

# DIRECTORS' DUTIES AND THE RULE IN *FOSS v. HARBOTTLE*

*PRUDENTIAL ASSURANCE CO. LTD. v. NEWMAN INDUSTRIES LTD.*<sup>1</sup>

*PRUDENTIAL ASSURANCE CO. LTD. v. NEWMAN INDUSTRIES LTD. (No. 2)*<sup>2,3</sup>

## 1. The Facts

B and L were directors of two companies, N and TPG. B and L indirectly held 35 per cent of the issued ordinary shares in TPG, which in turn held 25.6 per cent of the issued ordinary shares in N. B and L induced the board of directors of N to purchase TPG's main assets, allegedly at an over-valuation. In accordance with Stock Exchange regulations, the consent of N's shareholders was obtained, but by an allegedly "tricky" circular.

P, which held 3.2 per cent of N's issued ordinary shares, sued N, B, L and TPG claiming:

- (a) as representative of itself and the other shareholders at the time of the action, equitable damages on behalf of the company for breach of the defendants' fiduciary duty to N ("the derivative claim"), and
- (b) on behalf of itself alone, common law damages for conspiracy against B and L ("the direct personal claim").

Later P sought to amend its originating process to claim:

- (c) on behalf of itself and the other shareholders at the time of the alleged conspiracy, (i) a declaration of entitlement to damages and (ii) damages ("the direct representative claim").

## 2. The Judgments — Overview

In *Prudential (No. 1)*<sup>4</sup> Vinelott, J. allowed P to amend its originating process even though each member of the class represented had a separate cause of action in tort. In such a case, however, this had to be for benefit of the class members, those members had to have a common interest and no actionable right could be conferred upon a class member who would not otherwise have been able to assert such a right. This last proviso meant that

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<sup>1</sup> [1979] 3 All E.R. 507 (Vinelott, J.).

<sup>2</sup> [1980] 2 All E.R. 841 (Vinelott, J.).

<sup>3</sup> [1982] 1 All E.R. 354 (Court of Appeal).

<sup>4</sup> *Supra* n. 1.

usually only declaratory relief was possible, with each individual proving his damage in separate actions in order to obtain damages.<sup>5</sup>

Further, in *Prudential (No. 2)*<sup>6</sup> it was held that joinder of the direct and derivative actions was permissible, because each was based on the same allegation, viz. that B and L conspired to injure N and its shareholders by procuring the shareholders to vote in favour of a resolution.<sup>7</sup>

Vinelott, J. had held that there was a good cause of action in conspiracy in the direct claims. In the second case he allowed the derivative action to succeed for damages of £445,000.

The Court of Appeal, comprising Cumming-Bruce, Templeman and Brightman, L.J.J. partly allowed an appeal.<sup>8</sup>

Firstly (as *ratio decidendi*), they held that, on the evidence, N had suffered foreseeable loss of only £45,000.<sup>9</sup>

Secondly (by way of *obiter dicta*), they decided that the personal action was misconceived. This was because:

- (a) P's personal action was one to recover damages on the basis that P was interested in N which had suffered loss, P's damages being equal to the decrease in the market value of its shares or of likely dividend flow, but
- (b) shares are merely a right of participation in the company, and
- (c) that right was unaffected by a wrong done to N.<sup>10</sup>

Such a holding is to be welcomed, for otherwise the rule in *Foss v. Harbottle*,<sup>11</sup> discussed below, would be circumvented. Their Lordships did not refer to Vinelott, J.'s view on representative actions and on joinder of direct and derivative actions, so they must stand as good law, but the circumstances when the "same allegation" could create personal rights *and* corporate rights are now fewer.

Thirdly, (by way of *obiter dicta*), their Lordships disapproved of Vinelott, J.'s handling of the derivative action.

