

## Oppression (Part 2F.1 s232-235)

**Standing is NOT contentious:** As a [MEMBER STATUS] (s234(?)), XXX may be able to seek relief under s232 for [CONDUCT] (s232(?)) on the grounds that is *contrary to the interests of the members as a whole (s232(d))/oppressive to, unfairly prejudicial to, or unfairly discriminatory against a member or members.* [APPLICATION]

- Standing
  - o (a): member of company in their capacity, registered
  - o Former member
  - o (e): person considered appropriate by ASIC, having regards to investigations ASIC is conducting into the company's affairs
  - Any member may ask for relief under this section (© *Watson v James*)
    - o Doesn't have to be affecting themselves as a member
- Conduct
  - o (a) conduct of a company's affairs
  - o (b) actual or proposed act or omission by or on behalf of company
  - o (c) resolution/proposed resolution of members or a class of members of a company

### 232 Grounds for Court order

The Court may make an order under section 233 if:

- (a) the conduct of a company's affairs; or
- (b) an actual or proposed act or omission by or on behalf of a company; or
- (c) a resolution, or a proposed resolution, of members or a class of members of a company;

is either:

- (d) contrary to the interests of the members as a whole; or
- (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

For the purposes of this Part, a person to whom a share in the company has been transmitted by will or by operation of law is taken to be a member of the company.

Note: For *affairs*, see section 53.

**Standing is contentious:** The court may make an order under s233 if [CONDUCT] (s232(a)/(b)/(c)) is *contrary to the interests of the members as a whole (s232(d))/oppressive to, unfairly prejudicial to, or unfairly discriminatory against a member or members.*

- Does XXX have standing under s234?

### 234 Who can apply for order

An application for an order under section 233 in relation to a company may be made by:

- (a) a member of the company, even if the application relates to an act or omission that is against:
  - (i) the member in a capacity other than as a member; or
  - (ii) another member in their capacity as a member; or
- (b) a person who has been removed from the register of members because of a selective reduction; or
- (c) a person who has ceased to be a member of the company if the application relates to the circumstances in which they ceased to be a member; or
- (d) a person to whom a share in the company has been transmitted by will or by operation of law; or
- (e) a person whom ASIC thinks appropriate having regard to investigations it is conducting or has conducted into:
  - (i) the company's affairs; or
  - (ii) matters connected with the company's affairs.

### (s232(d))

- This exception means the same as for the benefit of the corporation as a whole.
  - o See for example: *Sanford v Sanford Courier Service*

**IF (E): I IS [CONDUCT] OPPRESSIVE, UNFAIRLY PREJUDICIAL OR UNFAIRLY DISCRIMINATORY TO [MEMBERS]? (s232(e))**

[CONDUCT] can be characterised as oppressive/unfairly prejudicial/unfairly discriminatory.

Objectively, reasonable directors in the circumstances of [DIRECTOR] would have decided it was unfair to [CONDUCT] (*Wayde's Case*)

Further, [CONDUCT] is adverse/detrimental to XXX's financial interests (*Tivoli Freeholds*)

Furthermore, [CONDUCT] is 'burdensome, harsh and wrongful' to [MEMBER(S)] and 'lacks probity and fair dealing' (*Scottish Co-operative, Tivoli Freeholds*).

Furthermore, [CONDUCT] of [OPPRESSOR] means [OPPRESSED MEMBER] is constrained to submit to [SOMETHING] which is unfair to them because [WHY IT'S UNFAIR] (*Re Jermyn Street Turkish Baths, Tivoli Freeholds*).

- There is nothing inherently unfair in being required to abide by the decisions of the majority S/Hs or directors (© *Re G Jeffrey*)
- 'mere prejudice or discrimination is not enough, there must be proof of oppression or unfairness (© *Wayde, Brennan J*)
- Unfairness is a question of fact and degree, needs to be established **objectively**. (© *Wayde*)
  - Would reasonable directors in the circ have decided it was unfair to make that decision?
- © *Re Jermyn Street Turkish Baths*: 'oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor'.
- © *Scottish Co-operative*: oppression denotes behaviour that's 'burdensome, harsh and wrongful' to one or more members of the company', and 'lacks probity and fair dealing'.
- © *Tivoli*: for oppression to occur: there must be something 'adverse or detrimental to members' financial interests. To be defined by both point of view of oppressor and the oppressed.
- Note: is it similar to *Wayde* where constitution expressly gives them discretion to act 'oppressively'
  - If so, then the power was exercised bona fide and for a proper purpose, then it's okay.

**Possible indicia: NOT likely to be oppression/unfair (look at pg. 387)**

- Inability to sell minority shares;
- Conservative management;
- Low dividends; high but reasonable directors' fees;
- Failure to pay dividends;
- Denial of access to corporate information.

**Possible indicia: LIKELY to be oppression/unfair (look at pg. 387)**

- Diversion of corporate business;
- Manipulation of voting power;
- Group interests favoured over corporate interest (but note s 187 – directors of wholly owned subsidiaries);
- Failure to give access to corporate records + running company for personal agenda + no meetings;
- Low dividends + failure to review policy.

**II ORDERS s233**

As it is likely [CONDUCT] was oppressive/unfair, courts may order [REMEDY] under s233 for [REASON].

Note:

- 233(1)(a) – winding up (as if order was made under s461 (233(2)))

- 233(1) (d) – person’s shares to be purchased, sort of like an exit strategy if person wants out.

**233 Orders the Court can make**

- (1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:
- (a) that the company be **wound up**;
  - (b) that the company’s existing **constitution be modified** or repealed;
  - (c) **regulating** the conduct of the company’s affairs in the future;
  - (d) for the **purchase of any shares** by any member or person to whom a share in the company has been transmitted by will or by operation of law;
  - (e) for the **purchase of shares** with an appropriate reduction of the company’s share capital;
  - (f) for the company to institute, prosecute, defend or discontinue specified proceedings;
  - (g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;
  - (h) appointing a receiver or a receiver and manager of any or all of the company’s property;
  - (i) **restraining** a person from engaging in specified conduct or from doing a specified act;
  - (j) requiring a person to do a specified act.
- Order that the company be wound up*
- (2) If an order that a company be wound up is made under this section, the provisions of this Act relating to the winding up of companies apply:
- (a) as if the order were made under section 461; and
  - (b) with such changes as are necessary.
- Order altering constitution*
- (3) If an order made under this section repeals or modifies a company’s constitution, or requires the company to adopt a constitution, the company does not have the power under section 136 to change or repeal the constitution if that change or repeal would be inconsistent with the provisions of the order, unless:
- (a) the order states that the company does have the power to make such a change or repeal; or
  - (b) the company first obtains the leave of the Court.

SDA (s236 & 7)

**Standing is NOT contentious:** As a [MEMBER STATUS] (s236(1)(a)(?)), XXX may be able to bring a SDA for [CONDUCT] under s236 if granted leave under s236(1)(b).

- Standing
  - o Member: s236(1)(a)(i)
  - o Officer: s236(1)(a)(ii)

**236 Bringing, or intervening in, proceedings on behalf of a company**

- (1) A person may bring proceedings on behalf of a company, or intervene in any proceedings to which the company is a party for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings (for example, compromising or settling them), if:
- (a) the person is:
    - (i) a member, former member, or person entitled to be registered as a member, of the company or of a related body corporate; or
    - (ii) an officer or former officer of the company; and
  - (b) the person is acting with leave granted under section 237.
- (2) Proceedings brought on behalf of a company must be brought in the company’s name.
- (3) The right of a person at general law to bring, or intervene in, proceedings on behalf of a company is abolished.

**I GO THROUGH BREACH OF WHATEVER DUTY**

**IF STANDING IS ISSUE: II DOES XXX HAVE STANDING TO BRING STATUTORY DERIVATIVE ACTION? S236(1)(A)**

- Member: s236(1)(a)(i)
- Officer: s236(1)(a)(ii)

**II WILL LEAVE LIKELY BE GRANTED? S237(2)**

- 237(2)(a)      Is it probable that [COMPANY] will not bring proceedings itself?**
- Look at how board of directors responded to notice of intention to apply for leave

**237(2)(b)      Is [CLIENT] acting in good faith?**

The courts will likely be satisfied that [CLIENT] is acting in good faith as they honestly believe [CONDUCT] is wrong, and a thus a good cause of action exists (which is why they are seeking advice) (*Swansson v RA Pratt*). Furthermore, facts do not suggest [CLIENT] has a collateral purpose amounting to abuse of power if SDA is applied for (*Swansson v RA Pratt*).

- © *Swansson v RA Pratt*: good faith comprised of two interrelated factors:
  - Applicant honestly believes a good cause of action exists and has reasonable prospect of success
    - May be **dis**believed if no RP in circs could hold that belief.
  - Applicant is not seeking to bring the derivative suit for a collateral purpose that would amount to an abuse of process
    - Eg. if they brought it but didn't want to prosecute it to conclusion, just using it as a means for obtaining some advantage.