OPENING REMARKS

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Whether I am an appropriate person to open a seminar "celebrating"—well perhaps at least noting the occasion of—the 100th anniversary of *Salomon v Salomon & Co Ltd*[1] is, I suspect, questionable. I have long been an unashamed admirer of the scholarship (not only in company law and in partnership) of Nathaniel Lindley. He, of course, was a member of the Court of Appeal that the House of Lords found to have got it so wrong.

I also am a person who strongly holds as a rule to purposive construction of legislation. And was Lindley LJ so palpably wrong when he said:

> There can be no doubt that in this case an attempt has been made to use the machinery of the *Companies Act*, 1862, for a purpose for which it never was intended.[2]

It seems to me the principal justification for favouring a literal as against a purposive interpretation of a statute is that the purpose in question offends against values the common law seeks to uphold so that if parliament is to strike at them it must do so plainly and unmistakably. But was *Salomon* such a case?

Because I always have less than revered the House of Lord's decision, I intend to devote some part of my remarks to the counter-revolution to the steps taken by the courts to take away with one hand what, in *Salomon*, they gave with the other. And this they surely had to do. But I will leave that for the moment.

First I want briefly to narrate a far less well-known, but probably more just, conferral of separate legal and corporate personality on what previously were regarded as unincorporated groups. I refer to the judicial bestowal of corporate status on statutory boards and trusts in the first half of the nineteenth century. If I can speak somewhat anachronistically it was this event that permitted the evolution in doctrine that allowed the citizen to make wide use of the tort of negligence against statutory bodies engaged in public works and in the provision of public services. The landmark decision in this arena was that of the House of Lords in *The Mersey Docks Trustees v Gibbs*.[3]

A DIGRESSION

It is appropriate in this setting and on this occasion to speak of the corporate form in the public sector. Governments have rediscovered it, exploited it and, on occasion,

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* Judge of the Federal Court of Australia.

1 [1897] AC 22.

2 *Broderip v Salomon* [1895] 2 Ch 323 at 337.

3 (1866) LR 1 HL 93.

have abused it. The use made of Corporations Law companies poses particular problems. Doubtless my view in this is quite unfashionable, but I think it can rightly be said today, as Lindley LJ said of the one person company, that governments have attempted to use "the machinery of the [Corporations Law] for a purpose for which it never was intended". My reason for this view, if I can oversimplify drastically, is that the principles of corporate law were not designed to accommodate the dictates and the demands of responsible government. I, for example, am perfectly comfortable with the Senate Standing Committee on Finance and Public Administration calling before it the executives of an off-budget, state owned company to give an account of themselves—as it once did with the Commonwealth Bank.[4] The true shareholders—the Australian people—are entitled to no less. But how does company law accommodate itself to this?

Like problems with responsible government, though with different manifestations, can equally affect statutory corporations. I was compelled recently to spill much ink on this very matter.[5] Here I merely question whether the fundamental principles governing public sector corporations necessarily must be different from those at play in the private sector.

But I have strayed from the story I am to tell.

THE "INCORPORATION" OF UNINCORPORATED PUBLIC BODIES

Today we take for granted both the ready attribution of corporate status to public agencies and the baggage of consequences that flow from this. It was not always, or necessarily, so.

A case that stuck in memory from my own undergraduate torts course is *Russell v The Men of Devon*.[6] It was the progenitor of a profoundly unjust rule that remains with us to this day. I refer to the immunity of highway authorities for non-repair of roads and bridges. Only much later did I discover its significance to corporate law.

Two inhabitants of the county of Devon were sued "for themselves and the rest of the men" of the county, for injuries sustained as a result of the non-repair of a bridge. Lord Kenyon CJ saw the question so raised in simple terms. It was:

> whether this body of men, who are sued in the present action, are a corporation, or qua corporation, against whom such an action can be maintained.[7]

And the significance of their being a corporation?

> Where an action is brought against a corporation for damages, those damages are not to be recovered against the corporators in their individual capacity, but out of their corporate estate.[8]

So should that "body of men" be so regarded?

