BOOK REVIEWS

COMPANY LAW WRITINGS: A NEW ZEALAND COLLECTION*

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Collections are more difficult to assess than monographs. The reviewer must attempt to understand both the impetus that drove the selected authors to write their papers and the criteria employed by the editors when selecting their specimens. Furthermore, in this case, the message, if any, that this collection of New Zealand writing has for an Australian or international audience must be considered.

The reviewer, thirty years removed from the source of the writing, expected a collection devoted to distinctive developments in New Zealand company law, an attempt to explain why, after a long gestation, New Zealand threw off the shackles of law derived, without much local input, from a mother country, whose later corporate development had been railroaded by European Community directives, refused the trans-Tasman lure of Australian reforms, which, whether branded 'simplification' or 'economic reform', seem committed to continual change with concomitant increases in volume, and adopted a pared down law, with few concessions to global convergence. His expectations were realised in part. That reform is canvassed directly in Goddard's article, *Company Law Reform — Lessons from the New Zealand Experience*[1] and provides the inspiration for the following papers but is not the theme of this collection. In contrast, the first part consists of writing chosen to demonstrate that New Zealand writers, however defined, share, with lawyers throughout the English speaking world, a common interest in issues in the mainstream of company law. This, like the myth of a Commonwealth common law, recently exploded by New Zealand's termination of appeals to the Privy Council, is a chimerical pursuit now that many streams flow from the central mystery. Nevertheless, the editors have organised a collection of disparate articles into a collection that, with one exception, seems to flow smoothly from *Salomon*[2] and the continuing mystery of corporate identity, through directors' liability in small companies to more particular issues arising under the *Companies Act 1993* (NZ).

The problems of Aron Salomon were paraded before the English judiciary more than a century ago but the implications of that House of Lords' decision are continually revisited, partly because company law has no other issue of comparable significance but, primarily, because changing conditions expose different facets of the jewel. This point is established deftly in the opening article by Len Sealy, entitled *Perception and Policy in Company Law Reform*[3] but directed more to our changing perceptions of the nature of the company. It is ably supported by Lord Cooke's tribute to the pragmatic Lord Halsbury in *A Real Thing*[4] but the sequel, *Corporate Identity*,[5] while traversing several related and interesting issues, such as Lord Haldane's 'directing mind and will' principle, defamation of companies and corporate crime, is a lesser work collectively than the sum of its parts.

* The Centre for Commercial and Corporate Law Inc, Christchurch, 2002, i–xvi, 1-314–pp, no index.

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1 Andrew Borrowdale, David Rowe and Lynne Taylor (eds), *Company Law Writings: A New Zealand Collection* (2002) 149.

2 *Salomon v A Salomon & Co Ltd* [1897] AC 22.

3 Above n 1, 1.

4 Ibid 21.

5 Ibid 39.

A very different approach is taken by John Farrar in *Frankenstein Incorporated or Fools' Parliament? Revisiting the Concept of the Corporation in Corporate Governance*,[6] who argues that the *Salomon* court failed to articulate a sufficient policy basis for their decision. This theoretical article notes that the *Salomon* principle has not been accepted outside the common law world and reviews various Anglo-American attempts to restate it in ways that overcome the theoretical gaps that have appeared, particularly since business has been conducted through corporate groups. Farrar does not suggest that, because of these efforts, there is any reason to cease the search.

It could be argued that the problems of the small company are merely *Salomon* in an acute form but Australians could learn from the controversy generated by *Trevor Ivory Ltd v Anderson* (*Trevor Ivory*)[7] which is discussed by both Peter Watts and Gloria Shapira in *The Company's Alter Ego — A Parvenu and Impostor in Private Law*[8] and *Liability of Corporate Agents: Williams v Natural Life Ltd in the House of Lords*[9] respectively. *Trevor Ivory* is essentially a case where the New Zealand Court of Appeal refused to extend the principle in *Lee v Lee's Air Farming Ltd* (*Lee*).[10] *Lee* recognised that the major shareholder and managing director of a company could employ himself as its chief pilot and that, following his death by accident when flying for the company, his widow was entitled to workers' compensation. Ivory was the principal shareholder, executive director and operator of a weed spraying company. A client, acting on Ivory's advice, suffered a detriment when the company applied a herbicide which destroyed his crop. Recognition of the functional distinction between the managing director as directing mind and will of the company and as a person employed in a lesser office should extend to recognition that, in the executive role, the managing director is the company but, in a lesser office, the person is primarily responsible and the company vicariously liable for torts committed in the course of employment. Shapira, who recognised that negligent advice causing physical damage is governed by *Donoghue v Stevenson*[11] principles, argues convincingly that the Court of Appeal in refusing to impose personal liability[12] paid too much attention to Ivory's natural wish to insulate himself from personal liability by forming a company and too little to the distinctions between shareholder, director and employee liability.[13] Curiously Watts, who criticises the reasoning of judges in several cases, including *Trevor Ivory,* where the chief executive has been treated as the *alter ego* of the company, accepts the result in that case. He recognises that '[t]he logic of this reasoning leads to the extraordinary outcome that where negligent advice has been given by a junior employee, that unfortunate employee is likely to be liable, but when the advice is given by her boss, the boss will be immune from suit'[14] but argues toward the proposition that 'the law must strive to treat incorporated and unincorporated businesses, and the agents involved in running them, in the same way when applying the rules of civil liability.'[15] This, also, is the position adopted by Shapira.[16]