### 3. The Derivative Action

In an action in respect of a wrong done to a company, the proper plaintiff is, *prima facie*, the company (here N), under the "proper plaintiff" limb of the rule in *Foss v. Harbottle*.<sup>12</sup> However, there is an exception where (a) there has been a *fraud* on the minority shareholders *and* (b) the wrongdoers were themselves in *control* of the company: the aggrieved minority (here P) can bring a minority shareholders' suit on behalf of themselves and all others to assert the company's claim.<sup>13</sup>

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<sup>5</sup> *Id.* 520.

<sup>6</sup> *Supra* n. 2.

<sup>7</sup> *Id.* 860.

<sup>8</sup> *Supra* n. 3.

<sup>9</sup> *Id.* 374 ff.

<sup>10</sup> *Id.* 366-7.

<sup>11</sup> (1843) 2 Hare 461, 67 E.R. 189.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Edwards v. Halliwell* [1950] 2 All E.R. 1064 at 1067 *per* Jenkins, L.J.

P's *locus standi* as a minority shareholder was no longer in issue before the Court of Appeal, because N had decided to accept the benefit of any order made in its favour. However, their Lordships made two important *obiter* observations, under headings (a) and (b) below.

(a) *Preliminary Hearing*

Firstly their Lordships disapproved of Vinelott, J.'s failure to determine, as a preliminary issue, whether P was entitled to bring a derivative action:

... the plaintiff ought at least to be required before proceeding with his action to establish a *prima facie* case (i) that the company is entitled to the relief claimed and (ii) that the action falls within the proper boundaries of the exception to the rule in *Foss v. Harbottle*.<sup>14</sup>

This stipulation is welcome in so far as it should minimise (oppressive) litigation. At the one extreme, leaving determination of the *locus standi* issue until the end of a case could mean subjecting "the company to a 30-day action . . . in order . . . to decide whether the plaintiffs were entitled in law to subject the company to a 30-day action. . .".<sup>15</sup> At the other extreme, to require the plaintiff to prove "fraud" and "control" before he can proceed may require the action "to be fought to a conclusion before the court can decide" his *locus standi* anyway.<sup>16</sup> A compromise requiring the plaintiff to show "fraud" and "control" before continuing but only on a *prima facie* basis, seems the most appropriate in minimising harassment of the company by unnecessary litigation.

What sort of "control" and "fraud" must be shown at the preliminary hearing, to come within the "fraud on the minority" exception?

(b) "Control"

The traditional view had been that "control" meant *de jure* control in the nature of holding a majority of voting shares.<sup>17</sup>

Vinelott, J. decided that "control" extended to *de facto* control, viz. . . . wherever the persons against whom the action is sought to be brought on behalf of the company are shown to be able "by any means of manipulation of their position in the company" to ensure that the action is not brought by the company.<sup>18</sup>

It had been unclear whether an independent justice exception to the rule in *Foss v. Harbottle* existed. Nevertheless Vinelott, J. relied upon a number of *obiter dicta*<sup>19</sup> to propose that there was an exception to the rule in *Foss v. Harbottle* whenever the justice of the case so requires.<sup>20</sup>

<sup>14</sup> *Supra* n. 3 at 366.

<sup>15</sup> *Id.* 365.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Burland v. Earle* [1902] A.C. 83 at 93 *per* Lord Davey, *Pavlidis v. Jensen* [1956] Ch. 565 at 577 *per* Danckwerts, J.

<sup>18</sup> *Supra* n. 2 at 875.

<sup>19</sup> *Foss v. Harbottle* (1843) 2 Hare 461 at 492, 67 E.R. 189 at 203 *per* Wigram, V.C., *Edwards v. Halliwell* [1950] 2 All E.R. 1064 at 1067 *per* Jenkins, L.J., *Russell v. Wakefield Waterworks Co.* (1875) L.R. 20 Eq. 474 at 480 *per* Jessel, M.R., *Heyting v. Dupont* [1964] 2 All E.R. 273 at 279 *per* Russell, L.J.

