money without any limit. This would have been a surprising power for a mere consultant but would be understandable in the case of a director of a family company.

31 There is no evidence before the Court of any delegation of powers by the sole director, R1, to R2, as one might expect if R2 was involved in the running of the company's affairs otherwise than as director. R2 was also unpaid, which would be very odd for a consultant. There is of course no evidence of any appointment as a consultant.

32 As far as the evidence before the Court goes, R2 did most things that one might expect a director to do in the circumstances in relation to the affairs of the company, and in particular, after the sale of the Company's property, dealt with:

- The resulting VAT issue, and in particular, the claim to repayment of the purchaser of the property, whom R2 successfully fobbed off;
- Withdrawing the Company's monies, in fact for the benefit of himself and/or his family and/or his family company.

'Persons connected with a director': s 252

A person is 'connected with' a director for the purposes, at least, of Pt 10 of the Act and much of the insolvency legislation, in the circumstances laid down by CA 2006 s 252. The people connected with a director are (defined exclusively): members of the director's family, other companies with which the director is 'connected' (ie in which he has, with his 'connected persons', at least a 20% stake), any trustee of a family trust and any partners.

It is important to bear in mind that statutory rules may affect these people as well as the directors. The statutory provisions do not, of course, affect matters at common law (but then the common law has some healthy rules of its own to cope with problems of this sort: see, eg, *Gilford Motor Co Ltd v Horne* **[2.17]** and *Selangor United Rubber Estates Ltd v Cradock* **[10.11]**, although note the following case).

Employees do not, as such, owe fiduciary duties to their employers, although such duties may sometimes be found on the facts. This rule can be crucial in considering the role of senior managers in a company.

[7.04] Ranson v Customer Systems plc [2012] EWCA Civ 841 (Court of Appeal)

An employee started a competing business. His previous employer (CS) alleged breach of fiduciary duties. The trial judge found that Ranson had breached his duties when he failed to inform CS of an opportunity obtained for his own company; when he canvassed for work in competition with CS while still a CS employee; and when he copied details of CS's business contacts, invoices, time sheets and order confirmations for use by his own company. The Court of Appeal (PILL, LLOYD and LEWISON LJJ) disagreed, and allowed the appeal.

LEWISON LJ:

20 It is, at the outset, necessary to distinguish between directors of a company and employees of a company. …

21 The appointment of a person as a company director does not make that person an employee of the company. A director is the holder of an office. Nor does appointment as a company director of itself bring into existence any contract between the director and the company. Many directors will have contracts of service running in parallel with their status as officers of the company. But they are distinct legal relationships.

(p. 319) 22 Whereas a company director will stand in a fiduciary relationship to the company, an employee will not, merely by reason of his role as an employee, assume fiduciary obligations to his employer.

23 In addition as Lord Browne-Wilkinson pointed out in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC

145, 206:

> 'The phrase "fiduciary duties" is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. That is not the case.'

24 Since fiduciary obligations are not 'one size fits all' it is, in my judgment, dangerous to reason by analogy from cases about company directors to cases about employees. The former cases (obviously enough) proceed on the basis that the director, while in office, owes a wide-ranging and single minded duty of loyalty to the company. In the case of a company director there is no question but that the director owes fiduciary duties to the company. The cases explore the extent to which, consistently with those duties, a director may prepare for business life after the end of his directorship. But in the case of an employee there is an anterior question: does the employee owe fiduciary (as opposed to contractual) duties at all? …

59 In his analysis of the law the judge directed himself by reference to a number of cases dealing with breaches of fiduciary duties by company directors. In my judgment this was an approach liable to lead to confusion. Thus in paragraph 76 of his judgment the judge said that 'Mr Ranson's position is here not materially distinct from that of the director defendant in Towers.' But in my judgment there was a highly material difference: Mr Ranson was not a director; he was only an employee.

60 In addition, in his analysis of the law the judge did not refer to the terms of Mr Ranson's contract of employment. In paragraph 77 of his judgment the judge said that he was 'satisfied that the situation with Mr Clothier was one in which fiduciary duties arose'. Mr Stafford submitted that the judge had, in effect, approached the question from the wrong end. He had started with the facts; finding inferentially that Mr Ranson was in a position where there was a conflict between his interests and those of CS, and had reasoned backwards to find from that conflict the existence of a fiduciary duty on the part of Mr Ranson. Having decided that fiduciary duties arose as a result of 'the situation with Mr Clothier' the judge reasoned that Mr Ranson was 'thereby in breach of his contractual duty of loyalty'. There is undoubted force in these submissions.