It is arguable that Ross Grantham's article, *The Doctrinal Basis of the Rights of Company Shareholders*,[17] is misplaced, as it is concerned with shareholders' rights after

6 Ibid 59.
7 [1992] 2 NZLR 517.
8 Above n 1, 79.
9 Ibid 95.
10 [1961] AC 12 (PC on appeal from NZ), where the Privy Council overrode an earlier New Zealand Court of Appeal's resistance to extending the *Salomon* principle: [1959] NZLR 393, discussed by Lord Cooke, above n 1, 26–27.
11 [1932] AC 562 (HL), as discussed by Shapira, above n 1, 101.
12 *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517, 524 (Cooke P), 527 (Hardie Boys J), 530 (McGechan J).
13 Above n 1, 102–111.
14 Ibid 81.
15 Ibid 93.
16 Ibid 111. Happily, I am able to avoid direct comment on the 'pre-eminence of company law' theory, espoused by Ross Grantham and Charles Rickett, 'Directors' "Tortious" Liability: Contract, Tort or Company Law?' (1999) 62 *Modern Law Review* 133, accepted by Evans LJ in *Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2000] 1 Lloyd's Rep 218, 231, but disdained by Watts, above n 1, 84.
17 Above n 1, 113.

Salomon. Perceptions that shareholders were owners of the company persisted long after the joint stock company obtained incorporation by registration but, after *Salomon,* their position has been challenged by recognition that they, along with other stakeholders, are in a contractual relationship with the company. Unfortunately, it is easier to accept the validity of the observation that the role of a shareholder has been being attenuated over time than the detail of this analysis. Before 1844, most large unincorporated joint stock companies operated under a deed of settlement,[18] rather than as large partnerships. Effectively their members, as beneficiaries of a unit trust-like device, were beneficial owners of their company's assets, not legal co-owners. That position did not change when the company was incorporated, nor has it changed over the last 190 years.

The latter part of the collection focuses on aspects of the *Companies Act 1993* (NZ). The first, *Company Law Reform — Lessons from the New Zealand Experience,*[19] was delivered to an audience of company law teachers in Canberra. It is a pity that this mix of philosophy and practical hints was not delivered to an audience that contained more senior officers from the Markets Group at the nearby Commonwealth Treasury, who could have benefited directly from the message, particularly lesson 1: 'Good company law can be concise, and relatively simply stated.'[20]

Mike Ross provides a detailed look at *The Statutory Solvency Test,*[21] which has replaced the old and imperfect capital maintenance doctrine as the benchmark against which directors must measure their conduct in any dealings involving the payment of company money to a shareholder. The paper contains a detailed but readable discussion of the test and the accounting operations that must be satisfied to fulfil those obligations. He properly highlights the failure of the courts to provide adequate guidance in the development of accounting standards but does not refer to *Re Spanish Prospecting Co Ltd,*[22] which recognised that to determine the existence of legal profits it was necessary to value all company assets at both the start and finish of each financial period, a practice not adopted by accountants. Implementation would demand a greater degree of skill and judgment from them but, if applied conscientiously, should reduce the number of massive and unexpected corporate failures.

