

CONSPECTUS OF THE LAW RELATING TO OPPRESSION

1. GENERAL PRINCIPLES

- a. Sections 232 and 232 of the Corporations Act ("the Act") came into operation on 13 March 2000. The immediate predecessor of those sections was Section 246AA of the Corporations Law. The concept of conduct "contrary to the interests of the members as a whole" was then to be found in the same paragraphs as conduct "oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members". As such it has been found that the proscription of conduct "contrary to the best interests of the members as a whole" did not "give rise to a wholly separate statutory basis for the court's jurisdiction" and that the section gave "rise to four distinct grounds or one composite one" but that it overlapped "'oppression, unfair prejudice and unfair discrimination' to provide a further element in the understanding of 'commercial unfairness'". (*Re Polyresins Pty Ltd* [1999] 1 Qd R 599 per Chesterman J. at Pp. 676 to 677 and *Turnbull v National Roads and Motorists' Association Ltd* (2004) 50 ACSR 44 per Campbell J. at Pp. 51 to 52).
- b. Sub-Section 232(e) of the Act "is concerned with commercial unfairness" (*Dynasty Pty Ltd v Coombs* (1995) 59 FCR 122 per Spender, O'Loughlin and Branson JJ at P. 130 E citing *Wayde v New South Wales Rugby League Ltd* [1985] 180 CLR 459 per Brennan J. at P. 472). The words "oppressive to, unfairly prejudicial to, or unfairly discriminatory against" are to be considered as "a composite whole and the individual elements mentioned in the section should be considered merely as different aspects of the essential criterion, namely commercial unfairness" (*Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692 per Young J., *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (1998) 28 ACSR 688 per Young J. at P. 739 and *Dunn v CTK* [2002] NSWSC 365 per Barrett J. at Para 56).
- c. "The test of unfairness is objective and it is necessary, though difficult, to postulate a standard of reasonable directors possessed of any special skill, knowledge or acumen possessed by the directors. The test assumes (whether it be fact or not) that reasonable directors weigh the furthering of the corporate object against the disadvantage, disability or burden which their decision will impose, and address their minds to the question whether a proposed decision is unfair. The court must determine whether reasonable directors, possessing any special skill, knowledge or acumen possessed by the directors and having in mind the importance of furthering the corporate object on the one and the disadvantage, disability or burden which their decision will impose on a member on the other, would have decided that it was unfair to make that decision."(*Wayde* per Brennan J. at pp. 472 to 473). "Section 320 requires proof of oppression or proof of unfairness: proof of mere prejudice to or discrimination against a member is insufficient to attract the court's jurisdiction

to intervene." (Wayde per Brennan J. at P. 472).

The applicable test may be summarised as being "whether (there is) conduct which is so unfair that reasonable directors who consider the matter would not have thought the decision fair." or as "whether objectively in the eyes of a commercial bystander, there has been unfairness, namely conduct that is so unfair that reasonable directors who consider the matter would not have thought the decision fair." (Morgan v 45 Flers Avenue Pty Ltd per Young J. at P.704 and Dynasty Pty Ltd v Coombs per Spender, O'Loughlin and Branson JJ at P. 130 E).

