SUPREME COURT OF QUEENSLAND

CITATION:	*LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo & Anor* [2013] QSC 225
PARTIES:	**LPD HOLDINGS (AUST) PTY LTD** ACN 060 214 511 (plaintiff/respondent) **v** **ALAN SPENCE PHILLIPS, SIMON HICKEY AND JOHN DOMINIC TOIGO** (first defendants/first applicants) and **MACARTHUR MINERALS LIMITED** ACN 103 011 436 (second defendant/second applicant)
FILE NO/S:	BS 11108 of 2012
DIVISION:	Trial Division
PROCEEDING:	Interlocutory application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	28 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	26 April 2013 Further written submissions provided on 2 May 2013.
JUDGE:	Philip McMurdo J
ORDERS:	**1. The plaintiff file and serve an amended statement of claim, in terms which are consistent with this judgment, within 21 days.** **2. The applications by the first and second defendants are adjourned to a date to be fixed.**
CATCHWORDS:	CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERS' REMEDIES AND INTERNAL DISPUTES – OPPRESSIVE OR UNFAIR CONDUCT – WHAT CONSTITUTES – CONDUCT OF OR RELATING TO DIRECTORS – where plaintiff brings proceedings against a company of which it is a shareholder for relief pursuant to s 233 of the *Corporations Act* 2001 (Cth) – where plaintiff also brings proceedings against the company's directors for relief under s 233 – where plaintiff complained of misconduct by the directors – where plaintiff did not seek leave to proceed under s 237 of the *Corporations Act* 2001 (Cth) – where plaintiff sought compensation under s 233 –

whether the plaintiff can bring proceedings under s 233 instead of s 237 – whether the broad powers expressed in s 233 are qualified by excluding a power to grant relief for acts or omissions for which the company would have a cause of action under s 236 of the *Corporations Act* 2001 (Cth) – whether the plaintiff can obtain compensation from the directors of the company as a shareholder of the company

Corporations Act 2001 (Cth), s 169, s 231, s 232, s 234, s 236, s 237

Atlasview Ltd v Brightview Ltd [2004] 2 BCLC 191; [2004] EWHC 1056 (Ch), considered
Campbell v Backoffice Investments Pty Ltd (2008) 66 ACSR 359; [2008] NSWCA 95, considered
Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (2001) 37 ACSR 672; (2001) NSWCA 97, considered
Gamlestaden v Baltic Partners Ltd [2007] 4 All ER 164; [2007] UKPC 26, considered
McCracken v Phoenix Constructions (Qld) Pty Ltd (2012) 272 FLR 104; [2012] QCA 129, considered
Rankine v Rankine (1995) 124 FLR 340, considered
Re Chime Corp Ltd (2004) 7 HKCFAR 546; [2004] HKCFA 73, considered
Re Hollen Australia Pty Ltd [2009] VSC 95, considered
Re Saul D Harrison & Sons plc [1995] 1 BCLC 14, cited

COUNSEL: D Savage SC, with C Jennings, for the plaintiff/respondent
L Kelly SC, with D Pyle, for the first defendants/first applicants
P Dunning SC, with D O'Brien, for the second defendant/second applicant

SOLICITORS: Russells for the plaintiff/respondent
Clayton Utz for the first defendants/first applicants
Hopgood Ganim for the second defendant/second applicant

[1] This is a claim for relief pursuant to s 233 of the *Corporations Act* 2001 (Cth) ("the Act"). The second defendant is the company the affairs of which are in question. I shall refer to it as the company. The first defendants are three of the company's directors.

[2] The first defendants apply for the summary dismissal of the claim against them, upon the basis that no relief has been or could be claimed against them. The company applies to strike out certain parts of the statement of claim or alternatively for particulars of some of those paragraphs.

[3] Sections 232 and 233 of the Act provide as follows:

"232. The Court may make an order under section 233 if:

(a) the conduct of a company's affairs; or

(b) an actual or proposed act or omission by or on behalf of a company; or

(c) a resolution, or a proposed resolution, of members or a class of members of a company;

is either:

(d) contrary to the interests of the members as a whole; or

(e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

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

233. (1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:

(a) that the company be wound up;

(b) that the company's existing constitution be modified or repealed;

(c) regulating the conduct of the company's affairs in the future;

(d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;

(e) for the purchase of shares with an appropriate reduction of the company's share capital;

(f) for the company to institute, prosecute, defend or discontinue specified proceedings;

(g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;

(h) appointing a receiver or a receiver and manager of any or all of the company's property;

(i) restraining a person from engaging in specified conduct or from doing a specified act;

> (j) requiring a person to do a specified act.
>
> Order that the company be wound up
>
> (2) If an order that a company be wound up is made under this section, the provisions of this Act relating to the winding up of companies apply:
>
> (a) as if the order were made under section 461; and
>
> (b) with such changes as are necessary.
>
> Order altering constitution
>
> (3) If an order made under this section repeals or modifies a company's constitution, or requires the company to adopt a constitution, the company does not have the power under section 136 to change or repeal the constitution if that change or repeal would be inconsistent with the provisions of the order, unless:
>
> (a) the order states that the company does have the power to make such a change or repeal; or
>
> (b) the company first obtains the leave of the Court."

The pleading

[4] The company is a public company incorporated under the Act and listed on the Toronto Stock Exchange. Its principal asset is an undeveloped iron ore deposit in Western Australia, which I will call the project.

[5] The company has six directors of which the first defendants are three. The plaintiff's case is that the first defendants caused the company's affairs to be conducted in the ways of which the plaintiff now complains.

[6] The statement of claim contains a table of contents, in which the pleading is broken into some 18 parts. Part 1 pleads the identity of various companies and individuals who were participants in some or all of the relevant conduct. The first defendants are described in the pleading as "the Board". It is alleged that from 31 August 2009 until 23 June 2011, the first defendants were the only directors of the company and controlled the company "and all of its business operations". Paragraph 22 of the pleading alleges that:

> "The conduct of [the company] and the Board pleaded below was oppressive to, unfairly prejudicial to, or unfairly discriminatory against, [the plaintiff] within the meaning of section 232 of the *Corporations Act* 2001 by reason of the matters pleaded therein."

[7] Paragraph 23 of the statement of claim pleads that each of the first defendants owed duties according to s 180, s 181, s 182 and s 183 of the Act, as well as duties under the general law to use reasonable care and skill, to act in the best interests of the

members of the company and to prevent a conflict of his interest with those of the company or his duty to the company or its members.

