

2019 SM1 CLAW Comprehensive Notes (85+ Marks)

Topic List (Cover Page)

Comprehensive Notes for Open Exam

- Consequences of Breach of Duty P1 –2
- Members' Remedies P3 – 9
- Members' Voting Rights P10 – 11
- Reporting and Disclosure P12
- Variation of Class Rights P13 – 14
- Restriction on Member Voting Power P15
- Transacting by Company P16-20

Lecture 1: Introduction to CLAW

P21 – 22

Week 2: Setting up Companies and Disclosure Requirement

P23 – 26

Week 3: Decision Making in Companies

P27 – 32

Week 4: Member Meetings, Irregularities, Members' Statutory Rights and Remedies

P33 – 37

Week 5: Enforcement and Introduction to Duties

P38 – 42

Week 6: Duty of Care, Insolvent Trading

P43 – 46

Lecture 7: Good Faith and Proper Purpose and Corporate Groups

P47 – 49

Week 8: Duty of Avoid Conflicts of Interest, Accessory Liability and Related Party Transaction

P50 – 53

Week 9: Dividends and Capital Maintenance

P54 – 57

Week 10: Variation of Class Rights and Gambotto

P58 – 59

Week 11: Transacting by Companies

P60 – 63

Consequences of Breach of Duty

Civil Penalty Provision s1317E

Enforceable by company and ASIC; Company can only seek compensation order even without ASIC

S1317G Pecuniary penalty order, if contravention materially prejudices interests of the company or its members/company's ability to pay its creditors/is serious, Pecuniary penalty up to \$200,000

S206C Disqualification order, disqualification justified regard to person's conduct in management, business or property of any company, or other matters court considers appropriate

S1317H Compensation order, have the person to compensate company for damages or loss suffered by the company, includes any profits made by the person resulting from the contravention

Note:

S180-183; s191; s588G are civil obligations

Criminal Penalty

Enforceable by ASIC only

S184 criminal offences for s181, s182 and s183

- (1) good faith and proper purpose
- (2) use of position
- (3) use of information

Some maximum penalties are in Schedule 3; actual penalty decided by court; penalty unit is \$210 each

- s184: 2,000 penalty units or 5 years jail or both
- s254Y: notice to ASIC of share cancellation within 1 month after shares are cancelled, 5 penalty units

Small technicality offence: i.e. s254Y share cancellation notice to ASIC

- strict liability offence
- action but no need to prove of intention

Others are called 'prescribed' offences

- Small breaches where no penalty specified in Sch. 3
- s1311 general penalty provisions \$1050 fine; penalty notice imposed by ASIC not court

Company's Remedy

Company's civil remedies for breach of General Law Duties

Injunction, company can seek injunction requiring director to stop doing something or undertake a particular action

Equitable remedy of compensation, when director caused loss to company because of breach of duty

Common law remedy of damages, when director breached general law duty of care

Account of profits, director made a profit because of breach of fiduciary duty have to pay profit to company (even though company has not suffered any loss or damages).

Directors took opportunity that company could not itself have used because company did not have funds to invest, did not suffer loss or damage, but directors made a profit on sale of their shares: ***Regal Hastings Ltd v Gulliver***

Rescission of contract, termination of contract, parties to contract returned to the position they held before contract was entered into. If not possible to terminate the contract, should seek account of profits.

Constructive trust, director breach duty as a result has some property of the company, company can seek court order that director holds the property on trust for the company. Where possible, the director must return the property to the company.

Note: Company must not unduly delay in bringing legal action against director. If company later agrees to the transaction and company has full knowledge of all relevant facts, will not be able to later sue the director.

Company's civil remedies for breach of Statutory Duties

S1317H Compensation order, have the person to compensate company for damages or loss suffered by the company, includes any profits made by the person resulting from the contravention

S1317J company can obtain any profit made by director or officer where that profit resulted from the contravention of civil penalty provision

Note: ASIC can obtain civil remedy on behalf of the company if the company has financial difficulty.