4 Senate Standing Committee on Finance and Public Administration, "Report on Annual Reports" in *Reports on Annual Reports* (August—December 1993).
5 *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1.
6 (1788) 2 TR 667.
7 Ibid at 671-672.
8 Ibid at 672-673.

> If the county is to be considered as a corporation, there is no corporation fund out which satisfaction is to be made. Therefore I think that this experiment ought not to be encouraged.[9]

And so, though Lord Kenyon indicated that the grant of corporate status was a matter of legislative discretion, even if the court could exercise it, it should not do so—and should not for naked reasons of policy.

For the injured citizen, the long trek to find a corporate defendant had begun.

By the early nineteenth century a significant range of public utility functions—ports, roads, turnpikes, drainage and sewers etcetera—had been legislatively devolved on a variety of public agencies (if I can so call them)—in some instances to municipal corporations, more commonly to unincorporated commissions and trusts. The latter were, characteristically, composed of significant local worthies who acted gratuitously. Ordinarily they were given statutory powers to levy tolls, rates and the like to fund the performance of the statutory functions entrusted to them. But were the members of these commissions and trusts to feel tort's sting? Or were they to be distant beneficiaries of the *Men of Devon*?

The highway-nonfeasance rule apart, they were to be held liable for their own personal wrongs or wrongs committed at their direction.[10] But this was not of particular consequence. The work of the commissions and trusts was undertaken by employees and contractors. The real question was whether the commissioners and trustees were to be held personally liable as well for their wrongs. Here, as with the *Men of Devon*, the courts were confronted with a bare issue of public policy. And their response was predictable. Chief Justice Best in *Hall v Smith*[11] says it all:

> If the doctrine of respondant superior were applied to such commissioners, who would be hardy enough to undertake any of those various offices by which much valuable, yet unpaid, service is rendered to the country? Our public roads are formed and kept in repair, our towns paved and lighted, our lands drained and protected from inundation,—our internal navigation has been improved,—ports have been made and are kept in order,—and many other public words are conducted by commissioners who act spontaneously. Such commissioners will act no longer if they are to make amends from their own fortunes for the conduct of such as must be employed under them. It would be much better that an individual injured by the act of an agent should endure an injury unredressed, than that the zeal of the most useful members of the community should be checked by subjecting them to a responsibility for agents from whose services they derive no benefit, and who are seldom under the immediate control of their employers whilst they are employed on the works they are ordered to do. The commissioners, taking the advice of their surveyors and engineers, are to direct what tunnels or other works are to be made. Few commissioners know how such works should be executed; they ought not, therefore, to be answerable for an imperfect execution of them.

I would ask in passing whether even today, when public-spirited individuals accept appointment to governmental or charitable boards, they do so with a reduced expectation of personal exposure should defaults and miscarriages occur. Mr Eise's fate in *Commonwealth Bank of Australia v Friedrich*[12] is salutory in this. But I have digressed.

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9 Ibid at 673.

10 *Metcalfe v Hetherington* (1855) 11 Ex 257; *Sutton v Clarke* (1815) 6 Taunt 29.

11 (1824) 2 Bing 156 at 159-169.

12 (1991) 5 ACSR 115.

The device used to deflect the imposition of vicarious liability was to analogise employment by a trust to that in a public office. If a minister was not vicariously liable for the actions of a public servant, why should a trustee for public purposes be so for the actions of trust employees and contractors?[13]

Where trustees did differ from the *Men of Devon* was in their power to create a separate fund for the purposes of the trust. Why could not that fund be used to satisfy damages claims against the trustees? Here doctrine initially prevailed over the obvious needs of justice: Funds raised under statutory powers for public purposes could only be used for those purposes. They could not, it was said, be used to satisfy personal liabilities.[14]

By the 1840s the English courts, increasingly, found themselves confronted with an anomaly. Alongside trusts and commissions, private enterprise also had begun to provide some "public utility" services for private profit, invariably using the corporate form for the purpose. The courts had little hesitation in holding such corporations liable for damage occasioned by their neglects and defaults. A landmark decision in this genre was *Parnaby v The Lancaster Canal Co*,[15] the defendant there being a privately owned company created by a special act of Parliament.

