the recent decision of the New South Wales Court of Criminal Appeal in *R v Scott*.⁷² The Court had to determine the meaning of the term 'officer' in s 173 of the *Crimes Act 1900 (NSW)* which is not defined in that legislation. The trial judge had directed the jury that it was sufficient to constitute a person an 'officer' under that section if the person was an employee of the company. This view, which was influenced by an examination of the definition of 'officer' in s 5 of the *Companies Code (NSW)*, was rejected by the Court of Criminal Appeal. (Gleeson CJ, Hunt and Allen JJ). The principal judgment was that of Gleeson CJ who made these comments as to the appropriate direction which should have been made to the jury:

....the concept of an officer of a public company calls for explanation. In the present case the jury should have been instructed that, although the issue was ultimately one of fact for them to determine, they should approach it as follows. To establish that the appellant was an officer the Crown would need to show

70 Above at 333.

71 Above at 10

72 (1990) 8 ACLC 752 at 757.

to show that the appellant held an office by virtue of which he participated in the management or administration of the affairs of the company. In this context the word 'office' refers to a specific position which usually (although not necessarily) carries a title and which has identifiable functions and responsibilities. The position must be part of the managerial or administrative structure of the company, and the person who occupies it must be one who takes part in the management or administration of the company. That part need not necessarily be powerful or dominant, but it would need to go beyond performing duties of a kind that might be performed by a clerk or a messenger or a stenographer or a person of similar rank. The fact that a person is called an 'executive' does not necessarily mean that the person is in truth an officer, any more than the fact that a person is not so described means that the person is not an officer. Nevertheless, in distinguishing between employees who are officers and those who are not, the distinction between employees who are regarded by a company as executives and those who are not will in many cases give useful practical guidance in applying the test stated above.⁷³

The Court rejected the appellant's submission that the only people who are officers of a public company are those who occupy positions which are established by the company's articles of association.

Subject to the caveat that one needs to avoid applying a test developed under the *Crimes Act* to the *Corporations Law* which contains its own definition⁷⁴ the above analysis by the Court may prove useful to our understanding of the definition of 'executive officer'. Any distinction based on whether employees are operating at a purely clerical or stenographical level is insufficient when one is discussing executive officers. But the court in *R v Scott* drew the line well above such a position. On the facts the Court noted there was a good deal of material upon which a jury could have found that the defendant was an officer. This included the fact that he was a senior executive of the company, its 'National Community Service Executive', a management grade officer who possessed an expense account and significant discretionary authority in relation to the expenditure of funds. It is not a great step to conclude that such matters will also be of importance in determining whether a person is an *executive officer* in the context of the *Corporations Law*. Gleeson CJ stressed the importance of the person holding an office but one which required participation in the management or administration of the company.

There are similarities to the definition of executive officer, but there are also some differences. The *Corporations Law* makes no mention of the person being required to hold an office though this could be implied in the same way it was in the development of the common law definition of 'officer' in *R v Scott*. This is important for those outsiders who by rendering extensive advice to the corporation might be said to be actually participating in management. The opposing (and it is submitted, more preferable view) is that the definition of 'executive officer' should have included the term 'officer' rather than 'person' in s 9 if this was the statutory intent. The fact that this was not done suggests that the intent was not to be read down by the meaning of 'officer'.

⁷³ Above at 758.

⁷⁴ The reverse error was the very matter criticised by the judge in *R v Scott*.

The other possible difference is that in *R v Scott* the Court described management *or administration*, whereas the definition in the *Corporations Law* only refers to management. It is possible that a distinction can be drawn between these two terms, the former implying more in terms of authority and control, the latter carrying an implication that an administrator simply implements the decisions of others.⁷⁵ However, this difference was not one emphasised by the court, and there was evidence to suggest the defendant was more than an administrator even on this strict analysis. What is clear is that a person who had no authority or control would be unlikely to meet the test in the *Corporations Law*, whether he or she be described as manager or administrator.