<sup>20</sup> *Supra* n. 2 at 873-4, 877.

This allowed Vinelott, J. to say on his findings of fact that despite B, L and TPG not holding a majority of shares, the interests of justice required that P's minority action should be permitted. This was because a history of deceptions had allegedly been practised on the other directors and shareholders which so distorted their view of the facts that a properly informed corporate decision would never be made.<sup>21</sup>

As well as this, *de facto* control might include

... a situation where the directors [can] manipulate the proxy-voting system to their own advantage or where the wrongdoers are likely, corruptly or otherwise, to exercise influence over the way votes are cast. . . .<sup>22</sup>

The Court of Appeal, *obiter dicta*, briefly but seriously doubted the "justice" exception, suspecting it was an impractical test possibly involving a full-dress trial before it was applied.<sup>23</sup>

It is submitted that in so far as Vinelott, J. thought that his reformulated "fraud on the minority" exception was based upon the court's general jurisdiction to allow a minority shareholder's claim where this was in the interests of justice,<sup>24</sup> their Lordships' rejection of the "justice" exception presumably also implies a rejection of a broad test of "control" for the "fraud on the minority" exception. This is particularly so because Vinelott, J. gave no illustrations of where "justice" required allowing a minority shareholder's action, apart from the *de facto* control situation.

We could also infer rejection of Vinelott, J.'s view of "control", by their Lordships' treatment of *East Pant Du United Lead Mining Co. Ltd. v. Merryweather*<sup>25</sup> and *Atwool v. Merryweather*,<sup>26</sup> upon which Vinelott, J. had relied regarding *de facto* control. In the first case an action in the company's name was dismissed;<sup>27</sup> in the second case a derivative action succeeded.<sup>28</sup> Their Lordships thought that *Atwool* only established that if an action is fought to a conclusion and the court finds the defendant guilty of fraud, it will discount the votes of those implicated in determining whether the plaintiff is authorised to sue, but the question of when the alleged delinquent or company can halt proceedings *in limine* had been left open.<sup>29</sup>

The writer respectfully agrees that the defendant in *Atwool*, unlike in *East Pant Du United*, had not moved to strike out the bill, but nevertheless counsel had raised *Foss v. Harbottle* and the *locus standi* issue.<sup>30</sup> Merely because 114 years later their Lordships thought that *locus standi* should be determined as a preliminary question and this had been frequently done,

<sup>21</sup> *Id.* 877.

<sup>22</sup> L.S. Sealy, "Foss v. Harbottle — a Marathon Where Nobody Wins" [1981] *C.L.J.* 29 at 30.

<sup>23</sup> *Supra* n. 3 at 366.

<sup>24</sup> *Supra* n. 2 at 871-5.

<sup>25</sup> (1864) 2 Hem. & M. 254, 71 E.R. 460.

<sup>26</sup> (1867) L.R. 5 Eq. 464 n.

<sup>27</sup> *Supra* n. 25.

<sup>28</sup> *Supra* n. 26.

<sup>29</sup> *Supra* n. 3 at 363.

<sup>30</sup> *Supra* n. 26 at 467, Druce Q.C. and Miller *arguendo*.

did not mean that Page Wood, V.C. attributed any significance to the action having been fought out to a conclusion.

Rather, the true basis for distinguishing *East Pant Du United* and *Atwool* is this: in the former, an action had been brought in *the company's name*, despite a resolution to the contrary, and so was dismissed; in the latter, an action was brought in the name of a *shareholder* and all other shareholders except the fraudulent directors. Thus only *Atwool* featured a derivative action and there the *locus standi* issue was raised but the action succeeded. This supports Vinelott, J.'s interpretation to the extent that the miscreants need not have a voting majority. (However, the cases do not support Vinelott, J.'s view, *infra*, that "use of wrongdoer's votes" is the *fraud* upon which to focus: rather Page Wood, V.-C. concentrated upon the fact that "the whole contract is a complete fraud".<sup>31</sup>)

The writer concedes that "justice" is a nebulous criterion. However, Vinelott, J. had given it a concrete meaning in terms of *de facto* control. It might be said that this would still require more evidence at a preliminary hearing on *locus standi* than would *de jure* control and so could make the litigation-saving purpose of the rule in *Foss v. Harbottle* self-defeating.