[8] Part 2 of the pleading alleges that there was an agreement or understanding between the plaintiff and the company, whereby the plaintiff and Chinese corporations to be introduced by it (which I will call its associates) would fund the development of the project. It also alleges that there were a number of transactions to give effect to this from early 2007 until late 2009.

[9] Part 3 pleads events which culminated in the ouster of two of the then directors in August 2009, leaving the first defendants as the directors.

[10] Part 4 is a series of allegations complaining of an issue of shares in the company in 2010. The plaintiff alleges that from January to March 2010, the first defendants had discussions with other investors, with the objective of diluting the interests of the plaintiff and its associates which, according to the original understanding, were to have been the parties "to commercialise" the project. Six million shares were issued at C$1.50 per share. None were offered to the plaintiff or its associates. It is said that the shares were issued to only a small number of investors and that two of them were companies associated with one or more of the Board.

[11] Paragraph 82 (within this Part 4) pleads that the Board's decision to proceed with the 2010 share issue was made for the improper purposes of excluding the plaintiff and its associates and reducing their bargaining and voting power and interest within the company and constituted a breach by the first defendants of their duties under s 181 - s 183 of the Act.

[12] Paragraph 83 pleads that the conduct of the company and the Board in proceeding with the 2010 share issue was oppressive to, unfairly prejudicial to, or unfairly discriminatory against the plaintiff and its associates, thereby engaging s 232 of the Act.

[13] Part 5 is headed "Insider Trading" and alleges that some of the shares within the 2010 share issue were allotted to a company associated with the defendant Mr Hickey, who was privy to information not generally available and which would be expected to have a material effect on the price of the company's shares. It is alleged that the share price in the company rose from C$1.42 immediately prior to the announcement of the share issue to C$2.10. Part 5 concludes with a plea (paragraph 87) that this conduct of the company engaged s 232 because it was contrary to the interests of the members of the company as a whole.

[14] Part 6 consists of a number of allegations concerning a company called First Strategic Development Corporation Limited ("FSDC"), of which one of the defendants, Mr Alan Phillips, was a director at relevant times. Paragraph 92 pleads that Alan Phillips caused his son (Mr Joe Phillips) and a Mr David Taplin (the secretary of the company) to incorporate FSDC for the purpose of acquiring certain mining tenements within the area which was the subject of the project. Paragraph 93 pleads that Joe Phillips and Mr Taplin did incorporate FSDC and that they, together with another man, became its directors. It is alleged that they concealed their interest in FSDC by entering another entity as the recorded sole shareholder. It is alleged that subsequently the defendant Alan Phillips became a director of FSDC and that in about November 2009, FSDC made an agreement by which the company (or a company related to it) would purchase the shares in FSDC for 50 per cent

more than the amount payable by FSDC under its option agreement for the acquisition of those mining tenements. In paragraph 104, it is alleged that Alan Phillips, Joe Phillips and Mr Taplin intended to deprive the company of the opportunity to take up these tenements and to make a profit for FSDC of $18.5 million, five per cent of which would pass to them.

[15] Paragraph 105 pleads that this conduct constituted breaches by the defendant Alan Phillips of his duties under s 181-183 and his general law of duties to act in the best interests of the members of the company as a whole and not to permit his own interests to come into conflict with the company's interests or his duties to the company or its members. Paragraph 107 pleads that this also constituted conduct of the affairs of the company which was contrary to the interests of its members as a whole within s 232 of the Act.

[16] Paragraph 106 pleads that the company has suffered and will continue to suffer loss and damage by the conduct of those directors of FSDC, in that the company has lost the opportunity to acquire the tenements, the company has supplied services to FSDC, worth more than $300,000, which ought to have been spent on tenements under the ownership of the company, the company has expended substantial sums in seeking to recover its interest in the tenements, including at least $432,073 on legal costs and expenses, FSDC has been ordered to be wound up, the company has expended substantial sums seeking to recover an interest in the tenements, and that the company remains liable to indemnify the liquidator of FSDC for his remuneration, costs and expenses.

[17] Part 7 of the pleading complains of the appointment of Joe Phillips as project manager for the project, in October 2009. It is alleged that he was appointed because he is the son of one of the directors. It is said that this appointment was conduct of the affairs of the company which was contrary to the interests of the members of the company as a whole within s 232.

[18] Part 8 complains of a further share issue, this time in 2011. The company then issued 13.9 million shares and 6.95 million warrants, receiving gross proceeds of C$50.4 million. The plaintiff and its associates, it is said, were not informed of the proposed issue. It is alleged that the Board intended, by this share issue, to further impede and delay the plaintiff and its associates from proceeding to commercialise the project, to dilute the power of the plaintiff and its associates and to exclude them from participating in the project. Paragraph 118 alleges that the 2011 share issue was thereby made for a collateral and improper purpose and involved a breach by the Board of their duties under s 181 of the Act. Paragraph 119 pleads that the conduct of the company and the Board in the 2011 share issue was contrary to the interests of the members of the company as a whole or alternatively was oppressive, unfairly prejudicial to or unfairly discriminatory against members, including the plaintiff, within the meaning of s 232 of the Act.

[19] Part 9 alleges a waste of funds of the company in its response to a request by the plaintiff, made in June 2010, for certain information relating to the company. It is alleged that the company's response was affected by the fact that the Board had a personal interest in concealing from the plaintiff the facts of the matter about which the plaintiff was enquiring. The plaintiff's proceedings for the provision of this information and documents relating to it were compromised in May 2011, after the Board had incurred legal costs and expenses in resisting the plaintiff's application in

an amount of nearly $500,000. It is alleged that the documents and information subsequently disclosed, as a result of the compromise of that case, have provided evidence of serious misconduct on the part of the Board which partly provides the factual basis for the present proceeding.

[20] Paragraph 128 pleads that the Board's resistance to the plaintiff's request for this information and documentation, and its expenditure of the company's funds to that end, constituted a use of the Board's power for improper and collateral purposes, namely to conceal the truth from the plaintiff, other members of the company, the Australian Securities and Investments Commission and the market, and breaches by the Board of their duties under s 181-183 as well as their general law duties as directors. Paragraph 129 pleads that the conduct of the company and the Board in this respect constituted conduct of the affairs of the company which was contrary to the interests of the members of the company as a whole or alternatively was oppressive to, unfairly prejudicial to, or unfairly discriminatory against members, including the plaintiff, within the meaning of s 232.

