

TITLE:

On shareholders as creditors -
Some perspectives on the position of shareholders and unsecured creditors after *Sons of Gwalia*

ABSTRACT:

The effect of the *Sons of Gwalia* decision is undoubtedly good for shareholders seeking to recover losses from misleading non disclosure but does have some detriment for unsecured creditors, particularly small trade creditors. The decision bypasses the *Houldsworth* principle which gave creditors priority and which had been said to be justified by the maintenance of capital principle and contract. The paper notes those arguments and also looks at the decision through the prism of different theoretical views of the corporation – both the nexus of contracts view and the stakeholder view. The paper also notes the view of economists that creditors are in a better position than shareholders to “self protect” through having better information and being able to negotiate security. The writer questions this view noting that small unsecured trade creditors and involuntary creditors have little access to information and little bargaining power. The paper lastly looks at some of the proposals to resolve the question that have been noted in the US literature. While concluding that, on balance, the case for legislative intervention has not been made out, a compromise position is suggested.

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