61 In my judgment, therefore, the judge's analysis got off on the wrong foot.

PILL and LLOYD LJJ concurred.

Directors' duties are owed to the company

The statement that directors' duties 'are owed by a director of a company to the company' (s 170(1)) may seem unnecessary. But the notion reflects a debate that has raged for over a century in one form or another. Historically, the argument centred on the meaning in this context of the term 'the company' (or 'the company as a whole', as it was sometimes put), so the debate may well continue, despite s 170, unless s 172 (the duty to promote the success of the company) has put matters to rest.

What lies at the heart of these debates? In relation to shareholders' or members' decisions, where similar expressions are used requiring shareholders to act in the interests of 'the company', there are *obiter dicta* equating the phrase with 'the shareholders, collectively' or 'the shareholders, present and future' (see 'Alteration of the articles', pp 219ff). This interpretation may be justifiable simply because, in most of these cases, the decision is one that primarily, if not exclusively, affects the shareholders' or members' rights and interests *inter se*. The question is more difficult with directors' decisions.

(p. 320) Until fairly recently, it would not have occurred to anyone to doubt that in this context, too, 'the company' meant 'the shareholders collectively' or 'the shareholders present and future', for no other interest group was recognised as having any stake in the corporate enterprise. So, for example, in cases like *Hutton v West Cork Rly Co*and *Parke v Daily News Ltd* ('Corporate gifts', pp 134ff), generosity to employees was held to be lawful only if it could be justified by reference to the long-term interests of the shareholders.

But for the past 20 years or more this view has been under attack as being increasingly out of keeping with contemporary values. It is now widely accepted that the claims of other interest groups—commonly referred to as 'stakeholders'—such as the company's workforce and its customers and suppliers, may deserve recognition as much as those of the passive investors in the enterprise. Then there are those who would go even further, and require the 'responsible company' (and its directors) to have regard to wider considerations, such as the community, the environment, charitable and other good causes and even the national interest.

The law does, of course, meet some of these demands by specific legislation: employment laws, insolvency laws, environmental laws, and so on. But company law has responded reluctantly and tentatively to the pressure for change. The few statutory provisions added to the 1985 Act were open to criticism as being merely symbolic (CA 1985 s 309—duty to have regard to the interests of employees, but giving employees no right of action), or permissive rather than obligatory (CA 1985 s 719—power to provide for company employees on cessation or transfer of the company's business); and a favourite ploy was simply to require publicity to be given to the company's policy or practice in a particular matter (eg employment of the disabled) by a statement in the directors' annual report to the shareholders (CA 1985 Sch 7). The judges, too, have largely been content to utter moralising or hortatory *obiter dicta* without making any serious attempt to frame new rules of law. On the other hand, it is probably true that there are limits to what company law, as such, can or ought to do in this difficult area. For instance, if directors were expected to have regard to the (often conflicting) claims of many different stakeholders their decisions would, in effect, be unreviewable by any judicial or other process.[11]

The terms of reference for the CLR's work included an instruction to consider how company law could be framed so as to 'protect, through regulation where necessary, the interests of those involved with the enterprise, including shareholders, creditors and employees'. This question (referred to as the 'scope' issue) was considered at some length, primarily in the context of directors' duties. The issue pitted wide-ranging *pro-stakeholder* approaches against narrower *pro-shareholder* approaches. The '*pluralists*', in the former camp, contended that a statement of directors' duties should oblige directors to have regard to the interests of all 'stakeholders' in the enterprise (and even, where appropriate, prioritise the interests of some stakeholders ahead of those of the shareholders). The other camp favoured retention of a shareholder-oriented approach, but conceded that this might be framed in an 'inclusive' way, so that, in assessing what might be likely to promote success of the company for the members' benefit, directors should take into account the interests of stakeholders (and wider interests, such as the environment) insofar as they believed, in good faith, that these factors were relevant. (The CLR called this approach '*enlightened shareholder value*'.) The conclusion **(p. 321)** of the CLR was that the 'inclusive' pro-shareholder approach is to be preferred, not least because the 'pluralist' alternative would pose difficulties in formulation of principles and their enforcement.[12]

CA 2006 s 172, imposing on directors a duty to promote the success of the company, adopts the enlightened shareholder value approach.

