

Corporate Law Exam Notes

Ordinary claim skeleton

To weave in authority (case and legislation):

- ___ is authority for the proposition that ___. In these circumstances therefore _____.
- _____ is authority that there is justification for a _____.
- - 'the application of s__ will result in _____'

When using case law, consider:

- Does the case apply? Are the facts sufficiently similar or can it be distinguished?
- What is the ratio of the case? Is it binding precedent or just persuasive?
- Why is the current scenario similar to justify applying the case?

If missing facts, ensure to state that! State what facts would be required for a more robust analysis.

1. Ensure you understand who you are advising – whether it be a person, the company or ASIC. This will make a difference as to your answer.
2. If advising a person, are they a member of the company? – see s 231 CA.
 - a. Is the person's name entered on the register of members? – s 231(b) CA.
 - b. *Note*, the powers of members and the rights of members and the voting procedures for members – see notes below.
3. **Is there a membership/shares issue on the facts?**
 - a. Is the company attempting to reduce share capital? Per s 156B does it:
 - i. Materially prejudice creditors?
 - ii. Is it fair and reasonable to shareholders?
 - iii. Has it been approved by shareholders?
 - b. Is the company issuing shares? *NOTE: this links with directors' duties (s 181).*
 - i. A company can issue fully-paid or partly-paid shares: s 254A(1)(c). These may be on any terms, include any rights, or restrictions as determined by the company: s 254B.
 1. Preference shares must carry rights over and above at least one other class: *Re Capel Finance*
 2. But, there is no need for the other class to be issued yet: *Beck*
 3. *For details on the possible rights attached, see below!*
 - ii. Can be for cash, or non-cash consideration - see below for more details
 - c. *Is the company attempting to alter the class rights of shares?
 - i. Class rights are rights attached to shares in a class of shares: s 246B.
 - ii. ASK:
 1. Does the company have the right to issue shares – above
 2. Do certain rights attach to the shares?
 3. When are class rights varied?
 - a. Is it a deemed variation under s 246C? If not,
 - b. Does it fulfil the common law test from *Greenhalgh*?

4. Has the company undertaken the s 246B(2) process (if no process in Constitution)? - *see below*
 5. Can the member challenge the variation under s 246D? – *below*.
- d. Is the company planning to pay a dividend?
- i. Directors may determine that a dividend is payable, and fix the time, amount, and method of payment: RR s 254U(1) CA
 - ii. A dividend can be ‘declared’ or merely ‘determined’.
 1. Debt is incurred when dividend is declared (s 254V(2)). If ‘determined’ it is incurred when the time of payment arrives (s 254V(1)). – *has impacts on insolvent trading!*
 - iii. *May lead to a Members’ Oppression Remedy!*
- 4. Is there an issue in relation to financial reporting obligations?**
- a. Every company must keep written financial records that, per s 286(1), correctly record and explain transactions and financial performance, which would enable a true and fair view of the company.
 - b. If it is proved that a company has failed to keep or retain financial records then the company is presumed insolvent throughout the period of its failure: s 588E(4).
 - i. *Has impacts on proving insolvency for insolvent trading provisions.*
 - c. Has the company satisfied their ‘continuous disclosure’ obligations?: ss 674-678
 - i. Is the company a disclosing entity?
 - ii. Under s 674: The company must immediately disclose all information to the ASX that a ‘reasonable person would expect to have a material effect on the price or value of the entity’s securities’.
 - iii. Is the obligation discharged due to the operation of Listing Rule 3.1A? – *see below*.
- 5. Is a shareholders’ meeting being held?**
- a. Meetings must be held for proper purpose: CA s249Q
 - b. Meetings must be held at a reasonable time and place: CA s249R
 - c. Who called the meeting?
 - i. Court has the power to call a meeting: CA s249G
 - ii. Any director can call a meeting: s 249C.
 - iii. Directors must call a meeting within 21 days, at the request of shareholders holding at least 5% of the voting shares or, at least 100 members who are entitled to vote: CA s249D(1).
 - iv. If directors fail the above then shareholders holding more than 50% of the votes of all shareholders who made the request may call: CA s249E(1)
 1. If so, the company must cover all reasonable expenses incurred by the shareholders in calling the meeting: s 249E(4) CA
 2. A director is not liable if it can show it took reasonable steps to comply with above: s 249E(5)
 - v. Shareholders with at least 5% of voting shares can call (without requesting directors to do so) BUT the cost is theirs! CA s249F
 - d. Notice of at least 21 days must be given for a meeting of company shareholders: s 249H – *see below*.
 - i. Did this notice contain the s 249L content? – *see below*