Who owes the statutory duties?

Statutory duties apply to "directors" as defined in the Corporations Act

- this includes "de facto" and "shadow" directors

s180 and s181 directors and officers only.

s182 and s183 directors, officers and employees.

s191 directors only.

s588G directors only.

Court grant relief (Not for criminal breaches of the Act)

Relief from liability of directors for breach of Statutory duty

S1317S Relief from liability for contravention of civil penalty provision (b) act honestly and ought fairly to be excused for the contravention having considered all the circumstances

S1318 Power to grant relief civil liability (1) 'negligence, default, breach of trust or breach of duty'

Requirements:

- The officer has acted honestly, and
- Considering all circumstances, it is "fair" for the officer to be excused, wholly or partly, from liability
- For example, ASIC v Healey, Healey's arguments

Relief from liability for breach of general law duty

S1318 any civil proceedings = negligence, default, breach of trust or breach of duty – person has acted honestly, considering all circumstances of the case, including those of the person's appointment, person should fairly be excused (applies to directors, officers, auditor, receiver, liquidator, receiver and manager)

Note: court is unlikely to relieve officer who receives a FB from breach of duty/continues to hold company property received as a result of breach of duty.

Company grant relief (only some breaches of general law duties, not statutory duties)

Ordinary resolution of members in general meeting can ratify some breaches of general law duties

- members must be given full information
- result is director or officer cannot be sued by the company
- for example, conflict of interest

Not available for statutory duties (where ASIC has action):

Miller v Miller – shareholders own voting cannot affect outside things

Company can't ratify where

- It is oppressive
- Company is virtually insolvent (*Kinsella*)
- It breaches the equitable limitation (lecture 9)
- Takes away a member's personal right
- Where company property is being taken by directors or majority members
- Where directors are acting for an improper purpose

Note: Who the duties are owed to, is the one who can enforce the duty.

Transacting by companies

Company contracts directly (there will be a board meeting to sign and approve, then a director will be sent out to contract in person of the BOD): by using common seal/signed/any procedure set out in constitution

Without seal requirements – transaction authorized and proper form: s127(1), s129(5)

With seal requirements – transaction authorized and proper form: s127(2), s129(6)

S123(1) A company may have a common seal, if company has a common seal, company must set out in it (a) for a company that has its ACN in its name – the company's name, or (b) the company's name and either (i) the expression ACN and the company's ACN, or (ii) the expression ABN and the company's ABN.

Usually, the board will pass 2 resolutions: resolution that company will enter a particular transaction (substantive authority), resolution authorizing the execution of relevant documents by i.e. the company seal being affixed by officers authorized to do that (formal authority): *Northside Developments Pty Ltd v Registrar-General*

S127(1) company without common seal can execute document if document is signed by: (a) 2 directors of the company or (b) a director and a company secretary or (c) for proprietary company that has a sole director who is also the sole company secretary – that director.

Assumptions in s129(5)

S127(2) company with common seal can execute a document if the seal is fixed to the document and this is witnessed by: (a) 2 directors of the company or (b) a director and a company secretary or (c) for proprietary company that has a sole director who is also the sole company secretary – that director

Assumptions in s129(6)

Company contracts through agent: Agent might have...

Actual authority: Express actual authority/Implied actual authority

EAA

- Can arise from a provision in the Corporations Act or the company's constitution

RRs198A(1) The business of a company is to be managed by or under the direction of directors

RRs198A(2) The directors may exercise all the powers of the company except any powers that this act or the company's constitution requires the company to exercise in GM

- Can also arise when someone who has actual authority delegates some of their own actual authority

S198D Directors may delegate any of their powers to any person, unless constitution restricts delegation

S190(1) if the directors delegate a power under s198D, a director is responsible for the exercise of the power by the delegate as if the power had been exercised by the directors themselves. (any director could be responsible)

S190(2) a director is not responsible if (a) the director believed on reasonable grounds at all times that the delegate would exercise the power in conformity with the duties based on directors of the company by this Act and the company's constitution (if any); and (b) the director believed (i) on reasonable grounds; and (ii) in good faith; and (iii) after making proper inquiry if the circumstances indicated the need for inquiry; that the delegate was reliable and competent in relation to the power delegated.

