Directors' Duty to Act in the Interests of the Company: Subjective or Objective?

Rosemary Teele Langford* and Ian M. Ramsay**

University of Melbourne

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Introduction

A duty to act in good faith in the interests of the company has been imposed on company directors by English and Australian corporate law for many years. The duty requires directors to act in good faith in what they consider to be the interests of the company. Its statutory equivalent in Australia in s.181(1)(a) of the Corporations Act 2001 (Cth) provides: "A director or other officer of a corporation must exercise their powers and discharge their duties in good faith in the best interests of the corporation."[1]

In the UK the duty has been codified in s.172(1) of the Companies Act 2006 (UK) and requires directors to act in a way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. In so doing they are required to have regard to a number of interests.[2] Despite differences in wording, courts interpreting s.172 draw on jurisprudence concerning the predecessor common law duty. Indeed in *Hellard v Carvalho* the court stated that s.172 "codifies the pre-existing common law".[3]

One issue of contention, particularly in Australia, concerns the role of objective factors in the application of the duty to act in good faith in the interests of the company. There is uncertainty as to whether the duty is subjective, objective or a combination of both. Some courts have adopted a purely subjective approach, looking at whether the director actually believed that the relevant course of action was in the interests of the company. In contrast, other courts have taken an objective

* Senior Lecturer, Melbourne Law School. The authors are grateful for research assistance provided by James Weatherhead.

** Harold Ford Professor of Commercial Law and Director, Centre for Corporate Law and Securities Regulation, Melbourne Law School.

[1] It has been held there is no material difference between acting in the interests of the company and acting in the best interests of the company: see, e.g., *Bell Group Ltd (In Liquidation) v Westpac Banking Corp (No.9)* (2008) 39 W.A.R. 1; [2008] WASC 239 at [4384].

[2] Note also the requirement (from which small companies are exempt) to prepare a Strategic Report for each financial year, the purpose of which is to inform members of the company and help them assess how the directors have performed their duty under s.172—see Companies Act 2006 (UK) ss.414A and C. The Report must contain a fair review of the company's business and a description of the principal risks and uncertainties facing the company. For discussion (in relation to the previous requirement to prepare a business review) see J. Lowry, "The Duty of Loyalty of Directors: Bridging the Accountability Gap through Efficient Disclosure" (2009) 68 C.L.J. 607, 619–621.

[3] *Hellard v Carvalho* [2013] EWHC 2876 (Ch); [2014] B.C.C. 337 at [88].

approach, particularly in contexts in which directors have given no consideration to the interests of the company. An intermediate approach is to assess compliance with the duty by applying both subjective and objective tests.

There is also uncertainty concerning whether, if directors fail to give consideration to the interests of the company, they will be in breach of duty and the appropriateness of applying the so-called "*Charterbridge* test".[4] We critically examine the relevant judgments and provide our views on the contested issues. The structure of the article is as follows. First, the duty to act in good faith in the interests of the company is outlined briefly. Secondly, the meaning of the terms "subjective" and "objective" in this context is examined. Thirdly, the different standards applied by the courts are analysed. Fourthly, we discuss our preferred approach to resolving the contested issues.

Description of the duty

The duty requires that directors act in good faith in what they consider to be the company's interests. Some of the situations in which the duty to act in good faith in the interests of the company has been applied include where directors are pursuing an unauthorised conflict or profit,[5] where directors fail to exercise independent judgment,[6] where directors of group companies look to the interests of the group rather than to the interests of the individual company,[7] where directors fail to consider the interests of creditors[8] and, particularly in the UK, where there is a failure to disclose by directors.[9]

Meaning of the terms "subjective" and "objective"

Prior to analysing the various approaches taken by courts to the duty to act in good faith in the interests of the company, it is instructive to examine the potential meanings of the terms "subjective" and "objective" in this context.

Subjective good faith is generally understood to encompass a subjective state of mind.[10] In other words a director will comply with the duty to act in good faith in the interests of the company if they act in what they consider to be the interests of the company. This is irrespective of whether the relevant action turns out to benefit the company or not and regardless of the reasonableness of the decision.

Defining objectiveness in the context of the duty to act in good faith in the interests of the company is more complex because the duty could be objective in a number of ways. The first way in which the duty could be applied objectively would be for the court to determine, based on objective factors, what is in fact in the interests of the company and then to assess the conduct of the directors by reference to that determination.