- e. Ensure the quorum at the meeting was met. The quorum is two, and they must be present at all times during the meeting: s 249T(1).
- f. Voting:
 - i. A show of hands, per a replaceable rule, entitles shareholders to have one vote per person: s 250E(1) (*if a company with share capital*)
 - ii. A poll entitles shareholder to have one vote per share: s 250E(1)
 - 1. Polls can be demanded by at least 5 shareholders entitled to vote, shareholders with 5% or the chair - CA s250L(1)
- g. Any breaches of the above rules? i.e. any irregularities?
 - i. Section 1322 allows for an individual to apply to the court to have the meeting invalidated. The court will consider:
 - 1. If the irregularity was procedural and,
 - 2. Whether it has or will cause a substantial injustice.
 - ii. BUT, an individual can also apply to the court to have the meeting validated under s 1322(6) if:
 - 1. It is only a procedural irregularity
 - 2. The person involved was acting honestly
 - 3. It is just and equitable to give the order

6. Are there any breaches of ethics on the facts?

- a. Establish who the client is
- b. State the hierarchy of obligations – *the client is number 3*
- c. Note the Australian Solicitors' Conduct Rules (2011)(ASCR), the *Professional Conduct and Practice Rules* and the Barristers' Rule 6.6
- d. Ensure the advice does not breach the *Legal Practitioners Act 1981* (SA) ss 68 and 69.
 - i. Is there a person involved in a contravention under s 71 CA?
- e. *Apply case analogies!*

7. Has there been a breach of Directors' Duties? – ensure you apply to the facts to determine if the person actually breached these duties!

- a. Does the duty apply to the person, or the Board?
 - i. Are they a director, *de facto* director, or shadow director under s 9 CA?
 - 1. Note the position they may hold and their usual role.
 - ii. Are they an officer of the company under s 9 CA?
 - iii. Is the person a company secretary?
 - iv. Is there a person involved in a breach under s 79?
 - v. *Apply case analogies!*
- b. Did the person breach the common law (fiduciary) duty of loyalty?
 - i. State: s 185 and s 193 specifically preserve the common law duties.
 - ii. State: The fiduciary relationship between directors and their company is an established fiduciary category: *Regal (Hastings)* [1967] 2 AC 134.
 - iii. Fiduciary duty:
 - 1. Conflict rule: A director must not allow a 'real or substantial possibility of' conflict to arise between their interest and duties, and the duties to the company: *Hospital Products* – see below

2. Profit rule: A director not use their position to gain a profit or advantage for themselves: *Hospital Products* – see below
3. Defences: Fully informed consent? See *Furs* and *Hudson* – below
- iv. Equitable duty of good faith:
 1. ‘directors must exercise their discretion bona fide in what they consider to be in the interests of the company, and not for any collateral purpose’: *Re Smith and Fawcett* – see below
- v. *Argue case analogies!*
- c. Has there been a breach of a statutory duty of loyalty?
 - i. Section 181: A director or other officer of a corporation must exercise their powers and discharge their duties: (a) in good faith in the best interests of the corporation; AND (b) for a proper purpose. – See below!
 - ii. Section 182: A director, secretary, officer or employee must not improperly use their position to gain an advantage for themselves or another or cause detriment to the company. – See below!
 - iii. Section 183: A person who obtains information because they are (or have been) a director, officer or employee must not improperly use the information to gain an advantage for themselves or another or cause detriment to the corporation. – See below!
 - iv. Section 191-196: Has the director given notice to the other directors of any material personal interests relating to company affairs? – see below
 1. Note effects of s 195 on public companies
 2. Note effects of s 194 on proprietary companies
 - v. Chapter 2E: Is there a related party transaction on the facts? See below for the 5 step process.
- d. Has there been a breach of the statutory and common law duties of care and diligence?
 - i. State: s 180(1), and the common law equivalent, impose a positive duty on the directors/officers of companies to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if there were a director or officer of a corporation in the corporation’s circumstances and occupied the office held by the relevant director/officer. – see below for applying it to the facts
 - ii. All directors have basic, non-reducible skills – but the duty can go up!
 1. See *AWA v Daniels* and *Daniels v Anderson*
 2. *Citrofresh* and *Healy* are authority that honesty will not prevent a breach of this duty of care.
 - iii. *Apply case analogies!*
 - iv. Defences:
 1. Can the director/officer rely on the s 189 defence? See *Daniels* and ss 198D and 190
 2. Can the business judgement rule be applied? Per s 180(2) if:
 - a. Made the business judgement in good faith for a proper purpose,