DIRECTORS AS FIDUCIARIES

QUEENSLAND MINES LTD. v. *HUDSON & ORS.*

The Problem

Take the case of a director who works zealously to obtain licences for his company to enable it to explore a vast area of land which has great potential for a mining industry. The licences are issued, but the company is faced with liquidity problems and is unable to find the backing to finance the project. What can the director do? Must he let this opportunity pass? Or, can he take up the licences, find the required backing, and set out to and in fact make substantial profits for himself?

In 1978 the Privy Council was faced with just this choice in the landmark decision of *Queensland Mines Ltd.* v. *Hudson & Ors.*[1]

The Facts

In 1960 the first defendant, Mr. Hudson, was a managing director of the plaintiff company, Queensland Mines Ltd. (hereafter Q.M. Ltd.) and in that capacity he negotiated with the Tasmanian Government for the issue of exploration licences with the intention of establishing a steel industry. In order for the licences to issue Mr. Hudson had to specify in his application that:

(i) a company by the name of Stanhill Ltd. would back the scheme;

(ii) Q.M. Ltd. was to be the body responsible for technical advice and assistance; and

(iii) the vehicle for the scheme was to be a company to be formed by Stanhill Pty. Ltd.

In February, 1961 the lastmentioned company had not been formed, so the licences were issued to Mr. Hudson in his own name. Subsequently Stanhill Pty. Ltd. withdrew for financial reasons and Mr. Hudson set about to look for a new backer. Eventually, he obtained the required backing and a large industry developed. Mr. Hudson transferred the licences to the second defendant[2] in 1963 and later to the third defendant[3] and both companies made substantial profits as a result.

It was only in 1973 that proceedings were commenced by Q.M. Ltd. against Mr. Hudson and the two companies. The plaintiffs sought a declaration that the defendants should account to Q.M. Ltd. for any

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[1] [1978] C.C.H. A.C.L.C. 40-389 (*Q.M. Ltd.* v. *Hudson*).
[2] Industrial and Mining Investigations Pty. Ltd.
[3] Tasmanian Investments Pty. Ltd.

moneys received and profits gained from exploration of the licences on the basis that Mr. Hudson had breached his fiduciary duty.

The Issues

Confronted with this claim the following contentions were put by way of defence:

(i) that Mr. Hudson's fiduciary duty owed to Q.M. had not been breached;

(ii) that even if such a breach had occurred there had been full disclosure given to, and consent obtained from, Q.M. Ltd. to authorize such a "breach"; alternatively

(iii) that the plaintiff's claim was nonetheless statute-barred.

Wootten, J. at first instance[4] found for the plaintiff on the first two issues but for the defendant on the third. On appeal, the Privy Council held that the Statute of Limitations need not be considered as the defendant was entitled to a decision in his favour on the basis of the first two contentions.

One point which should be made in order to avoid misleading the reader is that, although the Privy Council concluded that Mr. Hudson was not liable, either because he had not breached his fiduciary duty, or because there was disclosure and consent, the Board did not consider the two possibilities separately as did Wootten, J. The Board's failure to so distinguish has important consequences when an attempt is made to determine the exact basis of the decision. This problem will be considered shortly.

Directors as Fiduciaries

The first and most important question considered by the Privy Council was whether Mr. Hudson had abused his position as managing director to make a profit for himself. If he had done so he would be liable for both the substantial profits already made and any profits he could be reasonably expected to make as a result of his position as managing director of Q.M. Ltd. To so consider Mr. Hudson's position as director of the company and his consequent liability the Privy Council referred to and appeared to affirm Wootten, J.'s interpretation of two important English authorities, *Regal (Hastings) Ltd.* v. *Gulliver & Ors.*[5] and *Phipps* v. *Boardman.*[6]

In *Regal (Hastings) Ltd.*[7] five directors and a solicitor were sued by the plaintiff company to recover profits which they had made on a sale of their shares in a subsidiary. Two seemingly important facts that emerged from the case were firstly, that the company itself failed to purchase the shares due to lack of finance and, secondly, that the directors had always acted in good faith and in the best interests of the company.

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[4] [1976] C.C.H. A.C.L.C. 40-266 (*Q.M. Ltd.* v. *Hudson* (No. 1)).
[5] [1967] 2 A.C. 134n.
[6] [1967] 2 A.C. 46.
[7] *Regal (Hastings) Ltd., supra* n. 5.

