

**THE ENFORCEMENT OF CIVIL LIABILITY IN REGARD TO
COMMERCIAL CRIME AND CORPORATE ABUSE**

Memorandum by the Commonwealth Secretariat
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The annexed Paper by Dr. L.S. Sealy addressed problems of concern to Commonwealth Law Ministers both at Winnipeg in 1977 and at Barbados in 1980.

2. The Paper was commissioned with a broad mandate to examine strategies to combat the growing menace of commercial and economic crime from a variety of viewpoints.

3. Included among Dr. Sealy's conclusions are a number which address themselves to difficulties within the trial process and which may offer some degree of palliative to congested court calendars. In this regard, Ministers may be interested in his suggestions that:

- (i) resources spent on efficient administration and timely law reform may, in terms of fraud prevention, be money well spent;
- (ii) unnecessary evidentiary and procedural hurdles which are commonly imposed by courts in civil cases involving corporate and commercial wrongdoing should be eliminated, following e.g. the model of the Canadian legislation aimed at simplifying and improving minority shareholders' access to the courts in order to redress corporate fraud. The tendency of judges to make rules fettering their own jurisdiction may require correction by legislation;
- (iii) traditional definitions of "fraudulent trading", "fraudulent preference", etc., may impose a burden of proof which is too high; and civil liability in the case of fraudulent trading is unnecessarily restricted to claims in a liquidation. The sanction of disqualifying directors of insolvent companies from managing other companies could, with advantage, be more frequently invoked;
- (iv) legislation providing for contribution claims between persons civilly liable should, where necessary be modernised, so that persons held indirectly liable for losses should have remedies over or against those primarily to blame;
- (v) the power to order investigations in the affairs of companies, where fraud on the part of its controllers or managers is suspected, should be available - or more readily available - to shareholders with a serious complaint.

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Commonwealth Law Ministers have at their last two meetings expressed concern at the general prevalence of economic and commercial crime, and have sought as a matter of urgency to find ways of developing and strengthening law-enforcement procedures and of fostering international co-operation in this sphere. In the paper which Dr. Barry Rider prepared for the 1980 Ministers' meeting he drew attention to the growth of "white-collar" crime and to its insidious side-effects as regards national economies, political stability, market and investor confidence and the social structure generally. He explained the serious difficulties standing in the way of detection and enforcement in this area of criminal activity, especially in cases where the wrongdoing has an international dimension; and he made a number of practical proposals - some of which have been carried into effect - to try to meet the many problems arising.

2. Attention has so far been focused, naturally enough, specifically on the criminal aspect of these activities. The purpose of this paper is, however, to examine commercial and corporate crime from other viewpoints, such as the enforcement of civil liability against the perpetrators of fraud by those who have been its victims, and the regulation and control of commercial activity by the administrative organs of State and by such self-regulatory agencies as the stock exchanges. Obviously, it must be the primary concern of the law (and the foremost claim on the resources of any State) to endeavour to put down criminal activity, and to expose and deal with those concerned, by the direct application of the rules of criminal law; and a substantial proportion of public funds is rightly devoted to developing and maintaining the strength and expertise of police and other forces dedicated to this end. Of course it must be acknowledged, in a discussion paper such as this, that there is no way in which anything done on the civil or administrative side of the law can match in weight and effectiveness what the professional police and detective and prosecuting officers are able to achieve; but there is no reason to write off civil remedies and administrative controls as unimportant. A leading American scholar, Professor G.D. Hornstein, writing about the actions brought in the U.S. by minority stockholders in cases of managerial misfeasance, has observed:

"the record of litigated cases serves as a prophylactic - a deterrent to future wrongdoing. Every successful suit duly rewarded encourages other suits to redress misconduct, and by the same token discourages conduct which would occasion suit. There is no doubt that these derivative suits have materially raised the standards of fiduciary relationships and of other economic behaviour."
((1967) Journal of Business Law, 282, 288.)

It is my purpose to ask what can be done, however modestly, to make more effective the civil remedies available to the victims of commercial crime, and to strengthen the administrative and regulatory controls over commercial and corporate activities. Even though this may do little to deter organised crime on a large scale, at least it will do nothing to encourage or attract it; and further, if the less nefarious types of activity are discouraged in the way which Professor Hornstein describes, resources will be freed to pursue more important targets. A summary of the suggestions and recommendations made in this paper appears in para. 28.

3. I write as one interested in commercial law generally and in particular as a company lawyer, and both because of this special interest and also because of the

greater complexity of the subject my main emphasis will be on corporate and securities frauds. But all economic crime, whether it takes the form of market and trading frauds, expropriation, credit frauds, corruption, false accounting or anything else of a similar kind, involves essentially the same exploitation and the same breaches of trust and confidence, whether or not committed in the corporate sector or through the medium of an incorporated company; and therefore much of what is here discussed will be of general relevance. In many cases, white-collar crime is nothing more than "old-fashioned" fraud, or conspiracy to defraud, though committed perhaps on a more massive scale, and by more ingenious and sophisticated methods. This type of wrongdoing, although obviously a common-law crime, may well also involve more technical offences under company, securities, fiscal or currency-control legislation and, on the civil side, the torts of deceit, conspiracy, conversion, breaches of trust and contract, as well as liability under the laws of restitution or account. The victims of such crimes will therefore rarely have difficulty in finding an appropriate head of claim under which to seek to bring this type of malefactor to book.

