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Gambotto and the Rights of Minority Shareholders

Abstract

[extract] Until *WCP Limited v Gambotto & Anor* it appeared that, subject to certain changes specifically set out in the Corporations Law, and in the absence of some type of special circumstances, it was not possible for the majority to change the articles in order to compulsorily acquire the shares of a minority shareholder. However, the *Gambotto* decision has tipped the balance in favour of the majority shareholders. This paper examines *Gambotto*, both at first instance and on appeal, in relation to the 'bona fide for the benefit of the company as a whole' doctrine and the ability of the majority to alter the articles to force a compulsory acquisition of the shares of a minority shareholder.

Keywords

corporate law, shareholder rights, minority shareholders, majority shareholders, *WCP Limited v Gambotto & Anor*

GAMBOTTO AND THE RIGHTS OF MINORITY SHAREHOLDERS



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Introduction

There has always been potential for considerable tension within corporations between majority shareholders, who in general exercise significant power, and minority shareholders, who by contrast are normally in a relatively weak position. The most important issue concerns decisions taken at general meetings, where the minority shareholders must normally accept the decisions of the majority, especially in relation to changes in the articles of the corporation.

However, restrictions on the majority's powers have developed. In contrast with the position in the United States, where majority shareholders owe a fiduciary duty to minority shareholders, in Anglo/Australian common law jurisdictions the doctrine of fraud on the minority evolved.¹ This doctrine was later codified and its significance broadened by what is now section 260 of the *Corporations Law*. The archetypal doctrine used to assess whether fraud on the minority had occurred was the requirement that the majority act 'bona fide for the benefit of the company as a whole'.² This doctrine was of much relevance in the past not only as the criterion against which minority shareholders rights were frequently evaluated, but also in relation to the duties of directors. In recent years it has been much 'watered down' even in the latter context. However, as this paper will show, this doctrine still retains a status in company law beyond its actual significance.

At times a resolution passed by the majority may well be inimical to the interests of the minority.³ As the articles give rise to a contractual relationship both between the company and its members and between one member and another, a member is bound by the articles as they stood at the time he or she joined the company.⁴ If the particular action is within the power of the articles there is rarely anything the aggrieved minority shareholder can do.

1 There are numerous problems with any attempted use of this remedy by minority shareholders. In particular is the issue of standing to sue exemplified by the so-called rule in *Foss v Harbottle* (1843) 2 Hare 461. However, it is beyond the scope of this paper to address such questions.

2 *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, 671 per Lindley MR.

3 *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457.

4 *Hickman v Kent or Romney Marsh Breeders' Association* [1915] 1 Ch 881, *Rayfield v Hands* [1960] Ch 1 and section 180 *Corporations Law*.

Until *WCP Limited v Gambotto & Anor*⁵ it appeared that, subject to certain changes specifically set out in the *Corporations Law*,⁶ and in the absence of some type of special circumstances,⁷ it was not possible for the majority to change the articles in order to compulsorily acquire the shares of a minority shareholder. However, the *Gambotto* decision has tipped the balance in favour of the majority shareholders.

This paper examines *Gambotto*, both at first instance⁸ and on appeal,⁹ in relation to the 'bona fide for the benefit of the company as a whole' doctrine and the ability of the majority to alter the articles to force a compulsory acquisition of the shares of a minority shareholder. Despite the potential significance of the decision, the judgments are almost completely lacking in any legal analysis of the issues involved. This paper examines the courts' stated arguments and unstated assumptions in each case, together with the consequences which follow from them. The attitude of the judges both at first instance and on appeal to the 'bona fide for the benefit of the company as a whole' doctrine may appear at least at first glance to be both welcome and realistic. However, a clear examination of the decision of Meagher JA in relation to the application of s 180(3)(c) and of both Meagher JA and Priestley JA (if not the judge at first instance) in relation to the rights of majority shareholders to alter articles in order to force the compulsory acquisition of shares of minority shareholders reveals disturbing elements, not only in terms of what is said, but for what is left unsaid and unanalysed.

The Decisions

The Facts

WCP Ltd ('WCP') had an issued capital of 16,980,031 ordinary shares of 20 cents each. Approximately 99.7% of the shares were held by a wholly owned subsidiary of Industrial Equity Ltd ('IEL'). Of the remaining 0.3% of the shares, Mr Gambotto and the other complainant ('the complainants') held just under a third of these, or slightly less than 0.1% of the total shares.

Owing to potential tax and administrative savings the majority considered it would be financially advantageous to become a wholly owned subsidiary of IEL. On 16 April 1992 the secretary of WCP Ltd sent a written notice to the members of a general meeting to be held on 11 May 1992. The purpose of this meeting was to seek an amendment to the articles by inserting a new article 20A. This would have the effect of empowering any member who already held 90% or more of the shares to compulsorily acquire all the other

5 (1993) 11 ACLC 457 (New South Wales Court of Appeal).

6 Note in particular ss 701 & 702 in takeovers, s 411 in compromises and s 414 in schemes of arrangements.

7 For example, in *Sidebottom v Kershaw, Leese & Co Ltd* [1920] 1 Ch 154 an alteration of the articles to allow for the compulsory acquisition of shares of members carrying on business in direct competition with the corporation was held by the Court of Appeal to be valid.

8 *Gambotto & Anor v WCP Ltd* (1992) 10 ACLC 1046.

9 *WCP Ltd v Gambotto & Anor* (1993) 11 ACLC 457.

issued shares by 30 June 1992 for a price of \$1.80 per share. Accompanying the notice of the meeting was an independent valuation estimating the WCP shares to be worth \$1.365 per share calculated on a net asset value basis.

On 29 April 1992 the complainants faxed a letter to the secretary of WCP asking how the majority shareholders intended to exercise their voting powers. On 30 April 1992 the secretary faxed a letter in response stating that nothing had been lodged at that stage with WCP as to the manner in which the representatives of the majority shareholders would vote. However, he expressed the view that unless something unforeseen was to occur at the general meeting the representatives of the principal shareholders would vote in favour of the resolution. On 6 May 1992 the complainants commenced proceedings.

The complainants did not attend, neither were they represented at, the general meeting of the 11 May 1992. Present at the meeting were representatives of the eight majority shareholders and a minority shareholder who was also representing two other minority shareholders. These three minority shareholders held a total of just 8,300 shares (or about 0.1% between them). The motion when put to the meeting was passed unanimously on a show of hands. Presumably to put matters beyond doubt, a poll was demanded by the chairman. The minority shareholders present or their representatives were the only ones to vote and unanimously voted in favour of the resolution.

