THEFT BY CORPORATE CONTROLLERS

by

ELANA SMUKLER

submitted in part fulfilment of the requirements for the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR : PROF J T PRETORIUS

JANUARY 1994

SYNOPSIS

The pillaging of companies by those who control them is becoming a common occurence in South Africa. The problem arises where those in control of a company are its sole shareholders and the property they are charged with stealing, though not legally belonging to them, is vested in an entity which itself belongs to them. One defence is that there can be no theft where the company consents to the appropriation of its funds. It is argued that a theft is committed only where all the criminal elements of the crime of theft are satisfied, notwithstanding the consent, or absence thereof, by the company. Case law indicates that a conviction depends on the : solvency or insolvency of the company; degree of control and victim of the appropriation. It is submitted that it is inappropriate to base a conviction on these criteria. All abuses of the corporate structure should be punished.

CONTENTS

I **INTRODUCTION**

II **CORPORATE CONTROL**

III **THE ELEMENTS OF THEFT**

A AN ACT OF APPROPRIATION (*CONTRECTATIO)*

B PROPERTY CAPABLE OF BEING STOLEN

C WRONGFULNESS

D INTENT TO STEAL

IV **COMPARATIVE STUDIES**

AUSTRALIA (VICTORIA)

NEW ZEALAND

ENGLAND

PRELIMINARY CONCLUSIONS ON THE INTERNATIONAL AUTHORITIES

V **THE APPLICATION OF COMPANY LAW PRINCIPLES TO A CRIMINAL CHARGE OF THEFT**

A CORPORATE CONSENT

(a) Consent by the members in general meeting

(b) Consent by the board of directors

The *Alter Ego* Doctrine

B THE *ULTRA VIRES* DOCTRINE

C MAINTENANCE OF CAPITAL

D FRAUD ON CREDITORS

SECTION 424 OF THE COMPANIES ACT

VI **CONCLUSION**

Table of South African cases

Table of Foreign Cases

American cases

Australian cases

Canadian cases

English cases

New Zealand cases

Table of Statutes referred to

Bibliography

I INTRODUCTION

One of the most firmly established tenets of company law, first recognised in the landmark case of Salomon v A Salomon & Co Ltd, [1] is that the company is a legal entity separate and distinct from its shareholders. Separate personality as expounded in Salomon, means that companies as separate entities, own their own property legally and beneficially, and that however close the degree of control by the corporate governance, companies are not by that fact alone agents or trustees of their human controllers. [2] The twin principles of incorporation and limited liability have been an incalculable boon to western commerce. They are also privileges, a means of avoiding personal liabilities which would otherwise arise, and as such the doors for abuse are wide open. [3] Kahn-Freund [4] described Salomon as "a calamitous decision", but the case has been consistently followed and remains the custodian of a bedrock principle of both English [5] and South African company law. The "calamity" lies in the ease with which persons who are essentially the proprietors of their businesses can put a wall between themselves and their creditors, a consideration which argues that the criminal law should treat company property as "property

---

[1] [1897] A C 22.

[2] Even a controlling shareholder may not deal with the assets of the company as if they were his own, see S v De Jager 1965 (2) S A 616 (A); In re George Newman & Co [1895] 1 Ch 674; E B M Co Ltd v Dominion Bank [1937] 3 All ER 555 (P C); In re Cleadon Trust Ltd [1939] Ch 286 at 311; [1938] 4 All ER 518 (C A) per Scott L J; In re H R Harmer Ltd [1959] 1 WLR 62; [1958] 3 All ER 689.

[3] M Whincup " 'Inequitable Incorporation' - the Abuse of a Privilege" (1981) 2 Co Law 158.

[4] O Kahn-Freund "Some Reflections on Company Law Reform" (1943) 7 MLR 54 at 56.

[5] L C B Gower Gower's Principles of Modern Company Law 5 ed (1992) 86 (hereafter Gower).

belonging to another" for the purposes of the crime of theft - even against those who have a 100 percent stake in the company. [6]

With no minimum capital requirements for either close corporations, private or public companies, limited liability is freely available with a minimum of formality [7] and at modest cost. Unless there are special circumstances, persons with financial claims against a company must look exclusively to its funds. Therefore, in the interests of creditors and company employees, all company funds should be used exclusively in the pursuit and fulfilment of the trading objects of the company and not dissipated by self interested payments to company controllers. Civil law constraints on company controllers in this regard [8] are insufficient by themselves in preventing and remedying the abstraction of corporate funds. The criminal law has an appropriate role in inhibiting such conduct and in many cases the most suitable offence to charge will be theft. [9]

There are legitimate means by which a corporate controller can take funds out of a company. These include :

lawfully declared dividends out of profits;

legitimate and reasonable salaries;

---

[6]G R Sullivan "Company Controllers, Company Cheques and Theft" [1983] Crim L R 512 at 517.

[7]Companies Act 61 of 1973 ss 32-73; Close Corporations Act 69 of 1984 ss 2, 12, 13 and r15.

[8]Discussed infra under V(D) Fraud on the Creditors.

[9]G R Sullivan op cit note 6 at 513.

repayments of loan accounts;

reasonable reimbursement;

redemption of redeemable preference shares;

reduction of capital in compliance with the provisions of the Companies Act [10];

borrowing from the company and reflecting the director or shareholder as a debtor.

It is not these legitimate means which are the concern of this contribution, but rather the unlawful appropriation of company funds and property.

To establish theft from a company should in certain instances not create difficulties. If a burglar had to break into the company offices and appropriate money from the company safe, he would most certainly be charged and convicted of theft from the company. Likewise, if the managing director had to take R500,00 (five hundred rand) out of the petty cash drawer to go gambling, this would also amount to theft. Clearly the members of a company may be guilty of stealing from the company. This is so, even though the members in question are officials of such importance that for some purposes they "represent the directing mind and will of the company and control what it does," with the effect that for those purposes, "the state of mind of these managers is the state of mind of the company, and is treated by the law as such." [11]

---

[10] 61 of 1973 ("the Act").

[11] H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd [1957] 1 Q B 159 at 172, per Denning L J.

In larger companies, an abstraction of company monies may perhaps not take the form of a straightforward appropriation. It may be accomplished by the abuse of arrangements for loans to directors [12], options to purchase company houses [13], executive share incentive schemes [14], inter-corporate trading between connected companies [15] or "golden handshakes" [16]. In instances like these, where there is a facade of legitimacy, the prosecution may find it difficult to establish the ingredients of theft. If the executive is both devious and careful, he will be vigilant enough to note the arrangement in the company books and make disclosure to shareholders [17]. But non-disclosure to shareholders in breach of statutory obligations is a frequent concomitant of such transactions. Even in quoted public companies, the chief executive may tire of such subtleties and simply treat the company money as his own. [18] Such directness will be typical in the smaller, closely controlled company or close corporation, where appropriations will take the form of direct dealings with company money either causing the company to draw cheques in favour of company controllers

---

[12] Investigation into the Affairs of Court Line Ltd, HMSO (1982), pars 151 - 161, taken from G R Sullivan op cit note 6 at 513.

[13] Investigation into the Affairs of Lonrho Ltd, HMSO (1976), para 9.53 taken from G R Sullivan idem at 513.

[14] Chief Metropolitan Magistrate, ex parte Gov. of Singapore (1980) 70 Cr App R 77.

[15] Investigation into the Affairs of Pergamon Press Ltd,HMSO (1973), pars 1244 - 1250 taken from G R Sullivan op cit note 6 at 513.

[16] Re Acc (1982) 3 Co Law 196.

[17] A relevant question is whether it would amount to theft where the board of directors at a properly constituted meeting were to resolve intra vires to dispose of the company property in a certain way. If the managing director were to put the resolution into execution, he would be disposing of the company property in the manner authorised by the company. Therefore it seems that one would enquire whether the disposition of property is one that is properly authorised by the company. Superficially it would appear that if it is so authorised, the disposition cannot be theft, if it is not, it may be theft. This contention is addressed in this article.

[18] Investigation into the affairs of Peachey Property Corporation Ltd HMSO (1979), s XIII, taken from G R Sullivan op cit note 6 at 514.

or by such controllers drawing excessive remuneration. [19]

The core issue of this article is whether a person in control of a limited liability company, by reason of shareholding and directorship, or two such persons acting in concert, can and should be convicted of stealing the property of the company. The argument which has found favour in certain of the authorities runs as follows. There can be no theft if the owner consents to what is done [20]. If the accused, by reason of being the controlling shareholder or otherwise, is "the directing mind and will of the company" he is to be treated as having validly consented on behalf of the company to his own appropriation of the company's property. This is apparently so whether or not there has been compliance with the formal requirements of company law applicable to dealings with the property of a company and even to cases where the consent relied on is *ultra vires* [21].

This approach has been criticised as being wrong in law [22]. Where a company is accused of a crime, the acts and intentions of those who are the directing minds and will of the company are to be attributed to the company. That is not the law where the charge is that those who are the directing minds and will have themselves

---

[19] Re George Newman Ltd [1895] 1 Ch 674; Re Duomatic [1969] 2 Ch 365; Mainwaring (1982) 74 Cr App R 99 concern the controllers of private companies and the haphazard manner in which company money may be treated by them.

[20] R v Morris [1983] 3 All ER 288; R v Jona 1961 (2) S A 301 (W).

[21] R v Roffel [1985] VR 511; R v McHugh (1988) 88 Cr App R 385. See R v Gomez [1993] 1 All ER 1 at 40. See, however, S v De Jager supra note 2 dissenting judgment of Rumpff J A at 617-8.

[22] R v Gomez idem per Lord Browne-Wilkinson at 40.

committed a crime against the company [23]. This argument states that the whole question of consent by the company is irrelevant. Whether or not those controlling the company consented or purported to consent to the abstraction of the company's property by the accused, he will have appropriated the property of the company. The question in this argument will be whether the other necessary elements of the crime of theft are present [24]. Both arguments will be canvassed in this paper.

This contribution will examine the concept of corporate control; the essential elements of the crime of theft in our law; comparative studies in Australia, New Zealand and England on the topic of whether the taking of monies and credit facilities by controllers of closely held companies would amount to theft; the application of criminal principles to absolutely controlled companies, and will also consider the difficult policy issue of whether it is correct to convict defendants who are in absolute control of companies for abstracting property from their companies. [25]

II CORPORATE CONTROL

The term "corporate controller" covers a wide spectrum which stems from the concept of control - the ultimate power in the policy-making hierarchy of the corporation. Corporate control is a function of the ownership of voting stock. It is exercised by the process of casting votes and consists of the power to choose directors. As a

---

[23]See Attorney-General's Reference (No 2 of 1982) [1984] 2 All ER 216, [1984] QB 624 applying Belmont Finance Corp Ltd v Williams Furniture Ltd [1979] 1 All ER 118, [1979] Ch 250.

[24]R v Gomez supra note 21 per Lord Browne-Wilkinson at 40.

[25]See also G Virgo "Stealing from the Small Family Business" [1991] Cambridge L J 464.

corollary, it carries the capacity to influence and possibly to dominate the board of directors. [26] Bayne [27] states that control is chameleon-like, skipping from place to place in the corporate venture. Although control might be thought to reside most properly in the shareholder-owners, in times of financial pressure, it may shift to the bondholders or the preferred shareholders [28]. Mere ownership of shares need not mean control. Control is the power over the shares by whomever owned, or dominion over the owner of the shares. Effective control, as distinguished from the absolute ownership of more than 50 percent of the stock, may be held by management founded on mere incumbency and maintained by access to the corporate mechanics of proxy solicitation, personnel and funds.

In South Africa, the legislature has crystallised the control function in section 440 A (1) of the Act [29]. "Control" is defined to mean the holding of shares or other securities in a company entitling the holders thereof to exercise the specified percentage or more of the voting rights at meetings of that company, irrespective of whether such holding gives *de facto* control or not [30]. The "specified percentage" [31], which must not be

---

[26]A A Berle " 'Control' in Corporate Law" (1958) 58 Columbia L R 1212.

[27]D C Bayne "A Philosophy of Corporate Control" (1963) 112 University of Pensylivania L R 22.

[28]D C Bayne idem at 30.

[29]Companies Act 61 of 1973.

[30]See the definition of "control" in s 440A (1) of the Companies Act 61 of 1973.

[31]See the definition of "specified percentage" in s 440A (1) of the Companies Act 61 of 1973.

less than 20 percent, is prescribed in the Code [32] and is presently 30 percent [33].

Berle [34]puts forward two distinct types of control in the corporate system : absolute or outright control and working control [35]. "Absolute control" exists when :

(a) there is only one shareholder in the company [36], "taking nickname" as it was put in Salomon v A Salomon & Co Ltd [37];

(b) the majority of voting stock in a company is held by a single owner or by a few stockholders and their nominees, who by agreement or tacit consent act together;

(c) where a very large minority is so held, while ownership of the majority is disbursed among many small holders.

51 percent of ownership of the voting shares in a single hand or compact group constitutes absolute control. 35 percent ownership may also amount to

---

[32]Securities Regulation Code on Take-overs and Mergers (the "Code"), promulgated in terms of s 440C (3) and (4) by R 29 Government Gazette 12962 of 18 January 1991.

[33]Section B par 5 of the Code.

[34]A A Berle op cit at note 26 at 1213.

[35]J Gerson "Corporate Control - the Pivotal Role of the Proprietor" (1992) 2 Optima 38 and G Virgo op cit at note 25 at 465 discuss the forms of corporate control as absolute control (companies where all the shares are owned by the wrongdoer(s)) and majority control (companies where the wrongdoer(s) only have majority control.) J Gerson describes a majority controlled company as a company where an absolute majority of the votes is held by a single family, a financial institution, a long term partnership between two families or some other limited, stable and identifiable coalition.

[36]Likewise in a close corporation where the entire members' interest is held by one member.

[37]Supra at note 1.

absolute control if the remaining 65 percent is split among hundreds or thousands of small shareholders;

(d) where there are subsidiary companies which are wholly owned by their holding companies.

Today the normal fact situation is probably more often that of "working control" rather than absolute control resting on direct stock ownership [38]. "Working control" is more complex as it involves the additional element of the capacity to mobilise other shareholders. It commonly exists where a shareholder, or small group of shareholders, have a substantial minority interest, but also have a readily available method of inducing sufficient additional shareholders to vote with them so that in combination they can elect directors. Traditionally maintaining working control encompasses having so close a relation with the existing board of directors that in any corporate election, the board would request proxies for a slate of directors chosen or approved by the holders of this substantial minority. Because so many small shareholders almost automatically sign and return the proxy requested by the management, the ability to direct the proxy machinery, together with a substantial minority of ownership, commonly adds up to the ability to choose directors [39].

A rubric of the control function is "management control" which exists where there is no substantial minority and the stock is widely scattered among a large number of shareholders. Here the capacity to direct the proxy machinery is all that is

---

[38] A A Berle op cit at note 26 at 1213.

[39] Idem.

necessary [40].

III THE ELEMENTS OF THEFT

In South Africa the crime of theft is not statutorily defined. Snyman [41] describes the constituent elements of the common law crime of theft as :

> "the unlawful and intentional appropriation of anothers movable corporeal property, or of such property belonging to the perpetrator himself, but in respect of which somebody else has a particular right of possession." [42]

If a person in absolute control of a company is charged with theft from that company, four requirements must be proven, beyond a reasonable doubt, before he is convicted. They are (a) an act, which is performed in respect of, (b) a particular type of property (c) unlawfully and (d) intentionally [43].

---

[40]It is conceivable that a minority group may be able to mobilize additional shareholders votes without reference to the proxy machinery of the corporation itself. This is what is done when there is a proxy fight and a group wanting to change management undertakes the task of mobilizing the majority. But this is expensive, difficult and is not a common occurrence.

[41]C R Snyman Criminal Law 2 ed 1991 (hereafter C R Snyman) 467.

[42]The following definition put forward in Gardiner and Lansdown 2 1652 has been accepted as correct in various decisions, such as R v Von Elling 1945 AD 234 236; R v Harlow 1955 (3) S A 259 (T) 263; R v Sibiya 1955 (4) S A 247 (A) 250 - 251 and S v Kotze 1965 (1) S A 118 (A) : "Theft is committed when a person, fraudulently and without claim of right made in good faith, takes or converts to his use anything capable of being stolen, with intent to deprive the owner thereof of his ownership or any person having any special property or interest therein of such property or interest." Snyman points out that this definition is unacceptable, because it was for all practical purposes taken over over from s1 of the English Larceny Act of 1916 (which has been replaced in England by the Theft Act of 1968). Necessary requirements such as unlawfulness and intention are not mentioned, or are clothed in unacceptable, outdated and vague expressions such as "fraudulently" and "without claim of right made in good faith." P M A Hunt, South African Criminal Law and Procedure Vol 11 2 ed (1990) (hereafter P M A Hunt) defines theft as the "unlawful contrectatio with intent to steal of a thing capable of being stolen". For other short definitions of theft see R v Viljoen 1939 OPD 52 56; R v Jona supra at note 20 at 316 G; S v De Jager supra at note 2 at 617.

[43]C R Snyman op cit at note 41 at 468.

