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- West's Club was excluded. Court found this was done for corporation reasons.
- It impacted on the club's finances.
- Rule: It was discrimination, but it was not unfair. This was done for business reasons, and a reasonable director could make this decision. As long as it is justifiable for business reasons.
- No Finding of Oppression. Situations where you can argue is:
  - Diversion of corporate opportunity
  - Director fails to act in best interests
  - Improper share issues
  - Diversion of profits
  - Exclusion of shareholders from management

### Winding Up Remedy (s. 461-464) – (compulsory liquidation remedy)

- Creditors paid, then shareholders paid. This affects shareholders.

The company can apply; the shareholder can apply. If company is insolvent, a creditor or liquidator can apply, ASIC can apply if in public interest. Application will occur if a vote of 75% of shareholder. You can bring an action as a single shareholder: s 461(1)(k) – reasonable grounds for deadlock in management. If they cannot agree with each other, no resolutions can be made etc.

Small

- If one shareholder has been excluded from management, you can take action.
- In *Ebrahimi v Westbourne Galleries*:
  - 2 shareholders (directors). Later, the son bought 20% of shares.
  - If Nasser and Son voted together, they have 50%. Ibrahim was voted off as director because company never paid dividends etc.
  - This succeeded, so he can get his capital.

### Three elements:

1. Small company formed by people with personal relationships and mutual confidence
2. Reasonable expectation of management participation by shareholders
3. Share transfer restrictions: hard to sell shares
  - Exclusion from management in such a company = just & equitable grounds for winding up company.
  - But note overlap with oppression remedy here.

### Statutory Derivative Action (s. 236-242)

- Occurs where company interests have been harmed. Includes director's duties etc.

Shareholder or former shareholder may apply for leave to bring lawsuit to shareholders, it may be brought by an officer or former officer. Directors will not bring action against themselves, so shareholders may by seeking leave.

### Two Stage Process

1. Time-Consuming: To make sure the law suit is not frivolous. It is time consuming to bring this action. It is unpredictable. It is expensive.
2. Unpredictable & Expensive

**NOTE:** Not good for plaintiff because they have to pay the costs. If there are damages, the money goes to the company because you are suing on behalf of the company. If a shareholder, you won't get any benefit. It may indirectly benefit you, but it will not give you a direct benefit.

### Obtaining Leave

- Satisfy the 5 element test: s 237(2):
  - Company won't bring law suit itself (a). Give 14 days' notice to company.
  - Plaintiff is acting in good faith, and
  - Is in best interests of company to grant leave to the applicant, and
  - There is a serious question to be tried: *Ragless v IPA Holdings*. Must have legal cause of action

This test was applied in *Swansson v Pratt (NSWSC) (2002)*. Ms Swansson claimed that Highland wrongly took money for his own benefit. She failed on (b) and (c): leave not granted for her to bring law suit. Evidenced that she had received the money she was claiming from Mr. Highland.

**NOTE FOR EXAM:** In this area, only speak about whether the applicant can seek leave from the courts.

## Statutory Injunction, s 1324

Any person who has breached the corporations act. You can apply to court for an injunction to stop a person from doing something: (1) (2). Under 1324(10): If the court cannot bring an injunction, you can seek damages instead.

*Who can apply?*

- ASIC or
- 'A person whose interest have bene, are or would be affected by the conduct'. This could be shareholders, creditors etc.

## **REMEMBER FOR FINAL EXAM**

If breach of replaceable rules, this is not counted as part of corporation's act. This is counted as constitution; it is a contract. Therefore, a breach of replaceable rules is not a breach of corporation's act.

### **Mesenberg v Cord Industrial Recruits**

**Directors Duties?** Will this be covered if breached? YES, you may get an injunction to try and get them to pay damages or if harmed personally, get damages for yourself.

- This is controversial since the duties are civil penalties. This is a grey area. A breach of director's duties cannot be remedied by statutory injunction? Possibly.
- ASIC can bring action, or company can ask for compensation under civil penalty provisions:

**ALTHOUGH.** Prove you have been personally affected. Mesenberg will not apply and you can say that the plain terms of s 1324 need be determined ONLY.

This is a **discretionary remedy**.

### **Other Options**

- Join a class action where you sign up with another group of shareholders known as representative action. Often class actions brought if breach of disclosure rules: s 674-5 or misrepresentation: s 1041E.