SUPREME COURT OF QUEENSLAND

CITATION:	*Asia Pacific Joint Mining Pty Ltd v Allways Resources Holdings Pty Ltd & Ors* [2018] QCA 48
PARTIES:	**ASIA PACIFIC JOINT MINING PTY LTD** ACN 156 619 484 (appellant) **v** **ALLWAYS RESOURCES HOLDINGS PTY LTD** ACN 154 218 256 (first respondent) **McKAY BROOKE RESOURCES LIMITED** (second respondent) **SAMGRIS RESOURCES PTY LTD** ACN 147 457 181 (third respondent)
FILE NO/S:	Appeal No 4711 of 2017 SC No 11618 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 74 (Bond J)
DELIVERED ON:	23 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	11 October 2017
JUDGES:	Gotterson and McMurdo JJA and Jackson J
ORDER:	**The appeal be dismissed with costs.**
CATCHWORDS:	CORPORATIONS – WINDING UP – OTHER GROUNDS FOR WINDING UP – JUST AND EQUITABLE – OTHER – CASES – where the appellant is the majority shareholder in a company, the third respondent – where the first and second respondents are the minority shareholders in the third respondent company – where the respondents claimed that the affairs of that company had been conducted in a manner which was oppressive or unfairly prejudicial to, or unfairly discriminatory against, them as the minority shareholders – where the respondents further or alternatively claimed that the company's affairs had been conducted in a manner which was contrary to the interests of the members as a whole – where the respondents claimed relief in the form of an order for the winding up of the company under s 461 of the *Corporations Act* 2001 (Cth), or, alternatively, that the appellant purchase their shares at a price to be determined by

the court once the court had decided that they should have that relief under s 233 of the *Corporations Act* 2001 (Cth) – whether the learned primary judge erred in ordering the company be wound up rather than that the appellant purchase the respondent's shares

CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERS' REMEDIES AND INTERNAL DISPUTES – OPPRESSIVE OR UNFAIR CONDUCT – RELIEF – where the learned primary judge found that the appellant's conduct had been oppressive or unfairly prejudicial to, or unfairly discriminatory against, the respondents – where the learned primary judge held that the respondents had established an entitlement to remedy under s 232(d) and s 232(e) of the *Corporations Act* 2001 (Cth) – where there was no challenge to those findings on appeal – where s 467(4) of the *Corporations Act* 2001 (Cth) provides for when a winding up order must be made when some other remedy is available to the applicants for an order – where the remedy of ordering the appellant to purchase the respondents' shares was also available to the respondents – whether the learned primary judge erred in construing s 467(4) of the *Corporations Act* 2001 (Cth) – whether the learned primary judge should have treated winding up as a remedy of last resort

Corporations Act 2001 (Cth), s 232(d), s 232(e), s 233, s 461, s 467(4)
Companies Act 1862 (UK), s 79(5)
Companies Act 1948 (UK), s 210, s 225(2)
Companies (Qld) Code, s 320(2), s 367(3), s 364(1)

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304; [2009] HCA 25, considered
Charles Forte Investments Ltd v Amanda [1964] 1 Ch 240, cited
Ebrahimi v Westbourne Galleries Ltd [1973] AC 360, cited
Exton & Anor v Extons Pty Ltd & Ors [2017] VSC 14, cited
Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd [1998] NSWSC 413, cited
French & Ors v Smith & Ors [2004] VSCA 207, cited
Hillam v Ample Source International Ltd (No 2) (2012) 202 FCR 336; [2012] FCAFC 73, considered
Ian Allan Byrne v AJ Byrne Pty Ltd [2012] NSWSC 667, cited
In the matter of Amazon Pest Control Pty Ltd [2012] NSWSC 1568, cited
Loch v John Blackwood Limited [1924] AC 783, cited
Munstermann v Rayward [2017] NSWSC 133, cited
Netbush Pty Ltd v Fascine Developments Pty Ltd [2005] 189 FLR 320; [2005] WASC 73, cited
Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd [2010] WASC 38, cited
Re a Company (No 002567 of 1982) [1983] 1 WLR 927, cited

Re Bluechip Development Corporation (Cairns) Pty Ltd [2011] QSC 368, cited
Re Cooper (Cuthbert) & Sons Ltd [1937] Ch 392, cited
Re Dalkeith Investments Pty Ltd (1984) 9 ACLR 247, applied
Re Hollen Australia Pty Ltd; *Holt v Burnside* [2009] VSC 95, cited
Re Suburban Hotel Company (1867) LR 2 Ch App 737, cited
Re Weedmans Ltd [1974] Qd R 377, cited
Short v Crawley (No 30) [2007] NSWSC 1322, cited
Szencorp Pty Ltd v Clean Energy Council Ltd [2009] FCA 40, cited
Tomanovic & Anor v Global Mortgage Equity Corporation Pty Ltd & Anor (2011) 288 ALR 310; [2011] NSWCA 104, cited
Tomanovic v Argyle HQ Pty Ltd [2010] NSWSC 152, cited
Turner v Ulicorp Pty Ltd [2007] NSWSC 206, cited
United Rural Enterprises Pty Ltd v Lopmand Pty Ltd & Ors [2003] NSWSC 910, cited
Vujnovich v Vujnovich [1989] 3 NZLR 513; [1989] UKPC 21, considered

COUNSEL: S Couper QC, with J J Baartz, for the appellant
K E Downes QC, with S Hooper, for the first and second respondents

SOLICITORS: Corrs Chambers Westgarth for the appellant
Holding Redlich for the first and second respondents

[1] **GOTTERSON JA:** I agree with the order proposed by McMurdo JA and with the reasons given by his Honour.

[2] **McMURDO JA:** The appellant is the majority shareholder in Samgris Resources Pty Ltd ("Samgris"). Allways Resources Holdings Pty Ltd and McKay Brooke Resources Ltd, two of the respondents to this appeal, are its minority shareholders. I will refer to them as the respondents. Samgris is also a respondent, but not an active participant.

[3] The respondents brought this proceeding in the trial division, seeking orders under s 233 or s 461 of the *Corporations Act* 2001 (Cth) ("the CA"). They claimed that the affairs of Samgris had been conducted in a manner which was oppressive or unfairly prejudicial to, or unfairly discriminatory against, them as the minority shareholders, within the meaning of those expressions in s 232(e) of the CA. Further or alternatively, they claimed that the affairs of Samgris had been conducted in a manner which was contrary to the interests of the members as a whole, within the meaning of s 232(d). Under s 233, they claimed relief in the form of an order for the winding up of Samgris or alternatively, that the appellant purchase their shares at a price to be determined by the court once the court had decided that they should have that relief under that provision.

[4] They also relied upon s 461, in seeking that order for the winding up of Samgris. Under s 461, the alleged grounds were that:

- the directors had acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in a manner that was unfair or unjust to other members (s 461(1)(e)).
- the affairs of Samgris were being conducted in a manner which was oppressive or unfairly prejudicial to, or unfairly discriminatory against, the minority shareholders or in a manner that was contrary to the interests of the members as a whole (s 461(1)(f)).
- there had been conduct, by or on behalf of Samgris, which was oppressive or unfairly prejudicial to, or unfairly discriminatory against, the minority shareholders or was contrary to the interest of the members as a whole (s 461(1)(g)).
- it was just and equitable that Samgris be wound up (s 461(1)(k)).