- d. Sub-Section 232 (d) of the Act provides for "contrary to the best interests of the members as a whole' [as] a ground on which the court could make an order under s233, independently of whether conduct, etc, is oppressive to, unfairly prejudicial to, or unfairly discriminatory against a member or members..." (Turnbull v NRMA per Campbell J. at p. 54 [39]). "An action is capable of being 'contrary to the best interests of the members as a whole' in ways other than by being commercially unfair. Being pointlessly wasteful is one example." (Turnbull v NRMA per Campbell J.at P. 52 [32]) (see also Shelton v National Roads and Motorist's Association (2004) 51 ACSR 278 per Tamberlin J. at P.285 [25] and De Tocqueville Private Equity Pty Ltd v Linden & Conway Ltd [2006] FCA 1309 per Middleton J.). The power of a court to make an order based on this paragraph is one "which must be exercised with the greatest of care." (Turnbull v NRMA per Campbell J. at P.56 [51]).
- e. "The authorities also are to the effect that courts should not take any narrow approach to cases under s.260 [now s.232]. The clearest statement of this is by the full Federal Court Edwards v Idaville Pty Ltd (1996) 22 ACSR 1 at 3. A court must consider that the legislature has bit by bit enlarged the scope of the section since it first appeared in the companies legislation and apply the section broadly, though, because of the serious consequences of its application, it is not to be lightly applied: Thomas v H W Thomas Ltd [1984] 1 NZLR 686)." (Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (1998) 28 ACSR 688 per Young J. at Pp. 739 (50) to 740 (5)) (see also Jenkins v Enterprise Gold Mines NL (1992) 10 ACLC 136 per Malcolm CJ and Rowland and Franklyn JJ. at PP145 to 146 and Shamsallah Holdings Pty Ltd v CBD Refrigeration Airconditioning Services Pty Ltd [2001] WASC 8 per Owen J. at Para 14)."The concept of fairness must be applied judicially and the content which it is given by the courts must be based on rational principles. As Warner J. said in Re J E Cade & Son Ltd [1992] BCLC 213 at 227: 'The court...has a very wide discretion, but it does not sit under a palm tree.'" (Re a Company (No 00709 of 1992) O'Neill v Phillips [1999] 2 All ER 961 per Lord Hoffmann at P.966). "However, the court must bear a few things in mind when making an order under this section. The first is that the section is fairly common in the Common Law world and the approach to the section has been relatively uniform. It is important in the public interest that the uniform approach continue to be

followed, so that shareholders and their legal advisers and accountants will be able to advise them." (Fedorovitch v St Aubins Pty Ltd [No2] [1999] NSWSC 776 per Young J. at para 5). (see also O'Neill v Phillips per Lord Hoffmann at P. 967 h to 968b).

- f. "Because it is easily overlooked, it is necessary to repeat that the Plaintiff must actually prove oppression before obtaining relief." "No order can be made at all unless the court comes to the opinion [that proscribed conduct has occurred]". (Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (1998) 28 ACSR 688 per Young J. at p. 740).
- g. "One must look to all the circumstances, including the timing of the actions of the defendants, to ascertain whether particular conduct is within the terms of ss 232(d) or (e). One event or one act in itself may not constitute an act which will provide the basis for the court to conclude that the conduct is within these provisions. However a number of events or acts, when viewed cumulatively, may well provide such a basis." (De Tocqueville Private Equity Pty Ltd v Linden & Conway Ltd per Middleton J. at para 26).(see also Fexuto Pty Ltd V Bosnjak Holdings Pty Ltd(1998) 28 ACSR 688 per Young J. at P. 739 (5) and Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (2001) 37 ACSR 672 per Spigelman CJ. at P. 675 [6]).
- h. "The cases show that to establish oppressive conduct the court should usually find 'some overbearing act or attitude on the part of the oppressor': Re Jermyn Street Turkish Baths [1971] 1 WLR 1042,1060". "However, it must be remembered that these words were said in the context of a discussion of the leading cases, all of which point to the plaintiff having to demonstrate a course of conduct involving 'at least an element of lack of probity or fair dealing':Elder v Elder & Watson Ltd [1952] SC 49,60" (Lucy v Lomas [2002] NSWSC 448 per Young CJ. at paras 35 and 39).
- i. "Traditionally, lack of 'clean hands' by the minority in a petition for winding up on the just and equitable ground would defeat the petition: see eg the Westbourne Galleries case at 387. However, in s 260 cases, there has been a softening of the court's attitude and there is now no overriding requirement of clean hands; see Re London School of Electronics Ltd [1986] Ch 211". (Fexuto Pty Ltd V Bosnjak Holdings Pty (1998) 28 ACSR 688 per Young J. at P. 741 (5)). "The conduct of the petitioner may be material in a number of ways, of which the two most obvious are these. First, it may render the conduct on the other side, even if it is prejudicial, not unfair... Secondly, even if the conduct on the other side is both prejudicial and unfair, the petitioner's conduct may nevertheless affect the relief which the court thinks fit to grant under subsection (3). In my view there is no independent or overriding requirement that it should be just and equitable to grant relief or that the petitioner should come to court with clean hands." (Re London School of Electronics [1986] Ch 211 per Nourse J. at P. 222 A to C).(see also Morgan v

