

Corporations Law Full Exam Notes

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Topic 5 Who owes the duty and Consequences of breach

A. Who owes the duty

Director's duties may be owed by directors, officers and sometimes employees (e.g. ss182 and 183).

1. Directors: s9AC

CORPORATIONS ACT 2001 - SECT 9AC Meaning of director

- (1) A director of a company or other body is:
- (a) a person who:
 - (i) is **appointed** to the position of a director; or
 - (ii) is **appointed** to the position of an alternate director and is acting in that capacity; **regardless of the name** that is given to their position; and
 - (b) unless the contrary intention appears, a person who is not validly appointed as a director if:
 - (i) they **act in the position** of a director; or
 - (ii) **the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation).**

(a) validly appointed directors

- regardless of name of the position.

(b) de facto director: s9AC(1)(b)(i)

someone who is **acting as** a director though not validly appointed is also a director under s9AC(1)(b)(i).

(i) easier cases

Easier cases include:

- someone whose appointment was defective but still acts as a director.
- someone who is removed/resigns but still acts as a director.
- if their term expires but they continue to act as a director.

(ii) more difficult cases

- In more difficult cases, the question is whether the person has been **performing functions one would reasonably expect to have been performed by a director of that company given its circumstances'**: *Grimaldi*
- It is a question of degree having regard to all the circumstances. factors include:
 - **At the least, needs to perform 'top-level management functions'** (*Austin*)
 - size of the company (*Austin*): in a large and diversified company, great discretion to deal with important matters must be reposed in employees who may be less likely to be considered as directors than they might be in small companies;
 - specific expertise (*Austin*): an employee with particular expertise who is assigned specific responsibilities within that field of expertise is less likely to be treated as a director than one who is concerned with company affairs generally; and
 - whether others inside the company considers the person a director
 - whether the company itself has held the person out as a director (*Grimaldi*)
 - how the putative director was reasonably perceived by outsiders (*Austin; Grimaldi*): express holding out is not necessary if their dealings with third parties are consistent with them having acted as a director.

Grimaldi v Chameleon Mining NL (No 2)

Facts:

- Chameleon was a junior mining explorer whose affairs were managed in an "informal manner".
- Grimaldi was not appointed a director of Chameleon but became increasingly involved in its affairs as "consultant".
- The board gave Grimaldi "unconstrained authority" to negotiate the acquisition of mining interests.

Held: found as a de facto director.

- A limited and specific consultancy is unlikely on its own to be caught by the s 9 definition. Not so, a general and **unconstrained** on which permitted taking an active part in directing the affairs of the company.
- While they did not hold him out as a director, they clearly authorised him on occasion to perform functions such as would **lead a reasonable third party dealing with him** to believe he was acting as a director of Chameleon. His authorisations to negotiate the acquisitions of the mining interests instance this.
- More, generally, Mr Grimaldi was allowed either to perform functions, for example fund raising and share placements, in which **other directors acquiesced** with knowledge.

(c) shadow directors: s9AC(1)(b)(ii)

Even though companies cannot be formally appointed as, companies can be regarded as shadow directors under s 9AC:

Antico.

the test for a shadow director is set out in s9AC(1)(b)(ii) which includes four elements.

(i) *identify who are the directors of the company, both in law and in fact*

(ii) *'are accustomed to act'*

- it requires habitual compliance **over a period of time.**
 - the 1st thing done in accordance does not make that person a shadow director, and even the board subsequently became accustomed *later* that person is not liable for matters prior to that point.
- It is not necessary that all directors are so accustomed – enough that a **governing majority** of the board is so accustomed
- the board must act **in their capacity as directors**, not as executives.

(iii) *'in accordance with' the person's instructions or wishes*

- **Does not require the directions/instructions cover the whole field of corporate activities** – only requires that when directors are instructed/directed they are accustomed to act.
- Mere congruence is not enough. Needs to be a **causal connection** between the instruction/wish of the person and the director's action.
 - no causal connection if the board is going to take the course anyway: **Buzzle.**
 - no causal connection if the board is free to choose whether to accept the terms and only make their independent decisions to comply because doing so is in the best interests of the company, rather than treating those instructions/wishes per se as being a sufficient reason to act: **Buzzle; cf Antico.**

(iv) **excluding** *advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation.*

- When one looks to the evidence as a whole, **it cannot properly be said that the case is merely one of directors acting on the advice of an [advisor/consultant/creditor] in the proper performance of his duties.**

Buzzle	Not SD.	Despite Apple's ability to impose conditions being a large creditor, Apple is not a shadow director because Buzzle's directors were making their own decisions based on the best interests of the company rather than treating those instructions or wishes as themselves being a sufficient reason so to act.
AS	SD found.	Windsor was a shadow director because it cannot be said that in those matters in which

<i>Nominees</i>		Windsor intruded, the boards of either company exercised an independent role at all.
<i>Antico</i>	SD found.	Pioneer (a holding company of Giant) was a shadow director because decisions were made at board meeting of Pioneer, not of Giant. The directors of Giant simply passively accepts the decisions, without giving any separate independent consideration to those matters.

