

## Topic 9: Members' Remedies:

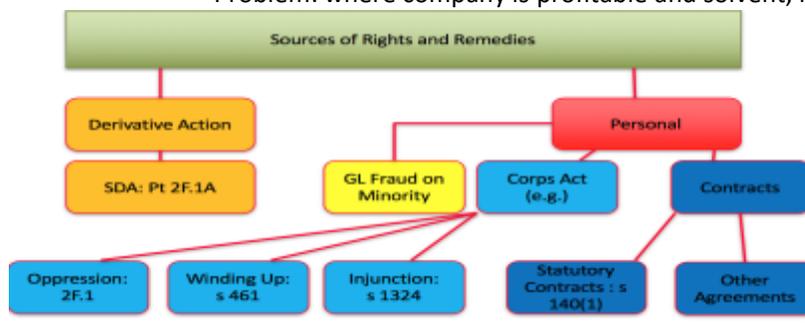
### PERSONAL SHAREHOLDER REMEDIES SUMMARY:

#### A. Statutory Derivative Action (Suing on company's behalf, remedies goes to the Company):

1. Statutory derivative action (Under **Part 2F.1A**)
2. Injunctions (2 forms according to the cause of action)
  - a. Statutory injunction: **s.1324**
    - Cause of Action: Breach of statutory directors' duties: (**s. 181, s.182, s.183, s.184**)
  - b. Ordinary injunction:
    - Cause of Action: Breach of Fiduciary Duty (No conflict/ Profits rule)
    - Issue: it is unclear if Shareholders have standing:
      - 'Mesenberg': Shareholders do not have standing and only ASIC does.
      - 'Airpeak': Shareholders and creditors both have standing.

#### B. Personal Action (breach of legal duties owed personally to shareholders, remedy goes to the SH):

3. Personal Actions in Equity:
  - a. Special fact fiduciary relationship: '*Coleman v Myers, Glavanics*'
  - b. Allotment of shares for an improper purpose (Duty to exercise for a proper purpose): '*Residues Treatment*'
  - c. Exercise of power to alternate the constitution in a way which is harmful to SHs: '*Gamotto*'
4. Personal actions in Contract:
  - a. Enforcement of private contract (e.g. sale of goods, employment contract and SH agreements)
  - b. Breach of statutory contract: (e.g. **s.140**- remedying breach of the constitution)
    - Problems:
      - Only available to enforce rights enjoyed in capacity as members
      - Not all provisions of the statutory contract give rise to personal rights there is no clear guidance from court. '*Pender, Gardiner*'
5. Personal action under Statute:
  - a. Enforcements of statutory contract (above)
  - b. Statutory injunction: **s.1324** (above)
  - c. Right to challenge variations of class rights: **s.246D**
  - d. Remedies against oppressive conducts: **Part 2F.1**
    - Advantages:
      - Flexibility of court orders- include:
        - Buy out orders where SH wishes to leave, or wants oppressor to leave company.
        - Court order changes to governance structure of the company.
          - ❖ E.g. changes to constitution, board composition, decision-making procedures.
6. Winding up remedy: **s.461**
  - Problem: where company is profitable and solvent, neither of the parties will usually seek destruction as a remedy, and the court will not order it.



## STATUTORY DERIVATIVE ACTIONS: ss.236-242- MOSTLY FOR DIRECTORS' DUTY

- Breach of fiduciary duty is not personal loss as such, it is a loss to the company. *'Prudential Assurance'*
- A SH does not suffer personal loss, his only loss is a dominion in the value of the net assets that he may have in a shareholder. At GL only the company could sue.
- The rule in *'Foss v Harbottle'* says that company is separate entity to members and that the company is the proper plaintiff. As equitable and CL derivative actions have been abolished by *Part 2.1 CA*, SH need to find relief under the CA. This is not a **personal legal action for the shareholder**.
- SDA: allows members and other eligible applicants to bring action on behalf of the company where the company is unwilling or unable to do so itself.



### 1. IS THERE RATIFICATION? Ratification does not prevent SDA:

- **s.239(1):** if members of a company ratify or approve conduct, the ratification or approval:
  - Does not prevent a person from bring proceedings with leave under **s.237**; and
  - Doesn't mean that proceedings brought (with leave) under **s.237** must be determined in favor of Director, or that conduct must refuse application for leave.
- Instead, under **s.239(2)**, court take ratification into account when deciding what order/ judgement to make. Court consider the following:
  - a) How well-informed about the conduct the members were when deciding to ratify; and
  - b) Whether the members who ratified or approved conduct were acting for proper purposes.

### 2. Applying for leave/ standing:

- **[P-individual shareholder/ officer]** will seek permission of the court to take action in the company's name for **[Choose and list]:**
  - cause of action against **[Director]**
  - cause of action against TP for breach of contract or torts.
- **If company is insolvent:** an application for permission to run a SDA will be denied. *'Chahwan' c.f 'Charlton'*
- **[p]** may bring proceedings per **s.236(1)**, on behalf of the **[company]**, as **[p]** is **[Choose]:**
  - a member, former member or person entitled to be registered as a member of the company (or of a related body corporate); or
  - an officer or former officer of the company.

### 3. Grounds for leave:

- **[P]** must get leave before actions can begin. The court must grant leave if satisfied that of **s.237(2)**.