[5] After a seven day trial, in which the trial judge (Bond J) received extensive evidence and argument,[1] the respondents' claims were upheld. Bond J held that the relationship between the appellant and the respondents, as the shareholders of Samgris, should be characterised as a "quasi-partnership" or "a majority controlled business requiring mutual cooperation and a level of trust".[2] He found that the relationship between the parties had irretrievably broken down and that this had been caused by the appellant's conduct.[3] He further held that the appellant's conduct had been oppressive and unfairly prejudicial to, or unfairly discriminatory against, the respondents within the meaning of s 232(e).[4] And he held that the respondents had established an entitlement to a remedy also under s 232(d).[5]

[6] In this appeal there is no challenge to any of those findings. The appellant's challenge is to the relief which was granted, which was an order that Samgris be wound up. The appellant's case is that the judge made legal errors in deciding to order a winding up, rather than a purchase by the appellant of the respondents' shares at a price to be determined by the court.

[7] For the reasons that follow, I conclude that the judge was correct to order the winding up of Samgris and I would dismiss the appeal.

The relevant facts and circumstances

[8] Samgris was incorporated in 2010 by Dr Wanfu Huang for the purpose of undertaking coal exploration in Queensland. He became its sole director and shareholder. Through other companies controlled by him, he held coal exploration tenements.

[9] In 2011 and 2012, he successfully negotiated with Shaanxi Coal and Chemical Industry Group Co Ltd and Shaanxi Coal Geology Group Co Ltd, for their investment in Samgris. Dr Huang was to cause the relevant coal exploration tenements to be transferred to Samgris and they were to provide funds. Those companies (which I will call "the Shaanxi Parties") are entities owned by the

---

1 The written submissions totalled more than 500 pages.
2 *Allways Resources Holdings Pty Ltd & Anor v Samgris Resources Pty Ltd & Anor* [2017] QSC 74 at [356] ("the Primary Reasons").
3 Ibid at [359].
4 Ibid at [362].
5 Ibid at [371].

People's Republic of China. By any measure they are very large corporations, as the judge discussed.[6]

[10] The appellant is a company established by the Shaanxi Parties for their investment in Samgris. The negotiations resulted in the appellant holding 60 per cent of the shares in Samgris and Dr Huang's entities, the respondents, holding the balance.

[11] A number of agreements signed by the parties in 2011 and 2012 recorded the objectives and terms of their association. Samgris was to explore for and develop coal resources on its tenements.[7] Samgris was to be restructured in order to facilitate 60 per cent of its shares being held by the appellant. A total of $66 million was to be contributed by the appellant, made up of $11 million to be paid to Dr Huang's side and $55 million to be contributed as capital to Samgris by a number of instalments.

[12] By one of these agreements, described by the trial judge as the "Investment Agreement" and made between Samgris (when Dr Huang was its sole director and shareholder), Dr Huang and the Shaanxi Parties, the terms of the agreed contribution of $55 million were set out. At the same time as the appellant paid the $11 million to Dr Huang for part of its shareholding in Samgris, the appellant was to pay the first instalment of $22 million towards its agreed contribution of $55 million. The second instalment, in an amount of $22 million, was to be paid (subject to the satisfaction of certain conditions) within 12 months of the first instalment. The third instalment, an amount of $11 million, was to be paid (again subject to certain conditions) within a further 12 months.[8]

[13] However, the amount to be ultimately contributed by the appellant was subject to adjustment depending upon the quantity of the coal resources which were revealed by the exploration activities. It is unnecessary to discuss the agreed terms for that adjustment. What is relevant is that the second and third instalments were not paid and at the time of the trial, the parties were in dispute about whether all or part of those instalments, totalling $33 million, was payable.[9]

[14] By the Investment Agreement, the parties agreed that their contract would be governed by the law of the People's Republic of China and that they would commit any dispute to an arbitration to be conducted by the China International Economic and Trade Arbitration Commission. The trial judge noted that the respective merits of that dispute were not in issue in the trial and that it was the subject of an arbitration.[10]

[15] The judge found that from April 2012, there was an association between the members of Samgris which derived from the pre-existing relationship between Dr Huang and the Shaanxi Parties and which involved mutual cooperation and a level of trust between them.[11] He found that by the terms of agreements between the parties, there were restrictions on the transfer by a shareholder of its shares such that Dr Huang and the respondents were locked into that relationship.[12] There was an express agreement that both sides would participate in the conduct of the business of Samgris, by provisions for the nomination of directors, the constitution of a

---

6 Ibid at [36].
7 Ibid at [41].
8 Ibid at [50].
9 Ibid at [57(b)].
10 Ibid at [57(c)].
11 Ibid at [75].
12 Ibid at [79].

quorum for directors' meetings and the need for a certain level of majority vote which effectively required the concurrence of both sides for particular types of decisions.[13] The trial judge found Samgris to be:[14]

> "… the type of company for which winding up is regarded as the characteristic remedy where the working relationship [between the shareholders] predicated on mutual cooperation, trust and confidence has irretrievably broken down." (footnotes omitted)

[16] It is unnecessary to discuss the events, extensively analysed by the trial judge, by which he found that there were grounds for relief under both s 233 and s 461 of the CA. There is no challenge in any respect to the judge's analysis and his findings.

[17] The judge was not asked to determine the financial position of Samgris. As I have said, he was not asked to consider the merits of the dispute in which the respondents claimed that the appellant was bound to pay $33 million to Samgris. But he observed that there were three principal assets of the company: an amount of cash, the company's mining tenements (described by the judge as the EPCs) and its claim to the disputed $33 million. He observed that there would be a "high" potential for dispute about the valuation of the mining tenements and the claim for the $33 million, and that the valuation of that claim would be particularly complex.[15]

Relevant provisions of the CA

[18] Sections 232 and 233, within Part 2F.1 of the CA, are as follows:

> "**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."
>
> **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:

---

13 Ibid.
14 Ibid at [84].
15 Ibid at [383(c)].

(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 …"

[19] Section 461, within Part 5.4A of the CA provides, in part, as follows:

"**461 General grounds on which company may be wound up by Court**

(1) The Court may order the winding up of a company if:

...

(e) directors have acted in affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever that appears to be unfair or unjust to other members; or

(f) affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or in

a manner that is contrary to the interests of the members as a whole; or

(g) an act or omission, or a proposed act or omission, by or on behalf of the company, or a resolution, or a proposed resolution, of a class of members of the company, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be contrary to the interests of the members as a whole; or

…

(k) the Court is of opinion that it is just and equitable that the company be wound up…"

[20] Section 467(4) of the CA is as follows:

"(4) Where the application is made by members as contributories on the ground that it is just and equitable that the company should be wound up or that the directors have acted in a manner that appears to be unfair or unjust to other members, the Court, if it is of the opinion that:

(a) the applicants are entitled to relief either by winding up the company or by some other means; and

(b) in the absence of any other remedy it would be just and equitable that the company should be wound up;

must make a winding up order unless it is also of the opinion that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy."