However, this is partly overcome by only requiring a *prima facie* case to be made out at the preliminary hearing. This is accepted practice elsewhere anyway, even if the subject-matter is complex, notably in the granting of interlocutory injunctions. If we were to extend to the present context the case law surrounding interlocutory injunctions, then the plaintiff's case must be a *prima facie* one in the sense that if the evidence remains as it is, there is a "probability" that at the final hearing the plaintiff would be held entitled to relief. However, the degree of probability required would depend upon the nature of the rights asserted and the practical consequences of any court decision; this may be considerably less than an even chance.<sup>32</sup> This gives the court some (welcome) flexibility.

Vinelott, J.'s view on control should be welcomed, because not to recognise that control is possible with a shareholding much smaller than fifty per cent would make it virtually impossible (short of liquidation and leaving aside statutory remedies), in the case of large public companies, to bring an action for breach of duty by the incumbent board. A board not in *de jure* control of the company could easily remain unchallenged in *de facto* control without calling a meeting to ratify what has been done.<sup>33</sup>

### (c) *Fraud*

What sort of "fraud" is required for the "fraud on the minority" exception to *Foss v. Harbottle* to apply? This question is linked with that of ratifiability by shareholders in general meeting of wrongs done to the company. The traditional view is that ratification is allowed and that an act

<sup>31</sup> *Id.* 467.

<sup>32</sup> *Beecham Group Ltd. v. Bristol Laboratories Pty. Ltd.* (1968) 118 C.L.R. 618 at 620 per Kitto, J., *Shercliff v. Engadine Acceptance Corporation Pty. Ltd.* [1978] 1 N.S.W.L.R. 729 at 735-7 per Mahoney, J.A. (Glass and Samuels, J.J.A. concurring).

<sup>33</sup> B. A. K. Rider, "Amiable Lunatics and the Rule in *Foss v. Harbottle*" [1978] C.L.J. 270 at 274.

is a "fraud" where the directors act *mala fide* or where some "property" (legal or equitable) of the company has been misappropriated.<sup>34</sup>

The Court of Appeal made no reported remarks on the issue. Vinelott, J.'s observations were *obiter*, because counsel for the defendants had conceded that P's claim was founded on "fraudulent" acts.<sup>35</sup> Vinelott, J. said:

... there is no obvious limit to the power of the majority to authorise or ratify *any act or transaction* whatever its character provided that it is not *ultra vires* or unlawful and that the majority does not have *an interest which conflicts* with that of the company.<sup>36</sup>

Where there is a conflicting interest, Vinelott, J. said, the court will disregard the votes of shareholders who had an "interest which conflicts with the interests of the company".<sup>37</sup> If there is a conflicting interest, the "fraud" lies in the use of voting power, not in the character of the wrongful transaction,<sup>38</sup> reversing the traditional view.<sup>39</sup>

Vinelott, J. said that minority shareholders would have *locus standi* to sue (and the miscreant controllers would be unable to use their voting power to ratify a wrong to the company) whenever directors, even if acting in good faith, "are guilty of a breach of duty to the company (including their duty to exercise proper care) and as a result of that breach obtain some benefit".<sup>40</sup> He conceded that ratification of negligence by the wrongdoers using their votes was possible at least where the wrongdoers had not benefited from their breach of duty,<sup>41</sup> but did not explain why the character of the transaction should matter here but not elsewhere.

With respect, Vinelott, J.'s attempted remoulding of the law is in conflict with the authorities.

