SUPREME COURT OF QUEENSLAND

CITATION:	*Hunter v Organic & Natural Enterprise Group Pty Ltd & Ors* [2012] QSC 383
PARTIES:	**CORNELIA HUNTER** (plaintiff) **v** **ORGANIC & NATURAL ENTERPRISE GROUP PTY LTD** **ACN 103 341 288** (first defendant) and **ALFRED FRANCIS ORPEN** (second defendant) and **VERITAS VINCIT AUSTRALIA PTY LTD** **ACN 061 024 486** (third defendant) and **COLIN MURRAY CHENERY** (fourth defendant) and **NARELLE LOUISE CHENERY** (fifth defendant) and **INTELLIGENT INDUSTRIES PTY LTD** **ACN 080 236 915** (sixth defendant) and **JOHN MALCOLM HUNTER** (seventh defendant) and **MIRONESCO PTY LTD** **ACN 085 804 539** (eighth defendant) and **AUSTRALIAN DESIGN & ENGINEERING PTY LTD** **ACN 110 012 649** (ninth defendant)
FILE NO/S:	BS 4124/07
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	11 December 2012

DELIVERED AT:	Brisbane
HEARING DATES:	2 August 2012, 7-10 August 2012, 13-14 August 2012, 16-17 August 2012, 20 August 2012, 30 August 2012
JUDGE:	Dalton J
ORDER:	**Judgment in favour of the first to ninth defendants against the plaintiff** **Injunction made 15 June 2007 discharged**
CATCHWORDS:	CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERS' REMEDIES AND INTERNAL DISPUTES – OPPRESSIVE OR UNFAIR CONDUCT – JUST AND EQUITABLE WINDING-UP - where five individuals were involved in the operation of a company - where the plaintiff was one of three shareholders and her then husband was one of three directors – where the company underwent a restructure - where the plaintiff's marriage dissolved – where the plaintiff alleges that she was subject to oppressive and unfair conduct due to restructure – whether there was an arrangement that all principals would remain involved in the management of the company – whether there was oppression as a result of directorship changes – whether there was an agreement to compulsorily acquire the plaintiff's shares and remove her from the business – whether the plaintiff was denied an opportunity to sell her shares on reasonable terms once she was no longer involved in the management of the company – whether the totality of conduct amounted to oppression – whether the company should be wound up pursuant to s 461(1)(e),(f) or (k) of the *Corporations Act*
APPEARANCES:	Plaintiff in person A Orpen for himself and for the first and third defendants C Chenery for himself and for the sixth and ninth defendants N Chenery for herself Wrightway Legal for the seventh and eighth defendants

[1] In 2003, five individuals met and decided to form a company. They were Colin and Narelle Chenery, a (then) married couple who, largely through Narelle Chenery, had a strong interest in manufacturing organic cosmetic products, and Alfred Orpen, who had a strong interest in marketing, and in organic products. Narelle Chenery and Alfred Orpen were directors of a company called MiEssence Pty Ltd, in which they held minority shareholdings. That company made organic cosmetic products. Lastly, were John Hunter and his wife, Cornelia Hunter. John Hunter had a background in network marketing and Cornelia Hunter had a background in administration and finance. Together these five individuals formed a company, Organic and Natural Enterprise Group Pty Ltd (Organic). It traded as OneGroup. There were 100 issued shares: 33 were held by Veritas Vincit Australia Pty Ltd, of which Mr Orpen was the sole director; 33 were held by Colin Chenery and 33 by

Cornelia Hunter. One share was jointly owned by Veritas, Colin Chenery and Cornelia Hunter. The directors of Organic were Narelle Chenery, Alfred Orpen and John Hunter.

[2] At one level Organic was a group of five individuals. I will call these five individuals principals. At another level its organisation fell naturally into three groups: Chenery, Hunter and Orpen. Although it involves some inaccuracy, I will call these three groups (as the parties themselves did) the Hunter family, the Chenery family, and the Orpen family. Veritas is a company associated with the Orpen family; Intelligent Industries Pty Ltd with the Chenery family, and Mironesco Pty Ltd (originally called Hygeia Certified Organics Pty Ltd) with the Hunter family.

[3] When Organic was set up it was decided to separate the directorship and shareholding. This was thought to be a good way of protecting assets – t4-105, t5-88. There was a director associated with each family group: John Hunter, Narelle Chenery and Alf Orpen. The directors were seen as representing the interests of the family group to which they belonged – t1-62. There was a shareholder associated with each family group: Cornelia Hunter, Colin Chenery and Veritas.

[4] All five principals were actively engaged in the day-to-day, and longer term, management of Organic – t4-66, t6-89, t7-88. That was despite the fact that only some of the principals were formally directors. As well, each of the five principals worked as an employee of the company. Cornelia Hunter was the financial controller of Organic. She was responsible for the payroll and for the internal accounting functions of Organic.

[5] Organic's business was rapidly successful and in August 2005 the company invited an accountant, Anne Turner, of Cordner Wilson Ludeke to review its operations. Ms Turner recommended that the business carried on by Organic be restructured – t8-35, t8-38 – and that Cleary Hoare be appointed as lawyers to undertake the restructure in conjunction with her accountancy firm. The company acted on this recommendation.

[6] The restructure took an unaccountably long time – over a year – to be finished. I am satisfied there is nobody to blame for that but the professional advisers involved. During this time the marriage between Cornelia and John Hunter broke down and, separately, it was discovered that John Hunter was acting in conflict with his duty as a director of Organic by involving himself in competing businesses.

[7] These events intersected with each other, and with the restructure, to produce a complicated concatenation of circumstances in the second half of 2006. Mrs Hunter seeks to construe what occurred as oppressive to her within the meaning of s 232 of the *Corporations Act* 2001 (Cth). She claims that her financial interests associated with Organic were diminished by the events of that time. She attributes that diminution to the restructure which she sees as a conspiracy (her word t5-27) by the Chenerys and Mr Orpen to exclude her from Organic and its business. Had the chronology of events involved in the restructure, marital separation and breach of fiduciary duty been different, such a claim would not have been even superficially open. Because events became entwined as they did, it is necessary to look in a detailed way, and chronologically, in order to see that any disadvantage in

Mrs Hunter's position by December 2006 does not result from any conduct caught by s 232 of the *Corporations Act*.

The Intent behind the Restructure

[8] The accountant, Anne Turner, saw three advantages to the restructure. Substantial payments were being made to the five principals of the business each month. This was a chance to formalise the basis for them – t8-36. Secondly, tax minimisation might be possible for each principal if profits from Organic were distributed through trusts, rather than to individuals – t8-51, t8-57 – 58. Lastly, the restructure aimed to provide asset protection by taking assets out of the main trading entity, Organic, so that if it were ever subject to say, a lawful demand from its creditors, it would have no money to pay it, and the assets of the business would be somewhere else, at the disposal of the principals of the business – t8-51. The process of achieving this last aim was referred to by Anne Turner and Cleary Hoare as "extraction of assets". Anne Turner aimed to turn Organic into a shell – t8-57.

[9] The intent of those professionals who suggested and oversaw the restructure was as follows. At the end of the restructure, Organic would be the trading entity of the business. It would show nominal assets in its balance sheet. It would pay a new company, Australian Design and Engineering Pty Ltd (ADE), a licence fee to use the intellectual property necessary to make the products it had always made and market them in the way it had always marketed them. ADE would first buy this intellectual property, in order to licence Organic to use it. ADE would receive licence fees (essentially the profit Organic made from trading) from Organic. It would hold those fees on trust for three unitholders: Veritas, Mironesco, and Intelligent. Those unitholders would in turn receive those monies as trustees of discretionary trusts: in the case of Veritas, for the Orpen family; in the case of Intelligent, for the Chenery family, and in the case of Mironesco, on terms of the Hunter Family Trust.

[10] Whether in fact the restructure documents are effective to achieve the result which was intended is not a matter with which I need concern myself. With one exception – Mrs Hunter's contention as to the transfer of intellectual property to ADE[1] – no party contends otherwise. The matter was never explored at trial. The plaintiff pleads that the documents were effective to transfer the assets of Organic out of Organic and that as a result of the transfers Organic was left with no assets – paragraph 25 of the second further amended statement of claim. In these circumstances – where there is no issue as to the effectiveness of the documents on the pleadings – it was not necessary for any party to address the matter in evidence and I should not act on the basis that I have all the written documents relevant to this unexplored issue, or that there were not oral agreements which supplemented them. The parties have all acted, since 1 July 2006, as though this result were achieved by the documents. The balance sheet of Organic in fact shows nominal assets. Its profits are in fact channelled through ADE to Veritas, Intelligent and Mironesco.

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[1] The plaintiff's pleading as to the effectiveness of the documents purporting to sell the intellectual property of Veritas, Intelligent and Mironesco to ADE does, in contrast to the rest of the pleading, assert that the documents were void and of no effect – paragraphs 37A-F of the second further amended statement of claim. She asks for a declaration to that effect – paragraph 4AA of the fourth amended claim.

[11] There is nothing to indicate that the result of the restructure would concern Mrs Hunter had she not separated from Mr Hunter. However, inconveniently in circumstances where they have separated, she finds that Mr Hunter is the sole shareholder and director of Mironesco[2] which now owns the assets of value, and that the terms of the Hunter Family Trust are such that Mrs Hunter is a beneficiary only if she is Mr Hunter's wife.[3] All Mrs Hunter owns are the shares in Organic, which as Ms Turner anticipated, has become a shell. Of course, Mrs Hunter has rights under the *Family Law Act* which, despite the long passage of time since the Hunter marriage failed, are yet to be finally determined.[4]

Chronology of Events in the Second Half of 2006

[12] I find that it was for no reason in particular – t8-58 – that documents effecting the restructure were signed in two tranches, thus adding to the complexity of events in the second half of 2006. I set out a summary of those events, so that the chronology is not lost in the detail which follows:

(a) In July 2006 Cornelia Hunter left her husband to take up with a Mr Noel James who owned a warehouse next door to, and used in, Organic's business.

(b) The resultant emotional turmoil led to Mrs Hunter withdrawing altogether from day-to-day attendance at the business premises of Organic by August 2006.

(c) On 2 August 2006 the five principals signed the first tranche of restructure documents (dated 1 July 2006). By these documents Organic and ADE resolved to become trustees of the OneGroup Unit Trust and the ADE Unit Trust respectively. Units were issued in those two trusts to Veritas as trustee for the Orpen Family Trust, Intelligent as trustee for the Creative Living Trust,[5] and Mironesco as trustee for the Hunter Family Trust. Documents selling intellectual property owned by Veritas, Intelligent and Mironesco to ADE were executed. A document entitled Unitholders Deed of Agreement was executed by Veritas, Intelligent and Mironesco. It contains provisions regulating the sale of units in the unit trusts.

(d) In September 2006 Cornelia Hunter commissioned a valuation of Organic's business. She wanted that for the purpose of selling her share in the business.

(e) In October 2006 Mr Orpen departed overseas for six weeks.

(f) On 8 November 2006 John Hunter told the Chenerys and Cornelia Hunter that he, along with the General Manager of Organic and the IT Manager of Organic, had been discussing forming a network marketing company which would sell car products, but use

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2 The plaintiff did not complain about the restructure until after she was told by Anne Turner that there were limitations on her right to sell her share of the business, and that is what excited her animosity – t5-18.

3 It was only after the restructure and her separation from John Hunter that the plaintiff became aware that by the terms of the Hunter Family Trust she was not a beneficiary if she and John Hunter were no longer married – t4-64.

4 The Family Court proceedings are not yet finalised. The parties were close to an agreement according to Mr Hunter in September 2006, but Cornelia Hunter withdrew from negotiations – t6-3. Proceedings in that Court are stayed, awaiting the outcome of this proceeding.