[4] *Charterbridge Corp v Lloyds Bank Ltd* [1970] Ch. 62 Ch D at 74.

[5] See, e.g., *Shepherds Investments Ltd v Walters* [2006] EWHC 836 (Ch); [2007] 2 B.C.L.C. 202.

[6] See, e.g., *Blackwell v Moray* (1991) 5 A.C.S.R. 255.

[7] See, e.g., *Walker v Wimborne* (1976) 137 C.L.R. 1.

[8] See, e.g., *Westpac Banking Corp v Bell Group Ltd (In Liquidation) (No.3)* (2012) 270 F.L.R. 1; [2012] WASCA 157.

[9] See, e.g., *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244; [2005] 2 B.C.L.C. 91. For differences between the jurisdictions see R.T. Langford, "The Duty of Directors to Act Bona Fide in the Interests of the Company: A Positive Fiduciary Duty? Australia and the UK Compared" (2011) 11 J.C.L.S. 215.

[10] See further A. Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Oxford: Oxford University Press, 2013), p.95.

The second way in which the duty could be objective is for the court to assess compliance with the duty in terms of reasonableness as measured by reference to a reasonable director or board of directors. What would a reasonable director or board regard as the interests of the company?[11] An example of this approach is seen in the judgment of Ward J in *Re Idylic Solutions Pty Ltd*, who said:

> "It is to be noted that the test as to whether a director or officer has contravened [the statutory duty to act in the interests of the company] is an objective test, having regard to what a comparable person, having the same knowledge and skills as the relevant director or officer, would reasonably have done in the circumstances."[12]

The third way in which the duty could be objective is for the court to apply the standard that there will be a breach of the duty if the decision is one that no reasonable director would consider to be in the interests of the company. An example is seen in *Re Southern Counties Fresh Food Ltd*, where Warren J said (in relation to the general law duty to act in good faith in the interests of the company and to s.172 of the Companies Act 2006 (UK)):

> "The question is whether the director honestly believed that his act or omission was in the interests of the company. The court does not consider that the duty is broken simply because, in the court's opinion, the particular exercise of power was not to promote the success of the company, although it is accepted that a breach will have occurred if it is established that the relevant exercise of power is one which could not be considered by any reasonable director to be in the interests of the company."[13]

There are differences between these three objective approaches. The difference between the first and second approaches is that in the first the court determines what the interests of the company are and in the second the court ascertains what the reasonable director or board of directors would consider are the interests of the company. The difference between the second and third approaches is that more deference is given to the decision of the director under the third—there will only be a breach of duty if *no* reasonable director could consider the decision to be in the interests of the company.

Outline of the approaches

Courts have adopted a variety of approaches when considering whether the duty is subjective or objective. In this section we outline these approaches.

Solely subjective test

The classic statement of the duty to act in good faith in the interests of the company is found in *Re Smith & Fawcett Ltd*, in which Lord Greene MR said: "[D]irectors

[11] Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (2013), pp.95–96; see also *Allco Funds Management Ltd (recs and mgrs apptd) (In Liquidation) v Trust Company (Re Services) Ltd* [2014] NSWSC 1251 at [123], [175], [178].

[12] *Re Idylic Solutions Pty Ltd* [2012] NSWSC 1276 at [1487]; see also *Downer EDI Ltd v Gillies* (2012) 92 A.C.S.R. 373; [2012] NSWCA 333 at [76].

[13] *Re Southern Counties Fresh Food Ltd* [2008] EWHC 2810 (Ch) at [53].

must exercise their discretion bona fide in what they consider—not what a court may consider—is in the interests of the company."[14]

A subjective approach is seen in a number of English judgments. For example, in *Regentcrest Plc (In Liquidation) v Cohen* Jonathan Parker J stated:

> "The duty imposed on directors to act bona fide in the interests of the company is a subjective one ... The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company, still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather the question is whether the director honestly believed that his act or omission was in the interests of the company."[15]

The problem with a purely subjective test is identified by Bowen LJ in *Hutton v West Cork Railway Co*:

> "Bona fides cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly bona fide yet perfectly irrational."[16]

It is therefore not surprising that courts have introduced some objective elements into the duty.