Vinelott, J.'s view that, *prima facie*, any transaction (if not *ultra vires* or unlawful) can be ratified, conflicts with *Atwool v. Merryweather*<sup>42</sup> (see discussion *supra*), *Re W. & M. Roith Ltd.*<sup>43</sup> and *Mason v. Harris*.<sup>44</sup> Those cases suggest that majority ratification of "fraud" in the sense of a lack of *bona fides* is never possible.

To assert that the votes of "interested shareholders" would be disregarded in ascertaining whether there was an effective ratification, Vinelott, J. had to explain away a number of cases, including *Regal (Hastings) Ltd. v. Gulliver*.<sup>45</sup> Lord Russell of Killowen had said that the

<sup>34</sup> Lord Wedderburn, "Derivative Actions and Foss v. Harbottle" (1981) 44 *M.L.R.* 202 at 205-6.

<sup>35</sup> *Supra* n. 2 at 869.

<sup>36</sup> *Id.* 862, emphasis added.

<sup>37</sup> *Id.* 874.

<sup>38</sup> *Id.* 862.

<sup>39</sup> K. W. Wedderburn, "Shareholders' Rights and the Rule in Foss v. Harbottle" [1958] *C.L.J.* 93 at 96.

<sup>40</sup> *Supra* n. 2 at 869.

<sup>41</sup> *Pavlides v. Jensen* [1956] Ch. 565, although on the facts of that case the directors may well have indirectly benefited — see J. Phelan "Challenging Director's Decisions — *Daniels v. Daniels*" (1981) 9 *Syd. L.R.* 447 at 452.

<sup>42</sup> *Supra* n. 26.

<sup>43</sup> [1967] 1 *W.L.R.* 432.

<sup>44</sup> (1879) 11 Ch. D. 97.

<sup>45</sup> [1967] 2 *A.C.* 134n, [1942] 1 *All E.R.* 378.

directors "... could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting",<sup>46</sup>

Vinelott, J. said this must have meant that the defendant directors of Regal did not control a majority of votes, for otherwise the *dicta* would conflict with *Cook v. Deeks*.<sup>47</sup>

With respect, Vinelott, J.'s suggestion must be rejected. Firstly, the defendant directors of Regal probably *did* control the majority of votes anyway, in view of the editor's note in the report that this was "doubtless" the case.<sup>48</sup> Secondly, if the House of Lords in *Regal*<sup>49</sup> had intended a proviso that the wrongdoers not control the vote, their Lordships would have said so explicitly.<sup>50</sup>

If not by Vinelott, J.'s method, how then do we reconcile *Cook*<sup>51</sup> and *Regal*?<sup>52</sup> Why was ratification:

- (a) not possible in *Cook*, where the (controlling) directors had diverted contracts to themselves, but
- (b) possible in *Regal*, where the directors had used corporate information to obtain secret profits?

If corporate property includes "advantages" belonging to the company,<sup>53</sup> the traditional approach cannot provide a satisfactory reconciliation.

Alternatively, we could choose "harm" as the test and say that whereas in *Cook* the directors profited at the company's expense, in *Regal* they profited without harming it.<sup>54</sup> However, this explanation has the problem of conflicting with *Furs Ltd. v. Tomkies*,<sup>55</sup> where the High Court held that ratification could occur irrespective of whether the company is harmed.

Ultimately the courts may have to concede that *Cook* and *Regal* are irreconcilable. In choosing between them, and in determining how to deal with "information" and "opportunities", it is to be hoped that the Australian courts will have cognisance of the American "corporate opportunity doctrine", noting however that the doctrine is more concerned with the scope of duties owed to the company than with questions of ratifiability of breach and standing to sue. Under the doctrine:

... if the corporation has a present interest in the opportunity or an expectancy in the sense that it is an opportunity that it has begun to look for, or is an opportunity in which it has no present interest or expectancy but is one in which it might reasonably be expected to be interested given its present line of business, then the fiduciary must

<sup>46</sup> *Id.* 150; 389.