2. officers: s9AD

CORPORATIONS ACT 2001 - SECT 9AD Meaning of officer

- (1) An officer of a corporation (other than a CCIV) is:
- (a) a director or secretary of the corporation; or
 - (b) a person:
 - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - (ii) who has the capacity to affect significantly the corporation's financial standing; or
 - (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation);
 - (c)-(h) certain insolvency administrators (e.g. liquidators, receivers, administrators).

(a) directors and secretaries

(b) person making or participating in decisions affecting a substantial part of the company's business: s9AD(1)(b)(i)

- the court looks at the **actual role or responsibilities** the person has regardless of how **it came to be imposed on the person**: *Shafron*.
- the relevant decisions are NOT confined to those alleged to be in breach – the court looks at all the decisions that affects the whole or substantial part of the business.
- Participation directs attention to **the role/contribution** that a person has in the ultimate making of decision **even though he did not ultimately made the decision** (e.g. because he did not have a vote).
 - *Shafron*: [found to be an officer under para b(i)] Shafron was a **senior executive employee**; he was one of the three executives that **initiated** this; he played an active role in **shaping and developing it through various versions**; he **presented several proposals** to the board; and the board was **'passive' rather than 'proactive'**.

(c) persons having the capacity to significantly affect the corporation's financial standing: s9AD(1)(b)(ii)

- Not limited to those who hold a named office or recognised position: *King*.
- A number of relevant factors - The size of a corporation, the corporate structure and management structure, and the identity and nature of the persons involved: *King*.
- Need to be involved in management: **para (b)(ii) does not refer to a person who has the relevant capacity as a third party (advisor/consultant/creditor) but is not involved in the company's management**: *King*; *Buzzle*.
 - question as to whether that person also answers the description of being **"of"** the corporation in the sense of being engaged, **in fact, in the management of its affairs or property**: *King*.

<i>Buzzle</i>	Not an officer under either (i) or (ii)	Not under b(i) : because Apple was not participating in making decisions. It was simply telling Buzzle directors what they wanted.
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		Not under b(ii): because the capacity to affect the company's financial status has to be exercised as an internal management power. It does not refer to a third party who is not involved in the company's management.
Adler	An officer under both (i) and (ii)	<p>(b)(i): as a director of the holding co and member of its investment committee, he participated in directing how the funds of the group were to be invested, and investment decisions were decisions that affect the whole or substantial part of the business of the corporation (esp. considering that HHC group runs an insurance company, which is supported by returns from its investment portfolios).</p> <p>(b)(ii): his involvement in investment decisions gave him that capacity, and more broadly, his participation in the control and direction of the affairs of the group including HHC also brought him under this para.</p> <p>Unlike a mere contractual counterparty, the holding company/Adler, was actively involved in the subsidiary's internal management (<i>distinguishing Buzzle</i>).</p>

B. Breaches: Overview of director's duties

Topic	General Law Duty	Statutory Duty	Who Owes the Duty?
6	Duty to act in good faith in the best interests of the company (equity, unclear whether fiduciary)	s 181(1)(a)	Directors and Officers
	Duty to use powers for a proper purpose (equity, unclear whether fiduciary)	s 181(1)(b)	Directors and Officers
7	Duty of care, skill, and diligence (common law)	s 180(1)	Directors and Officers
8	N/A	Duty to avoid insolvent trading (s 588G)	Directors
9	Duty to avoid conflict of interests	Duty to disclose material personal interests (ss 191, 192); Restrictions on voting (ss 194, 195)	Directors
	Duty to avoid unauthorised profits	Statutory duties proscribing misuse of position and information [overlap with conflicts] (ss 182, 183)	Directors, Officers and Employees
	N/A	Related Party Provisions (Chapter 2E)	All parties involved

C. Consequences

1. general law

Common law remedies: damages

Equitable remedies: