

Overall Scaffold

Has the company entered into a transaction it wishes to get out of?

Corporate Contracting

1. Has the company entered into the contract via the requisite formalities? If not,
2. Has an agent of the company entered into the contract, with authority:
 - Express actual authority
 - Implied actual authority
 - Ostensible authority
3. Is the third party entitled to rely on any assumptions? Have they lost the right to rely?

Does someone want to bring proceedings against a director?

1. Breach of duty to act in good faith for the benefit of the company as a whole and for a proper purpose

- **Good Faith:** Subjectively in the best interests of the company
- **For benefit of company:** Usually this means the shareholders as a general body, however in insolvency it can mean creditors. In limited circumstances you can consider the corporate group.
- **For a proper purpose:** objective test. there are prima facie improper purposes such as defeating a takeover which may be subject to rebuttal.

Statute: s181

Consequences: Subject to civil and potential criminal liability. This may give shareholders personal standing if it diminished their shares.

2. Breach of duty to avoid a conflict between duty and interest

A. Direct Conflict

General Law:

- Director's interest and company transaction directly conflict
- The test is whether a reasonable person would see a real, sensible possibility of conflict
- However, rule may attenuated by:
 - Full disclosure + GM approval; OR by constitution- Woolworths v Kelly

At statute:

- 'material personal interest'
- For both PTY and public, they may also breach the requirement to disclose to the board.
- For public companies, they may also breach the prohibition on not voting or attending meetings
- For PTY companies they can attenuate the rule by disclosure to board
- Consider if they have breached related party transactions!

Consequences: Not criminal consequences

B. Secret Profits

General law:

(i) Act relates to the affairs of the company and done in the course of management and in utilisation of their **opportunities and special knowledge as directors**

- utilisation of their opportunities and special knowledge as directors,
- (ii) The act of the director resulting in a personal profit;
 - (iii) The company did not give its fully informed consent (Regal Hastings)

Statute:

s182 use of position

S183 use of information

Consequence

- Criminal liability potential
- Capable of being cured in GM unless amounting to fraud on the minority through misappropriation of property- giving shareholder standing

3. Duty of care, diligence and skill

Starting point is statute:

- S180: What a reasonable director in their position would do

Informed by common law:

- The responsibilities of all directors require that they take reasonable steps to place themselves in a position to guide and monitor the management of the company- Daniels v Anderson
- Minimum duties set out in Daniels
- Then this may be heightened by their particular office, the constitution, what they have held themselves out to have ie special skills etc

Defences:

- Delegation
- Reliance on advice
- Business judgment

Consequences: does not elevate to criminal

4. Duty not to trade while insolvent

Purely statute:

Elements to establish liability under s588G(1):

1. A person is a **director** of a company;
2. At the time when the company incurs a debt;
3. The company is insolvent at that time, or becomes insolvent by incurring that debt; and
4. At that time, there are **reasonable grounds** for suspecting that the company is insolvent, or would so become insolvent.

Defences: There are many defences

Can directors get around any of these duties?

Shareholder Ratification:

- Possible
- But it won't be effective if it amounts to fraud on the minority and probably can't waive breach of statutory duty (conflicting case law- *Forge v ASIC*) but do not forget full & complete disclosure requirement
- In the secret profits situation, it will be the GM 'waiving' the breach rather than ratifying the transaction

Board Ratification:

Usually ineffective unless authorised by the constitution or replaceable rules – but query Queensland Mines v Hudson.

- H/e, the case may have been based on special circumstances – the company was a joint venture where all shareholders were represented on the board.

- Though notice to board attenuates the direct conflicts duty, or ability to vote in public companies

Does a shareholder want to bring proceedings?

Usually cant due to Foss v Harbottle. Exceptions:

PERSONAL CAPACITY

Equitable Limitations on the Voting Power of Majorities: Fraud on the minority

1. Misappropriation of Corporate Property & Rights

- Where the majority exercises their votes for the purpose of appropriating to themselves property or advantages which belong to the company (in bad faith)

2. Release of Directors Duties

- A GM resolution cant waive directors duties which are mala fide (though this is subject to debate)
- If majority shareholders are the same as the people who breached duty this is not ok

3 Amending the Constitution

Amendments which are used by the majority fraudulently to oppress minority

4. Expropriation of shares

Rule in gambotto

Compulsory liquidiation: Either on the just and equitable ground, or the directors acting in own interests ground

Oppression

Class Rights: it needs to be a 'class right' and it needs to have been altered or varied

DERIVATIVE

S236. Still need substantive cause of action. Costly.