A AN ACT OF APPROPRIATION (*contrectatio*)

Few areas of the criminal law present as much difficulty as *contrectatio* [44], which was the term used in Roman and Roman-Dutch law to describe the act of theft. Originally *contrectatio* meant the handling or touching of a thing, although today it is clear that a thing can be stolen without necessarily being touched or physically handled, for example the theft of money [45]. *Contrectatio* usually means any conduct by which an accused acquires effective control over property and simultaneously deprives the owner or lawful possessor of his control over it [46].

Snyman states that as it is desirable to describe the requirements for crimes in terms coherent to the layman, and seeing that the term *contrectatio* has lost its original meaning [47], the best way of describing the act required for theft is to refer to it as an appropriation of the property. Although our common law authorities may not have used the term "appropriation", it describes precisely what our courts in practice understand by the act of stealing or the term *contrectatio* [48].

---

[44]P M A Hunt op cit at note 42 at 601.

[45]Idem at 472.

[46]C R Snyman op cit at note 41 at 472. Contrectatio was described as the acquisition or exercise of control in R v Brand 1960 (3) S A 637 (A) 641 C - E; S v Albasini 1967 (4) S A 605 (R A) 607 H; R v Mkwanazi 1960 (2) S A 248 (N) 251 F. This criterion is also apparent from those decisions dealing with the dividing line between theft and attempted theft, where it is obviously necessary to decide whether there was a completed contrectatio.

[47]C R Snyman op cit at note 41 at 473. The concept of appropriation is used to describe the act of theft in England in the Theft Act 1968; Victoria, Australia in the Crimes Act 1958 (Vic). This concept is also applied in the definition of theft in s 206 (1) of the American Model Penal Code. J C De Wet sharply critizes the concept of contrectatio in (1950) 13 THRHR 243.

[48]Our courts aften describe theft as an "appropriation", although Snyman states that their use of the word "appropriation" is somewhat vague. See R v Viljoen supra at note 42 at 56; A-G (Tvl) v Martens 1960 (1) S A 120 (A) 124 C - D; R v Jona supra at note 20 at 316 G; S v Luther 1962 (3) S A 506 (A) 511 C; S v De Jager supra at note 2 at 617 : "A short (and incomplete) definition of theft is the unlawful appropriation of somebody else's property"; S v Van Coller 1970 (1) S A 417 (A) 425.

Appropriation means any act in respect of property which amounts to the accused behaving as if he were the owner of the property, and by which the owner or lawful possessor is effectively precluded from exercising his rights over his property. Actual deprivation is required [49].

In the case of the theft of money and funds which are commonly manipulated by means of cheques, negotiable instruments, debit or credit entries in books or registration in the electronic "memory" of a computer, such transactions may constitute a sufficient assumption of control to amount to an appropriation. Here we speak of the unlawful appropriation of "credit", "economic assets" or "an abstract sum of money" and what is important is the economic effect of the accused's conduct [50].

For an absolute controller to be convicted of theft, an appropriation of company assets must be established. Although appropriation is the central element of the offence of theft, in neither R v Jona [51] nor S v De Jager [52], the two seminal South African theft cases covering this topic, did the court even address the issue of appropriation [53], instead concentrating on the issue of corporate consent. It is respectfully

---

[49]C R Snyman op cit at note 41 at 473.

[50]Idem at 485.

[51]Supra at note 20.

[52]Supra at note 2.

[53]Foreign case law can be used to elucidate the appropriation requirement. Under English law the term "appropriation" is statutorily defined. By section 3(1) of the Theft Act 1968;

> "Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner".

In the context of the Theft Act, appropriation conveys the idea of treating something as if it were one's own. According to s 3(1) "any assumption by a personof the rights of an owner" amounts to an appropriation. In light of this definition what is meant by appropriation is at the very heart of any discussion as to whether theft can be

submitted that the courts did not take cognisance of the weight of the criminal elements of the crime of theft in the corporate context.

B PROPERTY CAPABLE OF BEING STOLEN

Although our common law authorities refer only to theft of movable corporeal property *in commercia*, our courts have long recognised that when money is stolen by the manipulation of cheques, banking accounts, funds, false entries and so on, it amounts to the theft of incorporeals [54].

---

proven.

The difficulty in English law concerned the conflict between two decisions of the House of Lords giving rise to much debate in subsequent cases and academic writings. In Lawrence v Metropolitan Police Commissioner [1971] 2 All ER 1253, [1972] AC 626 the House of Lords had laid down unequivocally that an act may amount to an appropriation notwithstanding that it is done with the consent of the owner. On the other hand, in R v Morris [1983] 3 All ER 288. [1984] AC 320, Lord Roskill had stated that the concept of appropriation involved an act not expressly or impliedly authorised by the owner, but an act by way of adverse interference with or usurpation of those rights.

The Morris approach was specifically adopted and applied in the English case of McHugh and Tringham (1989) 88 Cr App R 385; the majority judgment in the Australian case of R v Roffel (1985) 3 ACLC 339 (Supreme Court of Victoria) and the New Zealand case of Craig v Minister of Police (1983) BCR 141. Lawrence was followed and approved in the English cases of R v Philippou (1989) 89 Cr App R 290, CA; Dobson v General Accident Fire and Life Assurance Corp plc [1989] 3 All ER 927 and the minority judgment in Roffel (supra). To settle this long standing debate, the point of law which finally came to be decided by the House of Lords in the recent case of R v Gomez [1993] 1 All ER 1 was :

> "When theft is alleged and that which is alleged to be stolen passes to the defendant with the consent of the owner, but that consent has been obtained by a false representation, has, (a) an appropriation within the meaning of s 1(1) of the Theft Act 1968 taken place, or (b) must such a passing of property necessarily involve an element of adverse [interference] with or usurpation of some right of the owner?"

In applying Lawrence and disapproving the dictum of Lord Roskill in Morris the Law Lords held (Lord Lowry dissenting) that a person could be guilty of theft, contrary to s 1 (1) of the 1968 Act, by dishonestly appropriating goods belonging to another if the owner of the goods was induced by fraud, deception or a false representation to consent to or authorise the taking of the goods, since it was the actual taking of the goods, whether with or without the consent of the owner, in circumstances where it was intended to assume the rights of the owner that amounted to the 'appropriation' and the fraud, deception or false representation practised on the owner made the appropriation dishonest. Thus it is now clear that under British law there can be an appropriation whether or not the owner consents to the taking.

[54] C R Snyman op cit note 41 at 476.

For property to be capable of being stolen, it must either belong to another or belong to the perpetrator himself, but in respect of which somebody else has a particular right of possession [55]. Applying the Salomon principle, a corporation has a separate legal personality and exists apart from its members [56]. The money and credit facilities of the company constitute the property of the company. Where a director takes company money for his own use, he may be convicted of stealing from the company [57]. It makes no difference if the defendant is a shareholder with absolute control of the company, because shareholders do not have a proprietary interest in corporate property [58].

The only way that the property of the company could ever be said to belong to a shareholder is if the corporate veil can be pierced or lifted [59]. It appears that this will only be allowed where the company is a "mere facade concealing the true facts" [60]. Examples of this include where the company has only been established as a means to defraud creditors or to evade the obligations imposed by law, or where

---

[55]Refer to the definition of theft idem.

[56]Salomon principle applied in Goodall v Hoogendoorn 1926 AD 11 at 16; Dadoo v Krugersdorp Municipal Council 1920 AD 530; Estate Salzmann v Van Rooyen 1944 OPD 1; Gumede v Bandhla Vukani Bakithi Ltd 1950 (4) S A 560 (N); Lategan N O v Boyes 1980 (4) S A 191 (T) 200. This principle was affirmed in the United Kingdom by the Court of Appeal in Adams v Cape Industries plc [1990] Ch 433, 536 and the House of Lords, J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 433, 482 (Lord Templeman), 515 (Lord Oliver).

[57]R v Kohn (1979) 69 Cr App R 395; R v Mainwaring (1981) 74 Cr App R 99 and R v McHugh and Tringham (1989) 88 Cr App R 385.

[58]In Macaura v Northern Assurance [1925] AC 619, 633 Lord Wrenbury stated :

> "The corporator even if he holds all the shares is not the corporation, and ... neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation."

See further J T Pretorius (editor), P A Delport, M Havenga and M Vermaas Hahlo's South African Company Law through the cases : A Source Book 5 ed (1991) (hereafter H R Hahlo) 20 - 21.

[59]See H S Cilliers, M L Benade, J J Henning, J J Du Plessis and P A Delport Corporate Law 2 ed (1992) 9 - 12 (hereafter H S Cilliers); L C B Gower op cit note 5 at 108 - 138.

[60]Lord Keith of Kinkel, Woolfson v Strathclyde Regional Council (1979) 38 P & C R 521, 525.

the company for all intents and purposes acts as the agent for the shareholder [61]. The basis for the decision in Salomon and pertinent to this paper is that where there is only one shareholder with absolute control, that fact alone does not necessarily make that company a facade. Likewise, "wholly owned subsidiaries" can exist as commercial entities independent of their holding company.

C WRONGFULNESS

The wrongfulness of an appropriation may be excluded by a ground of justification, for example consent [62]. In theory, an accused is not guilty of theft if he takes property with the consent of the owner or person entitled : the taking must be *invito domino* [63]. The consent may however be legally ineffectual due to non-compliance with statutory or common law requirements for consent. The latter possibility has been raised in two cases [64] in which company directors were charged with theft of company funds.

Whether a corporate controller can authorise his own disposition of company property, and thus negative the wrongfulness requirement, was first addressed by the South African courts in R v Jona [65], where it was held that a sole beneficial shareholder and

---

[61] More than effectual and constant control is required before the company is treated as the shareholders' agent, other factors such as to whom the profits belong and who governs the trading venture are to be taken into account : Smith, Stone and Knights Ltd v City of Birmingham [1939] 4 All E R 116 (KB).

[62] Corporate consent to company abstractions will be discussed below.

[63] R v Herholdt 1957 (3) S A 236 (A) at 257; R v Jona supra note 20 at 317; S v De Jager supra note 2 at 617, 624-5.

[64] R v Jona idem, S v De Jager idem.

[65] Supra note 20.

director of a private company who had abstracted various amounts from the company's funds for his own purposes, was not guilty of theft. There were two reasons for the acquittal. The one was that there was a reasonable possibility that the accused *bona fide* believed that he had the right to take the money in the circumstances, especially as he was the sole beneficial shareholder and director. The other ground for his acquittal was that in law there could be no theft because the owner of the abstracted funds was the company, and that company, acting through its sole beneficial shareholder and director, the accused, had consented to the abstractions. In this connection, Williamson J said that in this particular case, the company, as represented by the whole of its directorate (all the directors being Dr Jona himself) and all of its shareholders (all of the shareholders being Dr Jona himself) had consented to Dr Jona taking the money out of the company. As it was not a taking without the consent of the owner, there could be no intention to steal. The learned judge stated that when the owner consents to property being taken, it is never theft, unless it is misrepresented to him in some way and he has given his consent through a misapprehension [66].

A similar matter was brought before the Appellate Division in S v De Jager and another [67]. De Jager, who practiced as an attorney for nine years, was charged with theft by abstracting various sums of money from a public company of which he was a director. The trial court found that De Jager, in conspiracy with a co-director (Shaban), had caused payments totalling R22 665,00 to be paid out of the company's

---

[66] At 317-8. See R C Beuthin "Theft by a Director" (1965) 82 SALJ 479 at 480, where the writer states that although the decision in Jona may perhaps be correct in the particular circumstances of that case, Williamson J's reasoning does not appear to take sufficient account of the fact that a company's powers to deal with its assets are limited. (This matter is discussed more fully in section IV of this paper).

[67] Supra note 2.

funds, that these payments were unauthorised, that they were for his own purposes and not for the benefit of the company and that this constituted theft.

De Jager raised numerous defences. The defence that is relevant here, is that there had in law been no theft from the company because De Jager and Shaban, who were the sole beneficial shareholders, must be taken to have agreed to the abstractions, and therefore, in effect the company was a consenting party. This defence was rejected by the court *a quo*. The Appellate Division upheld the conviction by a majority of two to one, with Rumpff J A [as he then was] dissenting. Holmes J A, who delivered the judgment of the majority stated : [68]

> "In my view the appellant's contention cannot succeed. It involves the proposition that de Jager, in his capacity as shareholder, could be a party to the company's agreeing to be despoiled by him in his capacity as director. It also in effect gives a general right to the company to distribute its assets to shareholders. This offends against certain principles of company law basic to the concept of limited liability as introduced by Parliament - at any rate in regard to companies limited by shares as this one was, namely :
>
> (a) The company is a separate legal persona, owning the assets.
>
> (b) The directors manage the affairs of the company in a fiduciary capacity to it.
>
> (c) The shareholders' general right of participation in the assets of the company is deferred until winding-up, and then only subject to the claims

[68] At 624-5.

of creditors.

> Neither shareholders nor directors nor the company itself can violate the foregoing, whatever the memorandum or articles may say."

In view of the above dictum, the decision in R v Jona may be taken to have been overruled.

Rumpff J A was prepared to acquit the accused because it had not been proved that the shareholders consent to the appropriation was *ultra vires* the memorandum. In dissenting from the decision of the majority, he stated [69] :

> "I am not aware of any provision whereunder the shareholders of a company commit theft when the company (through a resolution of the shareholders) disposes of its assets in a manner which is not ultra vires the memorandum. There is also, in my view, no duty on the shareholders when they meet as shareholders to act in the interests of the company. They can decide what they like - within the objects of the memorandum - and when they decide, the company has decided. Nor do the directors or the company itself owe a common law fiduciary duty to creditors to preserve the assets of the company. For purposes of this case the only question to be considered is one of consent.
>
> [I]f the evidence ... reveals that the confirmation by the shareholders is ultra vires the memorandum, to the knowledge of the appellants, it could be said that the

[69] At 617-B.

appellants are guilty of theft because in that case the company cannot be said to have given its consent."

The learned judge said that in view of the fact that the memorandum of the company was not placed before the court, and as "we do not know what its provisions are", he was unable to decide that the consent of the shareholders was in fact *ultra vires* the memorandum.

IMPLICATIONS OF DE JAGER

In terms of our common law, directors are subject to fiduciary duties requiring them to exercise their powers *bona fide* and for the benefit of the company, and to display reasonable care and skill in carrying out their office. Where a director misappropriates company property (other than a direct appropriation of company funds), this would amount to a breach of his fiduciary duty, which could be ratified by an ordinary majority of shareholders in general meeting or cured by the unanimous consent of all the shareholders. One must distinguish between two different situations in the sphere of the appropriation of company property. "On the one hand, there are cases in which the directors have appropriated for themselves, or for others, property or economic opportunities which either belonged to the company .... or in regard to which the company had some kind of claim, thereby enabling the property or opportunities to be regarded as corporate in nature ...., with the consequence that their acquisition by the directors can be seen to have taken place at the expense of the company. On the other hand, there are cases in which the directors have not made their acquisitions at the expense of the company, although their profit may have

been obtained in some other way as a result of their office ....." [70] It is not the aim of this paper to discuss such misappropriations of company property suffice it to mention that although a breach of fiduciary duty could be ratified by a bare majority of shareholders at a general meeting or by the unanimous consent of all the shareholders, in De Jager the majority held that it was not possible for the company in general meeting or even with the unanimous consent of all the members, to ratify the conduct of the director.

Although this result appears to be rather harsh, in cases of the appropriation of company funds in majority or working [71] controlled companies, it may be asked where the line would be drawn. Should it be for example a 51, 75, 90 or even a 98 percent majority of the shareholders who need to consent to the appropriation? Linked to the question of how much consent is necessary, is the case of creditors, existing or potential, and whether or not any kind of a duty is owed to them [72].

If De Jager was correctly decided [73], then by implication the taking of an exorbitant salary by a corporate controller may amount to theft. But, there is no difference in principle between taking an exorbitant salary and the situation where the company reduces its share capital by an amount of for instance R400 000,00 without compliance with the provisions of sections 83 -90 of the Companies Act, or from the situation where a holding company charges its subsidiary (whether wholly owned or

---

[70] R C Beuthin "Corporate Opportunities and the No-profit Rule" (1978) 95 SALJ 458 at 462. See also H R Hahlo op cit note 58 at 422-6, 435-6.

[71] Refer to the definition of control infra section II.

[72] See section IV(D) Fraud on the Creditors.

[73] This question is addressed in this dissertation.

not) an administration fee of R450 000,00, where on any arms length basis, the most generous payment would be R50 000,00. Such an unlawful reduction of capital would amount to a material irregularity which the auditor would then have to report to the Public Accountants' and Auditors' Board,[74] but likewise, could it be said that the holding company is guilty of theft? The directors of holding companies normally appoint themselves or their nominees to the board of directors of their subsidiaries. Often holding companies do not endeavour to charge or even to estimate the exact fees for the services they have rendered to their subsidiaries, instead often using a method of siphoning profits out of the subsidiary. In terms of the De Jager decision this would amount to theft. The directors of the holding companies, in their capacity as shareholders of the subsidiary, would be party to the company's agreeing to be despoiled of its assets. That is exactly what the Appellate Division in De Jager said the shareholders cannot do.

The conviction in De Jager of an absolute controller of a company was correct, but it is the writer's submission that the court went too far. It is respectfully submitted that the majority judgment may perhaps have overlooked the conceptual problems presented to the court largely owing to a failure to examine criminal principles in the corporate context.[75]

---

[74] This is in terms of s20(5) of the Public Accountants' and Auditors' Act 80 of 1991.

[75] The writer's submission is endorsed by the recent House of Lords decision in R v Gomez [1993] 1 All ER 1 at 40 per Lord Browne-Wilkinson "Whether or not those controlling the company consented or purported to consent to the abstraction of the company's property by the accused, he will have appropriated the property of the company. The question will be whether the other necessary elements are present, viz was such appropriation dishonest and was it done with the intention of permanently depriving the company of such property?"

D INTENT TO STEAL

It is firmly established that the form of *mens rea* required for theft is intention and the intention must relate to all the elements of the crime as well as to the wrongfulness requirement[78]. In South Africa, in accordance with the general principles of criminal law, intention to steal at least in the form of *dolus eventualis* is required[77].

In the context of theft by a corporate controller from his absolutely controlled company, this could be defined as follows : the accused subjectively foresees the possibility that withdrawing for instance R200 000,00 for his personal use might amount to an appropriation of company funds, and reconciles himself to this

---

[78] C R Snyman op cit note 41 at 478. P M A Hunt op cit note 42 at 616.

[77] In England s 1(1) of the Theft Act 1968 states that to be found guilty, the accused must "dishonestly appropriate". S 2(1) gives some indications as to when the defendant will not be dishonest.

"S 2(1) : A person's appropriation of property belonging to another is not to be regarded as dishonest -

(a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or

(b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it."

Dishonesty cannot be assumed, but sometimes it can be inferred, as for instance in the case of Attorney-General's Reference (No 2 of 1982) [1984] QB 624, (discussed below) where defendants drew millions of pounds from companies they completely controlled. Here dishonesty could be inferred from the scale of the spending (which amounted to millions of pounds), and from the fact that the money was not used for corporate purposes, but was spent on cars, yachts, antiques and home improvements. However, Kerr L J held that even in such a situation, the dishonesty of the defendants was still for the jury to decide as a matter of fact.

The English Courts have applied a subjective standard to the meaning of dishonesty. In terms of R v Ghosh [1982] QB 1053, the defendant would only be found to be dishonest if the reasonable man would regard his conduct as dishonest and the defendant realises that the reasonable man would so regard the conduct. Where an absolute controller is accused of stealing money from the company, there could well be difficulties in proving that he was dishonest, because dishonesty invariably involves foresight of some detriment to others. If the absolute controllers do not foresee that their action would have any effect on anyone but themselves, they could not be dishonest.

C R Snyman op cit note 41 at 15 states that our courts have moved further and further away from the English model of criminal law. Dolus eventualis is a concept that is unknown in English law and hails from the Continent as a form of intention.

possibility or is reckless as to whether his act would amount to theft or not[78]. Any mistake (in order to exclude intention) need not be reasonable, since the test for determining intention, or particular knowledge on the part of the accused, is subjective. To have an intention to steal, the accused :

(a) must intend to deprive the owner permanently of the full benefit of its ownership that is, the accused must have an intention to appropriate (for the purposes of this paper, this can be assumed);

(b) need not intend to gain from his appropriation; nor need he intend to prejudice the owner, that is the company;

(c) must not believe that the company, acting in its rights, would permit the appropriation, that is, there must be an absence of a claim of right.

In theory, an accused could escape conviction because of his *bona fide* belief that he was entitled to appropriate company monies if either he thought that the company had consented, or he *bona fide* believed that he had a legal right to effect the appropriation. The accused's *bona fide* error precludes an intent to steal[79]. This was recognised by the court in Jona [80] where one of the reasons for the acquittal of the accused was that there was a reasonable possibility that he *bona fide* believed that he had the right to take the money in the circumstances, especially as he was the sole

---

[78]Adapted from the definition in C R Snyman idem at 198.

[79]P M A Hunt op cit note 42 at 616 - 626.

[80]Supra note 20.

beneficial shareholder and director. Although this defence was raised in De Jager,[81] Holmes J A rejected it stating :

> "De Jager cannot be heard to say that the fact that he and Shaban were sole beneficial shareholders enabled him as director to use company funds for his own purposes. As to whether De Jager had a bona fide belief that he could do this, in Rex v Milne & Erleigh (7), Centlivres C J, said, 'Indeed it is difficult to imagine that any person of ordinary intelligence would believe that he had a power to despoil a company in relation to which he stood in a fiduciary capacity.'"[82]

In a community where people are reasonably acquainted with a knowledge of the basic outlines of company law, such a statement is undoubtedly correct, but for the lesser trained businessmen of the emerging new South Africa, one might find that they have not been sufficiently exposed to company law and they might well confuse their right to treat the company assets as their own. It is respectfully submitted that the judiciary ought to take cognisance of this possibility.

IV COMPARATIVE STUDIES

S v De Jager [83] is the last reported South African decision on the issue of whether persons who own all the shares in a company can be guilty of the crime of theft from that company. In the international field, the cases are far more recent than De Jager. Although the crime of theft is statutorily defined in Australia, New Zealand and

---

[81] Supra note 2.

[82] 1951 (1) S A 791 (A) at 817F.

[83] Supra note 2.

England, the issues addressed by the courts in the relevant cases can be applied to the common-law elements of the crime of theft in South Africa. Although the statutes in the abovementioned countries in all material respects identically define the crime of theft, the conclusions reached have been different.

AUSTRALIA (VICTORIA)

In R v Roffel [84], a full Court of the Victorian Supreme Court, acting as the Court of Criminal Appeal, decided by a majority[85] that there was no theft where an individual obtained property from his own company, even where such was done dishonestly[86]. The decision indicated that where a company, through its human agents who are its embodiment, consented to the taking of its property, there could be no appropriation of property in terms of section 72(1) of the Crimes Act.[87] The Australian High Court refused to grant special leave to appeal[88].

---

[84](1985) 3 ACLC 339.

[85]Young C J and Crockett J, Brooking J dissenting.

[86]The relevant legislation under which this case was decided was the Crimes Act 1958 (Vic) which provides :

"S 72(1): A person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

S 73(4): Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner."

The Crimes Act 1958 (Vic) virtually copies verbatim the Theft Act 1968 of the United Kingdom. Victoria is the only state in Australia with a theft provision reflecting the United Kingdom reforms. Queensland, Tasmania and Western Australia have distinct criminal codes, while New South Wales and South Australia retain positions which predate the English reform.

[87]1958 (Vic).

[88]Unreported, May 17 1985. The High Court did not feel that a reversal of the Victorian Court's decision in Roffel was called for due to the prosecutions failure to establish the appropriate lack of company consent at the trial and due to the hardship which had already been suffered by the defendant, who had already served a portion of his sentence.

The relevant facts were briefly as follows : Mr and Mrs Roffel ran a small clothing manufacturing business. They then formed a limited company of which they became the sole directors and shareholders and sold the business to the company. The price remained unpaid. The company's premises were destroyed by fire and the proceeds of insurance were paid into the company's bank account. The company's debts exceeded the proceeds of the insurance. Despite assurances to creditors that they would soon be paid, the husband drew cheques in his own favour on the company's account for amounts which represented the vast majority of the insurance proceeds. He was prosecuted for theft from the company and convicted.

An appeal was brought on the ground that the evidence was insufficient to support the convictions. Defence counsel raised for the first time the lack of appropriation,[89] stating that the acquiescence of both controllers amounted to the company's consent to the taking. The principle question in Roffel was whether the company had consented to the applicant's act, and if so, whether that consent negatived "appropriation" and therefore, theft. The Supreme Court of Victoria by a majority quashed the conviction on appeal, holding that, under the Crimes Act[90], the necessary element of appropriation required proof of adverse interference with or usurpation of some right or rights of the owner[91]. As the company was a separate legal entity, and in the particular circumstances (through its directing mind and will) had consented to the husband's drawing the cheques, it could not be said that he had

---

[89]The applicant contended that the evidence upon which he could have been found guilty of theft was deficient in that there was no evidence of an appropriation, or if there was, there was no evidence that the appropriation was dishonest. Reliance was placed on the argument that as the applicant and the company were one and the same in fact, he could not have acted dishonestly in relation to it.

[90]1958 (Vic).

[91]This followed the approach of R v Morris supra note 53.

appropriated the company's property.[92]

Von Nessen suggests that Roffel presented the Australian courts with three theoretical problems.[93]

(1) **Did the views expressed in R v Morris on the meaning of appropriation require the conclusion that consent to a taking prevents such a taking from being an appropriation?** The Victorian court was faced with the difficulty of reconciling the different views as to what constituted appropriation for the purposes of the statutory definition of theft in terms of the decisions of Lawrence and Morris. The majority held that the concept of appropriation as advocated by Lord Roskill in Morris should prevail. Thus there would be no adverse interference with or usurpation of an owner's rights where he consented to the taking. When Mr Roffel took the money, his company had intended him to have it and to use it for his own purposes. The motive of the company in making the gift could not convert the applicant's act in receiving the money into a usurpation of the company's rights.[94] Crockett J held that the company had consented to entry into the impugned transactions by the instrumentality of the only person through which it could effectively act, thus the transactions were not unilateral. By reason of its very acquiescence in the drawing

---

[92]See the judgment of Lord Lowry in R v Gomez supra note 53 where he states that the decision must be regarded as a misapplication of Morris, since the majority relied on Tesco Supermarkets Ltd v Nattrass [1971] 2 All ER 127, [1972] AC 153, [1971] 2 WLR 1166, HL for the directing mind doctrine and refused to apply the later English case of Attorney-General's Reference (No 2 of 1982) [1984] 2 All ER 216, [1984] QB 624, [1984] 2 WLR 447, C A, insisting that the transaction between the company and the husband was 'consensual'.

[93]P Von Nessen "Company Controllers, Company Cheques and Theft - an Australian Perspective" [1986] Crim LR 154 at 156.

[94]Per Young C J at 342.

of the cheques on its funds, the company was not acting so that it could be said that Mr Roffel was adversely interfering with or usurping some right of ownership possessed by the company [95]. Under this view of appropriation the majority concluded that if the taking was consensual in the true sense (not being induced by duress or deception) the taking could not be described as an assumption of the rights of the owner [96].

It is submitted that the dissenting judgment of Brooking J is to be preferred. Applying Lawrence, which makes it clear that consent to or authorisation by the owner of the taking by the rogue is irrelevant, Brooking J stated that even if the sums of money and cheque were taken with the authority of the company, there was still a series of appropriations. He saw no necessity to consider whether what was done by the applicant was authorised by the company [97].

(2) **Was consent given by a company, which was *ultra vires* or otherwise prohibited by company law, effective consent in this criminal law context?** The majority held that in its view civil company law concepts such as *ultra vires* and the maintenance of capital rules did not intrude into criminal law to negate the company's consent for criminal matters. Both concepts were held to be irrelevant to the determinations of criminal law. Brooking J dissenting, asserted that the company law doctrines were relevant to the issue of appropriation in several ways[98].

---

[95]At 348.

[96]Per Crockett J at 345.

[97]This dissenting view has been endorsed by the majority of the House of Lords in the recent case of R v Gomez supra note 53.

[98]Both views in this regard will be elaborated on further on in this paper.

(3) Were the controllers of a company to be regarded as its directing mind when consenting to a taking whereby they themselves were despoiling the company? The majority of the court were of the opinion that the applicant director, as the company's directing mind and will, was to have been identified with the company as the embodiment of the corporate entity. Thus it held that his actions in relation to the company's affairs must have been the company's actions.

Thus it can be said that the Victorian Court of Criminal Appeal, in the Roffel case, indicated a clear preference for the view that any taking by controllers of closely held companies does not amount to theft as there is no appropriation. This view was not based on any supposed proprietary right which the controllers may have had, either as controllers of the company or as recipients of the property under a voidable transaction, but rather was based on the ground that there is no appropriation where the company has consented to the taking[99] . Company law concepts which might have abrogated the consent were considered irrelevant insofar as they related to the appropriation issue.

NEW ZEALAND

The decision of the New Zealand Court of Appeal in Craig v Minister of Police[100] closely resembles the reasoning adopted by the majority of the court in Roffel[101] . Here the case involved a defendant who was the sole director and beneficial owner of all the shares in a company, which together with sixteen other companies in a group controlled by

---

[99]P Von Nessen op cit note 93 at 161.

[100](1983) B C R 141.

[101]Supra note 21.

the defendant was placed in statutory receivership. The company had purchased a car, the balance of the purchase price being financed by way of a conditional purchase agreement. A few weeks prior to the receivership, the defendant attempted to assign to himself the company's rights in the car. In order to make it appear from the records of the company that the car had been badly damaged in an accident and subsequently purchased by the defendant in an ensuing tender sale, the motor vehicle was re-licensed as "re-built" and the ownership papers were transferred by the company to the defendant. The defendant was charged and convicted of theft in the district court. As the High Court had reaffirmed this conviction, the defendant appealed to the Court of Appeal.[102] The appeal was dismissed on technical grounds[103], but in deference to the arguments presented to it, the Court of Appeal examined whether the defendant's actions constituted theft within the meaning of section 220(1)(a) of the Crimes Act 1961[104].

The section provides for two forms of theft : theft by taking and theft by conversion. The first issue for the Court of Appeal to determine was whether the defendant had converted the car to his own use with the intention of permanently depriving the company of its special interest.

---

[102]Under s 144 of the Summary Proceedings Act 1957 (N Z).

[103]The Court of Appeal ruled that it did not possess jurisdiction to grant such special leave to appeal because s 144 of the Summary Proceedings Act 1957 provided for an appeal with leave "against any determination on a question of law arising in any general appeal." The challenge to the High Court ruling was seen not as one of law but one of fact.

[104]S 220 of the New Zealand Crimes Act defines the crime of theft as:

> "(1) ...the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, anything capable of being stolen, with intent -
>
> (a) to deprive the owner, or any person having any special property or interest therein, permanently of such thing or of such property or interest ...
>
> (2) For the purposes of sub-section (1), the term 'taking' does not include obtaining property in or possesion of anything with the consent of the person from whom it is obtained, although that consent may be induced by a false pretence; but a subsequent conversion of anything of which possession only is so obtained may be theft".

Adopting the Morris approach to appropriation, it was the view of the court that for the purposes of section 220, the act of conversion must involve "some violation or usurpation of the rights of the owner or person with special interest"[105] , provided that no conversion could exist where the act in question was carried out by either the owner, the person with the special interest, or a third party acting with the consent of the owner. Therefore the court had to determine whether, in the circumstances of the case, the company had consented to the would-be act of conversion.

The Court of Appeal applied the doctrine of identification as laid down in Tesco Supermarkets Ltd v Nattrass[106] , stating that "[h]e is an embodiment of the company or, one could say, he hears and speaks through the *persona* of the company, within his appropriate sphere and his mind is the mind of the company."[107] It pointed out that Tesco had been applied in New Zealand in Nordik Industries Ltd v Regional Controller of Inland Revenue[108]. Therefore, applying the identification principle, Cooke J said that *in casu* it was clear that the defendant, acting as the company, intended to vest the company's interest in the car in himself personally and had given instructions and taken other steps to that end[109] . Thus the court concluded that the company, in the person of the defendant, had genuinely consented to his actions, and that must be regarded as fatal to the charge of theft from the company, for the company's consent was inconsistent with a conversion from it[110].

---

[105]Craig (1983) B C R 141 at 147.

[106][1972] A C 153.

[107]From Craig supra note 105 at 147.

[108][1976] 1 NZLR 194.

[109]Craig supra note 105 at 146 (per Cooke J).

[110]Ibid at 148.

ENGLAND

The Theft Act 1968 defines theft as the dishonest appropriation of property belonging to another with the intention of permanently depriving the other of it[111] . In the Crown Court case of Pearlberg and O'Brien,[112] the defendants had drawn millions of pounds from companies which they completely controlled. These drawings, made from overdraft facilities, funded lavish personal expenditure which "could not in any way be classed as company expenditure"[113] . No attempt was made by the defendants to relate the payments to the business activities of the company. Repeated professional advice stressed the illegality of their conduct. The companies were liquidated with no prospect of meeting the vast indebtedness. Blaker Q C in the court *a quo* acquitted the defendants on the basis that there was no case to answer on a charge of theft as the defendants and the company were identical. There was complete identification of the company and its controllers and it was not possible to steal from oneself. The controllers had consented to the writing of the cheques and

---

[111]S 1(1). Two of the elements of the crime of theft, dishonesty and appropriation, receive further attention in the Theft Act. S 2(1) gives some indications as to when the defendant will not be dishonest :

> "S 2(1): A person's appropriation of property belonging to another is not to be regarded as dishonest -
>
> (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or
>
> (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it".

S 3(1) defines appropriation as :

> "Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner".

