Personal and Derivative Rights

The historical foundation is found in **Foss v Harbottle**, that established two restrictive principles:

1. Only the company itself can sue for a wrong done to it, since it is a separate legal person, this is known as the proper plaintiff principle.
2. Courts will typically refuse to interfere in matters that could be properly ratified simply by a majority of members.

- **Exceptions to Foss v Harbottle;** Courts allowed shareholders to sue for ultra vires acts, failure to follow special majority rules, fraud on the minority, or the infringement of **personal rights**.
    - For example, in **Pender v Lushington**, the court confirmed that a right to vote is a personal property right that a member can enforce in their own name.

Statutory Remedies: The Oppression Remedy (**CA s 232**)

This is the remedy used when a member suffers commercial unfairness. This is conduct that is contrary to the interests of the members as a whole, or conduct that is “oppressive, unfairly prejudicial, or unfairly discriminatory.

- Ordinary disadvantage or discrimination is insufficient without "unfairness." (Ref. **Wade** Ref. **Catalano**)

A court may intervene if conduct of any affairs, acts/omissions, or resolutions are **(CA s 232):**

1. Contrary to the interests of members as a whole; or
2. Oppressive, unfairly prejudicial, or unfairly discriminatory.

   This Applies to (**CA s 234**):
    - Current members.
    - Former members (if the application relates to their removal).
    - Persons to whom shares were transmitted by will/law.
    - ASIC (based on investigations).

Under **CA s 233**, the Court has discretion to order a share buy-out (most common), wind up the company (least common), or modify the constitution.

Ground/Indicator	Legal Standard
Wade v NSW Rugby League	A company decision is not "oppressive" merely because it harms a shareholder, provided the directors acted in good faith, in the best interests of the company, and within the bounds of a reasonable business judgment.
Catalano v Managing Australia	The Court established that to determine if conduct is oppressive, unfairly prejudicial, or unfairly discriminatory, the test is strictly objective. It requires viewing the situation through the eyes of an independent commercial bystander: Is the conduct so unfair that reasonable directors would not consider it fair?
Sanford v Sanford Courier	Controlling directors act oppressively by exploiting their position to drain company profits through excessive remuneration while excluding minority shareholders from financial returns. The court found that manipulating company resources for majority benefit over that of the members as a whole violates corporate law, favouring a share buy-out as a remedy.
Watson v James	A shareholder cannot claim corporate oppression for actions that harm them only as a director or employee; the conduct must directly violate their rights **as a shareholder**.

Statutory Derivative Action (**CA s 236**)

A **statutory derivative action (SDA)** occurs when a member brings/intervenes in legal proceedings in the company's name for a wrong done to the company. The applicant must obtain court permission before proceeding with an SDA (**CA s 237**).

- Under **CA s 237(2)**, a Court **must** grant leave if:

a) Company unlikely to bring proceedings itself (usually due to director self-interest). (**CA ss 155-6, 201-2**)
b) Applicant is acting with proper motivation.
c) It is in the company’s best interest (considering commercial risks/scandals).
d) There is a serious legal question to be tried. (**CA ss 156-7, 202-3**)
e) 14 days written notice is given to the company.

Winding Up (**CA s 461**)

Under **CA s 461(1)(k)** a court may order a company be wound up if it is "just and equitable" to do. This typically applies in cases of:

- Deadlock in management.
- Fraud or lack of integrity by directors.
- Failure of "substratum" (where the company no longer pursues its main purpose).

Courts generally refuse winding up if an alternative remedy (like a share buy-out under **CA s 233**) is available and the member is acting unreasonably in seeking winding up.

Other Remedies

Under **CA s 1324**, a Court can order an injunction that restricts conduct that directly contravenes the Act (**CA**).

Under **CA s 247A**, a member can seek a court order to inspect the company records if acting in good faith and for a proper purpose.

Week 11: Process for Receivership, Schemes of Arrangements, Voluntary Administration, and Winding-up

A company is solvent if it can pay all its debts as and when they become due and payable; otherwise, it is insolvent [*CA s 95A*]. Courts apply a "cash-flow test" focused on commercial reality rather than a formal balance sheet [*Sandell v Porter*, *ASIC v Plymin*]. Insolvency is often presumed if a company fails to comply with a statutory demand for a debt (minimum $4,000) within 21 days [*CA s 459E, s 459C*]. External administration mechanisms include receivership, where a secured creditor appoints a practitioner to realize specific assets [*CA ss 416–434M*], and voluntary administration, which allows an independent practitioner to take control to maximize the company's chances of survival [*CA s 435A*]. Winding up (liquidation) is the final process of collecting and selling assets to pay creditors [*CA s 459A*]. In a liquidation, all unsecured debts in a class rank equally (pari passu) [*CA s 555*], but certain debts, such as the costs of the liquidation and employee entitlements, are given statutory priority [*CA s 556*]. Liquidators also have the power to recover "voidable transactions," such as unfair preferences given to certain creditors shortly before insolvency [*CA s 588FA*, *Airservices Australia v Ferrier*].

External Administration is a broad term that encompasses the group of legal processes utilised when a company is in financial distress. This sits on a spectrum that ranges from Rescue & Restructure (VA, SoA) to enforcement (Receivership) to termination (Liquidation, Winding-up).

Statutory Demands are formal legal demands for debts (minimum of $4,000) under **CA s 459E**. Failure to comply with the demand within 21 days creates a statutory presumption of insolvency that allows a creditor to apply to the Court for a court-ordered winding-up (**CA s 459F**).

- The presumptions for insolvency under **CA s 459C(2)** are: **(a)** failure to comply with a statutory demand **(b)** execution against property returned unsatisfied (by judgement) **(c)** appointment of a receiver **(d)** appointment of an official manager **(e)** winding up by court order **(f)** appointment of a provisional liquidator.

Receivership

Receivership is primarily a secured creditor remedy. A **receiver** is an externally appointed specialist responsible for controlling, protecting, or selling secured assets (loan collateral) to recover a debt for the appointing creditor. **Receivers** are considered an agent of the company, not the secured creditor (***Expo International Pty Ltd v Chant***). This means the company (not the creditor) is responsible for the receivers acts and default(s). Due to the receiver being an agent of the company, their appointment does not automatically terminate employee contracts (or the company's separate legal personhood). Alongside this, under **CA s 419**, receivers are responsible for debts incurred from G+S, or leased property during receivership.

- Unlike privately appointed receivers, **court-appointed receivers** are an officer of the court, which almost always terminates existing employment contracts.
- **CA s 420A(1)** creates the statutory duty of care for a 'controller' (receiver) when exercising a power of sale. This also creates a requirement to obtain "market value" **(a)** or the "best price reasonably obtainable" in the circumstances **(b)**
  - **Downsview Nominees Ltd v First City Corporation Ltd** affirmed the general law duty of a receiver to act in good faith and for a proper purpose.
  - **Jeogla v ANZ Banking Group (1999):** application of the **CA s 420A** duty of care in the sale of assets. The court found a receiver breached their duty by failing to take reasonable care to obtain the best price for cattle, specifically by choosing a rapid sale at meat value rather than seeking a higher price for breeding stock

Voluntary Administration

Voluntary Administration (VA) is an insolvency procedure where an independent specialist takes control of a company to investigate its viability. Their goal is to maximise the chances of the company continuing to exist, or to achieve a better return for creditors than immediate termination would bring (**CA s 435A**).

- VA brings with it a moratorium (legally authorised delay in the payment of debts) – that establishes a 'breathing space' for the specialist to assess the viability of the company without the creditors enforcing debts through legal proceedings in a 'dash for the money'. (**CA s 440D(1)**)

Deed of Company Arrangement

A **Deed of Company Arrangement** (DOCA) is an outcome of VA where creditors vote on a binding plan regarding how the company will be managed and how the company's debts will be compromised or repaid.

- Under **CA s 444D**, a DOCA binds all creditors, regardless of what they voted for.
  - **City of Swan v Lehman Brothers Australia Ltd (2009):** established the limitation that a DOCA cannot bind creditors to release personal claims against third parties such as auditors or parent companies (distinguishing it from a scheme of arrangement).

Schemes of Arrangement

Schemes of Arrangement (SoA) are a highly-flexible, court-supervised mechanism utilised for rearranging rights between a company and its creditors or members. Unlike VA, they are often utilised by solvent companies for complex mergers or restructures.