

**Law Council of Australia, Business Law Section
Corporations Workshop, August 2015
After Dinner Speech¹**

It is a great pleasure to be here again at the workshop. I started attending these enjoyable and valuable weekends when they began and it is a great honour to have been invited to sing a swansong.

The earliest workshop I recall was at Ballarat in, I think, 1982 or 83, followed by Manly a year or so later. I think the sponsor originally may have been Monash University but, in any event, the godfather then, as now, was Bob Baxt.

Bob and the other organisers over the years have excelled at providing not only varied content but also varied venues. It was at the workshop in far away Fremantle in 1999 that the seeds of a big shift in my own life were sown when Kim Santow casually asked if I had any interest in the possibility of judicial work.

At the 1995 workshop, there was a great deal of discussion about the *Gambotto* case². And unusually, there was interest in the person behind the case – Giancarlo Gambotto, the self-represented Italian immigrant who fought all the way to the High Court and became the David who slew Goliath in the person of Sir Ron Brierly.

We rarely pause to think about the people behind the cases. Had we inquired further about Mr Gambotto, we would have found that he was the father of the writer and critic Antonella Gambotto-Burke who has the distinction of having driven Cliff Richard to sue for libel over a review she wrote of a gospel concert at the Hammersmith Odeon³.

A predecessor case to *Gambotto* was, of course, *Peters American Delicacy Co v Heath*⁴. We read that case with a general realisation that Peters American delicacy is Peters ice cream. But we are blissfully unaware that we have Peters ice cream today only because an American who dabbled in several businesses in Sydney early last century did not make a success of Peters Pile Cure. Ice cream flourished where haemorrhoid medication languished; and Frederick Peters⁵ died a rich man, having outlived three of his four wives.

Peters American Delicacy was heard at first instance by Mr Justice Nicholas at the same time as Mr Justice Long Innes was hearing *Bulfin v Bebarfalds Ltd*, the

¹ The Hon R I Barrett.

² *Gambotto v WCP Ltd* (1995) 182 CLR 432.

³ The libel action is referred to in Turner S, *Cliff Richard: The Biography* (Lion Hudson, 3rd ed, 2008), p 321.

⁴ *Peters American Delicacy Co Ltd v Heath* (1939) 61 CLR 457.

⁵ See generally Walsh GP, "Peters, Frederick Augustus Bolles (1866–1937)", *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/peters-frederick-augustus-bolles-8027/text13993>, published first in hardcopy 1988.

1938 case about disclosure requirements for shareholders meetings⁶. Those of us of a certain age remember the Bebarfalds furniture stores. But who was Mr Bulfin? Well, it was in fact Mrs Bulfin – Gladys Bulfin⁷ – who derailed the Bebarfalds capital reconstruction. The daughter of a prominent bookmaker⁸, she had married into a family of publicans; and her father-in-law, as licensee of what is now the Newport Arms on Pittwater, chaired a meeting there at which Sir Henry Parkes made one of his federation speeches in 1891⁹.

Full and fair disclosure was also an issue in *Erlanger v New Sombrero Phosphate Co*¹⁰, the 1878 House of Lords case about the fiduciary responsibilities of company promoters. Sombrero is a barren speck of an island in the Caribbean. When it was named, it looked from afar like a Mexican's hat. Today, the hat has been flattened by phosphate mining.

The original mining company failed in 1871. Enter the financier Baron Frederic Emile d'Erlanger – although, since he was a native of Frankfurt, a Germanic pronunciation of his name must be appropriate.

Erlanger, as you will recall, arranged the formation of the New Sombrero Phosphate Co, which proceeded to buy the mining lease for £110,000. It raised the money under a prospectus implying that the lease was being bought from the liquidators of the old company. In fact, the vendors were an interposed Erlanger syndicate who had already purchased from the liquidators for £55,000. So, the investors in the new company promoted by Erlanger unwittingly gave his syndicate a quick and hidden profit of 100 per cent – and that, of course, is where the fiduciary duty bit.

