IRREGULARITIES IN COMPANY PROCEEDINGS

RE ACTION WASTE COLLECTIONS PTY. LIMITED
RE COMPACTION SYSTEMS PTY. LIMITED

By Section 222(1) (a) of the Companies Act, the Court may order the winding up of a company if the company has by special resolution resolved that it be wound up by the Court. Two recent decisions illustrate the wide range of issues to which a defective resolution can give rise and contain important judicial *dicta* on the operation of company law principles and the Companies Act in respect of the validation of company proceedings.

The cases are *Re Compaction Systems Pty. Limited,*[1] a decision of Bowen, J., Chief Judge in Equity in the Supreme Court of New South Wales (as he then was), and *Re Action Waste Collections Pty. Limited,*[2] a decision of Fullagar, J. in the Supreme Court of Victoria. Despite the many issues arising in the cases, the "unanimous assent" principle and each judge's opinion on the operation of s. 366 of the Companies Act form the basis of the decision and constitute the main contribution of the cases to the law in this area. It is to these grounds that most attention will be paid in this note.

Each case arose out of the course of the winding up of Omnico Limited (hereafter called "Omnico") in respect of two of Omnico's subsidiaries, Compaction Systems Pty. Limited and Action Waste Collections Pty. Limited. Omnico was the registered holder of all but one of the shares in the capital of each company, and claimed to hold the beneficial interest in the outstanding share in each case. Omnico's liquidator sought to obtain control of Omnico's investments in the face of the opposition of one McDonald, who was a director of both subsidiaries and in each case the registered holder of the outstanding share. The liquidator therefore presented winding up petitions to each court, seeking the appointment of a provisional liquidator in respect of each subsidiary and tendered in support of his application the minutes of extraordinary general meetings of each subsidiary, which in each case read as follows:

> PRESENT: Omnico Limited by Laurence Brian Hunter
> its official liquidator.

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[1] [1977] C.C.H. C.L.C. 29, 305; (1976) 2 A.C.L.R. 135 (hereafter *Compaction Systems*).

[2] (1976) 2 A.C.L.R. 253 (hereafter *Action Waste Collections*).

RESOLVED UNANIMOUSLY AS A SPECIAL RESOLUTION THAT:

The company be wound up by the Supreme Court of New South Wales/Victoria.

OMNICO LIMITED by Laurence Brian Hunter, Official Liquidator.

At the foot of this minute under the common seal of Omnico the following appeared:

Omnico Limited being the only shareholder in Compaction Systems Pty. Limited/Action Waste Collections Pty. Limited does hereby consent to the convening and holding of the abovementioned Extraordinary General Meeting and the passing thereat of a Special Resolution of the abovenamed resolution notwithstanding that the statutory period of notice of the said Meeting and of the intention to propose the said Resolution as a Special Resolution has not been given.

The common seal of Omnico was then attached beside a notation that the common seal was "hereunto affixed by its liquidator".

After the winding up order was pronounced in each case and the provisional liquidators appointed, McDonald applied to the Supreme Court of each State for declarations as to the invalidity of the special resolutions and sought the revocation of the orders appointing the provisional liquidators.

The respondent liquidator sought to establish the validity of the proceedings on a variety of grounds that both judges were unanimous in rejecting. Only on the application of s. 366 of the Act to validate the resolution did Bowen, J. and Fullagar, J. come to a different conclusion. Fullagar, J. rejected the view that s. 366 had any application to the case whereas Bowen, J. accepted the availability of the section as a basis upon which to make an order validating the resolution. When s. 366 is discussed it will be interesting to determine whether their Honours' different conclusions on this section indicate a difference in principle or whether the result can be explained on the facts of each case.

The main distinction required to be made in the fact situation in each case is in respect to the capital structure and registered holdings of the shares in each company. The issued capital of Action Waste Collections Pty. Limited was 20 ordinary shares of one dollar each. Omnico was registered as the holder of 19 of these shares and McDonald was registered as the holder of the remaining ordinary share. McDonald at all times held his one share upon trust for Omnico, which subscribed the capital for the share. For the purpose of verifying this an acknowledgement of trust was tendered in court. Fullagar, J. noted that Omnico could have on demand compelled McDonald to transfer his share to it, but the company had never attempted to do this.