Directors' duties are rarely owed to individuals within or associated with the company

The corollary of what has just been said, is that directors do *not* generally owe their duties to anyone other than the company.[13] Nevertheless, that has not prevented shareholders, employees, creditors and other third parties from attempting to sue directors, claiming remedies for the wrongs allegedly committed by directors against them personally.[14] These claimants would often (but not always) have no trouble establishing a legitimate claim against the company, but if the company is insolvent, then directors with deep pockets become attractive targets.

Directors do not normally owe fiduciary duties to individual members or shareholders.

[7.05] Percival v Wright [1902] 2 Ch 421 (Chancery Division)

The plaintiffs offered to sell their shares, and the defendants (the chairman and two other directors) agreed to buy them at £12.50 per share. After completion of the transfers, the plaintiffs discovered that at the time the board had been negotiating with an outsider for the sale to him of the company's whole undertaking at a price which represented well over £12.50 per share, but this information had not been disclosed to the plaintiffs. In fact, the takeover negotiations ultimately proved abortive. The plaintiffs claimed that the directors stood in a fiduciary relationship towards them as shareholders, and sought to avoid the transfers on the grounds of non-disclosure; but the court held that there was no fiduciary relationship between directors and the shareholders individually.

> SWINFEN EADY J: The position of the directors of a company has often been considered and explained by many eminent equity judges. [His Lordship discussed a number of cases dealing with directors' duties to their company, and continued:]
>
> The plaintiff's contention in the present case goes far beyond this. It is urged that the directors hold a fiduciary position as trustees for the individual shareholders, and that, where negotiations for sale of the undertaking are on foot, they are in the position of trustees for sale. The plaintiffs admitted that this fiduciary position did not stand in the way of any dealing between a director and a shareholder before the question of sale of the undertaking had arisen, but contended that as **(p. 322)** soon as that question arose the position was altered. No authority was cited for that proposition, and I am unable to adopt the view that any line should be drawn at that point. It is contended that a shareholder knows that the directors are managing the business of the company in the ordinary course of management, and impliedly releases them from any obligation to disclose any information so acquired. That is to say, a director purchasing shares need not disclose a large casual profit, the discovery of a new vein, or the prospect of a good dividend in the immediate future, and similarly a director selling shares need not disclose losses, these being merely incidents in the ordinary course of management. But it is urged that, as soon as negotiations for the sale of the undertaking are on foot, the position is altered. Why? The true rule is that a shareholder is fixed with knowledge of all the directors' powers, and has no more reason to assume that they are not negotiating a sale of the undertaking than to assume that they are not exercising any other power. It was strenuously urged that, though incorporation affected the relations of the shareholders to the external world, the company thereby becoming a distinct entity, the position of the shareholders inter se was not affected, and was the same as that of partners or shareholders in an unincorporated company. I am unable to adopt that view. I am therefore of opinion that the purchasing directors were under no obligation to disclose to their vendor shareholders the negotiations which ultimately proved abortive. The contrary view would place directors in a most invidious position, as they could not buy or sell shares without disclosing negotiations, a premature disclosure of which might well be against the best interests of the company. I am of opinion that directors are not in that position.
>
> There is no question of unfair dealing in this case. The directors did not approach the shareholders with the view of obtaining their shares. The shareholders approached the directors, and named the price at which they were desirous of selling. The plaintiffs' case wholly fails, and must be dismissed with costs.

Also see *Peskin v Anderson* [2001] 1 BCLC 372, CA.

➢ Notes

1. Directors are subject to 'insider dealing' rules, see 'Insider dealing', p 729. As the rules then stood, this transaction would not have been caught, since the shareholders made the offer to sell at a nominated price and the directors merely accepted. Would modern 'insider dealing' rules change the outcome? Should they?

2. Although fiduciary duties are rarely owed to shareholders, and therefore shareholders cannot bring a personal claim[15] against a director *for* breach of fiduciary duty, it should be noted that 'non-compliance by shareholders *cum* directors with their duties will generally indicate that unfair prejudice has occurred': *Maidment v Attwood*[2012] EWCA Civ 998 at [22], CA; and may also constitute a breach of the statutory contract (CA 2006 s 33, see 'Members' personal rights', p 250).[16]

Exceptionally, directors may owe fiduciary duties to individual members or shareholders, for example

when they undertake to act as the members' or shareholders' agents.

