



Précis Paper

Professional Advisors to, and Officers of, a Corporation

Jim Johnson of the Bar talks of the conflicts of professional duty people may experience when they are also board members of the client where they may have quite separate duties, for instance company secretary or a director.

Discussion Includes

- Company directors/officers bear duties under sections 180-184 *Corporations Act 2001* (Cth) and at general law where compensation is a remedy under section 1317E.
- Professionals advising directors can breach duties under section 185 or by being knowingly involved in a contravention – section 79.
- Courts may cure procedural errors such as absence of quorum see section 1322 if there is no substantial injustice.
- The dispute where the amount in dispute is small compared with the likely legal cost squarely raises the issue of proportionality of costs in section 60 of the *Civil Procedure Act 2005*
- Where directors are likely to see benefits from their decision as directors they must disregard that benefit and exercise their duty to the company (*Hawkins v Bank of China* (1992) 10 ACLC 588).
- Findings of credit and judicial criticism may adversely impact on a professional's reputation which is a matter of great significance to that individual

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1. In this edition of BenchTV, James Johnson (Barrister) discusses the NSW Supreme Court's (Robb J) decision in *Summerdowns Rail Ltd v Stevens* [2015] NSWSC 321 in relation to the application of statutory and general law duties to a professional acting as a company secretary. Mr Johnson acted for the first defendant, company secretary, Mr Stevens, in the Supreme Court.

Material Facts

2. The company, Summerdowns Rail Ltd, sought compensation under s 1317H of the *Corporations Act 2001* (Cth) against a director and secretary for purported contraventions of ss 180, 181 & 182 and for purported breach of equitable duties in relation to payments made out of company's bank account in favour of a consultancy company. The company argued that the breaches were a necessary consequence of the invalidity of the payments made following a meeting attended by only 2 of the 3 directors of Summerdowns which did not satisfy the relevant quorum requirements nor was the other director provided with reasonable notice of the meeting.

Resolution of the Legal Issues

3. Robb J determined that resolution to make the payment was not validly passed given the meeting had not been duly constituted ([185]-[187] of the judgment). His Honour did not determine whether s 1322 was able to cure this defect given the manner in which the claim and defence were pleaded. Nonetheless, the fact that the meeting and resolution authorizing the payment were invalid did not mean the defendants had breached their duties. The defendants did not breach the relevant duties to the company because they did not act in bad faith or against the best interests of the company with any improper purpose. In particular, the secretary was found (at [212] of the judgment) to be acting on the instructions of the directors, in the belief that they were entitled to give him instructions, having not turned his mind to technical questions of the validity of the meeting and acting on the basis that the payments were necessary for the viability of the company's business plan.
4. Furthermore, even if the defendants had breached their duties, the company failed to establish any damage that resulted from the invalidly held meeting given the payments were contractually required ([197] of the judgment).

Significance

5. This case demonstrates that where a company suffers damage due to the actions of a director/officer they may be able to claim compensation from the director/officer in circumstances where the director/officer should have been aware that the resolution calling for the action was not valid, given it was passed in a meeting that was not duly constituted.
6. Therefore officers of companies should familiarize themselves with the requirements for a validly held directors' meeting because a court may find that they should have known the requirements. A court will be more willing to find that an officer should have known the requirements where they are a professional such as an accountant or lawyer and hence they are particularly vulnerable to such a liability.

BIOGRAPHY

Jim Johnson

Barrister, Fredrick Jordan Chambers, Sydney

James Johnson was admitted as a lawyer in 1975 and called to the NSW Bar in 1991. He is a part time lecturer at UTS. His primary practice is in personal and corporate insolvency including where those areas intersect with family law.

Ian Benson

Special Counsel, A R Conolly & Company Lawyers, Sydney

Ian Benson was admitted as a lawyer in 2002. He has a First Class Honours degree in law from the University of Newcastle and a Masters degree in law from the University of New South Wales.

BIBLIOGRAPHY

Focus Case

Summerdowns Rail Ltd v Stevens [2015] NSWSC 321

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/55139c0ce4b04b50e5e969c9>

Benchmark

http://benchmarkinc.com.au/benchmark/composite/benchmark_16-04-2015_insurance_banking_construction_government.pdf

Cases

Barnes v Addy (1874) LR 9 Ch App 244

Giannarelli v Wraith [1988] HCA 52

Hawkins v Bank of China (1992) 10 ACLC 588

Legislation

Civil Dispute Resolution Act 2011 (Cth)

Civil Procedure Act 2005 (NSW)

Corporations Act 2001 (Cth), ss 79, 180, 181, 182, 248C, 1317H, 1317S, 1318, 1322

Income Tax Assessment Act 1997 (Cth)

Legal Profession Act 2004 (NSW)

Superannuation Industry (Supervision) Act 1993 (Cth)

Taxation Administration Act 1953 (Cth)