The critical factor which the Court left undefined is the degree of participation in management required. In the context of 'officer' in the *Crimes Act* the Court indicated that the taking part in management did not have to be powerful or dominant. In applying this test, the company's own classification of whether an employee was an 'executive' or not would in many cases give 'useful practical guidance' whilst not being necessarily determinative of the matter.

The Importance of the Definitions

Many of the obligations under the Act are placed generally on 'officers', a very broadly defined term in s 9. Where this is the case, the distinction between 'officers' and 'executive officers' is not so important. There are, in addition, other sections which catch directors and/or executive officers but not officers. As indicated above, s 232(1) contains a narrower definition of the term 'officer' which, unlike s 9, excludes employees from the definition. One effect of this is that executive officers are subject to s 232(2) and (4) and the consequential civil and criminal remedies. It thus becomes quite critical to distinguish executive officers from those employees who are not of that class for the purposes of these sub-sections.

As highlighted, there are a number of sections in the *Corporations Law* which use words which are close to the definition of 'executive officer'. Sections 229 and 600 have been discussed above, and will not be further elaborated on here. Section 592(1) of the *Corporations Law* should also be mentioned in this context. This section catches 'any person who was a director of the company, or took part in the management of the company'. When read in conjunction with s 592(3) there is the possibility that directors and those who 'took part in the management of the company' face criminal and personal liability. This may be the case when their company has incurred a debt when there were reasonable grounds to expect that the company would not be able to pay its debts as and when they became due. In addition, s 593(1) provides for a statutory form of lifting of the corporate veil at the court's discretion following a conviction under s 592(1).

The defences provided in s 592(2) offer some protection to those who 'took

73 There are some sections of the *Corporations Law* where 'management' and 'administration'
74 are used in the one section, implying that the words are intended to have different
75 meanings. For example, s 533(3) refers to 'a person who has taken part in the formation,
promotion, administration, management or winding up of the company....'

part in the management of the company' under these sections. The first defence is for the defendant to prove that the debt was incurred without his or her authority or consent. This defence would be of particular use to outsiders who by rendering advice to the company may arguably be said to have taken part in the management of the company. Hence a public accountant who played a very large part in the running of his or her client company might be able to avoid the operation of this section by pointing to the fact that though significant advice was rendered to the client, the accountant did not have the legal power to implement the advice on behalf of the client, that is he or she lacked express or implied authority to bind the client. The accountant would argue that debts of the company would always be incurred without his or her authority or consent. However, it must be remembered that poor advice as to the liquidity of a company which resulted ultimately in the demise of that company or personal liability in its management may make the accountant liable at common law for negligence.

The defence described above will be more useful to outsiders than insiders. The accountant employed by a company will often be in the best position of all to render advice to the company as to its ability to pay its debts. Such a person may in certain circumstances, be said to be one who takes part in the management of a company. If, for example, he or she has extensive delegated power, including the power to enter into contracts, or if management simply follows every instruction, he or she may be a person to whom this section applies. Such an accountant is especially vulnerable when he or she uses such contracting power because he or she will not have the benefit of a s 592(2)(a) defence (by definition) and would have the most difficulty of anybody in the company in making out the s 592(2)(b) defence of having reasonable cause to expect that the company would be able to pay its debts. Sections 592 and 593 apply as provided in s 589. Nevertheless this section offers little comfort because it describes a wide range of insolvent situations, including winding up, receivership, ceasing to carry on business, or inability to pay debts. Furthermore, the company can become a company to which the section applies after the debt was incurred under s 592(1)(c).

Conclusions

Certain propositions may be advanced from this examination of the definition and responsibilities of senior officers of large corporations.

The first conclusion is the most important. Senior corporate employees owe obligations which go well beyond the obligations owed under their contract of employment. Additional obligations are owed under equity and under statute. The more senior they are, the more likely:

- (i) they owe fiduciary obligations similar to those owed by directors of companies;
- (ii) they will come either within the definition of executive officer, or be considered to be concerned in or taking part in the management of the company with the additional exposure to criminal and civil obligations that this encompasses under the *Corporations Law*

(including potential responsibility for debts of the company in certain circumstances, as discussed above).

