

summary of facts

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

general introduction

following the shift of view by the Courts towards directors (Ds) come the 20th century, a stricter approach towards skill & DoC was expected. Subsequently, scope of duties & liabilities was clarified via case law based upon overriding policy objectives. However, due to their scattered nature, reference to such by D's proved increasingly difficult, resulting in the CLRSG recommending codification of common law so as to promote clarity & increase ease of accessibility. Consequently, these duties have been ratified under Part X of Company's Act, 2006 (CA 2006).

section 170 (CA, 2006)

- duties are owed by Ds (including 'shadow Ds') to the 'company as a whole' (**Percival v. Wright**)

* *thereby, in case of breach, proper claimant would be the company itself (Foss. Hartbottle)*

COMPANY AS A WHOLE

Greenhalgh - means corporation as a general body

2nd Savoy Inv. Report - decision making to consider interests of the company in the long term, including interests of future shareholders (SHs)

* "where takeover occurs," "future SH" interests irrelevant (**Coleman v. Myers**) & general duty primarily towards current SHs (**Peskin v. Anderson**)

- duties' effect is cumulative in nature & multiple may apply concurrently (**s. 179 CA, 2006**)

section 171 (CA, 2006)

Ds to act within powers conferred through AoA for the purposes they were conferred for (proper purpose)

PURPOSES

Re Smith v. Fawcett - requirement of 'good faith' & 'interest of the company' + decision shouldn't result in achieving some secondary purpose

- liability of Ds where action done in 'good faith' according to them but not carried out for proper purposes (**Ampol Petrol**)

Eclairs Group - seeking to control outcome of SH's decisions in gen. meeting via share allotment is not 'proper'

Bamford - where multiple purposes for exercise of power, principal purpose to be identified by Courts

Teck Corpn. v. Miller - share issuance for purposes other than capital raising is allowed (inconsistent with **Facwett**)

Scattergood - identified factors to determine 'improper use' of powers

1. identify conferred power
2. identify proper purpose of power
3. identify substantive (actual) purpose of power as exercised
4. was purpose of exercise proper?

Miller - onus on claimant to prove improper purpose (**Australian Metropolitan Life Assurance**)

section 172 (CA, 2006)

- duty to *bona fide* promote success of company for SH's benefit (**Percival v. Wright**)

- **Company Law Review** - Ds to promote 'enlightened stakeholder value'

section 172 (CA, 2006) (cont)

PDS v. Wide - SC Canada stated 'best interests' of company encompass employees and other stakeholders

DISCHARGING DUTY

- by 'having regard' to factors enlisted **s. 172(1)**

5. consequences of decisions long-term
6. interests of stakeholders (CSR)
7. need to act fairly b/w members

Fassihi - duty of Ds to inform SH of breach

Charterbridge v. Lloyd - test is qualified objective (**Regent Crest v. Cohen** = subjective element of *D honestly believing his act/omission was in company's interests*)

* subjective element needed to ensure Ds don't become too risk averse just to save themselves from liability

RELATING TO GROUP COMPANIES/ SUBSIDIARIES

Scattergood - where subsidarial relations, D to act in interests of company they are positioned in

* *though parent/subsidiary may TANGENTIALLY benefit*

INSOLVENCY s. 172(3)

- in event of financial crisis (BUT insolvency not yet occurred), greater weight placed on creditor interests (**W. Mercia Safteyware v. Dodd**) (**BTI v. Sequana**)

- insolvent risk must be 'probable', 'some risk' won't suffice (**BTI v. Sequana**)

! orbiter ! *'sliding-scale' approach - as risk increases, interests slide towards creditors + breach can't be ratified by SH resolution*

section 173 (CA, 2006)

- duty of Ds to exercise independent judgement

Boulting - to prevent Ds transferring their discretion to 3rd parties

HOWEVER, where such conference is established to be *bona fide* for the company's benefit, duty discharged

- if final judgement is exercised by D, duty discharged

Madoff Securities v. Raven - D must be aware of company's affairs (even those delegated) -- *duty to supervise*

Fulham Football - exercising discretion which may restrict future discretion doesn't amount to breach

section 174 (CA, 2006)

- duty to exercise reasonable skill, care & diligence

HISTORY

- 19th century courts had low standards of care for Ds as their role was more symbolic in nature

Donaghue v. Stevenson - cases were now based on 'reasonable foresight', making Ds accountable under general DoC principles

CURRENT LAW

- qualified objective test i.e.; subjective & objective elements

✘ objective - Ds acts/omissions measured against conduct expected of a reasonably diligent individual (**Gregson v. HAE Trustees**)

✘ subjective - according to the special skills that D possesses

DELEGATION OF POWERS

section 174 (CA, 2006) (cont)

Re Finch - delegating powers doesn't relieve D from duty to supervise, should be aware of company's affairs

Re Barings - *guiding principle* Ds to acquire & maintain **sufficient knowledge** of company's business