4. Some forms of white-collar crime, such as fraudulent trading and long-firm frauds, necessarily occur in a corporate context; others, such as insurance, banking and shipping frauds, will almost invariably be committed by or through companies because of the sheer scale of the operation. In other cases, companies may be used in order to give an appearance of respectability to the enterprise and, at the same time, to allow its controllers to hide behind the anonymity of the "corporate veil" and indeed, by the use of nominee shareholdings and "puppet" directors, to render their true identities wholly untraceable. Networks of companies may be used to "launder" funds, to evade tax liabilities and to move currency across frontiers and through exchange control barriers. For all these reasons, even if there is no direct infringement of company or securities law, it may well be that company law questions will arise incidentally or that the special machinery of company law (e.g. disclosure rules, powers of investigation, insolvency procedures) will have some part to play in ascertaining the true facts or unravelling the web of obscurity behind which criminal activities have been conducted. Again, the investigatory and disciplinary powers of the appropriate securities market and regulatory agencies may well overlap in function with the detection and elimination of corporate fraud on the criminal side. Company law in its civil and administrative aspects has therefore a vital role to discharge in matter of economic fraud.

5. The comments made in the foregoing paragraphs apply a fortiori when commercial crime has an international dimension. On this scale, the use of interlocking companies, nominee holdings, anonymous banking facilities and so on provides formidable additional weapons for the rogues' armoury. The problems of detection and investigation, the procurement of evidence and the enforcement of court orders are quite as daunting on the civil scene as they are in criminal matters. Indeed they may (especially on the grounds of expense) be almost insurmountable; but in some respects - e.g. the "Mareva" injunction (22) or the "freezing" of the power to deal with shares (26) - the civil law is not without ingenious remedies of its own.

6. White-collar crime, in its differing manifestations, in many ways hits Member-States whether large or small, indiscriminately. But there are some problems which more particularly affect jurisdictions and economies at one end or the other of the spectrum. Those countries which include the largest and most active commercial centres will have the established markets and the banking and other facilities which enable funds to be shifted on the massive scale necessary to perpetrate massive frauds. Their larger business population will also aid anonymity, and the sophistication of their legal and commercial institutions will allow scope for subtler kinds of deviousness and concealment. Obviously the law of such countries must have the refinement and flexibility needed to match such activities. This does not mean, however, that less developed economies have reason to be less vigilant: in fact, the absence of close regulatory scrutiny, the possible obsolescence of companies legislation (and similar "technical" laws), the dearth of professional expertise and of police resources, etc., have obvious attractions for the crooked operator. Again, those countries, and especially the smaller ones, which have endeavoured to set up "offshore" commercial facilities such as advantageous tax and licensing laws, confidential banking, and so on, may find that their efforts to attract enterprise have led suspect as well as respectable dealers to take advantage of the benefits available. In addition, where the victim or target of fraudulent

activity, whether primarily or incidentally, is the State itself, it is the economy of smaller nations which is bound to be hit hardest when large-scale international crime is successful. There are therefore lessons to be learned, albeit perhaps different lessons, from the experience and from the experiments of States large and small in dealing with these problems.

7. Looking now more specifically at company law and the regulation of the securities market, it should be emphasised right at the outset that it is not the primary concern or aim of the rules of law in either of these areas to keep down commercial crime; nor should it be. The main emphasis of good commercial legislation ought always to be on the needs of commerce and of honest business men. An eminent Californian lawyer, Professor Ballantine, wrote of company law many years ago:

"The primary purpose of corporation laws is not regulatory. They are enabling Acts, to authorise businessmen to organise and to operate their business, large or small, with the advantages of the corporate mechanism. They are drawn with a view to facilitate efficient management of business and adjustment to the needs of change."

This sector of the law must ensure that enterprises are able to attract investment as it is needed and that investors can find ventures (or havens) for the funds at their disposal; it must provide and maintain a fair and effective market for dealing in securities; and it must allow managers scope to manage whilst at the same time giving adequate protection for the members, and especially the minority members, of the corporate body. The aim is (in the words of Professor Gower (1980) 13 The Law Teacher 111, 114), "to make Capitalism work better." Such codes, to operate at all smoothly, must assume a degree of integrity typical of the business community in general; for the law cannot be backed by any very large state-enforcement apparatus - in part, no doubt, because resources are more naturally assigned elsewhere; but in part also because excessive regulation and policing of the business world is rightly regarded as counter-productive. Commerce flows the better with bureaucratic and judicial supervision kept to a minimum.

