

# 8. Members' Remedies, Sources of Funding & Fundraising and Disclosure

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## **MEMBERS REMEDIES (S461)**

### **Just and Equitable Grounds for Winding Up**

- Justifiable lack of confidence in the management of the company's affairs
  - Where management has conducted the company's affairs in breach of the law, e.g. refused to hold general meeting or pay dividends in order to force shareholders to sell their shares.
  - Also those who failed to comply with the Corporations Act, e.g. failed to comply with taxation laws for over 40 years.
  - Case Law: WONDOFLEX TEXTILES V VICTORIAN SUPREME COURT
    - Milne became director.
    - Jacobson then brought in his son and tried to force Milne out by making false accusations with aims of dismissing him.
    - Milne sought out a winding up order on the just and equitable ground.
    - Judge ruled lack of confidence in Jacobson as management was sufficient to support J&EWU order.
    - Additionally, the capital structure -> minimal shareholders and unwillingness to accept new ones, showed the Jacobson could not be trusted to run a company fairly in the future.
    - VERDICT: No winding up, but a fair price was agreed on for Jacobson to buy out Milne's shares.
- Breach of equitable considerations
  - Mutual trust and confidence
  - Case Law: EBRAHIMI V WESTBOURNE GALLERIES
    - Son and father used their majority voting power to remove E as director.
    - Despite corporate constitution for allowing such a resolution to remove a director, E applied for relief under the J&E provision in the relevant British Act.
    - VERDICT: E was granted relief and the company was dissolved.
- Fraudulent or oppressive conduct
  - See minority oppression remedy
- Company unable to or implement decisions caused by deadlock in management
  - Little prospect of the company being able to continue trading.
  - Case Law: RE YENIDJE TOBACCO CO + CAMPBELL V BACKOFFICE INVESTMENTS
    - Court wound up a very profitable company owned and managed by two individuals who refused to communicate with each other with all correspondence done by the secretary.
- Failure of substratum
  - Refers to a fundamental change in the operations of the company, which results in the company's inability to carry out the functions for which it was originally incorporated.

### **The Oppression Remedy (S232-S234)**

- It is a very broad provision which seeks to protect members of companies from commercially unfair conduct carried on the company or the people that control the company.
- Oppression - S232
  - Burdensome, harsh, wrongful, unfairly prejudicial or unfairly discriminatory
- Remedies - S233
  - Wind up the company
  - Amend the company's constitution
  - Order the company to purchase the member's shares
- Who can apply - S234
  - Originally restricted to conduct that adversely affected members in their capacity as members

- However, over time, there have been several amendments to the provision so that it now applies to persons whether in their capacity as members or in any other capacity
- BUT - only members and former member are allowed to apply for the court's orders

### **Right to Inspect Register**

- Right - S173
  - Members have a right to inspect without paying a fee
- Prohibition - S177(1)(a)
  - Prohibits them from using information gathered from register to contact or send material to the person
- Exception - S177(1A)
  - Prohibition does not apply if the use or disclosure of the information is for a purpose relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to them, or is approved by the company.