The capital structure of Compaction Systems Pty. Limited was more complicated. The issued capital consisted of 100 "A" class shares, all

of which were held by Omnico, and 6,151 "B" class shares, in respect of all but one of which Omnico was the registered holder. The remaining share was registered in the name of McDonald. There was conflicting evidence as to how McDonald held his share. The liquidator claimed that Omnico had provided the purchase money for the share and therefore held the beneficial interest in it. McDonald, however, appeared to be uncertain as to the source of the purchase money and expressed the view in evidence that payment of the purchase price was "more likely to have been by no one. I probably still owe for it".[3] He expressed the view that he held the share beneficially. Bowen, J. did not find it necessary to decide who held the beneficial title. This is disappointing because his Honour's conclusion on this point would have been important in determining the scope of some of the principles — most notably, "unanimous assent" — that arose in the case.

For its Articles of Association, Compaction Systems Pty. Limited adopted Table A of the Companies Act with slight modifications. One such modification provided that the "A" class shares should be the only shares in the capital of the company conferring the right to vote. The "B" class shares were specifically expressed not to confer any right to vote at a general meeting of the company. However, Bowen, J. found that the effect of Article 111 of Table A was to confer on the holders of "B" class shares a right to receive notice of, and to attend meetings of, shareholders.

Thus in both *Compaction Systems* and in *Action Waste Collections* a shareholder having the right to receive notice of, and to attend, the extraordinary general meeting had not received notice of, or been present at, that meeting. Only in *Action Waste Collections*, however, did the excluded shareholder have the right to vote; and to this extent McDonald had a stronger case in the Victorian action than he did in New South Wales. It is to a consideration of the main grounds of each decision that we now turn.

1. Assent of All Shareholders Entitled to Vote

The respondent argued in each case that the "unanimous assent" principle operated to validate the winding up proceedings. The core of this principle, initially enunciated in *in re Express Engineering Works, Limited*,[4] is that the company is bound by the assent of all of its shareholders present together at a meeting to the same extent as it would be by a resolution passed to that effect at a properly constituted meeting.

Subsequent cases have sought to extend the principle. In *Parker & Cooper, Limited* v. *Reading*[5] there was no meeting at all, however Astbury, J. considered that it did not matter whether the assent of all the members was given simultaneously (as in a meeting situation) or at

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[3] *Supra* n. 1 at 29, 308.
[4] [1920] 1 Ch. 466.
[5] [1926] 1 Ch. 975.

different times and places. And in *in re Duomatic Ltd.*,[6] Buckley, J. considered that if the assent of all the members entitled to attend and vote at the meeting was given, it was irrelevant that the holders of the non-voting shares without the right to receive notice of, or attend, general meetings did not assent. Other courts have not been as enthusiastic in taking up these extensions to the doctrine as Astbury, J. was in *Parker & Cooper, Limited* v. *Reading*. For example, the Privy Council in *E.B.M. Co. Ltd.* v. *Dominion Bank*[7] expressly declined to comment on the validity of Astbury, J.'s decision.

In *Action Waste Collections* one of the bases for Fullagar, J.'s rejection of the applicability of the unanimous assent cases was his opinion that "In the present case . . . there never was a meeting at all, of any shareholders".[8] Unfortunately his Honour, in appearing to reject the extension of unanimous assent propounded in *Parker & Cooper, Limited* v. *Reading*, not only failed to refer to the case at all, but did not even mention any of the Australian authority on this aspect. Wickham, J., in the Supreme Court of Western Australia in *Perseus Mining N.L.* v. *Landbrokers (Perth) Pty. Ltd.*[9] approved the principle in *Parker & Cooper, Limited* v. *Reading*. However, in the Supreme Court of Victoria, Gowans, J. in *Re Meyer Douglas Pty. Ltd.*[10] expressed reservations as to the correctness of the decision in *Parker & Cooper, Limited* v. *Reading* where there is no meeting of any kind;[11] and McInerney, J. in *E. H. Dey Pty. Ltd. (In Liquidation)* v. *Dey*[12] raised the issue of whether there was required to be a meeting, but did not have to come to any conclusion on the question.[13] It is, with respect, unfortunate that both Fullagar, J. and Bowen, J. have avoided contributing to any lessening of the uncertainty existing regarding the status in this country of the *Parker & Cooper, Limited* v. *Reading* decision.