IAA

Can arise by implication i.e. appointing someone to a certain position, power comes with your role

Different company officers have different levels of implied authority i.e. lower level → more specific, vice versa

NOTE: Express Actual + Implied Actual – **Express Restrictions** = Actual Authority

- IAA by acquiescence – 'ratifying' past exceeding of authority, i.e. pay the bill over EAA.

IAA through acquiescence: suppose a company has never appointed a CEO, but the A has been purporting to enter several transactions on behalf of the company, even though he has no EAA to do so, and no IAA simply from being a director. The BOD know what A has been doing, and did not stop him – acquiesced in what A has been doing – BOD is treated as having ratified A's unauthorized actions, in the future, A has IAA to bind the company in similar transactions, this IAA flows from lack of conduct of BOD when it acquiesced in A's earlier actions: *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd, Hely-Hutchinson v Brayhead Ltd*
IAA involved can be the same as a CEO where a person acting with board's acquiescence has been doing things a CEO of that type of company usually do

Implied Actual Authority: comes from things the principal says and does – appointing someone to a certain position/acting to give the person authority, including through acquiescence

Officers' IAA (not about co with only one director who has got full s198A power)

IAA of CEO: where there is no express list of delegated powers, being appointed to this position involves a grant of IAA to “do all such things as fall within the usual scope of that office”: *Hely-Hutchinson v Brayhead Ltd*

Usual scope depends on what is customary or usual for a CEO in a similar company (size of company) carrying on a similar business – dealing with everyday matters, supervising the daily running of the company, supervising senior managers, being in charge of company's business. Usual functions do not include entering a transaction that cannot be characterized as an ordinary trading transaction.

IAA of other executive officers: reflecting their scope of authority that is usually delegated to someone doing their type of job in their type of company, i.e. senior HR executive in large company has IAA to hire and fire employees below certain level of senior management

IAA of 1 director acting alone: BOD can pass resolutions that are binding on company, 1 individual director don't have power to bind the company (but if individual director is CEO or CFO, when wearing that executive hat, they have considerable power to bind the company) – director acting alone has no IAA to bind the company into contracts with outsiders: *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd*, in a company that has only 1 director, that director would normally have IAA of a CEO.

For a single director in a multi-director company to have authority to bind the company contractually:

The authority must have been expressly granted to them, i.e. where the board has expressly authorized 1 named director to negotiate a particular contract on behalf of the company, or Authority must have flowed from conduct of the board as a whole – position of director, company secretary have IAA to perform function of fixing, witnessing the fixing of common seal to documents company requires to execute: *Northside Developments Pty Ltd v Registrar-General*

IAA of chairperson of the BOD: chairperson does not have power to bind the company – where company has >1 director, the chairperson has no IAA to commit the company to contract with outsiders, same as director acting alone discussed above.

IAA of company secretary: has IAA to sign contracts relating to administrative matters: *Paranoma Developments Ltd v Fidelis Furnishing Fabrics Ltd* – would not include doing anything normally within senior management's responsibility: *Grimaldi v Chameleon Mining NL*

Apparent authority: Common law/s129(3) – (1) holding out (2) by company (3) reliance by outsiders

Apparent authority: Principal has not in any way agreed that the agent can act on behalf of the principal A (principal) acts in a way that gives a RP, B (outsider) the impression that A is appointing C (agent) with a certain range of authority, and B deals with C within that range of authority, A is not allowed to deny that C was authorized to contract for him.