45 Flers Avenue per Young J. at P. 706). "There is no overriding requirement that the applicant for relief must have clean hands but an attempt to achieve a collateral purpose by exerting pressure may lead to the application being dismissed as an abuse of process." (Nilant v RL & KW Nominees Pty Ltd [2007] WASC 105 per Hasluck J. at para 105). "...Mincom Pty Ltd V Murphy (1983) 7 ACLR 370; 1 ACLC 749 is distinguishable because it was a case, not of an application for relief under s186 or of the hearing of such an application, but an application for an injunction to restrain a winding up petition, which G N Williams J held was an abuse of the process on various grounds that are not necessary to examine in detail. In the course of his judgement, withj which I respectfully agree on this point, his Honour said that some evidence of a collateral motive or of bad faith on the part of the petitioner in that case was to be reasonably inferred from the fact that he had taken no steps to set in train the procedure under an appropriate pre-emption clause of obtaining a sale of his shares, instead petitionining for windin up as he did." (Re Dalkieth Investments Pty Ltd (1984) 9 ACLR 247 per McPherson J. at P.254).

- j. "Essentially, however, the aim is still to permit the minority to free its capital, even though it has locked its capital into a venture. The reason for this is that it is unfair that the capital should continue to be locked up if the circumstances are indicative of oppression. Accordingly, the prime thrust of the section is to either make the venture work so that the capital is properly employed, or to allow the capital to be removed. It is not for punishment or compensation or for taking the profit that ought to have been made had the venture been successful." (Fedorovitch v St Aubins Pty Ltd [No2] per Young J. at para 9).
- k. "Although no-one has ever voiced it, it seems to me that this essentially is the reason for the adoption of the rule that ordinarily the proper order is that the oppressor buy out the oppressed. This is in line with the policy that if a reasonable offer is made to buy out the oppressed the petition will be struck out because all the minority can really insist on is either the venture should proceed in accordance with what was understood or that he or she should get back the capital invested." (Fedorovitch v St Aubins Pty Ltd [No2] per Young J. at para 10). (see also Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (1998) 28 ACSR 688 per Young J. at p.743 , John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'Asia) Pty Ltd (1991) 6 ACSR 63 per Young J. at P.66J and O'Neill v Phillips per Lord Hoffmann at Pp. 974 j to 975 c).
- l. "Oppression is something done against a person's will and in his despite. It is not something done with the acquiescence or consent, and still less is something done with his cooperation:..." (John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'Asia) Pty Ltd per Young J. at P.66 l).
- m. The conduct complained of must affect the member or members complaining of it, whether or not that affect is in that persons capacity as a member or in any other capacity (John J Starr (Real Estate) Pty Ltd v Robert R Andrew

(A'Asia) Pty Ltd per Young J. at Pp. 65(40) to 66 (5)), (see also *Smith Martis Cork & Rajan Pty Ltd v Benjamin Corporation Pty Ltd* (2004) 207 ALR 136 per Wilcox, Marshall and Jacobson JJ P. 149 [105] to P. 150 [108]).