5 The Chenery family trust.

marketing systems like those Organic used. The General Manager was sacked at once, the IT Manager as soon as he could be replaced.

(g) Mr Chenery discovered in the next week or two that John Hunter was also planning to set up a cosmetic marketing company which would directly compete with Organic. He discussed this with Mr Orpen and Mrs Chenery. He did not discuss it with Mrs Hunter.

(h) A day or so after Mr Orpen returned to Australia the second tranche of restructure documents was signed on 27 November 2011. These documents were intended to remove any accumulated profits from Organic and distribute them to Veritas, Intelligent and Mironesco. This occurred in the morning.

(i) In the afternoon Mr Orpen gave Mrs Hunter a notice of a shareholders meeting of Organic to be held the next day to discuss the position of directors.

(j) On 28 November 2006, before the shareholders meeting, Mrs Hunter sent the Chenerys and Mr Orpen an email attaching the valuation she had received for the Organic business and notified them that she and John Hunter would soon make a formal offer to sell the shares in Mironesco.

(k) Later on 28 November 2006 the five principals met. John Hunter resigned as a director of Organic. Cornelia Hunter asked to be made a director and was refused.

(l) In the succeeding few days Colin Chenery was appointed as a director of Organic without the knowledge of Mrs Hunter.

(m) On 14 December 2006 Cornelia Hunter sent the formal offer foreshadowed on 28 November 2006 to Mr Orpen and the Chenerys.

(n) On 19 December 2006 Colin Chenery (on behalf of the Chenerys and Mr Orpen) replied to the formal offer made by Mrs Hunter, saying that his advice was that the value in the business lay with Mironesco and that as John Hunter was the only shareholder of Mironesco they were to deal with him.

(o) On 13 March 2007 Mrs Hunter sent an email to Mr Hunter, Mr Orpen and the Chenerys insisting on the value of $1.7 million for her 14.2 per cent of the "entire business" and threatening litigation if the purchase did not go ahead. She was not paid this sum and commenced this proceeding on 15 May 2007. She obtained an interlocutory injunction binding all the defendants on 15 June 2007.

Credit

[13] Before descending into the detail of the matters alleged to constitute oppression, I record my findings as to credit.

[14] I thought that Narelle and Colin Chenery and Alf Orpen were honest witnesses. I prefer the evidence of all these three witnesses where it is in conflict with other witnesses. Of the three of them, I thought that Mr Colin Chenery was the most reliable. He is an intelligent and methodical man, who was concerned to keep contemporary records of things he thought important.

[15] I thought that Mr John Hunter generally gave honest evidence, although he deliberately downplayed his role in planning to compete with Organic. Much of his evidence was unhelpfully vague due, I conclude, to his weariness with, and

disengagement from, many years of conflict with Cornelia Hunter in this litigation and in the Family Court.

[16] I did not find Cornelia Hunter an honest witness. She was quarrelsome, evasive and prevaricated frequently: tt4-29, 4-38, 4-42, 4-43, 4-44, 4-65, 5-24 – 26.

[17] At t4-83 – 88 is a passage of cross-examination which is pellucid in revealing Cornelia Hunter's preparedness to tell untruths, and to act dishonestly in her own financial interests. The subject matter of the questioning was her use of her husband's credit card to pay for expenses of Organic while she was employed as financial controller. The first answer in the series asserts that, "We had an agreement, which is between the directors, that we would utilise personal credit cards to take advantage of frequent flyer points, which I understand every one of us has done … I would use or [sic] Alf's or Col and Narelle's credit card, … and then reimburse that person … immediately transfer that fund from the Commonwealth Bank business account to their personal account."

[18] Incrementally over the course of the next 50 or so questions it emerged that, "unfortunately it was not a written agreement, but it was an oral agreement between the five of us, yes, and every one of us took advantage of that". Then it emerged that the only director who engaged in, or knew of, the practice was John Hunter, but Cornelia Hunter believed the others knew because she told them about it. Then, she did not tell the others about it, but she did not hide it from them, or at least not intentionally. In any case she did not believe she did anything wrong because, "I did not personally gain". Although she did fly her mother out from Germany on the points, and did charge over a million dollars worth of expenses that way. On further questioning she did recall that it was early in 2006 when the other four principals found out about the practice and that in consequence they "took up an argument with John and myself". Finally her position was that she did no harm – she did not take anything from the company but she conceded that she did get a benefit when the other principals did not. The dissembling all along the path of retreat in this line of questioning is most revealing.

[19] Further substantial evidence of acting dishonestly in her own financial interests was that, after this proceeding was commenced, including against John Hunter and Mironesco, Cornelia Hunter borrowed $700,000 against the security of the former matrimonial home (which remains in her name), without John Hunter's knowledge, to pay for her costs of this litigation. Mr Hunter was forced to obtain an order in the Family Court to protect himself – t4-65. Cornelia Hunter gave evidence that the matrimonial home was in her name but that she held it on trust for herself and her husband – t3-83.

[20] Further, I draw the inference from exhibit 111, an email circulated by Cornelia Hunter to about 22 of the top distributors (t4-95) working in the network marketing business of Organic, that Mrs Hunter was not at all averse to harming the interests of Organic and the other principals of it if she could.

[21] I turn now to the events of the second half of 2006.

Withdrawal of Cornelia Hunter from Organic

[22] At the end of 2005, Mrs Hunter decided to hand over her responsibilities as financial controller to an employed accountant – t3-85. That was a rational decision

as Organic's business had grown very quickly; she had no formal accounting training, and conceded that the job had got beyond her. She hoped to stay on in some sort of human resource role – t2-28, but was very vague about whether she ever voiced that intention – eg., t2-29. Certainly there was no agreement that she would do so. However, conflict[6] with John Hunter in the office meant that from August 2006 she no longer came into the office in any role – t2-32. She agreed with this situation, albeit reluctantly – t2-32. She tried meeting with the other principals once a week to stay involved in decision making, but she decided not to do this because she found it too difficult to see John Hunter – t2-33.

[23] Mrs Hunter attempted at times to put a gloss on these events to make it seem as though she were misled in someway – t2-61, or excluded in some way – t3-7 – 8, t3-96. There was no evidence whatsoever that she was misled or excluded from the premises, from employment, or from management of the business – cf t9-72 – 3. Mrs Hunter contended that after an initial period her relationship with her husband became civilised – eg., t7-26, t8-8 – 9, and t9-66. I reject this. Even in the courtroom there was conduct calculated to upset Mr Hunter – t6-83. And she claimed it upset her to refer to her husband by name – t1-56.

[24] In the time between July and November 2006 Mrs Hunter chose to withdraw first from the day-to-day business of Organic and subsequently from her management role in that company. The decision to withdraw was hers. She was not excluded by the other principals. This is entirely consistent with the fact that in September 2006 Mrs Hunter decided to have a valuation of her share of the business – t2-23. She did this because she wanted to sell her share – t2-23, t2-33, and exhibit 21.

The Hunter Family Trust

[25] Cornelia Hunter was married to John Hunter in 1994. They supported themselves by working in various enterprises together. Most recently before they met the Chenerys and Mr Orpen, they worked using the company Hygeia Certified Organics Pty Ltd as the vehicle for their business interests. John Hunter was the director and shareholder of the company. Cornelia was an employee. It earned money through network marketing.

[26] The Hunter Family Trust was established on 9 July 2004. Mironesco (Hygeia, as it was then called) was the trustee. The trust was a discretionary trust. The primary beneficiary was John Hunter. The secondary beneficiaries were any spouse, grandparent, parent, brother, sister, child etc of the primary beneficiary and charities etc.

[27] The directorship and shareholding of Mironesco and the terms of the Hunter Family Trust were established well before the restructure. The Hunter Family Trust deed was drawn by a firm of solicitors and no doubt the directorship and shareholding of Mironesco were chosen deliberately either because of professional advice or because of some notion which the Hunters had as to the best arrangement of their financial affairs.

[28] During the course of their marriage the Hunters did not (so far as the evidence before me revealed it) hold joint property. Cornelia Hunter said that she held half her shares in Organic in her own right and half on trust for her husband – t1-38.

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6 To the point apparently, of some physical violence in the Organic office – t2-25, t7-26, t9-58.

She said the trust was created in late 2002, orally, and no defendant disputed this – t1-64. Their matrimonial home was in Mrs Hunter's name. This was adopted as a strategy to protect their assets – t5-88. It was Mr Hunter's evidence that whatever the legal situation, both parties to the marriage jointly owned all the marital property. Consistently with this, Mr Hunter said, when asked if Mironesco held shares [units in the OneGroup and ADE trusts and shares in ADE] on trust for him and his wife in the new structure, "Oh it would have been on behalf of the Hunter parties" – t5-107, by which he meant himself and Mrs Hunter. The shares in Mironesco were in Mr Hunter's name. There was no agreement that they were held on trust, nor even any conversation about the ownership of the units, it was just that Mr Hunter regarded everything they owned as belonging to both of them – t5-109. There is not sufficient evidence before me to establish, either that any of the shares in Mironesco, or any of Mironesco's shares in ADE, were held on trust for Mrs Hunter. Mrs Hunter did not contend that they were held on trust for her. In fact, the basis of her action is that they were not. My finding is that Mr Hunter owned his shares in Mironesco absolutely, and that Mironesco owned its shareholding in ADE absolutely (exhibit 15). Further, the only evidence is that Mironesco held its units in the OneGroup and ADE trusts on terms of the Hunter Family Trust,[7] and I so find.

[29] Anne Turner said she always thought that Cornelia Hunter was a director of Mironesco, because she acted like one – t8-59 – 60. Cornelia Hunter was entirely responsible for Mironesco's bank account – t5-95, and finances – t5-103. She told Mironesco's bank that she was a director – t3-77. The decisions about the company were made by Cornelia and John Hunter together – t5-103. Mr Hunter thought Mrs Hunter was a director of Mironesco – t5-109. It may well be that Mrs Hunter did too, see [33] below. In my view during 2006 Mrs Hunter was a director of Mironesco within the extended definition of s 9 of the *Corporations Act.* It may be that she is no longer a director because she has ceased to play this role in Mironesco since separation from her husband; I have no evidence as to that.

Documents Dated 1 July 2006

[30] Most of the restructure documents are dated 1 July 2006. It appears that these were backdated. Mr Chenery thought, on the basis of his notes, that the documents were signed on 2 August of that year. I accept this as correct. The evidence was that the documents were brought to the five principals and they all spent some considerable time sitting around a table, each signing multiple copies of the documents one after the other, where the documents indicated they ought to be signed. No one read through any of the documents in detail on this occasion. At times, despite having given evidence that she signed the documents material to the restructure, without reading them (t2-34), Cornelia Hunter attempted to introduce the idea that she may not have signed them, notwithstanding that her signature appears on them – eg., t4-71, or t5-15. There was nothing in this. I find that she signed them as appears from their face.

[31] There is a resolution of Organic to become trustee of the OneGroup Unit Trust dated 1 July 2006. The resolution specifies that the unitholders are to be Veritas as trustee for the Orpen Family Trust; Intelligent as trustee for the Creative Living Trust, and Mironesco as trustee for the Hunter Family Trust. The document is

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7 See the terms of the restructure documents discussed below.

signed by John Hunter, Alfred Orpen and Narelle Chenery as directors of Organic. There is an identical document whereby ADE resolves to become the trustee of the ADE Unit Trust. There are six unit certificates (three for each trust) showing the unitholders, as trustees for their respective trusts, holding 10 units each.

[32] There are two deeds of trust, both dated 1 July 2006: the OneGroup Unit Trust and the ADE Unit Trust. Both documents are identically worded. Both deeds establish a trust for the benefit of unitholders. The unitholders in each case are Veritas as trustee for the Orpen Family Trust; Intelligent as trustee for the Creative Living Trust, and Mironesco as trustee for the Hunter Family Trust. The beneficiaries of the trust are the unitholders. These documents are signed by Mr Orpen for Organic, Mr Orpen for Veritas, Colin Chenery for Intelligent and Cornelia Hunter (but not John Hunter) for Mironesco.