Outsiders enforce a defective contracts made by agents

Contract made through an agent may be defective because the purported agent either:

- has no express actual authority (junior staff pretends to be senior), or
- has express actual authority that is too narrow for this contract
- has no implied actual authority

How to: Outsider assisted by common law rules/provisions of CA (statutory assumptions) that enable them to enforce the contract despite the defect.

Common law rules:

Prove that outsider had enough IAA or Apparent authority to be able to bind the company.

Common law rules to assist outsider (1)

3 requirements for agent to have apparent authority:

1) a “holding out”, 2) by someone with actual authority, 3) on which the other person relied

Holding out: A representation (by words/conduct) must be made to the outsider that the agent has authority to enter on behalf of the company into a contract (agent must be held out) i.e. acquiescence by the board can amount to representation by the board: *Freeman & Lockyer*

By someone with actual authority: Representation must be made by the company/someone with actual authority to act for the company (i.e. CEO) Person making representation must have actual authority (EAA/IAA), if has only apparent authority is not enough: *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising and Addressing Co Pty Ltd*

The representation made by someone with actual authority that is a purported agent (who lacks actual authority) cannot make a legally recognized presentation as to his own authority

Reliance: the outsider must be induced by the representation to enter into the contract Company deny that it is bound by a contract by showing that: it did not expressly authorize the contract, the procedures for fixing the common seal were not followed

Example: Principal had made a representation about the authority of the manager, through equipping her with certain title, status and facilities, and also failing to establish proper safeguards to protect itself and outsiders whom it dealt with from an unauthorized conduct: *Pacific Carriers Limited v BNP Paribas*

Safeguards: holding X out as a person authorized to do certain acts, but not ensuring that outsiders would not assume that X had authority to do other acts that were beyond X power i.e., in addition to giving “title, status and facilities”, bank failed to add safeguards = requiring X to explain to outsider that X don’t have authority to do certain things/give outsider document explaining limits of X authority – no safeguards – outsider entitled to assume that X had authority.

Common law rules to assist outsider (2)

Indoor management rule: show that company has given authority (IAA/apparent authority) – “persons dealing with a company in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular”

Outsider can assume:

1. There have been no procedural defects in appointment of directors, 2. Meeting of BOD has been properly called and held, and 3. Board/GM approval required under company’s constitution/RR has been obtained: *Royal British Bank v Turquand, Northside Developments Pty Ltd v Registrar-General*

Example: constitution clause requires approval of BOD for borrowings >500000, CEO borrow 1M>500000, contract defective because constitution was not complied with – large company, can assume that CEO’s IAA is sufficient to cover borrowings of 1M – indoor management rule assist the outside that CEO had enough IAA to bind the company (allows outsider to assume that BOD has approved the loan – has already complied with the constitution even though has not)

Exceptions where common law will not assist outsider:

Outsider was ‘put on inquiry’ (means made suspicious):

- *Northside Developments* (single director mortgaged Co.’s property, the money went to his private co.)

Test: has the outsider failed to make inquiries that would usually be made by a reasonable person in their position in these circumstances? (objective test)

- *Story v Advance Bank* (one director’s signature is forged, the other director made the deal, some benefits went to the co., the bank was held to not to be put on inquiry)

Actual knowledge: outsider actually knows that the purported agent lacks EAA/contract was defective in some other way – outsider unable to enforce the contract; if outsider deliberately keep his eyes shut to not discover an irregularity that they thought existed

Put on inquiry: outsider failed to make inquiries that would usually/customarily be made by someone in the outsider’s position; or a RP in outsider’s position would have been “put on inquiry” about a possible irregularity, and would have investigated, but outsider has not investigated at all/insufficiently

Example: Contracts purportedly entered directly rather through an agent: Put on inquiry exception applied, where loan being made to companies that were unrelated to principal, the principal was taking a large amount of risk for no apparent benefit – should have led the outsider to make inquiries to satisfy themselves that principal’s entry into the mortgage was properly authorized and that the “director and secretary” had authority to fix and witness the company’s common seal: *Northside Developments Pty Ltd v Registrar-General*

Statutory assumptions (s129 assumptions that can be made under s128 entitlement to make assumption) Slightly more limited than the indoor management rule

Statutory assumptions s128, s129: s128(1) A person is entitled to make assumptions in s129 in relation to dealings with a company. The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect – the company not allowed to argue that any of the statutory assumptions are incorrect.