8. However, corporate abuse does occur, to a greater or less extent, wherever there are companies; and accordingly it should be the concern in every responsible jurisdiction to have and to maintain as modern a code of company and securities laws as is possible, and to administer it with all the efficiency that the available resources allow. I am not advocating that it is necessary that such laws should be "tough" - quite the reverse, because the foremost aim should be to ensure that the business and investment sectors flourish, as has just been emphasised. But it has been demonstrated both by the research work done and by the legislative innovations made in such jurisdictions as federal Canada and its Provinces that a reasonable balance can be struck between the claims of liberality and of firmness without sacrificing either; and these examples deserve to be more widely known and, indeed, emulated. Even if little is achieved directly as regards detecting and eradicating crime, by having an up-to-date and well-run companies code, it can at least be said that an administration which regulates affairs efficiently and keeps on top of the more routine types of corporate misfeasance (such as the non-filing of returns) is bound also to be more likely to discourage the crooked operator. And in the case of some well-known types of white-collar crime, such as long-firm frauds, exchange-control fiddling and sanctions; busting enterprises, offending companies will be pretty certain not to have filed returns and compiled with the other niceties of good corporate behaviour, and this may be an early and timely sign that something is amiss. In contrast, if the administration of a Companies Registry or a securities market is slovenly or disorderly, or if the laws of a country have not moved with the times, it can only make it more likely that serious crime will flourish undetected amid the general disarray.

9. It follows in my view that there is everything to be gained by ensuring that these areas of law are as up-to-date as possible, as well as being tailor-made to suit local conditions and to cope with local problems. And parallel efforts should be made to see that the law works efficiently. There are, I know, problems here - not least the shortage of professional expertise, both in regard to general administration and in such special matters as legislative drafting. But this is a

matter over which it is easy to be penny-wise but pound foolish. Prevention is generally better than cure: a few hundreds spent in redrafting the law to block a potential loophole may be a faster and better investment than many thousands spent in pursuing the rogues who may exploit that loophole so long as it remains unblocked; and in any case, it is not really a "cure" even to bring to conviction a racketeer who has got away with spoils running into millions.

10. It is, of course, normally easier to persuade treasuries to commit funds for "law and order" than to administration and law reform. But for the reasons given above, it may be far cheaper all round to discourage abuse from the outset than to cope with its aftermath - cheaper not only in terms of the allocation of State resources, but also when account is taken of the potential damage to the economy and to society at large. Even an innovation which may be difficult to justify in terms of immediate results - such as the outlawing of insider trading, or the establishment of an investigation officer or a new regulatory authority - may prove more than worth while if it leads to a raising of investor or business confidence. Conversely, there has been some criticism of the step taken recently in the U.K. of abolishing the Business Names Register, through which the true proprietors of business firms, both incorporated and unincorporated, could be traced. There was, admittedly, some saving in the cost of a few civil service salaries; but on the other hand those in the business community claimed that the Register had proved useful in practice and that they were ready to pay such extra costs as might be needed to make it work more efficiently. An expert has now expressed the opinion that the commission of "long-firm" frauds will undoubtedly have been facilitated by the abolition of the Register: see M. Levi, (1980) 1 Company Lawyer 219, 220. If this is so, the resulting damage to business confidence and to the economy may make the cost-cutting exercise appear, in retrospect, to have been very short-sighted.

11. Once again, however, comes the difficult question of striking a balance. The "prophylactic argument" is, indeed, a strong one, but it must be weighed against costs. All too often, an innovation of considerable attractiveness in theory proves subsequently to break down at the enforcement level. And it is a disservice to business to step up the compliance and reporting requirements unnecessarily increasing the burden on the great majority of well-run companies in the vain hope of catching or deterring the occasional rogue.

12. It is a fact that in many Commonwealth countries the laws governing companies and securities regulation are not well designed to cope with today's problems, or with local conditions. There are many hangovers from Victoria England, which have little relevance in modern Britain, and less still in Uganda or the Yukon. While the need for reform may be widely recognised, finding the appropriate solution may be a difficult and expensive matter. Things may not always be helped - indeed, they may be made worse - by the slavish and uncritical adoption of more recent models from, say, the United Kingdom or the United States, where commercial conditions and the prevailing business philosophy and attitudes may be very different from those in the adopting State. (This problem, so far as the model of U.K. legislation is concerned, will from now onwards become progressively more acute as, under pressure from seemingly endless EEC "directives", European "reforms" are uncomfortably grafted on to the indigenous U.K. company and commercial legislation, while the overhaul of more important issues remains sadly neglected. Commonwealth countries will be well advised in future to follow the more recent English legislative precedents with caution.)