In a unanimous decision of the House of Lords it was held that the directors had to account for their profits since the opportunity and knowledge enabling them to acquire the shares had come to them as fiduciaries. The apparent good intentions of the directors, which had seemed so decisive to the Court of Appeal, were rejected by the House as irrelevant considerations.[8] Lord Russell showed just "how Draconian is the relevant English rule"[9] by stating:

> It matters not that he [the director] could not have acquired the property for the company itself — the profit which he makes is the company's, even though the property by means of which he made it was not and could not have been acquired on its behalf.[10]

Perhaps the most useful judgment in the case was that of Lord McMillan. He formulated a two-pronged rule[11] as to when a director would be rendered liable: firstly, if the director had allowed his duty to conflict with his interest, and secondly, if he had thereby profited. These two elements, which have been labelled the conflict and profit rules,[12] clearly establish the heart of the "Draconian" English law relating to fiduciaries.

The decision was applied in *Phipps* v. *Boardman*[13] but, unlike the unanimous decision of *Regal Hastings*, there were two strong dissenting judgments in the House.[14] Though the facts involved trustees rather than directors, Wootten, J. in the Supreme Court points out that it "again illustrates the strict character of the liability of a fiduciary".[15]

In keeping to this strict formulation, the majority simply applied Lord McMillan's two-pronged analysis in *Regal Hastings*. It rejected arguments based on the *bona fides* of the defendants and on the fact that the trust did not, and indeed could not have acquired the outstanding shares without the sanction of the court. Boardman and Phipps were in breach of their fiduciary duties since they had allowed a conflict to arise between their self interest and their fiduciary duty owed to the trust, and had thereby made a profit.

One further and perhaps ancillary comment should be made about this case. A distinction has recently been drawn between the situation where a company refuses to take an opportunity due to financial difficulties, and one where a company refuses to take an opportunity because it would be "illegal" to do so.[16] In the former situation, it is asserted that the fiduciary director cannot take advantage of the rejection since

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[8] *Id.* at 144-145 *per* Lord Russell; at 153 *per* Lord McMillan; at 157 *per* Lord Porter and at 154 *per* Lord Wright.

[9] *Q.M. Ltd.* v. *Hudson* (No. 1) *supra* n. 4 at 28; 687 *per* Wootten, J.

[10] *Regal (Hastings) Ltd., supra* n. 5 at 159.

[11] *Id.* at 153.

[12] S. M. Beck, "The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered" (1971) 49 *Canadian Bar Review* 80 at 90.

[13] *Phipps v. Boardman, supra* n. 6.

[14] Viscount Dilhorne and Lord Upjohn.

[15] *Q.M. Ltd.* v. *Hudson* (No. 1) *supra* n. 4 at 28, 687.

[16] *Id.* at 28, 693 and D. D. Prentice, "*Regal (Hastings) Ltd.* v. *Gulliver* — The Canadian Experience" in (1967) 30 *Mod. L.R.* 450 at 454.

a conflict prevails. But in the latter, the fiduciary is free to exploit the rejection for himself. This distinction does not seem to be in accord with the decision in *Phipps* v. *Boardman*. There, the trust could not legally have bought the outstanding shares in the company because it needed firstly the sanction of the court, and secondly, the approval of the beneficiaries (an approval which was not forthcoming). It would seem that it would have been illegal for the trust to buy those shares and yet it was held that the fiduciaries had to account for their profits.

Perhaps one answer to this "contradiction" is that these references to "illegality" may have two meanings. They may refer to the situation where the doing of a particular act is itself illegal. Or they may refer to the situation where an act can legally be done but only if certain pre-conditions are met; if they are not met the doing of the act becomes illegal. In *Phipps* v. *Boardman* the purchasing of the shares by the trust would have been legal only if a court sanctioned that purchase. The illegality of the act in *Phipps* v. *Boardman* was of a surmountable nature. The observations of Prentice and Wootten, J. may be confined to those acts which can never become legal (that is, it is only if the illegal acts are of an insurmountable nature that the fiduciary would be free to exploit the opportunity for himself). Nonetheless the two-pronged analysis of Lord McMillan in *Regal Hastings* was affirmed by all the members of the House (Viscount Dilhorne and Lord Upjohn dissenting only on the facts) and remains intact as a valid formulation of the duty of a fiduciary under English law.