[7.06] Coleman v Myers [1977] 2 NZLR 225 (New Zealand Court of Appeal)

The defendants were directors of a family company. The first defendant made a takeover offer to all the other shareholders and ultimately succeeded in acquiring total control of the **(p. 323)** company. The plaintiffs were minority shareholders who had reluctantly agreed to sell when the first defendant invoked statutory powers of compulsory purchase under a section equivalent to CA 2006 s 979. They then brought an action against the defendants alleging, inter alia, breaches of fiduciary duty owed by the defendants as directors to the plaintiffs as shareholders. Mahon J at first instance considered that *Percival v Wright* **[7.05]** had been wrongly decided, although he found in favour of the defendants on other grounds. On appeal, the New Zealand Court of Appeal did not regard *Percival v Wright* as having been wrong on its own particular facts, but did hold that a fiduciary relationship had existed between the directors and the shareholders in the special circumstances of *Coleman*'s case: the company was a private company with shares held largely by members of the one family; the other members of the family had habitually looked to the defendants for business advice; and information affecting the true value of the shares had been withheld from the other family shareholders by the defendants. The defendants were accordingly held liable to compensate the plaintiffs.

> In the course of his judgment, WOODHOUSE J, referring to *Percival v Wright*, said: In my opinion it is not the law that anybody holding the office of director of a limited liability company is for that reason alone to be released from what otherwise would be regarded as a fiduciary responsibility owed to those in the position of shareholders of the same company. Certainly their status as directors did not protect the defendants in a Canadian case which finally made its way to the Privy Council: see *Allen v Hyatt*.[17] The decision in that case turned upon the point that the directors of the company had put themselves in a fiduciary relationship with some of their shareholders because they had undertaken to sell shares of the shareholders in an agency capacity. But there is nothing in the decision to suggest that in the case of a director the fiduciary relationship can arise only in an agency situation. On the other hand, the mere status of company director should not produce that sort of responsibility to a shareholder and in my opinion it does not do so. The existence of such a relationship must depend, in my opinion, upon all the facts of the particular case …
>
> As I have indicated it is my opinion that the standard of conduct required from a director in relation to dealings with a shareholder will differ depending upon all the surrounding circumstances and the nature of the responsibility which in a real and practical sense the director has assumed towards the shareholders. In the one case there may be a need to provide an explicit warning and a great deal of information concerning the proposed transaction. In another there may be no need to speak at all. There will be intermediate situations. It is, however, an area of the law where the courts can and should find some practical means of giving effect to sensible and fair principles of commercial morality in the cases that come before them; and while it may not be possible to lay down any general test as to when the fiduciary duty will arise for a company director or to prescribe the exact conduct which will always discharge it when it does, there are nevertheless some factors that will usually have an influence upon a decision one way or the other. They include, I think, dependence upon information and advice, the existence of a relationship of confidence, the significance of some particular transaction for the parties and, of course, the extent of any positive action taken by or on behalf of the director or directors to promote it. In the present case each one of those matters had more than ordinary significance and when they are taken together they leave me in no doubt that each of the two directors did owe a fiduciary duty to the individual shareholders.

➢ Note

A similar approach was adopted in *Re Chez Nico (Restaurants) Ltd* [1992] BCLC 192 and *Platt v Platt* [1999] 2 BCLC 745.

(p. 324) ***Directors whose company is the 'target' in a takeover bid may owe duties to their company's members or shareholders.***

[7.07] Heron International Ltd v Lord Grade [1983] BCLC 244 (Court of Appeal)

Associated Communications Corpn plc (ACC) was the subject of rival takeover bids from companies referred to in the judgment as 'Bell' and 'Heron'. The capital of ACC consisted of 150,000 voting shares and over 54 million non-voting shares. Article 29(A) of the company's articles provided that the transfer of any voting share could only be made to a person nominated by the directors and with the approval of the Independent Broadcasting Authority (IBA).