The complainants argued that the so-called amendment was a nullity on three grounds: first, because of its oppressive effect the amendment was beyond the purpose and scope of the power to alter articles conferred by s 176 of the *Corporations Law*; secondly, because the secretary had convened the meeting without the authority of the board of directors of WCP (WCP cross-claimed arguing that any formal invalidity could be corrected by invoking s 1322 of the *Corporations Law*); thirdly, because the amendment imposed restrictions on the right to transfer the shares, and so could not be effective to bind the members as it breached section 180(3)(c) of the *Corporations Law*.

Decision at First Instance

McLelland J concluded that the complainants were entitled to succeed on the first ground and so did not find it necessary to consider the second or third grounds raised. He held that despite the width of the words of s 176(1) of the *Corporations Law*, which empowers a company to amend its articles by special resolution, the exercise of this power is constrained by the principles of equity. Such constraints are additional to any limitations imposed by statute or the memorandum.¹⁰ However, His Honour considered it impossible to come up with any precise test to determine the validity of the exercise of the voting power of the majority. He noted that the 'bona fide for the benefit of the company as a whole' test had been frequently cited since its introduction in *Allen v Gold Reefs of West Africa*.¹¹ However, citing *Peters' American*

10 (1992) 10 ACLC 1046, 1048.

11 (1900) 1 Ch 626, 671.

*Delicacy Co v Heath*¹² per Latham CJ and Dixon J and *Crumpton v Morrine Hall*,¹³ per Jacobs J, His Honour noted that this test was not an 'exclusive and conclusive test'¹⁴ and, in fact, was inappropriate in cases where a conflict arose between the interests of various classes of shareholders. He discussed the only three reported English cases in which majority shareholders attempted to alter articles in order to expropriate the shares of the minority.¹⁵ However, as these cases all relied on the 'bona fide for the benefit of the company as a whole' test, which he had already dismissed, he felt they were of no guidance.

His Honour inferred that the minority shareholders who voted in favour of the amendment to the article did so 'only because the prospect of obtaining \$1.80 for each of their shares was attractive to them.'¹⁶ He held that the three complainants not represented at the meeting believed that it was pointless to vote because the majority would simply use their voting power to effect the amendment. His Honour went on to conclude that 'the immediate purpose and effect of the amendment was to permit the shares of the minority shareholders to be expropriated by the majority shareholders.'¹⁷ In His Honour's opinion this amounted to 'unjust oppression of those minority shareholders who object.'¹⁸

Beyond these bald statements there was no deeper analysis of what constitutes 'unjust oppression' either in the circumstances of this particular case or in general. It would have been helpful if McLelland J had delivered a more thorough analysis of the reasons for his decision. However, given this was a judgment at first instance, perhaps such an omission is understandable.

Decision on Appeal

The NSW Court of Appeal unanimously overturned the lower court decision. Meagher JA, with whom Cripps JA concurred, gave the leading judgment. Priestley JA largely concurred with Meagher JA, but added some remarks of his own. Nevertheless, on the question of 'acting for the benefit of the company as a whole' Meagher JA appears, at least superficially, to be in accord with McLelland J. Meagher JA argued that even in the context of the fiduciary duties of directors the 'bona fide for the company as a whole' test is 'not without its difficulties.'¹⁹ Specifically, it was 'scarcely an apt test' to employ in the context of conflicts between shareholders who are not fiduciaries.²⁰ Rather it is up to all shareholders to vote in their own interests and they do not have to concern themselves with any notion of benefit or otherwise to the company.

12 (1939) 61 CLR 457.

13 (1965) 82 WN(1) (NSW) 456.

14 (1992) 10 ACLC 1046, 1049.

15 *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.

16 *Gambotto & Anor v WCP Ltd* (1992) 10 ACLC 1046, 1049.

17 *Ibid.*

18 *Ibid.*

19 *WCP Ltd v Gambotto & Anor* (1993) 11 ACLC 457, 460.

20 *Ibid.*

In relation to the question of whether in this particular instance the actions of the majority amounted to fraud on the minority, the Court of Appeal unanimously overruled McLelland J. Meagher JA went so far as to say that McLelland J seems:

to suggest that any Article which permits expropriation of minority shares under any circumstances, whether for value or not, will always constitute an oppression of the minority.²¹

On the other hand Meagher JA lay store by the fact that the *Corporations Law* allows expropriations in the context of takeovers,²² compromises²³ and schemes of arrangement.²⁴ He argues that these are not exhaustive and that the common law allows for other possible situations where compulsory acquisitions are allowable. In support of this argument he cites *Allen v Gold Reefs of West Africa*²⁵ and *Sidebottom v Kershaw, Leese & Co.*²⁶

Whereas McLelland J addressed only the first issue raised by the complainants, Meagher JA, whilst ignoring the second issue of whether the secretary convened the meeting without the authority of the board of directors, also addressed the third, concerning the right to transfer shares. In relation to this issue, Meagher JA dismissed the contention that article 20A would constitute an impermissible restriction on the ability to transfer the shares affected.²⁷

In an extremely short judgment Priestley J held that when people acquire shares in a company they know (or ought to know) that members of a company are bound to accept properly passed resolutions of the company. Therefore any minority shareholders who vote against the compulsory acquisition of their shares cannot complain if the majority pass such a resolution at a properly constituted general meeting as they have already agreed to be bound by the resolutions of such a meeting. Priestley J's judgment will not be considered at length in this paper. However, it is worth noting that this is a rather extreme position to hold. Certainly, there appears to be no doubt that if article 20A had been contained in the articles from the beginning then the minority could not complain if the majority used such an article to compulsorily acquire the shares of the minority. However, to take this the further step by inferring that the minority must submit to the will of the majority takes this ominously close to simple majoritarian rule. To be fair to Priestley JA, His Honour alluded to the fact that such majoritarian decisions can be oppressive. However, His Honour held that as this compulsory acquisition was accompanied by just compensation it was not unjust or oppressive.²⁸

21 Ibid at p 459.

22 *Corporations Law* ss 701, 702.

23 *Corporations Law* s 411.

24 *Corporations Law* s 414.