Were the divergent growths to be reconciled? Well this occurred in several steps. The first involved the attribution of corporate status to the trusts and commissions. Before statute took this step directly—an 1850s development it would seem—the courts latched onto a simple expedient for "corporatising" trusts and commissions. Increasingly, enabling Acts provided that the trustees in question (howsoever numerous) could be sued in the name of their clerk. Such a provision may have been a mere device to facilitate suit, but it provided the means for regarding trustees as a "quasi-corporate body".[16] This, though, was not the end of the story. Another step remained to be taken. It was, in a sense, the real public policy one: Should the trustees, though so incorporated, still not be held liable for the actions and defaults of their employees and contractors? It was this issue that *Mersey Docks Trustees v Gibbs*[17] settled decisively and with it that the corporation's funds were available in satisfaction of judgments against it.

The interesting point, really, is that that last step needed to be taken notwithstanding incorporation. There was no denying that the Mersey Docks Trustees were a corporation (indeed statute finally had made this plain). Likewise in *Salomon's* case the Court of Appeal accepted that Salomon & Co Ltd was a company. The question in both instances was what were the consequences that were to be attributed to that status in the circumstances. In each case in the House of Lords a policy judgment was made—in one instance (Mersey Docks), overtly; in the other, I would suggest, covertly. I would have to say I prefer the fashion of openness unobscured by the veneer of literal interpretation of statutes.

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13 Compare with *Lane v Cotton* (1701) 1 Ld Raym 646.
14 *Duncan v Findlater* (1839) 6 Cl & Fin 894.
15 (1839) 11 Ad & E 223.
16 *Ruck v Williams* (1858) 3 H & N 308 at 320.
17 (1866) LR 1 HL 93.

WITHDRAWING THE DISPENSATION

Regular exposure to the Trade Practices Act 1974 (Cth) has I suspect a subtle—some would say a subtly corrosive—effect on the reverence one shows for the intricacies of legal doctrine. Let me demonstrate the point. In an English passing off case, *White Horse Distillers Ltd v Gregson Associates Ltd,*[18] Nourse J had this to say of a director's liability in tort to a third party for conduct attributable to his or her company:

> it would seem to be irrational that there should be personal liability merely because the director expressly or impliedly directs or procures the commission of the tortious act or conduct. In the extreme, but familiar, example, of the one-man company, that would go near to imposing personal liability in every case.[19]

Sir Robin Cooke embraced this view enthusiastically in the leading New Zealand case, *Trevor Ivory Ltd v Anderson.*[20]

Now let me turn to the far more prosaic language of the Trade Practices Act 1974 (Cth). Section 75B(1), an interpretation section, says (in part) that:

> 75B (1) A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA or V shall be read as a reference to a person who —
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> (a) has aided, abetted, counselled or procured the contravention;
>
> (b) has induced ... the contravention;
>
> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention.

We have, apparently, an irrational Parliament. Directors of Nourse J's "one-man companies" are routinely held liable as accessories for the contraventions of their companies—and contraventions resulting from a director's own actions.[21] Having applied s 75B on a number of occasions, I can only say that it is a healthy and just antidote to the seemingly mesmeric influence of the *Salomon* and, for that matter, *Lee v Lee's Air Farming Ltd,*[22] principles.

But my purpose is not to talk of s 75B nor even of "piercing the corporate veil". Rather I want, under the shadow of s75B, to look briefly at this country's modern "common law" of accessorial liability. I suspect it now tends both to confirm Nourse J's worst fears and to go even further, perhaps, than Lindley LJ was prepared to countenance in *Salomon's* case.[23]

There is quite a provocative article in the *Cambridge Law Journal* entitled "The Tort of Conspiracy and Civil Secondary Liability".[24] The author sets out to identify:

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18 [1984] RPC 61.

19 Ibid at 91.

20 [1992] 2 NZLR 517; see also, A Borrowdale and M Simpson, "Directors Liability in Tort: Recent Developments" (1995) 13 *Company and Securities Law Journal* 400.