13. Where, then, can those who are anxious to make progress in the reform of company and securities law turn for help or advice or inspiration? These are fairly technical subjects; and, while on the one hand home-grown expertise may not be available, there is also a risk that a specialist adviser imported from outside may not have sufficient familiarity with local conditions to make the most appropriate recommendations. It seems to me that one way in which something practical could be done would be to make arrangements for the sharing by Member States of their experience, and of the fruits of such consultation, research and experimentation as may already have been carried out. Many of the reforms in company and securities law, recent and not so recent, have followed inquiries and reports by special commissions, committees or task forces, studies (extensive and intensive), ad hoc consultations, and so on; evidence has been collected, and papers commissioned. Some of this material exists in published form; some is out of print; probably the bulk of it has been made generally available. By reason of their ephemeral nature,

it is generally difficult after a year or two to find copies even of the better-known reports (such as the Gower Report on Company Law Reform in Ghana) in libraries, or to obtain them in bookshops. With a little effort and co-operation, however, all this material could be collected centrally and made available for consultation. The work already done over the past few decades and that being currently undertaken, the particular issues under review, the different solutions considered or adopted in different jurisdictions, and so on, could be made the subject of continuous monitoring and review - ideally under the aegis and direction of the Legal Division of the Secretariat.

14. A second way in which there might be co-operation - or, rather, more co-operation, for a good deal does of course occur all the time - is in regard to training schemes and secondment arrangements, especially for administrative personnel in the areas of companies registration and securities regulation. One problem here is that in so many countries the civil service promotion structure operates in such a way as to prevent key personnel from acquiring the specialist knowledge and expertise which these technical subjects demand - I would myself argue that one could concentrate a whole working lifetime in this area of law and practice, and still be learning something new at the end of it. Yet there are too few jurisdictions in which administrators have a real chance of becoming truly expert in company or securities law. In the U.K., for instance, the Department of Trade is concerned with matters as disparate as marine salvage and consumer protection, as well as with companies; and an official who has the qualities likely to take him to the top of the administrative hierarchy will be moved about from one section to another so that his opportunities to grapple with the complexities of company law occur only at intervals. Again, in smaller jurisdictions, the office of the registrar of companies is commonly combined with that of patents and trademarks, births, marriages and deaths, and so on. Personnel who are well-qualified in all these areas will be hard to find - and to keep. A promising young trainee who has begun to master only some of these fields may be tempted away by the lure of private practice or the status of a minor judicial appointment; and a valuable investment is lost. It is vital, however, to try to avoid this: to see to it that administrators are recruited, trained, and retained, within the specialisms of company and securities law and that, by secondment and otherwise, they are kept abreast of developments; for a system which is inefficiently run too easily becomes fair game for racketeers.

15. Another possibility (which I know is being actively explored in many fields already) is for the administrative and registration services and facilities of several countries to be pooled, or centralised, where there are related jurisdictions in fairly close geographical proximity - e.g. in the Caribbean, or in parts of the South Pacific. With the aid of modern technology, which enables information to be retrieved at many outlets whilst being centrally stored, there is no doubt considerable potential here. As a result, expertise could be concentrated rather than scattered. Ideally, any such move should be linked with a common or harmonised legislative programme.

16. Another question, and a major one, which may be asked is whether there are not ways in which the law itself, both substantive and procedural, might with advantage be made to work better, so that any proceedings against commercial and corporate fraudsters should have the best possible chances of success. Most of the forms of wrongdoing which we are discussing, such as expropriation, conspiracy and fraud, involve well-established heads of civil liability whose definitions are straightforward enough and which have been well tested over the years. But what very often is notoriously difficult is the matter of proof - the more so if the court insists on a standard comparable with that required in a criminal charge, which there appears to be a growing tendency for courts to do even at times when the parallel is not appropriate. The burden and expense of pursuing claims (which are bound in many cases to involve very complex issues and much financial and documentary evidence) may be quite as daunting as that facing a criminal prosecutor; but the private litigant has not the resources of the State behind him, and so it is not surprising that victims of commercial crime very often consider it worth while to "throw good money after bad". In jurisdictions where it is normal to have jury trial in civil fraud claims, virtually all the problems of the criminal prosecution are duplicated. If the swindle has an international dimension or if the defendant has absconded, the problems of detection and of adducing evidence are all the more formidable, as are those of service of the proceedings and enforcement

of the judgment. The civil litigant does not have the benefit of the services of international agencies and agreements such as ICPO-Interpol, or of extradition treaties. But, assuming that he is prepared to face these difficulties and, indeed, that he is able to overcome them, it does seem that the law and the judges should be astute to see that unnecessary hurdles are not placed in the way of a litigant who has a good case. The courts have, for instance, shown a marked reluctance over the years to review commercial decisions made by men of business, and to allow their jurisdiction to be invoked to resolve internal irregularities in corporate procedures. These self-denying attitudes are, in their proper context, understandable and, indeed, praiseworthy. But in my view the law must not be such as to allow allegations of fraud to go unprobed, and allegations of substantive wrongdoing to be defeated, by rules which are merely procedural in essence. If the object of the proceedings is to seek redress for misappropriation or fraud, it is surely the court's function and its duty to look into the matter; and if the courts allow their self-made rules of procedure to stand in the way, a legislative solution should be imposed. In this connection, the attitude of the U.K. Court of Appeal in the recent case of Prudential Assurance Co. Ltd. v Newman Industries Ltd. (No.2) (1982) 2 W.L.R. 31 is much to be regretted. Here, a leading institutional shareholder sought to bring to account two corporate officers on a large number of charges of alleged fraud, for which there must surely have appeared to be a prime facie case, for the trial judge did, after a long hearing, uphold the plaintiff's case. (It is not relevant to the present point that the greater part of his findings were reversed on appeal.) The Court of Appeal invoked the ancient rule in Foss v Harbottle (1843) 2 Hare 461, and declared that it would have been better all round if the case had not been heard, in view of the apparent opposition of those who controlled the company. This attitude of judicial non-interference was justified in these words:

"We were invited to give judicial approval to the public spirit of the plaintiffs who, it was said, are pioneering a method of controlling companies in the public interest without involving regulation by a statutory body. In our view the voluntary regulation of companies is a matter for the City. The compulsory regulation of the companies is a matter for Parliament."

The implication which it appears we are meant to draw - that the regulation of corporate fraud is not a matter for the courts - must surely be wrong. We may contrast the position in the United States, where the therapeutic effect of giving minority shareholders ready access to the courts is widely recognised. As Dr. Rider has observed, writing in an academic context and citing the authority of a distinguished Malaysian judge: "It would be misguided to consider that judicial non-interference will in all cases be in the best interest of the company as a whole, or of the community" (see [1978] Cambridge Law Journal 270, 271). A more encouraging sign, however, has been the emergence of the "Wallersteiner order" (see [1975] 1 Q.B. 373), by which a minority shareholder whose claim is adjudged ex parte to be meritorious may be awarded an indemnity against costs out of corporate funds. And very recently an English Court of Appeal has upheld the use of section 75 of the Companies Act 1980 (see para. 20 below) to order an action to be brought for the recovery of misappropriated assets, at the instance of a shareholder: see Re Cyplon Development Ltd. 3 March 1982.

17. It is doubtful, however, whether the courts, left to themselves, are likely ever to do sufficient to make the shareholder-suit or "derivative" action a really effective factor in the overall war against fraud and crime. The very reaction of the English court in the Prudential case (para. 16) is reminder enough of this; and that case is bound to have repercussions for years to come which will deter other plaintiffs who might have attempted to take similar action. The considered view of virtually all recent reports on the reform of company law is that procedural restraints such as that imposed by Foss v Harbottle, mainly restraints of the courts' own creation, must be legislated away or at least radically simplified. If shareholders' access to the courts cannot be made a matter of right (as is more or less universally the case in the U.S.), then reform on the lines introduced in many Canadian jurisdictions (and more recently under consideration in South Australia: see [1981] 7 Commonwealth Law Bulletin 138) is surely the next best thing. These provisions, which typically allow a member standing to sue with the leave of the

Court ex parte, do not go so far as those with American experience would recommend, but could be regarded as a "first step" in the right direction.

18. Other civil remedies which may help to eradicate or uncover corporate abuse include orders for the compulsory winding up of companies. Suits for this purpose may be instituted on the initiative of members, creditors and, in most jurisdictions, some agency of government (e.g. in the U.K. the Department of Trade). The notorious IOS organisation was dismembered in a number of Commonwealth jurisdictions by this procedure: both because of the evidence of systematic asset-stripping and the "state of complete and irrevocable disarray and impotency" into which the affairs of the group had fallen, it was ruled "just and equitable" to make compulsory winding-up orders (see, e.g. Re I.O.S. Ltd. (1973) 7 N.B.R. (2d) 311; Re Investment Properties International Ltd. (1974) 43 D.L.R. (3d) 684). Again, however, as with the corporate suit (para. 16) and the "oppression" remedy (para. 20), the courts have been prone to erect unnecessary procedural barriers of their own devising which debar or discourage those who might wish to seek this remedy. For instance, it is a rule of ancient standing (though more than once reaffirmed in modern times) that a shareholder has no standing to present a petition to have a company put into liquidation where that company is insolvent. This should not be the rule at least in cases of alleged fraud, in view of the element of public interest involved. It is urged that thought should be given to the question of abrogating this rule, as a part of any comprehensive company law reform programme.

