DISQUALIFICATION FOR UNFITNESS SECTION 149 OF THE COMPANIES ACT

PROBABLY no other provision of the Companies Act has caused as much controversy in such a short time as s. 149. In the nine months since it came into force on 15th August 1984 this section has been the target of almost universal condemnation. In this short note an analysis of the section will be attempted.

Analysis

Section 149(1) provides as follows:

> "149 — (1) Where a person —
>
> (a) is or has been a director of a company which has at any time gone into liquidation (whether while he was a director or at any time within three years of his ceasing to be a director) and was insolvent at that time; and
>
> (b) is or has been a director of another such company which has gone into liquidation and was insolvent at that time within five years of the date on which the first mentioned company went into liquidation,
>
> and that person within a period of five years after the other such company referred to in paragraph (b) has gone into liquidation, without the leave of the court, is a director or promoter of, or is in any way whether directly or indirectly concerned or takes part in the management of a company, he shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding two years or to a fine not exceeding ten thousand dollars or to both such imprisonment and fine."

To be within the section a person must satisfy the following criteria:

1. He must at some time have been a director of two companies, both of which went into liquidation (for convenience these will be referred to as *A* and *B*)*;* and

2. *B* must have gone into liquidation within five years of the liquidation of *A;* and

3. At the time of liquidation both companies must have been insolvent.

He is then caught if:

a. He was a director of *A* at the time of its liquidation AND a director of *B* at the time of its liquidation; or

b. He was a director of *A* at any time within three years of the liquidation of *A* AND was a director of *B* at the time of its liquidation; or

c. He was a director of *A* at the time of its liquidation AND was a director of *B* at any time before its liquidation; or

d. He was a director of *A* at any time within three years of the liquidation of *A* AND was a director of *B* at any time before its liquidation.

Perhaps the easiest way to determine whether a person is caught by s. 149 is to imagine that everyone begins with a clean slate. The moment a company of which that person is a director goes into insolvent liquidation, he gets a black mark. He gets the black mark even if he is not a director of the company on the day it goes into liquidation, provided that he was a director within three years of that date. Once a person has a black mark on his slate, another insolvent liquidation of a company of which he is a director within five years will bring him within the clutches of s. 149. His second black mark is awarded even if he is not a director of the second company at the time of its liquidation, provided he had *at any time before liquidation* been a director of the company.

The effect of being caught by the section is that such a person is prohibited from doing the following for five years (counting from the liquidation of B), unless the court gives leave:

(1) being a director of a company; and

(2) being a promoter of a company; and

(3) being concerned in the management of a company, whether directly or indirectly; and

(4) taking part in the management of a company, whether directly or indirectly.

The price of contravention is a maximum fine of $10,000 or a custodial sentence not exceeding two years.

This section is based on s. 9 of the U.K. Insolvency Act 1976.[1] The difference is that the U.K. statute puts the onus on the Official Receiver to apply for the disqualification of offending directors; here disqualification is automatic. It will be seen that the marginal note to the section is inaccurate. The section does not confer a "power to restrain directors of companies that have been liquidated"; the restraint is automatic, and it is for the erstwhile director to apply to have the disability removed.

Commentary

1. *Rationale*

The mischief that this section is designed to cure was stated by Professor S. Jayakumar, the acting Minister for Labour and Minister of State for Law in Appendix 3 to the Select Committee's Report on the Amendment Bill:[2]

> "The policy in this section is that the public must be safeguarded against persons who by their conduct have shown themselves to be unfit to manage the affairs of a company with limited liability. There is nothing in the law at present to prevent a person trading through the vehicle of one or more companies and allowing such a company to become insolvent and then establish a new company to carry on trading all the while leaving a trail of unpaid creditors. This is not an uncommon occurrence. *You will note that in the*

1 1976 c.60.

2 Report of the Select Committee on the Companies (Amendment) Bill and appendices, presented to Parliament on 12th June 1984. See pp. B18 & B19, columns 35-38.