Erlanger had form. There is a short report in 3 Chancery Division of a security for costs matter entitled *Republic of Costa Rica v Erlanger*¹¹. The substantive action is described only briefly. The allegation was that Erlanger's firm and others were retained to raise a large loan for the Costa Rica government, that

⁶ *Bulfin v Bebarfalds Ltd* (1938) 38 SR(NSW) 423 was heard on 1 April, 31 May and 2, 7 and 8 June 1938. The five day hearing in *Heath v Peters American Delicacy Co Ltd* concluded on 31 May 1938: *The Sydney Morning Herald*, 1 June 1938 p 10.

⁷ The report of the case in the State Reports discloses only the surname of the plaintiff. Contemporary newspaper reports identify her as Gladys Muriel Bulfin: for example "Capital of Bebarfalds Ltd", *The Sydney Morning Herald*, 2 April 1938, p 17.

⁸ NSW records show that Gladys Muriel Alldritt, daughter of William Alldritt, was born in 1888 and, in 1915, married William Bulfin (born 1875 at his parents; residence, the Maitland and Morpeth Hotel, Wharf Street, Sydney). William Alldritt was described in a 1925 newspaper article as "a well known bookmaker": "Wife's Alimony in Alldritt Case", *Evening News*, Sydney, 4 August 1925, p 8.

⁹ "Sir Henry Parkes at Newport", *The Sydney Morning Herald*, 9 June 1891, p 5.

¹⁰ (1878) 3 App Cas 1218.

¹¹ (1876) 3 ChD 62.

they did so and that “a very insignificant part of the amount raised has reached the Republic.”¹².

Erlanger subjected the American Confederate states to similar treatment in a bond issue he arranged to raise money for their war effort. He took the £100 face value bonds firm at £77, on-sold them at £90 and also received a 5 per cent commission – so that around 20 per cent of the money raised went directly into the middleman’s pocket. And when secondary market dealing is taken into account, it is estimated that Erlanger received as much from the issue as the Confederacy did¹³.

Erlanger was well connected in the American south. He had married a daughter of John Slidell, a prominent Louisiana lawyer and politician who served as the Confederate envoy to the court of Napoleon III¹⁴.

After 1865, Erlanger devoted a great deal of energy to railways in the southern states. There was much to be done. Large expanses of track had been destroyed in what was the first war in history in which massive military movements were undertaken by rail. The Union army was particularly adept at railway destruction, using a large hook dragged behind a train to rip up the sleepers and then burning them with the rails on top to soften them so that they could be twisted and made useless¹⁵. And the South, with severely limited iron and steel making capacity, had been forced to cannibalise tracks¹⁶.

Erlanger accumulated majority interests in a number of railway companies and came to control an extensive network of routes spanning the southern states¹⁷. He eventually brought these investments together under a holding company mentioned in just about every scheme of arrangement case heard in the last century and a quarter, the Alabama New Orleans Texas and Pacific Junction Railway Company¹⁸.

¹² That and other foreign loan raisings in the London market eventually prompted a parliamentary inquiry: *Report from the Select Committee on Loans to Foreign States* (Parliament, 1875. HC Repts and Papers).

¹³ Bondholders had an option to redeem for cotton at a very favourable price. There are many accounts of the bond issue which is sometimes described as the first Eurobond issue. See, for example, Brown WO and Burdekin RCK, “Turning Points in the US Civil War: A British Perspective” (2000) 60 *The Journal of Economic History* 216; Leigh P, “The Cotton Bond Bubble”, Opinionator, *The New York Times*, 30 January 2013.

¹⁴ A brief account of Slidell’s career and its intersection with that of Erlanger may be found in Hemard N, “The Railroad Baron Who Actually Was One”, *New Orleans Nostalgia* published by the New Orleans Bar Association in 2008.

¹⁵ Rails bent and twisted into loops were known as “Sherman’s neckties” or “Sherman’s bowties”.

