CASE NOTES

NORTHSIDE DEVELOPMENTS PTY LTD v. REGISTRAR GENERAL OF N.S.W. AND ORS[1]

INTRODUCTION

Section 68A and the rule in Turquand's case

Section 68A was inserted into the Companies Code, by the Companies and Securities Legislation (Miscellaneous Amendments) Act 1983 (Cth), in order to allow persons dealing with a company to make certain assumptions.[2] Section 68A basically codifies the common law rule known as the indoor management rule, a rule which derives from the decision in *Royal British Bank v. Turquand*.[3] According to the House of Lords in *Morris v. Kanssen*, the rule is that 'persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular.'[4]

In Australia, it has been unclear whether the indoor management rule is a variation of the principles of agency or a special rule of company law related to the use of a company seal. This issue was examined recently by both the New South Wales Court of Appeal (in *Registrar-General v. Northside Developments Pty Ltd & Ors*)[5] and then again, on appeal from that decision, by the High Court of Australia.[6] To the extent that it does resolve the uncertainty surrounding the interpretation and operation of the rule in *Turquand's case*, the decision of the High Court in *Northside Developments v. Registrar-General and Ors* establishes an important precedent, and one which could have 'important consequences' for creditors who take a company's guarantee for another's debt.[7] What the decision leaves unanswered, however, is the extent to which s. 68A is a codification of the rule in *Turquand's* case. This is because the proceedings in *Northside* were instituted in 1979, before the introduction of s. 68A into the Companies Code. As a result, the Code provisions were not applicable to the case, and did not receive in-depth judicial analysis at either the Court of Appeal or High Court stage.[8]

FACTS

Northside Developments Pty Ltd (Northside) was formed in 1965 with the sole function of holding certain land at French's Forest in N.S.W. (the land). At all relevant times, there were three directors of Northside, John Lees, Robert Ellis and Robert Sturgess. Between them, the three directors also

1 (1990) 93 A.L.R. 385. High Court, 28 June 1990, Mason C.J., Brennan, Dawson, Toohey and Gaudron JJ.

2 For general reference, see CCH Australian Company Law and Practice 1989, paras 10-210, 10-220, 10,230, 25-610; 9,401-9,424, 20,204.

3 (1856) 6 E. & B. 327.

4 (1946) 1 All E.R. 586, 592, citing *Halsbury* (Hailsham Edn) Vol. V, 423.

5 (1988) 14 N.S.W.L.R. 571.

6 *Northside Developments Pty Ltd v. Registrar-General & Ors* (1990) 93 A.L.R. 385.

7 *Australian* (Sydney), 24 July 1990.

8 They were, however, discussed in *Barclays Finance Holdings Ltd v. Sturgess & Ors* (1985) 3 A.C.L.C. 662 at 665-8, by Wood J., who held that s. 68A does not have any retrospective operation, so that for events occurring before the coming into operation of s. 68A, the previous common law applies: (1985) 3 A.C.L.C. 662, 668. See also Mason J. at 93 A.L.R. 385, 388: 'The provisions of s. 68A the Companies Code, introduced in 1984, are directed to the issues which arise for decision in this appeal. However, as the mortgage was executed in 1979, s. 68A has no application and the case must be determined by reference to the pre-existing law'.

owned or controlled all the shares of the company. On 14 November 1979, an accountant, Mr Horder, who had been acting as secretary of the company, resigned that office.[9] On the same day, Gerard Sturgess, the son of Robert Sturgess, at his father's request signed a consent to act as secretary. A statutory return of the change was signed by Robert Sturgess on 20 November 1979 and filed with the Corporate Affairs Commission two days later. Neither Lees nor Ellis knew of or approved this 'appointment', and it was not disputed that, as a result, the purported appointment of Gerard Sturgess as secretary of Northside was invalid.[10]

The dispute in the case concerned an instrument purporting to be a mortgage of the land executed by Northside, under its common seal, in favour of Barclays Credit Corporation Holdings Pty Ltd (Barclays) to secure a loan of $1.4 million made to a company or companies controlled by Robert Sturgess. When the loan was not repaid, Barclays exercised its power of sale and sold the land to a purchaser who in good faith registered the transfer. Thereupon, the indefeasibility provisions of the Real Property Act operated to deprive Northside of its land.[11] Having lost its land, Northside then commenced an action to obtain damages from the Registrar-General of New South Wales.[12]

It was common ground in the case that the mortgage the subject of the action had been executed without the knowledge of the other directors of Northside and without any authority from Northside. It was likewise not disputed that the seal of Northside had been attached to the mortgage document by Robert Sturgess and his son without any authority from the company to do so. As Kirby P. in the N.S.W. Court of Appeal pointed out however:

> [O]n the face of the instrument, . . ., the document was perfectly regular. . . . The seal was there, it was the company's seal. The signature of Mr Robert Sturgess was there. He was a director. And it was his signature. The signature of Mr Gerard Sturgess was also there. It was his signature. It purported to be placed there as 'secretary' of Northside. If Barclays had troubled to check with the registered articles of Northside it would have found the provision in art 56 [which] . . . provided, relevantly:
>
> > . . . the Directors shall provide for the safe custody of the Seal and the Seal shall never be used except by authority of the Directors and in the presence of one Director at the very least who shall sign every instrument to which the seal is affixed and every such instrument shall be counter-signed by the Secretary or by a second Director or by some other person appointed by the Directors for the purpose.[13]
>
> Had it [Barclays] troubled to check with the Corporate Affairs Commission, it would have found the registration of the purported change in the office of the secretary of Northside.[14]

[9] Mr Horder was a partner of the firm of accountants which, together with Robert Sturgess, had looked after the day to day administration of the company's affairs. The only activity of the firm of accountants had been to pay the rates, to place in a book minutes of meetings, which were not actually held, and to file statutory returns. Mr Horder's resignation as secretary followed a decision by his firm not to allow partners to act as officers of client companies.

[10] At first instance, Young J. found that first, there had been no acceptance by the directors of the company of Mr Horder's resignation as secretary, nor any evidence that Robert Sturgess had authority to accept such resignation. Secondly, he found that while notice of the change of secretary was lodged with the Corporate Affairs Commission the annual return filed in February 1980 still showed H as secretary. A notice filed with the Commission was only prima facie evidence of the truth of the statement made in it (*cf.* s. 68A Companies Code), and there was no evidence that the mortgagee had ever looked at the return of secretaries. Even assuming that s. 132(2) of the Companies Act 1961 (N.S.W.) permitted a delegation of authority to Robert Sturgess to appoint a secretary, the fact that in the past the directors had left all matters of company management to Robert Sturgess was insufficient of itself to say that they had given him authority to appoint a secretary. Accordingly, Gerard Sturgess was never appointed secretary of the company. The N.S.W. Court of Appeal and the High Court appear to have accepted Young J.'s findings and reasoning on this point.

[11] *Registrar-General v. Northside Developments Pty Ltd & Ors* (1988) 14 N.S.W.L.R. 571, 585 per McHugh J.A.

[12] Under the Real Property Act 1900 (N.S.W.) s. 127, which, *inter alia*, gives a cause of action to a person who has been deprived of land by the registration of another person as proprietor where the remedies under s. 126 of the Act are inapplicable. It was common ground that Northside had no remedy under s. 126 of the Act.

[13] *Cf.* Companies (New South Wales) Code 1981 (N.S.W.), Schedule 3, Table A, reg. 84.

[14] (1988) 14 N.S.W.L.R. 571, 575-6.

The case thus raised starkly the issue of the extent to which a third party such as Barclays is obliged to go behind the seal and signatures of the apparent officers of a company with which it enters into a contract. In the words of Kirby P., the case raised, 'in a precise way, the scope and operation of the indoor management rule'.[15]

THE JUDGMENT OF THE N.S.W. COURT OF APPEAL

A. *The Scope and Operation of the Rule in Turquand's Case*

At first instance, Young J. concluded that the mortgage could not be said to have been executed by the appellant. He then turned to the question whether or not the mortgage could nonetheless still take effect. After examining the rule in *Turquand's* case, his Honour stated that the nature of the mortgage transaction was such as to require the lender to make enquiries as to the authority of Robert and Gerard Sturgess to enter into the mortgage on behalf of the company and to affix the common seal. No evidence was put before his Honour as to what, if any, enquiries Barclays had made. This was insufficient to allow Barclays to rely on the *Turquand* rule, and so the improperly executed mortgage was of no effect. Damages were therefore awarded in favour of Northside, in the form of an order against the Registrar-General requiring the Registrar-General to compensate the company for the loss of certain land.[16] An appeal by the Registrar-General to the full Supreme Court came before Kirby P., Samuels and McHugh J.J.A.

Kirby P. began by stating that:

> It is necessary, in order to resolve the central question in the appeal, to decide whether the rule which relieves persons dealing with companies from satisfying themselves about the authority of the company's action . . . is grounded in the law of agency or is a rule sui generis of company law. . . . For if the rule is a species of agency law, it is necessary, as Diplock L.J. pointed out in *Freeman & Lockyer*, that the person dealing with the company should be able to show several things. These are that the person was in fact induced to enter the contract in reliance upon the representation of authority, that it in fact relied upon the representation of authority and, as well, that nothing in the memorandum or articles of association of the company deprived the company of the capacity to enter into the contract. In short, the conflict between the two schools of thought poses the question of the extent to which a party dealing with a company is obliged to go behind the apparently regular and valid transaction of the company in order to check whether, in fact, regularity and validity can be proved from a closer inspection of the company's internal affairs.[17]