<sup>47</sup> [1916] 1 A.C. 554.

<sup>48</sup> [1942] 1 All E.R. 378 at 379.

<sup>49</sup> *Supra* n. 45.

<sup>50</sup> *Supra* n. 34 at 210-1.

<sup>51</sup> *Supra* n. 47.

<sup>52</sup> *Supra* n. 45.

<sup>53</sup> *Burland v. Earle* [1902] A.C. 83 at 93.

<sup>54</sup> L.C.B. Gower, *Modern Company Law* (4 ed., 1979) at 618.

<sup>55</sup> (1936) 54 C.L.R. 583.

present it to the corporation for its consideration prior to exploiting it himself.<sup>56</sup>

Although an "opportunity" is something less tenable than ownership, yet it is arguably an extension of the concept of corporate property.<sup>57</sup> Cases such as *Canadian Aero Services v. O'Malley*<sup>58</sup> and *Industrial Development Consultants Ltd. v. Cooley*<sup>59</sup> offer hope for application of the doctrine in common law jurisdictions outside of the United States. Whether the concept of "property" is diluted in this way or a narrower "property" approach is taken, the focus is upon the character of the transactions involved and not, as Vinelott, J. had suggested, upon the use of voting power.

*North-West Transportation Co. v. Beatty*<sup>60</sup> was a major obstacle to Vinelott, J.'s argument that the votes of interested shareholders would be discounted. Yet Vinelott, J. said that all that case showed

... is that a contract between a company and a majority shareholder which is authorised or ratified in general meeting will not be set aside unless it is shown to have been an improper one... [It is not] authority for the more general proposition that a controlling shareholder who is also a director can, by using his votes in general meeting, confirm or ratify an act or transaction (not being of a fraudulent character or ultra vires) which was a breach of his duty as a director and thereby prevent the minority from bringing a derivative action.<sup>61</sup>

Vinelott, J. states the decision too narrowly, because the Privy Council had overruled a Canadian Supreme Court decision that ratification of the acts of an interested director "... should be by an exercise of the impartial, independent, and intelligent judgment of disinterested shareholders and not by the votes of the interested director, who ought never to have departed from his duty. ..."<sup>62</sup>

Their Lordships had reached their decision after hearing this argument: "The motives of shareholders for their votes cannot be inquired into. If there is no fraud they are free to exercise their own judgment as they please ..."<sup>63</sup>

So when their Lordships conceded the shareholder's right to vote despite his personal interest in the subject-matter,<sup>64</sup> this right should probably be taken to exist even where there is a non-fraudulent breach of the director's fiduciary duty being ratified.

In *Burland v. Earle*<sup>65</sup> Lord Davey said that derivative actions are

<sup>56</sup> S. M. Beck, "The Quickening of Fiduciary Obligation: Canadian Aero Services v. O'Malley" (1975) 53 *Can. Bar Rev.* 771 at 782-3.

<sup>57</sup> V. Brudney and R. C. Clark, "A New Look at Corporate Opportunities" (1981) 94 *Harv. L.R.* 998 at 1013.

<sup>58</sup> (1973) 40 D.L.R. (3d) 371.

<sup>59</sup> [1972] 1 W.L.R. 443.

<sup>60</sup> (1887) 12 App. Cas. 589.

<sup>61</sup> *Supra* n. 2 at 864.

<sup>62</sup> *Supra* n. 60 at 599-600.

<sup>63</sup> *Supra* n. 60 at 591-2, Webster and Jeune *arguendo*.

<sup>64</sup> *Supra* n. 60 at 593.

