

## DEFENCES – S588H

- S588H(2) reasonable expectation of solvency
- S588H (3) reliance on others providing the information on the solvency of the company
- S588H(4) illness or some other good reason resulting in absence from management
- S588H(5) reasonable steps to prevent the company from incurring any debts
- S588M recovery of compensation for loss resulting from insolvent trading
- S588M(2) Liquidator may recover from director
- S588M (3) Creditor may recover from director

Where D found to S588G, may apply to court for relief from liability under S1317S (civil penalties). Must prove acted honestly, in all circumstances they 'ought reasonably to be granted relief' from liability. Eg. If D genuinely and reasonably attempted to rescue business from financial ruin (Hall v Poolman)

## FIDUCIARY DUTIES - EQUITY

ASIC v Adler [2002]

**E: Act in good faith and in best interest of company (SH as a whole) S: S181 (1)(a)**

### Law of Equity

"act in good faith" generally means act honestly – duty to use powers to act honestly for benefit of company and not for some other ulterior purpose. Overlap with proper purpose. Acting for improper purpose may also constitute a failure to act in good faith in interest of company as a whole. Difference is good faith is subjective (did D act in good faith) and proper purpose objective (was conduct for pp).

Bona fides – Latin term 'to act in good faith' cannot be sole test – courts look at subjective & objective elements

BREACH – allow company (not ASIC) to sue D for equitable compensation, rescission of contract, an account of profits, a constructive trust or an injunction.

### Law of Statute

S181 – all D to exercise duties and powers in good faith for best interest of company and for proper purpose. May be enforced by Company or ASIC.

Same principles as Equity – difference is in consequence of breach.

BREACH - Civil penalty provision S1317G – proved on balance of probabilities. severity determined on intention to deceive or defraud company, members or creditors. Criminal sanctions - If attempt to be reckless or intentionally dishonest under s184(1).

**E: Act for proper purpose – Proper Purpose rule**

**S: 181 (1)(b)**

### Law of Equity

Mills v Mills 1938

D to exercise power only for benefit of company and use that is undertaken so is improper use and breach of F duty. Mills Case = D will not necessarily breach improper purpose if conduct they took will benefit a class of SH in which they happen to be a part of as SH themselves. Two step process:

- Determine what the purpose of the power is (that is, why does the power exist)  
Also, disclose what power may not be used for. Identify legal scope of power