Finding that no authority of either his own court or the High Court bound him to any particular view about the scope, origins and purposes of the indoor management rule, Kirby P. then proceeded to examine the historical development of the rule, and the policy considerations which might support one view over the other. He found that 'in a virtually unbroken chain for more than a century' courts in Australia had been applying the rule in *Turquand's* Case 'in the context of company law'.[18] As a result, he decided that it was too late to state or refine the rule in any other context. In addition, he identified several 'reasons of policy' which suggest that the rule should be kept as one special to corporations.[19] Perhaps the most important of these was that:

> [T]o require satisfaction about the internal management procedures of [a] corporation would involve a usually needless intrusion into its affairs, and, often, the expensive production of evidentiary material which, for the normal run of cases, would be purely formal and have no real practical utility.[20]

15 *Ibid.* 576.
16 *Northside Developments Pty Ltd v. Registrar-General* (1987) 11 A.C.L.R. 513; 5 A.C.L.C. 642.
17 (1988) 14 N.S.W.L.R. 571, 573, 578.
18 *Ibid.* 579.
19 *Ibid.* 580.
20 *Ibid.* 581.

It is for such reasons, concluded Kirby P.:

> [W]hich amount in essence to a rudimentary cost/benefit analysis of the utility of providing otherwise — that the law does not normally require in dealings with a company that the party so dealing should (in the absence of some consideration which alerts it to do otherwise) go behind that which appears on the face of the documents to have been done legitimately.[21]

McHugh J.A. with whom Samuels J.A. concurred, agreed with Kirby P.'s conclusion 'that the indoor management rule was and at least in one respect remains a special rule of company law'.[22] His judgment, however, is more carefully confined to the facts of the case at hand than is Kirby P.'s. Recognizing that the agency interpretation of the rule in *Turquand's*, case is supported by English judicial decisions and by academic opinion,[23] McHugh J.A. explained that:

> [A] number of factors combine to make it difficult, if not impossible, for this Court to apply the interpretation which modern English authority has given to the rule in *Royal British Bank v. Turquand* . . . First, the modern English cases in the Court of Appeal which have regarded the *Turquand* rule as an application of agency principles did not involve contracts where the company seal was affixed to the document. Secondly, until recently, the few Australian decisions, dealing with company contracts under seal, have stated the rule in terms that are independent of agency principles: . . . Thirdly, one of the grounds on which the High Court decided *Albert Gardens (Manly) Pty Ltd v. Mercantile Credits Ltd* (1973) 131 CLR 60 does not seem consistent with the rule in *Turquand's* case being a simple application of agency principles. Fourthly, the provisions of the Companies (New South Wales) Code, s. 68A and s. 68C, demonstrate that the legislatures of Australia do not accept that liability of a company for unauthorized acts should depend solely upon agency principles.[24]

Expanding upon each of these factors in turn, McHugh J.A. reached the conclusion that '[t]he "positive corporate seal rule" as Professor Lindgren has described it . . . is not an application of agency principles but a special rule of company law'. He carefully confined this conclusion, however, to cases in which a company seal is concerned:

> When the outsider does not rely on the seal of the company but on the representation of some person as agent of the company, no doubt the principles expounded by Diplock L.J. in *Freeman & Lockyer (a firm) v. Buckhurst Park Properties (Mangal) Ltd* are applicable: see *Crabtree Vickers Pty Ltd v. Australian Direct Mail Advertising & Addressing Co. Pty Ltd* (1975) 133 CLR 72 at 78. But where the company seal is concerned, the rule in *Royal British Bank v. Turquand*, a rule of company law, applies.[25]

It is also interesting to note that, in applying the indoor management rule, McHugh J.A. appears to have thought it necessary to concentrate not upon the conduct of the third party dealing with the company (in this case Barclays), but upon the conduct of the company itself. In the present case he found that:

> [W]ithin the meaning of the rule in *Turquand's* case, . . . the company failed to prevent Gerard Sturgess from purporting to act as secretary. If the directors take so little interest in the running of the company that they . . . permit another director to run the company, the company must be precluded from asserting that the majority of its directors were not aware of a state of affairs which affected the company.[26]

B. *Exception to the Rule: Put Upon Inquiry*

All members of the Court of Appeal agreed that:

> [W]hatever may be the exact scope of the rule in *Turquand's* case, . . . it is quite clear on principle and on the authorities that it can never be relied upon by a person who is put upon inquiry.[27]

21 *Ibid.* Kirby P. obtained support for this argument from Gower's *Principles of Modern Company Law* (4th ed. 1979) which, at 184, describes the indoor management rule as a rule 'manifestly based on business convenience'.
22 (1988) 14 N.S.W.L.R. 571, 586.
23 *Ibid.* 586.
24 *Ibid.* 587.
25 *Ibid.* 596.
26 *Ibid.* 597.
27 *Ibid.* 582, quoting the statement expressed in *B. Liggert (Liverpool) Ltd v. Barclays Bank Ltd* [1928] 1 K.B. 48.