25 [1900] 1 Ch 656.

26 [1920] 1 Ch 154.

27 This issue is taken up in Section 5.

28 Ibid.

The 'Bona Fide For The Benefit Of The Company as a Whole' Test

The classic test frequently enunciated in both the areas of duties of directors and protection of minority shareholders is that of acting 'bona fide for the benefit of the company as a whole'. In the minority shareholder context it was first introduced in *Allen v Gold Reefs of West Africa*²⁹ where Lindley MR stated that the power of the majority:

...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.³⁰

As both McLelland J³¹ and Meagher JA³² pointed out the principle was examined in some detail by both Latham CJ and Dixon J (as he then was) in *Peter's American Delicacy Co Ltd v Heath*.³³ In particular McLelland J cited Dixon J where he stated:

If the challenged alteration relates to an article which does or may affect an individual, as, for instance, a director appointed for life or a shareholder whom it is desired to expropriate, or to an article affecting the mutual rights and liabilities *inter se* of shareholders or different classes or descriptions of shareholders, the very subject matter involves a conflict of interests and advantages. To say that the shareholders forming the majority must consider the advantage of the company as a whole in relation to such a question seems inappropriate, if not meaningless, and at all events starts an impossible inquiry.³⁴

Whilst McLelland J merely cited with approval the above quotation from Dixon J's judgment, and made mention of similar views expressed by Jacobs J in *Crumpton v Morrill Hall*³⁵ as further supporting his position he did not analyse the issue further. In other words McLelland J thought that this test was not appropriate in the case of a dispute between shareholders, such as in *Gambotto*. Similarly, Meagher JA found that the 'bona fide for the benefit of the company as a whole' doctrine was not relevant in such circumstances when he stated:

It is scarcely an apt test to apply to shareholders, who are not fiduciaries, who can legitimately look after themselves, and who do not have to concern themselves with the company's benefit.³⁶

29 (1900) 1 Ch 656, 671.

30 *Ibid* at p 659.

31 *Gambotto & Anor v WCP Ltd* (1992) 10 ACLC 1046, 1049.

32 *WCP Ltd v Gambotto & Anor* (1993) 11 ACLC 457, 460.

33 (1938) 61 CLR 457.

34 *Ibid* at p 512. Although not quoted by either McLelland J or Meagher JA, in a similar vein Latham CJ said: 'The benefit of the company as a corporation cannot be adopted as a criterion capable of solving all the problems in this branch of the law. An alteration which is made bona fide and for the benefit of the company, if otherwise within power, will be good, but it is not the case that it is necessary that shareholders should always have only the benefit of the company in view. In cases where the question which arises is simply a question as to the relative rights of different classes of shareholders the problem cannot be solved by regarding merely the benefit of the corporation.' *Ibid* at p 481.

35 (1965) 92 WN(1) (NSW) 456.

36 *WCP Limited v Gambotto & Anor* (1993) 11 ACLC 457, 460.

However, Meagher JA made a point of setting out what he understood were the key issues raised by this doctrine. He noted that in *Brown v British Abrasive Wheel Co Ltd*³⁷ Astbury J took the test to have two elements, first, that the alteration must be made in good faith, and secondly, that it should intend to benefit the company as a whole. It is interesting to note that, in discussing the second element, Professor Ford, uses the word 'tend' rather than 'intend'.³⁸ Whilst the word 'intend' has positive connotations of resolving to do something the word 'tend' suggests something weaker, such as 'being predisposed'.³⁹ It is not clear whether this difference is indicative of a contrasting interpretation of this case by Meagher JA or whether instead it was a mere typographical error in the judgment. If the former is the case, then it may indicate a more stringent view of what constitutes this test than others such as Professor Ford argue. If this is the case then it could go some way towards explaining why Meagher JA dismisses the 'bona fide for the benefit of the company as a whole' doctrine so readily. However, to be fair to Meagher JA there are numerous other problems with this doctrine.

Astbury J's dual test was rejected by the English Court of Appeal in *Sidebottom v Kershaw Leese & Co Ltd*.⁴⁰ Since that case it appears that the shareholders must merely act honestly whilst having regard for the benefit of the company. It appears from this that it is for the shareholders not the court to decide whether something is 'bona fide for the benefit of the company as a whole.' Certainly Scrutton LJ in *Shuttleworth v Cox Bros & Co Ltd*⁴¹ considered it a matter for the shareholders. His Honour held that, when looking at any individual case, a court could only intervene where, even if honestly arrived at, no reasonable person could have come to such a decision. This view appears to be the rationale of the High Court decision in *Peters' American Delicacy Co Ltd v Heath*.⁴² It is also the basis of courts granting relief under s 260 where they may hold acts, omissions, resolutions or conduct of the company are unfairly prejudicial or unfairly discriminatory against a member or members. On this issue Meagher JA agreed with the decision in *Peter's* case and held:

where it was arguable whether a test was beneficial for the company, the court would not substitute its views for those of the shareholder. In such cases, it will simply decline to interfere.⁴³

Meagher JA also accepts the claim in *Peter's American Delicacy Co Ltd v Heath* that the test by Lindley MR in *Allen v Gold Reefs of West Africa Ltd*⁴⁴ was wider than necessary and concluded there would be less confusion

37 [1919] 1 Ch 290.

38 Ford, HAJ and Austin RP, *Ford's Principles of Corporations Law*, 6th edition, Butterworths, Sydney, 1992 at p 594.

39 For example, the *Macquarie Dictionary* refers to 'intend' as meaning 'to have in mind as something; to be done or brought about' and 'to have a purpose or design' whereas it refers to 'tend' as merely meaning 'to be disposed or inclined in action, operation or effect'.

40 [1920] 1 Ch 154.

41 [1927] 2 KB 9, 23.

42 (1930) 61 CLR 457.

43 *WCP Limited v Gambotto & Anor* (1993) 11 ACLC 457, 460.

44 [1900] 1 Ch 656.

if it was merely a negative rather than a positive test.⁴⁵ That is, this test is merely one possible test to be applied depending on the particular circumstances being addressed rather than a mandatory test in all cases of changes to articles.