[112][1982] Crim L J 829 (Winchester Crown Court).

[113]Attorney-General's Reference (No 2 of 1982) [1984] 2 WLR 447 at 450.

the drawing of the money, therefore Blaker Q C concluded that there was in law no theft. He stated that he did not think that any jury properly directed would regard it to be dishonest for two directors who were also the shareholders to draw money from their own companies to pay private bills [114].

The acquittal was controversial as it violated the basic principle of the separate legal personality of the company. Upon reference to the Attorney-General[115] , the Court of Appeal was asked its opinion on the point of law which was raised in Pearlberg and O'Brien - whether a person in total control of a limited liability company, by reason of his shareholding and directorship, or two such persons acting in concert, were capable of stealing the property of the company. The defence conceded the elements of the *actus reus*, and contested dishonesty, basing their defence on section 2(1)(b) of the Theft Act 1968 which precludes a finding of dishonesty if the defendant believes that the "other", with full knowledge of the circumstances, would have consented to the appropriation. The defence argument stated that since the defendants were the sole will and mind of the company, the company must be taken to have consented to everything to which they consented. Thus the appropriations could not be construed as dishonest under section 2(1)(b).

The Court of Appeal in Attorney-General's Reference (No 2 of 1982) [116] rejected the defence arguments on three grounds. Firstly, Kerr L J stated that the doctrine of

---

[114] Attorney-General's Reference (No 2 of 1982) idem, at 460 F - H.

[115] Under s 36 of the Criminal Justice Act 1972, cited as Attorney-General's Reference (No 2 of 1982) idem.

[116] Idem.

identification [117] had no bearing on offences committed against the company. Even where an individual is the controlling shareholder and director of a company, that would not preclude a jury from concluding that the individual could have acted dishonestly in his appropriation of company assets. Secondly, section 2(1)(b) did not apply because the directors did not possess an honest belief that they were entitled to appropriate the funds or that the company had consented to the appropriations. The defence argument of identification in relation to section 2(1)(b) raised a paradox in that the doctrine of identity alleges identity in all respects and for every purpose between the defendants and the company, but section 2(1)(b) uses the words "the other". If there is complete identity, the company cannot be regarded as "the other" for the purposes of this provision. Lastly, Kerr L J followed dicta in Belmont Finance Corporation Ltd v Williams Furniture Ltd [118], where Buckley J stated that where the essence of an arrangement was to deprive the company improperly of a large part of its assets, such knowledge should not be imputed to the company. He said that it is a well recognised exception from the general rule that a principal is affected by notice received by his agent, that, if the agent is acting in fraud of his principal and the matter of which he has notice is relevant to the fraud, that knowledge is not to be imputed to the principal. As the company was a victim of the conspiracy, Buckley J thought it would be irrational to treat the directors who were allegedly parties to the conspiracy, notionally as having transmitted this knowledge to the company [119].

---

[117] Identity between the defendants and the company. Also explained in Tesco Supermarkets Ltd v Nattrass supra note 92 and applied by Blaker Q C in Pearlberg and O'Brien supra note 112.

[118] [1979] Ch 250 (Buckley L, Orr & Goff L J J).

[119] Per Buckley L J ibid at 261.

Therefore, in Attorney-General's Reference (No 2 of 1982) the Court of Appeal held that where shareholders or directors had acted illegally or dishonestly in relation to a company, knowledge of that dishonesty was not to be imputed to the company.

In R v Philippou[120], the English Court of Appeal has reaffirmed the conclusion reached in Attorney-General's Reference (No 2 of 1982) that a controlling shareholder and director can be capable of theft from the company. The case involved two defendants who were the sole shareholders and directors of three companies, which had since gone into insolvent liquidation. Using corporate money from one of the companies the defendants had bought a block of flats in Spain for their own private purposes. Both were charged with stealing *choses in action* (namely a debt owed by a bank to one of the companies), contrary to Section 1(1) of the Theft Act 1968. Counsel for the delinquent directors argued that the reasoning of the majority in the Australian case of Roffel [121] supported the contention that no appropriation should exist in such circumstances. The Court of Appeal rejected this contention. For the reasons stated by Kerr L J in Attorney-General's Reference (No. 2 of 1982), O'Connor L J stated that there was no "consent" by the company on which the appellant could rely. The taking was adverse to the rights of the company, and Philippou was convicted of theft. [122]

---

[120](1989) 89 Cr App R 290.

[121][1985] VR 511 (Supreme Court of Victoria), discussed infra.

[122]G Virgo op cit note 25 states that the conviction of an absolute controller of a company in Philippou was correct, but that the reasoning by O'Connor L J in the case is fatally flawed. See also 472 - 473.

The House of Lords decision in R v Gomez [123] concerned the question of whether a charge of theft could be sustained against the respondent in circumstances where the owner of the relevant goods could be deemed to have consented to the goods being transferred. This was answered in the affirmative by the Law Lords[124] , but the actual decision in the case is not of relevance here. The comments of Lord Browne-Wilkinson [125] are interesting. Subsequent to agreeing with the analysis of the relevant facts in the case by the other Lords, he turned to the company law cases dealing with the question of whether a person, or persons, in *de facto* control of the company can be charged with theft from the company when they take the relevant goods, money or funds. His Lordship said [126] :

> "If the accused, by reason of being the controlling shareholder or otherwise, is 'the directing mind and will of the company' he is to be treated as having validly consented on behalf of the company to his own appropriation of the company's property. This is apparently so whether or not there has been compliance with the formal requirements of company law applicable to dealings with the property of the company ... .
>
> In my judgment this approach was wrong in law ... . Where a company is accused of a crime the acts and intentions of those who are the directing minds and will of the company are to be attributed to the company. That is not the law where the charge is that those who are the directing minds and will have themselves committed a crime against the company ... .

---

[123]Supra note 21.

[124]See note 53 above.

[125]At 40.

[126]Idem.

> Whether or not those controlling the company consented or purported to consent to the abstraction of the company's property by the accused, he will have appropriated the property of the company. The question will be whether the other necessary elements are present, ... In my judgment the decision in R v Roffel ... [is] not correct in law and should not be followed. As for Attorney-General's Reference (No 2 of 1982), in my judgment ... the decision in that case [was] correct, as was the decision in R v Philippou" [127]

Under English law, the matter here rests.

PRELIMINARY CONCLUSIONS ON THE INTERNATIONAL AUTHORITIES

In Craig the New Zealand Court of Appeal held the view that for the purposes of the definition of theft in section 220 of the New Zealand Crimes Act, conversion involved some violation or usurpation of the rights of either the owner or the person with the special property interest. This suggests that the act of either taking or conversion (as defined in the New Zealand statute) is within the Morris [128] concept of appropriation[129] . Thus, the similarity of reasoning between the New Zealand Court of Appeal in Craig, and the majority judgment of Roffel, which expressly adopted the Morris approach. Both Craig and Roffel concluded, albeit not by the same reasoning,

---

[127]See also similar comments by Lord Lowry ([1993] 1 All ER at 37 - 39); Lord Jauncey agreed with the analysis of the question of theft from a company expounded by Lord Browne-Wilkinson noted above. Lord Keith also supported this view.

[128]Discussed above in note 53.

[129]The concept of appropriation put forward by Lord Roskill in Morris has been criticised as being too wide and erring fundamentally by including in the concept of appropriation both the adverse interference with rights and the usurpation of rights. He suggests that appropriation includes the latter but not the former, aruging that the notion of usurpation must involve a taking unto oneself or a denial of the owner's rights or title to a thing. It must amount to an assumption, it does not speak of an adverse interference with a right to a thing. See L H Leigh "Some Remarks on Appropriation in the Law of Theft after Morris" (1985) 48 MLR 167, 170.

that if a company consents to the controlling shareholders having the property, the charge of theft from the company must fail. Both invoked the doctrine of identification to establish whether the company consented to the particular acts. In Craig, the Appeal Court accepted, without any discussion on the point, that the doctrine of identification can be used to establish whether a company has consented. In Roffel, Crockett J stated that the controllers were to be identified with the company and once that conclusion is reached, the actions of the controllers in relation to the affairs of the company, must be treated as being the company's actions[130] .

The utilisation of the doctrine of identification to determine whether a company has consented to a particular act for the purposes of determining whether a crime has been committed against the company, has also been criticised[131] . It leads to conclusions such as those reached in the Roffel and Craig cases, that "a person whom common sense would regard as a thief, is not a thief in law". [132] To allow a sole shareholder to escape charges of theft on the ground that the company property is in substance his, "is to encourage unwarranted assertions of dominion over the only property to which creditors can look, and to sanction a total inconsistency between the civil law and the criminal law, resulting in an extraordinary indulgence to controllers of closely held companies".[133] If there is no prejudice to creditors and the matter is simply an irregularity, no dishonesty or intent to steal will be proved. But

---

[130]G Williams "Theft by Company Controllers - A New Zealand view" (1989) 38 International and Comparative Law Quarterly 913 at 918.

[131]See G Williams idem; G R Sullivan op cit note 6; P Von Nessen op cit note 93.

[132]Roffel supra note 21 at 343 (per Crockett J).

[133]G R Sullivan op cit note 6 at 518.

if the appropriation occurs in circumstances where there is dishonesty or intent to steal, it is befitting that the criminal law conform to the civil law and regard company property as property belonging to another, even against an absolute controller of a company.

The doctrine of identification is a doctrine of imputed or ascribed liability [134] and was conceived to meet the inadequacy of the "organic theory" of company law which did not encompass particular forms of liability based on personal fault[135] . It was never intended to be used to establish whether in company law a company has consented to a particular act. This was recognised by Kerr L J in Attorney-General's Reference (No 2 of 1982) [136] when he noted that the doctrine of identification has no bearing on offences committed against the company. It merely illustrates that where any offences are committed by defendants in relation to the affairs of the company, the defendants "are" the company in a sense that the offences would be capable of being treated as offences committed by the company itself. Insofar as concerns the internal relationship betweem the company and its organs, dishonest or fraudulent acts directed against the company by its organs are not attributed to the company.

The acceptance by the majority in Roffel and by the New Zealand Court of Appeal in

---

[134]L H Leigh "The Criminal Liability of Corporations and other Groups" (1977) 9 Ottawa L R 247, 255.

[135]In terms of the organic theory the company is made liable, not because the controllers are its alter ego, but because they are an organic part of the company's ego itself. Whether they are, depends on whether they have control and managerial discretion, either generally over the company's business or over that particular part of it to which the transaction relates. See Tesco Supermarkets Ltd v Nattrass supra note 92. Gower states that this organic theory has not been carried to absurd extremes in English law in that "if those who constitute the head and brains are engaged in defrauding the company, they cannot successfully defend a civil action by the company (as in Belmont Finance Corporation v Williams Furniture Ltd supra note 23) or a criminal prosecution (as in Attorney-General's Reference (No 2 of 1982); R v Philippou supra) by saying 'we were the controlling organs of the company and accordingly the company knew all about it and consented.'" See L C B Gower op cit note 5 at 196-7.

[136]Supra note 23 at 461.

Craig, of the proposition that consent by a company to the taking of its property prevents such a taking from being an appropriation, leads to an anomalous result when looked at in conjunction with the decision in Attorney-General's Reference (No 2 of 1982). Von Nessen argues that even though the owners of a closely held company who receive property from it might still be considered as acting dishonestly (as indicated by the English Court of Appeal), the issue of dishonesty itself becomes superfluous in this context if the Roffel [and Craig] view that there is no appropriation where the company consents, is correct[137] . This could be attributable to either different applications of the requirement of dishonesty in England, Australia and New Zealand, or to differing attitudes towards the use of civil law concepts to resolve criminal law problems, as well as underlying differences in the civil law itself.

In British law both the Court of Appeal in R v Philippou and the House of Lords in R v Gomez expressly disapproved of the decision in R v Roffel. In Gomez Lord Browne-Wilkinson laid down explicitly that in his judgment the decision in Roffel was not correct in law and should not be followed. With regard to Attorney-General's Reference (No 2 of 1982), the Lord was of the opinion that both the concession made by counsel (that there had been an appropriation) and the decision in that case were correct, as was the decision in R v Philippou.

V THE APPLICATION OF COMPANY LAW PRINCIPLES TO A CRIMINAL CHARGE OF THEFT

In South African law, a valid consent by a company to an abstraction of company

---

[137] P Von Nessen "My Body, Myself: Problems of Identity in Corporate Crime" [1985] Company and Securities L J 235 at 241.

property is a ground of justification negativing unlawfulness [138].Therefore in determining the question of whether an absolute controller, or in fact any corporate controller, can be convicted of stealing from his company, regard must be had to the question of whether the company can be deemed to consent to the appropriation[139]. The dictum of Lord Browne-Wilkinson in the recent House of Lords decision of R v Gomez [140] states that "in any event, your Lordship's decision in this case ... renders the whole question of consent by the company irrelevant. Whether or not those controlling the company consented or purported to consent to the abstraction of the company's property by the accused, he will have appropriated the property of the company. The question will be whether the other necessary elements [of the crime of theft] are present ... ." Although this decision is recent and the above dictum directly in point, it is submitted that a House of Lords decision is merely persuasive authority to our courts and therefore it is still necessary in our law to discuss the issue of consent and the application of company law principles to a criminal charge of theft.

In the Australian case of R v Roffel[141] , the majority held that company law principles (specifically whether the applicant's acts were *intra vires* or *ultra vires*) were irrelevant in determining whether the applicant could be convicted of theft. Crockett J thought that this was a question which "should not be allowed to intrude into this branch of the criminal law". [142] The better view must surely be that of the dissenting judgment of

---

[138]Refer section III (C) Wrongfulness.

[139]Both the cases of R v Jona (supra note 20) and S v De Jager (supra note 2) canvassed the issue of corporate consent. See section III (C) Wrongfulness.

[140]Supra note 21 at 40.

[141]Supra note 21.

[142]Per Crockett J supra note 21 at 347.

Brooking J who asked pertinently at what point one would stop having regard to the company law. The learned judge enquired, in view of the fact that account is taken of the position of the applicant and his wife as directors and shareholders, how much further a jury would be permitted to enter the forbidden realm of company law. As Smith states : [143]

> "When the civil law is relevant, it must surely be taken into account in its entirety. The criminal court cannot pick and choose. The corporation is a creature of the civil law with no existence in the physical world; and, when the court has regard to its existence, it must surely have regard to all its relevant characteristics."

Even criminal lawyers should consider corporate principles in their entirety. The criminal law recognises the existence of companies, which exist by virtue of the civil law. Ignoring the rest of the civil law in which companies operate would be dangerous and deceptive. The question of criminal liability of a corporate controller essentially raises corporate principles and this was implicitly recognised by the Appellate Division in both the majority and dissenting judgments of De Jager.

There are five relevant principles in deciding whether the absolute controller is able to authorise an abstraction and so gain the company's consent. The *alter ego* doctrine and the principle of informal authorisation could be relied on by the defendant in trying to show that he is able to authorise the abstraction. The doctrines of *ultra vires*, maintenance of capital and fraud on the creditors could be relied on by the prosecution to show that an absolute controller is unable to authorise the

---

[143](1985) Crown L R 320 at 322.

abstraction. [144]

A CORPORATE CONSENT

The cases under discussion [145] each involved instances of closely controlled companies where the acts in question occurred with the full knowledge and consent of all the shareholders. In company law, a company can only be bound by or validly consent to a particular action by a resolution of one of its constitutional organs, either the members in general meeting or the board of directors.

(a) CONSENT BY THE MEMBERS IN GENERAL MEETING [146]

As a general rule, anything resolved upon by a bare majority of those who voted at the meeting will bind the company and all its members. The unanimous informal consent of the shareholders would have the same effect even though not given at a general meeting. The company's capacity to consent to any act (even when all the members unanimously agree) is strictly limited: the members in general meeting can effectively only consent to those things to which it has the power (express or implied) to consent by virtue of the company's memorandum of association. The members in general meeting can only consent to those things to which the Act or any other law expressly

---

[144]G Virgo op cit note 25 at 475.

[145]R v Jona supra note 20; S v De Jager supra note 2; R v Roffel supra note 21; Craig v Police supra note 105; Attorney-General's Reference (No 2 of 1982) supra note 23.

[146]R C Beuthin "Theft by a Director" (1965) SALJ 479.

or impliedly permits it to consent. Any consent given outside of the above parameters would be illegal and of no force or effect.

Conduct by unanimous assent has been recognised in a long line of South African [147] and English decisions [148]. Referring to unanimous consent where an absolutely controlled company is involved, it was observed that "where an absolute controller has the irresistible power to determine what policies the company shall pursue, there is nothing which he himself may do in the company's name which could in practice be unauthorised."[149] The requisite formalities may be dispensed with provided the informal consent is unanimous and all the members are fully appraised as to what they have assented to [150]. An illegal result cannot be obtained validly through unanimous consent. Thus in S v De Jager [151] it was held than an illegal appropriation of corporate assets cannot be justified on the ground of unanimous assent by all shareholders and directors. In Parker and Cooper Ltd v Reading [152] it was stated that where the transaction is *intra vires* and honest, and especially if it is for the benefit of the company, it cannot be upset where all the corporators have given their assent to it. It does not matter whether that assent is given simultaneously or at different times [153]. The real issue is whether the informal

---

[147]Dublin v Diner 1964 (1) S A 799 (D); Gohlke and Schneider v Westies Minerale 1970 (2) S A 685 (A); Marrock Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd 1975 (3) S A 403 (A).