Combination of subjective and objective tests

In *Bell Group v Westpac Banking Corp (No.9)* Owen J combined subjective and objective elements:

> "1. The test whether directors acted bona fide in the interests of the company as a whole is largely (though by no means entirely) subjective. It is a factual question that focuses on the state of mind of the directors. The question is whether the directors (not the court) consider that the exercise of power is in the best interests of the company.
> 2. Similar principles apply in ascertaining the real purpose for which a power has been exercised.
> 3. It is the directors who make business decisions and courts have traditionally not pronounced on the commercial justification for those decisions. The courts do not substitute their own views about the commercial merits for the views of the directors on that subject.
> 4. Statements by the directors about their subjective intention or belief are relevant but not conclusive of the bona fides of the directors.
> 5. In ascertaining the state of mind of the directors the court is entitled to look at the surrounding circumstances and other materials that genuinely throw light upon the directors' state of mind so as to show whether they were honestly acting in discharge of their powers in

[14] *Re Smith & Fawcett Ltd* [1942] Ch. 304 CA at 306.
[15] *Regentcrest Plc (In Liquidation) v Cohen* [2001] 2 B.C.L.C. 80 Ch D at [120]–[123].
[16] *Hutton v West Cork Railway Co* (1883) 23 Ch. D. 654 CA at 671.

the interests of the company and the real purpose primarily motivating their actions.

6. The directors must give real and actual consideration to the interests of the company. The degree of consideration that must be given will depend on the individual circumstances. But the consideration must be more than a mere token: it must actually occur.

7. The court can look objectively at the surrounding circumstances and at the impugned transaction or exercise of power. But it does so not for the purpose of deciding whether or not there was commercial justification for the decision. Rather, the objective enquiry is done to assist the court in deciding whether to accept or discount the assertions that the directors make about their subjective intentions and beliefs.

8. In that event a court may intervene if the decision is such that no reasonable board of directors could think the decision to be in the interests of the company."[17]

There is an important question arising from step 8 of the analysis of Owen J. Is step 8 an independent objective assessment that operates to found a breach of duty even if the director honestly believes their decision is in the interests of the company? Or is step 8 only used to assess the credibility of the director's assertion that they honestly believed their decision was in the interests of the company? It can be argued that Owen J's approach employs objective factors to test credibility only; that is, to test the genuineness of the director's asserted belief.[18] It is important to note the introductory words to step 8 "In that event". This would seem to indicate that step 8 is not to be interpreted as an independent objective assessment. Rather, it is linked to, and follows directly from, step 7. This interpretation is seemingly confirmed in the following extract from the judgment of Owen J in *Bell*:

> "If the challenging party can show that there are no reasonable grounds on which the decision could have been made or the conduct undertaken, then an element of objectivity is introduced into the equation. But it seems to me that the objective considerations relate back to the question whether the directors honestly believed the transaction to be in the best interests of the company, not to whether (regardless of what the directors believed) it did not benefit the company."[19]

However, if this is the correct way to interpret Owen J's judgment, there is an evident difficulty. If the use of objective factors is only for the purpose of assessing whether the director honestly believed the transaction or decision to be in the interests of the company, then we are still left with the problem identified by Bowen LJ in *Hutton v West Cork Railway Co.*[20] We therefore submit that in order to give

[17] *Bell v Westpac (No.9)* (2008) 39 W.A.R. 1; [2008] WASC 239 at [4619].

[18] An appeal from Owen J's judgment was heard by the Court of Appeal of the Supreme Court of Western Australia: *Westpac v Bell (No.3)* (2012) 270 F.L.R. 1; [2012] WASCA 157. Lee and Carr AJJA agreed with Owen J's outline of the law: at [923], [993], [2736] although Carr AJA believed that Owen J incorrectly applied the test by imposing a standard of reasonableness: at [2778]. Drummond AJA disagreed with Owen J's step 8, stating that this element goes beyond credibility and allows courts to set aside a manifestly unreasonable decision even though directors may have honestly believed they were acting properly: at [1983].

[19] *Bell v Westpac (No.9)* (2008) 39 W.A.R. 1; [2008] WASC 239 at [4598].

[20] See fn.16 and accompanying text.

the duty scope for operation in this situation, objective factors can be used to test whether the director honestly believed their actions were in the interests of the company but something more is required in terms of an objective standard. We develop this argument further when we discuss our preferred approach to the interpretation of the duty in the section "Preferred approach" below.