Both McLelland J and Meagher JA simply accept, without giving detailed reasons, that the doctrine of acting 'bona fide for the benefit of the company as a whole' is not appropriate in the given circumstances of this particular case. McLelland J does not question the doctrine itself. Meagher JA, as has been seen, alludes to the fact that it is 'not without its difficulties'⁴⁶ whether within the context of minority shareholder rights or of the fiduciary duties of directors. However, if the doctrine is analysed by examining its constituent elements it is possible to identify a number of problems.

First, there is the question of what is the particular entity to which the phrase 'company as a whole' refers. At least one writer has pointed out that it is an ambiguous concept,⁴⁷ another that it is a phrase 'of notoriously elusive meaning'.⁴⁸ Two separate strands of opinion as to the meaning of the phrase have developed. The first is that referred to as the separate legal entity view⁴⁹ which accords with the notion of differentiating the company from its shareholders initially enunciated in *Saloman v Saloman & Co Ltd*.⁵⁰ The second view is that the phrase relates to the aggregate of shareholders.⁵¹ Even the latter doctrine is fraught with difficulties as it is not clear whether 'company as a whole' refers to the present shareholders, the present and future shareholders, or possibly even the majority rather than totality of shareholders, either present or both present and future. In recent years the phrase has even been held to include creditors as well as shareholders.⁵² In other words it is as one commentator puts it:

a Delphic term employed by different judges in different circumstances to signify different things.⁵³

Secondly, the term 'benefit' is not necessarily straightforward, as the term 'interest' is frequently used instead whether within the context of the duties of directors or with reference to the voting powers of shareholders. For example, Ford and Austin speak of the 'interests of the company as a whole',⁵⁴ whereas Latham CJ and Dixon J spoke of 'the benefit of the company as a whole'.⁵⁵ Although these formulations appear to be used interchangeably, they are not precise synonyms. For example, 'benefit' suggests a more stringent or

45 *WCP Limited v Gambotto & Anor* (1993) 11 ACLC 457, 460.

46 *Ibid.*

47 Rixon FG, 'Competing Interests and Conflicting Principles: An Examination of the Power of Alteration of Articles of Association', (1986) 49 *Modern LR* 446 at p 448.

48 Sealy, LS 'Bona Fides' and 'Proper Purposes' in Corporate Decisions' (1989) 15 *Mon LR* 265 at p 269.

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

50 [1897] AC 22.

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

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

53 Rixon, above n 47, p 454.

54 Ford HAJ and Austin RP, *Ford's Principles of Corporations Law*, 6th edition, para 1435.

55 *Peter's American Delicacy Co Ltd v Heath* (1939) 61 CLR 457.

narrower test than does 'interest', the former being an essentially more positive concept than the latter. Interestingly, Farrar uses a third term when he refers to the concept as 'the duty to act bona fide for the good of the company'.⁵⁶ Although arguably a synonym for 'benefit' the appearance of this third term appears to add further confusion.

Even the 'bona fide' or 'acting in good faith' doctrine, which was the first element enunciated by Astbury J,⁵⁷ is itself open to criticism. Traditionally courts have been loath to intervene in the internal decision making of a company. As has already been noted, it is normally sufficient that the decision by the majority of shareholders is arrived at honestly. Obviously there is the possibility of not only a dishonest decision but also an honest decision that is bizarre. Because of this 'amiable lunatic' problem a court may intervene if it believes no reasonable person could come to such a decision. At least to this extent the subjective 'bona fides' of the majority is tempered.

If the whole 'duty to act bona fide for the benefit of the company' doctrine is not only considered inappropriate in the context of disputes between different shareholders but fundamentally flawed, and therefore inappropriate in any context, perhaps the doctrine should be discarded entirely. Certainly neither McLelland J nor Meagher JA went this far. However, McLelland J did note with approval the decision in *Crumpton v Morrish Hall Pty Ltd*⁵⁸ in which Jacobs J appears to advocate this approach. Whilst McLelland J did not actually cite Jacobs J in this case one telling quotation from Jacobs J is where His Honour stated:

It seems to me that no amount of legal analysis or analytical reasoning can conceal the fact that the decision in the past turned, and must turn ultimately, on a value judgment formed in respect of the conduct of the majority - a judgment formed not by any strict process of reasoning or bare principle of law but upon a view taken of the conduct.⁵⁹

This appears to suggest that all that is left is some sort of weighing up of the merits on a case by case basis. If there is any single criterion which can be appealed to it perhaps is simply one of 'fairness'. If attention is then turned to what constitutes 'fairness' some would argue that in the end this is an intuitive value judgment and perhaps a matter of the individual moral philosophy of the relevant judge. Others would argue that a theory of 'fairness' can be established.⁶⁰ This is not to submit that the 'bona fide for the benefit of the company as a whole' test should automatically be abandoned because it can be seen as a flawed cliché rather than a foolproof test. Despite its clear limitations it is one test or 'ready reckoner' against which a particular decision of a majority of shareholders (or the duties of a director) may be assessed. It can assist in the search for what is 'fair'. However, it must always be remembered such a cliché or metaphor cannot

⁵⁶ Farrar *ffl*, *above* at p 89. Emphasis added.

⁵⁷ *Brown v British Abrasive Wheel Co Ltd* [1919] 1 Ch 250.

⁵⁸ [1965] NSW 240.

⁵⁹ *Ibid* at p 244.

⁶⁰ This point will be followed up briefly later in the paper.

substitute for a deeper or more thorough examination of the merits of a particular course of action.

Before leaving this doctrine it is worth considering what decision would have been arrived at if McLelland J and Meagher JA had found the 'bona fide for the benefit of the company as a whole' test to be appropriate. McLelland J alluded to this when he noted:

The justification propounded for the amendment in the present case is that it would be to the financial advantage of WCP to become a wholly owned subsidiary of IEL...⁶¹

He went on to list the tax advantages of being a 'group company', the fact that WCP would no longer have to prepare and have audited a set of group accounts for itself and its subsidiaries, and the ensuing financial and administrative savings. Thus McLelland J seems to acknowledge that if he had applied this doctrine then he would have had to find in favour of WCP. It is hard to deny that such a decision would 'benefit the company as a whole' whether the company is considered to be a separate legal entity, the present shareholders (or at least the vast majority both numerically and in terms of representing almost all of the capital) or the present and future shareholders. It is only if the concept of 'the company as a whole' is accepted as including all present (or present and future) shareholders that such a conclusion would not be reached.