But the main ground of Fullagar, J.'s rejection of the unanimous assent argument in *Action Waste Collections* was that it was clear that all of the shareholders entitled to vote had not assented to the special resolution. His Honour did not refer to the case, but Long Innes, J. had reached the same conclusion on a consideration of similar facts in *In re Sander's Limited.*[14] After approving the unanimous assent principle in that case, Long Innes, J. said:

> There was, however, one person not present, who was still registered on the share register as a member in respect of one share; that was Mr. Pedashanko. It is true that he held the share as a trustee,

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[6] [1969] 2 Ch. 365.
[7] [1937] 3 All E.R. 555.
[8] *Supra* n. 2 at 258.
[9] [1972] W.A.R. 12.
[10] [1965] V.R. 638.
[11] Gowan, J.'s observations on this point are not included in the published report, but are to be found in *E. H. Dey Pty. Ltd. (In Liquidation)* v. *Dey* [1966] V.R. 464 at 466.
[12] [1966] V.R. 464.
[13] *Id.* at 467-468.
[14] (1932) 49 W.N. (N.S.W.) 220.

> possibly as a bare trustee, for the respondent Mr. Sander, who was present at the meeting. It is possible also that had he been present he might have been obliged to vote as Mr. Sander directed; but, in my opinion, he was still a member entitled to vote in respect of that one share which still stood in his name in the share register; and as no notice had been given to, or waived by, him, the meeting was not, in my opinion, a meeting of all members entitled to vote; it follows, in my view, that the extraordinary resolution was not duly passed, and that the company is not now in liquidation.[15]

Fullagar, J. further rejected the argument that McDonald, having no beneficial interest in his share, "must be taken therefore to have assented".[16] Neither judge really considered — Bowen, J. because he did not reach any conclusion as to whether McDonald held as a trustee — the question of the independence of trustee voting power. It could be argued that if it was within the beneficiary's power to give directions to the trustee as to the manner of exercise of voting rights in respect of the share in question, that the requirement as to the beneficiary formally exercising his power to direct the trustee might be waived in the same way as compliance with other formalities can be waived under the unanimous assent principle. Unfortunately the issue is not as simple as this. It is clear that it is the duty of the trustee of shares to exercise his voting power in the interests of the beneficiaries and, as is stated in *Jacobs' Law of Trusts in Australia*, "if all the beneficiaries are *sui juris* and absolutely entitled and are agreed upon the way in which the voting power should be exercised, the trustee usually should vote as the beneficiaries wish".[17] This, however, must be read subject to *Re Brockbank*,[18] where Vaisey, J., whilst recognising that the beneficiaries could direct the trust property either to themselves absolutely or to others on new trusts, held that, even when all the beneficiaries concur, they could not direct a trustee having the power to nominate his successor to appoint as successors persons indicated by the beneficiaries. It is beyond the scope of this note to become embroiled in the trust issue, but the decision in *Re Brockbank* suggests that the trustee's consent must be obtained for a "unanimous assent" of shareholders, even where all the beneficiaries concur. Certainly the authorities support Fullagar, J. in refusing to disregard the trust in such circumstances and rejecting that for the purposes of the unanimous assent principle the assent of the absolute beneficial owner is sufficient.

In *Compaction Systems*, where the holders of all the shares having the right to vote had been present at the meeting, the respondent sought to rely on Buckley, J.'s formulations of the unanimous assent principle in *Re Duomatic*. Bowen, J. quoted the best-known passage from Buckley, J.'s judgment:

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[15] *Id.* at 221.
[16] *Supra* n. 2 at 259.
[17] (4th ed. by R. P. Meagher and W. M. C. Gummow, 1977) p. 462.
[18] [1948] 1 All E.R. 288.