> The judgment of the court (LAWTON, TEMPLEMAN and BRIGHTMAN LJJ) was read by LAWTON LJ: Under article 29(A) if a shareholder desires to sell his shares, it is for the directors and not the IBA to decide who shall be the purchaser and transferee … Thus, [if] the directors are purporting to operate under article 29(A) …, they must consider whether a transfer should be allowed to take place to an intended transferee. In the present case, for example, the directors as a whole were under a duty to decide whether to sanction a sale by any director of voting shares to Bell. This duty to determine which person shall acquire and be registered as the holder of voting shares in ACC is a fiduciary power which the directors must exercise in the interests of the company and in the interests of the shareholders of the company. The fact that the directors as individuals held between them a majority of the voting shares did not authorise them to reflect their individual inclinations. The directors as directors had a duty to consider whether, in the exercise of the fiduciary power vested in them by article 29, they should agree to voting shares being transferred to Bell. In the declaration which the directors signed on 11 February 1982 they appear to be unaware of the fiduciary duties imposed upon them by article 29 because they assert that they will accept the Bell offer irrespective of what advice they may be obliged to give other shareholders. They could not advise shareholders to refuse Bell's offer and, at the same time, as directors allow their own voting shares to be transferred to Bell. Either it is in the interests of ACC and of all their shareholders, voting and non-voting, that Bell should take over ACC or it is in the interests of them all that Heron should take over ACC; and it is in the interests of all shareholders that they should not be deprived of an opportunity to sell their shares to the highest bidder …
>
> Where directors have decided that it is in the interests of the company that the company should be taken over, and where there are two or more bidders, the only duty of the directors, who have powers such as those contained in article 29, is to obtain the best price. The directors should not commit themselves to transfer their own voting shares to a bidder unless they are satisfied that he is offering the best price reasonably obtainable. Where the directors must only decide between rival bidders, the interest of the company must be the interests of the current shareholders. The future of the company will lie with the successful bidder. The directors owe no duty to the successful bidder or to the company after it has passed under the control of the successful bidder. The successful bidder can look after himself, and the shareholders who reject the bid and remain as shareholders do so with their eyes open, having rejected that price which the directors consider to be the best price reasonably obtainable. Thus, as a result of article 29, the directors owed a duty to the general body of shareholders who were shareholders on 13 January 1982 to obtain for the shareholders the opportunity to accept or reject the best bid reasonably obtainable.
>
> The directors of ACC could not consistently with their duty decide to sell and transfer their individual voting shares to Bell at 66p and, at the same time, advise other shareholders to reject the Bell bid on the grounds that the price was lower than the price obtainable from Heron.
>
> This does not mean that the directors were bound to refuse to commit themselves or to commit the company to Bell on 13 January 1982. What it does mean is that, when the directors considered the ultimatum presented by Mr Holmes à Court [a director of Bell] on 13 January 1982, they should **(p. 325)** have asked themselves whether there was a reasonable possibility of obtaining a higher bid either from Heron or a third party or from Bell, or whether it was vitally necessary, in the interests of the company and of the existing shareholders, that the Bell offer should be immediately embraced.

[His Lordship examined the evidence, and concluded that (notwithstanding the earlier remarks) the directors had not acted unreasonably or in breach of duty in deciding that the bid from Bell should be accepted.]

➢ Question

Which 'duty' was in issue here? To whom *was* the duty owed, as described earlier?

➢ Notes

1. For further cases dealing with the duties of directors in a takeover, see *Re a Company* **[15.13]** and *Dawson International plc v Coats Patons plc* **[15.14]**. These cases show that the directors' duty to the shareholders in *Heron International Ltd v Lord Grade* depended upon the special power contained in the company's art 29(A).

2. Also see *Mills v Mills* **[7.13]**, in which it was recognised that in matters affecting the relative rights of different categories of members or shareholders, where no considerations of the paramount interest of the company as a corporate body arise, the directors owe a duty to act fairly as between the different classes of shareholders. Is the duty which is described in this way still a duty owed by the directors to the *company*, or is it some sort of duty owed to the shareholders?

Directors' 'duties' to creditors

There are *obiter dicta* in a number of cases to the effect that directors owe a duty to have regard to the interests of *creditors* of their company. Sometimes this is put more loosely as a duty *owed to* the creditors.[18] But in many other cases the suggestion that directors owe a duty to creditors is emphatically rejected: see, for example, *Re Halt Garage (1964) Ltd* **[5.03]**; *Re Horsley & Weight Ltd* **[4.30]**; the *Multinational Gas* case **[7.39]**; and *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* **[7.45]**.

These statements must each be read in context. It would be contrary to all reason to burden directors with any duty towards creditors when the company is solvent: their function is to make judgements about business risks, and to take those risks—and usually, when negotiating with outside parties, to drive as hard a bargain as they can. Similarly, creditors cannot expect their business with a solvent company to be preferred over other stakeholders—or, in the limit, to be risk free. Those who give credit to limited liability companies are taken to be aware of this. The *dicta* in the four cases cited earlier confirm this. Moreover, the law gives no standing to the creditors, individually or collectively, to sue to redress a breach of any such supposed duty: *Yukong Line Ltd of Korea v Rendsburg Investments Corpn of Liberia* [1998] 2 BCLC 485.

(p. 326) The picture is different when a company is insolvent, or nearly so. It is in keeping with trends in the law of insolvency (eg in relation to 'wrongful trading': see *Re Produce Marketing Consortium Ltd (No 2)* **[16.16]**) for a judge to say that the directors of an ailing company must have regard to the interests of the company's creditors—not because any duty directly owed to the creditors has come into being,[19] but because it is the creditors' position in the company's liquidation which will be affected by the directors' acts. Even so, the only duty of the directors that the law is able to recognise continues to be that owed to the company as confirmed by the *Yukong* case (in the previous paragraph). Further, it is only indirectly, through a liquidator acting on behalf of the company (or an administrator or, perhaps, a receiver), that the creditors' interests are represented.

Judicial statements that directors are obliged to have regard to the interests of their company's creditors will be found invariably to have been made in the context just described. See the following cases.

Directors' 'duties' to creditors—or a company's duties to creditors?

[7.08] Kinsela v Russell Kinsela Pty Ltd (1986) 10 ACLR 395 (New South Wales Court of Appeal)

STREET CJ: The learned judge at first instance held, as I have noted, that he was bound by authority to hold that the approval by all the shareholders validated an action which would otherwise be beyond the powers of the directors provided that there had been a full and frank disclosure to the shareholders of all the circumstances relevant to the proposed transaction …

The authorities to which His Honour submitted, notwithstanding the generality of their enunciations of principle, were not intended to, and do not, apply in a situation in which the interests of the company as a whole involve the rights of creditors as distinct from the rights of shareholders. In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending their liquidation, return to solvency, or the imposition of some alternative administration …

It is, to my mind, legally and logically acceptable to recognise that, where directors are involved in a breach of their duty to the company affecting the interests of shareholders, then shareholders can either authorise that breach in prospect or ratify it in retrospect. Where, however, the interests at risk are those of creditors I see no reason in law or in logic to recognise that the shareholders can authorise the breach. Once it is accepted, as in my view it must be, that the directors' duty to a company as a whole extends in an insolvency context to not prejudicing the interests of creditors … the shareholders do not have the power or authority to absolve the directors from that breach.

➢ Note

This case clearly has relevance for issues of ratification, discussed at 'Ratification of acts of directors: CA 2006 s 239', pp 437ff.

(p. 327) ***Duties to creditors?***

[7.09] Winkworth v Edward Baron Development Co Ltd [1986] 1 WLR 1512 (House of Lords)

LORD TEMPLEMAN: [A] company owes a duty to its creditors, present and future. The company is not bound to pay off every debt as soon as it is incurred, and the company is not obliged to avoid all ventures which involve an element of risk, but the company owes a duty to its creditors to keep its property inviolate and available for the repayment of its debts. The conscience of the company, as well as its management, is confided to its directors. A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors.

The new duty to promote the success of the company for the benefit of its members, incorporated in CA 2006 s 172(1), is made subject to 'any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company' (s 172(3)). In this context, see IA 1986 s 214, *Re Produce Marketing Consortium Ltd (No 2)* **[16.16]**. This qualification in CA 2006 s 172(3) is seen in action in the following cases.

➤ Notes

1. In *Senex Holdings Ltd (in Liquidation) v National Westminster Bank plc* [2012] EWHC 131 (Comm), Field J accepted that in giving instruction to the bank to change the name of a joint account (which, in effect, transferred the company's rights in the £1 million to another company), the director was acting in breach of this duty [17].

2. Similarly, in *Rubin v Cobalt Pictures Ltd* [2010] EWHC 2240 (Ch) (see Note 1 *following Criterion Properties plc v Stratford UK Properties LLC* **[3.13]**, p 120), the court reaffirmed that, in the arena of borderline insolvency, the directors must have paramount regard for the interests of creditors, and in deciding whether to enter into a transaction on behalf of the company, the directors 'have a duty to give consideration to the *separate* interests of the Company and its creditors …' (emphasis added) [50].

3. In *GHLM Trading Ltd v Maroo* **[7.17]**, Newey J identified an analogy between creditors and shareholders in the context of a director's duty under s 172. When the company is insolvent, directors who act in the interests of a *particular* creditor, rather than all creditors as a *class*, will be acting in breach of the duty to promote the success of the company [168]. This conclusion follows the similar rule applying to directors and particular shareholders, rather than shareholders as a class, when the company is solvent.