Outsider would lose case under common law (put on inquiry exception) but would win case under statutory provisions because s128(4) is narrower than common law “put on inquiry” exception.

Assumptions that can be made by outsiders assumptions (CA → common law):

Helps with the enforcement of defective contracts. Overlap with **and add to** common law

Contract may be enforceable due to assumption **even where** the common law would say contract not enforceable

Each one is used to overcome an objection raised by company

Assumptions would NOT cover the example on the previous slide – use common law for that one

Slightly more limited than the indoor management rule

S129(1) A person may assume that the company’s constitution (if any), and any provisions of this Act that apply to the company as RRs, have been complied with.

Assumption about officers named with ASIC

S129(2) A person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company:

- (a) Has been duly appointed; and
- (b) Has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company.
i.e. named company secretary can execute documents

Assumption about officers of a ‘kind’ where company holding out

S129(3) A person may assume that anyone who is held out by the company to be an officer or agent of the company: (statutory does not define holding out, use *Freeman & Lockyer* to define)

- (a) Has been duly appointed; and
- (b) Has authority to exercise the powers and perform the duties customarily exercised or performed by the kind of officer or agent of a similar company

Note: look at the person’s label, PTY vs public, position. Then ask, is this contract within those customary powers? E.g. Marketing manager of small company can make small advertising contracts – does it ‘look right’?

Assumption that officers properly perform their duties

S129(4) A person may assume that the officers and agents of the company properly perform their duties to the company. (the outsider is entitled to assume)

Assumption of due execution without seal

S129(5) A person may assume that a document has been duly executed by the company if the document appears to have been signed in accordance with s127(1). For the purposes of making the assumption, a person may also assume that anyone who signs the document and states next to their signature that they are the sole director and sole company secretary of the company occupies both offices.

Note:

‘document appears to have been signed’ – two signatures, director and director; director and secretary

Two signatures in accordance with s127(1) execution of documents (including deeds) by the company itself.

Forgeries and frauds? Don’t matter s128(3)

Assumption of due execution with seal

S129(6) A person may assume that a document has been duly executed by the company if:

- (a) The company’s common seal appears to have been fixed to the document in accordance with s127(2); and
- (b) The fixing of the common seal appears to have been witnessed in accordance with that subsection.

Note:

‘document appears to have been signed’

Two signatures in accordance with s127(2)

Forgeries and frauds? Don’t matter s128(3)

Limitations on statutory assumptions:

S128(4) A person is not entitled to make an assumption in s129 if at the time of the dealings they knew or suspected that the assumption was incorrect.

- Narrower than “put on inquiry” exception
- Must ACTUALLY know or suspect
- So more favorable to outsider

s128(4) common law’s “actual knowledge” and “put on inquiry” exception – failure by outsider to make customary inquiries or to investigate when RP would be “put on inquiry” – unable to enforce contract, common law exception apply even when outsider had no suspicions, but was negligent

A person is not allowed to make an assumption if, at the time of dealings with the company, the person knew or suspected the assumption was incorrect – outsider must actually have known and suspected (find out through factual evidence) – if they were negligent in failing to realize that investigation was necessary = they did not suspect anything find out through factual evidence

Read assumptions carefully – only apply in their specified circumstances

Make sure you read the exam question – is it only asking you about enforcement under the Corporations Act?

Steps process to answer question

1) Does the agent act with actual authority?

EAA/IAA – if yes, then the contract is enforceable, if no, go to step 2

2) What is the company’s objection to paying the contract?