However, in applying this principle to the facts of *Q.M. Ltd.* v. *Hudson*, Wootten, J. departed from the decision of the Privy Council. It is submitted that the problem is, at least in part, more correctly analysed by the Privy Council than by Wootten, J. Although Wootten, J. reviews the facts more fully, he fails to consider what is constituted by a "conflict" in this context.

The Board started by considering a statement by Lord Cranworth, L.C. in *Aberdeen Railway Co.* v. *Blaikie Brothers*:

> And it is a rule of universal application, that no one having such duties to discharge, shall be allowed to enter into engagements in which he has or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.[17]

The Board further cited with approval Lord Upjohn in *Phipps* v. *Boardman*, where his Lordship referred to the phrase "possibly may conflict" and found it to mean that:

> the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person,

[17] (1854) 1 Macq. 461 at 471.

result in a conflict.[18]

At this stage the Board seemed to be envisaging the possibility of another defence open to Mr. Hudson: that of a director not being in a position of conflict with his company. This defence is independent of, and distinct from, the "alternative" defence of informed consent. However, the Board refrained from expanding on this and seemed to suggest that Lords Cranworth and Upjohn were referring to the possibility of informed consent. For example, having stated that it is possible for a fiduciary to avoid liability, the Board quoted Lords Hodson and Guest in *Phipps* v. *Boardman*, but both these quotations were to the effect that the only defence open to such a fiduciary is "fully informed consent".[19]

Ultimately the Board reached what is submitted to be a further ambiguous conclusion:

> The position after the 13th February can be put in either of two ways. (i) It can be said that from that date the venture based on the licences was outside the scope of the trust and outside the scope of the agency created by the relationship which continued to exist between Mr. Hudson and Q.M. Or it can be said (ii) that on that date Q.M. gave their fully informed consent to pursue the matter no further and to leave Mr. Hudson to do what he wished or could with the licences. In their Lordships' opinion it does not matter how it is put.[20]

The phrase "or it can be said" seems to suggest that (i) and (ii) are tautological, which is entirely different from the assertion that (i) and (ii) are distinct defences available to Mr. Hudson.

In the end, it is difficult to decide the exact result of this case. It may, on the one hand, merely represent a case where a director was acquitted on the basis that he had received the informed consent of the shareholders or the directors. If this is so, nothing new or particularly startling in relation to the law of fiduciaries emerges from the case. On the other hand, if Mr. Hudson has been acquitted on the basis that there was no "real sensible possibility of conflict" (that is, he would have been acquitted even if there had not been informed consent) it may reflect a new trend, in that it is the second of two Commonwealth cases to apply a less rigid formulation of the fiduciary's duty in the corporate context.

In the earlier Canadian case of *Peso Silver Mines (N.P.L.)* v. *Cropper*,[21] the defendant was managing director of Peso, and after the company board of directors had turned down an offer to purchase a number of mining claims, Cropper and some associates formed a private company to purchase those claims. Cropper thereby made substantial profits and Peso sued him for an account of profits. By a unanimous judgment of the Canadian Supreme Court the suit was dismissed. The plaintiff had argued on the basis of *Regal Hastings* and that case certainly

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[18] *Phipps* v. *Boardman, supra* n. 6 at 124.
[19] *Id.* at 105 *per* Lord Hudson and at 117 *per* Lord Guest.
[20] *Q.M. Ltd.* v. *Hudson, supra* n. 1 at 29, 779.
[21] (1966) 58 D.L.R. (2d) 1.

needed to be distinguished if a decision in favour of the defendant was to be given. The defendants advanced two possible distinctions. The first, somewhat tenuous distinction (which was accepted by the court)[22] was that the Peso board had decided not to purchase the claims in question for reasons other than the strained finances of the company. This certainly is "too antiseptic a view of the facts of Peso"[23] since there was substantial evidence in *Peso* that the company was in exactly the same position as the company was in *Regal Hastings*.