- n. Oppression "is not established simply by showing that the majority are in control of the company, or that the applicant is consistently out-voted , or that the majority have made some questionable decisions from a business point of view. The mere disadvantage of being in a minority does not in itself constitute oppression....Disagreement with the decision by a majority of shareholders and directors on the part of a minority shareholder does not entitle that shareholder to relief under the section." (*Shelton v NRMA* per Tamberlin J. at P. 285 [24]). (see also *John J Starr (Real Estate) Pty Ltd v Robert R Andrew(A'Asia) Pty Ltd* per Young J. at P.66 G, H and N and *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (1998) 28 ACSR 688 per Young J. at P. 740 (20)).
- o. "Oppression is not normally established merely by showing that the majority are in control of the company, that the applicant is consistently outvoted nor because the majority have made some decisions which were questionable from a business point of view or have later turned out to be disastrous." (*Fexuto Pty Ltd V Bosnjak Holdings Pty Ltd* (1998) 28 ACSR 688 per Young J. at P.740 (20)). "I am in agreement with the submission of the defendants that the essence of the complaint of the plaintiffs is that the businesss of the trust and the investment of Fesena were not well managed. However, poor manangement or mismanagement do not constitute oppression:Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (1998) 28 ACSR 688 at 740 (Young J)." (*Shirim Pty Ltd v Fesena Pty Ltd* (2000) 35 ACSR 221 per Davies AJ. at P. 233 [71]).
- p. "It is important when assessing corporate activities to see if there has been oppression that judges do not remain in their ivory tower. The business world is replete with individuals who quite legitimately are seeking the best for themselves. For mutual enrichment, they may enter into contractual regimes or corporate structures. They may also take on fiduciary obligations. However, subject to those obligations, they can act as they like in their own interests." (*Fexuto Pty Ltd V Bosnjak Holdings Pty Ltd* (1998) 28 ACSR 688 per Young J. at P.739 (15)).
- q. "Certainly it is to be noted that s 320 (2) (a) speaks of an opinion of the court about oppression or unfairness in the present tense and there is authority to support the view that so far as that provision is concerned, at least, the oppression must be continuing as at the date of the petition and the hearing: see *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042 at 1059 (although that was an extreme case, relating to a share issue which had taken place 15 years prior to the proceedings); *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 at 1012; *Re Tivoli Freeholds L:td* [1972] VR 445 at 452 - 4; *Re Campbell Tube Products Ltd* [1976] 1 NZLR 64 at 71-2; *Re Anti-Corrosive Treatments Ltd* (1980) ACLC 34,165 at 34,165 at 34,170.

Of course, I think it is equally clear that the broader formulation of s320 since the decisions cited above, indicates clearly that the court is not to be fettered in determining the existence of grounds for relief by such considerations and past conduct will clearly ground the relief under s 320(2) (b) and relief within the broad generality of powers which then follows." (Re Spargos Mining NL(1990) 3 ACSR 1 per Murray J. at P.44 (25)).

- r. "It is clear, I think, from the section itself that it is not necessary that the unfairness be continuing at the time of the petition or at the time when the court comes to consider the matter. But, of course, past unfairness referable to particular acts or omissions may lead a court to exercise its discretion to particularly seek to remedy the result of that particular act or omission or may cause the court to conclude that in the exercise of of its discretion there is no present requirement for the grant of relief in relation to past oppression. The operation of the section is not in that sense to be construed as in any way punitive and, of course, I have already referred to the point noted in Wayde's case as well as in Thomas' case, that the court will be reluctant to intervene if to do so really makes the application of the section a process in which the court, without clear justification simply takes over the management of the company." (Re Spargos Mining NL(1990) 3 ACSR 1 per Murray J. at P.44 (1)).

2. **BOARD DECISIONS**

- a. Oppression, at least in terms of commercial unfairness, may be shown "if the decisions of the Board were such that no Board acting reasonably could have made them" (Wayde v NSW Rugby League Ltd per Mason ACJ and Wilson, Deane and Dawson JJ at P. 468).
- b. However, "... the caution which a court must exercise in determining the application...in order to avoid an unwarranted assumption of the responsibility for management ..." must be borne in mind. (Wayde v NSW Rugby League Ltd per Mason ACJ and Wilson, Deane and Dawson JJ at P. 467). "The Court must keep in mind that the investment in the company by the majority shareholders is by definition larger than that of the minority. They should not be prevented by minority obstruction from taking steps which in their reasonable opinion will enhance the value of the company for the benefit of all members."(Nilant v RL & KW Nominees Pty Ltd [2007] WASC 105 per Hasluck J. at para 106).
- c. "The validity of an exercise of power cannot be challenged merely because too little weight is given to some matters which properly fall for consideration and too much weight to others for the court will not substitute its discretion for the discretion exercised in good faith by the directors. As Barwick C.J, McTiernan and Kitto JJ. said in Harlowe's Nominees Pty Ltd V Woodside (Lakes Entrance) Oil Co. NL "Directors in whom are vested the right and duty of deciding