The reason for the company denies the contract because i.e. the director who made the contract had not properly appointed/this contract should have approval by shareholders first but it didn’t/the agent only had authority up to 50000, but they made a contract for 55000/signature on the contract was forged etc.

It must be based on the fact that the contract was made without actual authority – because already dealt in step 1 – don’t get back into actual authority in step 2.

3) On the outsider’s standpoint, what assumptions to use s129(1) – s129(6)

Each of these rules/assumptions must directly address objections raised by the company in step 2.

Match outsider’s power to directly overcome each of the objections raised by the company in step 2.

Only need to bring out legal rules in step 3 that deal with the objections raised in step 2.

4) Does the outsider lose their rights to rely on any of their assumptions at step 3? S128(4)

(suspect? – if they have dealt with the company before, then maybe can suspect – recognize forged signature?)

5) Conclusion must match with everything stated above. If the company has raised an objection and the outsider has squashed it, the outsider hasn’t lost their right to rely on that squashing – the contract is ENFORCEABLE.

Lecture 4 Member Meetings, Irregularities, Members' Statutory rights and remedies

Types of members' meetings

S250N All public companies must hold an AGM

- Other meetings are called extraordinary general meetings i.e. EGMs
- Rules governing meetings are set out in CA and the internal management rules [RRs and or constitution].
- Usually, meetings are called by the board, can also be called by:

RR s249C by a single director (for pty ltd and public co.)

S249CA listed company by a single director

S249G court may order the meeting to be called on application by any director or member who would be entitled to vote at the meeting, if it is otherwise impracticable

Can members call a members meeting?

S249D members with at least 5% of the votes requisition

- State any resolution to be proposed at the meeting – s249D(2)(b)
- The directors must call the meeting within 21 days after the request is given to the company. The meeting is to be held not later than 2 month after the request is given to the company – s249D(5)

What's a proper purpose?

Members have right to vote. Members power in the Act or in the RR's or constitution.

Directors need not convene if the purpose is improper: NRMA v Parker

S249Q meetings only for proper purposes: NRMA v Scandrett – motive irrelevant

S249E members with more than 50% of the votes of all of the members who make a request under s249D may call and arrange to hold a general meeting if the directors do not do so within 21 days after the request is given to the company.

S249F members with at least 5% of the votes that may be cast at a GM of the company may call, and arrange to hold, a GM. The members calling the meeting must pay the expenses of calling and holding the meeting.

Note: Constitution can't take away these statutory rights to call a shareholders meeting

- S251B (member's right) and s173 access to inspect minutes for free
- RR s247D members right to inspect 'books'
- S247A members can apply for a court order to inspect 'book' or registered scheme

Members' meeting agenda

- Only matters that have been included in the notice of meeting can be considered at the meeting

S250R the business of an AGM may include any of the following, even if not referred to in the notice of meeting (a) the consideration of the AFR, directors' report and auditor's report; (b) the election of directors; (c) the appointment of the auditor; (d) the fixing of the auditor's remuneration.

- The directors determine the agenda when calling a meeting

S249N members can request the inclusion of resolutions to be put to the members at next meeting.

S249N(1)(a) at least 5% of the votes or (b) at least 100 members who are entitled to vote at a GM.

S249O, s249P company must send out notice of member resolutions, statements

Giving notice of the members meeting

General rule – 21 days s249H(1)

S249H(2) consent to short notice is possible – AGM's where all agree; EGM where 95% agree

S249H(3) – no short notice where resolution to remove public company director

S249HA – listed companies 28 days (a must)

S249J written notice of a meeting must be given to individually to each members and directors

S249K written notice of a meeting must be given to auditors

Notice

S249L what the notice of meeting must contain (a) place, date and time; (b) general nature of the meeting's business; (c) if a special resolution is to be proposed at the meeting – set out an intention to propose the special resolution and state the resolution (i.e., change constitution, issue preference shares)

Sufficient information so that shareholder can decide whether to attend or send proxy (or ignore it...)