4. Finally, there is the monumental decision in *Westpac Banking Corporation v The Bell Group Ltd (In Liquidation) (No 3)* [2012] WASCA 157, a judgment of the Court of Appeal of the Supreme Court of Western Australia. This litigation ranks as the largest, longest and most expensive legal proceedings in Australian history, and may not yet be over.[20] The Court of Appeal's judgment is 1,027 pages long; the trial judge's 2,643 pages. The court found that the directors' implementation of a scheme to prioritise the interests of certain banks when the corporate group was on the verge of insolvency had prejudiced the different companies' respective ability to meet the claims of other creditors. Accordingly, it was held that the **(p. 328)** directors had breached their duties to act in the best interests of the companies.[21] The court saw this duty as resting on an essentially subjective test of bona fides, although noting that the mere assertion of honest belief on the part of the directors would not inevitably suffice to excuse their liability. Indeed, the court was prepared to be more interventionist, at least to the extent of subjecting the directors' actions to a test which echoes the *Wednesbury reasonableness* requirement.

DRUMMOND AJA:

2046 Owen J [the trial judge in this case] was correct, in my opinion, … that when a company is in an insolvency context the interests of creditors are not in all circumstances paramount, to the exclusion of other interests including that of the shareholders. His conclusion at … was that directors could not properly commit their company to a transaction if the circumstances were such that 'the only reasonable conclusion to draw, once the interests of creditors have been taken into account, is that a contemplated transaction will be so prejudicial to creditors that it could not be in the interests of the company as a whole'. I would prefer to say that if the circumstances of the particular case are such that there is a real risk that the creditors of a company in an insolvency context would suffer significant prejudice if the directors undertook a certain course of action, that is sufficient to show that the contemplated course of action is not in the interests of the company.

2047 Changes in the organisation of large corporations that occurred during the 20th century and changes in ideas about the proper role of corporations in society, particularly large and powerful ones, by those controlling them and by the public may explain the change from judicial restraint to increased intervention in corporate decision-making that is described by Sealy [LS Sealy, '"Bona Fides" and "Proper Purposes" in Corporate Decisions' (1989) 15 *Monash University Law Review* 265, 265–266, referred to earlier in para 2028].

2048 As to the first matter, when owners controlled their companies, a laissez faire attitude to directors' conduct on the part of the courts was understandable and acceptable: there was a coincidence of interest in companies' activities between their owners and controllers. But with the development during the 20th century of large economically significant corporations, and the consequent wide dispersion of ownership, control passed to management whose interests do not always coincide with the shareholders, hence a need for legal intervention to protect shareholder interests …

2049 As to the second matter, the quite recent development of the rule requiring directors of insolvent companies to take into account the interests of creditors is a significant departure from earlier judicial attitudes which left corporate decision-making largely to management provided only that it acted honestly in what it believed to be the interests of the company. Further, it has become common in recent decades for directors, particularly those running large public corporations, to speak of the need to take into account a wide range of interests in addition to that of shareholders in order to better advance the company's business. Parliament in the UK has followed up on these kinds of aspirational statements by corporate boards. Section 172 the *Companies Act 2006* (UK) now requires a director of a company, in acting in the way he considers, in good faith, to be most likely to promote the success of the company for the benefit of its members as a whole, to have regard, not only to the interests of creditors, but also to various other interests including those of the company's employees, suppliers, customers and the impact of the company's operations on the community and the environment. …

2051 The impacts of corporate decision-making on a wider range of interests than shareholders are now being given more recognition. The need to ensure protection of those interests also I think **(p. 329)** serves to explain why modern company courts have become more interventionist, in reviewing the activities of directors than was traditionally the case.

➢ Questions

1. In the *Westpac* case, the court was considering the common law duty imposed on directors to act bona fide in the interests of the company and for proper purposes. Is there a difference between the formulations of the 'bona fides' element of these duties as advanced by Owen J and Drummond AJA? Does English law go so far, even with the benefit of CA 2006 s 172?