The second and more acceptable distinction was founded on a principle similar to that espoused in *Netherlands Society* v. *Kuys*[24] that "a person . . . may be in a fiduciary position *quoad* a part of his activities and not *quoad* other parts". Applying this principle to the facts of *Peso* it was said that Cropper was not acting in his capacity as a director all day every day. He was in effect wearing two hats. When he was approached to form the company in order to take up the rejected claims, he was utilizing the opportunity as an individual member of the community, rather than in his corporate capacity as a director. He should, therefore, not be rendered liable.

Nonetheless this latter distinction, apart from *Peso* and *Kuys* has rarely succeeded. Furthermore it has been criticized by Beck[25] on the basis that if the argument was accepted, the whole law on fiduciaries would be "inadequate to deal with the corporate context". Indeed the Privy Council in *Q.M. Ltd.* v. *Hudson* did not even seem to recognise this ground as an alternative formulation to the no "real sensible possibility of conflict" argument as they use the phrases, "no real sensible possibility of conflict" and "the activity is outside the scope of the agency" interchangeably.[26]

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[22] *Id.* at 9.

[23] Beck, *op. cit. supra* n. 12 at 101.

[24] [1973] 2 All E.R. 1222 at 1225-1226.

[25] Beck, *op. cit. supra* n. 12.

[26] It is significant that in P. D. Finn, *Fiduciary Obligations* (1977) a substantive distinction has been drawn between these two formulations of the fiduciary's duty. On the one hand, the conflict rule renders the fiduciary liable if he derives any benefit personally from an activity which he was authorised or required to undertake on behalf of his principal. On the other hand, the "outside the scope of the agency" argument renders the fiduciary liable if he merely utilizes his position as fiduciary to gain a benefit whether or not a conflict existed. Finn observes at pp. 231-234, 238-244 "the rules are anything but clear and well settled" and this is apparent from the decided cases including *Q.M. Ltd.* v. *Hudson*. For example, in *Phipps v. Boardman*, while the majority were contemplating whether the conflict rule had been breached, Lord Upjohn, it is submitted was really contemplating the "outside the scope of the agency" rule. That is, he thought the issue was whether the information gained by the defendants could only be gained through the utilization of their positions as fiduciaries or whether it was information freely available to the public at large. If it were the latter (as indeed Lord Upjohn decided) the defendants would not be liable. Significantly, Lord Upjohn asserts that he is applying the conflict rule, but this merely reinforces Finn's point that the rules are unclear.

The distinction also has important ramifications in regard to the defence of informed consent. If the conflict rule applies, the fiduciary need disclose that he is deriving the benefit which he undertook to derive for the company for himself. Alternatively, if the "outside the scope of the agency" argument applies, what needs to be disclosed is the fact that he is merely utilizing the opportunity through the use of his fiduciary position.

Therefore it is submitted that the real difference between cases such as *Peso* and *Q.M. Ltd.* v. *Hudson* on the one hand and *Phipps* v. *Boardman* and *Regal Hastings* on the other, lies in the rigour with which courts have applied Lord McMillan's two-pronged test, rather than a basic difference in the formulation of that test. English courts, at least up until the Privy Council decision in *Q.M. Ltd.* v. *Hudson*, have rigidly applied the test to every situation in which a fiduciary has made a profit. Australian courts have followed suit in the Supreme Court decision in *Q.M. Ltd.* v. *Hudson* and in the High Court decision of *D.P.C. Estates* v. *Consul Development Pty. Limited* (at least *per* Gibbs, J.).[27] Of the text writers Beck[28] and Prentice[29] certainly approve this approach, and though not clearly stated, Meagher, Gummow and Lehane[30] seem to do likewise.

On the other hand, only *Peso Silver* v. *Cropper* and perhaps the Privy Council in *Q.M. Ltd.* v. *Hudson* would appear to apply the doctrine with substantially less rigour. Amongst the text writers only Gareth Jones[31] appears to do so, although, as will be explained shortly, his view is better seen as an alternative rather than a less rigid formulation.

Failing the application of this less rigorous test it is still possible for a fiduciary director in these circumstances to succeed by arguing one of the following:

(1) On the basis of *Phipps* v. *Boardman*, where Lord Upjohn[32] held that so long as the information in question was freely available to any member of the public, the fiduciary director who utilized that information would not be made to account. This argument, however, was specifically rejected by Gibbs, J. in *D.P.C. Estates* v. *Consul Development Pty. Limited*[33] where there was a specific re-application of the "no conflict" principal in its full force. Until the High Court reconsiders this judgment, this possibility remains remote.