> . . . I proceed upon the basis that where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be. The preference shareholder, having shares which conferred upon him no right to receive notice of or attend and vote at a general meeting of the company, could be in no worse position if the matter were dealt with informally by agreement between all the shareholders having voting rights than he would be if all the shareholders met together in a duly constituted general meeting.[19]

However, his Honour found that because of the company's partial adoption of the statutory articles which conferred a right to receive notice of, and to be present at, meetings, the facts in *Compaction Systems* fell short of the extended unanimous assent principle in *Re Duomatic*. Clearly in Bowen, J.'s view the "B" class shareholders *could* be in a worse position if the proposed transaction was assented to informally by all the shareholders having the right to vote at a meeting to which they had been deprived of their right to receive notice of and attend. Bowen, J. did not reach any decision as to whether the non-voting shareholders had a right to be heard at the meeting. He presumably had regard, however, to their ability nevertheless to influence the outcome of proceedings by making representations to voting shareholders. In any event his Honour viewed their rights as being substantial, concluding:

> . . . I am not prepared to extend the principle to cover the case where only the shareholders entitled to vote have assented to a transaction while another shareholder entitled to receive notice of meetings and to attend has not been made aware of the transaction and has not assented to it.[20]

As well as entitling the "B" class shareholders to receive notice of general meetings, Article 111 gave the auditor for the time being of the company the same right. And s. 167(7) of the Act confirms this in the case of all companies. If the informal assent of members will, since the commencement of the Companies Act, 1961, be inoperative unless the auditor has received notice of the meeting, this will constitute an important restriction in practice on the availability of the unanimous assent principle. Bowen, J. implies in his judgment that unanimous assent will be effective notwithstanding the failure to notify the auditor and the policy basis of the principle — of disregarding formalities where all the members of the company have assented to the transaction — would appear to suggest that his Honour is correct in taking this approach.

Finally, even where on the facts it is established that there has been unanimous assent, it is questionable that this can ever be sufficient where the Companies Act (rather than the articles) requires a resolu-

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[19] *Supra* n. 6 at 373.
[20] *Supra* n. 1 at 29, 310.

tion at a meeting. In neither case was this issue considered, though s. 222 of the Act expressly requires a special resolution.

The question is one on which the authorities are not consistent. In *In re Oxted Motor Company, Ltd.*[21] the English Court of Appeal held that the assent of all members at a meeting to a special resolution that had, contrary to the English Companies Act, been put with less than 21 days' notice was effective to cure the defect. A similar approach was taken in Victoria in *Re Meyer Douglas Pty. Ltd.*[22] by Gowans, J., who said that if all the members of a company approve the course of action, then the need for a special resolution required by the Act is dispensed with. Gowans, J. relied on the Privy Council decision in *Ho Tung* v. *Man On Insurance Co. Ltd.*[23] where the validity of articles that had been acquiesced in by all the members over many years without being properly adopted was upheld. Gowans, J., however, did not consider whether any different rule applies with respect to resolutions required by the articles than applies in the case of resolutions required by the Act.

However, Barwick, C.J. in *M. Dalley & Co. Pty. Ltd. and Others* v. *Sims*[24] questioned whether, where the Act requires a resolution, informal assent could ever be enough. His Honour said that he entertained some doubt "as to whether the lack of a resolution duly passed to increase the capital can be overcome by acquiescence on the part of all the shareholders".[25]

Professor Ford[26] considers that the question depends upon whether the *only* power to do the act depends on the procedure provided by the Companies Act. Taking as an example s. 21(1) of the Act, which provides that the memorandum may be altered to the extent and in the manner provided by the Act "but not otherwise", Ford says:

> Where the matter does not involve alteration of the memorandum and the power though conferred by the Act could equally well have been in the articles as part of the social contract between members then, unless the Act clearly requires the power to be exercised only in general meeting, it is arguable that separate individual assents of all members should be effective.[27]

It is disappointing that neither case under consideration here gives any indication, aside from the validity of the particular resolution under challenge, whether a resolution is required at all. Bowen, J. obviously saw the matter as being best dealt with as a question of injustice under s. 366 of the Act. Even so, it is regrettable that there has been no further judicial consideration of this issue.

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[21] [1921] 3 K.B. 32.
[22] *Supra* n. 10 at 649.
[23] [1902] A.C. 232.
[24] (1968) 120 C.L.R. 603.
[25] *Id.* at 614.
[26] H. A. J. Ford, *Principles of Company Law* (2nd ed. 1978).
[27] *Id.* at p. 444.

2. Section 366 of the Companies Act

Having failed not only on the unanimous assent ground, but also on his other arguments to establish the validity of the proceedings of each subsidiary, the respondent sought a validating order under s. 366. The general effect of the section is to entitle the court to rectify the consequences in law of certain defects and irregularities in proceedings.