Residues Treatment & Trading v Southern resources

Must “fully and fairly inform and instruct the shareholder about the matter on which he or she will have to vote”

Devereaux Holdings

Need to balance the information presented, to make it accessible; must not be misleading or deceptive (even if this is unintentional) (i.e. three ways to lie)

Conduct of members meetings

RR s249T Quorum (default 2 people)

S249S use of technology

S249X proxies and corporate representatives (RR for Pty Ltd only)

RR s249U directors elect the chair of the members' meeting who has the casting vote at the members meeting

Decision making without a meeting

- In single member companies, resolution is passed by the member recording and signing it ('minutes'): s 249B – notice still goes to ASIC
- Proprietary companies may use “flying minutes”, in which all members entitled to vote must sign a document agreeing to the resolution: s 249A

Voting

RR s250E members' entitlement to vote (default one vote per share)

- Preference shareholders right to vote depends on their defined class rights
- Note some limits on member's right to vote in their own interests (i.e. related party transaction)

S249Y voting by proxies

RR s250J show of hands unless a poll is demanded (poll – voting according to the respective shareholding)

s250K a poll may be demanded on any resolution unless the constitution provided otherwise (i.e. election of the chair of a meeting)

RR s250E(3) casting vote of chair

Irregularities (for both members and directors)

S1322 outcome of meeting may be valid despite some irregularity

- failure to follow required procedure, not substantive
- Applies to “proceeding under the Act” – includes directors' and members' meetings, notices in the mail, emails, not meeting the quantum etc.

Two different mechanisms

- **Automatic validation** (valid unless a court says no) or

S1322(2) is the section where complainers on the receiving end of a procedural irregularity can apply to the court to have the proceeding invalidated.

For instance, if the members have 26% of the votes, they didn't get a notice of meeting and if they had, they would have attended, voted against it etc and THINGS WOULD HAVE BEEN DIFFERENT! Thus, they have suffered a substantial injustice. AND the court can't fix the problem by any other means, so the court orders the proceeding to be invalid and the company has to do whatever it is again.

- Would things have been different? (look at the fact, not just the share percentage)
- Onus on the person to prove its invalidity

- **Curing declaration** (invalid until a court says yes)

S1322 (4) - (6) – court can declare that an act, matter, or thing, or a proceeding, is not invalid so long as:

- procedural in nature; the person acted honestly; just and equitable to make the order; no substantial injustice

- Onus on the person asserting validity
- Substantial injustice:
 - *Poliwka v Heven Holdings*
 - *MTQ Holdings*

Irregularity does not amount to substantial injustice if the outcome does not change.

S1322(2) includes absence of quorum, defect of notice or time

- Not invalid unless court is of the opinion that a substantial injustice has resulted or may result, and declares it invalid

How does s1322(4) work?

- Something is already broken

Failure in *Weinstock v Beck* of the Pty Co director to be re-appointed 30 years ago in accordance with the constitutional requirement. The director was not re-appointed, but he appointed another person as an additional director, and the director applies to the court to have its role as a director, declared not invalid. Thus, he can get to the major dispute with the substance.

It is likely to be part of some other dispute and this section allows the court to tidy up the failure to do some procedure properly and then the court can get to the substance of the dispute.

- In other words, the main dispute before the court won't turn on 'a technicality'.

Members' rights and remedies

- Why do members need rights and remedies?
 - o To protect against harm from majority shareholders
 - o Member can't always exit co
- General law rights – previous lecture
- Statutory remedies – this lecture and later lectures

Members' statutory remedies

S1322 Procedural irregularity (available to members and others affected by a procedure i.e. director)

S232 Oppression (have to be a member to use this)

S461 Court-ordered winding up (also available to others)

S246D Variation of class rights – lecture 9

S236 Member's derivative action – where wrong done to company and remedy goes to company but member gets the legal action started – lecture 5

S1324 Statutory injunction to prevent contravention of CA – limited use by members - lecture 5

Oppression remedy – Pt 2F.1

S232, in respect of:

- the conduct of the company's affairs (see appendix), or
- an actual or proposed act or proposed omission by or on behalf of the company, or
- a resolution, or a proposed resolution, of members or a class of members

Where the conduct complained of is either:

- contrary to the interests of the members as a whole, or
- oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members

Who can apply to the court?