where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgement, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts." "(Wayde v NSW Rugby League Ltd per Brennan J. at P. 470).(see also McGuire v Ralph McKay Ltd & Ors (1987) 12 ACLR 107 per Murray, Gobbo and Southwell JJ. at P. 111).

- d. "However, in matters of management, the court usually takes the view that unless it can be seen that the majority have taken a line that involves self interest or a decision that no reasonable board could have taken, it does not interfere. Even though the Plaintiff may feel that his or her shares are falling in value because of the business strategy being adopted, ordinarily, the management strategy adopted by the majority will prevail" (Fexuto Pty Ltd V Bosnjak Holdings Pty Ltd (1998) 28 ACSR 688 per Young J. at Pp.726 to 728). "Allegations of mere error in the conduct of management are never sufficient in this regard." (Fexuto Pty Ltd V Bosnjak Holdings Pty Ltd (2001) 37 ACSR 672 per Spigleman CJ. at P. 677 (40)).
- e. "In Re Posgate & Denby (Agencies) Ltd [1987] BCLC 8 at 14, Hoffman J said that prima facie one looks at the articles to see the parties' rights and duties and that ordinarily what is sanctioned therein is not unfair. He points out that, "all decisions concerning the business of the company involve the risk that other decisions may turn out to have been better". (Fexuto Pty Ltd V Bosnjak Holdings Pty Ltd (1998) 28 ACSR 688 per Young J. at P.740 (35)).(see also Shirim v Fesena Pty Ltd (2000) 35 ACSR 221 per Davies AJ. at P. 233 [71]). (However, note the statement in Ford's Principles of Corporations Law 12th Edition at 11.450 P. 692, after citing Shirim for the proposition that "It is clear that mismanagement or poor management does not constitute oppression..", "However, mismanagement may be part of a broader pattern of conduct which establishes oppression." It is to be further noted that no authority, or other authority apart from Shirim, is cited by the authors in support of that proposition.) (see also the statement in Nilant v RL & HW Nominees Pty Ltd [2007] WASC 105 per Hasluck J. at para 111 "A commercially unreasonable approach to the making of profits might not amount to oppression, in the absence of any suggestion of wilful mismanagement or of any impropriety in the conduct of the company's affairs: Thomas v HW Thomas Ltd [1984] 1 NZLR 686").
- f. "It is not oppressive for those in control of a company to insist upon the adoption of a policy on a matter of business on which there are legitimate differences of opinion: Re Broadcasting Station 2GB Pty Ltd [1964-5] NSW 1648". (John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'Asia) Pty Ltd per Young J.at P. 66 H).
- g. "The mere fact that a member of a company has lost confidence in the manner in which a company's affairs are conducted does not lead to the conclusion

that he is oppressed; nor can resentment at being outvoted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or to efficiency, however well founded. Those who are alleged to have acted oppressively must be shown to have acted at least unfairly towards those who claim to have been oppressed: *Re Five Minute Car Wash at 751* (John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'Asia) Pty Ltd per Young J. at Pp. 66 to 67 N).

- h. "...I conclude that that unfairness may lie in the harm suffered as a result of the conduct of management, the particular prejudice caused, the lack of reasonable commercial justification for the course taken, or simply in the decision making processes within the company." (*Re Spargos Mining NL*(1990) 3 ACSR 1 per Murray J. at P.44 (5)). (see also *Ground & Foundation Supports Pty Ltd v GFS Management Services Pty Ltd* (2003) 21 ACLC 506 per Wallwork and Anderson JJ and Burchett AUJ. at para 39).