The question which then had to be answered concerned the circumstances necessary for a party to be put upon inquiry. Considerations pointed to by Northside in order to demonstrate that Barclays had been put upon inquiry were:

(1) The party seeking the loan (the company controlled by Mr Robert Sturgess) was not the owner of the land offered as security.

(2) The security was, as the most rudimentary inquiry by a credit provider would have disclosed, the single significant asset of Northside.

(3) The loan to Mr Sturgess' company secured by the mortgage had nothing, on its face, to do with the business of Northside.

(4) The fact that the effective beneficiary of the loan was also a director of the mortgagor and that his son joined with him in executing the mortgage should have put Barclays on notice of a possible irregularity.

(5) The transaction was one of the land title conveyancing. In this sense, it was not an ordinary class of commercial dealing but a specialized transaction of conveyancing in which a greater formality and more intensive investigation are the normal rule. Typically, upon transactions involving the title of land, a series of investigations are made about zoning, land tax *etc*. To add to these an investigation concerning the authority of the company involved is not unreasonable or burdensome. At least in the circumstances of this case, it should have been done by Barclays or their solicitors.[28]

In regard to this last consideration, Young J. had held that in applying the indoor management rule, a distinction should be drawn between conveyancing and commercial transactions. He said that in conveyancing transactions it was more likely that a court would hold that the transaction itself was one which would lead a reasonable person to make inquiries than was the case in a purely commercial transaction.[29] None of the members of the Court of Appeal agreed. On the contrary, both Kirby P. and McHugh J.A. expressly disagreed with that view. The High Court did not deal directly with the question but appears to have approached the case on the basis that the Court of Appeal was correct on this point.[30]

The Court of Appeal held that in the circumstances indicated above, the facts did not show that Barclays was put on inquiry, and allowed the appeal from the judgment of Young J. The High Court disagreed and allowed a further appeal by Northside.

C. *Exception to the Rule: The Forgery Exception*

An alternative argument put forward by Northside was that the rule in *Turquand's* case does not apply to a forgery and that a document which purported to be signed by a person as secretary, who was not the secretary, was a forgery.[31] Noting that it was not necessary for them to decide the question, their Honours expressed brief obiter views on the issue. All agreed that:

> If there is a 'forgery' exception, it does not apply to a case such as the present where the signature is genuine and, though unauthorized, purports to be that of a person holding an office in circumstances where his actions otherwise appears [*sic*] perfectly legitimate and regular.[32]

The Court felt that to give the suggested forgery exception the scope contended for by Northside would 'frustrate the operation of the *Turquand* rule'.[33]

28 (1988) 14 N.S.W.L.R. 571, 582 per Kirby P.

29 *Ibid*. 598 per McHugh J.A.

30 It should be noted, however, that while not accepting that any distinction should be drawn between commercial and conveyancing transactions as a matter of law, the High Court did focus upon the 'nature of the transaction' which would put a person dealing with a company upon inquiry. Mason C.J. (at 389) said 'A person, even one who has no special relationship with the company concerned, may be put upon inquiry by the very nature of the transaction.'

31 (1988) 14 N.S.W.L.R. 571, 598.

32 *Ibid*. 584. See also McHugh J. at 598.

33 *Ibid*. 584 per Kirby P., 598 per McHugh J.

THE JUDGMENT OF THE HIGH COURT OF AUSTRALIA

A. *Extent and Interpretation of the Indoor Management Rule*

The Chief Justice began by conceding that the combined effect of the judgments in *Freeman & Lockyer*[34] and *Crabtree Vickers*[35] was that within Australia:

> [T]he rule in *Turquand's* case in its application to the acts of a company undertaken through its agents is an exemplification of the law of principal and agent and that the ambit of the operation of the rule is to be ascertained by reference to the actual or ostensible authority of the agent who purports to act on behalf of the company.[36]

But pointing out, as McHugh J.A. had in the court below, that '*Freeman & Lockyer* says nothing about instruments executed under the common seal of a company',[37] he agreed with McHugh J.A. that in its application to instruments so executed, the rule in *Turquand's* case was 'an organic principle of the law relating to corporations'.[38]

All the other members of the Court felt that the indoor management rule should be analysed and applied in all cases, regardless of whether the use of a company seal was involved, in the context of agency principles of estoppel.

Brennan J. quoted at length from Lord Diplock's judgment in *Freeman & Lockyer*, and concluded that:

> [H]is Lordship's characteristically lucid exposition of the general principles of estoppel provides the framework within which the specifically 'indoor management' cases are to be placed. There being no other framework of legal principle in which they can be placed, the indoor management cases must be analysed within that framework.[39]

Nor could he find any valid reason for not applying agency principles in all such 'indoor management' cases, regardless of whether the use of a company seal was involved.