21 The constitutional validity of s 75B is unquestionable: see *Fencott v Muller* (1983) 152 CLR 570.

22 [1961] 1 NZLR 325.

23 [1895] 2 Ch 323 at 338.

24 P Sales, "The Tort of Conspiracy and Civil Secondary Liability" (1990) *Cambridge Law Journal* 491.

> that form of liability for civil wrongs imposed in civil law in circumstances similar to those in which criminal liability is imposed on persons who aid, abet, counsel or procure a crime.[25]

He goes on to suggest that:

> There are two main principles which emerge from the cases. First, liability may be imposed on a person who induces or procures the commission of a civil wrong against the plaintiff by a third party. Second, liability may be imposed on a person who assists a third party to commit a civil wrong against the plaintiff. There is a substantial body of authority in support of the first of these principles, and in support of its general applicability throughout the civil law. The second principle is less well-recognised, but is also supported by authority in particular areas and would be accepted as a principle of general application along with the first.[26]

The spirit of s 75B is alive and well here. But to sharpen the focus of this, assume in the case of each of the two principles—the "inducing/procuring" principle, and the "assisting" principle—that the third party wrongdoer is a company and that the inducer, procurer or assister is a director (or directors). If the company commits a tort, breaches a contract, or a fiduciary or statutory duty, why should not that director be held personally liable as an accessory?

The only apparent reason is that given by Cooke P in the *Trevor Ivory* case[27] in rejecting a third party negligence claim against a director:

> it behoves the Courts to avoid imposing on the owner of a one-man company a personal duty of care which would erode the limited liability and separate identity principles associated with the names of Salomon and Lee.

A consequence of this attitude—and one can find traces of it in case law in Canada,[28] Britain[29] and Australia[30] as well—has not been to deny outright the possibility of some form of participatory liability in directors and other corporate officers. Rather it has led to the attempt by at least some judges in some instances to accommodate accessorial liability to the need to have regard "to the separate legal existence of the company, [and] to the fact that the company acts through its directors".[31] And they have done this largely by artificially raising the threshold of accessorial liability. This in turn has created what a Canadian judge, Le Dain J, called the "elusive question": "What ... is the kind of participation in the acts of the company that should give rise to personal liability?"[32]

Yet again, there is a rather basic question of public policy here and it is not one that is properly answered by a mantra-like invocation of company law orthodoxies. Why should we compound the fiction of *Salomon* with the further fiction that the very person who, as a corporate officer, actually procures or induces a breach of his or her

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25 Ibid at 502-503.
26 Ibid at 503.
27 [1992] 2 NZLR 517 at 523.
28 *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3d) 195—an influential decision.
29 Most notably in inducing breach of contract claims: *Said v Butt* [1920] 3 KR 497.
30 *King v Milpurrurru* (1996) 136 ALR 327 at 350 per Beasley J.
31 Ibid.
32 *Mentmore Manufacturing* (1978) 89 DLR (3d) 195 at 203.

company's contract with another, is not the person responsible for causing that civil wrong simply because a company has to act through his or her agency?

It is said, though, that directors of small companies would otherwise be more exposed potentially to accessorial liability. But does this really provide reason at all for limiting that exposure? Australian case law on accessorial liability in equity, for example, would suggest not. Let me illustrate this.

The "knowing assistance" limb of what is known as the rule in *Barnes v Addy* exposes a person to the full range of equitable remedies available against a trustee if that person knowingly or recklessly assists in or procures a breach of trust or of fiduciary duty.[33] As has long been recognised in case law in the United States,[34] this form of liability is one of no little significance to the directors of a trust company for the very reason that, often enough, it will be their own conduct in exercising the powers of the board which causes their company to commit a breach of trust. They are, in other words, peculiarly vulnerable to this rule. Recent Australian case law is demonstrating an appreciation of this,[35] but not a resultant hesitation in giving full rein to the rule.[36]

A like disposition is now being manifest in tort cases. I will not traverse the case law here but merely refer you to the decision of Lindgren J in *Microsoft Corporation v Auschina Polaris Pty Ltd*[37] which reaffirms that the general test of liability of a director for corporate torts is whether the tortious conduct was "directed or procured" by the directors. In so doing Lindgren J rejected that line of authority that artificially raised the threshold of accessorial liability in the cause of a fidelity of sorts to *Salomon*.

