

### summary of facts

- briefly state case facts
- mention issues at hand
- topics to which question relates

### general introduction

The majority rule pervades over much of company law, touching over the key issue of who owns & controls the company (provisio Reg.3 + 4 of model articles). When simultaneously read with the doctrine of 'separate legal personality' (SLP) laid in *Saloman v. Saloman*, the right to sue where the company sustains injury is bestowed upon the company itself - which will be the proper claimant (*Foss v. Hartbottle*). As a consequence, individual shareholders (SH) cannot sue on the company's behalf as such a decision resides with executive body i.e.; the Board (*John Shaw & Sons [Salford]*)

Nonetheless, proper execution of the majority rule (in the passing of resolutions), results in all members becoming bound to it, regardless of their dissent. Additionally, the Court's non-interventionist policy in dealing with the internal management of companies - explained in *Carlen v Drury* - has led to the dissenting minority being bound to the wills & wishes of the majority.

In recognizing the potential of abuse, the law aims to find the right balance between the majority rule and protection of minority members.

### 1. derivative claims

- claim previously existed under common law but was inaccessible, unclear & too restrictive
- Law Commission (LC) recommended preservation of the sanctity of *Foss v. Hartbottle* as it was sound but to refurbish the law of DC in line with modern principle through a codified procedural code
- \* achieved via Part XI CA, 2006

### 1. derivative claims (cont)

- s.260* - action brought by member on company's behalf, seeking relief under the same
- when claim is granted leave by Courts, company joins as defendant (since Board presumably denied such action)

### 2. section 260 (CA, 2006)

- cause of action (CoA) primarily vested in company (refelct *Foss v. Hartbottle*)
- pursued by member for company benefit
- arising from D's 1. negligence 2. default or 3. breach of duties/ trust
- \* *breach principle extends scope of viable actions (compared to common law) by including D Duties, listed under Part X of Act) most commonly applied s. 172 & 174*

*Pavides v. Jensen* - even where D acted in good faith & hasn't personally gained, claim can be pursued

- action either against D
- \* or 3rd party who *dishonestly* assisted D in breach
- D broadly defined (de jure, de facto shadow or former)
- immaterial whether SH became member to company after CoA had already occurred
- \* hearing is a two-stage process (paper & full-permission)
- before claim proceeds, SH to be granted permission (leave) from Courts (s.261)* (1st stage)

- 1. paper hearing= courts consider evidence.
- \* - onus on member to establish self *prima facie* proper claimant otherwise Courts dismiss application (*lesini v. Westrip Holding*)
- threshold relatively low here

### 3. section 263 (CA, 2006)

- criteria referred to by judges deciding claim procession as a *derivative* claim
- criteria divided into mandatory & discretionary bars. Both to be satisfied to proceed

#### MANDATORY BARS *s.263(2)*

- 4. act/ omission yet to occur is already authorized
- 5. act/ omission already occurred has been authorized/ratified (**Re Singh Brothers Contractors**)
  - \* authorization (& maybe ratification) - requires *full & frank* disclosure **BEFORE** authorization (*Cullen Investments v. Brown* - SH be 'well-informed')
  - \* ratification - 'wrong-doer' or related persons can't partake in voting(*s.239(4)*)
- 6. a D acting in accordance with s.172 would not continue the claim
- \* hypothetical D test (would he consider claim worth pursuing)

→ consider criteria in *lesini v Westrip Holdings*

- ▶ size of claim
- ▶ proceedings cost
- ▶ company's ability to fund proceedings
- ▶ defendant's ability to satisfy judgement
- ▶ impact on company if pursued
- ▶ would prosecution damage company in other ways
- ▶ disruption in company's activities while proceedings occur
- ▶ is claim hiding personal vendetta

#### DISCRETIONARY BARS *s.263(3)*

- ▶ requirement of 'good faith'
- ▶ availability of alternate remedy
- \* claim *u/s.994* preferred by judges (**Franbar Holdings**) (Mission Capital\*\*)
- ▶ importance of claim given by 'notional D' in accordance with *s. 172* (**Franbar**)

### 3. section 263 (CA, 2006) (cont)

first 3 bars identified as crucial factors (**Kiani v. Cooper**)

- ▶ likelihood of authorization

\* **Smith v. Croft** - courts will have 'particular regard' to view of SH w/o any personal interest in claim

- ▶ whether company decided not to pursue claim

\* if Board's decision based on 'wrongdoers' advice → might influence judge against permission (**Kleanthous**)

### 4. personal action

- 2 hurdles need be crossed

#### CAUSE OF ACTION (s.994)

- Ds do not personally owe a duty to SH, as observed *u/s. 170*

but 3 exception give rise to such

#### *Tort Law*

- D gave SH negligent or dishonest advice

**Williams v. NLHF** - "assumption of personal responsibility" for advice need be shown

\* *takeover advice does not fall in this category* (**Sharp v. Blank**)

#### *Fiduciary Relationship*

- 'sufficiently close' relation → owe fiduciary duties

- where D takes on *additional burden* relating to SH (**Platt v Platt**)

**Allen v Hyatt** - Ds are trustees of profit for SH's benefit

**Coleman v. Myers** - selling/buying of shares taken on by D, FR formed

\* *takeover does not fall in this category* (**Peskin v. Anderson**)

#### *Special Contract*

- not employment contract but a special one b/w SH & D

### 4. personal action (cont)

**Giles v Rhind** - SH agreement where their responsibilities as D are also mentioned

#### REFLECTIVE LOSS BARRIER

**Sevilleja v Marex Financial** - principle only applies to SH claims, not Creditors

- where loss is reflective of loss suffered by company itself, cannot sue (**Prudential Assurance**)

**Jhonson v. Gore Woods** - loss has to be separate from any suffered by the company (i.e.; company suffered no loss as a result of that suffered by SH)

**Marex** - can only apply to claim brought by SH in his *capacity as SH*