Brennan J. then described what he saw as 'the relationship of the indoor management rule with a company's constitution':[40]

> a company's constitution . . . limits the authority which can be conferred on persons to execute binding instruments (or to engage in transactions) on the company's behalf. If the constitution of the company shows that the person or persons executing an instrument could not have been given authority to bind the company by their respective acts of execution, the company is not bound; if it shows that that person or those persons might have been given such authority, the question is whether that person or those persons had such authority or were held out by the company to have had it. The question of whether the authority could have been given under the constitution is a question of law, the question of whether the authority was given is a question of fact, the answer to which is affected by a presumption of regularity [provided by the indoor management rule].[41]

Where the indoor management rule applies, continued Brennan J.:

> [I]t covers each of the links between the constitution of the company and the particular act (or omission) done (or omitted) by a purported officer or agent of the company in the transaction. It covers the due making of appointments of the original directors, of subsequent directors, of other officers and of agents; it covers the conferring of authority on officers and agents; and it covers the satisfaction of conditions governing their exercise of authority in the instant case. As the presumption of regularity covers each of these links, so may the circumstances of a particular case put a party dealing with the company on inquiry as to any one of them.[42]

34 *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd & Anor* (1964) 1 All E.R. 630.
35 *Crabtree Vickers Pty Ltd v. Australian Direct Mail Advertising and Addressing Co. Pty Ltd* (1975) 7 A.L.R. 527.
36 (1990) 93 A.L.R. 385, 392.
37 *Ibid.*
38 *Ibid.* 393.
39 *Ibid.* 403.
40 *Ibid.*
41 *Ibid.*
42 *Ibid.* 406.

B. *Exception to the Rule: Put Upon Inquiry*

Mason C.J. and Brennan J. both agreed that '[b]eing a presumption of fact, the indoor management rule is displaced when the circumstances put on inquiry the party seeking to rely on the rule'.[43]

Mason C.J. began by examining the policy considerations behind the rule:

> What is important is that the principle and the criterion which the rule in *Turquand's case* presents for application give sufficient protection to innocent lenders and other persons dealing with companies, thereby promoting business convenience and leading to just outcomes. The precise formulation and application of that rule call for a fine balance between competing interests. On the one hand, the rule has developed to protect and promote business convenience which would be at hazard if persons dealing with companies were under the necessity of investigating their internal proceedings in order to satisfy themselves about the actual authority of officers and the validity of instruments. On the other hand, an over extensive application of the rule may facilitate the commission of fraud and unjustly favour those who deal with companies at the expense of innocent creditors and shareholders who are the victims of unscrupulous persons acting or purporting to act on behalf on companies. Agency principles aside, to hold that a person dealing with a company is put upon inquiry when that company enters into a transaction which appears to be unrelated to the purposes of its business and from which it appears to gain no benefit is, . . . to strike a fair balance between the competing interests. Indeed, there is much to be said for the view that the adoption of such a principle will compel lending institutions to act prudently and by so doing enhance the integrity of commercial transactions and commercial morality.[44]

His Honour then noted that it was not possible to give specific guidance as to the circumstances in which a person dealing with a company would be put upon inquiry. However, matters which would be relevant were said to include:

> [T]he powers of the company . . ., the nature of its business, the apparent relationship of the transaction to that business and the actual or apparent authority of those acting or purporting to act on behalf of the company.[45]

Mason C.J. also expressed substantial agreement with what Brennan J. had to say on the subject.[46] Brennan J. said that:

> A creditor will ordinarily be put on inquiry when his debtor offers as security a guarantee given by a third party company whose business is not ordinarily the giving of guarantees, for the execution of guarantees and supporting securities for another's liabilities, not being for the purpose of a company's business nor otherwise for its benefit, is not ordinarily within the authority of the officers or agents of the company.[47]

Echoing Mason C.J.'s notion of striking a fair balance between competing interests, Brennan J. also spoke of the need to find the proper balance between furnishing 'a charter for dealings between fraudulent officers of companies and supine financiers' and unduly obstructing the 'free flow of legitimate commerce'.[48] In other words, both Mason C.J. and Brennan J. placed far less importance that did the Court of Appeal upon 'business convenience'.

Brennan J. continued:

> In this case . . . the problem is simply whether the company is estopped from showing that the instrument of guarantee was sealed, attested and countersigned without authority. The instrument of mortgage was given to Barclays not for the purposes of Northside's business nor for Northside's benefit. It was given to secure the debts of Robert Sturgess' companies. That was enough to put Barclays on inquiry.[49]

Since the third party had been put upon inquiry, the rule in *Turquand's* case could not be applied to estop Northside from showing that the instrument of mortgage was not its instrument. The appeal should therefore be allowed. It should be noted that, despite the differences in their approach to the

43 *Ibid.* 405, per Brennan J. See also Mason C.J. at 394-6.
44 *Ibid.* 395-6.
45 *Ibid.* 396.
46 *Ibid.*
47 *Ibid.* 409.
48 *Ibid.* 414.
49 *Ibid.* 413.

case, both Mason C.J. and Brennan J. looked at the nature of the transaction in order to decide whether Barclays had been put upon inquiry. Unlike McHugh J., they did not focus primarily upon the conduct of Northside.