Whilst Meagher JA explicitly states that the 'bona fide for the benefit of the company as a whole' doctrine is not relevant to his decision,⁶² this doctrine does in fact accord with his decision, as the discussion above makes clear. In other words, because both McLelland J and Meagher JA reject this doctrine as a possible basis for their respective decisions, they both need to find some other rationale for their decisions. The issue of just what this is requires addressing.

Compulsory Acquisition of Shares

Anglo/Australian Position

As already noted Meagher JA specifically ruled out an appeal to the 'bona fide for the benefit of the company as a whole' doctrine as the basis of his decision even though it would support it. Instead, although not clearly enunciated as such, his decision appears to be based on the fact that the compulsory acquisition of shares is allowed in certain situations by the *Corporations Law*⁶³ and by the courts in some other cases.⁶⁴ His argument appears to be that as the *Gambotto* case is really not inherently different from those instances of compulsory acquisition permitted by the *Corporations Law* and earlier cases,

61 *Gambotto & Anor v WCP Ltd* (1992) 10 ACLC 1046, 1049.

62 *WCP Limited v Gambotto & Anor* (1993) 11 ACLC 457, 460.

63 Ss 701 & 702 re takeovers, s 411 re compromises and s 414 re schemes of arrangement.

64 *Allen v Gold Reefs of West Africa* [1900] 1 Ch 656, *Sidebottom v Kershaw, Leese & Co Ltd* [1920] 1 Ch 154.

compulsory acquisition by the majority of the minority shareholder's shares is acceptable.

An examination of the above suggested reasoning reveals a number of weaknesses. There is the argument that as the *Corporations Law* allows for compulsory acquisition of shares in certain circumstances it is possible for the courts to add other instances where expropriation is permitted as in the opinion of Meagher JA these provisions do not constitute an exclusive code.⁶⁵ However, there is an equally convincing argument from the opposite perspective, that as the *Corporations Law* has specifically set out in much detail certain instances where expropriation is permissible then these are the only times that expropriation can be allowed.

The historical background to the introduction of statutory methods of compulsory acquisition lends some support to this view. The Greene Committee set up by the United Kingdom Board of Trade in 1926 had a brief to examine the issue of dissenting shareholders in relation to simplifying the procedures for reconstructions and amalgamations of companies. The ensuing changes to the United Kingdom legislation were soon followed up in Australian jurisdictions. Similarly further changes to the legislation in the United Kingdom as a result of the Cohen Committee recommendations in 1945 were also taken up in Australia. Additional changes have occurred to the legislation in Australia as a result of recommendations of the Eggleston Committee⁶⁶ and the Edwards Committee.⁶⁷ As all these changes have basically come about because of government initiated reviews which have then led to the statutory changes mentioned, it can be legitimately argued that these are the only means by which the parliaments intended to allow for compulsory acquisition of shares.

To be fair to Meagher JA it also can be argued that the instances where expropriation of shares is permissible are not confined to those situations set out in the *Corporations Law* on the grounds that there are some recorded instances where the courts have allowed the compulsory acquisition by the majority of the shares of a minority of shareholders.⁶⁸ Meagher JA also specifically states that he relies on the decisions in *Allen v Gold Reefs of West Africa*⁶⁹ and *Sidebottom v Kershaw, Leese & Co Ltd*.⁷⁰ However, a closer examination of the facts of those cases shows that they do not support the views of Meagher JA as strongly as might at first be supposed. The *Allen* case did not strictly speaking concern the compulsory acquisition of shares. Instead it was concerned with the

65 *WCP Limited V Gambotto & Anor* (1993) 11 ACLC 457, 461.

66 Company Law Advisory Committee, *Report to the Standing Committee of the Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers*, 28 February 1969.

67 *Report of the Joint Select Committee on Corporations Legislation*, 1989. For a more detailed discussion on the historical background to these legislative provisions see Ford HAJ, *Principles of Company Law*, Butterworths, Sydney, 1992 6th edition at pp 778 & 9, and Spender P, 'Compulsory Acquisition of Minority Shareholdings', (1993) 11 *Companies and Securities Law Journal* 83 at 87.

68 For a comprehensive listing of the methods that can be employed to remove minority shareholders see Digby Q, 'Eliminating Minority Shareholdings', (1992) 10 *Companies and Securities Law Journal*, 105.

69 [1900] 1 Ch 656.

70 [1920] 1 Ch 154.

passing of a special resolution giving the company a lien over fully paid shares. The decision in the *Allen* case to change the articles in this way came about as a result of the death of a shareholder who had been issued some fully paid and some partly paid shares. At the time of his death there was an accumulated arrears of calls on his partly paid shares but his estate was insufficient to meet the arrears. The change to the articles then allowed for the proceeds of the sale of the fully paid shares to be put towards paying the debt to the company. Even though the change to the articles was clearly disadvantageous to the minority shareholder (or rather the beneficiaries under his will) it was held by the Court of Appeal to be valid.

There are two reasons this case can be distinguished. First, the minority shareholder was a debtor of the company and the alteration to the articles was a method by which the company could force payment of the debt due to it. The facts in the *Gambotto* case are clearly different in that it concerned expropriation of minority shareholdings in the absence of any wrong-doing or debt owed by the minority shareholders. Secondly, the ratio for the decision in *Allen's* case is that the alteration of the articles was made "bona fide for the benefit of the company as a whole." Whereas Meagher JA specifically rejected this doctrine in *Gambotto* it is this precise doctrine which is applied in the *Allen* case. There is a clear inconsistency in his approach. On the one hand he dismisses the 'bona fide for the benefit of the company as a whole' doctrine as irrelevant⁷¹ to the present case, yet on the other he appeals to a case decided precisely on this ground as precedent for his current decision.⁷²

Similarly, in *Sidebottom v Kershaw, Leese & Co Ltd*⁷³ the criterion of whether the alteration to the articles was 'bona fide for the benefit of the company as a whole' was applied. However, even if this is put to one side and the decision is examined in light of the facts then it is not really an appropriate precedent on which Meagher JA could rely. In *Sidebottom* the alteration to the articles gave the majority shareholders the right to expropriate the shares of any shareholder who was in business in direct competition with the company. Obviously if analysed in terms of what was for the benefit of the company such a change to the articles would be valid. However, even if this criterion is changed to one of what is 'fair' in the circumstances it is submitted a similar result would have been arrived at because it hardly seems fair to the company or the other shareholders that a minority of shareholders should be operating in competition with the company.