[21] As already noted, the trial judge found that there were grounds for an order under s 233, by conduct within s 232(d) and (e). In particular, the court was thereby empowered by s 233 to order that Samgris be wound up or the appellant purchase the respondents' shares.

[22] As also noted, the trial judge found that there were grounds for the winding up of Samgris according to s 461(1)(k). In the terms of s 467(4), the judge formed the opinions referred to in sub-paragraphs (a) and (b), namely that the (present) respondents were entitled to relief either by winding up the company or by some other means and that in the absence of any other remedy, it would be just and equitable that the company should be wound up. He said that another remedy was available to the respondents because, as both sides accepted, the remedy of ordering the appellant to purchase the respondents' shares was available.[16] Consequently, the judge said, he was required by s 467(4) to make a winding up order unless he formed the opinion that the (present) respondents were acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.[17] He concluded that they were not acting unreasonably in preferring the relief of a

16 Ibid at [377].
17 Ibid at [376].

winding up order over the alternative of a purchase of their shares, so that the company should be wound up.[18] Consequently, he ordered that Samgris be wound up. It is against that order that this appeal is brought. By agreement of the parties, the order has been stayed pending the determination of this appeal.

The appellant's arguments

[23] The appellant argues that the trial judge made several errors in determining that the appropriate relief was a winding up order. It is said that any one of these errors warrants the relevant discretion being exercised afresh by this Court, and that it should now be ordered that the appellant buy the respondents' shares instead of the company being wound up.

[24] The first of these errors is said to have been a mistake in the construction in s 467(4), by which the judge considered that s 467(4) was engaged in the circumstances of this case. Focussing upon the words "instead of pursuing that other remedy", the argument is that in this case, there *was* another remedy being pursued, namely relief under s 233 for the purchase of the respondents' shares.

[25] It is convenient to deal with that point now. The remedies of a winding up order and a compulsory purchase of an applicant's shares are alternatives. Both may be claimed in a proceeding when it is commenced and as it is prosecuted to, and throughout, the trial. But ultimately an applicant will have to elect between them. In the present case, ultimately the respondents sought to have the company wound up, at which point they were not pursuing their other remedy. They did not abandon their claim for that alternative remedy, in that their claim in that respect was preserved in case the court was not persuaded to make a winding up order. But when they ultimately pressed for that order, they were not pursuing the other remedy in the relevant sense. The appellant's argument would confine s 467(4) to cases where an applicant had not prosecuted or had abandoned a claim for the alternative remedy. There would be no apparent purpose for confining the provision to such cases. And the application of the provision would be problematical, in at least many of those cases, because the "availability" of the alternative remedy and the reasonableness of the applicant's preference for a winding up order would require the existence of an apparent entitlement to that alternative remedy. In my view, this first argument cannot be accepted.

[26] The second of the appellant's arguments is that s 467(4) is not a constraint on the grounds of relief under s 233. It is argued that where relief is available under s 233, s 467(4) has no role to play. Instead, the court more broadly considers what is the appropriate relief in consequence of the conduct which is found within s 232.

[27] Next it is argued that if s 467(4) was engaged, the matters upon which the judge relied in concluding that Samgris should be wound up did not provide a basis for that conclusion. Part of this argument is a suggested error by the judge in the construction of s 467(4) in its provision for an opinion that an applicant for a winding up order is acting unreasonably. Ultimately, this is an argument that the judge ought to have applied the statement of McPherson J (as he then was), in considering the predecessor to s 467(4) (s 367(3) of the *Companies (Qld) Code*) in *Re Dalkeith Investments Pty Ltd*,[19] that:

---

18 Ibid at [385]-[387].

19 (1984) 9 ACLR 247 at 252.

> "… winding up is to be regarded as a remedy of last resort and one which ought not to be granted if some other less drastic form of relief is available and appropriate."

The reasoning of the trial judge

[28] Having characterised the relationship between the two sides as a quasi-partnership which required mutual cooperation and a level of trust, the judge said:

> "[359] … Samgris is not functioning, and cannot reasonably be expected in the future to, in the way intended … There is no real prospect that the directors nominated by the two sides can work together sensibly to reach the necessary agreement to be able to conduct the company's business in the future.
>
> [360] In the circumstances of this case, in the absence of any other remedy, it would be just and equitable that Samgris should be wound up."

[29] The judge then turned to whether there was a remedy available upon grounds in s 232(d) and (e). He concluded that the (present) respondents were entitled to relief, upon these grounds, "either by winding up of the Company or by other means."[20]

[30] The judge then considered s 467(4). He said that the case was an application of the kind described in the chapeau to the section and that by his findings, he had formed the opinions referred to in sub-paragraphs (a) and (b). The result, he said, was that he was required to make a winding up order unless he formed "positive opinions" that some other remedy was available and that the applicants were acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.[21]

[31] The judge said that another remedy was available, namely that of the compulsory acquisition of the plaintiffs' shares. He observed that the only available buy-out order was one by which the majority shareholder bought out the minority shareholders. Dr Huang had given undisputed evidence that the minority could not afford to buy out the majority.

[32] He then considered a question of the onus of proof in the operation of the proviso in s 467(4). The plaintiffs argued that it was for the defendant to prove that they were acting unreasonably; the contrary was argued by the defendant. The judge preferred the plaintiffs' argument, because what followed the word "unless" was an expression of an exception to the general operation of s 467(4), so that the burden of proof would be upon the party to rely upon the exception.[22] Ultimately however, the judge held that if the onus was on the plaintiffs, they had discharged it.[23]

[33] After discussing that question of the onus of proof, the judge continued:

> "[380] In this case there is no suggestion that Samgris is not solvent. Its draft financial accounts for the year ended 31 December 2015 strongly suggest the contrary because they record net assets of

---

20 Primary Reasons at [372].
21 Ibid at [376].
22 Ibid at [378], citing *Vines v Djordjevitch* (1955) 91 CLR 512 at 519; [1955] HCA 19.
23 Primary Reasons at [386].

> in excess of $18 million before having any regard to the disputed $33 million receivable from APJM. I accept, therefore, that in forming the opinion and in exercising the discretion I have as to remedy based on the findings I have made, I should regard it to be an extreme step to wind up a solvent company." (footnotes omitted)

[34] That description of a winding up order as an "extreme step" was discussed earlier in the judgment when, before considering the facts of the case, the judge set out a number of legal propositions. Most relevantly, the judge said this:

> "[16] [T]he making of a winding up order on the just and equitable ground involves the exercise of a judicial discretion. It would be wrong to regard an order for the winding up of a solvent company as a "last resort". Although some cases have used that language, such an absolute statement seeks to impose a limitation on the discretion which is not justified by the wording of the statute: see generally the discussion in *Hillam v Ample Source International Ltd (No 2)* (2012) 202 FCR 336 per Emmett, Jacobson and Buchanan JJ at [8], [67] to [74], and see also the discussion of s 467(4) below. The better approach is that suggested in *Hillam* at [70], namely to regard it to be an extreme step to wind up a solvent company and to bear that consideration in mind when considering whether the remedy is appropriate on the facts of the particular case. It may also be relevant to consider –
>
> (a) whether the commercially sensible operations of the company in accordance with the incorporators' expectations has been frustrated;
>
> (b) whether continuation of the company would be a futility;
>
> (c) whether any loss of confidence is justified; and
>
> (d) whether the claimant is the person who is responsible for the breakdown of the relationship."