[21] Part 10 of the statement of claim complains of a waste of funds of the company by a funding agreement between the company and the liquidator of FSDC. There is (again) a pleading that the company has spent at least $432,073 in relation to FSDC and has become liable for further expenditure, which is here quantified at between $130,000 and $190,000. That is an alleged loss to the company which is pleaded in Part 6, as I have discussed. But at this point of the pleading, it is alleged that the conduct of the Board was motivated principally by the personal antipathy of the defendant Mr Phillips towards certain individuals. It is said that the Board acted for improper and collateral purposes and in breach of the duties under s 181-183 as well as their general law duties, including an alleged duty to act with reasonable care and skill. Again it is alleged that this conduct of the company and the Board was within s 232, by being contrary to the interests of members as a whole or oppressive to, unfairly prejudicial to or unfairly discriminatory against members, including the plaintiff.

[22] Part 11 alleges that the conduct pleaded in parts 2, 3 and 6 has caused loss or damage to the company, by alienating the plaintiff and its associates and thus damaging the company's prospects of securing other Chinese government agencies as partners in the project, effectively stalling the progress of the project and substantially eroding "the value of [the company]". But further to those allegations of loss and damage suffered by the company, which are set out in paragraph 135(a)-(f), this appears in paragraph 135(g):

> "Members have suffered loss and damage by reason of the decline in the [company's] share price from C$4.30 in February, 2011 to its current price of C$0.35."

[23] In paragraph 136, it is alleged (again) that this conduct involves a breach of the duties of the first defendants of s 180 of the Act and of their general law duties as directors. Paragraph 137 pleads that the plaintiff has suffered loss and damage, as follows:

> "137. The [plaintiff] has suffered loss and damage as a result of the conduct of the Board in acting as alleged …, in that;
>
> (a) the value of [the plaintiff's] shares have declined from C$2.12 to C$0.35;

(b) [the plaintiff] has incurred substantial costs and expenses in pursuing the commercialisation of the [project].

[The plaintiff] will update and supplement these particulars prior to trial."

[24] Paragraph 138 contains an allegation that the conduct of the company and the Board, which is pleaded within this Part 11, engaged s 232, (again) as being conduct contrary to the interests of members as a whole or alternatively as oppressive etc to members, including the plaintiff.

[25] Part 12 complains of shares and share warrants which was issued by the company to First Apollo, a company said to have been controlled by the defendant Mr Phillips. It is said that the approval of the members of the company should have been obtained for the issue of the shares and warrants, and for extensions of the time for the exercise of the warrants as well as for the payment of a fee of C84,000 to a company of which Joe Phillips and his wife were the directors and shareholders. It is also alleged that the first defendant Mr Toigo took no action in response to receiving information, in October 2009, of these benefits. In paragraph 160, it is alleged that the conduct of the defendants Mr Phillips and Mr Toigo, as well as of the company, constituted conduct of the affairs of the company which was contrary to the interests of its members as a whole within s 232.

[26] Part 13 complains of improper maintenance of the company's share register. It is said that the register does not comply with the requirements of s 169 of the Act which relevantly provides as follows:

"(1) The register of members must contain the following information about each member:

(a) the member's name and address;

(b) the date on which the entry of the member's name in the register is made.

…

(3) If the company has a share capital, the register must also show:

(a) the date on which every allotment of shares takes place; and

(b) the number of shares in each allotment; and

(c) the shares held by each member; and

(d) the class of shares; and

(e) the share numbers (if any), or share certificate numbers (if any), of the shares; and

(ea) the amount paid on the shares; and

(eb) whether or not the shares are fully paid; and

(f) the amount unpaid on the shares (if any).

…

(5A) The register of a company that:

(a) has a share capital; and

(b) is neither a listed company (within the meaning of section 603) nor a company covered by an order under section 707;

must indicate any shares that a member does not hold beneficially."

[27] The plaintiff makes several complaints of contraventions of this provision. The first is that the register is "practically illegible". But the other complaints would suggest otherwise. In essence, they concern the registration of most of the company's shares against the description "CDS & Co". I will return to the particulars of this case when I discuss the company's submission that this Part 13 should be struck out for failing to reveal any cause of action. But for the present, it can be noted that its purported relevance to this case is asserted in paragraph 169, where it is said that the state of the share register reflects conduct of the affairs of the company which was contrary to the interests of the members as a whole within s 232.

[28] Part 14 complains of certain bonuses and share options which have been received by Alan Phillips and Joe Phillips, as well as benefits received by entities related to Alan Phillips in the form of retainers for the provision of consultancy services. This conduct is said to have been contrary to the interests of the members as a whole.

[29] Part 15 pleads a series of allegations which amount to a comparison between the company's current share price and its reported assets. Its share price, current as at the filing of this statement of claim, was C$0.35, which for its number of shares corresponds with a market capitalisation of C$15,687,220.50. As at 30 September 2012, its reported current assets were approximately $18.5 million, which included cash of $17,719,212. This Part 15 concludes with the following allegation:

"182. In the premises of the allegations contained in this Part 15, the members of [the company], and the market, attribute no value to the [project] under the management of the current board."

[30] The relevance of Part 15, in the context of proceedings under s 233, is not expressly pleaded.

[31] Part 16 pleads an imminent insolvency of the company. It pleads an amount of approximately C$13.3 million in working capital, which will be spent at the rate of about $1.83 million per month on "operating and investing activities". It is alleged that the company will be unable to develop the project unless and until it undertakes a "bankable feasibility study" for the project, which the plaintiff contends would cost at least $10 million. In paragraph 189, it is alleged that the company "will

become, or is at serious risk of becoming, insolvent within the next six months". Again a connection with s 233 is not expressly pleaded.

[32] Part 17, headed "Oppressive Conduct", repeats or at least summarises earlier allegations in respect of the share issues in 2010 and 2011. It also contains the broad allegation, in paragraph 193, that conduct of the first defendants and of the company has been oppressive to, unfairly unprejudicial to and/or unfairly discriminatory against the plaintiff and its associates, that being conduct being pleaded in Parts 3 through 14. Remarkably, that allegation relies upon paragraph (e) of s 232 in relation to conduct which, when pleaded earlier, was said to be within paragraph (d) of s 232, namely the conduct in Parts 5, 6, 7, 12, 13 and 14. And also remarkably, Parts 15 and 16 are not included in this paragraph 193, fortifying the impression that there is no alleged engagement of s 232 by the conduct pleaded in Parts 15 and 16.

[33] Paragraph 194 then pleads that "[a]s a result of the conduct of the Board and of [the company] referred to in the said parts of this pleading, [the company] has suffered loss and damage, the particulars whereof are as follows …". The reference to "the said parts of this pleading" is apparently to those parts set out in the preceding paragraph, thereby excluding Parts 15 and 16.

[34] In the particulars of that allegation of loss and damage to the company, there appears to be only one item which suggests a loss to members which is not derived from the company's loss. This is in subparagraph (h) as follows:

> "The present value of [the company's] shares is now substantially less than;
>
> (i) The value of its interests in the [project]; and
>
> (ii) Its cash on hand."

Nevertheless, this appears as a particular of the company's loss and damage. It is conceivable that the company might be worse off because its shares are undervalued, thereby affecting its ability to raise further capital to pursue the project.

[35] Part 18 contains an allegation, within paragraph 195, of the plaintiff's entitlement to relief under s 233 and a claim for that relief. It is perhaps necessary to set out paragraph 195 in full:

> "195. In the premises, the [plaintiff] is entitled to and claims the following orders pursuant to sections 232 and 233 of the *Corporations Act 2001*:
>
> (a) that [the company] issue sufficient shares to [the plaintiff] to restore it to its equity position immediately prior to the 2010 Share Issue;
>
> (b) alternatively, that [the company] issue sufficient shares to [the plaintiff] to restore it to its equity position immediately prior to the 2011 Share Issue;

> (c) further or alternatively, that [the company] purchase [the plaintiff's] shares in [the company] at their fair value and that its capital be reduced accordingly;
>
> (d) further or alternatively, such further or other relief as may be appropriate, including an order for compensation;
>
> (e) alternatively, an order that the [company] be wound up pursuant to section 233(1)(a) of the *Corporations Act 2001* on the grounds set out in subsections 232(a) to (e) and/or subsection 461(1) on the grounds set out in subsection 461(1)(e), (f) or (k)."

[36] At the conclusion of the pleading is yet another claim for relief, within some six paragraphs. The first of them corresponds with subparagraphs (a) to (d) of paragraph 195. The second corresponds with paragraph 195(e). The third nominates a proposed liquidator. The fourth seeks orders under s 233(1) and s 175 of the Act, requiring the company to make its share register compliant with s 169. The fifth claim is for "such further or other orders or relief as may be appropriate" and the sixth claim is for "costs". The claims do not distinguish between the defendants. Within this Part 18 there is no specific claim that the first defendants should do or be restrained from doing anything. More specifically, there is no claim for compensation which is made specifically against those defendants.

The first defendants' application

[37] In essence, the first defendants say that they should not be parties to this case because no relief is or could be claimed against them pursuant to s 233. The plaintiff says that there is indeed a claim for damages which is made against the first defendants, as well as its claim or claims against the company. The first defendants say that such a claim against them would be bad in law. It is convenient to go first to that question.

[38] For the first defendants it is submitted that s 233 does not provide a power to order as against directors, the payment of compensation in favour of a shareholder or shareholders. It is said that s 233 does not specifically confer the power to make such an order and that it could never be appropriate for it to be made. That is because the proper complainant about the misconduct of directors is the company itself, and its rights of action, including its rights to compensation, for directors' misconduct cannot be adopted by a shareholder, by permitting the shareholder to recover the compensation to which the company is entitled.

[39] The first defendants then argue, as does the company, that the Act provides a means by which a shareholder can sue on behalf of the company for wrongs actionable by the company, by s 236 of the Act. It provides that a member may conduct proceedings on behalf of the company if the member is granted leave under s 237 and that the right of a person under the general law to conduct proceedings on behalf of the company is abolished. Section 237 requires the court to give leave if it is satisfied of the matters there set out, including that there is a serious question to be tried. It is submitted that to permit a member to bypass the requirement for a grant of leave under s 237, by instead making a claim for relief under s 233 against

directors for misconduct which is actionable by the company, would compromise the due operation of s 236 in a way which is inconsistent with the apparent legislative intention. Therefore, it is said, the broad powers expressed within s 233 must be qualified, by excluding a power to grant relief, at least for the payment of compensation either to the company or to the applicant shareholder, for some acts or omissions for which the company would have a cause of action which could engage s 236. Statements in the authorities which emphasise the breadth of the court's powers to grant relief in circumstances of the kind described in s 232 must now be read against this implied limitation of s 233 that results from the introduction of s 236 and s 237 in March 2000. Similarly, judgments from jurisdictions outside Australia, which have considered provisions analogous to s 232 and s 233, now have a relevance in this country which is limited by s 236 and s 237. No authority is offered for this construction of s 233.

[40] The power to grant relief under s 233 depends upon the demonstration of a ground under s 232. The conduct which might provide such a ground need not be conduct which is actionable also by the company. But in many cases, the conduct will have that dual character. That is acknowledged by s 233(1)(g), by which the court can make an order authorising a member to institute and prosecute specified proceedings in the name and on behalf of the company.

[41] Where conduct has that dual character, there will be a potential for the operation of both s 233 and s 236. The areas of operation of these two provisions are not mutually exclusive. In *Campbell v Backoffice Investments Pty Ltd*,[1] Basten JA observed that because conduct in contravention of s 181, s 182 or s 183 could also constitute conduct contrary to the interests of the members as a whole, within s 232(d), "[i]t is not tenable that there be a bright line separating cases involving misfeasance by directors from cases involving oppression".

[42] Because there will be many cases where the relevant conduct is both oppressive or unfairly prejudicial and actionable by the company, the submissions for the defendants would significantly confine the beneficial operation of s 233. On their submissions, where there is conduct of that kind, the operation of s 233 is ousted and compensation can be ordered only in proceedings brought according to s 237. And as for compensation in favour of the shareholder, it is submitted that s 233 permits that in no circumstance.

[43] I am unable to accept that the scope of the powers conferred by s 233 has become so limited by the introduction of s 236 and s 237, as the defendants suggest. But I do accept that those other provisions, and the means which they provide for the prosecution of proceedings in the company's name, could be relevant to the exercise of the court's discretion under s 233 in some cases. In particular, the court should be mindful of the potential for the misuse of proceedings which are purportedly brought under s 233 but for relief which, in the circumstances, could not be warranted in order to prevent or remedy the consequences of conduct of a kind described in s 232. And of course the availability of s 236 proceedings will be relevant in the discretionary consideration of whether there should be an order made under s 233(1)(f).

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1 (2008) 66 ACSR 359 at 406 [214].

[44] There are several comparatively recent cases in which it has been said that, under s 233 or its analogues in other jurisdictions, there is a power to order compensation in favour of the company whose affairs are in question, notwithstanding the availability of a derivative action.

[45] In *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd*,[2] the plaintiff shareholder proved that the affairs of certain companies had been conducted oppressively in the sense of s 260 of the Corporations Law, which was relevantly in the same terms as s 232 of the Act. Two of the defendants were directors. They were found to have acted in breach of their fiduciary duties. The New South Wales Court of Appeal held that relief in the nature of an account of profits, for the conduct constituting such breaches, could be granted under the then equivalent of s 233 of the Act. Of course an account of profits, strictly speaking, is not compensatory. But the point is that in recognising the availability of that relief in oppression proceedings, the court rejected the submission that the scope of s 260(2) of the Corporations Law (s 233 of the Act) should be confined by the rule that it is for the company to prosecute its own causes of action. Spigelman CJ[3] cited the statement by Hoffman LJ (as his Lordship then was) in *Re Saul D Harrison & Sons plc*[4] that:

> "Enabling the court in an appropriate case to outflank the rule in *Foss v Harbottle* was one of the purposes of the section."

[46] In *Atlasview Ltd v Brightview Ltd*,[5] a deputy judge of the High Court in England declined to strike out a claim, based upon unfairly prejudicial conduct of a company's affairs, which claimed "damages" against directors. The deputy judge was of the view that it was clearly open to a court in such proceedings to order payment to the company of the compensation to which the company would have been entitled in a derivative action. He went further, holding that an order could be made for the payment of part of that compensation directly to the shareholders who had brought the proceedings.

[47] *Atlasview* was discussed in the Court of Final Appeal of Hong Kong in *Re Chime Corp Ltd*.[6] Sitting as a member of that court, Lord Scott of Foscote apparently accepted that in such proceedings compensation could be ordered in favour of the company, but questioned whether part of that compensation could be ordered in favour of the claimant shareholder. Lord Scott said:[7]

> "Whether the judge was right in holding also that s 459 enabled an order to be made for the payment by the wrongdoers of part of that compensation to the petitioners seems to me, if I may say so, highly questionable. An order for payment or transfer of a part of the company's assets to the petitioning shareholders is, I would think, an order that could only properly be made in a winding-up of the company, or as a distribution of the company's profits, or as part of a reduction of the company's capital. … Otherwise the interests of the company's creditors would be at risk."

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2 (2001) 37 ACSR 672.
3 *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672 at 695 [138].
4 [1995] 1 BCLC 14 at 18.
5 [2004] 2 BCLC 191.
6 (2004) 7 HKCFAR 546.
7 (2004) 7 HKCFAR 546 at 570 [46].

Lord Scott held that there was a jurisdiction in proceedings of this kind to make an order for compensation or restitution in favour of the company. But as a general rule, his Lordship said, an order for the payment of compensation by directors of the company should not be made in such proceedings unless it would correspond with the order to which the company would have been entitled had the allegations in question been successfully prosecuted in an action by the company (or in a derivative action in the name of the company) and a court should not permit a claim for compensation to be made in cases such as these "unless it is clear at the pleading stage that a determination of the amount, if any, of the director's liability at law to the company can conveniently be dealt with in the hearing of the [oppression proceeding]".[8] In the same case, Bokhary PJ said that he "would not rule out the possibility of circumstances in which it can be seen that [an order for compensation in favour of the company] could properly be made [but that] such circumstances, even if they can arise, would in any case of complexity be rare and exceptional".[9]

[48] Lord Scott returned to this question in *Gamlestaden v Baltic Partners Ltd*,[10] in delivering the judgment of the Privy Council (on an appeal from the Court of Appeal of Jersey), as follows:

> "27. The first question to be addressed, therefore, is whether an order for payment of damages to the company whose affairs have allegedly been conducted in an unfairly prejudicial manner can be sought and made in an unfair prejudice application. Another way of putting the question is whether a cause of action allegedly vested in the company can be prosecuted to judgment in an unfair prejudice application. It would, of course, always be essential for the parties allegedly liable on the cause of action to be respondents to the proceedings. But that is not a problem in the present case.
>
> 28. There is nothing in the wide language of Article 143(1) to suggest a limitation that would exclude the seeking or making of such an order: the court 'may make such order as it thinks fit for giving relief in respect of the matters complained of.' The point was raised and considered by the Hong Kong Court of Final Appeal (the CFA) in *re Chime Corp. Ltd* (2004) 7 HKCFAR 546. An unfair prejudice application had been made in respect of Chime and one of the issues was whether the court had power on such an application to make an order for the payment of damages or compensation to the company. The CFA held that the court did have power to make such an order (see the judgment given by Lord Scott of Foscote at paragraphs 39 to 49, concurred in by the other members of the court, and the cases there cited). No reason has been advanced to their Lordships on this appeal why the decision in *Chime* should not be followed. Accordingly, no objection to Gamlestaden's prayer in its Article 141 application for an

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8 (2004) 7 HKCFAR 546 at 576 [62].

9 (2004) 7 HKCFAR 546 at 561 [27].

10 [2007] 4 All ER 164 at 172.

> order that the directors pay damages to Baltic for breach of duty can be taken at this strike-out stage."

[49] That judgment and Lord Scott's judgment in *Re Chine Corp* were discussed in the New South Wales Court of Appeal in *Campbell v Backoffice Investments Pty Ltd*. The relevant events occurred in 2005 (well after the commencement of the operation of s 236 and s 237 of the Act). Basten JA wrote:[11]

> "It may be accepted that the potentially wide operation of s 232 and the wide range of orders available under s 233 should not be allowed to subvert established constraints on the availability of derivative actions brought by shareholders on behalf of a company. On the other hand, the mere fact that the conduct complained of involves misconduct actionable by the company does not preclude relief under s 233: see *Re Chime Corporation Ltd* (2004) 7 HKCFAR 546 (*Chime*) at [9]-[26] (Bokhary PJ) and [39]-[49] (Lord Scott of Foscote NPJ)."

Young CJ in Eq, sitting in the Court of Appeal, said that although the text of s 233 of the Act is different from the Hong Kong provision considered in *Re Chime Corp*, "the reasoning of Lord Scott in the *Chime* case should be followed in Australia".[12] The decision of the Court of Appeal in *Campbell v Backoffice Investments* was reversed in the High Court, but the statements of Basten JA and Young CJ in Eq to which I have referred were not in issue.[13]

[50] The defendants seek support from the judgment of the Queensland Court of Appeal in *McCracken v Phoenix Constructions (Qld) Pty Ltd*.[14] In that case, the respondent had a contractual claim for damages against a company called Coastline Constructions Pty Ltd, of which the appellant McCracken was the sole director. That company went into liquidation and the respondent claimed that it was entitled to recover the same damages against the appellant pursuant to s 1324(10) of the Act, because of the appellant's contravention of s 182(1) of the Act. Section 1324(1) provides that where a person has engaged in conduct that constitutes a contravention of the Act, the court may, on the application of a person whose interests have been affected by the conduct, grant an injunction restraining the contravener from engaging in the conduct and requiring that person to do any act or thing. Section 1324(10) provides that where the court has a power under s 1324(1) to make an order, then the court may "order that person to pay damages to any other person". At the trial, the respondent was awarded damages for the appellant's contravention of s 182(1) in an amount corresponding with the respondent's contractual claim against the appellant's company. Fraser JA (White JA and Applegarth J agreeing) held that the award against the appellant should be set aside, one reason being that s 1324(10) should not be construed so as itself permitting any person whose interests are adversely affected by the contravention of a civil penalty provision, to recover damages. He said that such a construction "would make a dead letter of the provisions in Pt 9.4B which create and regulate the power to award compensation".[15] There was a further difficulty, in that the respondent's claim to loss was "merely derivative of the company's recoverable loss", so that the award in

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11 (2008) 66 ACSR 359 at 403 [199].

12 (2008) 66 ACSR 359 at 430 [361].

13 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304.

14 (2012) 272 FLR 104.

15 *McCracken v Phoenix Constructions (Qld) Pty Ltd* (2012) 272 FLR 104 at 112 [27].

the respondent's favour was contrary to the conventional view that it was for the company to recover such a loss.[16] That second reason is more relevant to the question here of whether compensation may be awarded in favour of the plaintiff, rather than in favour of the company. That first reason is said to be relevant to the question of whether compensation for a wrong which is actionable by the company can be awarded at all under s 233. It is submitted that this would have the result of making a dead letter of s 236 and s 237, by allowing a creditor to avoid the requirements of those provisions by bringing proceedings in purported reliance upon s 232 and s 233.

[51] That last submission cannot be accepted. To allow for the possibility that, in some cases, compensation in favour of the company could be ordered under s 233, would not put paid to the operation of s 236 and s 237 as is suggested. One reason for that is that to engage s 233 a shareholder would have to prove conduct within s 232. A further reason is that the grant of relief under s 233 is discretionary and, as I have discussed, there is considerable authority for the view that relief under s 233 in the form of an award of compensation should be refused if the appropriate, or more appropriate, course is to have an action brought on behalf of the company and pursuant to s 237.

[52] The argument for the company emphasises the words in s 236(2) that "a proceeding brought on behalf of the company must be brought in the company's name"[17]. It is said that this is inconsistent with the suggested availability of relief under s 233, in the form of compensation to be paid to the company. In my view, the short answer to that submission is that proceedings brought under s 232 are not proceedings brought on behalf of a company. And they do not become such proceedings if and when some order is made which, at least considered alone, would benefit the company. They are not proceedings to prosecute a cause of action which belongs to the company. Rather, they are brought upon one or more of the grounds specified in s 232, and the relief ultimately granted under s 233 is, in the court's discretion, granted in terms which relate to the demonstrated ground or grounds under s 232. That relief may correspond with the remedy to which the company is entitled under its cause of action against, for example, its director. But it does not follow that proceedings under s 232 are proceedings brought on behalf of a company.

[53] For these reasons it is open to a member, in proceedings brought under Part 2F.1, to claim relief which is in the nature of compensation to be paid to the company whose affairs are in question. Whether such a claim is sustainable in a particular case will depend upon the connection or otherwise between that relief and the ground or grounds for the claim, as well as a wide range of discretionary considerations affected by the circumstances of the particular case, such as the need for or desirability of an extensive litigation of a company's entitlement to compensation within proceedings under Part 2F.1 where there might be other appropriate relief, including an order under s 233(1)(f). In short the absence of jurisdiction, for which the defendants contend, is not demonstrated. But whether a claim for compensation in favour of the company here should be permitted to go forward would depend upon the way in which the plaintiff can plead its case. As I will discuss, from the present pleading, the plaintiff's claim for compensation, either to be paid to it or to the company, is irregular in many respects.

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16 *McCracken v Phoenix Constructions (Qld) Pty Ltd* (2012) 272 FLR 104 at 112 [28].

17 Second respondent's outline of submissions in relation to the derivative claim, para. 9.

[54] Before going to those matters, some general comments may be made about the potential for a sustainable claim to be pleaded by the plaintiff, by which the directors would pay compensation to it rather than to the company. Although there are several authorities supporting an order in such proceedings for the payment of compensation to the company, there is said to be only the statement in *Atlasview* to support a payment of compensation to the shareholder.

[55] For the moment this question must be discussed in the abstract, because of the vagueness, ambiguity and generality of the present statement of claim.

[56] The criticism made by Lord Scott in *Re Chime Corp* of what was said in *Atlasview* on this point should be accepted. Possibly that criticism would be sufficient to dispose of a claim for compensation from the first defendants, because a proper pleading might reveal that the only conduct for which that compensation is sought by the plaintiff is conduct which is also actionable by the company and that the plaintiff is seeking nothing other than a share of the compensation to which the company would be entitled for that conduct. But perhaps the claim for compensation against those directors is not only of that kind and might extend to conduct which is not actionable by the company. In such a case, the court could make some compensatory order under s 233 against those who caused the company's affairs to be conducted in a manner which engaged s 232. That is because one of the recognised purposes of so-called oppression proceedings is to compensate the member or members for the oppressive conduct.

[57] In *Rankine v Rankine*, Thomas J (Macrossan CJ and McPherson JA agreeing) said that in granting a remedy in favour of an oppressed shareholder under the predecessors of s 233(1)(d) and (e), by ordering the compulsory purchase of the applicant's shares at a stated price, "the court is in effect awarding compensation for the respondents' breach of duty".[18] That view was not unprecedented. A number of authorities for it are collected in the judgment of Robson J in *Re Hollen Australia Pty Ltd*,[19] in saying that "the relief ordered [under s 233] should also seek to compensate the member or members for the oppressive conduct [and] this objective may well be relevant in determining whether to order the purchase of their shares rather than order a winding up".[20]

[58] Therefore in principle, there could be no objection to an order that directors who have conducted the affairs of the company in a way which engages s 232, should make a payment to compensate an oppressed shareholder for a loss which is distinct rather than derivative from a loss of the company.