[148]In re Duomatic Ltd [1969] 2 Ch 365, [1969] 1 All ER 161; Parker and Cooper Ltd v Reading [1926] Ch 975; In re Bailey, Haye and Co [1971] 1 WLR 1357; [1971] 3 All ER 693.

[149]Per Mustill L J in McHugh and Tringham (1989) 88 Cr App R 385, 393.

[150]Re Bailey, Haye & Co supra note 148 held that acquiescence is enough.

[151]Supra note 2 at 624 - 625.

[152]Supra note 148.

[153]Per Astbury J at 984.

procedure that is adopted is "unreal or ... a cloak under which a conspiracy to defraud was concealed." [154]

In the case of absolutely controlled companies, where the directors take for themselves large amounts of the company funds, the question may be asked whether these payments amount to directors remuneration, donations or gratuitous payments. Directors remuneration is determined by the company in general meeting[155] . Beuthin states that "the mere fact that the remuneration or gratuity properly voted to a director may be excessively high, would not necessarily make the payment thereof theft. The courts would be slow to interfere with the discretion of businessmen who can safely be left as a rule to determine what is in fact in the best interests of the company." [156] Where the funds taken by a director are not genuine remuneration, but rather a disguised attempt to return capital to shareholders, the payment will be in contravention of the Companies Act and may amount to theft notwithstanding the consent of all the shareholders [157].

Perhaps it could be argued that the large payment to a director of company funds

---

[154] The Attorney-General for the Dominion of Canada v The Standard Trust Company of New York [1911] AC 498, 505 per Viscount Haldane.

[155] Table A article 78 Companies Act 61 of 1973.

[156] R C Beuthin op cit note 146 at 483. See also section VI Conclusion infra.

[157] In re Halt Garage (1964) Ltd [1982] 3 All ER 1016 (Ch), it was held that where payments of remuneration to a director are made under the authority of the company acting in general meeting pursuant to an express power in its articles to award directors remuneration, and there is no question of fraud on the company's creditors or on minority shareholders, the competence of the company to award the remuneration depends on whether the payments are genuinely directors remuneration (as opposed to disguised gifts out of capital) and not on an abstract test of benefit to the company. The amount of remuneration awarded in such circumstances is a matter of company management and, provided there has been a genuine exercise of the company's power to award remuneration, it is not for the court to determine if, or to what extent, the remuneration awarded is reasonable. In re Horsley & Weight Ltd [1982] Ch 442; [1982] 3 WLR 431; [1982] 3 All ER 1045 (CA) Oliver J held that certain payments made to a shareholder - director of the company professedly as director's remuneration were not, in fact, made in genuine exercise of the power to remunerate directors, but constituted a gratuitous distribution to a shareholder qua shareholder out of capital and therefore were unlawful.

would amount to a donation. In terms of section 34 of the Act, a company has plenary powers to enable it to realise its main and ancillary objects. Although one of these plenary powers is to make donations, because a donation must be made to enable the company to realise its main and ancillary objects, the donation must be made for a purpose reasonably connected with, or done for the benefit and promotion of the prosperity of the company. In Hutton v West Cork Railway Co [158] Bowen L J clarified the principles governing charity by companies.

> "Most businesses require liberal dealings. The test is not whether it is bona fide, but whether as well as being done bona fide, it is done within the ordinary scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business for the company's benefit ... . The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company ... ." [159]

Companies do have the power to make gratuities payments to directors, but their powers to do so are limited. In Parke v Daily News Ltd [160], Plowman J concluded that a company's funds cannot be applied in making *ex gratia* payments as such, and that the court will enquire into the motives actuating any such payment, and the objects which it is intended to achieve. In In re Lee Behrens & Co Ltd, [161] Eve J put forward three tests which gratuitous payments had to satisfy:

---

[158] [1883] 23 Ch 654 (CA).

[159] See also De Vos J in Amalgamated Society of Woodworkers of S A v Die (1963) Ambagsaalvereniging 1967 (1) S A 586 (T) at 594.

[160] [1962] Ch 927.

[161] [1932] 2 Ch 46.

1. Is the transaction reasonably incidental to the carrying on of the company's business?

2. Is it a *bona fide* transaction?

3. Is it done for the benefit and to promote the prosperity of the company?

Thus Plowman J held that gratuitous payments will only be upheld if these three tests are satisfied [162]. Despite these pronouncements, if all the shareholders consent to a director's taking for himself an *ex gratia* payment which is unrelated to the interests of the company or to the carrying on of its business, taking the payment will not amount to theft provided the shareholders intended it to be taken, and it is taken from funds which are available for distribution as dividends. Thus an absolute controller would enjoy a large measure of immunity *vis-á-vis* takings of his company's money, provided he is prudent enough to link his takings either to a remunerative package, to a company donation, or to an *ex gratia* payment that satisfies Eve J's three tests. De Jager did none of these.

(b) CONSENT BY THE BOARD OF DIRECTORS

The apparent consent of the board of directors may be ineffective on three grounds :

1. The transaction is *ultra vires* the company [163];

---

[162]P L Davies in his case note on Halt Garage 1983, Journal of Business Law, 243 suggests that according to Horsley & Weight and Halt Garage the tests laid down by Eve J in In re Lee Behrens & Co Ltd remain relevant to the question of the propriety of the exercise of the power, but not to the question of the capacity of the company to exercise it. This is equally applicable to South African law.

[163]Refer section V (B) The Ultra Vires Doctrine.

2. The directors, in purporting to consent, may have usurped a power which they never had;

3. The directors in purporting to consent, exercised powers which they actually had, but for purposes other than those for which they were conferred.

Directors do not have the power to deal with the company funds as if they were their own. They do not have the power to do as they please with everything belonging to the company, including using it for their own benefit or taking it for themselves. No such power could ever be conferred upon them. In a majority controlled company, where one person is both a director and a shareholder, when he attends shareholders meetings *qua* shareholder, he may vote in his own selfish interests. But when he dons his robes of director's office and acts *qua* director, he is only entitled to have regard to the interests of the company [164].

THE *ALTER EGO* DOCTRINE

In the case of an absolutely controlled company, the question arises as to how the company may authorise or consent to a transaction. The notion of *alter ego* was devised in order to attribute "human" fault elements, for example *mens rea* to companies, thus making the company personally, as opposed to vicariously liable[165]. In terms of the *alter ego* doctrine the mental element of those persons who are the directing mind and will of the company, or those persons who exercise primary control

[164] R C Beuthin op cit note 146 at 484.

[165] The step of ascribing the actions of some person or persons personally to the company was first taken in Lennards Carrying Company v Asiatic Petroleum Co Ltd [1915] AC 705. Here Lord Haldane L C held that in respect of the actions of the board of directors or the actions of a managing director, the company was liable not vicariously, but personally. These persons were the alter ego of the company.

over the company's affairs, can be imputed to the company and so inculpate the company, making it criminally or delictually liable [166].

The term *alter ego* is used here in the narrow sense. It accepts that the company does have a separate personality from that of its controllers, but it has regard to the mental elements of the controllers to enable the company to operate successfully. Thus the directing mind principle is referred to as the *alter ego* doctrine. *Alter ego* is accurate, as it means "second self" rather than "same self" [167]. The doctrine of identification is a different concept [168]. It is adopted when the directing mind is the company, and there is a total identification between the company and the controllers. In terms of the *alter ego* doctrine, the company is a different person in law, but to enable the company to function, the defendant's mental element is attributed to the company [169]. The question in the present context, is whether the *alter ego* doctrine can be used by the controllers of a company to exculpate them from criminal liability by authorisation of the abstraction.

---

[166]The alter ego idea has been applied with varying degrees of fidelity in the fields of criminal law, taxation and merchant shipping.

[167]G Virgo op cit note 25 at 478.

[168]The writer agrees with Virgo op cit note 25 when he states that he disagrees with the view of Lord Reid in Tesco Supermarkets Ltd v Nattrass [1972] AC 153, 171, who said that : "The person who speaks and acts as the company is not alter. He is identified with the company." In the same vein, Estey J in Canadian Dredge and Dock Co Ltd v The Queen (1985) 19 SCC (3 d) 1, 15 (Supreme Court of Canada), called the alter ego theory the identification theory. A doctrine of identification is more appropriate where the corporate veil is pierced. It is incorrect so far as the directing mind and will is concerned, as there is not total identification, but only "identification" for the purposes of attribution of mens rea. If the directing mind principle is founded upon identification, then it is difficult to explain the limitation on it where there is fraud on the company (discussed infra). If a doctrine of identification is adopted then the directing mind is the company, and it is not possible to defraud oneself. Therefore, the directing mind principle shall be referred to as the "alter ego" doctrine.

[169]L H Leigh "The Alter Ego of a Company" (1965) 28 MLR 584.

It has never been entirely clear who may be a corporate *alter ego*, therefore the first task is to identify who the directing mind and will of the company is. The quantity of shares that a person holds is irrelevant to the question of whether he is the corporate *alter ego*. The essential criterion is the possession of primary control, as opposed to delegated authority, in respect of the business of the company [170]. Where there is an absolute controlling shareholder who is also a director, clearly he will be the *alter ego*. Where by virtue of his shareholding, a person is an absolute controller, but is not also a director of the company, the application of the *alter ego* doctrine is more complex. Such a person may be the directing mind and will of the company, especially if he is a shadow director. In the Lady Gwendolen [171] the directing mind of a company was held to include any person to whom the owner has extended all the relevant powers of control. Thus identifying the *alter ego* amounts to the realistic task of establishing in whose hands primary control of the company lies. An absolute controller who has control through the organ of the general meeting would clearly be held to be the directing mind and will of the company [172].

In R v Jona [173], Williamson J implicitly gave support to the use of the *alter ego* doctrine enabling an absolute controller to authorise an abstraction. He stated that "if the whole of the company ... knows that the money has been taken, consents to it being taken, you are not committing a theft if you take the money." This was overruled in De Jager when the Appellate Division rejected the argument that the

---

[170]G Virgo op cit note 25 at 478.

[171][1965] 1 Lloyd's Rep 335, [1965] 2 All ER 283 (CA).

[172]Denning L J stressed the importance of control in H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd [1957] 1 QB 159, 172. So did Viscount Dilhorne in Tesco Supermarkets Ltd v Nattrass [1972] AC 153, 187.

[173]Attorney-General of Hong Kong v Nai-Keung (1988) 86 Cr App R 174; Houghton and Co v Nothard, Lowe and Wills Ltd [1928] A C 1; Philippou (1989) 89 Cr App R 290.

defendant, in his capacity as shareholder, could be a party to the company agreeing to be despoiled by him in his capacity as director. By implication, the court was enforcing one of the limitations on the application of the *alter ego* doctrine mentioned below. It is the submission of Virgo [174], that the *alter ego* doctrine is both valid and important in this context. He states that companies must be able to consent and authorise. This it does through the general meeting, unanimous informal consent of all shareholders or through the board of directors. The *alter ego* doctrine was specifically developed to enable companies to be found liable in civil cases or convicted in criminal cases by virtue of the attribution of mental elements. He states that there is no reason, in logic or in policy, for preventing the attribution to the company of mental elements of those who are the mind and will of the company. Thereby, the consent of the directing mind would negate an appropriation.

There are certain limitations which apply to exclude the application of the *alter ego* doctrine. The doctrine will not apply if :

(a) the directing mind acts outside the scope of his express or implied authority; [175] or

(b) the directing mind acts for his own benefit; [176] or

---

[174] Supra note 20 at 317-318.

[175] G Virgo op cit note 25 at 479.

[176] D P P v Kent & Sussex Contractors Ltd [1944] K B 146, 156. In Canadian Dredge and Dock Co Ltd (1985) 19 SCC (3 d) 1, 17 it was stated that the "act in question must be done by the directing force of the company when carrying out his assigned function in the corporation." Authority would not seem to cause a problem in the case of an absolute controller as he will have the power to authorise an abstraction, subject to three limitations on his ability to authorise, discussed infra.

(c) the directing mind acts in fraud of the company. [177]

Where a controller milks company funds entirely for personal consumption, he does not represent the directing mind and will of the company, but acts in his own capacity. The accused in De Jager would surely fall in this category. Where the directing mind is acting for his own benefit, most often it will also be in fraud of the company and the *alter ego* doctrine will not apply. The last two limitations will be relevant where the absolute controller is abstracting property from the company. When one of the limitations apply, the consent of the controller cannot be attributed to the company, and the abstraction would amount to an appropriation.

Canadian Dredge & Dock Co v The Queen [178] is a decision of the Supreme Court of Canada in which the outer limits of the *alter ego* doctrine were analysed. The court held that the doctrine will only operate where the Crown demonstrates that the action taken by the directing mind -

(a) was within the field of operation assigned to him;

(b) was not totally in fraud of the corporation; and

(c) was by design or result partly for the benefit of the company.

The case was concerned with the criminal liability of a company, and whether such corporate criminal liability arises where the directing mind conspiring to defraud acted in fraud of the corporation, or for his own benefit, or contrary to instructions not to act

---

[177] International Sales and Agencies Ltd v Marcus [1982] 3 All ER 551 : A person will step out of his role as corporate alter ego when his conduct is unrelated to the affairs of the company.

[178] Canadian Dredge and Dock Co Ltd v The Queen supra note 168 at 5.

illegally. The court explained the application of the *alter ego* doctrine generally. It stated that the doctrine merges the board of directors, the managing director, the manager or anyone else to whom was delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation. By this means, a corporation may have more than one directing mind. Each company has a directing mind and the fact that he may have defrauded the corporate employer, acted in part for his own benefit, or acted in breach of instructions, does not remove the company's criminal liability in the circumstances. However, the outer limit of the delegation doctrine will be reached and exceeded when the directing mind ceases completely to act, in fact or in substance, in the interests of the corporation. When the directing mind intentionally defrauds the corporation and when his wrongful actions form the substantial part of the regular activities of his office, the manager cannot realistically be considered to be the directing mind of the corporation. Where the criminal act is totally in fraud of the corporate employer and where the act is intended to and does result in benefit exclusively to the employee manager, the employee directing mind ceases to be a directing mind of the corporation, and consequently his acts cannot be attributed to the corporation under the doctrine. [179]

Although the case was concerned with the criminal liability of a company, it is submitted that the decision also applies to prevent the exculpation of controllers by means of the *alter ego* doctrine. The principle in Canadian Dredge has been followed in other decisions [180] and there is also support for it in certain English cases. [181]

---

[179]Supra note 168 at 5.

[180]At 663-664.

For example, in Attorney-General's Reference (No 2 of 1982), Kerr L J suggested that the *alter ego* doctrine did not apply where the shareholders and directors "had acted illegally or dishonestly in relation to the company", and in the civil case of Belmont Finance Corporation Ltd v Williams Furniture Ltd Buckley L J stated [182] that "if the agent is acting in fraud of his principal and the matter of which he has notice is relevant to the fraud, that knowledge is not to be imputed to the principle."

There is some confusion as to whether the limitation relating to fraud on the company applies where there is an absolute controller. In the New Zealand case of Nordik Industries Ltd v Regional Controller of Inland Revenue [183], Cooke J stated that :

> "... once identification has been made out, it must follow, ... , that ... , the question of fraud on the company becomes irrelevant and indeed meaningless. A person cannot defraud himself. The essence of the doctrine of identification is that the individual is treated as the company's self. They are one and the same.
>
> Presumably the identification does not extend to matters totally unconnected with the business of the company."

This illustrates the danger of calling the directing mind principle, the "identification doctrine". It ignores the fundamental axiom of the separate personality of the company. The limitation relating to fraud should apply to absolutely controlled

---

[181] Standard Oil Co of Texas v U.S. 307 F 2 d 120 (5th Cir 1962); Clarkson and Lyon (1986) 24 A Crim R 54; Clarkson (1987) 25 A Crim R 277; Maher (1986) 23 F L R 332.

[182] Supra note 23 at 262.

[183] [1976] 1 NZLR 194 at 202.

companies to prevent a controller from authorising an abstraction[184] . Holmes J A's judgment in De Jager lends support to this proposition. Thus it can be assumed that under South African law, the abovementioned limitations, excluding the operation of the *alter ego* doctrine, are equally applicable.

B THE *ULTRA VIRES* DOCTRINE

In his dissenting judgment in S v De Jager, Rumpff J A [as he then was] stated :

> "I am not aware of any provision whereunder the shareholders of a company commit theft when the company (through a resolution of the shareholders) disposes of its assets in a manner which is not ultra vires the memorandum ... . If the evidence ... reveals that the confirmation by the shareholders is ultra vires the memorandum, to the knowledge of the appellants, it could be said that the appellants are guilty of theft because in that case the company cannot be said to have given its consent." [185]

This was an accurate statement of the law before the introduction of the Companies Act. In terms of the *ultra vires* doctrine, the capacities and powers of a company were limited to those capacities and powers for which the objects clause in the memorandum of association had made provision. Any act beyond the capacity of the company was *ultra vires* and void because the company did not exist for a purpose beyond its capacity. If any abstraction from the company was *ultra vires* it could not be authorised. In the present context, the doctrine would apply to prevent authorisation of an abstraction from the company, thus enabling the

---

[184] G Virgo op cit note 25 at 482.