I have omitted the footnotes in that passage but the cases cited which had used the language of "last resort" were *Cumberland Holdings Ltd v Washington H Soul Pattinson & Co Ltd*[24] and the judgment of McPherson J in *Re Dalkeith Investments Pty Ltd* to which I have referred earlier.[25] As already noted, the trial judge's preference for the language of "an extreme step" to "a last resort" is challenged by the appellant's submissions.

[35] At that point, the judge discussed the interaction between s 233 and s 467(4). He observed that in some cases, grounds for winding up on the just and equitable ground under s 461(1)(k) may be established where the circumstances do not amount to oppression under s 232.[26] But he said that where the facts of the

---

24 (1977) 13 ALR 561.

25 (1984) 9 ACLR 247 at 252.

26 Primary Reasons at [17], citing *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672; [2001] NSWCA 91; *Nassar v Innovative Precasters Group Pty Ltd* (2009) 71 ACSR 343; [2009]

particular case reveal the availability of another remedy, either because oppression is established and other remedies are open under s 233, or for any other reason, it is necessary to consider s 467(4).[27] As I have noted, that proposition is challenged by the appellant's argument.

[36] The judge continued:[28]

> "(c) No implication that winding up is a last resort arises from s 467(4), or should be made in those terms: see *Re Bluechip Development Corporation (Cairns) Pty Ltd* [2011] QSC 368 per Peter Lyons J at [216]. Where s 467(4) applies, the Court is required to consider whether or not the opinions specified should be formed. If applicants are seeking to have a solvent company wound up instead of pursuing another available remedy, the fact that it is an extreme step to wind up a solvent company would be relevant to (but not necessarily determinative of) the question whether the Court should form the opinion that the applicants were acting unreasonably in pursuing that step instead of the other available remedy.
>
> (d) By way of example, in *Re Amazon Pest Control Pty Ltd* Black J specifically recognized the Courts' reluctance to wind up a solvent company, expressly bore in mind that it was an extreme step to make such an order, but nevertheless could not form the opinion that the applicant for the order was acting unreasonably in pursuing it. Black J made the order to wind up, although the order was stayed for a short period to permit the parties to explore the possibility of reaching another solution."

[37] The trial judge then stated a number of principles which he said governed the application of s 233. Citing *Campbell & Anor v Backoffice Investments Pty Ltd & Anor*,[29] he said that s 232 and s 233 were to be read broadly and that the imposition of judge-made limitations on their scope was to be approached with caution. Relevantly to this appeal, the judge said this about the exercise of the discretionary power in s 233:

> "[25] [I]n selecting the nature of the remedy concerned when a finding of oppression has been made, the discretion should be exercised with a view to ending the oppression. If there was no continuing oppression when a case came to trial, the weight of authority presently supports the view that the Court would retain power to make the orders for which s 233 provides; the fact that claimed relief was founded on conduct which was no longer continuing would be regarded as relevant but not necessarily determinative of the exercise of the discretion.
>
> [26] [F]or reasons expressed earlier in relation to winding up on the just and equitable ground, it would be wrong to approach the

---

NSWSC 342' *Doughty v Abboud* [2010] NSWSC 721 at [227]; *Re Amazon Pest Control Pty Ltd* [2012] NSWSC 1568 at [19].

27 Primary Reasons at [17].

28 Ibid.

29 (2009) 238 CLR 304 at [72]; [2009] HCA 25 ("*Campbell v Backoffice Investments Pty Ltd*").

> exercise of the discretion concerning remedy by regarding winding up a solvent company as a "last resort". Rather, that it is an extreme step to wind up a solvent company is a consideration which must be borne in mind when considering whether the remedy is appropriate on the facts of the particular case. Where some remedy other than winding up is available, it is necessary to consider the matters made relevant by s 467(4)." (footnotes omitted)

[38] The judge then compared the terms of s 232(d) and (e) with those of s 461(1)(e), (f) and (g). He noted that there were differences but some similarities.[30] In particular, he said that the language used in s 461(1)(f) and (g) mirrored the language used in s 232(d) and (e).[31] He described the significance of that similarity as follows:[32]

> "It is a settled canon of statutory interpretation that where the same words appear multiple times in a single piece of legislation, they should ordinarily be given the same meaning. In *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618, Mason J (as he then was) spoke of the "sound rule of construction to give the same meaning to the same words appearing in different parts of a statute unless there is reason to do otherwise". Given that a winding up order is an available remedy under both sets of provisions, ss 461(1)(f) and (g) do not appear to contemplate any avenues of relief beyond those available in s 232." (footnotes omitted)

[39] The effect of his reasoning was that when exercising either of the relevant discretionary powers, namely those in s 233 or the power in s 461(1), a court should regard the winding up of a solvent company as "an extreme step" and should act according to the requirements of s 467(4).

[40] Later in his judgment, having again stated that it would be an extreme step to wind up a solvent company, the judge said that this was to be "balanced" against a number of considerations which he described as follows:

> "[382] First, the operations of Samgris are relatively confined. Nothing of significance has happened in its operations for some little time. The persons affected by it being wound up will principally be Dr Huang, the minority shareholders and APJM.
>
> [383] Second, no offer is on the table. Rather the share buy-out option would involve my ordering APJM to purchase the plaintiffs' Samgris shares at a price to be determined by the Court on a date to be fixed after the culmination of a further judicial process. The requisite further litigation would carry with it the virtual inevitability of time, cost and further uncertainty. In this regard, I make the following observations:
>
> (a) APJM submitted that it was not legitimate for the plaintiffs to point to such considerations as justifying a submission that they would not be unreasonable in

---

30 Primary Reasons [28].
31 Ibid at [29].
32 Ibid at [30].

pursuing the remedy of winding up instead of the remedy of share-buy out by APJM.

(b) However, I reject that contention. Similar considerations were considered relevant in *Hillam*.

(c) I have no evidence from either side addressing the extent of time and cost which would be involved, but it would inevitably be considerable. I observe:

(i) There would be have to be valuation evidence necessarily adduced from each side, aimed at working out the value to be attributed to the plaintiffs' 40% shareholding.

(ii) That would require consideration of the true net asset position of Samgris.

(iii) There are 3 principal assets: cash, the EPCs and the chose in action against APJM for the disputed $33 million receivable.

(iv) The potential for dispute in the approach to be taken to the valuation of the latter two assets would be high. The valuation of the chose in action would be particularly complex.

(d) Further, I have no evidence as to the financial position of APJM. The facts that APJM is owned by the Shaanxi Parties and they are companies of significant substance does not mean that APJM should be so regarded. Accordingly, there is uncertainty whether APJM would be able to comply with any buy-out ordered by the Court and at least the possibility that a buy-out order might still end up with a winding up of Samgris.