A member, even if the oppression relates to

S234(a)(i) the member in a capacity other than a member (even if oppressed as a director, can apply for an order as a member; as opposed to breach of constitution *Eley*); (ii) another member in their capacity as a member

S234(b) A person removed from the register of members because of a selective capital reduction or oppressive behavior

What are the tests?

Wayde v NSW Rugby League:

The story...

NSW rugby league removes a team from rugby game in order to facilitate the play of the other teams

The key point (**the test for oppression**)

Was directors' decision one that no board of directors acting reasonably would have made? Not here

Note: Look at the unfairness to the member – not enough just to be 'prejudicial'

Thomas v HW Thomas

The story...

Family business, low dividend, conservative financial policy and many assets.

The issue...

One member asking for high dividend and sale of assets

The outcome...

Policy of low dividends not oppressive if all other members contented with the way co was run.

Note: Different if there was a change of policy deliberately to exclude someone i.e. remove directors.

Examples of oppressive conduct

- **No need to prove dishonestly/intention, importance is the effect.**
- **Whether the reasonable expectations of member have been breached?**
- **Not necessarily breach any statutory or general law**

Diversion of business opportunities (members supply to holding company)

- **Scottish Cooperative Wholesale v Meyer**

Improper exclusion from management (director was removed unfairly, no need to breach)

- Does member have a "reasonable expectation"?
- **Hogg v Dymock**

Oppressive conduct of board meetings (not allowing for questions and discussion)

- **John J Starr Real Estate**

Share issue for improper purpose (remove the other director deliberately by using the casting vote)

- **Kokotovich Constructions v Wallington**

Breaches of directors' duties

- **Re Spargos Mining NL**

Sale of company assets at undervalue

- **Cassegrain v Gerard Cassegrain**

What orders can the court make?

Any order "the court thinks appropriate". For example:

- winding up company
- regulating the company's affairs
- purchase of oppressed member's shares
- order for the company to start legal proceedings against someone (i.e. director)
 - Avoids members' derivative action procedure
- appointment of a receiver (i.e. secured creditor)
- restraining someone from doing something, or requiring someone to do something

Court-ordered winding up (don't have to be oppressed to use this) s461

- A member (and some others, i.e. a creditor, ASIC) can apply to court to have company wound up where:

S461(1)(k) just and equitable, or

S461(1)(e) directors acting in own interests, or unfair or unjust to members, or

S461(1)(f) oppressive, unfairly prejudicial or unfairly discriminatory conduct

- Member's right to apply

S 462(2)(c) 'a contributory' (members in the co limited by shares but not by guarantees, def. s515)

- BUT s 467(4) no winding up order under s461(1)(e) if

Some other remedy available, AND

Member acting unreasonably in asking for winding up

Winding up on just and equitable ground

- Deadlock
- Fraud or misconduct (cannot work out the worth of the co, need to liquidate and sale the assets)

Loch v John Blackwood (board not provide information to purchase minority shares at a lower cost)

- Failure of substratum

Re Tivoli Freeholds (public co in dance hall and theatre business, shareholders then involve in corporate rating)

- Breakdown in mutual trust

Ebrahimi v Westbourne Galleries (partnership agreement no longer there)

Appendix

S53 Affairs: Promotion, formation, control, membership, business, transactions and dealings, property, liabilities, profits, other income, receipts, losses, expenditure of the company/internal management and proceedings of company/ownership of shares or other securities issued by company/power of persons to control voting rights or rights to sell shares/matters about identification of persons who are or have been financially interested in the success or failure of the company/persons who are or have been able to control or materially influence company's policy.