The only other two cases that are directly relevant (although not specifically appealed to by Meagher JA) are *Brown v British Abrasive Wheel Co Ltd*⁷⁴ and *Dafen Tinplate Co v Llanelly Steel Co.*⁷⁵ In neither of these cases was the attempted alteration to the articles permitted by the court. Again, the

71 *WCP Limited v Gambotto & Anor* (1993) 11 ACLC 457, 460.

72 *Ibid* at p 461.

73 [1920] 1 Ch 154.

74 [1919] 1 Ch 290.

75 [1920] 2 Ch 124.

criterion applied in both cases was whether the alteration of the articles was 'bona fide for the benefit of the company as a whole'. At least to that extent these cases are not relevant to the *Gambotto* decision. However, putting this to one side, if a 'fairness' criterion is applied to the facts of these cases then a similar result may have still resulted.

In *Dafen* the articles were changed to allow the majority of shareholders to force the sale of shares of any member, other than one particular member, to anyone the directors chose. Whilst the purpose of the alteration of the articles was to force the sale of shares by a member who had set up in competition with the company, it was held that this power was much wider than was necessary as it enabled the company to force any shareholder, other than the one specifically exempted, to sell his or her shares. As the power was too wide it was held not to be 'bona fide for the benefit of the company as whole'. However, if analysed in terms of 'fairness' it is submitted a similar result would have been reached, on the grounds that 'innocent' members should not be potentially penalised in the same manner as the 'wayward' member. If the alteration to the articles had been drafted to relate only to the member in direct competition to the company then that may well have been 'fair', as was the alteration in *Sidebottom*.⁷⁶

The *Brown* case appears to be the one most like *Gambotto* on the facts. In that case the holders of 98% of the shares of the company would only give financial assistance to the company on condition that they be permitted to buy out the remaining 2 per cent of the shareholders and the article was drafted to allow the majority to do so. It appears that the motives of the 98% were not at issue and the arrangement would have benefited the company in the long run. However, it was held not to be 'bona fide for the benefit of the company as a whole'. This appears to involve a rather strained interpretation of this doctrine. Whether the company is understood as a separate legal entity, or the vast majority of shareholders, on any rational interpretation this change to the articles would appear to be advantageous to the company. It is only if the company is interpreted as a body that includes all of its members that such a change to the articles could be viewed as inimical to the interests of the company. This appears to be the interpretation given in this case when Astbury J stated:

'If passed, the majority may acquire all the shares and provide further capital. That would be for the benefit of the company as then constituted. But the proposed alteration is not for the present benefit of this company.'⁷⁷

This interpretation of what constitutes the company as a whole and what amounts to a 'benefit' accords great weight to the minority shareholders and their interests. Therefore it can be submitted that the underlying, but not clearly stated, rationale appears to be that such a change to the articles would

76 [1920] 1 Ch 154.

77 *Brown v British Abrasive Wheel Company Limited* [1919] 1 Ch 290, 296.

not be 'fair' in that the majority shareholders had no legitimate grievance against the minority shareholders.

United States Position

As we have seen neither McLelland J nor Meagher JA formulated a test to cover the expropriation of shares of the minority by majority shareholders. A tentative suggestion has been submitted that the test should be one of 'fairness'. However, before pursuing this suggestion it is instructive to consider the United States position on such expropriations.

As has already been noted there is no equivalent in most American states to the Anglo/Australian concept of fraud on the minority in this context. Instead, in the United States the concept of a fiduciary duty is extended beyond that of directors to their companies, to include majority shareholders and their relationship with minority shareholders. In the United States the customary way a situation such as found in *Gambotto* is handled is via what is usually termed a 'freezeout'. There are different forms of 'freezeout'⁷⁸ but for the purposes of this paper discussion will concentrate on the manner in which this was achieved in *Weinberger v UOP Inc.*⁷⁹ There are two reasons for restricting attention in this way: first, the facts in this case are not dissimilar from those in the *Gambotto* case and, secondly, a thorough examination was made of what constitutes 'fairness' in *Weinberger*.

In *Weinberger* a corporation (Signal) which was the majority shareholder of a subsidiary (UOP) sought, and acquired, the remaining shares of the subsidiary by a merger transaction which included the payment of cash to the minority shareholders of the subsidiary for their minority shares. Some of the minority shareholders who had not sold their shares for the merger price attacked the validity of the merger transaction and sought to either set the merger aside or receive an award of monetary damages because of 'unfairness'. It should be noted the issue was not whether such an expropriation of the shares of a minority was permissible but rather the manner in which it was to be achieved.⁸⁰ In *Weinberger* it was held that the merger was unfair to the minority shareholders because a feasibility study prepared by two of the subsidiary's directors, who were also directors of the parent company, was not disclosed to the subsidiary's outside directors. This study indicated that a price in excess of that which the parent company ultimately offered for the subsidiary company's outstanding shares would have been a good investment for the parents.

The two fundamental issues on which this decision turned were, first, the duty of loyalty by the directors of both UOP and Signal and, secondly, the concept of fairness. In regard to the first issue the court held:

78 For a discussion of different variations of this technique see Digby, Q, 'Eliminating Minority Shareholders', *above* at pp 119-122.

79 457 A 2d 701 (DelSupr 1983).

80 Arguments as to whether such an expropriation should be permissible will be examined later in para 6.

Thus individuals who act in a dual capacity as directors of both corporations, one of whom is parent and the other subsidiary, owe the same duty of good management to both corporations, and in the absence of an independent negotiating structure, or the directors' total abstention from any participation in the matter, this duty is to be exercised in light of what is best for both companies.⁸¹

This is not as onerous a test as that in *Scottish Wholesale Ltd v Meyer*⁸² where Denning LJ held that directors have to have a mind free from loyalty to anyone other than the company when making decisions in relation to the company. However, it is considerably stronger than Australian decisions in this area such as that of Jacobs J in *Re Broadcasting 2GB Pty Ltd*⁸³ where he held that the fact nominee directors were likely to act in the interests of the holding company 'without any close personal analysis of the issues' was not of itself sufficient to show a lack of bona fides, nor would it amount to oppression of any shareholder.