As will be seen below, on the approach taken by Dawson, Toohey and Gaudron JJ., the issue of whether Barclays had been put upon inquiry so as to disallow the application of the indoor management rule did not arise. However, they all expressed an obiter opinion on that point to the effect that Barclays *was*, in the circumstances of the case, put upon inquiry to the extent necessary to preclude the application of the rule in *Turquand's* case.

C. *Exception to the Rule: The Forgery Exception*

Gaudron J. agreed with Brennan J. that 'the rule in *Turquand's* case ought now to be seen as grounded in notions akin to those which underpin the law of estoppel'.[50] However, she said that the major reason why the indoor management rule could not be relied upon in the present case was because it was a case where:

> [A] director or agent is transacting business in fraud on the company. In such a case, the director or agent is not acting on behalf of the company and, *ex hypothesi*, the company has not itself done anything to foster any assumption. Accordingly . . . a company may answer an assertion that it has bound itself to a transaction embodied in an instrument to which its seal is affixed by establishing that the seal was fraudulently affixed, or, in other words, that the transaction was not entered on behalf of the company but with intent to defraud. Of course, . . . that answer will not avail if the company is otherwise estopped from denying that the transaction was entered on its behalf.[51]

However, since Northside had not been shown to have contributed to the acceptance of the forgery, it was not so estopped. The primary emphasis is upon the conduct of the company. For Gaudron J., the existence of facts which ought to have put Barclays on inquiry was not relevant at the stage of deciding whether this was a case where an exception to the *Turquand* rule applied (unlike in the approaches taken by Mason C.J. and Brennan J.). She had already determined that the indoor management rule did not apply to the case because it was a forgery. The fact that the nature of the transaction should have put Barclays on inquiry only became relevant later in her reasoning, as a factor which told against Northside having contributed to the (false) assumption made by Barclays that the mortgage was properly executed.[52] If Northside had so contributed, it would have been estopped from showing that the transaction was not its own.

After examining the nature and scope of the rule in *Turquand's* case, Dawson J. (like Gaudron J.)[53] recognized two situations in which the indoor management rule does not apply. He said that:

> [T]he rule in *The Royal British Bank v. Turquand* . . . does not apply where there are suspicious circumstances sufficient to place a person dealing with the company upon inquiry and . . . it does not apply where a document sealed or signed on behalf of the company is a forgery.[54]

He also agreed with Gaudron J. that the present case was an instance of the latter exception:

> In this case, there is no finding that Northside Developments Pty Limited held Robert Sturgess out as having authority to encumber its land on its behalf . . . The transaction was completed without the actual or apparent authority of Northside Developments Pty Limited and the affixation of the seal was a forgery. This precluded the application of the rule in *The Royal British Bank v. Turquand*. It is unnecessary to consider whether had there been ostensible authority to bind the company, the application of that rule would have resulted in a binding document.[55]

Two things are important to note at this stage. First, Dawson and Toohey JJ. reached their conclusion by applying the ordinary principles of agency.[56] Secondly, Toohey J. also recognized that

50 *Ibid.* 431.
51 *Ibid.* 432.
52 *Ibid.* 433-4, where Gaudron J. said 'the existence of facts which ought to put a person to further inquiry will tell against another having so contributed to the adoption of an assumption that adherence to the assumption should be compelled'.
53 *Ibid.* 430.
54 *Ibid.* 416.
55 *Ibid.* 425-6.
56 *Ibid.* 427, per Toohey J.

'[i]n a particular case, the consequences might well be the same if the indoor management rule were applied'.[57]

Like Brennan J., Dawson and Toohey JJ. also emphasized that there were two senses in which the term 'forgery' had been, and could be, used. All three agreed that:

> In *Ruben v. Great Fingall Consolidated*, Lord Loreburn L.C. was speaking of a forgery in the strict sense, that is, of an instrument bearing a false seal or signature. As the [indoor management] rule is founded on estoppel, it does not cover a forgery in that sense . . . On the other hand, when the seal and the signatures are genuine the question is simply whether the company has given actual or ostensible authority to the persons who affixed the seal, attested the sealing or countersigned the instrument to do so. Sometimes an instrument bearing a genuine seal and genuine signatures but executed without the authority of the company has been described as a forgery: see, for example, *Kreditbank Cassel GmbH v. Schenkers* [1927] 1 K.B. 826 . . . If such an instrument is a forgery, it is a forgery in a looser sense.[58]

Unlike Brennan J., Gaudron, Dawson and Toohey JJ. do not appear to have had any doubts in holding that:

> [F]orgery is not confined to a seal or signature which is counterfeit. As *Kreditbank Cassel GmbH v. Schenkers Ltd* [1927] 1 K.B. 826 shows, a document which is false and is sealed or signed in fraud of a company will be a forgery notwithstanding that the seal is the actual seal of the company or the signature is the actual signature of the person signing.[59]

However, this did not prevent them from agreeing with Brennan J. that:

> [A]n instrument bearing a genuine seal and genuine signatures, though it be described as a forgery, is binding on the company if the company be estopped from denying the authority of the persons affixing the genuine seal and writing genuine signatures to do so.[60]

For Gaudron, Dawson and Toohey JJ., however, this was not because of the indoor management rule, but because of the operation of ordinary agency principles:

> [T]he basis of the doctrine of ostensible authority is estoppel and there is no reason a person should not, by reason of having held someone out as possessing authority, be precluded from asserting a forgery on the part of the latter.[61]

As a consequence of this approach, Dawson and Toohey JJ. decided the question whether Northside was estopped by concentrating solely upon the company's conduct towards third persons.[62] They found that there was nothing in the conduct of the appellant to hold it to the actions of the Sturgesses in mortgaging its land.[63]

The possibility of a forgery exception was discussed also by Mason C.J. who did not think it necessary to resolve the question because in his view it was possible 'to decide the case on the basis that forgery is not an exception to the rule'.[64] However, he did note that the decision in *Ruben v. Great Fingall Consolidated* [1906] A.C. 439, upon which the forgery exception is usually said to be based, could equally well be explained by reference to agency principles.[65] He expressed the view also that 'if there is a forgery exception, it has a limited area of operation.[66] Brennan J. appears to have agreed, and to have felt that the operation of any forgery exception would be limited by

[57] *Ibid.*

[58] *Ibid.* 410, per Brennan J. See also Toohey J. at 427, and Dawson J. at 421: '. . . it is necessary to distinguish between forgery which involves a counterfeit signature or seal and that which does not. A counterfeit signature or seal purports to be that which it is not, not because of any lack of authority, but simply because it is false. There is no representation that the forger is authorized to act as an agent and there is no room for the application of the indoor management rule. The forgery is truly a nullity. In *Ruben v. Great Fingall Consolidated* there were counterfeit signatures and it was in that context that Lord Loreburn said that the indoor management rule did not apply because it "applies only to irregularities that might otherwise affect a genuine transaction".' Gaudron J. did not expressly recognize the existence of a distinction between two different kinds of forgery.

[59] *Ibid.* 417, per Dawson J.

[60] *Ibid.* 410, per Brennan J.

[61] *Ibid.* 422, per Dawson J. See also Gaudron J. at 432.

[62] *Ibid.* 427, per Toohey J., 421, 425-6, per Dawson J.

[63] *Ibid.*

[64] *Ibid.* 390.

[65] *Ibid.*, citing *Gower's Principles of Modern Company Law*, 4th ed. (1978) 204-5.

[66] *Ibid.* 390.

principles of agency and estoppel. Thus, while cases in which there would be ostensible authority to write a false signature were difficult to envisage, it was still possible that a company would be estopped from denying that a forgery in the strict sense was binding upon it.[67]

Conclusion

Perhaps the strongest common ground between at least four of the judgments in the High Court is that the *Turquand* rule should be seen as an expression of the rules of agency, and this is likely to be the context in which 'indoor management' cases will be dealt with by the courts in future. Only the Chief Justice thought that there was some reason for viewing the rule in *Turquand's* case as a special rule of company law, and then only in cases where the use of a company seal was involved. It is also true that Mason C.J. did say that he would have reached the same result if he had disposed of the case in terms of agency principles.[68] The Chief Justice's opinion does provide an opening for future High Court to again alter its approach to the indoor management cases, should it be considered in accord with justice and public policy to do so. In this respect, however, it is worth noting Gaudron J.'s observation that:

> [M]erely identifying the rule in *Turquand's* case as a special rule of company law or as an illustration of agency principles provides no sure guide to its application in any particular case.[69]

According to the Explanatory Memorandum accompanying the Bill which inserted s. 68A into the Companies Code, the purpose of the various paragraphs of s. 68A(3) was to 'restate' the rule (and the qualifications to the rule) in *Turquand's case*.[70] This, however, leaves open the question of the extent to which s. 68A codifies the indoor management rule. As already noted above, the *Northside* case also leaves this question undecided.