Significantly, he noted:

> It may be that a consequence of the view which I favour is that in the case of a "one man company", in the sense of a company, all of whose relevant acts, omissions and states of mind are exclusively those of one human being, that human being will be liable for the tortious conduct of the company, at least in cases other than "dealings cases". I find nothing in principle or authority inconsistent with this result.[38]

The "dealings cases" to which he referred were ones where a wrong is committed in or in consequence of a director acting on behalf of a company in a dealing with a third party, for example in giving advice, or in breaking a contract. It is fair to say that all of the controversies surrounding negligent dealing cases have not been stilled, though, I suspect, the *Microsoft* judgment goes some distance towards so doing.

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33 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373; 5 ALR 231. See *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 WLR 64 and the cases and writings referred to therein; *Wickstead v Browne* (1992) 30 NSWLR 1; *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 32 NSWLR 50 per Kirby P; G Bogert, *The Law of Trusts and Trustees* (2nd ed) at para 901; Oakley, "Liability of a Stranger as a Constructive Trustee" in Cope (ed), *Equity: Issues and Trends* (1995).

34 *Shuster v North American Mortgage Loan Co*, 40 NE 2d 130 (1942); *Seven G Ranching Co v Stewart Title & Trust of Tucson*, 627 P 2d 1088 (1981); see also, *Scott on Trusts* (4th ed) at para 326.3; G Bogert, above n 33 at para 901, esp fn 10.

35 *Young v Murphy* (1994) 13 ACSR 722; *Biala Pty Ltd v Mallina Holdings Ltd* (1993) 11 ACSR 785 at 832.

36 *Australian Securities Commission v AS Nominees Ltd* (1995) 133 ALR 1.

37 (1996) 142 ALR 111.

38 Ibid at 126.

The breach of contract cases are another story. It is stated, for example, in the looseleaf version of *Ford's Principles of Corporations Law*[39] that:

> Where a corporation breaks its contract by conduct of its agent, the agent cannot be liable in the tort of inducing breach of that contract: *Said v Butt* [1920] 3 KB 497 referred to in *G Scammell & Nephew Ltd v Hurley* [1929] 1 KB 419 at 443; *O'Brien v Dawson* (1941) 41 SR (NSW) 295 at 308 affirmed (1942) 66 CLR 18; *D C Thomson & Co Ltd v Deakin* [1952] Ch 646 at 680-1; [1952] 2 All ER 361; *Traztand Pty Ltd v Bousfield* (1984) 56 ALR 188; *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* (1989) 95 ALR 211 at 243. It is said that an agent acting in good faith within the scope of authority is the alter ego of the principal and as the principal could not be considered to have induced the principal to break the contract the agent could not be liable.

The cases cited, doubtless, suggest this. Whether they are correct is altogether another matter. And there does not appear to be binding Australian authority on the point. For my own part, I have some difficulty in reconciling this particular treatment of the tort of inducing a breach of contract with, for example, that more general treatment of tort by Lindgren J in *Microsoft* or with the knowing assistance cases in equity.

If this contract-related bastion of immunity should fall—it would be quite impolitic of me to prophesy its capitulation—then it can I think properly be said that *Salomon* has been outflanked and in a rather decisive way. A director who procures, induces or knowingly assists in the commission of a tort, a breach of contract, an equitable fraud or an actionable breach of statutory duty would seem potentially to be exposed to the liabilities of an accessory. The implications of this are obvious enough—particularly, but not by no means only, for the one person company.

But should we worry about the consequences of this for corporations and for corporate law? Well it is pleasing to know that others here today are to reflect on *Salomon* and on the reverence we should show it.

All that remains for me to say is—remember s 75B.

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39 (1997) at 16, 066.