[185] At 617-8.

abstraction to become an appropriation. This was because companies could only authorise or consent where they had capacity to do so.

Since the introduction of section 36 of the Act, assuming that the abstractions of money from the company were *ultra vires*, that will no longer prevent the company from authorising or consenting to the transaction[186] . Although certain aspects concerning section 36 are still in dispute[187] , the effect of this section is that even if an abstraction is beyond the capacity of the company, it cannot be impugned on the ground of being *ultra vires*[188]. Section 36 has "except as between the company and its members or directors, or as between its members and its directors", effectively abolished the *ultra vires* doctrine. Because of this exception, it is in this context necessary to make a distinction between companies which are absolutely controlled and companies where the wrongdoers have only majority control. Where there has been an abstraction from an absolutely controlled company, the abstraction would go unchallenged, as all the controlling shareholders are also the wrongdoers. The consent of the company to the abstraction would not be invalidated by reason of the abstraction being beyond the capacity of the company. Conversely, where the

---

[186]Section 36 states that : "No act of a company shall be void by reason only of the fact that the company was without capacity or power so to act or because the directors had no authority to perform that act on behalf of the company by reason only of the said fact and, except as between the company and its members or directors, or as between its members and its directors, neither the company nor any other person may in any legal proceedings assert or rely upon any such lack of capacity or power or authority."

[187]H S Cilliers op cit note 59 at 179-80; H R Hahlo op cit note 58 at 106-8; S J Naudé "Company Contracts : The Effect of Section 36 of the New Act" (1982) 99 SALJ 315 at 335.

[188]On the effect of s 36, see also M L Benade "Exit Ultra Vires" (1972) 35 THRHR 281; J S McLennan "The Ultra Vires Rule and the Turquand Rule" (1979) 96 SALJ 392; M S Blackman "The Capacity, Powers and Purposes of Companies : The Commission and the New Companies Act" (1975) 8 CILSA 1, esp at 34ff; A N Oelofse "Artikel 36 van die Maatskappywet versus Artikel 15A van die Akteswet" (1979) 42 THRHR 100; M G Fredman "A Note on Section 36 of the Companies Act" (1982) 99 SALJ 283; M J Oosthuizen "Aanpassing van die Verteenwoordigingsreg in Maatskappyerband" 1979 TSAR 1; J S A Fourie "Die Wisselwerking tussen Suid-Afrikaanse Maatskappyeregleerstukke" (1988) 51 THRHR 218 and M S Blackman "Directors' Duty to Exercise their Powers for an Authorised Business Purpose" (1990) 2 S A Merc LJ 1.

wrongdoers only possess majority control of the company, the issue of *ultra vires* will still be relevant. In such a case, the shareholders who are not party to the abstraction can, in terms of section 36, restrain the company from authorising an act beyond its capacity[189]. Such an injunction [190] would only be appropriate before the company concludes any contract with the wrongdoers. The option of holding the directors personally liable for acting beyond their authority and in breach of their fiduciary duties is still available[191] . This will only be relevant where the wrongdoers have majority control, as these duties are owed to the company and therefore can only be enforced by the company. In the exceptional circumstance of an appropriation of a large part of company assets, members may be entitled to enforce these duties on behalf of the company[192] . In the light of section 36, *ultra vires* is no longer relevant in determining whether an abstraction amounts to an appropriation. Where there has been unanimous assent by all the shareholders, a gratuitous disposition or abstraction of company property could not be challenged on the grounds of lack of capacity.

Where the abstraction or gratuitous disposition takes place from a close corporation, no question of the capacity of the corporation can be raised, as a corporation has unlimited capacity [193]. The corporation's capacity is not affected by the statement

---

[189]On the basis of the contract which exists in terms of s 65(2) of the Act between the company and its members qua members, a member may rely on such contract to prevent the company from acting in contravention of its contractual obligation.

[190]Achieved by an application for an interdict.

[191]M S Blackman "Directors' Duty to Exercise their Powers for an Authorised Business Purpose" (1990) 2 S A Merc L J 1 at 9.

[192]See H S Cilliers op cit note 59 at 288 19.01 et seq in this regard.

[193]Section 2(4) of the Close Corporations Act 69 of 1984 provides that : "A corporation shall have the capacity and powers of a natural person of full capacity in so far as a juristic person is capable of having such capacity or of exercising such powers."

of the principle business in the founding statement. Therefore, any abstraction of property or gratuitous disposition from a close corporation need not be in the commercial interests of the corporation. The corporation is analogous to an individual who has the unfettered power to make gifts to whomever he likes, for whatever reason[194] . The negation of a company's or corporation's consent can be examined with more success from the standpoint of either the principles of capital maintenance or fraud on creditors.

C MAINTENANCE OF CAPITAL

The maintenance of capital doctrine may be relied on to support the conclusion that an absolute controller is unable to consent on behalf of the company to an abstraction. The approach followed by the courts in regard to the maintenance of capital is that "the share capital of a limited company constitutes the fund to which creditors of the company must look to for the satisfaction of their claims. Creditors are accordingly entitled to rely on the fact that such fund, although it may be diminished or lost in the course of the company's business, must not otherwise be impaired by being diverted from the objects of the company." [195] In the dissenting judgment of Brooking J in Roffel, the learned judge pointed out that the underlying rationale for such a principle was the need to ensure that the company's capital was not improperly reduced to the prejudice of its unsecured creditors[196] . A corollary of this principle is that a disposition of the company's property which contravenes the rules of capital maintenance cannot be ratified, not even by a unanimous decision of

---

[194]H S Cilliers op cit note 59 at 614.

[195]Idem at 314.

[196]Roffel supra note 21 at 351.

the shareholders [197]. This is relevant to the present paper, because if the funds or property received by the controlling shareholders can be classified as a return of capital in contravention of the capital maintenance doctrine, then it cannot be argued by the controlling shareholders that the company, through the unanimous consent of all the shareholders, has consented to the disposition of the property [198].

In the realm of abstractions from absolutely controlled companies, the maintenance of capital doctrine is of particular importance. Authorisation or ratification of a payment, even by all of the shareholders, is not possible if the maintenance of capital rules are transgressed. As long as it is capital that is being abstracted from the company, the absolute controller is unable to authorise the abstraction. Williams [199] states that one of the fundamental weaknesses of the capital maintenance rules is that they do not take into account the amount owed to creditors. Pennington [200] suggests that the capital maintenance doctrine should include both the monies raised by the issue of shares as well as the amount raised by borrowing [201]. Where corporate controllers are charged with theft from their companies, this conclusion is appropriate, for such controllers invariably rely on borrowed funds to achieve their

---

[197] Roffel idem; Re Exchange Banking Co [1882] Ch D. at 519

[198] G Williams "Theft by Company Controllers - A New Zealand View" (1989) 38 ICLQ 913, 921.

[199] G Williams idem at 922.

[200] R R Pennington Company Law 5 ed (1985) 451.

[201] In support of this proposition, Pennington cites Lindley L J in the case of In re George Newman & Co [1895] 1 Ch 674, 686 :

> "To make presents of profits is one thing and to make them out of capital or out of money borrowed by the company is a very different matter. Such money cannot be lawfully divided amongst shareholders themselves, nor can it be given away by them for nothing to their directors so as to bind the company in its corporate capacity."

objectives [202]. This corresponds with the rationale of the doctrine, which is to protect the position of the shareholders and creditors.

D FRAUD ON CREDITORS

There are two main reasons for the conviction on a charge of theft from a company : the fact that a juristic person has been unlawfully deprived of its property and the prejudice to members and creditors[203] . Even where there has been unanimous consent by all the shareholders, the creditors still remain and the issue of fraud on the creditors is relevant. Beuthin submits that "there would be no less justification for conviction even if the accused was able to show that the company in fact had no creditors; for so long as a company is in existence it has potential creditors, and while there are potential creditors, there is potential prejudice" [204]

Where the abstractions by the corporate controller are minor, the solvency of the company will not be endangered. Here there would be no question of a fraud on the creditors. Where there are substantial or numerous abstractions of company property, the solvency of the company may be jeopardised and the complaint of the creditors of the company is simple - there is not enough money to pay them and the actions of the controllers have diverted funds from the company. There has been a failure of the controls on the decision makers. Possible insolvency of the company renders the shareholders disinterested as shareholders in the remnants of the company assets. Controlling shareholders or directors see no benefit in preserving

---

[202]G Williams op cit note 198 at 923.

[203]In R v Herholdt 1957 (3) S A 236 (A) 261, Fagan C J stated :

> "[T]he people they wronged by the acts on which their convictions are based were the minority shareholders ... and the creditors".

[204]R C Beuthin op cit note 146 at 486.

the remaining funds of the company for the creditors, therefore they will seek to benefit themselves further from the remains of the corporate funds, that is, at the expense of those creditors. Where the management of the company and its control by the shareholders are well separated, the shareholders will be checked from taking corporate assets by the management, and management checked by the shareholders. Where there is an absolutely controlled company, or a majority controlled company where the management and control is not well separated, the risks to creditors increase [205], and the issue of whether directors owe a duty to corporate creditors becomes material.

The traditional view in South African company law is that there is no direct fiduciary relationship between directors and creditors [206]. Directors primarily stand in a fiduciary relationship with their companies and therefore must act *bona fide* and in the best interests of their companies. Traditionally it was accepted that creditors should protect their interests by bargaining with the company [207] in respect of the amount of interest charged for the service they render[208]. There are also various statutory provisions tendentious of the fair treatment of creditors where a company is being

---

[205] See D A Wishart "Models and Theories of Directors' Duties to Creditors" (1991) 14 New Zealand University LR 323, as well as O J S Fourie "Die Plig van Direkteure Teenoor Maatskappyskuldeisers" (1992) 4 S A Merc L J 25.

[206] Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd [1983] 2 All ER 563 (CA) 585 g; O J S Fourie op cit note 205.

[207] L S Sealy "Directors' 'Wider' Responsibilities - Problems Conceptual, Practical and Procedural" (1987) 13 Monash University L R 164, 176.

[208] Built into the interest fee is compensation for the risk of loss they bear. The greater the risk of loss, the more is charged to compensate for that risk. Creditors cannot complain that it is the insolvency of the debtor company which has caused them loss because they have contracted to bear that risk and have built compensation for bearing it into the cost of credit. Creditors assess the risk according to their expectations as to the behaviour of the company's controllers. It is when controllers act outside these expectations that the creditors are bearing uncompensated risks. See D A Wishart op cit note 205 at 335.

wound up[209] .

In certain other jurisdictions there has been a tentative cognisance of the creditors as a distinct group. Stemming from Walker v Wimborne and others [210], the *locus classicus* of the interests of creditors[211] , the courts in Australia [212], New Zealand [213] and England [214] have widened the dictum of Mason J in Walker so that it can now be said that in those Commonwealth jurisdictions directors have a general duty towards present and future creditors, to take their interests into account in circumstances where the debtor company is insolvent, potentially insolvent or of doubtful solvency [215].

Developing a formalised recognition of a duty towards creditors to take their interests

---

[209]C A Riley "Directors' Duties and the Interests of Creditors" (1989) 10 Co Law 87; N Hawke "Creditors' Interests in Solvent and Insolvent Companies" (1989) Journal of Business Law 54, 56-57 and 59.

[210](1976) 50 ALJR 446; (1976) 137 CLR 1. This decision of the High Court of Australia has been followed and clarified in various other decisions.

[211]cf Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd supra note 206.

[212]Ring v Sutton (1980) 5 ACLR 546 548; Re 67 Budd Street (Pty) Ltd; The Commonwealth v O'Reilly (1984) 2 ACLC 190 197; Hurley v BGH Nominees (Pty) Ltd (No 2) (1984) 2 ACLC 497; Grove v Flavel (1986) 43 SASR 410; Kinsela v Russell Kinsela (Pty) Ltd (in liq) (1986) 10 ACLR 395; Jeffree v National Companies and Securities Commission (1989) 15 ACLR 217, 7 ACLC 556.

[213]Re Day-Nite Carriers Ltd (in liq) (1975) 1 NZLR 172; Re Avon Chambers Ltd (1978) 2 NZLR 638; Nicholson v Permakraft (NZ) Ltd (1985) 1 NZLR 242.

[214]Winkworth v Edward Baron Development Co Ltd and Others [1986]1 WLR 1512 [1987] 1 All ER 114; West Mercia Safety Wear (in liq) v Dodd [1988] BCLC 250; Brady and Another v Brady and Another [1989] 1 AC 755, [1988] 2 All ER 617.

[215]O J S Fourie op cit note 206 28 - 36. It should be noted that the recognition of fiduciary duties between directors and creditors is rejected in some circles. See L S Sealy "Directors' Duties - An Unnecessary Gloss" (1988) Cambridge L J 175 at 177; L S Sealy op cit note 207 176 et seq, 186 and 187-88.

into account encompasses problems and unanswered questions [216]. In New Zealand, the Law Commission released a report [217] consciously attempting to codify the directors duties and advocating a radical solution to the problem [218]. The New Zealand Companies Bill although seeming to subvert the intentions of the Law Commission at both the conceptual and practical levels [219] stresses that directors will possibly be statutorily empowered to weigh up the interests of creditors together with those of the members of the company and that creditors will have *locus standi* to sue for breaches of the law as well as the company constitution [220]. The position in Australia was covered in the report of the Senate Standing Committee on Legal and Constitutional Affairs endorsing the continuing regulation of the area by equitable fiduciary duties developed in the case law and implicitly accepting the current trends in that law[221]. The Australian Law Reform Commission recommends yet another scheme, a new duty on directors to refrain from insolvent trading[222].

In the South African law there has thus far been no elucidation of any general duty on

---

[216]The uncertainty relates to : to whom the duty is owed; the nature, content and duration of the duty; the juridical grounds underlying such a duty; remedies whereby creditors can enforce the duty, as well as the problem of ratification by the shareholders. See Fourie op cit note 206 at 37-44.

[217]Law Commission Report No 9 Company Law Reform and Restatement(1989).

[218]Paras 214 - 222 stated that the contractual status of creditors should be emphasised, their only shield being a duty owed by management to the company to maintain solvency and standing to sue for breach of the company constitution or the Act.

[219]See D A Wishart "Models and Theories of Directors' Duties to Creditors" 1991 (14) New Zealand University LR 323 at 324.

[220]O J S Fourie op cit note 206 at 44 - 46.

[221]Senate Standing Committee on Legal and Constitutional Affairs Company Directors' Duties (AGPS, Canberra, 1989) paras 5.58, 5.61 - 5.62. D A Wishart op cit note 219 at 324.

[222]Law Reform Commission Report No 45, General Insolvency Inquiry (AGPS, Canberra, 1988) Ch 7. D A Wishart op cit note 219 at 325.

directors to take into account the interests of creditors[223] . Although there has been recognition that the interests of creditors are of paramount importance where the company is insolvent, [224] the recent Appellate Division case of Ex Parte De Villiers and Another N N O : In re Carbon Developments [225] may have put a damper on the expectation of a judicial pronouncement regarding a general duty towards creditors. Assuming that the company was liable to be wound up, the court had to decide whether its directors were acting unlawfully in allowing it to do business and to incur credit. Goldstone J A held that : [226]

> "... [T]he mere carrying on of business by its directors and incurring credit does not constitute an implied representation to those with whom they do business that the assets of their company exceed its liabilities : the implied representation is no more than that the company will be able to pay its debts when they fall due .... .
> The fact that the liabilities of a company exceed its assets does not necessarily mean that the incurring of further debts would constitute fraudulent or reckless conduct." [227]

---

[223]H S Cilliers op cit note 59 at 156-7. O J S Fourie op cit note 206 at 47.

[224]The Appellate Division recognised in an obiter dictum in Sammel v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) where Trollip J A said at 662 :

> "[In a take-over case where the transferor company is solvent] the court has regard only to the interests of the shareholders. Here because of the insolvency of Saaiplaas, the paramount consideration must be the rights, wishes and interests of the creditors and not of the shareholders."

[225]1993 (1) S A 493 (A).

[226]At 504 E - F. Corbett C J, Van Heerden JA, Nicholas A J A and Harms A J A concurring.

[227]The court approved and applied the dictum in R v Latib 1973 (3) S A 982 (A) at 984 G - H as well as the statement by Buckley J in an unreported judgment quoted in Palmer's Company Law 24th ed at 1463 :

> "In my judgment, there is nothing wrong in the fact that directors incur credit at a time when, to their knowledge, the company is not able to meet all its liabilities as they fall due. What is manifestly wrong is if directors allow a company to incur credit at a time when the business is being carried on in such circumstances that it is clear that the company will never be able to satisfy its creditors. However, there is nothing to say that directors who genuinely believe that the clouds will roll away and the sunshine of prosperity will shine upon them again and disperse the fog of their depression are not entitled to incur credit to help them to get over the bad time".