19. It is of course true that the discovery of frauds during a liquidation may not be of great use to anyone, and that the chances of recovering misappropriated funds may be remote. However, even private liquidators have a duty to report suspected frauds to the Director of Public Prosecutions (or the equivalent authority), so that in the wider context of putting down commercial crime this procedure may have beneficial results, through liaison between the civil and criminal arms of law enforcement. Prosecutions for "fraudulent trading" may follow (a fortiori, for "reckless" or "wrongful" trading, if the law has been reformed to create this wider jurisdiction, as in some progressive States). Money may also be recovered under the heading of "fraudulent preference" (or the broader category of "undue preference", as in Australian jurisdictions). As the passages in brackets in the preceding sentences indicate, however, there is in the more traditional codes of company and insolvency law a burden of proof which is widely criticised as being too high; and reforms along the lines suggested should be more generally introduced in order to strengthen the remedies against honest and delinquent commercial operators. There is a strong case, too, for removing the link between fraudulent trading and liquidation, not only for criminal purposes (see Companies Act 1981 (U.K.), s.96) but also to extend the corresponding civil liability (Companies Act 1948 (U.K.), s.332(1)). The jurisdiction of the courts to order that persons who have been concerned in the management of insolvent companies should be disqualified from acting as directors of companies ought to be far more frequently invoked, as well as being more liberally defined in legislative terms. All too often those who have irresponsibly or even fraudulently allowed one corporate organisation to collapse in insolvency, perhaps bringing ruin to many innocent creditors as a consequence, are allowed by virtue of the principle of limited liability to emerge virtually unscathed and to begin trading again through a newly-incorporated company. The power should exist to stop this and, where it does exist, it should be used with greater vigour.

20. Earlier disquiet over the restrictions of the Foss v Harbottle rule (para. 16, above) led to recommendations for the introduction of a new remedy for shareholder "oppression". Such an innovation has been made in very many Companies Acts in the Commonwealth. It is difficult to say whether this experiment has been a success or not, for the answer to this question depends entirely on the response of the judges, and this has varied from country to country. We may, for instance, contrast the imaginative solution devised by the Malaysian court in the Kong Thai Sawmill case (1976) 1 M.L.J. 59 (Fed. Ct.) with the defeatist and negative approach in such cases as Re Bellador Silk Ltd. [1965] 1 All E.R. 667 in the United Kingdom. It is, regrettably, almost certainly the case that the overall experience of the "oppression" remedy in practice has been a disappointing one, because of the proneness of the judiciary to construe these sections restrictively and it may well be that the more modern variants of the legislation, which use the test of "unfair prejudice" rather than "oppression", will be all too likely to meet a

similar reception. The Cyplon decision (para. 16) is, however, an encouraging indication to the contrary. But here again we see that, when the legislature invites the courts to involve themselves in the policing of corporate mismanagement, it is easier to lead the judicial horse to water than it is to make it drink. The lesson is perhaps that it is a mistake to assume that courts in the common-law tradition will readily undertake an inquisitorial and interventionist role. The alternative is for administrative counterparts of this kind of procedure to be developed (see para 25); but here, too, the oppressed minority shareholder has had a discouraging reception in practice. An intermediate way might be for jurisdiction to dispense this highly discretionary form of justice to be conferred in the case of the smaller private company (where "oppression" is most often met) upon District or Country Courts, or the equivalent, where adherence to precedent is commonly less strict, and in addition costs are lower.

21. There is another area where recent developments are certain to have a salutary impact on the conduct of company and commercial affairs, although there is an arguable view that these changes cannot be welcomed universally. I am referring to the increasingly heavy responsibility which the law is placing on persons in professional and advisory positions, making them answerable for what are primarily the misdeeds of others. These include accountants, auditors, liquidators, receivers, solicitors, valuers, etc.; banks which allow misappropriated funds to pass through their hands without due inquiry; passive and inactive directors; and so on. There are various factors at work here. Developments since Hedley Byrne v Heller [1964] A.C. 465 have led to the imposition of extensive liability in negligence for economic loss; companies legislation more and more calls for valuations, certificates of solvency, etc., as a precondition to various corporate activities; and (in the case of Canada) specifically makes directors collectively responsible except for those individuals who expressly dissociate themselves from the act or decision in question; in addition, professional standards (especially in auditing and accounting) have noticeably risen during the present century. There can be little doubt that, as a result, commercial affairs generally are now carried on under a fairly intense pattern of vigilance from these "watchdog" figures, with a general enhancement of responsibility all round. My reservations about these trends are that the compliance costs of the very many well-run companies are pushed up in the hope of restraining an undisciplined few; and that the victims of fraud are presented with a readily available and solvent "soft" target, while the real malefactors may well escape. Even if these defendants have in law a remedy over against the main culprits (which will by no means be certain, in the absence of an enactment such as the U.K. Civil Liability (Contribution) Act 1978, the evidentiary problems will be formidable for a plaintiff who seeks contribution in respect of a wrong to which he was not a primary party. In order to help such claims, all jurisdictions should aim to have, at the very least, legislation on the lines of the U.K. Act mentioned above. In many places, the existing statutes govern only the case of tortfeasors, and this may be inadequate to meet more complex forms of liability.

22. There are developments in the general field of procedural law which are to be welcomed, as additional aids in the fight against commercial crime. Mention may be made of the "Mareva" injunction (which prevents the removal of assets out of the jurisdiction of the court pending the disposal of litigation) and the "Anton Piller" order, allowing entry upon premises and the inspection of their contents, in cases of infringement of copyright and other forms of piracy of intellectual property. Subject to the necessary safeguards, there is everything to be said for the encouragement of such novel remedies, which may in some cases be quite as effective as the powers of the police in the corresponding criminal situation.

