

Members remedies

The legal issue is whether Rodney as a member and director of Zap Graphics (ZG) Pty Ltd can use member's remedies to take actions against Lily and Morris because of the oppressive and unfair conduct.

Members' remedies are provided to members if they can show that the conduct of company's affairs is contrary to the interests of the members as a whole, or oppressive, unfairly prejudicial to a member or members under **s232**. The conduct may affect members in their capacity as members or in any other capacity. Under s234(a), a member of a company, even though the application relates to an act or omission that is against the member in a capacity as a member or in a capacity other than as a member, can apply members' remedies. In this case, due to the fact that in a director's meeting Lily and Morris issued Rodney with two shares in the company therefore Rodney is a member of ZG. Moreover, at the general meeting for shareholders, Rodney was also appointed as a director of the company even though he said that he would not attend the board meetings and wanted to be treated as a "silent partner". Therefore, Rodney can apply member's remedies because of the oppressive and unfair conduct of Lily and Morris

S232 provides a remedy for minority shareholders of ZG if the majority shareholders divert a corporate opportunity to themselves or their associates. In this case, Lily and Morris are the majority shareholders formed another company, Lily, Morris & Carol Graphics Pty Ltd (LMC), in which Rodney was not involved, and **diverted a valuable government design contract that they had negotiating to their new company (Cook v Deeks)**. Lily and Morris breached directors' fiduciary duties and failed to act in good faith, in the best interests of the company and for a proper purpose: s181(1), s184(1) and duty of care s180(1). Rodney as a minority cannot represent the BOD to sue other 2 directors. Instead Rodney can apply for Statutory Derivative Action under Pt 2F. 1A as a shareholder and officer, and ask for court to sue these 2 directors, void the contract diversion: s236(1).

Another oppressive or unfair conduct is diversion of profits that the profits of the business are divided up among themselves in accordance with the number of shares held. The majority may act oppressively or unfairly because a significant proportion of the profits are paid in the form of high director's fees and low dividend shareholders, esp for minority shareholders (Sanford v Sanford Courier Service Pty Ltd). Lily and Morris decided **not to declare a dividend for the current year** despite the company's increased profits, gave themselves **pay rises and arranged for the company to lease 2 cars for their personal use**. These are business decisions that are within the delegated power of directors: s198A (business of the company is to be managed by the direction of directors) so Rodney as a member cannot get involved in these decisions. The third oppressive or unfair conduct is exclusion from management, which is applied where a quasi-partnership between 2 or more independent investors, it may be oppressive or unfair to exclude one of the investors from the company's management. Lily and Morris called a general meeting to remove Rodney as a

director and approve contract diversion => Rodney as a director cannot stop them from calling a meeting, changing resolution, removing directors as members and majority approval of business decision as directors. They **did not notice of meeting** to Rodney => Rodney can apply **s232, s233 under Part 2F.1** asking court to enforce buy-out of his share at market price to and he can get back his investment. The court may even wind up the company under **s233(1)(a) s461(1)(f) & (g)** even if it is solvent if there are real risks of further oppressive conduct and the limited nature of the company's business activities.

EXAM- IRAC – issue, rules, application, conclusion.

1. List and explain what you know about the companies mentioned in the Question:

P Finance Ltd is public limited company, Q TV Pty Ltd is proprietary limited company => characteristics in s45A, s113, slides

2. List and explain what documents P Finance Ltd should demand from A and/or Q TV Pty Ltd in order to be satisfied as to the validity and good faith of the transaction.

- Company's constitution
- Director register in ASI-lodged documents
- Member's meeting minute
- Company's memorandum, company's articles of association (that company is not deprived of capacity to enter this contract or delegate authority to agent to enter into this contract on its behalf) => this not apply in Aus s 125

3. List and explain what searches and inquiries P Finance Ltd should conduct in order to be satisfied as to the validity and good faith of the transaction (what search needed to be done, so there is no suspect, s128(4) not apply, so can rely on s129 assumptions and enforce the loan security agreement)

- Company's constitution and inquired whether A had been properly appointed
- Director register in ASI-lodged documents to see whether A was named as director, whether A had previously conducted transactions and signed documents as it he was director, if yes then A was held out by company even though A not appointed properly
- Member's meeting minute regarding the representation of company (or by the board who has actual authority) that A had authority to contract on its behalf

Explain the different ways (at least three) in which R Pty Ltd would execute mortgage (like a legal document)

1 - with seal s 127(2) , 2 - without seal s 127 (1), 3 - contract through agents s 126

- Explain what assumptions P Finance Ltd may/can rely on.

S 129 (1), s 129(2), s 129(4), s 129(6) and s 127(2),

- Explain whether A's appointment of E as company secretary is valid.

S 204D: A secretary is to be appointed by the directors.

Note 1: Company must notify ASIC of the appointment within 28 days (see subsection 205B(1)).

Note 2: Section 188 deals with the responsibilities of secretaries for contraventions by the company.

S 205B (1) A company must lodge with ASIC a notice of the personal details of a director or secretary within 28 days after they are appointed. The notice must be in the prescribed form.

=> A followed the process of notifying ASIC, E is named as secretary => could be valid

1. In the light of the additional facts, discuss whether P Finance Ltd can still rely on their earlier assumptions.

No, did not do enquiries, a reasonable party contract with company should have done inquiries research and should have suspected s 128(4)