Solely objective test

A purely objective approach has been applied by some Australian courts in the application of the duty to act in good faith in the interests of the company.[21] This is seen in the quote from *Re Idylic Solutions Pty Ltd* above. This approach can also be seen in the approach of Hamilton J in *Australian Securities and Investments Commission v Sydney Investment House Equities Pty Ltd*:

> "The test to be applied [to the duty to act in the interests of the company] is whether an intelligent and honest man in the position of the directors of the company could not have reasonably believed that the transaction was in the best interests of the company having in mind the interests of the company's creditors."[22]

The problem with a purely objective test is that it gives little deference to directors in the application of the duty.

Objective test in the absence of consideration

It is important to note the emphasis given by Owen J in *Bell Group v Westpac (No.9)* to the need for directors to "give real and active consideration to the interests of the company".[23] Where a director does not give consideration to the interests of the company is the result a breach of duty by the director? There is disagreement among the courts.[24] The approach of Owen J would result in a breach of duty. However, as we now see, some other courts proceed to apply the objective test in *Charterbridge Corp v Lloyds Bank Ltd* (*Charterbridge*) to determine if there is a breach of duty.[25]

Those courts that have applied this test do so when the director did not give any actual consideration to the interests of the company. Rather than immediately find a breach of duty, the courts that apply the *Charterbridge* test consider whether an intelligent and honest person in the position of the director would have believed

[21] English courts have applied the objective *Charterbridge* test, as discussed in the next section.

[22] *Australian Securities and Investments Commission v Sydney Investment House Equities Pty Ltd* (2008) 69 A.C.S.R 1; [2008] NSWSC 1224 at [41].

[23] *Bell v Westpac (No.9)* (2008) 39 W.A.R. 1; [2008] WASC 239 at [4619].

[24] The role of consideration as concerns the factors enunciated in s.172(1) is also contested—for commentary see *Gower & Davies: Principles of Modern Company Law*, 9th edn, edited by P.L. Davies and S. Worthington (London: Sweet & Maxwell, 2012), pp.545–546 paras 16-72 to 16-73; D. Kershaw, *Company Law in Context*, 2nd edn (Oxford; Oxford University Press, 2012), p.383.

[25] *Charterbridge Corp v Lloyds Bank Ltd* [1970] Ch 62 Ch D at 74. Regardless of the consequences of a lack of consideration of the company's interests, it is clear that what is required in terms of consideration will vary according to the circumstances. For example, the closer the company is to insolvency, then the greater is the weight that should be given to the interests of creditors by the directors: see *Bell v Westpac (No.9)* (2008) 39 W.A.R. 1; [2008] WASC 239.

that the relevant decision was for the benefit of the company. If so, there is no breach of duty.[26]

Cases applying the *Charterbridge* test can be divided into two categories. The first category is those cases where courts have limited the application of the test to contexts involving group companies and companies that are insolvent or close to insolvent.[27] The second category is those cases where courts have not limited the application of the test to particular factual contexts.[28]

The second category is seen in the recent English case *Madoff Securities International Ltd (In Liquidation) v Raven*.[29] In that case Popplewell J outlined the subjective nature of the duty.[30] His Honour later said:

> "Where a director fails to address his mind to the question whether a transaction is in the interests of the company, he is not thereby, and without more, liable for the consequences of the transaction. In such circumstances the Court will ask whether an honest and intelligent man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company: *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62 at 74E–F. If so, the director will be treated as if that was his state of mind."[31]

Both categories can be seen in *Hellard v Carvalho*.[32] In that case John Randall QC (sitting as a Deputy High Court Judge) said that the duty to act in the interests of the company is subjective[33] but that this general principle of subjectivity is subject to three qualifications:

1. Where the duty extends to consideration of the interests of creditors, their interests must be considered as "paramount" when taken into account in the director's exercise of discretion[34];
2. The *Charterbridge* test applies where there is no evidence of actual consideration of the interests of the company;
3. Building on the second principle, where a very material interest, such as that of a large creditor (in a company of doubtful solvency, where creditors' interests must be taken into account), is unreasonably

[26] The *Charterbridge* test remains relevant in the UK, particularly in the context of creditors' interests, owing to s172(3) of the Companies Act 2006, which provides that the duty in s.172 has effect 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.

[27] See, e.g., *Charterbridge* [1970] Ch. 62 at 74; *Equiticorp Finance Ltd (In Liquidation) v Bank of New Zealand* (1993) 32 N.S.W.L.R. 50 at 147–148; *Linton v Telnet Pty Ltd* (1999) 30 A.C.S.R. 465 at 471–472.