> *Companies Act there are other provisions dealing with fraudulent trading,* such as section 304 [now s. 340], *by directors as distinct from incompetent directors who are unfit to manage their companies. This section is aimed at the latter category.... The formulation adopted in this section is designed to ensure that it would be more difficult for those with poor commercial track records to recommence trading under cover of limited liability.* We recognize that the section could in its operation cause some inconvenience and cost to some persons who have been unfortunate in their trading activities as distinct from those who are unfit to manage companies in that both categories of persons need to satisfy the Court of their fitness to manage companies after they have been concerned in two insolvent liquidations. But we see no great injustice, however, in such a provision when weighed against the need to protect dissatisfied and unpaid creditors.... We have also considered [the] suggestion that simultaneous liquidations be deemed to be one liquidation for the purpose of this section. But we are not in favour of accepting this suggestion because it would defeat the purpose of this section if a director is trading through one or more companies in the same group where two of the companies go into liquidation. *The evil that the section aims at is the same, i.e., unpaid and dissatisfied creditors due to the unfitness of the directors to manage these companies effectively.* It may well be that on an application for leave to the Court, the Court would take these circumstances into account when deciding whether or not to give leave to a director to continue to manage the company." (emphasis added).

It will be seen from the statements of the Minister that the section is aimed not so much at dastards as at fools. It is designed to protect creditors of limited companies from losing their money to incompetents masquerading as businessmen. The mischief that the section is designed to cure should be kept in mind when attempting to interpret the section.[3] In this respect our courts are on their own; in the eight years since the enactment of s. 9 of the Insolvency Act 1976[4] there does not seem to have been a single reported decision on its interpretation or application.

2. *"Director"*

Section 4 of the Companies Act provides that the term "director" includes

(1) an alternate director;

(2) a substitute director;

(3) any person occupying the position of director of a corporation by whatever name called; and

(4) any person in accordance with whose directions or instructions the directors of the corporation are accustomed to act.

This definition is expressed to apply "unless the contrary intention appears". There is no indication in s. 149 of a contrary intention,

3 Concerning the use of such reports as an aid to the interpretation of statutes, see *Black Clawson International Ltd.* v. *Papierwerke Waldhof-Aschaffenburg A.G.* [1975] 1 All E.R. 810 (House of Lords).

4 *Supra,* note 1.

so until a *court* authoritatively rules otherwise, we must accept that this extended definition of director applies to the section. If this is so, certain people who are not named as directors of a company may nevertheless be caught by the section.

As stated above, it is not just the people who are directors of the liquidated companies at the time of liquidation who are within the net that s. 149 casts. A person may have resigned from the board and yet still be caught. In relation to the first company, a person who "has been" a director of the company any time within three years of the liquidation is within the scope of the section. In relation to the second company, the section includes within its clutches a person who "has been" — apparently at any time in the past — a director; unlike in relation to the first company, the window of liability remains open for an indefinite period after resignation.

Consider the following example: *A* Co. Ltd. goes into liquidation on 1st January 1985. *B* Co. Ltd. goes into liquidation on 31st December 1989. Both are insolvent at the time. The persons who are within the prohibition imposed by s. 149 are:

(a) a person who was a director of *B* on 31st December 1989 and was also a director of *A* on 1st January 1985.

(b) a person who was a director of *B* on 31st December 1989 and had been a director of *A* at any time during the three years prior to 1st January 1985.

(c) a person who had *at any time* been a director of *B* and was a director of *A* on 1st January 1985.

(d) a person who had *at any time* been a director of *B* and had been a director of *A* at any time during the three years prior to 1st January 1985.

The section as presently worded could catch a person who is not a director of *A* at the time *A* went into liquidation *and* not a director of *B* at the time *B* went into liquidation. Indeed, a person who had resigned his position as a director of *B* even before *A* went into liquidation could still be within the scope of s. 149! This surely must be an oversight. One hopes that it will be corrected soon.

3. *"Liquidation"*

Sub-section (3) of section 149 provides that for the purposes of this section a company is deemed to have gone into liquidation:

(1) if the company is wound up by the court, on the date of the winding-up order;

(2) if the company is not wound up by the court, on the date the resolution for winding-up is passed.