Andrew Beck contributes a thoughtful piece, *Auditors' Liability: An Ongoing Quest for Principle.*[23] This contribution can have no direct bearing on Australian attitudes, given the High Court's adoption of *Caparo*[24] in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg,*[25] but provides evidence that the more extensive accountability principle, recognised in *Scott Group Ltd v McFarlane,*[26] still glimmers, notwithstanding adverse comment in *Boyd Knight v Purdue.*[27]

Company Law Enforcement: Theory and Practice,[28] jointly authored by Matthew Berkahn and Lindsay Trotman, follows the model of Ian Ramsay's 1995 investigation into

[18] Paul Davies, *Gower's Principles of Modern Company Law* (6th ed, 1997) 29–30, relying on Armand Dubois, *The English Business Company after the Bubble Act 1720–1800,* (1938), 30. Contrast Grantham, above n 1, 116 and 139, although he refers to deed of settlement companies, Ibid 120. Sealy, who discusses the same phenomenon: Ibid 12–15, identifies the deed of settlement company as the major form of joint stock company prior to 1844 but ascribes to it a predominantly partnership-like character and recognises that the law then perceived the deed of settlement company to be a form of partnership.

[19] Above n 1, 145.

[20] Ibid 163.

[21] Ibid 177.

[22] [1911] 1 Ch 92, 98-101 (Fletcher Moulton LJ), since endorsed in *QBE Insurance Group Ltd v Australian Securities Commission* (1992) 38 FCR 270.

[23] Above n 1, 203.

[24] *Caparo Properties plc v Dickman* [1990] 2 AC 604.

[25] (1997) 142 ALR 750.

[26] [1978] 1 NZLR 553.

[27] (1999) 8 NZCLC 261, 899.

[28] Above n 1, 215. This paper contains a patent error at 226, where creditors are recognised as 'contributors to the company's capital and therefore insiders in the wider sense.' One lapse could be overlooked but the idea is reprised at 242.

the initiation of legal action to enforce corporate rights.[29] Consistently with the policy of 'self reliance and voluntary co-operation',[30] enforcement in New Zealand is left overwhelmingly to those whose interests are affected. This is contrary to the Australian practice but consistent with the pre-1993 New Zealand position. Lynne Taylor's article on *The Derivative Action under the Companies Act 1993*[31] provides useful guidance for both practitioners interested in exploiting the potential of its newer Australian equivalent and academics interested in comparing these with the Canadian model from which they were derived. *International Corporate Insolvency*[32] is Andrew Borrowdale's exposition of the difficulties encountered when a company operating in two or more jurisdictions becomes insolvent with assets and creditors in both. Although practical in nature, it appears to be a theoretical exercise in using complex rules as, with two teams of liquidators working on the carcass, there are few occasions when there will be surplus funds available from one winding up to support the other.

Although well written and interesting, Peter Fitzsimons' article, *Controlling Insider Trading — The 'Civil' Approach in New Zealand*[33] is appropriately hidden at the end of the collection, as it exposes the downside of the 'private rights, private enforcement' ethos. Whether insider trading should be regulated is a debateable issue but, once the decision is made to prohibit the practice, the legislature needs to provide an adequately resourced and appropriate control system or face the risk of ridicule and contempt for the law. That appears to be the position in New Zealand. Australia, with a better funded and more elaborate regulatory system, also appeared to be heading towards regulatory failure,[34] when most actions before *R v Hannes*[35] failed. However, spurred by that and subsequent convictions, it can be argued that, in this area of the law, Australia can provide guidance. This could be regarded as reciprocal offering for the benefits that Australian and other international readers will gain from these papers on the company law reform experience in New Zealand.

Many of these papers will be familiar to New Zealand readers but the editors have performed a useful service in compiling this collection, which both showcases New Zealand contributions to elucidating the central mystery and highlights important aspects of New Zealand's private rights-oriented company law. The collection is a worthwhile export product that will provide others with an insight into both a newly developing stream of corporate law and its effect on those who, from that southern perspective, reflect on the nature of the company.

[29] 'Enforcement of Corporate Rights and Duties by Shareholders and the ASC: Evidence and Analysis' (1995) 23 *Australian Business Law Review* 174.

[30] The quotation, above n 1, 221, 244, is taken from Peter Shirtcliffe, 'Good Governance: A Case for Paternalism or Personal Responsibility?' [1998] *Company and Securities Law Bulletin* 66, 66, 68.

[31] Above n 1, 245.

[32] Ibid 263.

[33] Ibid 287.

[34] See, eg, Simon Rubenstein, 'The Regulation and Prosecution of Insider Trading in Australia: Towards Civil Penalty Sanctions for Insider Trading' (2002) 20 *Company and Securities Law Journal* 89.

[35] (2000) 36 ACSR 72(CA).