

BUSINESS ORGANISATIONS LAW GUIDEBOOK

SECOND EDITION

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CHAPTER 6

PROBLEM QUESTION

James was elected as a director of 'Super Pty Ltd' at the annual general meeting. His appointment was invalid because the procedure in the constitution (which was in relation to appointments of directors) was not complied with. James continued to attend board meetings. He voted on resolutions with other directors and he participated in the management of the company. ASIC suspected that the board of directors of Super Ltd were breaching their duties and decided to take action.

Could James be sued for breach of directors' duties? Why or why not?

ANSWER

Can James be liable for breach of directors' duties?

Section 9 of the *Corporations Act* notes that a person is a director if they fall under one of the following categories:

- ☐ appointed as director;
- ☐ de facto director;
- ☐ shadow director.

James's appointment is invalid. However, he may still be a director as noted in *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236; [1978] HCA 52. Based on the facts of the question, he is attending board meetings and voting at those meetings. He is also participating in the management of the company. He is a de facto director and that means that he has the duties of directors. If he breaches the duties, he will be liable.