It should be noted that the material date is not the date on which the winding-up is deemed to have commenced. A winding-up is deemed to have commenced:

(a) where a provisional liquidator is appointed under s. 291(1), at the time the statutory declaration by the directors required under that section is lodged with the Registrar;[5]

[5] Section 291 (6)(a).

(b) where a resolution has been passed to voluntarily wind up the company, at the time the resolution was passed;[6]

(c) where the winding up is by the court and no resolution to voluntarily wind up was passed, at the time of the presentation of the petition to wind up.[7]

It will be seen that except where the winding up is pursuant to a voluntary resolution of the company, the date that the company is deemed to have gone into liquidation for the purposes of s. 149 is not the same as the date the liquidation is deemed to have commenced. Why there should be this anomaly is a matter for speculation. One must be especially careful where the winding up is by the court. For the purposes of s. 149 the material date is the date of the winding-up order; whereas for other purposes the winding-up is deemed to have commenced at the time of the presentation of the petition. There could well be quite a lapse of time between the two dates.

4. *"Insolvent"*

There are two meanings attached to the word "insolvent". A person (natural or artificial) may be said to be insolvent when "upon an exact balance of his capital and liabilities, it appears that he has not enough in the world to meet all the claims that might be made against him by creditors".[8] The other meaning is "when the debtor is unable to meet his current obligations".[9]

The second meaning is the one usually adopted in commercial matters. A commercial entity is "insolvent" when it is unable to pay its debts as they become due.[10] The fact that total assets exceed total liabilities is usually irrelevant to determining whether a company is solvent or not; a company may be at the same time insolvent and wealthy.[11]

The aim of this section is to protect the creditors of the company.[12] If this is so, nothing is gained by disqualifying the directors if the creditors eventually get paid. Accordingly, despite the definition of commercial insolvency, it is suggested that the legislative purpose of the enactment would be better served by adopting the first definition of the word "insolvent" when construing the section.

Until a judge has ruled authoritatively on this however, the counsel of prudence is to assume that "insolvent" means "commercially insolvent".

5. *"Company"*

The term "company" is used in two different contexts in s. 149(1). The first is in relation to the bodies corporate (to use a neutral term)

6 Sections 291(6)(b) and 255(1).
7 Section 255(2).
8 *Per* Lord M'Laren in *M'Lay* v. *M'Queen* 1 Fraser 804. Cited in Stroud's Judicial Dictionary (4th Edition, 1971; Sweet & Maxwell) in Volume 3, p. 1380.
9 *Ibid.*
10 See dicta of Buckley L.J. in *London & Counties Assets Co. Ltd.* v. *Brighton Grand Concert Hall & Picture Palace Ltd.* [1915] 2 K.B. 493, 501.
11 See dicta of Lord Edmund-Davies in *Malayan Plant (Pte) Ltd.* v. *Moscow Narodny Bank Ltd,* [1980] 2 M.L.J. 53, 54A (Privy Council on appeal from Singapore).
12 *Supra,* note 2.

that have gone into liquidation. The second is in relation to the bodies corporate in the management of which the erstwhile director is precluded from participating.

"Company" as defined in s. 4 means a company incorporated pursuant to the Act or its predecessor legislation. However, s. 149(3) states that "company" in the section includes an unregistered company within the meaning of s. 350. Section 350 provides that "unregistered company" includes:

(1) a foreign company; and

(2) any partnership, association or company consisting of more than five members.

A "foreign company" according to s. 4 means:

(a) a company, corporation, society, association or other body incorporated outside Singapore; or

(b) an unincorporated society, association or other body which does not have its head office or principal place of business in Singapore, which under the law of the place of its origin may sue and be sued or may hold property.

Thus according to the definitions, "company" includes any of the following:

(i) a company incorporated in Singapore;

(ii) a partnership of more than five members;

(iii) an association of more than five members;

(iv) a company incorporated outside Singapore;

(v) other corporate bodies incorporated outside Singapore;

(vi) unincorporated associations which do not have their principal place of business or their head office in Singapore and which may sue and be sued, or hold property.