- a) **Probably that company will not bring proceedings:**

- It is probable that **[Company]** itself will not bring proceedings or properly take responsibility for them. Onus on **[p]** to prove that company will not act.
- On facts, it seems **[likely/unlikely]** that **[company]** would bring action as **[look to facts]:**
  - E.g. *'Charleton v Babar'*:
    - Court prepared to infer that it was unlikely that company would take action from contents of administrator's report.
    - Applicant here may also argue that alleged wrongdoer has a dominant influence on the board: Evidence of High position or majority shareholder.
    - Interrelates with the final notice requirement in s.237(2)(e), would provide relevant evidence.

**b) Applicant is acting in good faith:**

- **[P]** must show that they are acting in GF (members cannot pursue a private interest). Here, **[P]** will point to **[discuss]**.
  - Palmer J in *'Swansson'* held GF involves 2 interrelated factors:
    - 1) Plaintiff **honestly believe** that a good cause of action exists and has a **reasonable prospect of success** AND;
    - 2) Whether Plaintiff is seeking to bring SDA for a **collateral purpose as amount to an abuse of process**.
      - E.g. in *'Swansson'*: collateral purpose was to get back at her ex and increase her divorce settlement.
      - **Conduct falls short of abuse of process, but seeks to further personal interests** is a lack of GF (c.f. interests of company as a whole): *'Chahwan'*.
      - **No financial benefit to P personally**: *Charlton v Baber*: Barret J held that the fact that P was unlikely to benefit financially from successful action was irrelevant to his bona fides (c.f. former director may have felt responsibility to creditors who suffered loss.)
      - **Is P, a director, trying to place pressure on other directors**: *'Chapman v E-Sports club'*: collateral purpose was to pressure on the other directors to extricate him financially from his investment in the company.
      - **If creditor**: if creditor has standing under **s.237** in another capacity (other than as a member), and brings action solely to place [company] in financial position to repay debt (rather than to recover property for company), creditor not acting in GF.

**c) It is in the best interest of the company that the applicant be granted leave:**

- **[Plaintiff]** must show that leave to sue is in **[company's]** best interests (consider the presumption under **s.237(3)**). Here, **[discuss- check whether presumption applies below first]**.
- 1. **Action for: Company against TP; or TP against Company (e.g. suing service providers)**
  - **Rebuttable Presumptions for: s.237(3)** granting leave is **not in the best interest of the company** if:
    - a) The proceedings are by the company against a TP or by a TP against the company; **and**
      - **s.237(4)** defines a person as a TP if:
        - they are relatives of serving directors; or
        - the company is a public company and the person is not a related party of the company (defined in **s.228** TOPIC 8 RPT Ch 2E!); or
          - ❖ if **[D]** has not been a director for the last 6 months: **s.228(5)**, director is a **TP**.
        - The company is not a public company and the person would not be a related party if the company were a public company.
    - b) Company has decided not to bring, defend, or discontinue, settle or compromise the proceedings; **and**
    - c) All of the directors who participated in that decision:
      - i. Acted in **GF for a PP**
      - ii. Did **not have MPI** in the decision

- iii. **Informed themselves about the subject matter** of the decisions to the extent they reasonably believed to be appropriate; and
- iv. **Rationally believed that the decision was in the best interest** of the company.
  - Decision: Director belief that the decision is in best interests of company rational if belief is one that a reasonable person in director's position would hold.

**2. NORMAL:** Company might have good business reasons for not pursuing a cause of action (e.g. loss from breach is nominal and less than costs of taking proceedings to court).

- **s.237(2)(c)** requirement is of high standard '*Swansson*'; '*Ragless*'. Court must satisfy that proposed SDA is on Balance of probability, in the best interest of the company (aka: enhancing returns to creditors).
- **TEST:** Is it in the best interest of the company in terms of its separate and independent welfare to allow the SDA? The following factor is considered: '*Ragless*'
  - **Character of the company (type and size)** for the purposes of determining effect of proposed litigation on purpose for which company established.
    - ❖ E.g. SDA may harm relationships in small family company.
    - ❖ E.g. '*Fiduciary v Morningstar*': SDA regarded as suitable means of resolving allegation by one SH that another had caused company loss.
  - Alternative method to address this matter?
    - ❖ E.g. '*Sasson*': applicant had potential remedy under the *Family Law Act*.
    - ❖ E.g. '*Hassall*': SDA proceeding would duplicate the complaints pursued in the oppression action and not demonstrated that relief available in oppression proceedings will not be adequate. Is there an alternative method to address this matter?
  - Nature of business so effects of proposed litigation on the business may be considered:
    - ❖ Would litigation affect the operation of the business?

**3. When in liquidations:** **Part 2F.1A** intended to apply on to company as a going concern and not one under control of a liquidator. '*Chahwan*'

- When company is in liquidation, court cannot grant leave to bring SA as company is under liquidator's control.
- '*Chahwan*': applicant seeking to bring SDA to establish that certain property held by Euphoric Pty on CT for company so that he could, in turn, establish that the company held the property on CT for him. Held: Applicant's personal interest would preclude company (and its unsecured creditors) from benefiting from the proposed action and the action is not in the best interest of company.
- 2 reasons why SDA do not intent to apply to company in liquidation: Tobias JA in '*Chahwan*'
  - 1) SDA intended to replace General Law exceptions to the rule in '*Foss v Harbottle*'
  - 2) **S.237(3)** operates as a protection against excessive litigation, which only individuals with their own vested interests might want to bring on behalf of the company.