[28] See, e.g., *Mernda Developments Pty Ltd (In Liquidation) v Alamanda Property Investments No.2 Pty Ltd* (2011) 86 A.C.S.R. 277; [2011] VSCA 392 at [32], [37]; *Spedley Securities Ltd (In Liquidation) v Greater Pacific Investments Pty Ltd (In Liquidation)* (1992) 7 A.C.S.R. 155 at 164; *Linter Group Ltd (In Liquidation) v Goldberg* (1992) 7 A.C.S.R. 580 at 260; *Farrow Finance Co Ltd (In Liquidation) v Farrow Properties Pty Ltd (In Liquidation)* [1999] 1 V.R. 584 at 621–622 [133]; see also *Environinvest Ltd v Prescott (No.2)* [2012] VSC 151 at [13].

[29] *Madoff Securities International Ltd (In Liquidation) v Raven* [2013] EWHC 3147 (Comm); [2014] Lloyd's Rep. F.C. 95 at [193].

[30] *Madoff Securities v Raven* [2013] EWHC 3147 (Comm); [2014] Lloyd's Rep. F.C. 95 at [189].

[31] *Madoff Securities v Raven* [2013] EWHC 3147 (Comm); [2014] Lloyd's Rep. F.C. 95 at [193].

[32] *Hellard v Carvalho* [2013] EWHC 2876 (Ch).

[33] *Hellard v Carvalho* [2013] EWHC 2876 (Ch); [2014] B.C.C. 337 at [91].

[34] *Hellard v Carvalho* [2013] EWHC 2876 (Ch); [2014] B.C.C. 337 at [92].

> (that is, without objective justification) overlooked and not taken into account, the objective test must equally apply.[35]

It can be seen that principle no.2 of this approach exemplifies the first category of the application of the *Charterbridge* test without reference to particular categories of cases and that principle no.3 exemplifies the second category of application in the context of creditors.

The *Charterbridge* test has had a mixed reception in Australia in contrast to England, where it appears to be more favoured. A particular issue with the *Charterbridge* test is that it undermines the importance of consideration and in some ways rewards directors who give no consideration to the interests of the company (as compared to directors who give some, but inadequate, consideration to the interests of the company). It is to be queried whether this is defensible in policy terms. In *Equiticorp Finance Ltd (In Liquidation) v Bank of New Zealand* (*Equiticorp*), Clarke and Cripps JJA preferred the view that where directors have failed to consider the interests of the relevant company they should be found to have committed a breach of duty. If, however, the transaction was, objectively viewed, in the interests of the company, then no consequences would flow from the breach.[36]

The uncertainty about the *Charterbridge* test in Australia is reflected in the *Bell* judgments at first instance and on appeal. Owen J did not favour the *Charterbridge* test because of the importance that he placed on the need for real and actual consideration by the directors.[37] The appeal judges adopted different views in relation to the *Charterbridge* test. Lee AJA agreed with the reservations expressed by Clarke and Cripps JJA in *Equiticorp*.[38] His Honour also found there was no need to apply the *Charterbridge* test because the directors had breached their duty to act in good faith in the interests of the company by entering transactions that caused material prejudice to the interests of creditors.[39] Drummond AJA agreed that the egregious nature of the breaches made it unnecessary to apply the *Charterbridge* test.[40] In contrast Carr AJA thought that *Charterbridge* should have been applied, given the finding that the directors had not considered the interests of individual group companies.[41]

The *Charterbridge* test was introduced in 1970 specifically in the context of group companies at a time when group company structures were increasing but the law in relation to corporate groups was not as developed as it is today. It is perhaps understandable that at a time when group structures were rapidly evolving, but many directors may not have understood the need to give consideration to the interests of the company of which they were a director and not prefer the interests of the parent company or the corporate group, Pennycuick J introduced a test that could assist directors. However, given the subsequent volume of literature and

[35] His Honour further stated: "This is not the court substituting its own judgment on the relevant facts (with the inevitable element of hindsight) for that of the directors made at the time; rather it is the court making an (objective) judgment taking into account all the relevant facts known or which ought to have been known at the time, the directors not having made a judgment in the first place": *Hellard v Carvalho* [2013] EWHC 2876 (Ch); [2014] B.C.C. 337 at [92].