Given this bewildering series of definitions, it is hard to be certain what bodies corporate are companies for the purposes of the section.

There are two sorts of bodies corporate probably covered by the section: locally-incorporated companies and foreign-incorporated companies (referred to as "local companies" and "foreign companies" respectively for brevity).

Is s. 149 meant to cover foreign companies that go into liquidation and are insolvent? If the aim is to "ensure that it would be more difficult for those with poor commercial track records to re-commence trading under cover of limited liability",[13] it is logical to assume that mismanagement of foreign companies is within the mischief that the section seeks to ameliorate. Incompetence knows no nationality. It would seem that s. 149 could be interpreted to cover a person who is a director of two insolvent liquidated foreign companies, even if those companies had nothing whatever to do with Singapore.

[13] See the comments of Prof. Jayakumar, *loc. cit. supra,* note 2, at p. B18, column 36.

If this interpretation is correct, enforcement of the section is going to be a problem. There are no facilities in Singapore to keep track of foreign liquidations, much less to identify the directors of the liquidated companies. It is suggested that such a wide interpretation should not be adopted. For practical purposes, it may be better to restrict the operation of the section to foreign companies that do business in Singapore.[14]

The other question is, what sort of companies does s. 149 prohibit a person from managing, directing or promoting? There are three possibilities:

(1) local companies;

(2) foreign companies that do business in Singapore;

(3) foreign companies that do not do business in Singapore.

It is certain that local companies are within the scope of the prohibition. It is probable (if s. 149(3) is to have any meaning) that foreign companies that do business here are also within the scope of the prohibition. Such foreign companies must be registered here, and so there will be some records kept in Singapore. But it is suggested that foreign companies that do not do business here are not within the scope of the prohibition. To make it a crime for persons to manage, direct or promote companies anywhere in the world would be extra-territorial legislation of the most outrageous sort. Besides, such a restriction would be impossible to enforce. Again practicality dictates that the prohibition should only extend to local companies and to foreign companies that do business here.

If the foregoing arguments are correct, then in essence s. 149 only applies to local companies and to foreign companies that are registered here. A foreign company that does not do business here (and hence is not registered) is outside the scope of the section. It should be noted that companies that went into liquidation before the date of commencement of the section [15] are not within its scope.[16]

One last problem: s. 350 includes partnerships of more than five persons within the definition of "unregistered company". This means that strictly speaking a person disqualified by s. 149 may not participate in the management of a partnership. This could have extremely serious implications for professionals like solicitors and accountants who practise in partnerships. Surely this was not intended by Parliament? As s. 149 is in the Companies Act it is suggested that it should not cover partnerships and other associations. An amendment to make this clear would be most welcome.

6. *The scope of the prohibition*

A person who is caught by s. 149 may not be a promoter or director of a company, or take part in the management of or be concerned in the management of companies, for five years unless the court gives

14 Which would necessitate that they be registered under Division 2 of Part XI of the Companies Act.

15 *Viz.,* 15th August 1984.

16 Section 149(5).

leave. This is a prohibition of frightening width, the limits of which are undefined in the section itself.

(a) "Promoter". The classic definition of promoter is that of Cockburn C.J. in *Twycross* v. *Grant:*[17]

> "A promoter, I apprehend, is one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose."

The Companies Act does not define the word "promoter", except in relation to prospectuses. It is not uncommon for a company to be set up by purely professional persons — lawyers, for instance — and then transferred to the persons who are really interested in it. These professional persons are nevertheless promoters in the eyes of the law. It would appear that if such a person ran afoul of s. 149, he could not do even this much.

(b) "Director". This has already been discussed above.