By s. 366(1): "No proceeding under this Act shall be invalidated by any defect irregularity or deficiency of notice or time unless the Court is of opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any order of the Court". To this effect, s. 366(2) empowers the Court if it thinks fit to make an order declaring that such proceeding is valid notwithstanding any such defect, irregularity or deficiency.

Section 366(3) — with which the cases were mainly concerned — empowers the court to make such order as it thinks fit to modify the consequences in law of an omission, defect, error or irregularity which has occurred in the "management or administration" of a company whereby:

(i) a breach of the Companies Act has occurred; or
(ii) there has been default in the observance of the memorandum or articles of the company; or
(iii) any proceedings at meetings of the company, or of directors or of creditors and members have been rendered ineffective; provided that by s. 366(3) (b) the court shall before making any such order satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof.

There is a paucity of judicial comment on the operation of s. 366. Where judges have considered the section it has usually been only in relation to the particular facts of the case in a cursory rejection at the end of the judgment. Thus Bowen, J.'s judgment, in dealing comprehensively with the principles and application of s. 366, is particularly valuable.

Bowen, J. considered the effect of the first three sub-sections of s. 366. With respect to s. 366(1) his Honour noted that when the subsection referred to a "proceeding under this Act", the reference is not limited to legal proceedings, but relates to both curial and non-curial proceedings.[28] He further noted that the sub-section was limited only to defects, irregularities or omissions "of notice or time" and that there were many departures from proper procedure — for example, the absence of a quorum — which fall outside this provision and to which Bowen, J. would not allow the possibility of an extension.[29] Fullagar, J., however, in a rather curious statement, appeared to contemplate that subsection (1) might not be so limited, or at any rate he leaves the question open for further consideration: "If the defects or irregularities

[28] *Supra* n. 1 at 29, 314.
[29] *Supra* n. 1 at 29, 314.

referred to in sub-s. (1) include those which are not of notice or time . . . ?"[30] This is not, with respect, a construction that would appear to be available on a literal interpretation of the wording of the sub-section. Moreover the breadth of s. 366(3) appears to leave little scope for affording a wider interpretation to s. 366(1).

Bowen, J. next noted how the sub-section appeared to be designed to validate automatically by operation of the statute proceedings under the Act which, if it were not for the section, would be invalidated unless the court forms the opinion that substantial injustice had been or might be caused thereby which could not be remedied by any supplementary order of the court.[31] But whereas Bowen, J. considered that the sub-section acted to automatically validate a proceeding invalidated by such a defect or irregularity without requiring the court to exercise its discretion to make an appropriate order, Fullagar, J. appeared to take a contrary approach that the court had to exercise its discretion for the proceedings to be validated: "I see no reason at all why I should exercise (my discretion) by intervening to save or validate any of the unauthorised proceedings".[32] Thus Fullagar, J.'s approach again appears to be at variance with that taken by Bowen, J., even though in practice such differences are unlikely to lead to a different result.

As to what constitutes a "proceeding under the Act", Bowen, J. thought that this extended to include a proceeding under the Schedules to the Act. The most important consequences with respect to this arise in regard to the statutory articles. Thus where there was a defect as to notice or time with respect to an article under Table A of the Fourth Schedule to the Act, a company to which the article applied could take advantage of the validating effect of s. 366(1), whereas a company that had excluded the statutory articles but had an identical provision in its own articles could obtain no relief from the operation of the sub-section.[33] This again will be of limited importance in the light of the scope Bowen, J. afforded to s. 366(3).

With respect to s. 366(2), Bowen, J. noted that when an order was sought under this sub-section rather than relying on the contingent validation afforded by s. 366(1), the practice of the court was to read the two sub-sections together and to consider whether any substantial injustice has been, or may be, caused which could not be remedied by any order of the court, even though s. 366(2) was not expressed to be subject to the proviso relating to injustice.[34]

The matters to which s. 366(3) refers have already been listed. Bowen, J. emphasised the width of this sub-section and the whole tenor of his judgment is that this ought not to be read down.