Employees who are not or do not consider themselves 'senior' should not feel free from liability. Seniority *per se* is not the test for a fiduciary or for an executive officer, though, as will be discussed below, it may be a relevant consideration. There is no doubt that low ranking employees will often be exposed to liability in specific transactions where they have assumed trustee obligations. Obvious examples are Moulton LJ's errand boy, the cashier who has to account for his employer's receipts, or the employee who receives a secret commission while acting as an agent for his employer in negotiating a contract. Low ranking employees are also exposed to a myriad of statutory obligations. As employees they are within the definition of 'officer' in the *Corporation Law*, the starting point for criminal and civil liability in many sections.

The second proposition is that the courts have given little clear guidance as to where the line should be drawn in describing a person associated with a company as an 'executive officer'. The term is yet to come before the courts for consideration, though when it does, the disqualification cases discussed above will be persuasive. In *CCA v Bracht*, Mr Justice Ormiston in trying to develop a formula by which participation in management could be determined, indicated that 'it cannot be confined to those matters performed by the board of directors or a managing director, for those are already the subject of the prohibition against acting as a director'.⁷⁶ This is an obvious but important consideration. If the line is drawn almost at the level of director, the concept of an executive officer loses all value because the provisions controlling directors (including the definition of that term) or de facto directors are quite sufficient to catch such people. On the other hand, if the courts take the opposite extreme, low ranking employees will unfairly carry the criminal and civil liability of their superiors. This will probably not be the case, the more likely result being that courts will err on the high side of management participation. The line needs to be drawn at the level where employees exercise initiative and responsibility, and are influential in the direction the company takes or a significant part of this direction. Ormiston J concentrated on the potential effect of this initiative and responsibility on the financial standing of the corporation as a whole or a substantial part of it, or the conduct of its affairs. He was not convinced that participation had to be in central management provided the manager's decisions had a significant bearing on the company's financial business and overall financial health.

It is submitted that the 'managing of the company's affairs as a whole' test from *Gibson v Barton and Registrar of Restrictive Trading Agreements v WH Smith and Son Ltd* is both inappropriate and far too restrictive and should not be adopted in the interpretation of 'executive officer'. The reasons advanced by Ormiston J in arguing against the central management test are equally appropriate here. In addition, such a test will ignore a group of senior employees who exercise genuine and independent power, because it concentrates too much on corporate hierarchies, and may enable the

⁷⁶ Above at 47.

employee who is in fact very influential in corporate destiny, but not part of the formal command structure, to escape liability.

The cases enable us to more readily identify the features of those who are not likely to be considered as executive officers: Those employees who simply carry out directions, or policy determined by others, or are agents appointed to carry out specific tasks will not be caught. Employees who are described as clerical or possess little in the way of discretion are not executive officers. One group who (somewhat surprisingly) cannot be eliminated as executive officers are non-employees of the company. As discussed above, the definition appears theoretically available to those outsiders who by extending considerable advice to the company and becoming so involved in it can be said to be taking part in its management. This is a more preferable result than an interpretation which requires all executive officers to also be officers under the *Corporations Law*.

Piecing together various attributes from the cases it may be possible to build up a profile of an executive officer: One would expect such a person to possess genuine power over at least a part of the corporate destiny. Indicia of this might include: The ability to hire and fire employees at senior levels, the company's description of the employee as 'senior management', or as a 'senior executive', the type of salary package possessed, access to a generous expense account, formal or informal links to the board, or to the most senior executive, very high limits on power to spend the company's money or to contract without formal board authorisation. Subject to the qualifications advanced by the New South Wales Court of Criminal Appeal in *R v Scott* the way in which the person has been categorised by the company itself will be very important. If the company has treated the employee with the trappings of power and privilege it will be very difficult for the employee to deny his influence in the company.

There are obvious overlaps between those who readily will be categorised as fiduciaries and executive officers. It follows from an analysis of the cases above that it would be very hard for an employee who was held to be an executive officer to deny that he also owed fiduciary duties. The reverse is not necessarily true, because it is possible that fiduciary obligations can be owed by quite junior employees.