(2) He may argue for the application of a principle of unjust enrichment, as Gareth Jones[34] has done. According to this view, the liability of a fiduciary would be based primarily on the question of whether the fiduciary has profited at the expense of the principal, and if this is answered in the negative, the fiduciary is absolved of liability. However, as Beck points out, the acceptance of such an argument would overrule both *"Regal* and the Equity leaning behind it".[35]

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[27] (1975) 132 C.L.R. 373 at 394-395.
[28] Beck, *op. cit. supra* n. 12.
[29] Prentice, *op. cit. supra* n. 16.
[30] R. P. Meagher, W. M. C. Gummow and J. R. F. Lehane, *Equity: Doctrines and Remedies* (1975) pp. 107-135.
[31] G. Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 *L.Q.R.* 472.
[32] *Phipps* v. *Boardman, supra* n. 6 at 128-129.
[33] *D.P.C. Estates, supra* n. 27.
[34] Jones, *op. cit. supra* n. 31.
[35] Beck, *op. cit. supra* n. 12 at 112.

In view of the fact that both of these approaches are remote, one can go no further than to suggest, as did Lord Cohen in *Phipps* v. *Boardman*,[36] that "his liability (the fiduciary's) to account must depend on the facts of each case" and, in addition that Lord McMillan's two-pronged rule should be applied with as much flexibility as it was in *Peso* and perhaps in *Q.M. Ltd.* v. *Hudson*. This is so, it is submitted, because:

(i) this less rigorous approach would not make the perpetuation of frauds easier since it would only be applied if the condition precedent of there being no fraud were first established;

(ii) it is possible that in all cases of this kind there is no "real sensible possibility of conflict";

(iii) it would seem unjust to allow the company to make a profit indirectly in circumstances in which it could not have made the profit directly; and

(iv) the director is in a position quite different to that of other fiduciaries. He, unlike a trustee who is appointed to maintain the trust, is actively seeking to promote the company's (and his own) interests. To apply the rule rigidly therefore, would be to place him in a position where such a task would be rendered increasingly difficult.

Ratification

Having considered this first issue at length the Privy Council posed this question: Did Mr. Hudson disclose to Q.M. Ltd. the fact that he was going to utilize these exploration licences for himself and thereby seek to make a profit?[37]

The Board started by considering the first of two preliminary issues, that is, since the principal in the corporate context (the company) is not itself capable of being informed, it is necessary to ask: who is to represent the company as principal, for these purposes? The answer given by the Privy Council was that the company consent can be given either by the shareholders at a general meeting, or by a meeting of the board of directors.

In regard to the shareholders' meeting it is surprising that the Privy Council failed to pose a second preliminary question, as to whether this body can in fact so authorize or ratify every breach of a director's duty or whether this power of ratification is limited to some breaches only. No doubt there is considerable authority for the proposition that a general meeting of shareholders can authorize (antecedently) or ratify (subsequently) what would otherwise be a breach of fiduciary duty.[38] However, the general proposition is not unqualified. It is only if the wrong is ratifiable that the fiduciary can be absolved from liability and the minority shareholders are precluded from bringing a derivative suit. For

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[36] *Phipps* v. *Boardman, supra* n. 6 at 103.

[37] *Q.M. Ltd.* v. *Hudson, supra* n. 1 at 29, 775.

[38] This proposition is stated in a number of cases including *Phipps* v. *Boardman, supra* n. 6 and *Cook* v. *Deeks* [1916] 1 A.C. 554 at 563-564.

example, no majority of shareholders can give away company assets,[39] nor can they authorize the directors to act in fraud of the company.[40] Each case therefore will inevitably depend on its own facts and no broad statement of principle (as the Privy Council sought to establish) can ever be fully effective. Indeed in the circumstances of this particular case, it is perhaps arguable that the shareholders, by allowing Mr. Hudson to exploit the licences for his own profit had in fact authorized a giving away of the company's property. Though it is perhaps difficult to contemplate that shareholders have given away property by authorizing the action of a director who merely utilized an opportunity already rejected by the company, it was precisely this that was held in *Peso*, *Regal* and in *Cook v. Deeks*.[41]