[33] There are three sets of documents concerning the sale of intellectual property to ADE. One set is for Veritas, one for Intelligent and the last for Mironesco. In each set of documents is a recommendation by the directors to the shareholders of these companies that they sell intellectual property to ADE; a notice of EGM to consider that sale to ADE; minutes of an EGM resolving to sell intellectual property to ADE, and a notice fixing the value of the intellectual property at $25,000. In the case of Mironesco's documents, both John Hunter and Cornelia Hunter have signed as "director" (and initialled a change to text) in the recommendation to shareholders. Both John Hunter and Cornelia Hunter have signed the notice of EGM as directors and both signed it again as shareholders having received the notice. Only John Hunter has signed the minutes. Both John Hunter and Cornelia Hunter have signed the value notice as directors of Mironesco and John Hunter has signed it additionally as a director of ADE. The signature of John Hunter alone, on behalf of ADE is about one inch below the signatures of both John and Cornelia Hunter on behalf of Mironesco. The same obtains in relation to the intellectual property sale agreement whereby Mironesco sells intellectual property to ADE – that is both John and Cornelia Hunter sign for Mironesco about one inch above John Hunter signing on behalf of ADE. On neither document are the names John Hunter or Cornelia Hunter part of the printed document. They have both signed at the space marked for Mironesco. It is difficult to avoid the conclusion from the signatures on these two documents that Cornelia Hunter believed herself to be a director of Mironesco.[8]

[34] In any event, as discussed above, Cornelia Hunter, at this time, was a director within the extended definition at s 9 of the *Corporations Act*, and thus her signature on behalf of Mironesco on both the deeds of trust and on the documents relating to the sale of intellectual property to ADE is valid to bind Mironesco.

[35] I record that where I have described Cornelia Hunter, and indeed any other party, as having signed a document where a name does not appear adjacent to the signature in question, I have drawn the conclusion that the signature is that of the named party by comparison with signatures on documents where there is a name adjacent to such signature, and from affidavits and pleadings in the Court file.

[36] Only Cornelia Hunter signed the deeds of unit trust on behalf of Mironesco, John Hunter did not. Further, only John Hunter signed the Unitholders Deed of Agreement (below) on behalf of Mironesco, Cornelia Hunter did not. I do not draw

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[8] John Hunter's evidence was that Cornelia Hunter signed on behalf of Mironesco because "everybody" thought she was – t6-35.

any untoward conclusion from the somewhat inconsistent signings. The most likely explanation seems to me to be the lack of supervision on behalf of those advising Organic, and the principals, in relation to this restructure. I find that all the documents were executed validly to bind the parties to them, and further that all the documents were executed as part of an overall plan to restructure Organic's business in which all principals chose to participate.

[37] There is a document headed "Directors Minuet [sic] 26th August 2006@1;06PM". It reads:

> "The document constitutes the agreement of all directors and share holders from the units [sic] trusts associated with ONE group and ADE.
>
> The minuet [sic] states that all payments of profit share will be implemented and distributed no later than the 20th of the following month.
>
> This agreement can not be changed and is binding unless a unanimous decision is met."

It is signed by Alfred Orpen, Cornelia Hunter, John Hunter, Narelle Chenery and Colin Chenery – exhibit 114. This is a document written without the assistance of professional advisers, implementing a regime for monthly payments in the new restructured business. It shows the willing participation of all principals in implementing the restructure.

Validity of Intellectual Property Sale Agreements

[38] Mrs Hunter claims that the three agreements whereby Veritas, Intelligent and Mironesco transferred intellectual property to ADE are void and of no effect because of a total failure of consideration. She says that when Organic was formed, there were specific sales of tangible assets from the five principals or their related corporations to Organic and, insofar as there were no specific invoices raised, any other property relevant to the business – including intellectual property – was given by the five principals and their associated entities to Organic – t1-59.

[39] Mrs Hunter adduced evidence that various trademarks relating to, for instance MiEssence products, were registered in the name of Organic – see exhibits 7, 14 and 16. There was no evidence before me of any specific sale of these trademarks to Organic. However, there was certainly more intellectual property used in Organic's business than the trademarks. Know-how in relation to the production of cosmetics and in relation to the network marketing schemes, and the product formulas themselves were obviously very important and valuable items of intellectual property.

[40] It was contended by Mrs Hunter that documents relating to a Commonwealth funding grant, initially to MiEssence Pty Ltd, later novated so that Organic took the benefit of the grant, were evidence that Organic owned the intellectual property in various cosmetic formulas. I do not think that these documents bear on this issue. The initial deed of grant (exhibit 17) provided at cl 14.1, that subject to any agreement to the contrary, intellectual property rights vested in MiEssence. The deed was novated so that Organic took the benefit of the grant – exhibit 9. There is nothing in the deed of novation which necessarily implies anything greater than a licence in Organic.

[41] Mrs Hunter also concentrated on the monthly payments which were, from the inception of Organic, made to the five principals, or entities associated with them, by Organic. She said these were pre-payments of the company's profit. The other principals said they were royalties or licence fees paid for the use of intellectual property which remained in the ownership of the principals or their associated companies. While Mrs Hunter was the financial controller, the internal accounts (such as Quickbooks) show the amounts initially recorded as expenses, but then added back in as part of the total profit of the company at year's end. However, the accounts prepared by external accountants in the financial years 2004, 2005 and 2006, and Organic's tax returns, showed these amounts as expenses of the company, not as part of its profits – t8-39 – 47.

[42] There are documents – for example exhibit 11 – which provide contemporary support for the idea that these payments were licence fees or royalties, rather than distributions of profit in advance of the year's end. Invoices rendered for licence fees were paid by Mrs Hunter as financial controller. Thus, the internal books of the company must be regarded as ambiguous. It is clear, for example from exhibit 146, that Mrs Hunter had no firm contemporary view as to the nature of the payments. So far as Anne Turner could work out in 2005, on the basis of instructions, they were payments for the use of intellectual property.

[43] On the balance of probabilities I conclude that, as shown in the externally prepared financial statements and tax returns, payments to, or at the direction of, the five principals between 2003 and 2006 were payments referrable to the contribution of intellectual property – formulas, marketing information, know-how and the like - contributed by the five principals and/or their associated entities, and that intellectual property continued to reside outside Organic up until the sale documents dated 1 July 2006 were signed. It must be said that insofar as the intellectual property sale agreements purport to transfer MiEssence trademarks from Intelligent and Veritas to ADE, two of the agreements must be, to that extent, ineffective having regard to the evidence at exhibits 7, 14 and 16. However that does not amount to a total failure of consideration.

[44] Associated with this point was Mrs Hunter's contention that the licence fees charged to Organic by ADE were far and above what could be justified if what ADE had purchased was merely $25,000 worth of intellectual property from each of Veritas, Intelligent and Mironesco. This discrepancy was relied upon by Mrs Hunter to highlight the artificial nature of the transactions, and demonstrate that they were not in fact genuine. Having regard to the commercial purposes of the principals in effecting the restructure, I do not find the point sufficient to persuade me that the conclusion I have reached above is incorrect.

[45] There is the further matter that Cornelia Hunter signed documents on behalf of Mironesco to effect the transfer of intellectual property from Mironesco to ADE. In all the circumstances I cannot use this fact as evidence that she genuinely believed intellectual property resided in Mironesco as at the date of the transfer. However, I do conclude that she was perfectly content to co-operate in signing these documents as part of an overall scheme which she believed, at that stage, to be to her financial advantage. Further, in signing the documents as part of the restructure she co-operated in bringing about a situation where, for six years now, the affairs of all the defendants have been conducted on the basis that the documents were valid. Even if I had not made a factual finding as to the validity of the intellectual property

sale agreements, these would be sufficient reasons in my discretion to refuse the relief sought by way of declaration in relation to the validity of the intellectual property sale agreements.

Unitholders Deed of Agreement

[46] This is the last of the documents dated 1 July 2006. Much attention was focussed on this document by the plaintiff. First, she says its provisions affect her adversely. Second, there are two different signed and bound versions: exhibits 123A and 123C.[9] I will deal with the second point first.

Two versions of Deed

[47] Each version bears the date 1 July 2006, and each is signed by Mr Orpen on behalf of Veritas; Colin Chenery on behalf of Intelligent and John Hunter on behalf of Mironesco. From a comparison of signatures with other documents in the case, I conclude that the signatures on both versions are genuine – there was no contention from anyone who had apparently signed the documents that any signature was not genuine.

[48] A partner of the firm Cleary Hoare, which drafted the Unitholders Deed of Agreement, gave evidence that the document, which is exhibit 100, is the final version of the document on his firm's file. It is an unsigned copy identical in terms with exhibit 123A.[10] It emerges that view is incorrect.

[49] The document which is exhibit 123C bears the word processor marking "Docs_104816_1/1" on the cover. It bears the word processor reference "Docs_104816_1(2)/1" on its first page and the word processor markings "Docs_104816_1(2)/17" and "Docs_104816_1(2)/18" on its seventeenth and eighteenth pages. Apart from that, the word processor markings on it are identical to those on exhibit 123A. The markings are consistent with exhibit 123C being an amended version of 123A. I am satisfied that it is, and that the amendment came about in the following way.

[50] On 30 January 2007 Mrs Hunter visited Ms Turner in the company of Mr James to ask questions about the effect of the restructure - t2-72. This session seems to have alerted Ms Turner to some inaccuracies in the restructure documents. On that same day, without Mrs Hunter's knowledge or permission, Ms Turner lodged an ASIC form signed by Mr Hunter appointing Cornelia Hunter a director of Mironesco – t2-74, t9-11.

[51] On 1 February 2007 a solicitor from Cleary Hoare emailed Anne Turner saying that he thought it better to have "separate agreements". What that means is unclear, it does not appear that this is the first contact on the matter. Anne Turner replied no, that would cause angst with the client – exhibit 101. Then later on 1 February 2007, Anne Turner emailed that solicitor: "How are you going with One Group? One of the principals wants a copy of the agreement urgently, and I promised today" –

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9 In fact there are three versions in total: exhibits 100, 123A and 123C, but exhibits 100 and 123A are identical in their substantive text, although they bear different word processor identification codes on the left bottom corner of each page. Exhibit 100 was not signed or bound.

10 Exhibit 100 has a slightly different word processor reference from exhibit 123A. Exhibit 123A, the signed version, has the word processor reference, "Docs_104816_1/1" with the last numeral increasing by one as the pages progress.

exhibit 102. The reply was, "Karen is amending the first page and the Schedule I will have her email the document when she get [sic] in." This seems to be a reference to the Unitholders Deed of Agreement, because the amendments to exhibit 123A, as shown on exhibit 123C, are to those two parts of the document. On 2 February 2007 that solicitor emailed Anne Turner saying, "The amended pages are page 1 and both pages of the schedule." A document may have been attached to that email, although it is not expressly noted. The response from Anne Turner on the same day a few minutes later is:

> "Peter, the shareholdings aren't correct. Neither are the directors.
> At the date of the agreement, shareholders of Organic & Natural Enterprise Group Pty Ltd were: Veritas Vincit 1/3, Colin Chenery 1/3, Connie Hunter 1/3
> Directors of Australian Design and Engineering Pty Ltd were: Alfred Orpen, Colin Chenery and John Hunter
>
> Can you please amend these and send me the new copy."

[52] A matter of minutes later that solicitor sent a document to Anne Turner. From the email the word processor reference on the document is, "Docs_104816_1.DO." Anne Turner received it and thanked the solicitor.

[53] When first asked about the matter Ms Turner said she did not make the change herself and did not know who did – t8-62. She prevaricated – t9-9, t9-11, and then finally conceded what is obvious from the emails, that after 30 January, when she noticed that Mrs Hunter had not been a director of Mironesco at the time the Unitholders Deed was signed, she arranged for a solicitor at Cleary Hoare to make the changes – t9-25. No one but she and the solicitor was involved in this, no one of her several clients authorised the change – t9-25. As to the changes to the first page of the Unitholders Deed of Agreement, Ms Turner said she was surprised to be made aware of them – t9-24. They seem more like changes a lawyer would make than changes an accountant would make.

[54] I find that Ms Turner and Cleary Hoare made the changes to the document which is exhibit 123C, substituting pages, but not the execution pages, and then re-binding the document. I find that they did this without instruction from any principal or any of the companies who are defendants in this matter. It was very poor professional conduct. It is hard to know what it was meant to achieve given that there were two unaltered versions of the document which remained in existence. It is also hard to know what it was intended to achieve when the substance of the changes is regarded. The changes to pages 17 and 18 particularly interested Mrs Hunter because they change a schedule which shows details of her directorship and shareholding in Mironesco. However, whatever the schedule provided as to these things, it could not change either the true state of affairs or the operation of the Unitholders Deed of Agreement. In any event, in the circumstances as I find them, the version of the deed which was exhibit 123C has no legal effect.

Provisions of Unitholders Deed of Agreement

[55] The parties named on the cover sheet of exhibit 123A are: Veritas as trustee for the Orpen Family Trust, Intelligent as trustee for the Creative Living Trust and Mironesco as trustee for the Hunter Family Trust. However, additional parties are named on its first substantive page:

(a) the directors and shareholders of Organic (named in schedule 3 to that document as Alfred Orpen, Narelle Chenery and John Hunter and (wrongly) Veritas, Intelligent and Mironesco); and

(b) the directors and shareholders of the unitholders (named in schedule 5 to that document as Alfred Orpen, Colin Chenery, Narelle Chenery, John Hunter and (wrongly) Cornelia Hunter).

[56] Notwithstanding this, there is no provision made in exhibit 123A for anyone but Veritas, Intelligent and Mironesco to sign the deed. Furthermore, the Unitholders Deed of Agreement then goes on to make a number of promises which could not properly be made by Veritas, Intelligent and Mironesco. These include cll 2.1, 3.1, 4.2, 5.1, 5.3, 5.4, 5.6, 5.8, 5.9, 12.2 and 13. The deed only applies to one unit trust, the OneGroup Unit Trust.

[57] Clauses 6 to 10 of the deed contain provisions which relate to the valuation and sale of units in the trust. Unlike the provisions of the deed which attempt to bind persons who are not parties to it, it seems to me that these provisions do have an effect.

[58] Clause 6.1.2 provides that the value of each unit will be $25,000 or such higher amount as is determined to be market value by a resolution of the unitholders in a general meeting based on a formula. The formula is: (a) goodwill determined as twice the 'EBITDA' for the previous financial year; (b) the depreciated value of plant and equipment; (c) the deemed depreciated value of equipment held on lease; and (d) no regard to debtors or work in progress.

[59] Clause 7 then provides:

> "7.2 A Unitholder may sell his units in the Trust only if the Unitholder and the Unitholder's Related Owners sell their Sale Interest in the same transaction.
>
> 7.3 Notwithstanding anything else in this Deed, no transfer of a Sale Interest or any part of a Sale Interest may take place unless the disponee in each case is, or becomes, a party to, and bound by, this Deed."

[60] At cl 1.1.17 the term "Sale Interest" is defined as: "Sale Interest of a Party means all shares in the Trustee Company and units in the Trust owned by that Party and its Related Owners…" The term "Related Owner" is defined to mean "Related Parties", which in turn is defined to mean the persons named in Part 7 of the schedule. No persons are named in that part.

[61] Clause 8 makes provision for unitholders who wish to sell units. A notice must be given – cl 8.1. In various circumstances such a notice will be deemed to have been given, including the circumstance – cl 8.2.7 – where "a Trustee Company Director, related to that Unitholder, resigns". Clause 8.3 provides that the sale price contained in the sale notice is deemed to be the market value as determined by an independent valuation, which is rather a surprise given the detailed provision at cl 6 (above). The sale notice is to be given to the trustee company and, by cl 8.5, that company is to offer the "Sale Interests covered by the Sale Notice" to the remaining unitholders who have 30 days in which to accept. Only if the other unitholders do not purchase the units may the seller sell them to "any person reasonably acceptable to the Trustee Company Directors" at a price not less than the "Sale Price", defined

to mean market value on independent valuation. Given that the Trustee Company is not bound to act in conformity with the clause, its practical effect must be questionable.

[62] There follow pages more conditions as to the sale of units which here and there assume that Organic is bound by the deed – cll 8.6, 8.7, 8.9, 10.2, 10.4 and 10.5 – and that the term, "Related Owners" has a meaning – cl 9.1 and cl 10.7.3 – 10.7.7. They make settlement contingent upon the receipt of, "signed resignations by the Directors of the Trust associated with the selling Unitholder and the selling Company Shareholder", which is simply a bewildering requirement. At cl 10.7, there are provisions as to a "Policy" and "Policy Owner" which are quite obscure, as though the drafter has had some mistaken regard to an insurance precedent.

[63] I note here that the constitution of Organic (before and after the restructure) provides at cl 27 for restrictions on the transfer of shares. There are pre-emptive rights at a price fixed by the intending vendor, or if in the opinion of the directors that price is not "fair value", then at the price fixed by an "auditor" selected by the directors or failing that, selected by the President of the Australian Society of Certified Practising Accountants who is to determine the fair value of the shares to be transferred.

Documents signed 27 November 2006

[64] By a document titled Resolution of Directors, the directors of Organic – John Hunter, Narelle Chenery and Alfred Orpen – resolved on 27 November 2006 to recommend to the shareholders of Organic that the constitution of the company be changed and that there be an EGM to change it. The change was to increase the capital of Organic to include 1000 Z class shares. Z class shares entitle the holder to such dividend or distribution of profit as is determined in the sole discretion of the directors of Organic. There is a Notice of Extraordinary General Meeting to consider resolutions to facilitate this amendment to Organic's constitution. It is signed by John Hunter as director. It is signed as being received by Colin Chenery, Cornelia Hunter and Veritas as shareholders. There are minutes of a shareholders meeting resolving to change the constitution, signed by Colin Chenery as chairman.

[65] There is a notice from Organic to Cornelia Hunter which advises her that she can apply for 10 Z class shares and that a general meeting will be held on 27 November 2006 to consider issuing these shares. She has signed as having received it. There are identical notices to Colin Chenery and to Veritas. There are two identical notices, one from Colin Chenery and one from Cornelia Hunter declining the offer to take up Z class shares. Cornelia Hunter has signed the notice from her. These documents proceed on the basis that Organic was required to offer its existing shareholders Z class shares. In fact Veritas, Intelligent and Mironesco all apply for 10 Z class shares. Mironesco's application is signed by both John Hunter and Cornelia Hunter. It is on behalf of Mironesco as trustee of the Hunter Family Trust. Organic grants Veritas, Intelligent and Mironesco 10 Z class shares each. The grant is to Mironesco on behalf of the Hunter Family Trust and the share certificate issued by Organic is in the name of Mironesco as trustee for the Hunter Family Trust.

[66] There are documents showing that Organic resolved to declare a dividend of $23,246.23 per Z class share. There is a document to the shareholders of Organic which recites the intention of Organic to declare such a Z class dividend and says,

"prior to the declaration of the dividend the company seeks your consent in writing in your capacity as shareholders to the declaration of this divided". Cornelia Hunter has signed this document as a shareholder of Organic twice on different documents – exhibits 58 and 59.

[67] There is a series of documents which I take it are designed to complete what Organic's advisers called the "extraction of reserves" from Organic – exhibits 62, 63, 64, 65, 66, 67, 68, 69, 70. These documents appear to consist of a rather complicated round-robin of loans. They did not feature independently in the plaintiff's case at trial, nor does the pleaded case make anything particular of them. They need not be further dealt with.

Cornelia Hunter's Involvement in, and Understanding of, the Restructure

[68] Mrs Hunter's pleaded case was that the restructure was pursuant to an agreement between the other four principals and implemented by the other four principals – paragraphs 14 and 15 of the second further amended statement of claim.[11] Her case continued that, to the knowledge of the other principals, she was not fully informed about the restructure and relied on them to act in her best interests. She pleads that she did not understand the documents without the benefit of legal and accounting advice and simply signed them at the direction of Ms Turner – paragraphs 27-29 of the second further amended statement of claim. I reject the pleaded case.

[69] Mrs Hunter understood the purpose of the restructure to be tax minimisation and to allow the company to protect its assets from lawsuits - t2-24 and t5-29. She admitted that she attended a presentation by advisers to all the five principals where there were diagrams on a white board. She conceded that she may have been at more than one such meeting – t2-24, t3-98, t4-76, t4-79. She conceded that she attended other meetings which she said were directors meetings about the restructure, but claimed that, as she was not a director, and was very busy with her work, she did not stay and participate as the others did – t4-77.

[70] The other principals said that Mrs Hunter participated in as many meetings with advisers about the restructure as they did – t5-92, t9-48 - and that she had the opportunity to make any enquiries she wanted – t5-91, t5-108, t7-57, 58, 59 and 65.

[71] Ms Turner's evidence was that as far as she could recall, all the five principals were at every meeting. She thought there were about four or five meetings at which she discussed and explained the restructure – t8-34. She said the purpose of the meetings was to ensure that everyone understood the restructure and was in agreement with it proceeding – t8-52. Mr Hart's (Cleary Hoare) evidence was so demonstrably based on supposition rather than actual memory, and so inconsistent, that I do not rely on it

[72] The evidence of both the Chenerys, and Mr Orpen, was that on one, or two, occasions Mr Orpen stated in the presence of Mrs Hunter that while he had put more time and effort into reviewing the restructure documents than the other

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[11] It will be seen from paragraph 14 that the pleaded case wrongly interprets the restructure as transferring Organic's business away from it and leaving it without an income stream sufficient to pay its liabilities – and see paragraph 25(c) for example. In fact the business of Organic stayed with that company and Organic has continued to trade. The only evidence before me was that it was profitable and able to pay its debts as they fell due.

principals, he was not taking responsibility for the interests of the other principals and that they should obtain their own independent legal or accounting advice – t7-78, t9-48. I accept that evidence. The evidence was that Mrs Hunter never made any objection at any meeting to any aspect of the proposed restructure – t7-78. I accept that evidence.

[73] I find that Mrs Hunter attended all the meetings which the other principals attended with external advisers. I find that she had adequate opportunity to take copies of the draft documents through the more than 12 months during which the restructure was discussed. I find she had adequate opportunity to read those documents herself and take independent advice on them if she wished to do so. The truth of the matter was that Mrs Hunter chose not to concern herself with the details of the restructure – t4-76. She approved of its overall aims – t2-24, t2-34. She said she understood from the meetings she did attend that Organic would form two unit trusts – t2-28, 29. She also understood that Mironesco and the Hunter Family Trust would be the vehicles used to receive payments from the business in order to reduce tax – t4-64, t4-69. She was content to leave the detail to others – her fellow principals and the professional advisers to the company – t2-25, t3-100, t4-72, t4-76, t5-5. That was her deliberate choice. There is no evidence whatsoever that she was misled in any way about any aspect of the restructure.

[74] The email Mrs Hunter sent to the Chenerys and Mr Orpen at 10.51 am on 28 November 2006 demonstrates to my mind that she understood that the value of the business was no longer in her Organic shareholding but was in the Mironesco shares and that the three entities which held the value of the business were Mironesco, Intelligent and Veritas. That email, exhibit 76, reads:

> "John and I are currently preparing an offer of all shares of Mironesco Pty Ltd for the total sum of 5 million to Intelligent Industries and or Veritas Vincit. The formal offer will be presented within the next few days."

[75] On 14 December 2006 the formal offer foreshadowed on 28 November 2006 was made. Again to my mind that email demonstrates that by this stage Mrs Hunter had understood that her shares in Organic were valueless – she refrains from offering her shareholding in Organic for sale but refers to her shareholding "in the business" and "my share of the business value".

[76] I note that none of the principals had a complete understanding of the restructure – see eg., Mr Orpen's cross-examination of Mrs Hunter from t5-21 – 23. Or Mrs Hunter's cross-examination of Mrs Chenery – t7-16 or Mr Chenery at t7-83 – 87. Mr Hunter admitted that he did not understand the restructure, even at the time of trial – t5-91. So did Mr Orpen – t9-70.

[77] It is plain that insofar as there was an agreement to restructure, Mrs Hunter was a party to that agreement, to the same extent as the other principals – cf paragraph 14 of the statement of claim. She participated to the same extent as the other principals in implementing it by signing as many of the relevant documents as was appropriate for her to sign – cf paragraph 15 of her pleading. There is no evidence of any fraud, mistake or misrepresentation causing her to sign the documents. There is no evidence or rule of law which supports her contention that the other principals owed her any duty to give her information or explanation about the documents.

[78] It is pleaded – paragraph 13 of the statement of claim – that the other principals knew from mid-2006 that John and Cornelia Hunter had separated and that thereafter their interests in the business were not coincident. The other principals certainly knew of the separation. The extent to which they turned their minds to how the restructure would affect the financial interests of John and Cornelia Hunter was not explored in the evidence. That the other principals knew of the Hunters' separation does not change any of my conclusions above. One would have thought that John and Cornelia Hunter, acting sensibly in their own best interests would have separately taken advice on this matter. They chose not to. In those circumstances the other principals can hardly be criticised for not adverting to the potential issues.

[79] As a footnote to this, in November 2006 (well after the bulk of the restructure had occurred) Cleary Hoare and Anne Turner were aware that John and Cornelia Hunter were contemplating divorce and wondered whether Mironesco as trustee for the Hunter Family Trust was an inappropriate vehicle to receive the Z class shares – see exhibits 91, 92, 93, 94, 95, 96 and 97. The decision was left to Anne Turner to resolve. She decided that Mironesco was an appropriate vehicle. There is no evidence that either John or Cornelia Hunter were ever informed of these concerns or that their instructions were sought about the matter.

Resignation of John Hunter as a Director

[80] Mrs Hunter admitted that she attended a meeting held at the Chenerys' home at very short notice, to discuss Organic's General Manager and IT Manager who were forming a competitor company to Organic – t4-38. I find, in accordance with Colin Chenery's evidence, that this meeting was on 8 November 2006. Cornelia Hunter repeatedly denied that the meeting discussed John Hunter's involvement with this competitor company – t4-39, t4-41. John Hunter gave evidence that he called the meeting and that at it he said he was involved in the discussions about forming the new company, although he did not say he was going to be one of the participants in it – t5-96. The evidence of Narelle Chenery was to similar effect – t6-90 – 96. Colin Chenery said that there was a detailed discussion in which John Hunter said that he had participated in planning to set up a company which used Organic's marketing know-how and systems – t7-60. Mr Chenery had notes of this. I prefer the evidence of the defendants. I find, in accordance with the evidence of all the other principals, that Mrs Hunter was present during these disclosures.

[81] I accept that Mr Chenery made investigations after this meeting and discovered that John Hunter was extensively involved in behaviour inimical to Organic's business – t7-62. This included planning to set up a company which would directly compete with Organic's products. Mr Chenery discussed these matters with Mr Orpen by telephone – Mr Orpen was in England. The Chenerys and Mr Orpen met to discuss these matters as soon as Mr Orpen returned from overseas – t9-49. They decided that they would ask John Hunter to resign. Mr Chenery tried to discuss this matter with Cleary Hoare but was unable to until 30 November 2006 – exhibit 99. Mrs Hunter was not involved with these discussions.

[82] On the afternoon of 27 November 2006 Cornelia Hunter received an email from Mr Orpen telling her that there was a shareholders meeting the next morning and that the subject of the meeting was the position of directors – t2-35. At the meeting Mrs Hunter says she was shocked to see that John Hunter's position as director was

terminated and that he did not oppose this, but signed two pieces of paper, presumably to effect this – t2-62. She says she asked why he was to be terminated as a director and that she was told the decision had already been made and was given no further explanation – t2-62. She says that she asked to be appointed as a director in his stead and that there was no agreement to this – t2-63.

[83] The other principals have a different version of what occurred at that meeting. They say that John Hunter was asked to resign at the meeting and that he did so. They say that there was not much discussion as to the reasons why he resigned, but that there was some short discussion. Narelle Chenery thought that Colin Chenery told John Hunter, in the presence of Cornelia Hunter, that he had discovered that John Hunter had been planning to compete with Organic and that in those circumstances it was appropriate for John Hunter to resign – t6-91. So did Colin Chenery – t7-69. Mr Hunter's evidence was similar – t5-98. It was said by the other principals that as the meeting at the Chenerys' home was only 20 days before the resignation, there was sufficient said at the time of the resignation to let Mrs Hunter understand the reason for the resignation – t7-90.

[84] I find that John Hunter was asked to resign and did so. I find that there was a short discussion along the lines suggested by Colin and Narelle Chenery and I find that, against the background of the meeting at the Chenerys' home, Mrs Hunter understood well enough the reason for what occurred. This is corroborated by the fact that at no time after the meeting did Mrs Hunter ask any of the defendants about the reason for John Hunter's resignation – t4-44, t4-46.

[85] Pursuant to the constitution of Organic (exhibit 6) a director may resign by written notice – cl 56(2). So there is no doubt that the resignation by John Hunter on 28 November 2006 was effective. There was no need for a meeting to have been called to effect the resignation; pleaded questions about short notice do not arise.

Appointment of Colin Chenery as a Director

[86] Cornelia Hunter's evidence that, on 28 November 2006, she asked to be appointed as a director of Organic instead of John Hunter and was refused is not challenged. Nor is it challenged that she was not involved in the appointment of Colin Chenery as a director. The ASIC records show Colin Chenery being appointed as a director from 27 November 2006, but he thought that was backdated, he thought he was made a director a few days after 28 November 2006 – t7-92. I accept his evidence.

[87] By cl 57 of the constitution of Organic, the directors of the company could at any time appoint a person to be director. That right is independent of recourse to the shareholders and therefore the appointment of Colin Chenery was valid.

[88] Mr Chenery explained why Cornelia Hunter was not made a director and why she was not consulted about his appointment as director. He said that on 28 November 2006 the Chenerys and Mr Orpen received notice that both Hunters wanted to leave the business – exhibit 76. Mr Chenery remembered this email arriving before the meeting to remove John Hunter as director – t7-71.

[89] Mr Orpen said that in the circumstances which had arisen by 28 November 2006 he did not want Mrs Hunter as a director – t9-51. By that time there had been disruption caused by the Hunters' marital breakdown, and Mr Hunter's breach of duty to Organic, as well as Mrs Hunter's notice that she wanted to sell her share of

the business. Mr Orpen thought it was better to have three directors than two, to avoid deadlock, and he thought that Mr Chenery brought skill to the company as a director – t9-51. However, before agreeing to the appointment of Colin Chenery as a director, he paused to consider whether it was against his interest to have both the Chenerys as directors – that is the Chenery interests could always out-vote him – t9-51 – 52. He overcame those doubts, and agreed with the appointment as being as in the best interests of the company.

Mrs Hunter's Offer to Sell

[90] On 14 December 2006 Cornelia Hunter sent the Chenerys and Mr Orpen an offer, as foreshadowed by her on 28 November 2006, to sell what she described as her "14% of the total business" for $1,775,000 and asking for a response within seven days.

[91] On 19 December 2006 Mr Chenery replied on behalf of the Chenerys and Mr Orpen saying:

> "Dear Connie
>
> The share of ONE Group you are offering to sell is held in Mironesco P/L as Trustee, for which John is the sole shareholder. We can only act on an offer from John, as he is the legal owner of Mironesco, and its interest in ONE Group.
>
> Our advice is that your legal entitlement to any share of ONE Group is a Family Law issue, which is between you and John." – exhibit 77.

[92] Both Mr and Mrs Chenery gave evidence that they were relieved that advice (from Anne Turner) was that the shares in Mironesco belonged only to John Hunter and it was he who the other principals had to deal with, not Mrs Hunter. Mrs Chenery explained her view, "at least John is reasonable" – t7-29. Mr Chenery thought that by then Cornelia Hunter had become irrational and unpleasant to deal with –t7-74. Nonetheless, there is no suggestion that the advice was not genuinely given. And indeed it seems to me to have been essentially correct. The principals other than Mrs Hunter were slow to respond to the 14 December 2006 offer. They debated the value of their business. They made no counter-offer and asserted no rights to purchase anything from Mrs Hunter or Mironesco.

[93] On 13 March 2007 Mrs Hunter sent an email to Mr Hunter, Mr Orpen and the Chenerys insisting on her valuation of $1.7 million for 14.2 per cent of the "entire business". She said, "It is only fair to inform you all that I am at an advanced stage in preparation for litigation to ensure I get a fair outcome". She says that if she receives an offer for the price she wants with a cash settlement by 1 July 2007, "I will suspend litigative action and leave things undisturbed. Given the advanced stage of my litigative proceedings, I need this level of commitment by the close of business on Monday, 26 March, 2007. … I mean no harm to the business or to any of you, but I must insist on this outcome, which I believe to be fair." - exhibit 86.

[94] On 3 April 2007 she confirmed her definite position saying:

> "I am surprised to see that you are all still discussing this issue. [the value of Organic]
>
> My view, which I have expressed before, is that this is a waste of time and money as you have the BDO Kendalls assessment and you are able to have it reviewed for only $2500.

I disagree with any other proposal." - exhibit 108

Mrs Hunter's Conduct after November 2006

[95] I find that Mrs Hunter's conduct after November 2006 has led to an irretrievable breakdown of relations between her on the one hand, and the other four principals in this proceeding. Until November 2006, relations between Mrs Hunter and the other principals were strained, largely because of the consequences of her marriage breakdown. There was however no real conflict until December 2006. As can be seen from the correspondence about selling her share of the business, Mrs Hunter became aggressive toward the other four principals soon after that.

[96] This proceeding was commenced on 15 May 2007. On 15 June 2007 Mrs Hunter was granted an interlocutory injunction. There have been costs and losses to Organic, and consequently the principals, associated with the injunction – t7-73. The order of 15 June 2007 required continuing substantial monthly payments to Mrs Hunter. Further, the order prohibited any activities by Organic outside the ordinary course of business without the consent of Mrs Hunter. Mrs Hunter has on two occasions, at least, refused such consent. Particularly for Mr and Mrs Chenery, who continue to work full time in the business, these burdens have been very significant.

[97] Mrs Hunter acted for herself on the trial, assisted by Mr Noel James as McKenzie friend. On the first day of trial she sought to tender an affidavit served that morning which contained well over 4,000 pages of exhibits. Throughout this proceeding she has filed numerous prolix documents such as notices to admit to every defendant, extending to many hundreds of facts, different in the case of each defendant. However, it is clear from the matters which preceded its listing for trial (it was a supervised case) that Mrs Hunter has attempted to postpone the actual determination of her case. The financial impact of the litigation on the defendants has been very significant.

[98] The basis for Mrs Hunter's conduct since December 2006 appears to be suspicion and inferences of conspiracy. During the conduct of her case she asserted a plan to drive her out of the business. Notwithstanding the dire nature of these allegations, throughout the trial she reproached the other principals for not offering her a chance to return to the business to work alongside them and to assist in the troubled times that followed November 2006, including after litigation had commenced – eg., t7-36, t7-92, t8-7, t9-65. Altogether I found her thinking about the matters involved with the other principals, Organic, and this litigation to be distinctly unreal.

[99] The Chenerys and Mr Orpen attributed Cornelia Hunter's actions in bringing this suit to Noel James' influence over her.[12] He does seem to have been involved in her bringing this proceeding. He attended with her at a visit to Anne Turner in January 2007, questioning the effect of the restructure - t2-72. He was involved in drawing the instructions to her valuers (BDO Kendalls) in September 2006 - t5-11-12. Mrs Hunter said in cross-examination that it had only ever been Noel James who had told her there was a disadvantage to her personally after the restructure – t5-35. The behaviour of Mrs Hunter and Mr James in Court was on occasions disruptive to

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12 tt20 (20/8/12), 21 (20/8/12), 4-51 – 53, 5-12, 5-35, 5-59, 5-66, 7-75, 8-59, 9-45, 9-48.

the trial.[13] Mr James constantly spoke to, or at, Mrs Hunter, including while I spoke, the other parties spoke, and while witnesses were answering questions, including those which Mrs Hunter had asked. There was behaviour between Mr James and Mrs Hunter while Mr John Hunter gave evidence which I conclude was calculated to upset him.[14] At other times however, the behaviour seemed to me to indicate that Mrs Hunter and Mr James were so consumed with their joint thoughts that the reality of the trial itself had difficulty intruding.

[100] Mrs Hunter's behaviour since November 2006, including throughout the conduct of this proceeding, has led to an irretrievable breakdown in relations between Mrs Hunter and the other four principals. As I indicated at the outset of these reasons, Mrs Hunter's claims in the proceeding are baseless.

No Oppression as a Result of Restructure

[101] Section 232 of the *Corporations Act* allows the Court to make a remedial order if the conduct of a company's affairs is either contrary to the interests of the members as a whole, or oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member, whether in the member's capacity as a member or any other capacity. Mrs Hunter's pleading relies on all these grounds – paragraphs 30 and 57 of the second further amended statement of claim.

[102] Unfairness within the meaning of the section is objective unfairness such that a reasonable director considering all the relevant matters would think that the decision was not fair – *Ian Allan Byrne v A J Byrne Pty Ltd*.[15]

[103] Because matters are judged objectively, it is not to the point that conduct said to amount to oppression was carried out without any intention to unfairly prejudice, oppress or discriminate against a member.[16] Accordingly conduct which is on the basis of professional advice can be oppressive if that is, in fact, its effect.[17] Here, I find that the principals all acted in accordance with the advice of their accountants and lawyers. Also, I find that none of the Chenerys, Mr Orpen, or Mr Hunter ever intended to act in a way which was contrary to the interests of the members of Organic, or unfairly, oppressively to, prejudicially to, or in a way that discriminated against, Mrs Hunter. Nonetheless, I must look to the objective consequences of the conduct of Organic's affairs, not to the state of mind of the defendants.

[104] In this case the plaintiff was a minority shareholder, as all the shareholders were minority shareholders. That does not mean that there can not be oppressive conduct within the meaning of s 232. The section directs attention to the conduct of a company's affairs, not whether that conduct is at the instance of a majority.[18]

[105] In assessing whether or not the statutory criterion of unfairness has been met, it is appropriate to take into account the behaviour of the person making the allegation of oppression: "The conduct of the petitioner may be material in a number of ways …

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13 tt1-6, 1-8, 1-9 – 10, 2-15, 4-108, 5-9, 6-11, 6-28 – 29, 6-35, 6-54, 6-81 – 82, 6-83, 7-36, 8-90 – 91, 8-104, 8-105.

14 t6-83.

15 [2012] NSWSC 667, [45], and the cases cited there.

16 *Campbell v Backoffice Investments* [2009] 238 CLR 304, [176].

17 *M Dalley & Co Pty Ltd v Sims* (1968) 120 CLR 603, 606.

18 cf *Campbell v Backoffice Investments Pty Ltd* [2008] NSWCA 95, [212], [213].

First, it may render the conduct on the other side, even if it is prejudicial, not unfair …"[19] In *Fexuto* Spigelman CJ said:

> "There will be circumstances in which the emergence of irreconcilable differences will cause the Court to conclude that an understanding or expectation as to participation in management should be taken to have ceased, in a manner not entitling the person excluded from such participation to relief under the statutory provisions. That would be so where the Court decides that it is the person excluded who is responsible for the breakdown in the relationship."[20]

[106] There is abundant authority that, "wrongful exclusion from participation in the management of [a] company" can amount to oppressive conduct.[21] It will be particularly relevant that the person excluded from participation is not able to sell their share in the company in question at a reasonable price.[22]

[107] Here the plaintiff was never excluded from the premises, employment or management of Organic. She chose to withdraw from late 2005. The plaintiff was as involved as any other principal in agreeing to the restructure of Organic's business and implementing that restructure through the documents dated 1 July 2006 and 27 November 2006, and the minute of 26 August 2006. She signed those documents willingly, with adequate opportunity to explore their effect, and their effect on her. Mrs Hunter was not misled or deceived about these documents in any way. There was no agreement about the restructure that did not include her. The conduct of the company's affairs in implementing the restructure by the execution of these two tranches of documents was not contrary to the interests of the members of the company as a whole. If tax minimisation and protection of assets from creditors are regarded as advantages, the restructure was advantageous to the members as a whole. Implementing the restructure was not discriminatory against Mrs Hunter, the documents brought about changes which applied equally to all members of Organic at a time when it was not known who might in the future wish to sell an interest in the business.

[108] The shares which Mrs Hunter owned in Organic were rendered virtually worthless as a result of the restructure. The assets and income stream of the business were transferred and diverted to ADE. Mrs Hunter is not a director of that company, but then, she had never been a director of Organic. Mironesco holds 30 of the 90 shares in ADE on trust for the Hunter Family Trust. Mrs Hunter has never been a shareholder of Mironesco. It holds one third of the units in the ADE Unit Trust and the OneGroup Unit Trust. While Mrs Hunter remains married to Mr Hunter she has rights as a secondary beneficiary to distributions from the Hunter Family Trust, in the discretion of the trustee. No doubt rights as the beneficiary of a discretionary trust are less certain than rights as a shareholder of Organic. The trustee of the Hunter Family Trust might choose never to distribute income or capital to Mrs Hunter, and she would have limited rights to challenge that. Nonetheless, she

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19 *In re London School of Electronics Ltd* [1986] 1 Ch 211, 222; *Joint v Stephens* [2007] VSC 145, [233] ff.

20 *Fexuto Pty Ltd v Bosnjac Holdings Pty Ltd & Ors* [2001] NSWCA 97, [90], and the cases cited there.

21 *Campbell v Backoffice Investments* [2009] 238 CLR 304, [175] citing *In Re HR Harmer Ltd* [1959] 1 WLR 62.

22 *Ian Allan Byrne v AJ Byrne Pty Ltd* [2012] NSWSC 667, [48]; and *Fexuto* (above) [27]-[30].

willingly exchanged the security of her rights as a shareholder for this position because, on advice, she thought it better in her financial interests – it allowed tax minimisation and asset protection. To the extent that there is a prejudice to her financial interests as a result of the conduct of the affairs of Organic, it is a diminution which she sought and actively participated in bringing about. It could not be regarded as unfair within the meaning of s 232. In fact, I think the better analysis is that if any prejudice does arise, it is caused by her own neglect of her own financial interests and her marriage breakdown, not from the conduct of the affairs of Organic.

[109] When the Hunters finally divorce, Mrs Hunter will no longer be a beneficiary of the Hunter Family Trust. There is no evidence before me that this will be to her financial detriment. One might expect that the orders made in the Family Court will fairly adjust her rights to take that into account, and to take into account that Mr Hunter owns the shares in Mironesco. Even if there were to be some diminution in financial position as a result of Mrs Hunter's no longer being a beneficiary under the Hunter Family Trust, that diminution will not result from the conduct of Organic's affairs, but from the marital breakdown between the Hunters. In these circumstances I cannot find that there is any oppression or prejudice to Mrs Hunter, or separately, that any oppression or prejudice arises from the conduct of the company's affairs, or separately again, that any prejudice would be unfair in the sense comprehended by s 232.

[110] Mrs Hunter relied upon cl 8.7.2 of the Unitholders Deed of Agreement as a provision of the restructure documents which was specifically used oppressively against her. That is dealt with below at paragraph [131] and following. Otherwise Mrs Hunter's case was based on the general effect of the restructure rendering her shares in Organic worthless, no other particular provisions of the restructure documents were relied upon as having been used oppressively against her. I outline the relevant provisions of the Unitholders Deed of Agreement above. It contains pre-emptive provisions and other provisions which limit the rights of those persons who are parties to it, for example non-competition restrictions. I accept the submissions on behalf of the Chenerys that insofar as there may be restrictions on parties' rights imposed by the restructure documents, these were agreed to by all relevant parties at a time when it was not known how and if they would be relied upon in the future. That is, it was not known whether any one of the five principals would wish to sell, or buy, units or shares under the new arrangement.

[111] I add that I do not see any of the pre-emptive provisions in the Unitholders Deed of Agreement as being commercially unusual. At the end of the day, a sale under the pre-emptive provisions will be at market value. As I have noted above, there are pre-emptive provisions in the constitution of Organic which also, at the end of the day, come back to sale at a fair value. Further, Mrs Hunter is not a party to the Unitholders Deed of Agreement, it is clear that she is not bound by it, so that any effect on her can only be indirect.

[112] Further, I record my conclusion that, there is little risk that the defendants will attempt to use provisions from the restructure documents in an oppressive way. By an open letter dated 25 July 2008 (exhibit 109) the Chenerys and Mr Orpen offered to do whatever was reasonably necessary to give effect to the restructure in a way which preserved, to Mrs Hunter's satisfaction, her control and interest in the business venture conducted by Organic.

Quasi-partnerships

[113] As noted at the outset, Organic was originally, and at least until around July 2006, continued to be, in some ways similar to a partnership between five individuals. There has been considerable discussion in the cases as to the regard which may be had to such a background relationship between the principal actors in an oppression case. In *O'Neill v Phillips* Lord Hoffmann cited Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd*,[23] a winding-up case involving the just and equitable ground:

> "The words ['just and equitable'] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act 1948 and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents [the company] suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way." – at 967.

[114] Lord Hoffmann thought the same reasoning applied to the concept of unfairness in the context of oppression. In *O'Neill v Phillips* he said:

> "… a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But … there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith." – at 967.

[115] In this context Lord Hoffmann quoted from an Australian case, *Re Wondoflex Textiles Pty Ltd*,[24] another just and equitable winding-up case:

> "It is also true, I think, that, generally speaking, a petition for winding up, based upon the partnership analogy, cannot succeed if what is complained of is merely a valid exercise of powers conferred in terms by the articles … To hold otherwise would enable a member to be relieved from the consequence of a bargain knowingly entered into by him … But this, I think, is subject to an important qualification. Acts which, in law, are a valid exercise of powers conferred by the articles may nevertheless be entirely outside what

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23 [1973] AC 360, 379.

24 [1951] VLR 458, 467 per Smith J.

> can fairly be regarded as having been in the contemplation of the parties when they became members of the company; and in such cases the fact that what has been done is not in excess of power will not necessarily be an answer to a claim for winding up. Indeed, it may be said that one purpose of [the just and equitable provision] is to enable the Court to relieve a party from his bargain in such cases."