(c) "Management of a company". Management of a company can range from directing the operations of the entire commercial entity to assisting in a small facet of the business. There is a continuum of managerial posts from Chief Executive down to Section Supervisor and below. Where is the line to be drawn? Is a person who is caught by s. 149 required to resign from all managerial posts that he holds? Section 4 of the Companies Act defines "manager" as "the principal executive officer of the company for the time being", but "management" is not defined. Clearly a person would be prohibited from being the principal executive officer of a company if disqualified by s. 149. But what of lesser posts, posts that might carry with them extensive powers though the incumbent is not the principal executive officer? It is suggested that a possible test is that of supervision. The mischief that s. 149 is designed to cure is the mischief of having an incompetent manage a company. This mischief may be avoided if the disqualified person is sufficiently supervised. Thus if the post that the disqualified person wishes to occupy is one that is subject to close supervision by some other person, there should be no objection to him holding that post; contrariwise if the post is one that carries with it considerable autonomy. Guidance from the courts on this point is sorely needed. It was stated in the Select Committee's Report that "the section could in its operation cause some inconvenience and cost to some persons who have been unfortunate in their trading activities as distinct from those who are unfit to manage companies".[18] That is an understatement if one takes the word "management" in its largest sense.

Avoiding the consequences of s. 149

Given the horrendous consequences of being caught by s. 149 it behoves every person potentially within its scope to seek deliverance from its clutches as soon as possible.

A person who is caught by s. 149 may apply for the leave of the court to promote, direct and manage companies. Such applications

17 (1877) 2 C.P.D. 469 (Court of Appeal, England).
18 *Supra,* note 2, at p. B18. column 36.

must be made by originating summons.[19] Notice of the application[20] must be served on the Minister[21] and the Official Receiver.

The court is given the unenviable task of determining whether the applicant's conduct as a director of any of the liquidated companies made him unfit to be concerned in the management of a company.[22] What a court will take into account is an open question. There are no cases from other jurisdictions to provide analogies.

Some guidance might be obtained from decisions on analogous provisions in the Companies Act, namely s. 148 (disqualification of undischarged bankrupts) and s. 154 (disqualification after being convicted of certain offences). It has been held both in Australia[23] and in Singapore[24] that disqualifications like these are not punitive, but rather designed "to protect the public and to prevent the corporate structure from being used to the financial detriment of investors, shareholders, creditors and persons dealing with the company".[25] The same might be said of s. 149.[26] The analogy between these sections and s. 149 is not exact, of course, and what was said in the cases may need modification in the new context.

The following factors are offered as speculations:

(a) *The extent to which the application was concerned in the management of the company.* The more intimately bound the applicant is to the management of the company, the more it can be said that he is responsible for its failure.[27]

(b) *Whether the applicant is guilty of any breach of fiduciary duty to the company, which breach caused loss to the company.*

(c) *Whether the applicant is guilty of any breach of the duty to show skill, which breach caused loss to the company.*

(d) *Whether the applicant is guilty of any breach of the duty to take care in relation to the affairs of the company, which breach caused loss to the company.*

19 Rules of the Supreme Court 1970, Order 88 rule 2 and Order 5 rule 3.

20 Section 149(2)(a).

21 "Minister" means the Minister for the time being charged with the responsibility for the department or subject to which the context refers: s. 2 Interpretation Act (Cap. 3). With effect from 1st August 1984 the Minister for Finance has been in charge of companies, in place of the Minister for Law: see S 197/1984 and S 198/1984.

22 Section 149 (2) (b).

23 See *Re Altim Pty. Ltd. and Companies Act 1961* [1968] 2 N.S.W.L.R. 762; *Re Ferrari Furniture Co. Pty. Ltd. and the Companies Act* [1972] 2 N.S.W.L.R. 790; *Re Macquarie Investments Pty. Ltd.* (1975) 1 A.C.L.R. 40; *Re Maelor Jones Pty. Ltd.* (1975) 1 A.C.L.R. 4; *Re Magda Alloys and Research Pty. Ltd.* (1975) 1 A.C.L.R. 203; *Zuker* v. *Commissioner for Corporate Affairs* [1981] V.R. 72. I am greatly indebted to my colleague Mr. Andrew Hicks for bringing these Australian cases to my attention.

