Duty to act bona fide in best interests of company as a whole

- Directors must act: “bona fide in what they consider – not what the court may consider – is in the interests of the company...”: Re Smith & Fawcett Ltd [1942] Ch 304
- Both subjective and objective elements
  - The Bell Group Ltd v Westpac Banking Corporation (no 9) [2008] WASC 239 per Owen J (affirmed on appeal – Westpac Banking Corp v Bell Group Ltd (No 3) [2012] WASCA 157)
    - Directors will breach their duty “if, on consideration of the surrounding circumstances (objectively viewed), the assertion of directors that their conduct was bona fide in the best interests of the company and for proper purposes should be doubted, discounted or not accepted.” (Lipton, Herzberg & Welsh, p389)
- Duty breached if director acts in a way that no rational director would have considered to be in the best interests of the company:
  - ASIC v Adler [2002] NSWSC 171
  - Hutton v West Cork Railway Co (1883) 23 Ch D 654 – must be more than simply director believing they’re acting in best interest of corporation e.g. some crazy director could think its legit to give away all the funds. Therefore must be objective when deciding this.

Harlowe’s Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL (1968) 121 CLR 483:

Facts

- Harlowe’s held 170,000 (out of 20,000,000) of Woodside’s shares
- Woodside allotted and issue 9,000,000 shares to Burmah Oil Australia Ltd
- Harlowe alleged that Woodside did not need additional funds and the issue was made for an improper purpose not in the best interests of the company – preventing Harlowe obtaining voting power

Furwick CJ, McTiernan & Kitto JJ at 493:

“The principle is that although primarily the power is given to enable capital to be raised when required for the purposes of the company, there may be occasions when the directors may fairly and properly issue shares for other reasons, so long as those reasons relate to a purpose of benefiting the company as a whole, as distinguished from a purpose, for example, of maintaining control of the company in the hands of the directors themselves or their friends ... [the] ultimate question must always be whether in truth the issue was made honestly in the interests of the company.”

What are the company’s interests?

“The phrase “the company as a whole”, does not...mean the company as a commercial entity distinct from the corporators it means the corporators as a general body”: Greenhalgh v Arderne Cinemas Ltd [1951] Ch 286

Includes creditors when the company is an insolvency context: Kinsela v Russell Kinsela Pty Ltd [1986] 4 NSWLR 722

“In my view it is proper to have regard to the interest of the members of the company, as well as having regard to the interests of the company as a commercial entity. Indeed it is proper also to have regard to the interests of the creditors of the company. I think it is proper to have regard to the interests of present and future members of the company, on the footing that it would be continued as a going concern.”: Darvall v North Sydney Brick and Tile Co Ltd (1988) 6 ACLC 154

The Bell Group Ltd v Westpac Banking Corporation (No 9) [2008] WASC 239:

- Reference to the “concomitant” interests of creditors and shareholders
- “Brought down to its most basic terms, the directors failed to ensure that there was a corporate benefit to the individual companies in entering into the respective transactions”

Is there a duty to individual shareholders?

Found no duty to individual shareholders: Percival v Wright [1902] 2 Ch 421

Coleman v Myers [1977] 2 NZLR 225:

- The NZ Court of Appeal concluded that whilst Percival v Wright had been correctly decided, it did not apply to the “special circumstances” in that case involving a family company.
Woodhouse J said that whether a duty is owed to individual shareholders by directors will depend upon such factors as:

- Shareholders’ dependence upon information and advice;
- The existence of a relationship of confidence between directors and shareholders;
- The significance of some particular transaction for the parties;
- The extent of positive action taken by directors to promote the transaction.

Directors who act as trustees owe fiduciary duties to individual shareholders and beneficiaries in certain circumstances: *Hurley v BGH Nominees Pty Ltd (No 2) (1984) 2 ACLC 497*

Special circumstances call for duty to individual shareholders. It depends on nature of transaction (in this case G sold their shares to B who hadn’t told them about a third party seeking to buy shares. B proceeded to sell shares bought from G at higher price). If director has special knowledge and uses it to benefit themselves rather than company it can be a breach: *Brunninghausen v Glavanics (1999) 17 ACLC 1247*

**Section 181(1):**

A director or other officer of a corporation must exercise their powers and discharge their duties:

a) In **good faith and in the best interests of the corporation**; and

b) For a proper purpose

This is a **civil penalty** provisions, however will amount to a criminal offence under s 184 if they are **reckless** or **intentionally dishonest** in the breach.

**Duty to exercise a power for proper purposes**

*Australian Metropolitan Life Assurance Co Ltd v Ure (1923) 33 CLR 199 per Isaacs J at 217:*

“A regulation such as [the article giving power to refuse to register the transfer of shares] entrusts to the directors a corporate power, which is exercisable by them as agents of the Company. But, although it is a power which necessarily involves some discretion, it must be exercised, as all such powers must be, bona fide – that is, **for the purpose for which it was conferred**, not arbitrarily or at the absolute will of the directors, but honestly in the interest of the shareholders as a whole … The general character of such a regulation is clear, but the ambit of the purpose of the power of course varies with the circumstances of each particular case. The nature of the company, its constitution and the scheme of its regulations as a whole must all be taken into account in determining whether a given factor comes within its range.”

**Determining if a power has been exercised for a proper purpose**

*Howard Smith Ltd v Ampol Petroleum Ltd:*

1. **Question of law** – what are the objective purposes for which the power may, and may not be, exercised?
2. **Question of fact** – what were the intentions of the director, and what was the actual purpose for which the director exercised the power?

May consider surrounding circumstances: *Hindle v John Cotton Ltd (1919) 56 Sc LR 625*