3. **DENIAL OF ACCESS TO INFORMATION**

- a. The primary remedy open to a member of a company to be granted access to "books" of the company, which includes " a register, any other record of information, financial reports or financial records, however compiled, recorded or stored and a document" (excluding telephone records referred to in Subdivision D of Division 5 of Part 6.5 of the Act) (section 6 of the Act) is via application made pursuant to Section 247A of the Act. This remedy is in excess of the rights of members to access various registers or books of a company (such as access to: the register of members per Section 173 of the Act; minutes of shareholder's meetings per Section 251B of the Act; financial reports per Section 314 of the Act and the books of a company, including its financial records, by a former officeholder if request is made within 7 years of ceasing to be an officeholder and is made for the purposes of legal proceedings inter alia brought by that person or proposed to be brought by that person in good faith per Section 198F of the Act).
- b. A remedy may also lie in oppression where a director is deliberately denied "any effective ongoing information concerning the management" of a company for "a number of months" and attempts to gain access to such information are "frustrated by those in control." (see *Re Back 2 Bay 6 Pty Ltd* (1994) 12 ACSR 614 per Thomas J. at P.615 (20) to (45)).(see also *Shum Yip Properties v Chatswood Investment and Development Ltd* [2002] NSWSC 13 per Austin J. at [198]).

4. **ONUS OF PROOF**

- a. "The onus of establishing unfairness rests on the applicant asserting the conduct that is contrary to the interests of the members as a whole, or that is oppressive, unfairly prejudicial or discriminatory" (*Shelton V NRMA* per

Tamberlin J. P. 285 [24]). Where the facts established by the applicant demonstrate that a company entered into a transaction for no apparent commercial benefit and there is an apparent conflict of interest on the part of the directors of the company, the evidentiary burden shifts to the company to establish the commercial reality of the transaction and the commercial basis and benefits to the company and the manner in which the directors resolved the conflict of interest. If the company does not adduce satisfactory evidence on these matters, unfairness may be inferred. (see *Jenkins v Enterprise Gold Mines NL* (1992) 6 ACSR 539 per Malcolm CJ and Rowland and Franklyn JJ.).

5. **PLEADINGS**

- a. "However, it should be observed that the far-reaching and highly intrusive relief sought makes it imperative that the matters sought to be raised should be properly, logically and specifically pleaded. The allegations levelled at the NRMA and its directors are extremely serious....The relief sought in the present case intrudes into the internal administration and policies of the NRMA and its commercial policies .Accordingly, if such far-reaching relief can be granted (and I reach no conclusion on that at the present time), the pleading must be framed with precision, clarity and conciseness...". (*Shelton V NRMA* per Tamberlin J. P. 283 [16] and [17]). However, *CF Backoffice Investments v Campbell* [2007] NSWSC 161 per Bergin J. at [93] to [96].

6. **REMEDIES**

- a. "His Honour went on to refer to the introductory words at s260(2), as quoted above, to the effect that the court is empowered to make 'such order or orders as it thinks fit. His Honour said that he agreed with the approach that the amendments to s260 had been designed to ensure that the court was invested with plenary power to deal with all kinds of oppression with whatever weapons seem just and equitable. I agree with his Honour in this regard and also with the reasons of Priestley JA to similar effect." (*Fexuto Pty Ltd V Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672 per Spigleman CJ. at P. 696 [143]). "Subject to that, the trial judge had, and this court has, a wide discretion to make such ' order or orders as it thinks fit' within the boundaries of the relief sought...As in equity, the court's duty is to make orders which are practically just". (*Fexuto Pty Ltd V Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672 per Fitzgerald JA at P. 792 [693]). (see also *Smith Martis Cork & Rajan Pty Ltd v Benjamin Corporation Pty Ltd* (2004) 207 ALR 136 per Wilcox, Marshall and Jacobson JJ at P.145 [70]).
- b. "The issue of relief must, however, be determined as at the date that the statutory discretion falls to be exercised."(*Fexuto Pty Ltd V Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672 per Spigleman CJ. at P. 698 [159]).
- c. "Even if it were established that one or more acts of the NRMA, the board, or

'majority' shareholders were to contravene s232, it does not necessarily follow that the relief sought should or would be granted under s233". (Shelton v NRMA (2004) 51 ACSR 278 per Tamberlin J. at P.286 [27]).