[116] Lord Hoffmann expresses the view that weight must be given to the principle of legal certainty when considering unfairness which does not involve breach of any legal obligation. His concern was that the notion of fairness did not become "wholly indefinite" – p 968. It can be seen from the discussion of the facts which follows the above extracts from *O'Neill v Phillips* that there must be some definite basis shown on the evidence when it is alleged that there is an understanding not recorded in the company's constitution. In that case there had been an in-principle agreement to transfer shares, subject to formal agreement. The parties had acted consistently with the in-principle agreement, in substance in dividing the profits of the company equally, for many years.[25] However, it was held there was no unfairness in departing from this in-principle agreement because there had in fact been no promise made, there had just been negotiation.

[117] The same insistence on a firm and identifiable basis for an understanding contrary, or additional to, the rights and obligations in the constitution of a company is found in the treatment of the facts of *Fexuto Pty Ltd*, in the judgment of Spigelman CJ between paragraphs [59] and [79].

[118] There was no evidence before me that there was any arrangement along the lines that each of the five principals would continue to play a role in the management of Organic for as long as they pleased, even an arrangement or understanding falling short of a contract. While the company was clearly established with the idea of equality in shareholding and directorship between each of the three family groups, there was nothing clearly expressed or understood as to the future. Having regard to the decided cases I cannot find a sufficiently definite and identifiable basis for an assertion that there was an agreement or understanding, additional to the constitution of Organic, that all principals would remain involved in its management.

[119] And indeed it must be a rare case where there could be a realistic arrangement of that type into the future, in whatever factual circumstances arose. While the five principals may originally have hoped for success for the company, I doubt any of them could have expected the extent of the early success which came to Organic. Further, presumably none of the principals expected that the Hunters' marriage would breakdown; that John Hunter would breach his fiduciary duties to Organic and depart from the management of the business, or that Cornelia Hunter would become irrationally suspicious of, and aggressive toward, them.

[120] As Black J says, when discussing expectations as to future involvement in the management of a company, in *Ian Allan Byrne* (above), "… expectations are not immutable. The non-fulfilment of expectations will not establish oppression, if there has been some good reason for the extinguishment of the expectation."[26] Very

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25 See p 964 and pp 970-971.

26 *Ian Allan Byrne v AJ Byrne Pty Ltd* [2012] NSWSC 667, [49] citing Austin J in *Tomanovic v Argyle HQ Pty Ltd*, and various other cases at [49(c)].

similar dicta are found in *Fexuto Pty Ltd*, per Spigelman CJ, often quoting from the trial judge, Young J. In that matter a family business which had humble beginnings became very large, and over a long period of time experienced considerable change. It was not sensible to expect management style and practices to remain the same.[27]

No Oppression in Directorship Changes

[121] Mrs Hunter's pleaded case about the removal of Mr Hunter as a director of Organic, and his replacement with Mr Chenery, is that there was agreement between all principals, except her, that these two events would occur and that subsequent to them the Chenerys and Mr Orpen would use Mr Hunter's resignation to compulsorily acquire her shares in Organic under provisions of the Unitholders Deed of Agreement. In the alternative it is pleaded that there was an agreement between the Chenerys and Mr Orpen to force Mr Hunter to retire as a director of Organic and then compulsorily acquire Mrs Hunter's shares in Organic and Mironesco's units in the unit trusts and shares in ADE – paragraphs 38 and 39 of the second further amended statement of claim.

[122] As I have found, the retirement of Mr Hunter from Organic was valid pursuant to the constitution. The appointment of Mr Chenery pursuant to the constitution was valid. The plaintiff's pleaded case about this – paragraphs 41(c), 41(d) and 44-49 of the second further amended statement of claim is simply wrong in law.

[123] While it is not pleaded, Mrs Hunter's case at trial went some way to asserting a contradiction of her extra-constitutional expectations, in relation to directorship of Organic. Mrs Hunter complained that without a director, all the other principals had complete control of the company with no-one looking after her interests – t5-20. She used the term "my director" – t5-33, and said "I am without a director" – t5-34. As recorded above, I find no extra-constitutional arrangement or understanding that all three family groups, or all five principals, would always have a director associated with them on the Board of Organic.

[124] It is true that the Chenerys and Mr Orpen discussed matters relating to Mr Hunter's resignation to the exclusion of Mr and Mrs Hunter. In the circumstances obtaining at the time I find it was reasonable for them to do so. Mrs Hunter was not a director. She had withdrawn from employment with, and management of, Organic. The state of relations between her and Mr Hunter was uneasy to say the least. The events under discussion were serious breaches of fiduciary duty owed to Organic by Mr Hunter.

[125] Mrs Hunter did not challenge the fact that Mr Hunter had been planning to compete with Organic, and was in breach of his fiduciary duties to Organic at the time of these events. In fact her case, at least at trial, involved considerable elements of reproach against the Chenerys and Mr Orpen for allowing Mr Hunter to continue in some loose association with the business of Organic and as a director of ADE in circumstances where, by reason of his breaches of fiduciary duty, she asserted he was disentitled from any involvement with the company. For the Chenerys and Mr Orpen to insist on Mr Hunter's retiring in those circumstances was, on all the evidence, clearly in the interests of the members of Organic as a whole. In any event, Mr Hunter himself decided to retire. It was his voluntary decision, he was not removed by the other directors or the company.

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[27] Above [59]-[87].

[126] Given the behaviour Mr Hunter had engaged in, and given that the relationship between Mr Hunter and his wife was by that stage no longer one where she could assume as a matter of course that he would act in their joint interests, I cannot see that insisting that Mr Hunter retire as director of Organic could possibly be oppressive or prejudicial to, or discriminatory against, Mrs Hunter. It could certainly not be regarded as unfairly prejudicial to or unfairly discriminatory against her within the meaning of s 232 of the *Corporations Act.*

[127] I accept Mr Chenery's evidence that it was not until some days after the retirement of Mr Hunter that he was appointed a director. I accept Mr Orpen's evidence that Mr Chenery's appointment as a director was by no means a natural or foregone conclusion. There is no evidence that Mr Chenery's taking a directorship of Organic had been agreed before Mr Hunter retired from Organic, much less agreed as part of a larger plan to oust Mrs Hunter from Organic, or alternatively Mr and Mrs Hunter from Organic.

[128] The directors of Organic – Alf Orpen and Narelle Chenery – were entitled to appoint another director without consulting shareholders. They did so and appointed Colin Chenery.

[129] There is no evidence that the appointment of Mr Chenery as a director was contrary to the interests of the members of Organic as a whole. In circumstances where I have found no extra-constitutional understanding as to the management of Organic, I cannot see that the appointment of Mr Chenery was oppressive or prejudicial to or discriminatory against Mrs Hunter. Even if there had been some sort of extra-constitutional understanding in this regard, contradiction of it would not have been unfair within the meaning of s 232 of the *Corporations Act* in circumstances where Mr Hunter had disqualified himself from office and Mrs Hunter had, after a gradual withdrawal from the business since late 2005, told the remaining principals of her (and her husband's) intention to sell her share in the business and depart.

Efforts to Sell or Buy Mrs Hunter's Shares in Organic and/or Shares and Units Owned by Mironesco

[130] There is no evidence that there was an agreement whereby the Chenerys and Mr Orpen, with or without Mr Hunter, determined to compulsorily acquire Mrs Hunter's shares in Organic in order to remove her from the business – see paragraphs 38(a)(iii) and 39(a)(iv) of the second further amended statement of claim. This part of the pleading seems to be related to paragraphs 25(f) and 21(q)-(u) of the statement of claim.

[131] Clause 8.2.7 of the Unitholders Deed of Agreement provides that a "Unitholder and a Unitholder's Related Owners shall be deemed to have given the Trustee Company a notice of their desire to sell their Sale Interest if a Trustee Company Director related to that Unitholder resigns". Mironesco was a unitholder. There are no Related Owners (see [60] above). Organic is the trustee company and John Hunter was a trustee company director. Sale Interest was defined as, "'Sale Interest' of a Party means all shares in the Trustee Company and units in the Trust owned by that Party and its Related Owners".

[132] Mrs Hunter was not a party to the Unitholders Deed of Trust. She was a shareholder in Organic. Mironesco owned no shares in Organic. Clause 8.2.7 does not bind Mrs Hunter, or Organic. When John Hunter resigned as a Trustee

Company Director within the meaning of cl 8.2.7 of the Unitholders Deed of Agreement, there was therefore no deemed notice to sell the shares Mrs Hunter owned in Organic.

[133] There was however a deemed notice of sale of Mironesco's units in the OneGroup, but not the ADE Unit Trust, or its shares in ADE, because the Unitholders Deed of Agreement applies only to the OneGroup Unit Trust. There has never been an assertion of rights to buy from Mironesco based on this provision, or otherwise.

[134] The only pleaded particulars of an attempt to compulsorily acquire Mrs Hunter's shares in Organic and Mironesco's shares in ADE and units in the two unit trusts are four emails – paragraph 42(b) of the second further amended statement of claim. Only two were tendered, together they are exhibit 128. In the first of them, dated 9 February 2007, Ms Turner offers Mironesco some legal advice as to the meaning of cl 8.2.7 of the Unitholders Deed of Agreement. The advice is as to how Mironesco should go about offering its units in the ADE unit trust for sale. It does not concern Mrs Hunter's shares in Organic and does not lend support to the pleaded case. The second is an email string beginning 14 February 2007 where John Hunter sends Anne Turner's advice to the Chenerys and Mr Orpen, and Mr Orpen, in consequence, asks the General Manager of Organic to get an independent valuation of Organic. Mr Orpen lets Mr Hunter know that he has done this. Again, there is no support for the case pleaded.

[135] Very commonly in the cases one party asserts that, whatever the formalities as to directorship and management, they, as shareholders, "… have entered into association upon the understanding that each of them who has ventured his capital will also participate in the management of the company".[28] Of such a situation Lord Hoffmann says, "… it will usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participation in the management without giving him the opportunity to remove his capital upon reasonable terms."[29]

[136] In *Fexuto*[30] Spigelman CJ noted that, "One of the significant factors in virtually all of the case law about oppression and winding-up on the just and equitable ground, has been a formal restriction which prevented the applicant for relief selling his or her interest for full value."

[137] The defendants have never insisted upon Mrs Hunter selling her shares in Organic, or upon Mironesco selling its units in either unit trust, or its shares in ADE. It is Mrs Hunter who has insisted on a sale at a valuation which is quite inappropriate to the factual circumstances. There is no factual foundation for the claim pleaded.

[138] I say that the BDO Kendalls' valuation which Mrs Hunter obtained in November 2006 is inappropriate to the factual circumstances because it values the entire business of Organic and Mrs Hunter relies upon it to claim one-sixth of that value. Having regard to my findings above, Mrs Hunter does not own anything other than her shares in Organic, half of which she holds on trust for Mr Hunter. It is those shares which will need to be sold to achieve her disentanglement from Organic.

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28 *O'Neill v Phillips* (above) p 970.

29 *O'Neill v Phillips* (above) p 970, per Lord Hoffmann quoting an extract from his own decision in *Re Saul v Harrison & Sons Plc* [1995] 1 BCL 14, 19.

30 (above) [51].

After the restructure, as she correctly understands, those shares have little value. Her remaining rights are against Mr Hunter in the Family Court in respect of all the property of the marriage which will include the shares in Mironesco.

[139] I record that while the BDO Kendalls' valuation was in evidence, its author was not called to give evidence. The valuation was simply in evidence as something Mrs Hunter commissioned, received and acted upon. The valuation has not been tested in any way in this proceeding.