[384] Third, winding up would introduce a third party (namely the liquidators) who could bring an objective mind to the realization of the assets and liabilities of Samgris, including Samgris' chose in action against APJM for the recovery of the $33 million receivable. The liquidators could form a view whether there was merit in the pursuit of APJM for the monies. True it is the liquidators would have to form a view about value in order to make the decisions involved in performing their duty. There would be at least a possibility that Samgris might become involved in further litigation. But it would not necessarily involve any direct incurrence of costs by the plaintiffs." (footnotes omitted)

[41] Having set out those considerations, the judge concluded that it was "entirely reasonable [for the plaintiffs] to choose to avoid the practical certainty of being directly subjected to the time, cost and uncertainty involved with further litigation concerning the value of any buy-out offer and the potential uncertain consequences

of obtaining a buy-out order."[33] He thereby concluded that the appropriate relief was to order that Samgris be wound up.

Consideration of the appellant's arguments

[42] It is convenient to discuss first the construction of s 467(4) before going to the interaction of that provision and s 232 and s 233.

[43] Like the trial judge, I am of the view that the relevant onus was upon the appellant in seeking to establish the exception to the general requirement that a winding up order be made.

[44] The judge rejected the proposition that, according to s 467(4), a winding up order should be made only as a last resort. He regarded that as an undue limitation on the discretion which is not justified by the wording of the statute.[34] Clearly, the discretion must be exercised according to the terms of this provision. But the question is one of the proper construction of those words and, as I will discuss, the cases which have employed the language of "last resort" have not departed from that language.

[45] In essence, this question of construction involves the meaning of "unreasonably" in the proviso in s 467(4). Undoubtedly it requires an objective assessment of the applicant's preference for a winding up order, rather than a consideration of whether the applicant believes that it has good reason to prefer that outcome. But to what extent, if at all, is the reasonableness of the applicant's position affected by the consequences for others of a winding up? In particular, in a given case, could those consequences outweigh the applicant's interests in obtaining a winding up where that is the only adequate outcome from its perspective?

[46] In my view, the reasonableness of the applicant's position is to be assessed by reference to the consequences of the events and circumstances upon which the application is founded and what is necessary to redress them. If they could be redressed only by a winding up, then the pursuit of a winding up order would not be unreasonable in the relevant sense. On the other hand, if there is an alternative remedy which would equally redress those consequences, then an applicant's preference for a winding up order would usually be considered to be unreasonable, because ordinarily the winding up of a solvent company will have far reaching effects. It will not only deprive the other shareholders of their investment in a solvent enterprise, but it will also be likely to affect the interest of others, such as the company's employees and third parties whose interests from transacting business with the company would be affected. It is the likelihood of substantial and wide ranging prejudice of this kind which would cause judges to describe a winding up of a solvent company in this context as an extreme step. In *Hillam v Ample Source International Ltd (No 2)*,[35] the Full Court of the Federal Court (Emmett, Jacobson and Buchanan JJ) said that although there is no presumption against the winding up of a solvent company, a court should bear in mind the "warnings given in the authorities, that an order to wind up a solvent company is an extreme step".

[47] The evident purpose of the proviso in s 467(4) is to avoid the extreme step of a winding up if there is an alternative and adequate remedy. Consequently a winding

---

33 Ibid at [385].
34 Ibid at [16].
35 [2012] FCAFC 73; (2012) 202 FCR 336 at 350 [70].

up will be ordered if there is no other remedy which is adequate, in that it would redress the consequences of the facts and circumstances which are the basis for relief. This is another way of saying what McPherson J said in *Re Dalkeith Investments Pty Ltd* about the statutory predecessor of s 467(4) namely "that winding up is to be regarded as a remedy of last resort and which ought not to be granted if some other less drastic form of relief is available and appropriate."[36] In referring to a winding up as "drastic form of relief", McPherson J was referring to the far reaching consequences of a winding up. In referring to an alternative form of relief which was "appropriate", his Honour was referring to what was necessary, in the interests of the applicant, to redress the consequences of the relevant events and circumstances.

[48] That principle has been endorsed in many cases: see for example: *French & Ors v Smith & Ors*;[37] *Netbush Pty Ltd v Fascine Developments Pty Ltd*;[38] *Turner v Ulicorp Pty Ltd*;[39] *Short v Crawley (No 30)*;[40] *Re Hollen Australia Pty Ltd*; *Holt v Burnside*;[41] *Tomanovic & Anor v Global Mortgage Equity Corporation Pty Ltd & Anor*;[42] *In the matter of Amazon Pest Control Pty Ltd*[43] and *Ian Allan Byrne v AJ Byrne Pty Ltd*.[44]

[49] In *Short v Crawley (No 30)*, White J (as he then was) discussed the statement by McPherson J in *Re Dalkeith Investments Pty Ltd* and explained its relevance to the operation of s 467(4) in terms which I would respectfully adopt:[45]

> "In *Re Dalkeith Investments Pty Ltd* (1984) 9 ACLR 247, McPherson J … said (at 252) that winding-up is to be regarded as a remedy of last resort and one which ought not to be granted if some other less drastic form of relief is available and appropriate. Presumably, if some other less drastic form of relief is available and appropriate, it can then be seen that the applicant for winding-up is acting unreasonably in seeking such an order, even if such an applicant has cogent reasons to advance in support of the application … [W]here the various parliaments have re-enacted s 367(3) of the *Companies Code* as s 467(4) of the *Corporations Law* and then as s 467(4) of the *Corporations Act* … it may be taken that the legislatures have adopted the judicial construction of the provision, particularly where the construction is by an acknowledged authority in the field."

[50] Against those authorities is *Re Bluechip Development Corporation (Cairns) Pty Ltd*[46] where that passage from the judgment of White J was criticised as follows:[47]

> "In *Re Dalkeith Investments Pty Ltd* it was said that the effect of an earlier provision similar to s 467(4) of the *Corporations Act* was that

---

36 (1984) 9 ACLR 247 at 252.
37 [2004] VSCA 207 at [122].
38 [2005] 189 FLR 320 at 337 [72]; [2005] WASC 73.
39 [2007] NSWSC 206 at [23].
40 [2007] NSWSC 1322 at [1222].
41 [2009] VSC 95 at [78]-[81].
42 [2011] NSWCA 104 at [289].
43 [2012] NSWSC 1568 at [31].
44 [2012] NSWSC 667 at [79].
45 [2007] NSWSC 1322 at [1222].
46 [2011] QSC 368.
47 Ibid at [216].

> winding up "is to be regarded as a remedy of last resort and one which ought not to be granted if some other less drastic form of relief is available and appropriate". In *Short v Crawley (No 30)* (*Short*) with respect to this statement, it was said, "Presumably, if some other less drastic form of relief is available and appropriate, it can then be seen that the applicant for winding up is acting unreasonably in seeking such an order, even if such an applicant has cogent reasons to advance in support of the application." ... Section 467(4) identifies two matters that, taken together, would justify not making a winding up order, namely, that some other remedy is available to the applicant, and that the applicant is acting unreasonably in seeking to have a company wound up instead of pursuing another remedy. The passage from *Short*, in my respectful opinion, gives no weight to the reference to an applicant acting unreasonably." (footnotes omitted)

[51] In my respectful opinion, that criticism of *Short v Crawley (No 30)*, and thereby of *Re Dalkeith Investments Pty Ltd*, did not pay sufficient regard to White J's reference to an alternative remedy which is "appropriate", meaning that it is appropriate to redress the position in which the appellant or the company have reached as a result of the relevant events and circumstances.