2. In *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler* (1994) 122 ALR 531 at 550, Gummow J said:

> It is clear that the duty to take into account the interests of creditors is merely a restriction on the right of shareholders to ratify breaches of the duty owed to the company. The restriction is similar to that found in cases involving fraud on the minority. Where a company is insolvent or nearing insolvency, the creditors are to be seen as having a direct interest in the company and that interest cannot be overridden by the shareholders. This restriction does not, in the absence of any conferral of such a right by statute, confer upon creditors any general law right against former directors of the company to recover losses suffered by those creditors … the result is that there is a duty of imperfect obligation owed to creditors, one which the creditors cannot enforce save to the extent that the company acts on its own motion or through a liquidator.

Is the position the same under English law? Is the English law position satisfactory?

3. Insofar as directors may be said to be under a duty to have regard to the interests of creditors, do shareholders have a similar duty? (See *Re Halt Garage (1964) Ltd***[5.03]**, and contrast the *Kuwait Asia Bank* case **[7.45]**.)

Directors' 'duties' to employees

CA 1985 s 309(1) (the predecessor of CA 2006 s 172(1)(b)[22]) provided that 'the matters to which the directors of a company are to have regard in the performance of their functions include the interests of the company's employees in general, as well as the interests of its members'. Much of the interest in this provision centred on the question of enforcement—the statute gave employees no rights to sue the directors personally. But on the nature of the duty imposed, it is plain from the wording that the directors are not merely *permitted* to consider the employees'

interest but *bound* to do so; but the borderline between 'may' and 'must' in this context is probably meaningless, for there is no requirement that the interests of the employees should be *preferred* to those of the members. Additionally, there will be many cases in which a decision adverse to the employees will be justifiable by reference to the benefits of long-term profitability and thus the interests of the members. However, this is an argument that can cut both ways: a decision that is unpopular with the members or shareholders or adverse to their interest may also be defended because in reaching it the directors took account of its effect on the company's employees.
In *Re Welfab Engineers Ltd* [1990] BCLC 833, the company's liquidator alleged that the company's directors, faced with insolvency, had improperly sold the company's business for less than its full value. But Hoffmann J held them not liable because the purchaser was prepared to take on the company's workforce and work in progress, whereas another, higher, offer which they might have been able to accept was for the company's freehold premises alone, and would have led to all the employees being made redundant.

(p. 330) ➢ Questions

1. What difference does an enactment such as CA 1985 s 309(1) or CA 2006 s 172(1)(b) make in theory or in practice to company law?

2. The CLR described CA 1985 s 309 as 'ambiguous and unsatisfactory', but its repeal as 'neither desirable nor politically sustainable'. Has CA 2006 s 172(1)(b) resolved the issues?

Scope and nature of directors' general duties: CA 2006 s 170

The next sections of this chapter examine, in turn, each of the general duties imposed by CA 2006 Pt 10, ss 170ff.[23] The provisions themselves are not generally repeated in the text. It is essential, therefore, to have a copy of the Act close at hand.

Section 170 restates the fundamental principle that directors' duties are owed to the company (see earlier). This means that only the company can bring actions for a breach of these duties. Such actions may be initiated on behalf of the company by the board of directors, a liquidator, etc, or by means of a derivative action (see 'The statutory derivative action: CA 2006 ss 260ff', pp 642ff.

In addition, the duties in ss 175 (conflicts of interest) and 176 (benefits from third parties) *may* continue after a person has ceased to be a director, but they apply only 'to the extent stated' in s 710(2), and 'subject to any necessary adaptation', indicating that the courts may be flexible. Existing case law is likely to remain relevant, but this provision offers some clarification: see *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443; *CMS Dolphin Ltd v Simonet* **[7.31]**.

Importantly, s 170(3) explains that these general statutory duties replace the common law rules and equitable principles from which they are derived. Actions against directors will have to be based on breach of some statutory provision, not breach of related common law rules and equitable principles. But s 170(4) then provides a new way of interpreting and applying the statute. It requires the court to have regard to the existing interpretation and the continuing development of the common law rules and equitable principles on which the statutory statement is based. This is not normally allowed. In Grand Committee Lord Goldsmith explained the government's intention:

> Although the duties in relation to directors have developed in a distinctive way, they are often manifestations of more general principles. Subsection (4) is intended to enable the courts to continue to have regard to developments in the common law rules and equitable principles applying to these other types of fiduciary relationship. The advantage of that is that it will enable the statutory duties to develop in line with relevant developments in the law as it applies elsewhere. (HL GC Day 3, Hansard HL 678, 6/2/06, cols 243–245)

The practical effect of this is that reference will have to be made to the statutory statement of duties, but in order to