Raithata v. Baig - proper execution of delegated tasks can't be assumed by D

* decisions leading to loss for company can't automatically be presumed to breach s.172 ('hindsight principles') - D's thought process to be considered

section 175 (CA, 2006)

- duty to avoid conflict of interests

- broad duty as not only actual but also possible conflicts are encompassed

Bray v. Ford - individual in a position of fiduciary duty can't place himself in position where his interests & duty are in conflict

Broadman v. Phipps - possibility of conflict must be real & not 'theoretical'

CORPORATE OPPORTUNITIES

- these opportunities are considered as assets of company, hence shouldn't be misappropriated (**Cook v. Deeks**)

- Ds shouldn't be unjustly enriched

- extends to opportunities personally presented to Ds, outside their capacity as one (**IDC v. Cooley**)

* *regardless of whether company could've taken advantage of opportunity itself*

Regal (Hastinga) - liability arises from mere fact of profit having

O'Donnell v. Shanahan - doesn't matter is opportunity outside company's line of business

POST-RESIGNATION BREACH

section 175 (CA, 2006) (cont)

- resignation in itself doesn't amount to breach but doesn't immunise D from potential breach either

Balston v. Headline Filters - intention to set competing business after resignation doesn't amount to breach

Tranez Anstalt v. Hayek - D can utilize confidential information & know-how acquired while in business but not 'trade secrets'

! 'trade secrets' company database, customer lists, business strategies, supplier agreements (**Fassihi (QM v. Pyke)**)

Foster Bryant Servicing v. Bryant - criteria for breach → relied upon judgement in **CMS Dolphin v. Simonet**

a) relevant connection b/w *mala fide* intent of D's future exploitation of company's opportunity &

b) resignation of D

COMPETING DIRECTORSHIPS

- *INITIALLY*, it was held that Ds could hold office in 2 competing businesses

Bristol - 'double-employment' is a clear conflict of interest (**IPG v. Pyke**)

ratification of breaches

- can be approved by Board only, no need for SH approval

* if private limited company (PLC) - can be done as per other D's discretion

* if public limited (LTD) discretionary powers to be mentioned within AoA

* breaching D cannot vote

section 176 (CA, 2006)

- duty not to accept benefits from 3rd parties

Novoship - only those benefits conferred to Ds b/c of the position they hold

- if benefit cannot reasonably be inferred to give rise to conflict of interest, no breach

- D won't be liable for breach if SH authorize acceptance of benefits. **180**

section 177 (CA, 2006)

- duty to disclose Ds interests in a transaction of/by company

- interests exist even where D himself doesn't directly accrue benefit (family/friends)

- duty discharged where D merely informs/declares interest to Board before transaction is finalized

Lee Lighting - informal disclosure will suffice if Board is already aware or should reasonably be aware, duty discharged

GDV v. Koshy - information of interest needs to be precise

- breach carries civil sanctions & complies criminal sanctions of s.182

relief from liability

CONSENT/APPROVAL/AUTHORIZATION OR RATIFIATION BY MEMBERS

1. authorization- approval by SH *before* action is undertaken via ordinary resolution

* **BUT**, full-disclosure to be given **BEFORE** voting transpires (**Cullen Investments v. Brown**)

2. ratification - approval by SH *after* action is undertaken via ordinary resolution

* only effective if any Sh connected to D or D (also an SH) can't vote (**s.239(4) CA, 2006**)

SUBSTANTIAL PROPERTY TRANSACTIONS

relief from liability (cont)

- where D is buying/selling 'substantial' non-cash asset (**s. 190-196 CA, 2006**)

* 'substantial' = asset whose value exceeds £100,000/- or 10% of company's net worth (whichever is lower)

- failure to attain approval will result in transaction being **voidable** at company's behest

Re Duckwari - D to compensate company for any losses incurred

THROUGH COURT ORDER (**s.1157**)

- where negligence, default, breach of duty or trust occurred **BUT** act carried out honestly and reasonably,

▶ D claimed against may apply to court for relief under this section

Court may excuse officer in part or wholly from liability & withdraw case against him

remedies

- enshrined in **s. 178 CA, 2006** for civil breaches

8. compensation - where company suffers loss (**JSD v. Brown**)

9. restoration of company property (**JJ Harrison (Properties)**)

10. account of profits made by D (**Regal (Hastings)**)

11. injunction or declaration (**CPE v. Bryant**)

12. rescission of contract where D failed to disclose interest (**Transvaal Lands**)

section 190 (CA, 2006)

substantial property transactions of non-cash assets

for amounts exceeding £100,000/- made by D or someone connected to D, prior SH approval required

- transaction could be by D for company or from company

- if no prior SH authorisation, contract VOID

- does not apply to services (such as loans taken by D for company → these filed for breach u/s.177)

breach u/s.177 = contract VOIDABLE at company's behest