

## CASES

### Furs Ltd

- Mr T was director of Furs Ltd & member in co B
- Furs selling products to co B
  - Co B wanted Mr T to work for them & would pay to give secret formula
  - Mr. T breached for giving formula

Taking **COPORATE PROPERTY**

### Cooks v Deeks

- Cook was 25% s/h & a director
  - Not liked by the other 3 directors
- 3 directors set up new co & took new contract to cut out Cook
  - Turned it down on behalf of co & took contract as new co

Taking **COPORATE OPP.**

### Peso Silver Mines

- Mr P on board - board said no to taking new opp
- Mr P was approached personally, took it up
- Did NOT breach
  - Acted correctly in interest of the co, no intentions

### Regal Hasting v Gallaver

- Co had to pay 5k
- Directors put in remaining 3k (co paid 2k)
- Directors made profit when shares sold
  - BREACH
- All of board decided co didn't have enough money
  - Should have gone to s/h & told them they were chipping in own money
  - TRANSPARENCY

Taking **COPORATE OPP.**

### Canadian Aero Service Ltd

- 2 workers for CAS took up contract for aerial surveying whilst overseas on job
- Resigned from CAS
  - Set up new co & bided for contract
- Took corporate opp whilst with Aero

Taking **COPORATE OPP.**

### CMS Dolphin Ltd v Simonet

- Simonet was managing director of a co
- Resigned & smoothly transferred into a new co- funds, employees, clients
  - Proof he had been planning this
- Breached fiduciary duties as director
  - **Exploited a maturing business opp** after resignation
  - Business opp treated as **belonging to the co**

**Step 2: Who can apply? s 234****a) ASIC****b) Someone whose interests have been affected**

- E.g. **Creditor**  
→ *Allen v Atalay*

**c) A member**

If involves breach of s 180- 183 - **civil penalty provisions**

- breach of civil penalty provision can only be enforced by ASIC

→ They can:

*Airpeak Pty Ltd v Jetstream Aircraft Ltd*

*Emlen Pty Ltd v St Barbara Mines Ltd*

**VS.**

**s 1324(1A): Affected interests****a) Insolvency affects interest of a creditor****b) Affects interests of creditor or member:**

- i) **257A(1)(a)** share buy-back
- ii) **256B(1)(b)** share capital reduction
- iii) **260A(1)(a)** financial assistance for share acquisition

→ They CAN'T, only **ASIC** can:

*Mensenberg v Cord Industrial Recruiters Pty Ltd*

**NOTE:** General law injunction - **future** VS. Members' injunction remedy - **past/ present/ future**

**❖ Members' personal action**

**Personal action:** legal action to enforce a personal right

Have a personal right under

- Contract
- Statute
- General law

**Personal rights under CONTRACT**

From **express** contract

E.g. terms of issues of shares

From **statutory** contract

- **s 140** - co's **constit & RR** has effect b/w ...
- Can only be enforced in their **capacity as a member**
  - E.g. **RR 254D(1)** : pre-emption rights of members of Pty Ltd co's

**Personal rights under STATUTE**

**SOME EXAMPLES** from CA:

- **s 249 F**- Right to call GM if holding  $\geq 5\%$  s/holding
- **s 249 N**- Right to add resolution to agenda
- **s 249 X**- Appoint proxy
- **s 251 B**- Member's right to inspect minutes
- **s 173**- Member's right to inspect minutes

**Personal rights under GENERAL LAW**

- Right to **info to be discussed** @ GMs - *Kaye v Croydon*
- Right to **vote** (unless constit prohibits) - *Pender v Lushington*
- Right to be **protected** from **improper dilution** of s/holding - *Residues Treatmet & Trading co v Southern resources*
- Personal duty - *Bunninghausen*

## ❖ Statutory derivative action - s 236

**Derivative action:** action to enforce a right of the co

- Harm done to co
- Co should enforce breach BUT DOES NOT
- Members can bring about action
  - BUT remedy goes to the co

### NOTE:

#1 ≠ members' statutory remedies OR member's personal action

#2 Permission of court must be granted to bring statutory derivative action

### Step 1: Who can apply? s 236(1)

- (i) current, former, or entitled to be registered as a **member** of co or a related co, or  
(ii) current or former **officer** of co  
AND
- Leave granted under s 237 (the criteria)

### Step 2: Criteria for granting leave s 237

Court **grants** if **ALL** criteria met:

- Probable that co will NOT take legal action (if not for applicant)
- Applicant acting in good faith
- In best interest of co
- Serious question to be tried
- Notice of proceedings to co

#### b) Good faith

→ **Swansson v RA Pratt Properties** – seeking derivative action, action NOT in good faith

- If seeking to bring derivative action for **collateral purpose**
  - abuse of process

→ **Goozee v Graphic World group holdings**

#### d) Serious question to tried

"Standing" of applicant NOT "merits" of case

**Standing:** right to bring the action

→ **Charlton v Baber**

## ❖ Other sections

**s 241:** appointment of independent **investigator**

court can appoint someone to report on:

- Financial affairs of co
- Facts/ circumstances
- Costs incurred

**s 240:** permission to **discontinue** or **settle proceedings**

Derivate action proceedings cannot be discounted/ settle W/O permission of court

**Ratification** under **s 239** does NOT prevent member's ability to bring about derivative action

**s 242:** power of **courts to decide costs**

Court decides appropriate costs to applicants, co, other parties