The issue of divided loyalties of directors was simply ignored both at first instance and on appeal in the *Gambotto* case. This may be understandable at first instance especially as the judgment of McLelland J simply reflected earlier decisions. However, the failure of any of the appeal judges to examine this issue is surprising. Whether they considered the issue of no relevance⁸⁴ or whether they simply accepted or felt constrained by the view put by Jacobs J in the *Re Broadcasting 2 GB* case is unclear. Certainly the overall appeal decision in *Gambotto* is in line with this case. However, when not only overturning a case on appeal but also in effect creating 'new law' an appellate court should clearly address such a fundamental issue.

In relation to the second issue addressed in *Weinberger*, that of 'fairness', it was held in that case that :

The concept of fairness has two basic aspects: fair dealing and fair price....However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.⁸⁵

In fact the court in *Weinberger* did examine each of these aspects in considerable detail. In relation to the first aspect, fair dealing, it discussed questions such as how and when the transaction was initiated and negotiated, and how the approvals of the directors and stock holders was obtained. Also, in relation to fair price, considerable analysis of factors such as assets, market value, earnings and future prospects of the company took place. This case is also notable for recognising that the current trading value of shares is not the

81 Ibid at p 710-11.

82 [1958] 3 All ER 66.

83 [1964-1965] NSW 1648.

84 On the other hand, the issue may not even have been raised by counsel and the judges did not feel compelled to pursue it.

85 *Weinberger v UOP, Inc* 457 A 2d 701 (DelSupr 1983) at 711.

only relevant factor when assessing a shareholder's equity interest in a corporation.

However, in *Gambotto* some of these issues were alluded to but never really examined. For example, in relation to the issue of fair price, other than merely noting that there was never any allegation that the compensation provisions were inadequate,⁸⁶ Meagher JA merely glossed over the issue. There was certainly no analysis of whether there were factors other than the current market price which should be considered in relation to what would constitute a fair price. Instead, more emphasis was given to the fact that the ability of the majority to buy out the minority was going to be financially advantageous to the company. In other words the whole issue of what was 'fair' was never properly addressed and certainly not to the same extent and with the same rigour as in *Weinberger*. The question here is not so much the decision which was arrived at but rather the almost complete lack of examination of the issues involved. In fact if examined in light of the matters focussed on in *Weinberger* the decision may even have been the same. However, it is hard to assess this in the absence of sufficient analysis and information contained in the judgments.

The combination in the United States context of the fiduciary duties of majority shareholders towards the minority, and the duty of directors who act in a dual capacity as directors of two corporations to owe the same duty to both corporations, together with the duty of fair dealing and fair price give some sort of reasoned analysis to the issue of the expropriation of shares. However, there is no such analysis in *Gambotto* and this is even more surprising when viewed in light of its both overturning of the judgment at first instance and its impact for the future. Viewed at face value it appears that *Gambotto* stands for the notion that as long as the shares are paid for at or above current market value then it is always possible for the majority to expropriate the shares of the majority.

Appropriate Test

Having concluded that there is no test enunciated by the Court of Appeal in the *Gambotto* case beyond a vague requirement that the price paid for the shares is at or above current market price, it is submitted that it is important to see whether a more fundamental test could be articulated.

The test proposed in this paper already is one of 'fairness'. However, this is often viewed as a very loose concept and presumably the judges in the Court of Appeal in the *Gambotto* case could well argue that their decision was 'fair'. Similarly, no doubt the judgment of McLelland J at first instance could be viewed as fair. So what is 'fair' in the context of the expropriation of the shares of minority shareholders? The answer for the Court of Appeal seems in the end to come down simply to monetary compensation. If minority shareholders

86 *WCP Limited v Gambotto & Anor* (1993) 11 ACLC 457, 460.

are offered 'sufficient' money then that is 'fair'. This paper has already discussed the difficulty of determining what is a fair price and pointed out that it may well be more than simply an offer that is at or above current market values.⁸⁷ Obviously for McLelland J it was not enough that the minority shareholders were offered considerably more than the current market value for their shares, and His Honour does not appear to dispute that this was a fair price. The question then arises of why such an offer is not enough to be considered 'fair' to the minority shareholders. McLelland J seems to be saying there is something more to being 'fair' than merely being offered a 'fair price'. Perhaps for His Honour, the question of a fair price only appears to arise if a transaction is voluntary. If the shareholder is being forced to sell the transaction is unfair, irrespective of price.

To return to the issues raised in *Weinberger*, McLelland J seems to require some version of "fair dealing". This raises the question of what is 'unfair' about the dealings in the *Gambotto* case. His Honour does state that the amendment of the articles is oppressive⁸⁸ but gives no analysis of what it is about the facts in this case that lead him to that conclusion. Perhaps, as Meagher JA suggests,⁸⁹ any change to the articles which allows the majority shareholders to compulsorily acquire the shares of the minority, even if for market or considerably higher value, is for McLelland J an oppression on the minority. Perhaps, as already stated, for McLelland J the issue is one of 'fair dealing'. However, it appears to be even more than this. McLelland J seems to believe that shares have an intrinsic value beyond mere monetary value. For His Honour they are not just items of investment, but also appear to have value in the context of membership of the corporation. Therefore, they are items of property which have some inherent worth, and so, cannot be legitimately expropriated in the absence of specific legislative powers to do so. This is to treat shares similarly to real property.

Certainly, if attention is focused on free enterprise western style democracies such as ours, where private property of various types can be compulsorily acquired, then, leaving shares aside for the moment, such compulsory acquisitions are rare. In fact, in the absence of contractual provisions stating otherwise, such acquisitions seem to be limited to cases where specific legislation or local government by-laws are passed for this purpose. However, such compulsory acquisition is always by government or public authorities and for a purported public purpose. Even in the case of land there are examples where individuals have held out against compulsory acquisition and governments have been loath to interfere.⁹⁰ In other words if shares can be compulsorily acquired by other than government or public authorities and not for some public or community purpose they are some lesser form of 'property' than land.

87 Even what constitutes the current market value is frequently a matter for some dispute. However, in the case of listed public companies where appeal can be made to the current price on the stock exchange this may appear to be less of a problem than in the case of proprietary companies.

88 *Gambotto & Anor v WCP Ltd* (1992) 10 ACLC 1046, 1049.

89 *WCP Ltd v Gambotto & Anor* (1993) 11 ACLC 457, 459.