24 See *Huang Sheng Chang & Ors.* v. *Attorney-General* [1984] 1 M.L.J. 5, a decision of Wee C.J. on s. 130 (now s. 154) (High Court, Singapore). The reasoning of the learned Chief Justice was affirmed by the Court of Appeal in *Attorney-General* v. *Derrick Chong Soon Choy* [1985] 1 M.L.J. 97.

25 *Per* Bowen C.J. in *Re Magda Alloys and Research Pty. Ltd., supra,* note 23 at p. 205.

26 See the remarks of Professor Jayakumar, *supra,* note 2.

27 *Re Magda Alloy and Research Pty. Ltd., supra,* note 23; *Huang Sheng Chang & Ors.* v. *Attorney-General, supra,* note 24.

(e) *Whether the applicant has shown reasonable diligence in the discharge of the duties of his office.* The fact that a director has not been reasonably diligent should weigh heavily in the scales against him. It may be said that such a person is not fit to be a director. "Reasonable diligence" is of course a question of fact, and should not be interpreted to impose onerous burdens on honest directors.

(f) *The number of other companies in which the applicant is involved which have gone into liquidation.* The Minister of State for Law, Prof. Jayakumar, suggested in his remarks in the appendix to the Select Committee's Report [28] that although simultaneous liquidations should not be considered to be one liquidation for the purposes of s. 149, nevertheless this might be a factor that the court will take into account.

(g) *Whether when the debts of the company were contracted the applicant had a reasonable expectation of the said debts being paid.*[29]

(h) *The structure and the nature of the business of each of the companies which the applicant seeks the leave of the court to become a director of or to take part in the management.*[30]

(i) *The interests of the general public, the shareholders, creditors, and employees of these companies.*[31]

(j) *The risks to the persons mentioned and to the general public if leave is given.*[32]

(k) *The applicant's general character.*[33]

(l) *The need to vindicate public morality.*[34] There may be a public sentiment in particular cases that would be outraged by granting leave to the applicants.

As far as ss. 148 and 154 are concerned, the onus is on the applicant to show that "the general policy of the legislature laid down in the section ought to be made the subject of an exception in his case".[35] The same probably applies as regards s. 149, sub-section 2(b) of which clearly envisages that it is for the applicant to satisfy the court that his conduct did not make him unfit to be concerned in the management of a company.

[28] *Supra,* note 2, at p. B19 column 37.

[29] If there was no such reasonable expectation, the director in default would be guilty of an offence under s. 339(3). A conviction under that section would lay the offending director open to an order imposing unlimited liability in respect of the debts in question under s. 340(2).

[30] *Re Magda Alloy and Research Ply. Ltd., supra,* note 23; *Huang Sheng Chang & Ors.* v. *Attorney-General, supra,* note 24.

[31] *Re Magda Alloy and Research Pty. Ltd., supra,* note 23; *Huang Sheng Chang* v. *Attorney-General, supra,* note 24; *Zukcr* v. *Commissioner for Corporate Affairs, supra,* note 23.

[32] *Ibid.*

[33] *Re Magda Alloy and Research Pty. Ltd., supra,* note 23; *Huang Sheng Chang* v. *Attorney-General, supra,* note 24.

[34] See *Re Zim Metal Products Pty. Ltd.* (1977) 2 A.C.L.R. 553.

[35] *Per* Bowen C.J. in *Re Magda Alloys and Research Pty. Ltd., supra,* note 23 at p. 205. See also *Re Ferrari Furniture Co. Pty. Ltd., supra,* note 23; *Zuker* v. *Commissioner for Corporate Affairs, supra,* note 23; *Huang Sheng Chang* v, *Attorney-General, supra,* note 24.

The disadvantage of taking this course of action is that while the restriction takes effect immediately the second company is deemed to have gone into liquidation,[36] the application for leave — even if filed simultaneously with the liquidation — is unlikely to be heard for some time after it is filed. In the meantime the erstwhile director is in limbo and effectively precluded from managing companies.