[36] *Equiticorp Finance Ltd (In Liquidation) v Bank of New Zealand* (1993) 32 N.S.W.L.R. 50 at 147–148.

[37] *Bell v Westpac (No.9)* (2008) 39 W.A.R. 1; [2008] WASC 239 at [4616].

[38] *Westpac v Bell (No.3)* (2012) 270 F.L.R. 1; [2012] WASCA 157 at [1010].

[39] *Westpac v Bell (No.3)* (2012) 270 F.L.R. 1 at [1009]–[1012].

[40] *Westpac v Bell (No.3)* (2012) 270 F.L.R. 1 at [2079].

[41] *Westpac v Bell (No.3)* (2012) 270 F.L.R. 1 at [2895]–[2902].

specific regulation (both legal and financial) directed at group companies and their directors,[42] it is to be queried whether the *Charterbridge* approach is still justifiable. The requirement that directors consider the interests of the company of which they are a director even when that company is part of a corporate group is well established. We therefore submit that it is reasonable to require directors to consider the interests of the company of which they are a director or otherwise be in breach of duty.

Preferred approach

We now return to the three issues mentioned in the Introduction: whether the duty is subjective, objective or a combination of both; what the role of consideration is in the application of the duty; and when it is appropriate to apply the *Charterbridge* test. In our view, the preferred approach combines both subjective and objective tests in the following way. The duty is subjective in the sense that it is for the directors to determine what are the interests of the company and they must give actual consideration to the interests of the company. Objective factors can be used by the court to determine if the director honestly believes the decision they made was in the interests of the company. However, in order to address the problem identified by Bowen LJ in *Hutton v West Cork Railway Co*, the court is entitled to inquire if the decision is one that no reasonable director would consider to be in the interests of the company. If so, there is a breach of duty even if the director honestly believed the decision was in the interests of the company. The court makes this determination by reference to the reasonable director—not what the court would consider to be the interests of the company. By using the test that there is no breach of duty unless that decision is one that *no* reasonable director would consider to be in the interests of the company, rather than the test that there is no beach of duty if a reasonable director would consider the decision to be in the interests of the company, additional deference is given to the decision of the director, as discussed in the section "Meaning of the terms 'subjective' and 'objective'" above.

We believe this approach strikes the right balance between subjective and objective considerations. In placing an important emphasis on a subjective assessment, it gives appropriate deference to directors' commercial decision-making, recognising that directors are best placed to assess the interests of the company. Although the focus of this approach begins with the subjective belief of the relevant director, courts can look beyond the director's assertion of such belief to objective factors to assess whether the belief is honestly held and, in order to protect the interests of the company, to test whether the decision in question is one that no reasonable director would consider to be in the interests of the company even if the director honestly holds the belief in question. This promotes accountability, avoids the problem identified by Bowen LJ in *Hutton v West Cork Railway Co*, and allows a suitable protective role for the duty.

[42] See, e.g., I.M. Ramsay and G. Stapledon, "Corporate Groups in Australia" (2001) 29 A.B.L.R. 7; R. Baxt and T. Lane, "Developments in relation to Corporate Groups and Responsibilities of Directors—Some Insights and New Directions" (1998) 16 C.S.L.J. 628; J. Cilliers, "Directors' Duties in Corporate Groups—Does the Green Light for the Enterprise Approach Signal the End of the Road for Walker v Wimborne?" (2001) 13 A.J.C.L. 109; Corporations and Securities Advisory Committee, *Corporate Groups—Final Report* (May 2000).

This approach therefore balances the need for accountability with the need to allow directors freedom to take considered risks and to make decisions without being subject to judicial second-guessing of business decisions. It retains the primacy of directors in deciding what is in the company's interests, but also provides an avenue for review where those interests are not shown to have received meaningful consideration, where the bona fides of the relevant director is otherwise impeached based on consideration of the surrounding circumstances, and where no reasonable director would consider the decision to be in the interests of the company.

In relation to consideration, while courts have disagreed on whether a lack of consideration results in a breach of duty, our view is that, in such a situation, there should be breach of duty. While the application of the *Charterbridge* test has some appeal, it undermines the importance of consideration, which is a key facet of the duty. Requiring consideration also promotes accountability by directors. It also avoids the anomalous situation of a director who gives inadequate consideration being held to be in breach of duty but a director who has given no consideration to the interests of the company potentially not being held to be in breach of duty because of the application of the *Charterbridge* test.