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Question 1
70/100
(a)
This issue is that of CDES providing financial assistance to a related company (FI) to buy its shares. This sounds a lot like the situation in *ASIC v Adler*. The first question is whether there has actually been financial assistance.

Financial Assistance

The test for this is that set out in *ASIC v Adler*. There needs to be a net transfer of values that either: (1) causes material prejudice to the interest of the company, (2) materially prejudices the interests of the shareholders or (3) materially prejudices the company’s ability to pay creditors. Clearly, the company’s loaning of $2 million to a company that later cannot repay that loan, and just after losing the prospect of being funded (preference subsidies), is not in the best interests of the company or its shareholders, especially as the loan is unsecured and undocumented (like in *ASIC v Adler*).

Therefore the test in s 260A(1) has to be satisfied as to whether the company was allowed to financially assist. Clearly, the assistance did materially prejudice the interests of the co and its shareholders (s 260A(1)(a)(i)). The shareholders were not even made fully aware of the loan at the time of the GM, so they clearly did not vote on the matter. Therefore, the FA (financial assistance) was not authorised.

The purchase of the shares through the contravention of this section doesn’t affect the validity of the FA or any contract associated with it (s 260D(1)(a)).

As this is a civil penalty provision, ASIC [✓] is allowed to bring proceedings under part 9.4B (ss 1317E, 1317G, 206C and 1317J). However, the company can also get compensation under s 1317J just like ASIC.

(b)
To have standing to commence an action on behalf of the company, Tine would have to prove the statutory derivative action requirements.

She is a member, so she has satisfied s 236(1)(a)(i), as well as (ii). She then has to get leave under s 237(2).

(a)—it is unlikely that the company will bring proceedings itself as the other directors were the ones involved in the loan.

(b)—Wanting to recover property for the company so that share value goes back up is in good faith. Also, wanting the Ds to compensate the company for their directors’ duties breaches is in good faith. Simply because R told her she was acting for vendetta does not mean that she was, especially as he was the one involved in the contravention.

(c)—As she is trying to get money back for the company, this is clearly in its best interests as is the compensation for DDs breaches.
(d)—There is a serious question to be tried as DDs are a big problem and so is the fact that the company is now in a bad financial situation because of the share purchase as it has lost $2 million that it cannot get back.

(e)—She would have to notify the company within 14 days. However, if her notice could mean that the company started to move property out of the company (perhaps to “FI” in order to protect it, the court may get rid of the notice requirement (s 237(2)(e)(ii)).

Tina could also try to argue the oppression remedy. She wouldn’t want to bring a winding up order as she “wants CDES to survive as a successful business”. She can bring this action, even in her capacity as a D (s 234(a)). However, simply being outvoted may not be enough to prove the remedy. The way in which the company is being run, where the board refuses to pursue her matters seems authoritarian (as was argue in Re Jeffreys). However, there it wasn’t enough for oppression. However, here, as she is also being personally targeted by being told “your request is just a private vendetta” perhaps would lead to a stronger case than Re Jeffreys.

(c)

Conflict of interest
Rocky has a conflict of interest. He is on the board (and a shareholder) of a company that received a major loan from CDES. He had a personal interest in the loan to FI. Rocky does not seem to have disclosed this to either the board or the GM. Under the common law and s 191(1) the D needs to disclose fully and frankly (to the GM under the common law and the board under s 191(1)). He has clearly breached his duty under both common law and statute.

Duty of care
As in ASIC v Adler, under the CL (common law) and the s 180(1) test, a reasonably careful D of CDES (especially here, where the company seems smaller and probably with much lesser capital and available profits than HIH) would not have loaned the amount of $2 million to a related company to be applied (also in part, like in ASIC v Adler) to the purchase of shares. This is so especially as the loan was unsecured and the company was already in financial trouble.

Duty of good faith
The loan R and S give has been argued by them to be in the best interests of CDES. The duty exists at CL and at statute under s 181(a) (it’s the same at CL and statute, just like the duty of care). However, the duty is subjective. Therefore, R’s and S’s belief that the loan was in the best interests of the company would normally satisfy this duty. However, this can be set aside if no reasonable person could have believed that it was in the benefit of the company (ASIC v Adler).

It seems that they believed the FA would help the share price. However, it could be argued that the fact that the loan was unsecured and undocumented and the deal was done behind the backs of shareholders (who were not told), could give rise to the argument that no reasonable person would have made a $2 million [✓] unsecured loan, if they were already in financial trouble. This is especially so as the dropping of the price anyway, regardless of the assistance was obviously (as it turned out) a possibility.

Subsidiary Insolvent
As FI seems to be insolvent (it’s not in a position to repay the loan), this would raise the issue of CDES’s liability for this as a holding company. However, there don’t seem to be enough facts to determine suspicion or expectation of insolvency.