[52] It follows that I differ from the trial judge in the present case, insofar as he declined to apply the statement in *Re Dalkeith Investments Pty Ltd*. His Honour apparently regarded that statement as being too restrictive of the power to order a winding up, even where, as he recognised, a court should keep in mind that the winding up of a solvent company is an extreme step. In my view, that is a warning which is not inconsistent with what was said in *Re Dalkeith Investments* and the cases which have applied it.

[53] It follows that the appellant's submission, which criticises the trial judge for rejecting the statement in *Re Dalkeith Investments*, should be accepted.

[54] What must now be considered is the appellant's argument that the discretion under s 233 is not confined by the way in which the discretion under s 461 is confined by s 467(4) and that where s 233 is engaged, s 467(4) is irrelevant.

[55] The argument emphasises the statement by French CJ in *Campbell v Backoffice Investments Pty Ltd*[48] that:

> "Their language and history indicate that ss 232 and 233 are to be read broadly. The imposition of judge-made limitations on their scope is to be approached with caution."

In the same case, Gummow, Hayne, Heydon and Kiefel JJ said that:[49]

> "[T]he power given to the court by s 233(1)(d) should not be hedged about by implied limitations".

[56] Referring to those passages, the Full Federal Court in *Hillam v Ample Source (No 2)* noted that the plurality's observation had been footnoted with reference to *Owners*

---

48 (2009) 238 CLR 304 at 334 [72].

49 (2009) 238 CLR 304 at 361 [178].

of Ship Shin Kobe Maru v Empire Shipping Company Inc, where the High Court said:[50]

> "It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words."

[57] Those statements, however, provide little support for the appellant's present argument. In *Campbell v Backoffice Investments Pty Ltd*, there was no occasion to consider the interaction of s 233 and s 467(4). Nor was it relevant to consider whether the drastic or extreme nature of a winding up order should affect a court's exercise of the discretion under s 233 where there is an alternative and appropriate remedy under that provision.

[58] In *Hillam v Ample Source (No 2)*, a winding up order was sought but only upon grounds which were in s 232 and not by reference to s 461. Nevertheless, as already discussed, the Full Court accepted that a court should act upon "the warnings given in the authorities, that an order to wind up a solvent company as an extreme step."[51] The Court added that under s 233:

> "The real question is whether a winding up order was appropriate to deal with and address the grounds for relief which had been established".[52]

[59] No authority is cited for the argument that where, as in the present case, a ground is established for a winding up under s 233 as well as a ground for the same order under s 461(1)(f), (g) or (k), the court should decide whether to order a winding up without reference to s 467(4). In my opinion, that argument cannot be accepted.

[60] There are two steps to that present argument. The first is that the discretion to order a winding up under s 233 is unaffected by the considerations which are expressed in s 467(4). The proposition is inconsistent with the authorities. In *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd*,[53] a case involving the corresponding "oppression" provisions in the *Corporations Law*, Young J said that:[54]

> "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."

Those statements have been applied in many cases: see for example *Szencorp Pty Ltd v Clean Energy Council Ltd*;[55] *Tomanovic v Argyle HQ Pty Ltd*;[56] *Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd*;[57] *Short v*

---

50 (1994) 181 CLR 404 at 421.
51 (2012) 202 FCR 336 at 350 [70].
52 (2012) 202 FCR 336 at 351 [70].
53 [1998] NSWSC 413; 28 ACSR 688.
54 (1998) 28 ACSR 688 at 742.
55 [2009] FCA 40 at [70].
56 [2010] NSWSC 152 at [44] and [46].
57 [2010] WASC 38 at [20].

Crawley (No 30);[58] *United Rural Enterprises Pty Ltd v Lopmand Pty Ltd & Ors*;[59] *Munstermann v Rayward*;[60] *Exton & Anor v Extons Pty Ltd & Ors*.[61]

[61] The second step in the appellant's argument is that, assuming that the discretion under s 233 is broader than that which is confined by s 467(4), a court may disregard the latter provision even though, upon its findings, it is engaged. There is nothing in the text of s 233 or s 467(4) which would support that proposition. Nor is there anything in the context of those provisions or in their apparent purposes which does so.

[62] As the present case illustrates, there will often be facts and circumstances by which the court has powers both under s 233 and s 461. Conduct in the nature of oppression can make it just and equitable that a company be wound up. In such cases, s 467(4) will not be engaged by the exercise of a judicial discretion. Rather, it will be engaged by an application being of the kind described in the chapeau to the provision, and by the formation of the court's opinion that the applicant is entitled to relief, either by winding up the company or by some other means, and that in the absence of any other remedy, it would be just and equitable that the company should be wound up. Where, as in the present case, that opinion is reached, the provision by its mandatory terms, requires a winding up order unless the court is also of the opinion which is described in the proviso. The requirements of s 467(4) cannot be avoided by a court declaring that it is exercising only the discretion under s 233.

[63] It is, of course, a question for the court to decide upon the appropriate relief. But where it is engaged, s 467(4) confines the exercise of that discretion, whether or not there is also a claim for relief under s 233. The consequence of that operation of s 467(4) is unremarkable, once it is understood that the discretion under s 233 is itself subject to a substantially similar limitation.

[64] Consequently the trial judge was correct in regarding himself as bound to apply s 467(4).

[65] Of the appellant's arguments discussed thus far, I have accepted the criticism of the trial judge's rejection of what was said in *Re Dalkeith Investments Pty Ltd* and like statements in other cases. For that reason, it must be accepted that his consideration of the ultimate question (whether to wind the company up) may have been too generous to the plaintiffs' argument, so that it would be necessary for this Court to exercise the relevant discretion. Although the discretion would have to be considered afresh, it is convenient to discuss its exercise by reference to the judge's reasoning.

The application of s 467(4)

[66] The considerations which the judge considered relevant were discussed at paragraphs [382] to [384] of the Primary Reasons, which I have set out above at [40]. The appellant's argument criticises that reasoning in several respects.

---

58 [2007] NSWSC 1322 at [1220].

59 [2003] NSWSC 910 at [26]; (2003) 47 ACSR 514, where Campbell J (as he then was) said that whilst the decision of Young J concerning the remedy which was appropriate in that case was varied on appeal, there was nothing in the judgment of the Court of Appeal which cast doubt upon this statement of principle.

60 [2017] NSWSC 133 at [22].

61 [2017] VSC 14 at [42].

[67] First it is said that it was irrelevant that the operations of Samgris were "relatively confined" and that the persons affected by a winding up would be principally its shareholders. That criticism has some force. Those observations tended to understate the impact upon the appellant as the majority shareholder of a solvent company.