From the commercial man's point of view it would be desirable if leave could be obtained the moment the first company goes into liquidation, or at any rate before the disqualification takes effect; then there will not be a hiatus when the second goes under. It will not improve a director's performance to have this Sword of Damocles suspended over him. Whether this can be done is another matter. The section is silent on the point. It is suggested that courts should allow a prospective application for leave for reasons of commercial expediency. Otherwise several companies may find themselves abruptly decapitated if their directors fall foul of s. 149. Again the guidance of the court on this matter is imperative.

Some thoughts on reform

The main problem with s. 149 is that it is over-inclusive. It may prevent incompetents from setting up companies, but in the present economic climate the section will deprive the country of much-needed entrepreneural talent. Doubtless there is a mischief to tackle; but the cure could be more specific. A scalpel is needed to remove the tumour, not a cutlass.

There are really two problems to be tackled: first, the problem of the unpaid creditors: second, the problem of unfit directors. It would be better to tackle them separately.

As for the first problem, the remedy seems fairly simple. If the company does not pay the creditors, then let the persons responsible for incurring the debts or liabilities on behalf of the company pay them. In England the Cork Committee on Insolvency Law and Practice recommended that a person who has been responsible for the failure of one company, and who wishes to recommence trading, should be required to do so without the benefit of limited liability.[37] It is may not be necessary to go quite so far.

Within the existing framework of the Companies Act, a director or officer of a company may be made liable for the company's debts. If at the time a debt was contracted there was no reasonable or probable ground of expectation that the company would be able to pay the debt, then any officer of the company who was "knowingly a party" to the contracting of the debt would be guilty of an offence under s. 339(3). A conviction under s. 339(3) would lay the offender open to an order under s. 340(2) making him liable for the payment of the whole or any part of the company's debts.[38]

36 See *supra,* n. 5-7 on when a liquidation is deemed to take place.

37 Report of the Review Committee on Insolvency Law and Practice, Cmnd. 8558 at para. 1826.

38 See e.g. *Dunn* v. *Shapowloff* (1978) 3 A.C.L.R. 775, *Re Klintworth Homes Pty. Ltd.* (1977) 3 A.C.L.R. 213, for the operation of the Australian equivalent of this section.

This remedy is not easily available at present because civil liability may be imposed only after a conviction is obtained. A creditor has no control over whether a prosecution for a contravention of s. 339(3) is instituted. It is suggested that a simple and elegant solution to the problem of the unpaid creditor may be found by simply removing the necessity for a prior conviction before a court can order a director to be personally liable for the company's debts. The creditors will have first recourse against the company. If in proceedings against the company it appears that the debts of the company were contracted without reasonable expectation of them being paid, then it is only fair that the persons who caused those debts to be contracted should pay them if the company cannot. If on the other hand there was a reasonable expectation that the debts would be paid, then it may be said that the creditors took a business risk which did not come off; in such a case, the directors should not be personally liable. The Act should not penalise persons who are unfortunate in their dealings, as opposed to being fraudulent or careless.

As for the problem of unfit directors, the question of whether such persons ought to be barred altogether from managing companies is a policy decision. If it is felt that the public needs to be protected in this way, it is suggested that disqualification should be imposed only on the application of a competent authority. There are several practical reasons for this. Firstly, the making of a disqualification order will ensure that a disqualified person knows that he cannot participate in the management of companies; there will be no pleas of ignorance as there might be in respect of s. 149 as presently drafted. Secondly and more importantly, disqualification can be more selective, catching those who are truly unfit rather than making everyone suffer equally. Thirdly, where there is automatic disqualification it is impossible to discover whether any particular person is disqualified; whereas if an order were necessary a register of such orders could be maintained.

This procedure will of course increase the work-load of the competent authority (probably the Registrar of Companies). But with progressive computerization, identification and enforcement may become less of a problem. In any case, it is a question of balancing the inconvenience to the commercial sector against inconvenience to a public authority. There should be no doubt on which side the balance should lie.

WALTER WOON