SUPREME COURT OF QUEENSLAND

CITATION:	*Hunter v Organic & Natural Enterprise Group Pty Ltd & Ors* [2013] QCA 331
PARTIES:	**CORNELIA HUNTER** (appellant) **v** **ORGANIC & NATURAL ENTERPRISE GROUP PTY LTD** ACN 103 341 288 (first respondent) **ALFRED FRANCIS ORPEN** (second respondent) **VERITAS VINCIT AUSTRALIA PTY LTD** ACN 061 024 486 (third respondent) **COLIN MURRAY CHENERY** (fourth respondent) **NARELLE LOUISE CHENERY** (fifth respondent) **INTELLIGENT INDUSTRIES PTY LTD** ACN 080 236 915 (sixth respondent) **JOHN MALCOLM HUNTER** (seventh respondent) **MIRONESCO PTY LTD** ACN 085 804 539 (eighth respondent) **AUSTRALIAN DESIGN & ENGINEERING PTY LTD** ACN 110 012 649 (ninth respondent)
FILE NO/S:	Appeal No 260 of 2013 SC No 4124 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	6 August 2013
JUDGES:	Gotterson JA and Atkinson and Boddice JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

1. **Appeal dismissed.**
2. **Appellant to pay the respondent's costs of the appeal on the standard basis.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – TRIAL – OTHER MATTERS – where the appellant appeals against a substantive order that there be judgment for the first to ninth respondents – where the appellant formed a company with five individuals, including her then husband, called Organic and Natural Enterprise Group Pty Ltd – where the company acted on the recommendation of an accountant to restructure with the intention to formalise payments to the principals, tax minimisation and asset protection – where Mr Hunter became the sole shareholder and director of a new company, Mironesco, which owned the assets of value for the Hunter family – where the terms of the Hunter Family Trust are such that Mrs Hunter is a beneficiary only if she is Mr Hunter's wife – where Mr and Mrs Hunter have separated – where Mrs Hunter brought proceedings seeking orders that numerous restructure transactions be set aside, other orders that her shares in Organic be purchased by other parties and that Organic be wound up under the *Corporations Act* 2001 (Cth) – where the trial judge refused an application for an adjournment of the trial apart from delaying the commencement by one day – where the basis of the appellant's adjournment application was that whilst she had been expecting to be represented by counsel, a Mr Wiltshire, at her trial, her professional relationship with him had become irretrievably soured and she could not continue with him as her counsel on that account – whether an adjournment should have been granted longer than one day – whether there has been a miscarriage of justice

CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERS' REMEDIES AND INTERNAL DISPUTES – OPPRESSIVE OR UNFAIR CONDUCT – WHAT CONSTITUTES – GENERALLY – where the appellant appeals against a substantive order that there be judgment for the first to ninth respondents – where the appellant formed a company with five individuals, including her then husband, called Organic and Natural Enterprise Group Pty Ltd – where the company acted on the recommendation of an accountant to restructure with the intention of formalising payments to the principals, tax minimisation and asset protection – where Mr Hunter became the sole shareholder and director of a new company, Mironesco, which owned the assets of value for the Hunter family – where the terms of the Hunter Family Trust are such that Mrs Hunter is a beneficiary only if she is Mr Hunter's wife – where Mr and Mrs Hunter have separated – where

Mrs Hunter brought proceedings seeking orders that numerous restructure transactions be set aside, other orders that her shares in Organic be purchased by other parties and that Organic be wound up under the *Corporations Act* 2001 (Cth) – where the trial judge found that Mrs Hunter was a party to the agreement to the restructure to the same extent as the other principals – where the trial judge found that Mrs Hunter participated to the same extent by signing as many of the relevant documents as was appropriate for her to sign and that there was no evidence of fraud, mistake or misrepresentation to sign those documents – whether the restructure was oppressive to, unfairly prejudicial to, or unfairly discriminatory to the appellant – whether the appeal should be allowed

Corporations Act 2001 (Cth), s 232, s 233, s 461(1)

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304; [2009] HCA 25, cited
Gerlach v Clifton Bricks Pty Ltd (2002) 209 CLR 478; [2002] HCA 22, cited

COUNSEL: S J Keim for the appellant
M R Bland for the respondents

SOLICITORS: Anthony Delaney Lawyers for the appellant
Wrightway Legal for the respondents

[1] **GOTTERSON JA:** Cornelia Hunter ("the appellant") appeals against a judgment given on 11 December 2012 in a proceeding commenced by her by way of originating application in the Supreme Court of Queensland on 5 June 2007. The substantive order in the judgment is that there be judgment for the first to ninth defendants against the appellant plaintiff. These defendants are the first to ninth respondents to the appeal respectively.

The circumstances giving rise to the litigation

[2] At the commencement of her reasons for judgment, the learned trial judge outlined the circumstances that gave rise to the litigation. I adopt her outline which is as follows:

> "[1] In 2003, five individuals met and decided to form a company. They were Colin and Narelle Chenery,[1] 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[2] were directors of a company called MiEssence Pty Ltd, in which they held minority shareholdings. That company made organic cosmetic

[1] Fourth and fifth respondents respectively who were the fourth and fifth defendants.
[2] Second respondent who was the second defendant.

products. Lastly, were John Hunter[3] 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).[4] It traded as OneGroup. There were 100 issued shares: 33 were held by Veritas Vincit Australia Pty Ltd,[5] 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[6] with the Chenery family, and Mironesco Pty Ltd[7] (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 - tl -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

---

3 Seventh respondent who was the seventh defendant.
4 First respondent who was the fifth defendant.
5 Third respondent who was the third defendant.
6 Sixth respondent who was the sixth defendant.
7 Eighth respondent who was the eighth defendant.

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."[8]

[3] Her Honour explained the intent behind the restructure as follows:

"[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),[9] 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] (Footnotes added.)

---

8 AB 4423-4424.

9 Ninth respondent who was the ninth defendant.

10 AB 4425.

[4] Her Honour noted that, with one exception not relevant to this appeal, no party put in issue the legal efficacy of the documentation executed by the parties in order to achieve the intended result. She observed that they all had acted, since 1 July 2006, as though the documents were effective. The balance sheet of Organic showed nominal assets. Its profits were channelled through ADE to Veritas, Intelligent and Mironesco.[11]

[5] The appellant's plight which motivated her to commence the proceeding, was summarised by her Honour as follows:

> "[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 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. 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."[12] (Footnotes omitted.)

The assets of value to which her Honour was referring are the units in the ADE Unit Trust which Mironesco owns.

The proceeding

[6] The appellant sought an extensive array of relief under s 233 of the *Corporations Act* 2001 (Cth). It included orders that numerous restructure transactions be declared of no force or effect, or alternatively, that they be set aside, and an order that Mr Orpen, Veritas, Mr and Mrs Chenery and Mr Hunter purchase her shares in Organic at a market value assessed on the basis that the transactions she was seeking to impugn had not been entered into or given any effect. She also sought an order that Organic be wound up under s 233 or any one of paragraphs (e), (f) or (k) of s 461(1) the *Corporations Act.*

[7] Relief was sought by the appellant under s 233 on the footing that there had been conduct oppressive to her as a member of Organic in the conduct of its affairs. That this was the central feature to the appellant's case was noted by her Honour in the following broad summary she gave of the appellant's case:

> "[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* (Cth). She claims that her financial interests associated with Organic were diminished by the events of that time. She attributes that

---

11 Reasons [10].

12 AB 4426.

> 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*."[13]

[8] Early in the proceeding, an order was made that it continue as if started by claim.[14] Pleadings were directed and extensive pleadings, supplemented by particulars, ensued. Disclosure of documents was protracted and included applications for further disclosure. The matter was tried over 10 days in August 2012. The substantive order made on 11 December 2012 had the effect of dismissing the appellant's claim for relief. At the same time, the court ordered that interlocutory injunctive orders made on 5 June 2007 be discharged.

[9] With the exception of Mr Hunter and Mironesco who were represented by Mr M Wright, solicitor, none of the parties was legally represented at the trial. Mr Orpen represented himself and, by leave, Organic and Veritas. Mr Chenery represented himself and, by leave, Intelligent and ADE, and Mrs Chenery represented herself. At times during the litigation, the appellant had engaged different firms of solicitors to act for her; and at other times she had attended to steps towards trial herself. As will be explained in greater detail in the context of the first ground of appeal, for a period of time, she engaged a barrister to act for her on a direct brief basis. On the hearing of the appeal, she was legally represented by senior counsel acting on instructions from a firm of solicitors whereas the respondents were legally represented by experienced junior counsel acting on instructions from Mr Wright's firm.

The appeal and grounds of appeal

[10] On 8 January 2013, the appellant filed a notice of appeal[15] to this Court. This document, which the appellant herself had prepared, listed six grounds of appeal, one of which, Ground 5, set out some 12 findings which the appellant contends the learned trial judge should have made. An amended outline of argument prepared by junior counsel was filed by the appellant on 17 June 2013. It addressed each of the six grounds of appeal.

[11] At the commencement of the hearing of the appeal, senior counsel for the appellant informed the court that he proposed to present oral submissions on Ground 1 and then on Grounds 2 to 4, as the one ground.[16] He said that the appellant would not proceed with Grounds 5 and 6 as separate grounds of appeal.[17] He did seek to rely on some of the matters set out in Ground 5 in order to illustrate his argument on

---

13 AB 4424-4425.
14 Order made 5 June 2007; AB 2469-2471.
15 AB 4458-4466.
16 Tr1-2 LL12-32.
17 Tr1-2 LL32-33.

Ground 1. In these circumstances, it is appropriate to consider Ground 1 first, then Grounds 2 to 4 together.

Ground 1 – refusal to grant an adjournment

[12] This matter was case managed on the Supervised Cases List on 7 March 2012. It was set down for a 10 day trial to commence on 6 August 2012.[18] By Thursday, 26 July 2012, the appellant had engaged Mr C Wiltshire, barrister, to act for her in the trial on a direct brief basis. On that date, an applications judge heard an application by certain of the individual defendants for leave to represent corporate defendants. Mr Wiltshire announced his appearance on the application for the appellant; however, the appellant was not personally present due to illness.

[13] At that hearing, Mr Wiltshire foreshadowed an application by the appellant for an adjournment of the trial for which no application had been filed or leave obtained to make it. He told the applications judge that he wished the application to be dealt with *instanter*. He read an affidavit sworn by the appellant on the previous day. In her affidavit, the appellant said that Mr Wiltshire had been "very recently retained" and that he had advised her that the matter was not ready for trial.[19] She exhibited to her affidavit emailed correspondence[20] she had sent the previous day to the other parties which also notified them that the judge before whom the matter was listed for trial had reserved judgment in another matter which that judge had heard and to which Mr Wiltshire personally was a party.[21] That, it was claimed in the letter, precluded the listed judge from hearing the matter because of an "unacceptable risk of actual or apparent bias" on her part.

[14] Mr Wiltshire told the applications judge that he had been retained for the trial on the preceding Monday only.[22] He summarised an argument that the listed judge would have to disqualify herself on the ground of actual or apparent bias were he to appear at the trial.[23] The other parties intimated that they would oppose any adjournment application. After hearing submissions, his Honour refused the adjournment application.

[15] The appellant did not seek leave to appeal that decision.[24] Instead, on 31 July 2012 she filed an application for an adjournment.[25] The application was heard by the listed trial judge at a directions hearing on 2 August 2012. On this occasion, the appellant appeared for herself. Mr Wiltshire was not present in court. She supported her application with an affidavit sworn by her on 31 July 2012.[26] The affidavit contained a narrative of her dealings with Mr Wiltshire in relation to the trial. Notably, on 21 June 2012, he emailed her to say that he "believe[d] in [her] and [her] claim" and that she was "assured of [his] focused attention and detailed

---

18 This occurred at a case management directions hearing at which the judge told the appellant in very clear terms that the trial would proceed on that date and would not be adjourned at the start. He urged the appellant to engage legal representation. On this occasion, the judge refused orders sought by the appellant to amend further her statement of claim and for further disclosure: AB 930.

19 Paragraph 4; AB 4091.

20 AB 4096-4098.

21 *Amos ats Wiltshire* No 4406 of 2012.

22 AB 4108 Tr1-8 LL20-22; AB 4113 Tr1-13 LL14-16; and AB 4155 Tr1-15 L55.

23 AB 4108 Tr1-8 LL48-51; AB 4113 Tr1-13 LL38-52.

24 At the hearing of the appeal, the appellant's counsel volunteered that that decision was correct: T1-10 L19.

25 AB 4059-4062.

26 AB 4068-4071.

preparation from 12/7 onwards".[27] By 11 July he had at his disposal nine "files" that constituted the appellant's Bundle of Documents (over 3,425 pages).[28] On that date, the appellant paid Mr Wiltshire his agreed fee for preparing for trial and appearing at the trial by Bank transfer.[29] She conferred with him on 12 July at which time they discussed the identity of the judge who was listed to hear the trial.[30]

[16] Her Honour refused the application other than to delay the commencement of the trial by one day to Tuesday, 7 August 2012.[31] She intimated that she would allow the appellant to be assisted by a McKenzie's Friend. The appellant had proposed that this person who she said was experienced in both litigation and business, act, in effect, as her lawyer, making submissions and examining and cross-examining witnesses. For obvious reasons, her Honour would not countenance that proposal. She also took the time to explain in detail to the parties the procedures for adducing evidence, cross-examination, tendering documents and addresses.[32]

[17] When refusing the application for adjournment, her Honour said that she would defer giving detailed reasons for the refusal. Such reasons were given on 30 August 2012,[33] the trial having concluded on 20 August 2012. The appellant's notice of appeal challenges the refusal of the adjournment application as if it were part of the judgment given on 11 December 2012. The respondents do not take issue with the fact that a separate notice of appeal has not been filed in respect of the refusal order made on 2 August 2012.[34] Such a step was not necessary given that on an appeal from a final order, an appellate court may correct any interlocutory order that affected the final result.[35]

[18] The basis of the appellant's adjournment application was that whilst she had been expecting to be represented by Mr Wiltshire at the trial, her professional relationship with him had become irretrievably soured by what appeared to her to be inconsistencies between facts as she knew them and what, from her reading of the transcript of the hearing on 26 July 2012, Mr Wiltshire had told the applications judge. She said that she could not continue with him as her counsel on that account.[36]

[19] As the applications judge had been, her Honour also was sceptical of the reason for the adjournment advanced by Mr Wiltshire which related to her. As to it, she placed the following on record:

> "The major point agitated orally by Mr Wiltshire that day was that I was to be the trial judge allocated to hear the matter and that that caused him difficulty because I had before me, reserved, a matter involving him personally.

---

27 AB 4076.
28 AB 4077-4078.
29 AB 4079.
30 Para 13; AB 4069.
31 AB 24; Tr1-24 LL25-27.
32 AB 26-31.
33 AB 927-937.
34 Tr1-5 LL15-27.
35 *Gerlach v Clifton Bricks Pty Ltd* [2002] HCA 22; (2002) 209 CLR 478 per Gaudron, McHugh and Hayne JJ at [6].
36 AB 13 Tr1-13 LL39-53.