90 For an example see Spender, P, 'Compulsory Acquisition of Minority Shareholdings', *above n 67* at p 90.

However, Meagher JA may not be correct in his analysis of McLelland J's view. Another explanation of McLelland J's decision is that, in the absence of any wrong-doing or debt owed by the minority, the majority simply cannot compulsorily acquire the shares of the minority. The analysis of the previous English cases outlined above at paragraph 3.2 supports this explanation. However, even if this is the correct analysis of McLelland J's view it still accords with an extremely strong belief in the inherent rights of minority shareholders and is not dissimilar from the first explanation.

Thirdly, it might be thought that McLelland J appealed implicitly to the 'clean hands' doctrine as it appears from His Honour's judgment that there was no evidence to suggest that the dissenting minority in this case were 'green-mailers' and simply holding out for more money. However, there does not appear to be any reason to believe that the majority shareholders acted other than with 'clean hands', unless the self-interested⁹¹ and expedient behaviour of the majority can be equated with an absence of clean hands. However, this would be to apply an overly stringent view of this principle.

Turning to the Court of Appeal, both the approach and the result were different. As noted at paragraph 3.2 above whilst Meagher JA dismissed the 'bona fide for the benefit of the company as a whole' doctrine he followed the decisions in *Allen v Gold Reefs of West Africa*⁹² and *Sidebottom v Kershaw, Leese & Co.*⁹³ In both cases the court appealed to this doctrine as the basis for their decisions. Furthermore, as also previously noted Meagher JA's decision is consistent with the acceptance of this doctrine. However, if some notion of 'the benefit of the company' was not the basis for Meagher JA's decision, nor arguably was it the protection of dissenting minority shareholders, then presumably what he considered most 'fair' was the position of the majority shareholders. Therefore, it can be inferred that for Meagher JA, shares are not items of property having an intrinsic value beyond that calculated in purely monetary terms. It appears that if the majority are prepared to pay enough money for them (market value or above) then compulsory acquisition of the shares of the minority is 'fair'. The issue of fairness, except in extreme circumstances, is no more than the issue of 'fair price', and the issue of 'fair dealing' in *Weinberger* is ignored, or at the very least glossed over.

Appeal to Section 180(3)(c)

As stated earlier three arguments were put to McLelland J as to why article 20A should not be permitted. However, having found in favour of the minority shareholders on the question of whether the new article 20A amounted to a fraud by the majority on the minority, McLelland J did not find it necessary to consider the argument that this article was in breach of section 180(3)(c). By contrast, Meagher JA briefly alluded to section 180(3)(c) and its relationship

91 It has already been noted that it is not improper for shareholders to vote in their own interests. See, for example, *Peters' American Delicacy Co Ltd v Heath & Others* (1939) 61 CLR 457.

92 [1900] 1 Ch 656.

93 [1920] 1 Ch 154.

to article 20A but in a very cryptic statement dismissed the claim that the compulsory acquisition of the shares of the minority shareholders constituted a breach of this section. This section states:

A member of a company, unless either before or after the alteration is made the member agrees in writing to be bound by it, is not bound by an alteration of the constitution made after the date on which the member became a member so far as the alteration :

- (a)
- (b)
- (c) increases, or imposes, restrictions on the right to transfer the shares held by the member at the date of the alteration.

Meagher JA simply stated :

The legal effect of Article 20A is not to impose any restrictions on the rights of minority shareholders to transfer shares in the appellant. They may do so freely until they receive a notice under Article 20A. Even then the shares remain transferable without restriction.⁹⁴

It is submitted that this can only be seen as an extremely perfunctory dismissal of an important argument by the minority shareholders. It is a very narrow and curious interpretation of the phrase 'restrictions on the right to transfer shares' to hold that a compulsory acquisition does not amount to such a restriction. Meagher JA appeals to the distinction between the article itself and a notice issued under it. Perhaps this part of the argument can be sustained, if one were to separate the act of passing the article at a general meeting from the act of actually implementing the provisions of the article. This would be analogous to a change to the Australian Constitution being made at a referendum enabling the Federal Parliament to pass legislation in a particular area and then the Federal Parliament choosing not to pass any such legislation. However, an interpretation of this nature could sustain only part of the argument put by Meagher JA. In the final sentence Meagher JA goes on to claim that even after the issuing of such a notice 'the shares remain transferable without restriction.' It is submitted it is a curious interpretation of the section to hold that there is no restriction on transfer after notice under article 20A is issued. Such an interpretation is so narrow and overly pedantic as to be nothing less than bizarre. Moreover, it is obvious this article would not have been put to the general meeting if there had been no intention of implementing it by the stated date.

However, if section 180(3)(c) were interpreted in a less strained way and the words given there natural meaning then the result might be that any change to articles allowing for compulsory acquisition would be disallowed. This would not accord with what appears to be the intellectual basis for the decision of the Court of Appeal.

94 *WCP Ltd v Gambotto & Anor* (1993) 11 ACLC 457, 461.

Conclusion

To summarise, the analysis of this case by the judges both at first instance and on appeal showed that the 'bona fide for the benefit of the company as a whole' doctrine is inadequate in the context of the rights of minority shareholders. However, their analysis was cursory and deficient. Secondly, the analysis of whether the majority shareholders should be able to compulsorily acquire shares of the minority in the absence of any wrongdoing or evidence of 'green-mailing' was disappointingly superficial and failed to indicate any principles or guidelines for the future. In particular, Meagher JA's appeal to cases decided on the basis of the 'bona fide for the benefit of the company as a whole' doctrine was surprisingly slipshod. Thirdly, Meagher JA's analysis of section 180(3)(c) of the *Corporations Law* was narrow and contrived, even if necessary for him to come to the conclusion he reached. Finally, the issue of what is 'fair' in cases such as *Gambotto* appears to come down in the end to the intuitions of the individual judge.

Perhaps the discussion has become too analytical and the theory has overwhelmed practical realities. Maybe it can be argued that the Court of Appeal's decision is the only practical one. Even if this were accepted, the community not only deserves but requires a thorough analysis of the issues raised by this problem. The Court of Appeal certainly did not provide the business and legal community with this analysis.

Editor's note: On appeal to the High Court *Gambotto's* appeal was allowed. The High Court's decision was delivered after the date of this article (see: *Gambotto & Anor v WCP Limited*, a judgment delivered on 8 March 1995) but a short note on the High Court's decision will be included by the writer of this article in the December 1995 issue of the *Bond Law Review*.