23. To turn now to discuss some possible administrative controls, we may consider in turn (a) various forms of licensing, (b) systems of registration and disclosure and (c) powers of investigation and inspection by, or under the authorisation of a government officer or department. We begin with licensing. Some developing countries have business licensing laws in force which affect virtually the whole range of commercial activity. While this gives the State very direct powers of regulation and enables action to be taken against improper practices (whether known, or only suspected) almost at will, the administration of such a system soon becomes unwieldy and expensive, with the growth of business generally, and there is inevitably pressure to discontinue it if investment from abroad is to be attached. It is also bound to be, or at least to seem to be, arbitrary and at times oppressive in its operation. Although in some countries this method of control may appear to

be a good form of protection for the people and the economy, this is surely an inward-looking and paternalistic view. More restricted licensing systems may be the appropriate form of regulation for such activities as banking and money lending, dealing in securities, insurance, unit trusts and so on. Examples are numerous in all jurisdictions. The primary issue of policy here is to balance the need for control against the cost of administration; but there is no doubt that this is among the most effective methods of regulation. The grant of incorporation itself may in theory (e.g. in letters-patent jurisdictions), and in some cases even in practice, depend on a degree of executive discretion. In some countries, the Registrar of Companies has quite extensive supervisory powers. In my view it is difficult to defend this form of control, in view of the now accepted tradition of freely available incorporation, and even more difficult to enforce it in practice, given the need to allow shares to be transferable without restriction subsequently to the incorporation. Attention is sometimes drawn to the widespread use in civil claims for damages in the USA of remedies based on the concept of "breach of statutory duty", having as their legislative source the regulations of the Securities and Exchange Commission. Although there is no doubt that in such matters as insider dealing a most useful jurisdiction has developed in that country, my own view is that the better way is for civil remedies, where thought necessary, to be provided expressly by the legislation in question rather than for them to depend upon the altogether unpredictable interferences as to the "intention" of penal legislation which the courts in common-law countries have to make in this context.

24. Disclosure is, of course, the keyword and the principle which underlines the whole of the philosophy of company law and the regulation of listed securities. As well as ensuring that investors and creditors are adequately informed about the affairs of the companies with which they are concerned, the disclosure system has the beneficial effect of making journalists, market analysts and, in a sense, the whole of the public participate in the supervisory process. But, vital though it is, it is no panacea - especially against devious and crooked operators, who can all too easily defeat the system by using nominees, giving inaccurate or misleading information, or allowing returns to fall into arrear. For these and other reasons, the efficient and effective administration of the registration and disclosure system is vital; and this applies equally to the official and governmental agencies and to self-regulatory bodies. It is all too easy, also, for legislators to assume that disclosure in corporate affairs is self-evidently a good thing, and so to require more and more information to be filed or publicised, without paying sufficient attention to the added burdens thereby being placed upon commerce and upon government administrators. At best, disclosure can only be seen as an aid in the enforcement of the law against fraud and crime; it is an illusion to believe that it will stamp out such misconduct.

25. Investigations into allegations of mismanagement and fraud have been a feature of company law since the earliest times; but whereas there was originally a quite widespread use of this device as a way of meeting shareholders' complaints and grievances, in more recent times there has been a swing away from this notion to the idea that inspections and investigations should be part of the government's armoury, and used either to allay public disquiet following some investment or trading scandal, or as part of the general law-enforcement process. Valuable as these considerations may be, it does seem important in my view that shareholders, who under our traditional laws (in contrast with those of the USA) have no right of access to corporate records, should have some means of securing that suspected managerial malpractice should be officially investigated. Unfortunately, there are on record instances where a shareholder with a complaint of fraud, which is eventually shown to have been well-founded has been repeatedly turned away (as in the Wallersteiner case (1975)); and the change made in the U.K. by the Companies Act 1981, which has taken away from members the right to have their company's affairs investigated when this has been requested by a special resolution, is much to be deplored. Dr. Rider, in his Paper to the 1980 Law Minister's Meeting, has discussed the inspection system fully and examined the part which it can play in the detection of commercial fraud and crime, and I shall not try to cover this ground again. In regard to the civil law an inspection can, of course, have a valuable role in the unearthing of evidence to which a plaintiff would otherwise not have access; and judicial decisions which allow either the evidence given to an inspector or the findings embodied in his report to be used as at least prima facie evidence in compulsory liquidation proceedings or in damages claims show the potential usefulness of the inspection procedure in civil enforcement aspects of

corporate fraud. But the system has also the defects, adverted to by Dr. Rider in his paper, of cost, delays and the risks of injustice inherent in all arbitrary and inquisitorial powers.