<sup>65</sup> [1902] A.C. 83.



confined to cases where the acts complained of are of a fraudulent character or beyond the powers of the company.<sup>66</sup>

Vinelott, J. dismisses this<sup>67</sup> too lightly by supposing that he was "not attempting to set out an exhaustive statement of the rule in *Foss v. Harbottle* and the exception to it"<sup>68</sup> and that somehow Lord Davey had not meant what he had said. As noted elsewhere, the "minor claims" in *Burland v. Earle*<sup>69</sup> do not support Vinelott, J. because they were orders that the defendant should account for funds and moneys owned by or owed to the company, so falling within the "corporate property" category.<sup>70</sup>

Vinelott, J. misguidedly relied upon *Alexander v. Automatic Telephone Co.*<sup>71</sup> There the court did not need to base its decision on breach of duty to the company. This was because as noted by Templeman, J. in *Daniels v. Daniels*,<sup>72</sup> the case was one where "the plaintiff shareholder could be said to be suing in respect of his *individual rights* as a shareholder to receive the same treatment as any other shareholder".<sup>73</sup> Secondly, although Lord Lindley, M.R. also considered the directors to be in breach of duty to the company,<sup>74</sup> he was the only judge to refer to *Foss v. Harbottle* in the Court of Appeal<sup>75</sup> and counsel had not cited it in the reported argument.<sup>76</sup>

*Daniels v. Daniels*<sup>77</sup> was cited by Vinelott, J.<sup>78</sup> but does not provide persuasive support. Templeman, J. did not refer to use of voting power, but rather purported to define the scope of *transactions* caught by the "fraud on the minority" exception. Templeman, J. had thought certain cases of negligence were caught; but the case

. . . properly understood, merely illustrates that "fraud on the minority" covers more than fraud in the strict sense . . . The allegation . . . was that the directors and controllers were expropriating to themselves the property of the company. The fact that they had not intended to defraud the company was irrelevant.<sup>79</sup>

Even as a matter of principle, Vinelott, J.'s view is fraught with difficulty. In disregarding the votes of "interested" shareholders, how is the "conflict" of interests between the majority and the company to be judged, if we are to ignore the character of the transaction? If the majority shareholders are to benefit from a proposed transaction, when are they forbidden to vote?<sup>80</sup>

<sup>66</sup> *Id.* 93.

<sup>67</sup> *Supra* n. 2 at 861-3.

<sup>68</sup> *Id.* 863.

<sup>69</sup> *Supra* n. 65 at 85.

<sup>70</sup> *Supra* n. 34 at 210n.

<sup>71</sup> [1900] 2 Ch. 56.

<sup>72</sup> [1978] 1 Ch. 406.

<sup>73</sup> *Id.* 411, emphasis added.

<sup>74</sup> *Supra* n. 71 at 69.

<sup>75</sup> *Id.*

<sup>76</sup> *Supra* n. 71 at 59-63.

<sup>77</sup> *Supra* n. 74.

<sup>78</sup> *Supra* n. 2 at 868-9.

<sup>79</sup> *Op. cit. supra* n. 54 at 649; cf. Phelan *supra* n. 41 at 451-6, 459-60, where the conclusion is reached that *Daniels v. Daniels* instead is founded upon a separate ground of breach of duty of care.

<sup>80</sup> *Supra* n. 34 at 208.

Can a director vote on a motion to remove him under s. 225 of the new Companies Code?<sup>81</sup> If A company holds a few shares in B company, A is transacting with C company, and B is a shareholder in C, will B's vote on the transaction at C's general meeting be disregarded?

#### 4. Conclusion

It is to be hoped that Australian courts will embrace the Court of Appeal's stipulation that *locus standi* be tried as a preliminary issue. However, the Court of Appeal's apparent rejection of "*de facto* control" as satisfying the control prerequisite for a "fraud on the minority" suit, should not be followed, with Vinelott, J.'s approach preferred. Ambiguities in the "fraud" prerequisite should be resolved by Australian courts not by referring to use of voting power as Vinelott, J. suggested, but to the character of the impeached transaction.

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<sup>81</sup> Cf. *id.* 210.