[59] The next question is whether any sustainable claim for damages has been pleaded. There are some paragraphs of the statement of claim which are expressed in terms of some loss and damage being caused by certain conduct on the part of one or more of the first defendants. They are paragraphs 106, (perhaps) 124 and 130, 135, 137 and 194. Most of them allege a loss by the company rather than by shareholders or any one or group of them: namely paragraphs 106, 124, 130, 135 (with the exception of 135(g)) and 194. Paragraph 137 pleads a loss suffered by the plaintiff, as a result of the conduct of the Board alleged in paragraph 134(a)-134(e), in that the plaintiff has "incurred substantial costs and expenses in pursuing the

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18 (1995) 124 FLR 340 at 345.

19 [2009] VSC 95 at [84]-[87].

20 [2009] VSC 95 at [84].

commercialisation of the [project]" and the value of the plaintiff's shares have declined from C$2.12 to C$0.35. Those costs and expenses of the plaintiff are not particularised, as they should be. And the alleged loss from that fall in share price is to be compared with the loss alleged to have been suffered by all members, as pleaded in paragraph 135(g), from the same conduct being a decline in the share price from C$4.30 to C$0.35. This apparent inconsistency is a further flaw in the pleading.

[60] The plaintiff does allege that its shareholding, and that of its associates, has been diluted by the 2010 and 2011 share issues.[21] But it is not pleaded that this has caused some loss or damage to the plaintiff.

[61] The loss pleaded in paragraph 194 is said to be that of the company. Therefore, the allegation in subparagraph 194(h), that the present value of the company's shares is now substantially less than the value of its interest in the project and its cash on hand, does not plead a loss by the plaintiff.

[62] In summary then, only a small part of the plaintiff's overall case is pleaded as resulting in a loss to the plaintiff.

[63] Then there are the further flaws in that the only claim for any compensation (paragraphs 195(d) and paragraph 1(d) at the conclusion of the pleading) does not identify the person or persons who should make that compensation, the person or persons in whose favour it should be made or the amount or amounts which should be awarded. The case should be properly pleaded and the defendants should not have to search for the content of the case against them in correspondence between the parties' lawyers.

[64] The consequence for the first defendants is that they are not informed of the case, if any, which is made against them. It is unnecessary to consider the submission that the pleading does not comply with r 155 of the *Uniform Civil Procedure Rules* upon the basis that the claim for "an order for compensation" is a claim for "damages". Regardless of that rule, there are such serious flaws in the pleading in this respect that if the plaintiff is to persist in its case against the first defendants, it must replead.

[65] The plaintiff also submitted that the first defendants are proper parties, because if successful, it is likely that the plaintiff will seek an order for costs against them. In doing so, it will rely upon findings of misconduct which it would seek according to this pleaded case. Therefore, the plaintiff says, the first defendants should be parties so that they are bound by those findings. But counsel for the first defendants responded by saying that in that event, they would undertake to be bound by any findings, if they were removed as parties.

[66] The joinder of the first defendants, for the purpose of having them bound by findings upon which costs might be sought from them, was not improper or unreasonable. The first defendants' offer to be bound by any findings made in these proceedings would have made the continuing participation of the first defendants unnecessary and inappropriate, if the only order to be sought against them was for costs. At present, however, it is yet to be seen whether the plaintiff is able to properly plead a case for relief against the first defendants, consistently with these

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21 Statement of claim, paras. 191, 192.

reasons. The plaintiff should have an opportunity to do so. Therefore, the proceedings against the first defendants should not be dismissed at this stage. The plaintiff will be ordered to file and serve an amended statement of claim, in terms which are consistent with this judgment, within 21 days and the application by the first defendants will be adjourned to a date to be fixed.

Application by the company

[67] The first of the company's complaints concerns paragraphs 195 and 1(d) at the conclusion of the statement of claim. For the reasons given in paragraph [63] above, this claim and allegation is irregular and the consequence for the company also is that it is not duly informed of the case which is made against it. The company asks for an order for particulars of the compensation which is sought. But as the pleading is likely to be amended in consequence of my conclusions upon the first defendants' application, it is preferable to have these paragraphs amended by the general order for repleading, referred to in the previous paragraph of this judgment.

[68] Paragraphs 83(g) and (h) allege that the conduct of the company and the Board in proceeding with the 2010 share issue engaged s 232 because the Board advanced "their own interests or interests of Jaldale and Pinetree to the detriment of [the company]". The company has asked for particulars of the nature of each of the interests said to have been advanced. They should be provided.

[69] Paragraph 90 pleads that it was in the interests of the company to acquire the tenements which were acquired by FSDC. The company seeks particulars of the way in which it was in the interests of the company to acquire those tenements. Having regard to the other matters pleaded within this Part 6, and in particular the allegation that the company later took steps in an endeavour to acquire the tenements, it is possible that this allegation in paragraph 90 could not be genuinely disputed. For the present therefore, it is better to see the pleading in response to it. The company can plead to it without the particulars which are sought.

[70] Paragraph 92 pleads that Alan Phillips caused Mr Taplin and Joe Phillips to incorporate FSDC. The company seeks particulars of the means by which he did so. Possibly, the plaintiff cannot provide further particulars at this stage. That is not to say that the allegation is wrongly made, because it may be based upon a reasonable inference. Again, it is preferable that the company pleads to this allegation so that it can be seen whether it is genuinely disputed.

[71] Paragraph 136(d) pleads that the Board breached their duties not to permit their interests to come into conflict with the interests of the company or their duties to the company or its members as a whole. The company seeks particulars of those interests of the Board. This is a proper request and in an amended pleading in accordance with this judgment, those particulars should be provided.

[72] Particulars had been sought of paragraph 156 but at the hearing counsel for the company said that this request was not pressed.

[73] The company applies to strike out Part 13 upon the basis that it is manifestly flawed and could not be relevant to a claim for relief under s 233. Part 13 pleads that the company has not maintained a register of members in compliance with s 169. I have extracted the relevant parts of s 169 at [26] of this judgment.