26. The self-regulatory bodies, such as The Stock Exchange (and the Take-over Panel and similar agencies, most typical of the London scene but occasionally "exported", with mixed success, to other parts of the globe) also have an important part to play in keeping commercial crime at bay. The purpose of these agencies is, of course first and foremost the maintenance of a fair and effective market; but of course in such functions as market surveillance, the enforcement of codes of conduct, reporting requirements and the maintenance of standards of integrity and responsibility among their professional members, they plainly supplement the law and, indeed, discharge a function which in the majority of countries, is left to the law. In some respects the business scene can be policed more effectively by a voluntary code - for instance, the emphasis can be on the spirit rather than the strict letter of the rules, and fact-finding is made easier by the co-operation and goodwill characteristics of self-governing associations of professionals. Decisions are normally taken with less formality and a good deal more speed, and administration is less costly. Nevertheless, organisations which lack full legal backing are bound to meet problems when dealing with outsiders, and especially with persons based overseas. It is not as easy for them to establish liaison with the police and other governmental law-enforcement agencies, both internally and on the international scene; while in their relations with individuals and the public at large they may be inhibited by considerations of confidentiality and by their vulnerability to legal action, e.g. in regard to defamation. Some of these difficulties may be overcome by bringing such self-regulatory bodies as the stock exchanges within the statutory framework - as Professor Gower has suggested in his recent Discussion Paper, Review of Investor Protection (HMSO January 1982); but the agencies themselves may resist such a move out of fears for the loss of independence which might appear to be involved. Another solution is for such a body to be given ad hoc legal authority, e.g. by conferring on it the powers of investigation described in para. 25 - a move for which there is always a precedent within the Commonwealth. Another possibility is for the law to step in and take the primary responsibility for a particular kind of abuse (e.g. insider trading), whilst leaving undisturbed the greater part of the self-regulatory activities, or to authorise particular forms of extra-legal sanctions by conferring additional powers expressly for this purpose. For an example of the latter, we may look at the Companies Act 1981 (U.K.) Part IV, and especially sections 74-77, which give extensive powers to "freeze" the rights attached to equity shares where the registered holders refuse to give satisfactory information about the beneficial ownership of shares held by nominees, or about the existence of suspected "concert parties". There is a case for reviewing the law, at least in all jurisdictions where shares are widely held and extensively traded, in order to ensure that possible loopholes allowing fraud and concealment to flourish are closed by reforms along the lines discussed.

27. The last and, in many ways, the most intractable of the problems in this area is the question of the enforcement of civil remedies and sanctions, and related issues of procedure and evidence. These matters pose difficulties enough when dealing with the criminal aspects of commercial fraud and corporate abuse; but in a civil context, where claims must be prosecuted without the backing of public funds and without the aid of extradition treaties and other forms of international co-operation, they may be insuperable. For this reason, the development of sanctions which directly affect the property concerned (such as the "freezing" of rights attached to shares (para. 26)) and of procedural aids such as the Mareva injunction, though somewhat Draconian, may be the most efficacious solution.

28. It may help to summarise some of the recommendations and suggestions made in this paper.

(1). (paras. 8-9). Company and securities laws should be as up-to-date as possible, and adapted to meet local conditions and the special problems of particular jurisdictions. Parallel efforts should be made to ensure that the law works effectively at an administrative level.

(2). (para. 10). Money spent on efficient administration and timely law reform may prevent frauds which, in terms both of the damage they do and of the

expense of pursuing the wrongdoers, may turn out to be infinitely more costly.

(3). (para. 13). Consideration should be given to collecting and pooling of existing and new information regarding company and commercial law and law reform and the sharing of reports, studies, surveys etc. already carried out or currently being undertaken by Member countries.

(4). (para. 14). Co-operation in such matters as training schemes, the secondment of personnel, etc. should be encouraged. The need for administrators to develop specialist expertise in technical areas of commercial law should be acknowledged, and not thwarted by internal civil service promotion structures, etc.

(5). (para. 15). Smaller countries may be able to concentrate expertise by instituting co-ordinated or centralised registration and administration services.

(6). (paras. 16-17). Unnecessary evidentiary and procedural hurdles which are commonly imposed by courts in civil cases involving corporate and commercial wrongdoing should be eliminated, following e.g. the model of the Canadian legislation aimed at simplifying and improving minority shareholders' access to the courts in order to redress corporate fraud. The tendency of judges to make rules fettering their own jurisdiction (paras. 16-20) may require correction by legislation.

(7). (para. 19). Traditional definitions of "fraudulent trading", "fraudulent preference", etc., may impose a burden of proof which is too high; and civil liability in the case of fraudulent trading is unnecessarily restricted to claims in a liquidation. The sanction of disqualifying directors of insolvent companies from managing other companies could, with advantage, be more frequently invoked.

(8). (para. 21). Legislation providing for contribution claims between persons civilly liable should, where necessary, be modernised, so that persons held indirectly liable for losses should have remedies over or against those primarily to blame.

(9). (para. 25). The power to order investigations into the affairs of companies, where fraud on the part of its controllers or managers is suspected, should be available - or more readily available - to shareholders with a serious complaint.

(10). (para. 27). The problem of nominee shareholdings may best be dealt with by direct sanctions such as "freezing" rights attached to shares. Where legislative backing is needed for this, reforms should be introduced.