¹⁶ For example, a Special Order issued by the Adjutant and Inspector General’s Office at Richmond, Virginia, on 22 January 1863 appointed a commission to inquire into salvaging iron from railways for military purposes.

¹⁷ A town in Kentucky on the Cincinnati to Chattanooga line is named after Erlanger.

¹⁸ *In re Alabama New Orleans Texas and Pacific Junction Railway Company* [1891] 1 Ch 213.

The Australian railway market also captured Erlanger's attention. In 1880, the Queensland premier, Thomas McIlwraith, introduced a Bill to develop railways on the American model, with private companies building lines for nothing on land given by the government, their reward being the land left over. The leader of the opposition, Samuel Griffith, spoke forcefully against this. He targeted a particular plan for a line to the Gulf of Carpentaria – a plan put forward by a syndicate arranged by none other than Erlanger & Co. That firm, Griffith told the House, was a very well known firm – even a notorious firm, but a firm, he said, that the colony would be better off having no dealings with. He then went on to relate Erlanger's Costa Rica and New Sombbrero exploits¹⁹.

McIlwraith's framework legislation was passed, but the scheme was dismantled a few years later when Griffith became premier²⁰. And so Erlanger never got to practise his dubious arts on Australian railways.

Erlanger's reputation, while somewhat tarnished²¹, positively shone by comparison with that of his contemporary, Albert Grant²².

The son of a Prussian father and an English mother, Grant was born into poverty in Dublin in 1831, a year before Erlanger. By 21, he was a merchant's clerk in London, working beside a stuttering West country boy who went on to become the famous actor, Sir Henry Irving. At 29, he established his first finance company. When it failed two years later, he abandoned his German name and reinvented himself as Albert Grant.

During the 1860s and 70s, Grant featured in a very large number of company flotations, many of them disastrous for enterprises and investors. His basic technique was the same as Erlanger's – to ensure that secret commissions and side deals put large amounts of cash into his own pocket; and then to manipulate the market until insiders' holdings had been sold at a profit.

The ventures floated by Grant included the Odessa Waterworks²³ and the Cadiz Waterworks²⁴ both of which featured in company law cases for reasons unrelated to him; also the Emma Silver Mining Co and the Lisbon Tramway Co.

¹⁹ Debate on the *Railway Companies Preliminary Bill*, second reading, *Queensland Parliamentary Debates (Hansard)*, Legislative Assembly, 5 October 1880, p 913.

²⁰ *Railway Companies Preliminary Act of 1880 Repeal Act 1884* (Qld).

²¹ Erlanger's business methods, while not entirely out of line with the commercial morality of the era, did not commend themselves to more conservative bankers. In 1905, Kleinworts told Goldman Sachs that Erlanger & Co's business was "much too speculative and unknown to render their acceptance desirable and we recommend you to completely avoid the name in the course of your exchange business": Kynaston D, *The City of London, Volume II: Golden Years 1890-1914* (Chatto & Windus 1995), p 279.

²² See generally Hedges M, *An Infinite Deal of Nothing* (Smashwords, 2014); Robb D, *White Collar Crime in Modern England* (Cambridge University Press, 1992), pp 99ff; McKie D, "Monument to a crook", *The Guardian*, 24 October 2002; *A Pebble on His Grave: Albert Grant 1831-1899*, posted on August 29, 2014 by Actonbooks.

²³ *Wood v Odessa Waterworks Co* (1889) 42 Ch D 636.

²⁴ *Cadiz Waterworks Co v Barnett* (1874) LR 19 Eq 182.

These last two spawned a raft of litigation, with Grant accused of all manner of unconscionable dealing in cases that included *Twycross v Grant*²⁵ and *Emma Silver Mining Co v Grant*²⁶, both of which continue to be cited today²⁷.