[68] The appellant criticises the judge's statement that "no offer is on the table", saying that this was an irrelevant comment. However, in context, it was part of the judge's description of an obviously important consideration, namely that an order for a buy-out would require the court to determine, by further extensive and expensive litigation, the price to be paid by the appellant for the respondent's shares. In paragraph [383], the judge referred not only to the time and cost which would be involved in that course, but also the uncertainty about its outcome. Critically, he made these observations:

> "I have no evidence as to the financial position of [the appellant]. The facts that [the appellant] is owned by the Shaanxi Parties and that they are companies of significant substance does not mean [the appellant] should be so regarded. Accordingly, there is uncertainty whether [the appellant] would be able to comply with any buy-out ordered by the Court and [there is] at least the possibility that a buy-out order might still end up with a winding up of Samgris."

[69] At [384] of the Primary Reasons, the judge described some advantages from a winding up, in that although a liquidation might result in further litigation, that would be at the cost of the liquidators and not, at least directly, at the cost of the plaintiffs. In my view, that was a relevant consideration in favour of a liquidation. Although, under a buy-out order, the court could have required the appellant to pay the cost of the valuation. Initially the respondents could be put to considerable cost, especially in contending for a higher valuation for the tenements and the company's claim against the appellant.

[70] In my view, the critical considerations are that not only would the valuation of the respondents' shareholding be an extensive, expensive and time consuming process, but there is also a real uncertainty as to whether the appellant would be willing and able to pay the price which is ultimately determined. The appellant is a company incorporated only to hold the shares in Samgris. There is no indication that without the support of the Shaanxi Parties, it would be able to comply with an order for the purchase of the respondents' shares. The Shaanxi Parties are not parties to this litigation. They have not undertaken to cause the appellant to comply with the share buy-out order, if it is made. The appellant's counsel candidly told this court that the possibility that the assessed value would be too high a price to be affordable could not be excluded.[62] In answer to the court's question of whether it would be open to the court to impose a condition of a buy-back order that security for the appellant's performance be given by its parent companies, the appellant's counsel said that such a condition could be imposed, but that "[w]e would have to obtain instructions about whether that would be suitably forthcoming." Counsel agreed that in principle, there could be a guarantee by the parent companies, the Shaanxi Parties, in an unlimited amount. Tellingly, no such instructions were obtained prior to the hearing (although the problem was raised in the Primary Reasons and the

---

62 Transcript 1-45.

respondents' outline), or have been obtained, even though it is now some months since the hearing of the appeal.

[71] Consequently, the appeal must be decided upon the premise, as discussed by the trial judge, that the performance of a buy-out order is uncertain and that the ultimate outcome might still have to be a winding up because the appellant would not comply with the order.

[72] Ultimately, the appellant urges this Court to make an order which, it candidly admits, it might not perform. The areas of uncertainty about its performance are largely matters within its own knowledge. It has offered no evidence of the preparedness of the Shaanxi Parties to support its compliance with the order which it seeks.

[73] The buy-out order proposed by the appellant is another remedy which is available. But for these reasons, the respondents are not unreasonable in seeking to have the company wound up.

Conclusion and orders

[74] I agree with the conclusion of the trial judge. I would order that the appeal be dismissed with costs.

[75] **JACKSON J:** I agree with McMurdo JA.

[76] In my view, it is appropriate to add something about the statutory history of s 467(4). There are two reasons. First, like McMurdo JA, I differ from the Judge below as to the test to be applied, because I favour McPherson J's approach in *Re Dalkeith Investments Pty Ltd*,[63] whereas the Judge below did not. It is appropriate, therefore, to explain why I favour the *Re Dalkeith Investments Pty Ltd* approach, in addition to my acceptance of McMurdo JA's reasoning. Second, there is some awkwardness in applying the text of s 467(4) where it appears in the context of the current *Corporations Act* 2001 (Cth). The history explains, at least in part, how that has come to be so.

[77] The just and equitable ground for an order that a company be wound up on the application of a contributory has appeared from the first modern *Companies Acts*, more specifically s 79(5) of the *Companies Act* 1862.[64] It is accepted that the concept was borrowed from the law of partnership. However, there were clear differences between the legal structure and underlying contractual relationships of partners and members of a company. They led to a number of principles, developed by the courts, that restricted the circumstances when a winding up order would be made on the just and equitable ground,[65] at least until reversed by later decisions[66] or statutes.

[78] The presently relevant principle is that the court would decline to make a winding up order on the just and equitable ground where the member who sought it had an alternative means of redress short of such an order, which I will call the "alternative

---

63 (1984) 9 ACLR 247.
64 FH Callaway, *Winding Up on the Just and Equitable Ground*, Law Book Co, 1978, p 2.
65 For example, *Re Suburban Hotel Company* (1867) LR 2 Ch App 737, 740.
66 For example, *Loch v John Blackwood Limited* [1924] AC 783, 788-794.

remedy principle".[67] Underlying this principle was that the legislation otherwise required a majority of 75 per cent of members for a resolution to wind up the company at the instance of members.

[79] The zenith of the alternative remedy principle was reached in 1937 in *Re Cooper (Cuthbert) & Sons Ltd*,[68] where a petition to wind up on the just and equitable ground was refused on the basis that the petitioners could have brought other proceedings to establish their entitlement to be registered as members of the company. That case was overruled in 1973 in *Ebrahimi v Westbourne Galleries Ltd*.[69]

[80] The origin of s 467(4) lies in the Cohen Report of 1945,[70] that is, long before *Cooper (Cuthbert) & Sons Ltd* had been overruled, and the amendments which were made to Companies' legislation in the United Kingdom and the Australian States following that report.

[81] The Cohen Report is best remembered for recommending a statutory provision that:

> "the Court, if satisfied that a minority of the shareholders is being oppressed and that a winding up order would not do justice to the minority, should be empowered, instead of making a winding up order, to make such other order, including an order for the purchase by the majority of the shares of the minority at a price to be fixed by the Court, as to the Court may seem just."[71]

[82] However, another recommendation of the Cohen Report concerned the principle that a winding up order would be refused on the just and equitable ground if there was an alternative remedy available. The committee recommended, *inter alia*, that:

> "the Court should be empowered to make a winding-up order notwithstanding the existence of an alternative remedy if the Court considers it just and equitable to do so or, instead of making a winding up order, to impose a settlement of the matter in dispute between the shareholders of the company."[72]

[83] These recommendations found voice in the amendments made to the *Companies Act* 1948.[73] Those amendments were quickly transposed into the Australian context, by State Companies legislation. It is unnecessary to trace all the steps, but they were carried into the Australian States' 1961 Uniform Companies Legislation ("UCA") as s 186,[74] providing a remedy in cases of oppression, and s 225(3)[75] which corresponded in substance to the current terms of s 467(4).

---

67 See *Re Professional Commercial and Industrial Benefit Building Society* (1871) LR 6 Ch App 856, 862, referred to in *Palmer's Company Law*, Thomson Reuters, 2017, Vol 2, Part 8, [8.3911].

68 [1937] Ch 392.

69 [1973] AC 360, 377 and 384.

70 United Kingdom, Board of Trade, *Report of the Committee on Company Law Amendment* (1945) Cmd 6659.

71 United Kingdom, Board of Trade, *Report of the Committee on Company Law Amendment* (1945) Cmd 6659 at [153] recommendation II.

