



VPro Lawyers Newsletter
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Mike Lyons
VPro Lawyers
mike@vprolawyers.com.au

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COMPANY DIRECTORS NOT PERMITTED TO TAKE COMPANY OPPORTUNITY FOR THEMSELVES

Although the recent Queensland Supreme Court case of *Dwyer v Lippiatt* did not break new legal ground, the case (which involved a proprietary company with only 2 shareholders) provided a salutary reminder of two important principles for directors and others closely involved in running companies.

The first important point dealt with an individual (Mr K) who, although not a director of the company had been heavily involved in the company's affairs. He had been intimately involved in all of the important decisions affecting the company and there was no doubt about his importance in regard to the drive and direction of the company. The Court found that despite the absence of any formal appointment, he could properly be described as an "officer" of the company being one who makes or participates in making decisions that affect the whole or a substantial part of the business of the company.

This was important to the second aspect of the ruling which turned on an interpretation of section 182 of the Corporations Act. This provides that a director, secretary, other officer or employee of a corporation must not improperly use their position to gain an advantage for themselves (or someone else).

The Court reviewed the conduct of Mr K, and, having found him to be an officer of the company, was satisfied that he was obliged

to avoid a conflict of his duty to the company with his personal interests. Any opportunity which fell within the company's interests could not be appropriated by Mr K (or interests associated with him) without first being made available to the company. Failure to satisfy that obligation would involve a breach of his fiduciary obligations to the company.

The scope of these fiduciary obligations vary, depending on the particular circumstances of each case and depending on the extent of the connection between the available opportunity and the nature and extent of the company's operations and anticipated future operations.

As the Court observed "Full disclosure and approval, where there is doubt, is always available (for a person in the position of Mr K)".

In these circumstances, the Court concluded that Mr K did owe a duty to ensure that the company was given the first right to consider the business opportunity (before he took it for himself).

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