As far as ratification by the board of directors is concerned, the analysis of the Privy Council is again limited to the simple question of fact: was there disclosure to, and consent by, the board of directors? Again the more fundamental question of whether such disclosure and consent is at all possible is not posed. Yet, interestingly enough, there is no case that suggescts that such disclosure and consent is at all possible. Indeed, there is considerable High Court authority to the effect that a board of directors can never authorize or ratify a breach of duty by a director.[42]

Nonetheless, if not as a matter of strict precedent, it is submitted that as a matter of principle, to allow the possibility of authorization or ratification by a meeting of the board of directors is to deny altogether the existence of the commandment that "no man shall be seen to be a judge in his own cause".[43]

The Privy Council, however, ignored these issues and decided after an extensive review of the facts that Mr. Hudson had disclosed to, and received consent from, both the shareholders and the board of directors.[44] He was therefore also to be absolved from liability on this ground.

Conclusion

It is perhaps surprising to find that a director's liability should be governed by principles of law borrowed essentially from equity. It is not only surprising but also disturbing when it is found that such laws are so inappropriate to the corporate context. Perhaps it is time therefore for company law to develop its own rules to govern the liability of company directors. These rules, it is submitted, should be both less restrictive than cases such as *Regal Hastings* and *Phipps* v. *Boardman* suggest in regard to the director's initial liability, and more restrictive than the case of *Q.M. Ltd.* v. *Hudson* suggests in regard to the possibility of an

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[39] *Cook* v. *Deeks* [1916] 1 A.C. 554.
[40] *Ibid.*
[41] *Ibid.*
[42] *Furs* v. *Tomkies* (1936) 54 C.L.R. 583 at 590; *Ngurli* v. *McCann* (1953) 90 C.L.R. 425.
[43] Beck, *op. cit. supra* n. 12 at 119.
[44] *Q.M. Ltd.* v. *Hudson*, *supra* n. 1 at 29, 778.

informed consent. (This defence of informed consent should only be available if there is disclosure to, and consent given by, a majority of the *disinterested* shareholders.[45]) In other words, a less rigorous approach to a director's duties in one sense but a more rigorous approach in another.

Postscript

Recently the High Court in *Viro* v. *The Queen*[46] decided that it is no longer bound to follow precedents set by the Privy Council. If, therefore, *Q.M. Ltd.* v. *Hudson* represents a less restrictive view of the director's fiduciary duty than do cases like *Regal Hastings* and *Phipps* v. *Boardman*, the High Court would now nonetheless be free to adopt the more restrictive view. A less clear result of *Viro* v. *The Queen* is the consequent position of the Supreme Court, for of the seven High Court judges only Barwick, C.J., Murphy and Jacobs, JJ. state that in cases of dispute, the Supreme Court must follow the High Court decision in preference to that of the Privy Council.[47] Of the remaining four judges, though all favour this view, all recognize various situations in which a Privy Council decision may be preferred by the Supreme Court.[48]

Nonetheless in view of the strict approach adopted by Gibbs, J. in *D.P.C. Estates* v. *Consul Development*[49] to the question of a director's duty, the less strict approach of the Privy Council in *Q.M. Ltd.* v. *Hudson* is unlikely to be followed in Australia. In addition, any notion that a board of directors can authorize or ratify a breach of duty by a director as was asserted in *Q.M. Ltd.* v. *Hudson* would not necessarily be followed in Australia where *Furs Ltd.* v. *Tomkies*[50] and *Ngurli* v. *McCann*[51] are High Court authorities to the contrary.

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[45] Beck, *op. cit. supra* n. 12 at 119.
[46] (1978) 18 A.L.R. 257.
[47] *Id.* at 260-261 *per* Barwick, C.J.; at 306 *per* Jacobs, J.; at 318-319 *per* Murphy, J.
[48] *Id.* at 283 *per* Gibbs, J.; at 291 *per* Stephen, J.; at 295 *per* Mason, J.; at 327 *per* Aicken, J.
[49] *D.P.C. Estates, supra* n. 27.
[50] *Furs* v. *Tomkies, supra* n. 42.
[51] *Ibid.*