> I record that that is in fact that case, and I have a matter involving Mr Wiltshire as a personal litigant before me, reserved after hearing an application in the applications list. That involved a matter where Mr Wiltshire was involved in litigation. The litigation went on appeal to the Court of Appeal. The appeal was resolved and a costs order was made in the Court of Appeal. After the costs order was made, the registrar of the Court of Appeal sent, or referred, the costs to a costs assessor to be assessed. The assessment proceeded. After the assessment was complete, the party opposed to Mr Wiltshire in the litigation took the point that on an interpretation of a particular rule in the Uniform Civil Procedure Rules only the registrar of the Court of Appeal, and not a costs assessor delegated the function by the registrar of the Court of Appeal, could assess costs of appeal. It is that point that is before me.
>
> I place on record that I can see absolutely no reason why having had that matter reserved before me would have prevented me hearing this matter had Mr Wiltshire represented the plaintiff. In the matter involving Mr Wiltshire personally, the merits of the litigation are not in question, the credit of Mr Wiltshire or his opponent in the litigation are not in question, it is simply a matter of interpreting as a matter of law the meaning of one particular rule in the Uniform Civil Procedure Rules."[37]

[20] Her Honour noted that the appellant had made the adjournment application under the misapprehension that another 10 day period convenient to her would be readily available. The learned trial judge noted that the senior judge administrator had informed her that having regard to a number of listing considerations, it was most unlikely that the matter could be listed for trial for another 12 months. She recountered the circumstances in which she had permitted the McKenzie's Friend. She also made the following observations with respect to matters of discrepancy involving Mr Wiltshire that had concerned the appellant:

> "I do not decide the matter finally, but it certainly seemed to me on the hearing of the application that there were a number of inconsistencies between the documents exhibited to the plaintiff's affidavit and the matters which Mr Wiltshire informed the Court of on 26 July 2012. The plaintiff asserted there were such matters and that Mr Wiltshire had wrongly informed the Court of various matters. On 26 July 2012 she said that regardless of Mr Wiltshire's own position, which it appeared from her affidavit, was that he would not run the trial before me, she had lost faith in Mr Wiltshire on account of the inconsistencies between her instructions to him and what he informed (the applications judge) on 26 July 2012.
>
> She applied therefore for an adjournment on the basis that she was expecting to be represented at trial, but would not be, as her professional relationship with Mr Wiltshire was irretrievable as a result of these inconsistencies. The plaintiff said that her first language was German and that despite having lived 25 years in

---

37 AB 930-931.

> Australia, she had difficulty with technical and business terms, so that it would be very difficult for her to run the trial."[38]

[21] It is apparent that the learned trial judge had regard to all of these factors in determining the adjournment application. As well, she had regard to the implications for the other parties, particularly the Chenerys, of a lengthy adjournment having regard to the interlocutory injunctive orders in place. Those orders, her Honour noted, were imposing and over five years had imposed, severe financial restraints both on the development of Organic's business and upon the ability of the Chenerys to sustain themselves financially.[39] Her Honour recountered:

> "Mrs Chenery made, what I thought, were very compelling submissions about the cost to her and Mr Chenery, personally, and both financially, and in terms of the emotional stress that they have been under for the five years this litigation has endured. She particularly referred to the sale of their home and the litigation as a contributing factor to their marriage breakdown. The submissions really resonated very well with the cases that explain that in matters such as deciding whether or not to adjourn a trial, the Court should not look just to see whether the parties can be compensated financially, for example, by a costs order, but look at the personal costs of delay and an adjournment on the parties."[40]

[22] Another factor considered by her Honour was the appellant's conduct in the litigation. With respect to that, she noted:

> "Mr Chenery referred me to the history of prevaricating conduct on the part of the plaintiff throughout the proceedings, the history of her producing prolix documents, the history of the defendants making attempts to get the matter on for trial and the plaintiff opposing this, and also referred me to history of the plaintiff's failing out with her lawyers over time, and significantly, in my view, this included a history of her falling out with Mr Wiltshire in the past and then re-engaging him."[41]

[23] Her Honour concluded her reasons with the following summary of factors considered by her:

> "I refused the application for an adjournment, except that I allowed an extra day at the beginning of the first week of the trial for preparation, so that the trial started one day late. I had regard to the lateness of the application for an adjournment, the fact that it was made by the plaintiff who, after all, ought to have carriage of the matter and be pushing it forward. I had regard to the fact that the defendants were constrained by the injunction, and that this plaintiff had a history of baulking when it came to the trial actually being heard and of falling out with her lawyers, particularly with