Grant was a master of cosmetics. His adoption of the Albert Grant name was the first step in the creation of a new and imposing persona. In 1865, he acquired a seat in Parliament by dubious means²⁸. In 1868, the king of the newly united Italy made him a baron, supposedly for services rendered in establishing the Victor Emmanuel Galleries in Milan; but there was a strong suspicion that money had changed hands²⁹. Contemporary attitudes to Baron Grant's foreign title are summed up in an epigram that did the rounds of the London business world:

Kings may a title give,
Honour they can't,
Title without honour
Is a barren grant.³⁰

Grant tried very hard to win a title from Queen Victoria. His program of ostentatious philanthropy included giving valuable paintings to the National Gallery (these included Landseer's portrait of Sir Walter Scott for which he paid 800 guineas³¹) and acquiring, laying out and presenting to the nation a grandly refurbished Leicester Square³² – on land, as it happened, that had featured in the famous real property case of *Tulk v Moxhay*³³. Her Majesty and her advisers were unmoved.

When the Emma Silver Mining Co was floated, Grant gave it an air of special respectability by putting on to the board the United States ambassador to London, Robert Schenk. Investors were not told that the ambassador's participation had been bought for £10,000. Nor were they told that favourable press coverage in *The Times* had been corruptly planted by Grant himself. Such

²⁵ (1877) 2 CPD 469.

²⁶ (1879) 11 Ch D 918.

²⁷ Other reported cases in which Grant played a central role include *Bagnall v Carlton* (1877) 6 Ch D 371 and *Rubery v Grant* (1872) LR 13 Eq 443.

²⁸ At the 1874 election, he corruptly offered inducements to electors: see *Grant v Overseers of Paghham* (1877) 3 CPD 80. A contemporary report described the inducements as "a meal and an evening of jollity": "Mr Justice Mellor has unseated Mr Albert Grant for Kidderminster", *The Spectator*, 18 July 1874, p 2.

²⁹ The suspicion was referred to during debate in the House of Commons on the *Traffic in Titles (No 2) Bill* on 19 May 1914: HC Deb 19 May 1914 vol 62 cc 1793.

³⁰ Various accounts of the precise wording and of the circumstances in which the verse entered circulation are recorded in *Notes and Queries*, Series 12, Volume 10 (The Times Publishing Co, 1922).

³¹ Murray J, Note (1875) 7 *The Academy* 618.

³² Lord Derby, Disraeli's close political associate, observed that "in any man, this would be called an act of public spirit: in a disreputable speculator, who has more than once narrowly escaped prosecution for fraud, it is an ingenious device for putting himself right with the world": McKie D, "Monument to a crook", *The Guardian*, 24 October 2002.

³³ (1848) 47 ER 1345. The decision in that case that an 1808 covenant prohibiting building ran with the land ensured that the site was open space when acquired by Grant.

was the value he attached to the power of the press that he bought the halfpenny evening paper, *The Echo*, to amplify his message.

Grant pitched his selling strategies at unsophisticated investors, particularly widows and clergymen; and he understood human nature, once saying: "I know hundreds who would rather make £50 on the Stock Exchange than £250 by the exercise of their profession." His back-office staff kept thousands of handwritten cards recording the names and addresses of Britain's new middle-class. Prospectuses were mass-mailed through the penny post – an unbelievable 80,000 in a single day, according to one commentator.

Unlike Erlanger, Grant did get to practise his dubious arts on an Australian railway. He floated the Tasmanian Main Line Railway Co, which built the Hobart to Launceston line³⁴. In a February 1878 editorial about the railway company, the Hobart Mercury referred to Grant's "many questionable transactions", branding him an "arch schemer" and, with undisguised irony, as "that intensely honest and unsophisticated gentleman . . . to whom Tasmania owes all its railway troubles"³⁵.

Of course, lawyers were active in all these corporate deals.

Erlanger directed a great deal of business to the solicitors Ashurst Morris Crisp & Co where, in the 1880s, much of it was handled by the young William Slaughter; and when he branched out on his own in 1887, Erlanger went with him and became an important foundation client of the new Slaughter and May³⁶.