Before the insolvency stage, it is clear that the courts are, with the exception of an application made under section 424 of the Act[228] , powerless to give help to creditors[229] .

When a creditor is aware that a company, that is trading in insolvent circumstances and continuing to obtain further goods and services on credit, both the company and the directors could be charged with the common law crime of fraud[230] .

SECTION 424 OF THE COMPANIES ACT

To supplement a creditors common law remedies, the legislature introduced section 424(1) of the Act, which has been described as being "surely one of the most powerful instruments in the hands of creditors," [231] as well as being "an important and powerful weapon in combatting or at least detering, the abuse of limited liability as a vehicle of fraud." [232] Section 424(1) provides :

> "Where it appears, whether in the winding up or judicial management of a company, or otherwise, that any business of the company concerned was or is being carried on recklessly or with the intent to defraud creditors of the company or any other person, or for any fraudulent purpose, the court may, on application, declare that any person who was knowingly a party to the carrying on of the business in such

---

[228] Discussed below.

[229] O J S Fourie op cit note 206 at 48.

[230] Ex Parte Lebowa Development Corporation Ltd 1989 (3) S A 71 (T) at 106 G - I. See also H S Cilliers op cit note 59 at 523; s 332 of the Criminal Procedure Act 51 of 1977. Directors can also be held personally liable : Orkin Bros Ltd v Bell 1921 TPD 92.

[231] J J Du Plessis Maatskappyregtelike Grondslae van die Regsposisie van Direkteure en Besturende Direkteure (unpublished LLD thesis, University of the Orange Free State 1990) 126.

[232] F H I Cassim "Fraudulent or 'Reckless' Trading and Section 424 of the Companies Act" (1981)98 SALJ 162 at 163.

a manner be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct."

Section 424(3) states that every person who was knowingly a party to the conduct of the company's business in the manner set out in subsection (1) commits an offence, apart from any other criminal liability he has incurred[233] . The application of the section is not excluded because such person may otherwise be criminally liable in respect of the matters on the ground of which the declaration under subsection 1 is made[234] .

The ambit of section 424(1) is undoubtedly broad, conferring a wide discretion on the court to provide a meaningful remedy. Having regard to its object, namely to render liable persons who in effect have managed or are managing the business of the company recklessly or fraudulently, even if the company is not in the process of being wound up, its language should be given its full breadth [235].

Where an absolute controller has appropriated funds from the company, this civil remedy could be brought in conjunction with a charge of theft. In this context, in terms of subsection (1), a creditor could obtain an order declaring a director personally liable for some or all of the debts or liabilities of the company where the director was knowingly a party to the reckless or fraudulent carrying on of the business. Much

---

[233]M Havenga "Creditors, Directors and Personal Liability under Section 424 of the Companies Act" (1992) 4 S A Merc LJ 62 at 65. See also F H I Cassim idem.

[234]The delinquent may be criminally liable example for common law fraud or for an offence under s 249 (1), 250 (1) or 251 (1) or for an offence under s 425 read with the Insolvency Act. In the laying of any charge regard must however be had to the provisions of s 336 of the Criminal Procedure Act 51 of 1977. See P M Meskin (editor) Henochsberg on the Companies Act 4 ed (1985) 750. (hereafter Henochsberg).

[235]Gordon v Standard Merchant Bank Ltd 1984 (2) S A 519 (C) at 527.

uncertainty relates to the degree of fault required to constitute reckless or intent to defraud in the section. In Ex Parte Lebowa Developments Corporation Ltd [236], Stegmann J discussed the intention to defraud [237] and distinguished *dolus directus* and *dolus eventualis*. Intention to defraud takes the form of *dolus directus* "when the person making the misrepresentation is proved to be aware of its falsity and to intend that the representee should be deceived and should act on the induced misapprehension"[238]. On the other hand, the form of *dolus eventualis* is assumed "when one person makes a misrepresentation of fact to another whilst not knowing whether his representation is true or false, if the representor knows that his representation may be false and reconciles himself to the risk entailed in suggesting it to be true, to the potential or actual prejudice of that other or of anyone else." [239] Intention in the form of *dolus eventualis* is sufficient to constitute fraud[240]. Recklessness corresponds with the concept of *dolus eventualis*[241]. Stegmann J indicated in Lebowa that in the context of fraud, the term "recklessly" is used in its narrow sense, and that the subjective state of mind of the representor needs to be considered.

---

[236]1989 (3) S A 72 (T).

[237]The locus classicus in respect of fraudulent intent is the English decision of Derry v Peek (1889) 14 AC 337, where Lord Herschell said :

> "[F]raud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in its truth." (at 374).

[238]Op cit note 236 at 101 D - E.

[239]Idem at 101 E - F.

[240]S M Luiz and K E Van der Linde. "Trading in Insolvent Circumstances - Its Relevance to Sections 311 and 424 of the Companies Act" (1993) 5 S A Merc L J 230 at 236.

[241]Reckless is the third instance mentioned in Derry v Peek (supra note 237) See S M Luiz and K E Van der Linde idem at 234.

The term "recklessly" in the context of section 424 is used to refer to a serious departure from the objective standard of care expected from a reasonable man[242]. Being an objective test and not subjective, it suffices that the offence was committed "by reason of the appellants blind faith in his own ability to pull the company straight." [243] "The criteria will be in the scope of operations of the company ... the role, functions and powers of the director, the amount of the debt, the extent of the company's financial difficulties and the prospects, if any, of recovery and many other factors particular to the claim involved and the extent to which the director has departed from the standards of a reasonable man in regard thereto. No attempt at a closer definition of gross negligence is feasible or advisable." [244] In this broader sense, the term "recklessly" is used in contradistinction to "intent to defraud"[245] . Carrying on any business of the company recklessly means carrying it on by conduct which evinces a lack of genuine concern for its prosperity[248] , as recklessness connotes at least gross negligence[247] .

There is some controversy as to the matter of whether a single transaction, for example one massive fraud committed by the director can attract liability under the

---

[242]S M Luiz and K E Van der Linde idem at 234.

[243]Per Fagan J in S v Goertz 1980 (1) S A 269 (C) at 274 C.

[244]Margo J in Fisheries Development Corporation of S A Ltd v Jorgensen and Another; Fisheries Development Corporation of S A Ltd v A W J Investments (Pty) Ltd and Others 1980 (4) S A 156 (W) at 170.

[245]Lebowa supra note 236 at 111 C - D; Ozinsky N O v Lloyd and Others 1992 (3) S A 396 (C) at 413 A.

[248]Anderson v Dickson 1985 (1) S A 93 (N) at 110. In S v Harper 1981 (2) S A 638 (D) at 681 Milne J (as he then was) noted that conduct which constitutes a carrying on of the company's business with intent to defraud would almost invariably be reckless conduct where for any reason the intent to defraud is absent.

[247]See op cit note 244 at 170 D. In S v Parsons 1980 (2) S A 379 (D) the court held that the word 'knowingly' means 'with knowledge of the facts'. The word 'recklessly' applies to gross negligence without conscious disregard of the consequences.

section. In Gordon v Standard Merchant Bank[248] , De Kock J pointed out that the question is not whether the transaction constituted the carrying on of a business, the question is whether, having regard to the transaction, any business of the company was carried on, or is being carried on in any of the manners envisaged by section 424(1). Thus the misappropriation of company funds by a corporate controller, even if it amounted to one single transaction, would be covered by the section.

The enquiry in terms of the section is whether the delinquent was knowingly a party to the carrying on of the business, and therefore one who knew that the business was being carried on in any of the ways envisaged by the section, and either actively participated in, or merely acquiesced in that happening was knowingly a party thereto, within the meaning of subsection (1)[249] . The remedy is available in circumstances "other" than where the company is in the process of being wound up or under judicial management. The exact meaning of this is not clear, but it seems that it would certainly protect creditors adequately against the misuse or abuse of their powers by corporate controllers[250] . The intention of this section is not that the delinquent should be responsible to the company, so that payment by him would be to the company for the benefit of the creditors generally. Rather, the intention is that he is to be responsible for (himself obliged to pay) the debt or debts to which the declaration pertains and the court may make whatever direction it thinks proper for the purpose of giving effect to its declaration. An application under section 424(1) may be made by the Master, the liquidator, the judicial manager, or any creditor, member

---

[248]1984 (2) S A 519 (C) at 524 - 525, 528.

[249]Henochsberg op cit note 234 at 748.

[250]M Havenga op cit note 233 at 68.

or contributory of the company[251].

The declaration of the court may be made in relation to any debt or other liability (that is in addition to the debt or other liability) owed to the victim of the fraud or the recklessness. Thus the declaration may be made in relation to all the debts or other liabilities of the company, or made even where the company is able to pay its debts, in which case the declaration would have the effect, once obeyed, of benefiting the members. The court is also not limited to exercising its power only if the company has been or is being prejudiced. Henochsberg [252] points out that the court is able to penalise a delinquent whatever other consequences for the company, its members or its creditors his effecting payment pursuant to the declaration may have. In view of the above, Henochsberg submits that the purposes of section 424 are both compensatory and punitive. Despite the strong implications of the section, Luiz and Van der Linde [253] acknowledge that the application of the legal principles to the facts of particular cases is fraught with difficulties.

In conclusion, where a director has abstracted large amounts of company property, even with the unanimous assent of the shareholders, the common law remedy of fraud on the creditors or the provisions of sections 424 and 219 [254] provide sufficient relief in principle to protect the interests of creditors. It seems that a duty on directors,

---

[251]Where creditdors of a close corporation have been prejudiced by the appropriation of corporation funds by the controllers, s 64 of the Close Corporations Act 69 of 1984 contains similar provisions regarding the close corporation. See H S Cilliers, M L Benade, M J Oosthuizen, E M De la Rey Close Corporations : A Comprehensive Guide (1989) 51.

[252]Op cit note 234 at 748.

[253]Op cit note 240 at 236.

[254]Section 219 of the Companies Act 61 of 1973 provides for the disqualification of directors, officers and others by the Court.

similar to that in Australia, New Zealand and England, to take into account creditors interests during insolvent or potentially insolvent circumstances, is not necessary at this time in South Africa[255].

VI CONCLUSION

Disregarding the legal technicalities of whether persons in working or absolute control of a company are capable in law of stealing from that company, it is necessary to consider whether such conduct ought to be termed as theft. That those who control a company (even if they constitute the totality of its shareholding) are capable in law of stealing from that company is clear[256] . A paradoxical situation arises when those accused of stealing from a company are its sole shareholders, since the property they are charged with stealing, though not legally belonging to them, is vested in an entity which itself belongs to them.[257] The essence of theft is that someone is wrongfully deprived of his property. In the case of an absolutely controlled company, the only persons who suffer loss in the event of an appropriation of the funds, are the company's creditors, including the Receiver of Revenue, who will be directly deprived of taxes due to him if the controller extracts company funds after they have been accounted for in the company's books and declared, or deprived of taxes even if the controller extracts the funds before they have been accounted for in the company's books. Although it is not suggested that the creditors have any proprietary interest which can be stolen, recent developments regarding the principle of fraud upon the creditors in England, Australia and New Zealand suggest that they,

---

[255]O J S Fourie op cit note 206 at 50.

[256]S v De Jager supra note 2; Attorney-General's Reference (No 2 of 1982) supra note 23; R v Philippou supra note 53.

[257]J C Smith "Roffel Case Comment" (1985) 9 Crim L J 320.

together with the company itself, might be properly regarded as victims of the offence. No wrong will be done to the shareholders because in an absolutely controlled company, the shareholders are also the alleged thieves.

It may be asked whether a conviction on a charge of theft is the correct deterrent. From one perspective, the conviction of an absolute controller appears resolute. The punishment given by the court is essentially a discretionary matter, there being no standard sentences for theft charges. Although there is no mathematical relationship between the value of the property stolen and the punishment imposed, the court will take into account the moral blameworthiness of the offender and the subjective factors peculiar to the accused[258] . Although in the case of an absolute controller appropriating company funds, the deterrent effect of a heavy sentence will be substantial, justice might be better served were the offender to lose his limited liability and make good his abstractions. From another perspective, there is no fundamental difference between a controller who breaks into the company's offices at night and steals from the company safe, and a controller who, by virtue of his control over the company, compels it to consent to its being despoiled. For the former offence a criminal conviction would be commonplace, therefore surely in the latter instance a conviction is also justified. If not convicted, it would amount to the controller "having his cake and eating it." [259] Holmes J A [as he then was] in De Jager stated :

> "The appellants contention is an attempt to have it both ways. On the one hand he would retain the advantage of limited liability as a shareholder. On the other hand he would seek to absolve himself from the fiduciary duty which a director owes to

---

[258]P M A Hunt op cit note 42 at 652.

[259]G Virgo op cit note 25 at 486.

> the company, helping himself to its assets via its supposed consent to which he was a party ... . To combine in substance the common law advantages of individual ownership with the statutory benefits of limited liability without regard to fiduciary duties as a director - this would not be company law at all." [260]

Although a criminal conviction of theft coupled together with a declaration in terms of section 424(1) of the Act providing for the personal liability of the delinquent directors seems enviable, the effective application of civil law remedies and criminal sanctions to the transgessions of corporate controllers is likely to remain problematic. [261] Corporate controllers may be involved in obvious thefts unattended by any evidential difficulties. These will normally occur in closely controlled companies and involve drawings from the company clearly unconnected with its authorised business objectives. On the other hand, provided the company is in a state of solvency, those at the heart of the company's affairs can reward themselves on a scale transcending liberality with considerable impunity[262] . Schemes which in essence involve the abstraction of company money, may take on the guise of ordinary transactions. In certain instances, schemes which involve nothing more than the straightforward channeling of company money into the bank account of the controller may be obscured in evidential terms by a plethora of nominee companies involved in circular transactions[263].

---

[260] Supra note 2 at 625.

[261] "A powerful chairman and managing director, with a board of directors which is not able or willing to play an inquisitorial role into his transactions and expenditure, has immense scope for diverting company money to his own use over a long period of time" : Investigation into the Affairs of the Peachey Property Corporation Ltd, HMSO (1979), para 227 from G R Sullivan "Company Controllers, Company Cheques and Theft" [1983] Crim L R 512 at 522.

[262] G R Sullivan idem at 522.

[263] Look for example at the facts of Wallersteiner v Moir [1974] 1 WLR 991.

There is also another form of "disguised theft". If payments are claimed, for example, as directors' remuneration, despite the fact that remunerating directors is clearly a matter reasonably incidental to the running of a business, one could draw the conclusion that an appropriation of property belonging to another has occurred[264]. Excessively generous remuneration is prejudicial to the interests of minority shareholders (in majority controlled companies), may be harmful to employees of the company, and also to creditors where the company is insolvent or in danger of becoming so. However, the courts will not usually interfere with the amount of remuneration to be paid to directors citing this as a matter of internal management. Therefore in most of the cases of dispute, the courts have evaluated the entitlement to the remuneration[265] . The prime reason why the courts steer clear of the task of supervising the level of payments to directors is the absence of an objective means of measuring a directors worth to the company. With the exception of small companies, it is virtually impossible to calculate the value of directors' services. The varying talents of directors and the different demands made by their positions determine only a vague market value. What amounts to directors remuneration beyond their justifiable reward must be based on the standard of reasonableness. To come within "reasonable remuneration", the amount awarded must be in proportion to the director's ability, services and time devoted to the company. Other relevant factors include the responsibilities assumed, difficulties involved, success achieved,

---

[264]In Re Halt Garage [1982] 3 All ER 1016 Oliver J ruled that the mere fact that "directors remuneration" was attached to the payments did not preclude a court from examining their true nature. If the payments were in substance gratuitous distributions out of capital and not a reward for services rendered, they fell outside the scope of a provision empowering the payment of remuneration and were beyond ratification even by unanimous vote of the shareholders.

[265]The reason for the paucity of reported decisions challenging directors' remuneration is not hard to find. Apparently the market for top executives is a highly specialised one and there is no ready yard-stick by which to measure the worth of an executive : Rogers v Hill 289 US 582 (1933). See generally Z Adenwala "Directors' Generous Remuneration : to be or not to be paid?" (1991) 3 Bond L R 25.

corporation earnings, profits and prosperity[266] . These issues together with the courts long standing tendency to regard such matters as an internal concern of the shareholders, means that very few cases exist in which the courts have looked at the level of remuneration. In the absence of evidence of actual intention, it is therefore difficult to distinguish between remuneration which is merely generous, and payments which are of such an unreasonable amount, that they constitute a gift. Thus the remuneration of directors is a contentious issue, generally not determined in a manner which relates to effort and performance, and may amount to a "disguised theft".

****

In the final instance, it is necessary to answer directly the question as to whether, as a matter of law, absolute controllers should be convicted of the common law crime of theft. It is submitted that there are three different scenarios. [267]

(1) Where a defendant has only majority or working control, regardless of the solvency of the company, where corporate property is abstracted, this is clearly theft. Victims would include creditors and minority shareholders and it would be relatively simple to show intent to steal in the form of *dolus eventualis*.