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[30] *Supra* n. 2 at 258-59.
[31] *Supra* n. 1 at 29, 314.
[32] *Supra* n. 2 at 259.
[33] *Supra* n. 1 at 29, 314.
[34] *Ibid.*

Section 366(3) is not limited to proceedings under the Act, nor to defects as to notice or time. Bowen, J. did explore one possible limitation in the sub-section's operation in the requirement that the defect or irregularity had to occur in the "management or administration" of the company. His Honour considered that the "management or administration" of a company appeared "to cover all the matters committed by the Act, and by the articles of association to the board of directors, and also generally those matters which may be dealt with by shareholders in general meeting".[35] Bowen, J. specifically rejected the argument that where a board of directors resolve that a petition to wind up a company be presented to the court this went beyond the powers of the board. Such an argument — based on the view that the articles, in committing to the directors the management of the affairs of the company, do not thereby empower the directors to launch proceedings directed at terminating the company's affairs — ignores the fact that the decision to terminate the affairs of a company is committed to the court. The decision to present a winding-up petition is not a decision to terminate the affairs of a company; nor is a resolution to apply for the appointment of a provisional liquidator; for in each case a winding-up order may or may not ultimately be made.[36]

Bowen, J. dealt with a *dictum* of Else-Mitchell, J. in *Omega Estates Pty. Ltd.* v. *Ganke*[37] that s. 366 did "not authorise the court to override the articles of association of a company nor to prescribe a procedure which would have that effect".[38] Bowen, J. expressly disapproved Else-Mitchell, J.'s statement:

> In view of the fact that s. 366(3) expressly empowers the court to make an order validating proceedings where there has been "default in the observance of the memorandum or articles of the company" it certainly involves power to disregard the articles.[39]

In seeking to apply what he called the "plain words" of the section, his Honour not only finally disapproved Else-Mitchell, J.'s restrictive approach, but made it unnecessary to consider the gloss that Blackburn, J., in *Re Australian Continental Resources Ltd.*[40] had sought to put upon these words of Else-Mitchell, J. when he suggested that Else-Mitchell, J.'s *dictum* applied only to cases where the making of an order would involve disregarding an express prohibition in the articles.

On a procedural point, Bowen, J. said that in cases to which s. 366(3) applies:

> . . . the court may either of its own motion or on the application of any interested person make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be

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[35] *Id.* at 29, 315.
[36] *Ibid.*
[37] [1963] N.S.W.R. 1416.
[38] *Id.* at 1423.
[39] *Supra* n. 1 at 29, 315.
[40] (1976) 10 A.C.T.R. No. 19, 30 at 33.

> modified the consequences in law of any relevant omission, defect, error or irregularity, or to validate or to make a validating order.[41]

Despite his broad interpretation of sub-section (3), Bowen, J. did recognise a restriction on its operation in that a court is required before making an order under s. 366(3) to satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof. As to what constituted an injustice, his Honour said that this involved more than a technical infringement of a person's rights such as would occur where a member, having the right to receive notice of a meeting, had not in fact received notice.[42] Rather he said that a "real" prejudice had to be suffered:

> . . . and not merely insubstantial or theoretical, prejudice which will be suffered by, for example, a member by the making of an order, and to weigh this on the scales against the prejudice to the company, other members and creditors, if an order be not made.[43]

As an example of the type of injustice to a member which could lead the court to refuse a validating order under s. 366(3), Bowen, J. cited:

> . . . an irregularity in the calling of a meeting where the business for discussion was the expulsion of a member and he received an insufficient notice of the meeting. An order was refused in such circumstances in *Ryan v. Kings Cross R.S.L. Club Ltd.* [1972] 2 N.S.W.L.R. 79.[44]

In the circumstances in *Ryan* v. *Kings Cross R.S.L. Club Ltd.*,[45] McLelland, J. took the view that a very strong case would have to be made out in order to establish that the making of an order validating the proceedings would not be conducive of injustice where the irregularity involved derogated from the rights of a person against whom the proceedings are taken. As opposed to regarding that there was some kind of onus to discharge, Bowen, J. relied instead on a more informal process of "weighing" the prejudice to be suffered by the making of an order against the prejudice that would be suffered should the order be not made. It is submitted that there is no real inconsistency of approaches between these two N.S.W. cases. Rather, in circumstances such as those in *Ryan's Case*, it may be that the factors productive of injustice are so totally one-sided as to afford no scope for the making of a validating order, even given the court's ancillary jurisdiction to make subsidiary orders to rectify any injustice arising out of the validating order.