The law reports show that Grant's counsel in the early stages of the Lisbon Tramway litigation was the distinguished Queens Counsel, Judah Benjamin³⁷. Benjamin had gone to the bar in London at the age of 55 after fleeing the ruins of the Confederacy with nothing but the clothes on his back. He was a former law partner of Erlanger's father-in-law in Louisiana, had been offered a seat on the United States Supreme Court before the war, was a very able Attorney General and Secretary of State in the Confederate government and had negotiated the cotton bond deal with Erlanger. With time on his hands in his early days in London, he authored what was to become the definitive work on the sale of goods, the ninth edition of which appeared just last year³⁸.

The exploits of Erlanger and Grant seem unbelievable today. Particularly strange to us is the lack of oversight of the solicitation of investment and the weakness of criminal sanctions. In the laissez faire environment deliberately fostered by the

³⁴ Construction of the line was well advanced by the end of 1874, according to a detailed report in *The Argus*, Melbourne, 8 January 1875, p 6.

³⁵ *The Mercury*, Hobart, 8 February 1878, p2 .

³⁶ See generally Dennett L, *Slaughter and May: A Century in the City* (Granta Editions, 1989), pp 20ff.

³⁷ See generally Evans EN, *Judah P Benjamin: The Jewish Confederate* (The Free Press, 1988).

³⁸ Bridge M (ed), *Benjamin's Sale of Goods* (Sweet and Maxwell, 9th ed, 2014).

1862 companies legislation³⁹, it was left to judges – courageous judges, one might say – to fashion remedies out of basic principle. Such were the values of the time that, as late as the mid 1890s, William May of Slaughter and May (who admittedly had a personal interest) branded as a “magnificent miscarriage of justice” the decision in *Scott v Brown Doering McNab & Co*⁴⁰ that a contract deliberately made to rig the stock market should not be enforced by the court⁴¹.

Next time you reach for one of the familiar company law cases, pause for a moment. Think what might lie behind the dry pages of the law reports. The family company that came under the High Court’s gaze in *Mills v Mills*⁴² operated a Riverina sheep station⁴³. Did it produce the imposing Merino ram that appeared on our old shilling coin⁴⁴? *Spies v The Queen*⁴⁵: was that the Peter Spies who became the new occupant of the Sydney mansion, “Swifts”, after it was sold by the Catholic Church in 1986⁴⁶? And do we perhaps have among us here tonight the person at the centre of the 1995 case about a former director’s right of access to company documents, *State of South Australia v Barrett*⁴⁷?

³⁹ The legislation’s architect, Robert Lowe, is reported to have said: “This is not a paternal government; people who embark in these things must take care of themselves.” See McQueen R, *A Social History of Company Law* (Ashgate, 2007), p 132.

⁴⁰ [1892] 2 QB 724.

⁴¹ Dennett L, *Slaughter and May: A Century in the City* (Granta Editions, 1989), p 104. Slaughter and May were parties to the litigation.

⁴² (1938) 60 CLR 150.

⁴³ Identified in the judgment of Starke J as “Uardry”.

⁴⁴ The 1932 Royal Sydney Show grand champion ram bred at Uardry was immortalised on the coin: “Reality Rams Home as Fine Merino Chapter Ends”, *The Australian*, 8 December 2012.

⁴⁵ (2000) 201 CLR 603

⁴⁶ The appellant in the High Court was identified in the judgment of the Court of Criminal Appeal as Peter Mannery Spies, a director of Stirling Nicholas Duty Free Pty Ltd: *Regina v Spies* [1998] NSWSC 459. A newspaper report of April 1986 stated that Peter Spies of Stirling Nicholas Duty Free had become the occupant of Swifts after it was purchased by a family company associated with Carl Spies and Anthony Spies: “Swifts Gets a New Owner for \$9m”, *The Eastern Herald*, a supplement to *The Sydney Morning Herald*, 17 April 1986 p 1.

⁴⁷ (1995) 64 SASR 73. The first respondent in that case was Lewis Barrett AO, OBE, a prominent citizen of South Australia unrelated to the author.