72 United Kingdom, Board of Trade, *Report of the Committee on Company Law Amendment* (1945) Cmd 6659, [152].

73 *Companies Act* 1948, ss 210 and 225(2).

74 For example, *Companies Act* 1961 (Qld), s 186.

75 For example, *Companies Act* 1961 (Qld), s 225(3).

[84] *Charles Forte Investments Ltd v Amanda*[76] was an early English consideration of the provision, whilst *Re Weedmans Ltd*[77] was an early Queensland consideration of the provision.

[85] Among members of the academy, a young Bruce McPherson published an article in 1964 entitled *Winding Up on the "Just & Equitable" Ground*,[78] that considered the existence of alternative remedies as a discretionary answer to a winding up petition presented by a contributory on the just and equitable ground.[79]

[86] Not long afterwards, Professor McPherson (as he was by then) published the *Law of Company Liquidation*,[80] a work that is still published under his name in both this country and the United Kingdom in separate editions. Professor McPherson said of s 225(3) of the UCA:

> "… but it has never been doubted that the existence of a satisfactory alternative form of procedure for correcting the wrong complained of is itself a sufficient reason for refusing to order winding up. This rule has now received direct statutory recognition in s 225(3), which provides that the court shall make a winding up order on a contributory's petition which is based either on the just and equitable ground or on the ground of directors' unfair conduct, unless it is satisfied that there is some other remedy available to the petitioner and that he is acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy. Despite its somewhat unsatisfactory wording, there can be little doubt that this new provision only comes into play if and when the court is satisfied that the petitioner is entitled to relief by way of winding up order, and that it represents no more than a legislative expression of a principle which has always been recognised by the general law."[81] (footnotes omitted)

[87] An obvious alternative remedy, from the time of introduction of the oppression remedy and its extension by later companies legislation, is what now appears in s 233 of the *Corporations Act* 2001 (Cth). However, the earlier case law showed that was not the only potential alternative remedy that was under consideration when the progenitor of s 467(4) was introduced.

[88] Section 467(4) contains some awkwardness of operation. It applies where a winding up application is made by members as contributories on the grounds that "it is just and equitable that the company should be wound up or that the directors have acted in a manner that appears to be unfair or unjust to other members". It does not apply to other grounds of winding up. That quoted part of the text of s 467(4) corresponds to the grounds of winding up set out in s 461(1)(k) and (e).

[89] In 1983, s 367(3) of the *Companies Code* was in substantially the same form as s 467(4) is now, and the grounds for winding up by the court corresponding to s 461(1)(k) and (e) now were contained in s 364(1)(j) and (f).

---

76 [1964] 1 Ch 240, 258, 261 and 263.
77 [1974] Qd R 377, 396.
78 McPherson, *Winding Up on the "Just & Equitable" Ground* (1964) 27 *Modern Law Review* 282.
79 McPherson, *Winding Up on the "Just & Equitable" Ground* (1964) 27 *Modern Law Review* 282, 300-301.
80 McPherson, *The Law of Company Liquidation* (Law Book Co, 1966).
81 McPherson, *The Law of Company Liquidation* (Law Book Co, 2nd ed, 1980), 119.

[90] Before 1983, that the affairs of a company were being conducted in a manner that was oppressive or unfairly prejudicial to or unfairly discriminatory against a member or members or in a manner that was contrary to the interests of the members as a whole, was not one of the general grounds on which a company could be wound up by the court under then s 364 of the *Companies Code*. However, a winding up order could be made on such a ground under the oppression remedy, under s 320(2) of the *Companies Code*.

[91] In 1983, that ground was added to the list of general grounds for a winding up order when it was introduced as s 364(1)(fa) of the *Companies Code*.[82] But no corresponding amendment was made to s 367(3), then, to engage s 367(3) when that ground applied, or to the corresponding sections since. Unless the reader is aware of that history, it might seem odd that s 467(4) is not engaged also where the ground of an application to wind up a company is that under s 461(1)(f).

[92] An appreciation of the statutory history of s 467(4) also serves to explain the relevance of cases decided under equivalent provisions in other jurisdictions.

[93] In 1983, in *Re a Company (No 002567 of 1982)*, Vinelott J considered a case where oppression had been made out and the question was whether relief should be refused under the equivalent of s 467(4). Vinelott J said:

> "What [the section] contemplates is, I think, a situation in which the continuance of the company would be unjust to the petitioner and where that injustice cannot be remedied by any step reasonably open to the petitioner. If an offer is made to purchase his shares he is thereby provided with an alternative course; the question is whether he is acting unreasonably in rejecting it.
>
> … the jurisdiction of the court under [the section] is discretionary. The court would be at least entitled to refuse to make an order if satisfied that the petitioner is persisting in asking for a winding up order and that it would be unfair to the other shareholders to make that order, having regard to any offer they have made to the petitioner to meet his grievance in another way. If that is right, then the question I have to consider is whether the petitioner is acting unreasonably in refusing to accept the respondents' offer to purchase his shares at a valuation."[83]

[94] Later in his reasons, Vinelott J continued:

> "In insisting on a winding up order [the petitioner] is, in effect, asking that the respondents should either buy out his shares at the price he chooses to place on them, or face the disruption of a winding up order and that notwithstanding the fact that at least until July of last year they continued to run the company in the expectation that a price, or a fair machinery for ascertaining the price, could be agreed and exposed themselves to a continuing liability under a guarantee to the company's bankers in order to do so. In these circumstances, in my judgment, [the petitioner] is not entitled to the order he seeks."[84]

---

82 From the *Companies and Securities Legislation (Miscellaneous Amendments) Act* 1983 (Cth), s 107.

83 [1983] 1 WLR 927, 933-934.

84 [1983] 1 WLR 927, 936.

[95] In 1984, when McPherson J explained the operation of s 367(3) of the *Companies Code* in *Re Dalkeith Investments Pty Ltd*,[85] as having the effect "that winding up is to be regarded as a remedy of last resort and one which ought not to be granted if some other less drastic form of relief is available and appropriate",[86] his Honour did so understanding the history and the case law which informed the meaning of the subsection. In my view, those points serve to reinforce why there should be no departure from McPherson J's view when applying s 467(4).

[96] The view I take of the operation of s 467(4) is confirmed by *Vujnovich v Vujnovich*[87], where in 1989 the Privy Council considered the equivalent New Zealand provision, saying:

> "[The appellant] suggests, if their Lordships understand the submission aright, that the section directs the Court, before making a winding-up order, to consider whether some other remedy is available and that, having regard to their conclusion that there had been oppressive conduct on both sides, the Court of Appeal ought to have been of opinion that some other remedy was available and thus refrained from making a winding-up order. Their Lordships are unable to see how this section helps the appellants. In the first place, it is directed to imposing a mandatory duty on the Court to make a winding up order with a discretion not to make one if certain conditions are satisfied. Secondly it is directing the Court to regard the position of the person seeking the order (in this case the respondent) and giving a discretion to withhold the order if it is of opinion that he has another available remedy and is unreasonably failing to pursue it."[88]

---

85 (1984) 9 ACLR 247.
86 (1984) 9 ACLR 247, 252.
87 [1989] 3 NZLR 513.
88 [1989] 3 NZLR 513, 518-519.