On the facts in *Compaction Systems*, the question came down to whether an order under s. 366(3) validating the special resolution would cause sufficient injustice to McDonald to lead the court to refrain from exercising its power. Bowen, J. concluded that the making of such an

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[41] *Supra* n. 1 at 29, 315.
[42] *Id.* at 29, 315-16.
[43] *Id.* at 29, 316.
[44] *Ibid.*
[45] [1972] 2 N.S.W.L.R. 79 at 80-81.

order would not do injustice to McDonald in the relevant sense and that the case was an appropriate one for the making of an order.

But McDonald also challenged the appointment of the provisional liquidator, on the basis that the application for appointment had not been made with the authority of the company. On this point, Bowen, J. agreed with McDonald. He was unable to ascertain the existence of any meeting or resolution of the company deciding that the company should apply for the appointment of a provisional liquidator. Had there been such a proceeding, Bowen, J. said that he would have been inclined, on the same considerations which lead him to conclude that he should make an order validating the special resolution, to make appropriate orders validating the appointment of the provisional liquidator. However, he said that "the problem in this regard is that there are not even any irregular or invalid proceedings to attract the discretion of the court".[46] Thus McDonald succeeded in his application for a declaration that the order for the appointment of a provisional liquidator was not made on the application of, or with the authority of, the company or any person lawfully authorised on its behalf.

As opposed to Bowen, J.'s extensive consideration of the section, Fullagar, J. dismissed the respondent's reliance on s. 366 cursorily:

> As I have said, if I have any discretion under s. 366 of the Companies Act I do not think that I should exercise it by interfering to prop up acts of the liquidator of one shareholder which were, in my opinion, unauthorised; though I have no reason to doubt that they were exercised by him entirely *bona fide*.[47]

It is difficult to determine whether Fullagar, J.'s approach is different in principle to that taken by Bowen, J. It would be convenient to seek to explain any difference on the basis that in *Compaction Systems* the resolution was assented to by all the shareholders entitled to vote. Certainly it can be said that Bowen, J. took the same approach as Fullagar, J. in regard to the appointment of the provisional liquidator which was not authorised by the company. With respect to the special resolution for winding up, it is submitted that the differences can be explained on no other basis than that of discretion, even though Bowen, J. appears to take a more liberal approach as to the availability of the relief under s. 366.

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The result of *Compaction Systems* and *Action Waste Collections* appears to present a paradox: on the one hand a "tightening up" of the unanimous assent principle, on the other hand an increasing willingness of the courts to exercise the discretion given them under s. 366 to validate company proceedings that are in some way defective. The increased formality that now appears to apply in respect of unanimous

[46] *Supra* n. 1 at 29, 316.
[47] *Supra* n. 2 at 259.

assent is not altogether to be welcomed, particularly in the small business context where in a practical sense the doctrine is indispensable. As a practical measure, corporators in small business should seek to exclude the operation of Article 111 of the Table A articles where applicable and otherwise seek to restrict the classes of shareholders entitled to receive notice of a general meeting. Otherwise the existence of members of the company having the right to receive notice of a meeting even though having no right to vote will as a practical matter render it extremely difficult to effect a valid unanimous assent outside of a meeting because of the requirements as to the giving of notice to non-voting shareholders. Bowen, J. in *Compaction Systems* also recognises another obstacle to be negotiated by would-be unanimous assenters in the right of the auditor under the Act to receive notice of a meeting, particularly to the extent that the informal agreement of members is ineffective to overcome an express requirement of the Act.

The increasing rigours associated with unanimous assent have in some ways been compensated for in the greater readiness of courts to make validating orders under s. 366. Certainly Bowen, J., in seeking to apply the "plain" words of the Companies Act, and his insistence upon there being some "real, and not merely insubstantial or theoretical, prejudice" before the court should be precluded from making a validating order under the section, takes an admirable approach in refusing to become embroiled in technicality and formality, and it will be important to see whether future decisions will follow his Honour's lead in according to the section this breadth of scope. In future the real issue as to the validity of company proceedings appears likely to turn not so much on whether the validity of the proceedings can be established on the basis of unanimous assent, but rather on the practical consideration of whether the validation of the proceedings in the circumstances of every case is likely to be, on balance, conducive to justice.

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