(2) Where the defendant is an absolute controller of a company which has become insolvent as a direct or indirect result of his abstractions. Here clearly he should be convicted of theft. Most instances of theft by an absolute controller

---

[266]Z Adenwala idem at 30.

[267]G Virgo op cit note 25 at 488.

would fit into this category as large abstractions will often endanger the solvency of the company. In this regard, the cases of Roffel and Craig are, in the writer's submission, incorrect to the extent that they state that an absolute controller cannot be guilty of theft[268] , and serve only to add fuel to the arguments of those persons critical of certain parts of the law in its treatment of company directors[269].

(3) The situation where the defendant is an absolute controller of a company which remains solvent despite his appropriations of company funds. Here the defendant probably could be convicted of theft. If the abstractions are small, they probably would not endanger the solvency of the company and prosecution would be unlikely because there is no obvious victim. Where the abstractions are large, a conviction of theft would be more likely if it could be shown that capital has been abstracted. Where third parties have been affected by the abstraction and there is clear evidence of an intention to steal, in principle it is justified to convict. This would be a situation where both Moses and the man in the street [270] would support a conviction for theft.

In answering the above question, one should assess whether it is expedient to draw a distinction between circumstances where the company is solvent or insolvent. The primary function of the criminal law is to deter undesirable conduct[271]. The pillaging of companies

---

[268] Idem.

[269] R Baxt "Stealing from One's Own Company" (1993) 67 Australian L J 696 at 697.

[270] Attorney-General's Reference (No 1 of 1985) 41 SASR 147, 153 (Prior J).

[271] "Why are certain kinds of actions forbidden by law and so made crimes or offences? The answer is : to announce to society that these actions are not to be done, and to secure that fewer of them are done." H L A Hart Punishment and Responsibility - Essays in the Philosophy of Law (1986) 6.

by those who control them is now all too common.

In the final analysis, it is submitted that it would offend both common sense and justice to hold that the very control which enables such people to extract the company's assets constitutes a defence to a charge of theft from the company. In each case the question must be whether the abstraction of the property from the company was performed with the required intent, not whether the alleged thief has consented to his own wrongdoing. Despite the impact of the appropriation of company funds on creditors, where an absolute controller steals from the company, he may think that "when it comes down to it, it's all up to us" [272] within the corporation. This abuse of the corporate structure, making the separate personality of the company appear and disappear as would a genie, must be deterred, and where necessary punished.

[272]A Ayckbourn A Small Family Business (1981), G Virgo op cit note 25 at 464, 489.

TABLE OF SOUTH AFRICAN CASES

A-G (Tvl) v Martens 1960 (1) S A 120 (A)

Amalgamated Society of Woodworkers of S A v Die (1963) Ambagsaalvereniging 1967 (1) S A 586 (T)

Anderson v Dickson 1985 (1) S A 93 (N)

Dadoo v Krugersdorp Municipal Council 1920 AD 530

De Villiers and another N N O : In re Carbon Developments, ex parte 1993 (1) S A 493 (A)

Dublin v Diner 1964 (1) S A 799 (D)

Estate Salzmann v Van Rooyen 1944 OPD 1

Fisheries Development Corporation of S A Ltd v A W J Investments (Pty) Ltd and others; Fisheries Development Corporation of S A Ltd v Jorgenson and another 1980 (4) S A 156 (W)

Gohlke and Schneider v Westies Minerale 1970 (2) S A 685 (A)

Goodall v Hoogendoorn 1926 AD 11

Gordon v Standard Merchant Bank 1984 (2) S A 519 (C)

Gumede v Bandhla Vukani Bakithi Ltd 1950 (4) S A 560 (N)

Lategan N O v Boyes 1980 (4) S A 191 (T)

Lebowa Development Corporation Ltd, ex parte 1989 (3) S A 72 (T)

Marrock Plase (Pty) Ltd v Advance Seed Co (Pty) Ltd 1975 (3) S A 403 (A)

Orkin Bros Ltd v Bell 1921 TPD 92

Ozinsky N O v Lloyd and Others 1992 (3) S A 396 (C)

R v Brand 1960 (3) S A 637 (A)

R v Harlow 1955 (3) S A 259 (T)

R v Latib 1973 (3) S A 982 (A)

R v Herholdt 1957 (3) S A 236 (A)

R v Jona 1961 (2) S A 301 (W)

R v Milne and Erleigh (7) 1951 (1) S A 791 (A)

R v Mkwanazi 1960 (2) S A 248 (N)

R v Sibiya 1955 (4) S A 247 (A)

R v Von Elling 1945 AD 234

R v Viljoen 1939 OPD 52

Sammel v President Brand Gold Mining Co Ltd 1969 (3) S A 629 (A)

S v Albasini 1967 (4) S A 605 (RA)

S v De Jager 1965 (2) S A 616 (A)

S v Goertz 1980 (1) S A 269 (C)

S v Harper 1981 (2) S A 638 (D)

S v Kotze 1965 (1) S A 118 (A)

S v Luther 1962 (3) S A 506 (A)

S v Parsons 1980 (2) S A 379 (D)

S v Van Coller 1970 (1) S A 417 (A)

TABLE OF AMERICAN CASES

Clarkson (1987) 25 A Crim R 277

Clarkson and Lyon (1986) 24 A Crim R 54

Maher (1986) 23 FLR 332

Rogers v Hill 289 US 582 (1933)

Standard Oil Co of Texas v U S 307 F 2 d 120 (5th Cir 1962)

TABLE OF AUSTRALIAN CASES

Commonwealth, The v O'Reilly, re 67 Budd Street (Pty) Ltd (1984) 2 ACLC 190

Grove v Flavel (1986) 43 SASR 410

Hurley v BGH Nominees (Pty) Ltd (No 2) (1984) 2 ACLC 497

Jeffree v National Companies and Securities Commission (1989) 15 ACLR 217, 7 ACLC 556

Kinsela v Russell Kinsela (Pty) Ltd (in liq) (1986) 10 ACLR 395

R v Roffel (1985) 3 ACLC 339 (SC Vic)

Ring v Sutton (1980) 5 ACLR 546

Walker v Wimborne and Others (1976) 50 ALJR 446; (1976) 137 CLR 1

TABLE OF CANADIAN CASES

Canadian Dredge and Dock Co Ltd v The Queen (1985) 19 SCC (3d) 1 (SC Canada)

TABLE OF ENGLISH CASES

Acc Re (1982) 3 Co Law 196

Adams v Cape Industries plc [1990] Ch 433

Attorney-General for the Dominion of Canada v The Standard Trust Company of New York [1911] AC 498

Attorney-General of Hong Kong v Nai Keung (1988) 86 Cr App R 174

Attorney-General's Reference (No 2 of 1982) [1984] QB 624, C A; [1984] 2 WLR 447; [1984] 2 All ER 216; (1984) 78 Cr App R 131; [1985] Crim L R 241

Attorney-General's Reference (No 1 of 1985) 41 SASR 147

Bailey, Haye and Co, In re [1971] 1 WLR 1357; [1971] 3 All ER 693

Belmont Finance Corp v Williams Furniture Ltd [1979] 1 All ER 118, [1979] Ch 250

Brady and Another v Brady and Another [1989] 1 AC 755, [1988] 2 All ER 617

Chief Metropolitan Magistrate, ex parte Gov of Singapore (1980) 70 Cr App R 77

Cleadon Trust Ltd, In re [1939] Ch 286; [1938] 4 All ER 518 (CA)

Derry v Peek (1889) 14 AC 337

Dobson v General Accident Fire and Life Assurance Co plc [1989] 3 All ER 927

DPP v Kent & Sussex Contractors Ltd [1944] KB 146

Duomatic Ltd, In re [1969] 2 Ch 365

Exchange Banking Co, re [1882] Ch D 519

George Newman & Co, In re [1895] 1 Ch 674

Halt Garage (1964) Ltd, In re [1982] 3 All ER 1016 (Ch)

H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd [1957] 1 QB 159

Houghton and Co v Nothard, Lowe and Wills Ltd [1928] AC 1

Horsley & Weight Ltd, In re [1982] Ch 442; [1982] 3 WLR 431; [1982] 3 All ER 1045 (CA)

H R Harmer Ltd, In re [1959] 1 WLR 62; [1958] 3 All ER 689

Hutton v West Cork Railway Co [1883] 23 Ch 654 (CA)

International Sales and Agencies Ltd v Marcus [1982] 3 All ER 551

Investigation into the Affairs of Court Line Ltd, HMSO (1982)

Investigation into the Affairs of Lonrho Ltd, HMSO (1976)

Investigation into the Affairs of Peachey Property Corporation Ltd, HMSO (1979)

Investigation into the Affairs of Pergamon Press Ltd, HMSO (1973)

Lady Gwendolen, The [1965] 1 Lloyd's Rep 335, [1965] 2 All ER 283 (CA)

Lawrence v Metropolitan Police Commissioner [1971] 2 All ER 1253, [1972] AC 626

Lee Behrens & Co Ltd, In re [1932] 2 Ch 46

Lennards Carrying Company v Asiatic Petroleum Co Ltd [1915] AC 705

Macaura v Northern Assurance [1925] AC 619

Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd [1983] 2 All ER 563 (CA)

Parke v Daily News [1962] Ch 927, [1962] 3 WLR 566, [1962] 2 All ER 929

Parker and Cooper Ltd v Reading [1926] Ch 975

R v Ghosh [1982] QB 1053

R v Gomez [1991] 3 All ER 394, [1991] 1 WLR 1334, 93 Cr App R 156, CA; [1993] 1 All ER 1

R v Kohn (1979) 69 Cr App R 395

R v Mainwaring (1981) 74 Cr App R 99

R v McHugh and Tringham (1988) 88 Cr App R 385, CA

R v Morris [1983] QB 587, [1983] 2 All ER 448, [1983] Crim LR 559, CA; [1983] 3 All ER 288, [1983] 3 WLR 697, [1983] Crim LR 813, HL

R v Philippou (1989) 89 Cr App R 290, CA

Rayner JH (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 433

Re Acc (1982) 3 Co Law 196

Salomon v A Salomon & Co [1897] AC 22 HL

Smith, Stone and Knights Ltd v City of Birmingham [1939] 4 All ER 116 (KB)

Tesco Supermarkets Ltd v Nattrass [1971] 2 All ER 127, [1972] AC 153, [1971]

2 WLR 1166, HL

Wallersteiner v Moir [1974] 1 WLR 991

West Mercia Safety Wear (in liq) v Dodd [1988] B C L C 250

Winkworth v Edward Baron Development Co Ltd and Others [1986] 1 WLR 1512,[1987] 1 All ER 114

Woolfson v Strathclyde Regional Council (1979) 38 P & C R 521

TABLE OF NEW ZEALAND CASES

Craig v Minister of Police (1983) BCR 141

Nicholson v Permakraft (NZ) Ltd [1985] 1 NZLR 242

Nordik Industries Ltd v Regional Controller of Inland Revenue [1976] 1 NZLR 194

Re Avon Chambers Ltd [1978] 2 NZLR 638

Re Day-Nite Carriers Ltd (in liq) [1975] 1 NZLR 172

TABLE OF STATUTES REFERRED TO

Close Corporations Act 69 of 1984

Companies Act 61 of 1973

Public Accountants' and Auditors' Act 80 of 1991

Australian law : Crimes Act 1958 (Vic)

English law : Theft Act 1968

New Zealand law : Crimes Act 1961

New Zealand law : Summary Proceedings Act 1957

BIBLIOGRAPHY

Adenwala, Z "Directors' Generous Remuneration : to be or not to be paid?" (1991) 3 Bond L R 25

Ayckbourn, A A Small Family Business (1981)

Baxt, R "Stealing from One's Own Company" (1993) 67 Australian L J 696

Bayne, D C "A Philosophy of Corporate Control" (1963) 112 University of Pensylivania L R 22

Benade, M L "Exit Ultra Vires" (1972) 35 THRHR 281

Berle, A A " 'Control' in Corporate Law" (1958) 58 Columbia L R 1212

Beuthin, R C "Theft by a Director" (1965) 82 SALJ 479

Beuthin, R C "Corporate Opportunities and the No-profit Rule" (1978) 95 SALJ 458

Blackman, M S "The Capacity, Powers and Purposes of Companies : The Commission and the New Companies Act" (1975) 8 CILSA 1

Blackman, M S "Directors' Duty to Exercise their Powers for an Authorised Business Purpose" (1990) 2 S A Merc L J 1

Cassim, F H I "Fraudulent or 'Reckless' Trading and Section 424 of the Companies Act" (1981)98 SALJ 162

Cilliers, H S, Benade, M L, Henning, J J, Du Plessis, J J and Delport, P A Corporate Law 2nd edition 1992

Cilliers, H S, Benade, M L, Oosthuizen, M J, De la Rey, E M Close Corporations : A Comprehensive Guide (1989)

Du Plessis, J J Maatskappyregtelike Grondslae van die Regsposisie van Direkteure en Besturende Direkteure (unpublished LLD thesis, University of the Orange Free State 1990)

Fourie, J S A "Die Wisselwerking tussen Suid-Afrikaanse Maatskappyeregleerstukke" (1988) 51 THRHR 218

Fourie, O J S "Die Plig van Direkteure Teenoor Maatskappyskuldeisers" (1992) 4 S A Merc L J 25

Fredman, M G "A Note on Section 36 of the Companies Act" (1982) 99 SALJ 283

Gerson, J "Corporate Control - the Pivotal Role of the Proprietor" (1992) 2 Optima 38

Gower, L C B, Prentice, D D, Pettet, B G Gower's Principles of Modern Company Law 5th edition 1992

Hart, H L A Punishment and Responsibility - Essays in the Philosophy of Law (1986)

Havenga, M "Creditors, Directors and Personal Liability under Section 424 of the Companies Act" (1992) 4 S A Merc LJ 62

Hawke, N "Creditors' Interests in Solvent and Insolvent Companies" (1989) Journal of Business Law 54

Hunt, P M A, Milton, J R L South African Criminal Law and Procedure Volume II Common-Law Crimes 2nd edition 1982

Kahn-Freund, O "Some Reflections on Company Law Reform" (1943) 7 MLR 54

Law Reform Commission Report No 45, General Insolvency Inquiry (AGPS, Canberra, 1988) Ch 7

Law Commission Report No 9 Company Law Reform and Restatement(1989)

Leigh, L H "The Criminal Liability of Corporations and other Groups" (1977) 9 Ottawa L R 247

Leigh, L H "The Alter Ego of a Company" (1965) 28 MLR 584

Leigh, L H "Some Remarks on Appropriation in the Law of Theft after Morris" (1985) 48 MLR 167

Luiz, S M and Van der Linde, K E "Trading in Insolvent Circumstances - Its Relevance to Sections 311 and 424 of the Companies Act" (1993) 5 S A Merc L J 230

McLennan, J S "The Ultra Vires Rule and the Turquand Rule" (1979) 96 SALJ 392

Meskin, P M (editor) Henochsberg on the Companies Act 4th edition 1985

Naudé, S J "Company Contracts : The Effect of Section 36 of the New Act" (1982) 99 SALJ 315

Oelofse, A N "Artikel 36 van die Maatskappywet versus Artikel 15A van die Akteswet" (1979) 42 THRHR 100

Oosthuizen, M J "Aanpassing van die Verteenwoordigingsreg in Maatskappyerband" 1979 TSAR 1

Pennington, R R Company Law 5th edition 1985

Pretorius, J T (editor), Delport, P A, Havenga, M, Vermaas, M Hahlo's South African Company Law through the Cases : A Source Book 5th edition 1991

Riley, C A "Directors' Duties and the Interests of Creditors" (1989) 10 Co Law 87

Sealy, L S "Directors' Duties - An Unnecessary Gloss" (1988) Cambridge L J 175

Sealy, L S "Directors' 'Wider' Responsibilities - Problems Conceptual, Practical and Procedural" (1987) 13 Monash University LR 164

Senate Standing Committee on Legal and Constitutional Affairs Company Directors' Duties (AGPS, Canberra, 1989) paras 5.58, 5.61 - 5.62

Smith, J C, Hogan, B Criminal Law 7th edition 1992

Smith, J C "Roffel Case Comment" (1985) 9 Crim L J 320

Snyman, C R Criminal Law 2nd edition 1991

Sullivan, G R "Company Controllers, Company Cheques and Theft" [1983] Crim L R 512

Virgo, G "Stealing from the Small Family Business" [1991] Cambridge L J 464

Von Nessen, P "Company Controllers, Company Cheques and Theft - An Australian Perspective" [1986] Crim LR 154

Von Nessen, P "My Body, Myself: Problems of Identity in Corporate Crime" [1985] Company and Securities L J 235

Whincup, M " 'Inequitable Incorporation' - the Abuse of a Privilege" (1981) 2 Co Law 158

Williams, G "Theft by Company Controllers - A New Zealand view" (1989) 38 International and Comparative Law Quarterly 913

Wishart, D A "Models and Theories of Directors' Duties to Creditors" (1991) 14 New Zealand University LR 323