- d. "Although there is no reported authority on the matter, my view is that the section should be applied by first considering whether orders can be made for regulating the company' affairs in the future so that there is no further oppression or unfair conduct, if that cannot be done, to see if there should be a buy-out by one faction of another: Re Enterprise Gold Mines NL (1991) 3 ACSR 531 at 539. The remedy chosen should be the least intrusive: Martin v Australian Squash Club Pty Ltd (1996) 14 ACLC 452 at 475. Only as a last resort is the court to make a winding up order of an otherwise solvent company under the section. The flavour of the section also is that the court is only to give the remedy which removes the oppression...Thus it is not enough merely to find oppression and then proceed to find some remedy that might bring peace to the company generally. The court should only grant the remedy that removes the oppression found."(Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (1998) 28 ACSR 688 per Young J. at P.742). (see also United Rural Enterprises Pty Ltd v Lopmand Pty Ltd (2003) 47 ACSR 514 per Campbell J. at P.518 [26] and Mopeke Pty Ltd v Airport Fine Foods Pty Ltd [2007] NSWSC 153 per Brereton J.at para 89). "Even if oppression is found, the courts have to bear in mind the principle of proportionality." (Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd(1998) 28 ACSR 688 per Young J. at P.741 (10)).
- e. Instances where the court has ordered the winding up of a solvent company are relatively rare. Those instances have involved serious and persistent breaches of fiduciary duties, payment of very excessive directors fees and expenses , persistent failure to provide information to directors, the likelihood of continuation of such conduct and companies with limited assets. (see Kokotovich Constructions Pty Ltd v Wallington (1995) 17 ACSR 478 per Kirby ACJ and Priestley and Handley JJA., Re Back 2 Bay 6 Pty Ltd (1994) 12 ACSR 614 per Thomas J. and Shum Yip Properties v Chatswood Investment and Development Ltd [2002] NSWSC 13 per Austin J.).
- f. "Even though there is this broad discretion as to the appropriate remedy, and as to the mode of valuation of shares if a compulsory buy-out order is held to be the appropriate remedy, if the case before a court is similar to others which have been decided by the courts, the judge should take that into account in exercising his or her discretion. As Young J. said in Fedorovitch v St Aubins Pty Ltd (No.2) (199) 17 ACLC 1558 at 1559:'...the section is fairly common in the Common Law world and the approach to the section has been relatively uniform. It is important in the public interest that that uniform approach is continued to be followed, so that shareholders and their legal advisers and accountants will be able to advise them.'" (United Rural Enterprises Pty Ltd v Lopmand Pty Ltd (2003) 47 ACSR 514 per Campbell J.at P.521 [38]). (see also Smith Martis Cork & Rajan Pty Ltd v Benjamin Corporation Pty Ltd (2004)

207 ALR 136 per Wilcox, Marshall and Jacobson JJ at P.146 [70]).

- g. "The ordinary order is that the majority buy out the minority: *Wilton-Davies v Kirk* [1998] 1 BCLC 274 at 277....Ordinarily, the court will not order an oppressed plaintiff to sell his shares against his will. It may, as occurred in the *Australian Squash Club* case allow the plaintiff to elect to continue under the defendant's regime or sell his shares to the company at valuation." (*Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (1998) 28 ACSR 688 per Young J. at P.743 (45)). (see also *Fexuto Pty Ltd V Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672 per Priestley JA. at P. 774 [580]). Failure to take up this option by an oppressed member may affect the discretion to grant other relief (see *Fexuto Pty Ltd V Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672 per Spigleman CJ. at P. 682 [53] to [54]).