---

38 AB 932-933.
39 AB 934-935.
40 AB 935.
41 AB 935.

> Mr Wiltshire, in the past. I also had regard to the very clear terms of the warning administered to the plaintiff by Justice Boddice on 7 March 2012. I had regard to the fact that all the defendants, but Mr Hunter, were self-represented.
>
> I had regard to the public interest in the fact that Court resources had been put into this case as a supervised case and that it had been given an allocated date for a long trial in the calendar. To adjourn it would cause inconvenience and injustice to other litigants. It would also cause a great delay in having the matter tried.
>
> Balancing the public interest considerations and the interests of all parties, it seemed to me that satisfactory accommodation could be made for the trial to go ahead with Mr Noel James acting as a *Mackenzie friend* to the plaintiff and allowing the plaintiff an extra day to prepare, so that the matter started on 7 August 2012, rather than the 6th."[42]

[24] Senior counsel for the appellant framed the arguments on this ground of appeal conscious that in order to succeed on it, error of principle in refusing the adjournment had to be shown and that injustice flowing from the refusal was a relevant and necessary consideration.[43] Turning first to error of principle, counsel indicated that there were a number of errors that he would identify.[44] No misapprehension of legal principle by the learned primary judge was suggested. A fair summary of two of the claimed errors is that each was of the nature of taking into account as a factor relevant to the exercise of the discretion, a matter which, it was said, was factually inaccurate.

[25] The first of them mentioned by counsel was that the trial would be delayed for at least a year if the adjournment was granted.[45] That was said to be factually inaccurate principally upon the basis that the appellant had made an enquiry of the registry about available trial dates and was of the belief from her enquiry that the matter could be set down for a trial beginning on 5 November 2012. It must be said at once that the appellant's belief fails to demonstrate factual error by her Honour. Besides, experience with the listing of case-managed trials of substantial length tells that the basis upon which her Honour acted was quite correct.

[26] The second matter identified by counsel concerned her Honour's having taken into account as a factor that on 26 July, the appellant had failed in an application to obtain an adjournment. It was not suggested that that, of itself, was not a relevant factor. The complaint made was that her Honour proceeded on the footing that the request for an adjournment on that occasion was a consequence, in part at least, of the appellant's own conduct in briefing Mr Wiltshire late.

[27] Having read the transcript of the application for the adjournment before her Honour and her reasons for refusal, I am unable to find within them any expression of an opinion or belief on her part that the appellant had briefed Mr Wiltshire in

---

42 AB 936-937.

43 Tr1-6 LL10-17, citing *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177.

44 Tr1-9 L30.

45 Tr1-10-Tr1-14.

insufficient time for him to prepare for the trial on the listed dates. Furthermore, during the hearing of the application, the appellant outlined a chronology which appeared in her affidavit, saying:

> "I believe I did the correct things by obtaining counsel in the sufficient time I had. He has been in – in this matter since August last year; he settled the applications, he settled my current statement of claim and claim; he dealt with defences which at that time were significantly changed and required applications which he also assisted, so I believe he was fully informed. In June, on the 20th, according to my – I have all this in my affidavit – there's an email between us where he confirms that we would – that he would be retained but he was going away and we arranged a date of the 12th July where he confirms, Exhibit 3, that he has sufficient time from the 12th of July, he dedicated exclusively time to me, to my matter which I believe … ."[46]

To this, her Honour said, "I've read all that … I understand the facts behind it."[47] At no point did her Honour level any criticism towards the appellant suggesting that she had been dilatory in briefing Mr Wiltshire for trial.