[74] At least the principal complaint in this respect involves shares registered under the name "CDS & Co" which, as at October 2011, are said to have constituted more than 85 per cent of the issued share capital of the company. Paragraph 164 pleads that CDS & Co is not "the true name of any holder or holders of those shares" and that the names and addresses of those holders does not appear in the register.

[75] It is also alleged that, as at August 2010, the register recorded 1.07 million shares as held by "NBCN Inc in Trust for Pinetree Resource Partnership", although there was no similar entry in the register as at October 2011.

[76] There is an apparent suggestion in paragraphs 167 and 168 that shares may have been acquired in breach of Chapter 6 of the Act by the use of CDS & Co or NBCN Inc to disguise relevant interests in significant parcels of shares. Paragraph 167 pleads that neither CDS & Co nor the Pinetree Resource Partnership (or any other person) has made any takeover bid for the company or lodged with ASIC any notice of increase or decrease in its shareholding. The suggestion in this pleading seems to go no further than that the allegedly defective nature of the register could have facilitated a contravention of relevant provisions of Chapter 6. In turn, this is sought to be linked to the relief sought under s 233 by the allegation (in paragraph 169) that the conduct of the company pleaded in this Part 13 constituted conduct of the affairs of the company which was contrary to the interests of the members as a whole within s 232.

[77] The company submits that Part 13 is pleaded upon a misconception of the requirements of s 169, by which it is required to maintain a register of *members*. CDS & Co and NBCN Inc were the relevant members although they held their shares on behalf of others. Section 9 defines the word "member" to be, in relation to a company, a person who is a member under s 231, which is as follows:

> "A person is a member of a company if they:
>
> (a) are a member of the company on its registration; or
>
> (b) agree to become a member of the company after its registration and their name is entered on the register of members; or
>
> (c) become a member of the company under section 167 (membership arising from conversion of a company from one limited by guarantee to one limited by shares)."

[78] The company's submission should be accepted. Section 169 does not require a register of the names of those who have relevant interests in shares. What is required is a register of a company's members. That the two categories are not identical is plain from, for example, s 608 and s 609. And s 169(5A) makes it clear that it is not in every case that the fact of non-beneficial ownership by a member must be indicated by the register.

[79] In the course of the oral submissions, counsel for the plaintiff at first disavowed any case that the company was in contravention of s 169(5A). Part 13 of the pleading contains no specific reference to that subsection. But further into the argument, the possibility emerged that the subsection is relevant, because the company may not be a "listed company" in the sense indicated by the definition of "listed" in s 9, namely

"a company … included in the official list of a prescribed financial market operated in this jurisdiction". However, if s 169(5A) does apply, it requires the register to indicate any shares that a member does not hold beneficially. In the case of CDS & Co and NBCN Inc, that fact was reasonably apparent and any failure to maintain the register in that respect could not have been consequential. Section 169(5A) does not require the beneficial owners to be identified and for their details to be registered as if they were members.

[80] Therefore, the principal complaint within Part 13 is indeed flawed. But there remain the complaints that the register does not record the date on which every allotment of shares has taken place, the number of shares in each allotment, the share numbers (if any) or share certificate numbers (if any) of any of the shares in the company, the amount paid on any of the shares and whether or not the shares are fully paid. At present, these seem to be tenable claims, because they do not depend upon the "true holder" point. Section 175 of the Act provides that the court may order the correction of a register kept by the company under Part 2C.1, upon the application of the company or "a person aggrieved". There is no argument about the standing of the plaintiff to make an application for an order under s 175. A specific order is sought within the statement of claim under this provision.

[81] Therefore, some of the allegations within Part 13 should be allowed to stand, as should the claim under s 175. But much of it is unsustainable. At present, it is difficult to see how the properly pleaded components of Part 13 could be relevant to the plaintiff's claim for relief under s 233. But it is better to see whether the plaintiff, when repleading Part 13, seeks to make it relevant to relief under that provision as well as under s 175.

[82] Next there is Part 15, which the company says should be struck out because it is of no apparent relevance to any relief which is sought. As I have noted, there is no allegation within Part 15 of any conduct which is said to have engaged s 232.

[83] The plaintiff's argument is that the fact that the market attributes such a low value to shares in the company, reflecting the market's view that the project has no substantial value, is a consequence of the conduct of which complaint is made in other parts of the pleading. The plaintiff's case is that this has been to the detriment of members as a whole in that the share price is much less than it should be. This may be a type of loss which is not simply derivative from a loss to the company, because the plaintiff pleads that the project in truth has a value in the range of $173 - $227 million.[22] Therefore, there is some potential relevance in Part 15.

[84] Part 16 is also said to be irrelevant to any relief which is claimed. This alleges that the company will become, or is at serious risk of becoming, insolvent.

[85] In the written submissions for the plaintiff, it is suggested that this allegation is relevant to the question of whether the conduct of the directors has been contrary to the interests of the members as a whole. In effect, this is said to be relevant in the same way as Part 15, in that it is raising the prospect of a loss by shareholders. But in the case of Part 16, if the company does become insolvent, and that is due to the conduct of which complaint is made here against the directors, the loss would seem to be merely derivative from the company's loss. The potential relevance of Part 16 is not demonstrated.

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22 Statement of claim, para. 174.

[86] Further, the factual basis for this allegation is not readily apparent from Part 16. It pleads that the company had working capital, as at the date of the pleading, of about $13.37 million and that it will spend $1.83 million per month on operating and investing activities. It pleads that the cost of detailed engineering designs and a feasibility study would be at least $10 million. But it does not plead that the company has no means of raising funds, either to meet its recurrent expenditure or to meet the cost of that design and study. The pleading does give the impression that it is made for the purpose of bringing pressure upon the company in the market and perhaps to obtain disclosure of current financial records of the company. This confirms my view that it should be struck out from the present pleading and should not reappear in the further pleading which the plaintiff will be ordered to provide according to these reasons.

Conclusion

[87] The outcome of the application by the first defendants is that the plaintiff will have one more opportunity to plead a case, if it can, against those defendants.

[88] The company has demonstrated that if this pleading was otherwise to stand, certain paragraphs would have to be further particularised and some paragraphs would be struck out. But as a new statement of claim must be filed, those particulars and omissions can be accommodated within the new pleading.

[89] It will be ordered that the plaintiff file and serve an amended statement of claim, in terms which are consistent with this judgment, within 21 days. The applications by the first defendants and the second defendant will be adjourned to a date to be fixed. I will hear the parties as to costs and other orders.