

Essay sample on business ethics

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Soalan 2 Introduction Somebody has to set up the company and in order to set up a company, there have to be promoters. The promoters will purchase property from which the company is going to operate and undertake the preliminary steps to set the company up. They will thus be acting before the company has been formed. In Victorian Britain, there used to be professional company promoters. These promoters were often dishonest and acted fraudulently. The Anglo-Bengalee Disinterested Loan and Life Assurance Company, mercilessly lampooned by Dickens in “ Martin Chuzzlewit”, the typical of the sort of situation that arose.

Indeed Albert Giant, who features in some of the prominent late Victorian cases concerning company promotion, is assumed to be the inspiration for the villain, Augustus Melmotte in Trollope’s “ The Way We Live Now”. A code of rule therefore developed to ensure that promoters acted with integrity in setting up the company. There are few statutory rules in this area and indeed no satisfactory statutory definition of a promoter S67 of the companies Act 1985 formerly defined a promoter in S67(3) as a person who is “ a party to the preparation of the prospectus or a portion of it”.

In the absence of any precise definition in statute, resort must be had to judicial statements relating to promotion. As Gross notes in “ who is a company promoters? ” [1970] 86 LQR 493, the term “ promoter” is ill defined by companies legislation. The usual dictum referred to in defining a promoter is that of Cockburn CJ in Twycross vs Grant (1877) 2 CPD469 where he said that a promoter 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.

This definition is clearly somewhat general. In *Whaley Bridge Calico Printing Co vs Green* (1880) 5 QBD 109, Bowen J said; “ The term promoter is a term not of law, but of business usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence. ” The old, Victorian rogue promoters responsible for finding directors to manage a company and for drafting prospectuses to raise capital from the public are largely a thing of the past.

Most companies are promoted as private companies by those who will subsequently be managing the business. Promoters’ Duties A company promoter owes fiduciary duties to the company which he is setting up. Fiduciary duties are basically duties of good faith and integrity. Most obviously, where a promoter is selling property to a company, he must ensure that he discloses any profit that he is making on the deal. The disclosure may be made to all of the shareholders, actual and potential, as was the case for example in *Salomon vs A Salomon & Co Ltd* (1897).

Disclosure to the shareholders was also the method employed successfully in *Lagunas Nitrate Company vs Lagunas Syndicate* [1899] 2 Ch 392. Alternatively, the disclosure can only be effective if it is to an independent board of directors. In *Erlanger vs New Sombrero Phosphate Co* (1878) 3 App Cas 1218, a syndicate had purchased a lease of a Caribbean island called Sombrero. The syndicate was selling the island to a company which had been formed for the purpose. The syndicate owed promotional duties in relation to the sale.

They disclose the profit that was being made in selling the island to the company to the board of directors. There were five directors; two were

abroad at the material time, two were associated with the syndicate and the fifth was the Lord Mayor of London who was too busy to give proper attention to the affairs of the company. It was held in the circumstances that this was not a full disclosure to an independent board of directors. The company was able to rescind the contract. Remedies for Breach of Promoters' Duties

Promoters owe fiduciary duties to the company which they are promoting. The duty is akin to the duty owed to the unborn child as no company is yet in existence. However, there is a range of remedies that will be available against. A promoter who has breached his duty and failed to disclose the extent of the profit that he is making where he has sold property to the company. A possible remedy is for rescission of the contract of the sale between the promoter and the company- The usual bars to rescission will apply.

Thus, rescission is not available where there has been affirmation, where it is impossible to restore the parties to their pre-contractual positions/ where third party rights have intervened. An alternative remedy is for the company to sue for a return of the profit. If the company wishes to keep the property in question and merely recover the profit, this is clearly the appropriate remedy to seek. This was the remedy awarded, for example in *Gluckstein vs Barnes* (1900). These are two usual alternative remedies. However, in one case, the remedy to seek. This occurred in *Re Leeds and Hanley Theatres of Varieties Ltd* (1902) 2 Ch 809.

In this case, the claim was for breach of duty of care in the promoter selling property to the company at an overvaluation. Damages were awarded

against the promoter. This is a rare instance damages being awarded against a promoter, but it is interesting to note that the measure of damages was the same as the profit made by the promoter. It may be on occasion that a single shareholder can bring a claim as a derivative action on behalf of the company. The shareholder must fit within one of the exceptions to the rule in *Foss vs Harbottle* (1843) 2 Hare 461 or S260 CA 2006.

This could occur where the Promoters are in control of the company and using their management and/ or voting powers in general meeting to prevent an action being brought in respect of an undisclosed profit that has been made by promoters. A further remedy may be available in the particular instance of the company's liquidation that a promoter restore to the company any property/money obtained in breach of duty. This may be done on the petition of the liquidator or on the petition of a creditor/ member (section 24. 3)

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