One alternative is that the Code provisions may prove to be wider in scope than the common law rule, thereby relegating the *Northside* decision to secondary usefulness for third-parties plaintiffs seeking to rely upon indoor management principles. For example, take the *Crabtree Vickers*[71] type of case, where a third party relies upon a representation made by person A, who has ostensible, but not actual authority to make the representation, that another person, B, has authority to bind company X. Suppose that, relying on A's representation about B, the third party enters into a transaction with B believing than the transaction is with company X. A's lack of actual authority to make the representation would be fatal to any subsequent attempt by the third party to argue that company X was bound by the transaction by virtue of the *Turquand* rule. However, the third party may be able to argue that unlike the common law rule, the Code does allow ostensible authority to be derived from ostensible authority. If this is the case, a company in the position of company X would be bound by the transaction due to the combined effect of first, s. 68A(3)(a) or s. 68A(3)(b) (where A is listed on the register of directors, principal officers and secretaries), enabling the presumption that A had authority to make a representation on behalf of the company, and secondly s. 68A(3)(c), in order to bind the company to the representation make about B on its behalf.

The view that the Code provisions are wider in scope than the common law rule is supported by several obiter statements in the cases. For example, in *Barclays Finance Holdings Ltd v. Sturgess*, Wood J., referring to the provisions of s. 68A, said:

> [T]here can be little doubt that these provisions were enacted, *inter alia*, to clarify and codify the indoor management rule developed from the decision in *Royal British Bank v. Turquand* . . .[72]

[67] *Ibid.* 410.
[68] *Ibid.* 395, 396.
[69] *Ibid.* 430.
[70] See especially the statement in respect of s. 68A(3)(a) to the effect that 'the purpose of this provision is to restate the general rule that an outsider dealing with a company is entitled assume that the internal rules of the company have been complied with (*Royal British Bank v. Turquand*)': Explanatory Memorandum accompanying the *Companies and Securities Legislation (Miscellaneous Amendments) Bill* 1983, as cited in CCH Australian Company Law and Practice, para. 10-210, 9, 402.
[71] *Crabtree Vickers Pty Ltd v. Australian Direct Mail Advertising and Addressing Co. Pty Ltd* (1975) 7 A.L.R. 527.
[72] *Barclays Finance Holdings Ltd v. Sturgess & Ors* (1985) 3 A.C.L.C. 662, 667.

Expanding upon this statement, his Honour appears to have taken the view that s. 68A provides a comprehensive code for application in indoor management cases, and one which leaves no room for the continued development or operation of the common law rule. If the courts do use the Code provisions to provide remedies in a wider range of cases than are covered by the *Turquand* rule, they may well develop an interpretation of s. 68A that is separate and independent from that of its common law predecessor. In this event, the *Northside* decision may well become a case of little more that historical interest.

The opposite view, however, is that there does remain scope for development of the common law rule outside of s. 68A. This view has also received support in some of the cases. For example, in *Australian Capital Television Pty Ltd v. Minister for Transport & Communications for the Commonwealth of Australia & Ors*,[73] Gummow J. said that:

> [W]hilst sec. 68A in some of its operations undoubtedly clarifies the rule in *Turquand's* case and deals more effectively with the mischief and inconvenience to which the rule was directed, nevertheless there remains scope outside sec. 68A for the development of the rule in *Turquand's* case.[74]

In *Lyford & Anor v. Media Portfolio Ltd & Ors* Nicholson J. of the Supreme Court of Victoria also appears to have allowed for the continued operation of the common law indoor management rule in circumstances not covered by s. 68A.[75] If the common law doctrine is indeed wider than s. 68A, as some of the cases seem to suggest, then the *Turquand* line of cases can be relied on in the alternative whenever a s. 68A action is initiated. If this occurs, then the *Northside* decision will be an important member of that line of cases.

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73 (1989) 7 A.C.L.C. 525 (Federal Court).

74 *Ibid.* 535. Gummow J. continued: 'Assume A sues B for damages in tort for inducing company X to break its contract with A, and B denies formation of the contract on the ground of an irregularity in the internal management of company X. If, as seems to be so, sec. 68A of the Code does not apply, may not A rely on the rule in *Turquand's* case to meet the allegation by B? Likewise in the . . . case [where] the assertion of want of compliance with the articles is made by a third party, not by the company or by the party having dealings with the company. Section 68A(1) of the Code will not apply. . . . In a case . . . where the question propounded by the applicant is whether a legislative requirement had been satisfied at a particular date by what was put forward as the act of a company, and where the point taken against the company and the party dealing with the company by a third party in proceedings to which all of them are joined, . . . the company and the party dealing with it may, in those proceedings, claim the benefit of the rule in *Turquand's case* to support their case that what took place did comply with the relevant legislative requirement': (1989) 7 A.C.L.C. 525, 535.

75 (1989) 7 A.C.L.C. 271, 281. In holding that s. 68A(4)(b) referred only to knowledge a person ought to have *by reason of his connection or relationship with* the company, Nicholson J. noted that arguments based on facts said to give notice of irregularities such as would put a reasonable person on enquiry appealed to the rule of common law, rather than to the codified rule. He thus appeared to accept that the common law rule was wider than Code provisions in such cases: at 281.

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