Totality of Conduct

[140] Whether or not conduct is unfair within the meaning of s 232 of the *Corporations Act* is to be judged in the entire context in which the conduct takes place. Individual acts are not to be looked at in isolation and, relevantly in this case, the entire course of conduct relied upon by the plaintiff is to be judged as a whole.[31]

[141] I have found that none of the individual acts relied upon by Mrs Hunter amount to conduct within the meaning of s 232 of the *Corporations Act.* I cannot see that in combination the acts amount to conduct which falls within the section. There is no basis to say that the totality of conduct is contrary to the interests of the members of Organic as a whole. Viewing all the conduct together, there has been no oppression or unfairness within the meaning of s 232 in my view. The affairs of the company have been conducted fairly and reasonably in response to external events. Largely the background to those events has been Mrs Hunter's desire to leave both her marriage and the Organic business. It is very significant that there has been no obstacle to her leaving but her own wrong insistence on an inflated purchase price for her shares in Organic.

Lack of Remedy

[142] Because I find that there was no oppressive conduct within the meaning of s 232 of the *Corporations Act* I am not permitted to make any order pursuant to s 233 of that Act. It has been many times noted that the Court does not have jurisdiction to make an order under an oppression provision only because there has been a breakdown in the personal relationship between the principal actors in a quasi-partnership – oppression must be shown within the terms of the statutory remedy.[32] As Lord Hoffmann put it in *O'Neill v Phillips*, no-fault divorce is not available in company law.[33]

Winding-up

[143] Alternatively to the main relief sought in the proceeding, the claim seeks that Organic be wound up pursuant to s 461(1)(e), (f) or (k) of the *Corporations Act.* Mrs Hunter did not advance this as a separate part of the case she ran at trial. No defendant asked me to wind-up Organic.

[144] Section 461(1)(e) gives the Court power to wind-up a company if the directors have acted in their own interests rather than the interests of the members of the company as a whole or in any other manner whatsoever that appears to be unfair or unjust to

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31 *Lucy v Lomas* [2002] NSWSC 448, [45] and the authorities cited there.

32 *Campbell v Backoffice Investments Pty Ltd* [2008] NSWCA 95, [443]; *Fexuto Pty Ltd* (above), [89]-[90].

33 *O'Neill v Phillips* (above) p 972.

other members. It follows from what I have said above that I do not see any factual basis to wind the company up on this ground. Nor is there any ground to wind it up pursuant to s 461(1)(f), winding-up for oppression.

[145] Section 461(1)(k) allows the Court to wind-up a company if the Court is of the opinion that it is just and equitable to wind-up a company.

[146] While the law relating to partnerships and companies has many similarities,[34] it does differ, and due respect must be paid to the fact that parties have made a deliberate choice to conduct their affairs one way or the other, a choice attended in the vast majority of cases by professional advice and formalities.[35] This was discussed in *Re a Company*[36] by Vinelott J in the context of an application for winding-up on the just and equitable ground. The company there was a quasi-partnership. Vinelott J spent some time analysing the special rules which apply because of the fiduciary relationship between partners and went on to say:

> "But when partners transfer their business to a company, they accept a new legal structure with different rights and liabilities, albeit that equitable principles will govern the way in which those rights are exercised … if the partnership is superseded by a company the partnership assets become the property of the company. The partners take in exchange shares of the company which, unlike an interest in a partnership, are capable, subject to restrictions in the articles, of being transferred or transmitted, though in the case of a minority holding the full value may not be realisable on sale. It seems to me impossible to say that despite this change in the relationship between the former partners, each shareholder has the same presumptive rights, if the common intention that all should participate in the affairs of the company is frustrated, to have the company wound up and its assets realised on sale, a course which, I should add, is likely to prove far more damaging to the shareholders than the appointment of a receiver and the sale of a partnership business is to the partners. What each quasi-partner is entitled to do is apply to the court to have the company wound up on the ground that the conduct of the majority makes it just and equitable to do so."

[147] The history of Organic in the years 2003 to 2006 was nothing short of spectacular. In the first 18 months of its operation it grew 2,500 per cent – t4-101. Immediately before the restructure the company employed some 45 to 65 staff – t4-109. All the principals believed that the company had a lot of potential – t4-109. Since 2006 the company's economic performance has not been nearly so strong. Some of the reasons for that are canvassed in this decision. No doubt the strain of this litigation and the restrictions in the interlocutory injunction have played their part. No doubt general economic vicissitudes between 2006 and the present, including the strength of the Australian dollar, have played a part. Nonetheless the company continues to operate its business, largely due to the hard work and dedication of the Chenerys. It remains solvent.

[148] Their drawings from the business of Organic are the only livelihood the Chenerys have. They have devoted nearly 10 years of their lives to the company, *inter alia*,

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34 See Hoffmann LJ in *O'Neill v Phillips* (above) 967.

35 See Hoffmann LJ in *O'Neill v Phillips* (above) 966.

36 [1983] 2 All ER 854, 861.

because they have a strong, principled belief in its products. The formulas for the Organic skincare range were devised by Mrs Chenery. The uncontradicted evidence was that they were the first totally organic cosmetic products in the world. The evidence before me on 20 August 2012 was that the costs of this litigation have meant that the Chenerys have lost their family home. It is unlikely that they would have the resources to buy assets from a sale if the company is wound-up. The costs of a liquidation are likely to destroy any value in the business, greatly to the financial detriment of all the principals.

[149] On the other hand, Mrs Hunter had since late 2005 been progressively withdrawing from the business of Organic. By November 2006 she wished to sever entirely her links with the business and the company, the only thing preventing her doing so was her own insistence on an exorbitant purchase price for her shares in Organic. While I have no doubt that Mrs Hunter worked long hours, and performed indispensable administrative work between 2003 and 2005, her contribution to Organic was the least original of any of the five principals. She has had no involvement in the business at any level since August 2006. Since November 2006 she has taken the position that she wishes to move on.

[150] While Mrs Hunter has effectively been excluded from the management of Organic, this has come about as a result of her own actions since late 2005. The relationship between Mrs Hunter and the other principals has broken down. There is no realistic possibility of their working together again. The breakdown in relationship between Mrs Hunter on the one hand, and the other principals on the other, has come about as a result of Mrs Hunter's own behaviour. She has not been prevented from withdrawing her capital from the business. The cases cited at [135] and [136] are relevant here. The only thing preventing her selling her shares in Organic has been her wrong, over-inflated, notion of their value. In these circumstances I cannot see that it is just and equitable to wind-up Organic.

Miscellaneous Points Taken by the Plaintiff

[151] It is necessary to deal with a series of miscellaneous points either pleaded by the plaintiff, or raised by her at the trial.

[152] The plaintiff pleads at paragraphs 31-34 of the second further amended statement of claim that the restructure was beyond the powers of the directors because cl 64(1) of Organic's constitution provided:

> "Subject to the Act and to other provisions of this Constitution, the business of the Company shall be managed by or under the direction of the directors, who may pay all expenses incurred in promoting and forming the Company, and may exercise all such powers of the Company as are not, by the Act or by the provisions of this Constitution, required to be exercised by the Company in general meeting."

[153] It is pleaded that the restructure involved a purported disposition of the business of Organic to the OneGroup Unit Trust and the ADE Unit Trust and that there was no general meeting to approve the disposal of the business. This plea must be rejected. First, it rests on a wrong assumption, which is also found at paragraphs 14 and 15 of the pleading, that there was a transfer of its business away from Organic in the course of the restructure. In fact there was not. Organic continues to conduct the

same business it always has done, under the management of its directors. Its assets and its income stream are now held, and disposed of, pursuant to a trust structure, but Organic does still conduct the business. In any case as I have found, all the shareholders of Organic, together with all the directors of Organic, concurred in agreeing to the restructure and implementing it, including by Mrs Hunter signing all appropriate documents, so that it could not possibly be argued that the restructure occurred without the approval of the shareholders of Organic.

[154] Paragraphs 50-56 of the second further amended statement of claim plead that the directors of Organic owed fiduciary duties to it, which may be accepted. It is pleaded that they breached these fiduciary duties by implementing the restructure because their actions were not in the best interests of Organic, but in their own interests, without the fully informed consent of the shareholders of Organic. It is then pleaded that Organic has suffered loss and damage (unspecified) as a result of the breaches.

[155] If this were an independent cause of action asserted on Organic's behalf, Mrs Hunter is not authorised to make it. However, from paragraph 57 of the second further amended statement of claim it appears to be a pleading in aid of the oppression claim as supporting the idea that the restructure was contrary to the interests of Organic's shareholders as a whole. As I have found, all the shareholders of Organic agreed to, and participated in, implementing the restructure. I have found no oppression within the meaning of s 232 of the *Corporations Act.*

[156] Mrs Hunter alleged during the course of the trial that there were irregularities with the 2007 accounts of Organic. This is not a matter which is pleaded. Notwithstanding that, the matter was explored to some extent in evidence. The declining performance of the company since 2006, or between 2006 and 2007, was called in aid by Mrs Hunter here. I have no doubt that the terms of the interlocutory injunction have contributed to the declining performance of the company. Further, the fact that in 2006 the General Manager, IT Manager and Mr John Hunter were all effectively removed from the company at once in unplanned circumstances must have affected the company significantly and negatively. The evidence was that network marketing companies such as Organic depend very heavily upon the confidence of the marketers associated with the company and the events of late 2006, and this litigation, continuing as it has, for six years, must have affected that. No doubt the continuance of the litigation has also been a factor in the company's declining performance. The Chenerys and Mr Orpen thought so. In his submissions Mr Chenery refers to the defendants to the action being "commercially immobilised" by the plaintiff's behaviour. The evidence was that the company has always been able to pay its debts, and in fact it still pays significant amounts to all five principals by way of licence fees through the ADE trust.

[157] I cannot see that there was anything in this matter which would be such as to conclude that the directors' conduct of the company was wrong, poor, or in any way such as to be oppressive.

[158] Further, although there is no pleading to this effect, Mrs Hunter made various accusations during the course of the trial that the directors' conduct of the company was poor because the directors still had some personal and business relationship with John Hunter, and allowed him to be a director of ADE. She complained that he is welcome at the company premises and has access to the computer and banking

systems of the business. There was nothing in the latter point – see t5-78 – 79, t5-99, t5-102. I find he has no access to the banking or computer systems and has not had any inappropriate access since his resignation as a director.

[159] ADE does not trade. It holds assets and receives income. The income and the assets are held on trust. The evidence was that as at 28 November 2006 John Hunter was not asked to resign as a director of ADE because the parties did not advert to his being a director of ADE. Nonetheless, he has not been asked to resign as a director of that company since then.

[160] There is no doubt that in the past Mr Hunter's expertise in network marketing using the internet has been of great value to Organic. It continues to be the case that he consults informally and infrequently with some of the directors of Organic about aspects of its business. Despite all that has occurred, and despite this litigation, it is clear that the Chenerys and Mr Orpen have a civil, business-like relationship with Mr Hunter. No doubt this is sensible considering the extent to which their financial interests are still intertwined. I can see nothing in the accusations made by the plaintiff which would amount to poor conduct on the part of the directors and certainly nothing which would amount to mismanagement of a type which would fall within s 232 of the *Corporations Act.*

[161] I record that, at times, Mrs Hunter asserted that in April or May 2007 John Hunter instructed the directors not to make payments to her. This is not pleaded and Mrs Hunter said she did not rely on it as part of her case – t 4-15. In any case, there was nothing in the claim that monthly payments to her had been stopped by the directors at John Hunter's request – t8-24, t9-48.

[162] Lastly, during the trial Mrs Hunter tried to explore an unpleaded point that the Chenerys, and perhaps Mr Orpen, were attempting to use MiEssence Pty Ltd to take Organic's business away from it. I ruled that she could not run this point as it is not pleaded. She did not seek leave to amend her pleadings when told she could do so - t4-42. The documents which she wished to rely on in support of this notion do not show any realistic support for it.[37] I note that MiEssence is de-registered and that the trademarks which it previously owned are held in Organic's name.

[163] I give judgment for the defendants against the plaintiff. The defendants ask for indemnity costs. I will hear the plaintiff on this point.

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[37] Marked "I" for identification.