[28] It is appropriate to observe in this context, that her Honour did not attribute fault to the appellant in her decision that she could not continue with Mr Wiltshire as her counsel. I have already set out her Honour's comments in her reasons about the discrepancies identified by the appellant. That her Honour empathised with the appellant's plight as one not of her own making is revealed in the following observations she made to Mr Chenery during the adjournment hearing:

> HER HONOUR: "… But I think there is now and I have some sympathy for that, because I think when you look at what he said in Court and what is in the email – the contemporary emails, there does seem to be a reason, or a reasonable basis at least, for Mr(s) Hunter saying she's lost faith in him."
>
> RESPONDENT C CHENERY: "Yes –"
>
> HER HONOUR: "I can – I don't – I can see her point of view there."[48]

[29] The appellant suggested error of principle in another dimension in that her Honour took into account as relevant that, with the exception of Mr Hunter and his company, the other respondents would not be legally represented. That, it was said, was a distraction from the important factor that the appellant herself would not be legally represented. Reference was made to the observations of Murphy J in *McInnis v The Queen*[49] concerning the daunting task faced by an unrepresented accused in a criminal trial in conducing a defence. Those observations have a real resonance when the Crown is represented by an experienced prosecutor who has the resources of the state available. They are not to be read as applying cogently to

---

46 AB 8; Tr1-8 LL28-40.
47 *Ibid* LL43-47.
48 AB 18 Tr1-18 LL6-15.
49 (1979) 143 CLR 575 at 585.

a civil trial where, for the most part, the parties are not legally represented. To my mind, it was quite relevant for her Honour to have regard to the nature of the representation all round at the trial.

[30] Lastly, the appellant submitted that in having regard to the hardship to the other parties resulting from the interlocutory injunction, her Honour overlooked that it could have been discharged or varied. At a theoretical level a variation or discharge was a possibility but in circumstances where the appellant did not indicate any willingness on her part to that course being taken, the submission lacks real substance.

[31] For these reasons, I am quite unpersuaded that her Honour took into account matters which were inaccurate, incomplete or irrelevant, as the appellant has claimed. Nor did she attribute relative weight to them in a way that was not rational. No error of principle in the exercise of the discretion to refuse the application for adjournment has been made out. That is sufficient for this ground of appeal to fail.

[32] Notwithstanding, I wish to add that, in my view, the appellant also failed to establish a substantial injustice to her as a consequence, and to outline briefly why I take that view. At the conclusion of the adjournment hearing, her Honour noted that in the appellant's affidavit, she had proposed that her evidence-in-chief be by affidavit. Her Honour indicated that the appellant could use the time to prepare an affidavit and bring it to court.[50] At the trial, her Honour declined to permit the evidence to be given that way because "a lot of it's inadmissible; a lot of it's irrelevant."[51] The appellant's evidence-in-chief was given orally using the affidavit as a guide. I am unable to see any significant injustice to the appellant in this course having been taken. By comparison, had the affidavit been received as the evidence-in-chief, some lack of direction and focus could have been introduced to the trial.

[33] It may be accepted that the factual matrix from which the appellant sought to make a case was quite detailed, if not complex, and the legal characterisation of oppression that she sought to put upon them required analysis of fact at an abstract level. The appellant was not a trained or skilled cross-examiner. It is not at all unrealistic to propose that those factors put the appellant at some disadvantage in conducting the litigation. However, the question remains whether that disadvantage resulted in substantial injustice to her. A number of features of the litigation suggest rather forcefully that it did not.

[34] Firstly, it was the appellant, by her affidavit, who suggested that the matter might proceed without counsel, but with assistance for her from her *McKenzie's Friend*. Next, there is no suggestion on appeal that any relevant witness was not called or that any relevant document was not adduced, in the appellant's case. Thirdly, as the following paragraphs from her Honour's reasons reveal, powerful findings of credit against the appellant were made based on her own answers in cross-examination and her own documented actions:

> "[16] I do 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.

---

50 AB 25 Tr1-25 LL15-25.

51 AB 63 Tr1-29 LL48-52.

[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 or 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."[52]

None of these findings are challenged on appeal.

[35] For all these reasons, this ground of appeal must fail.

Grounds 2, 3 and 4 – refusal to find oppression

[36] In oral submissions, senior counsel for the appellant informed the court that it was intended to argue one point only with respect to these grounds. In those circumstances, it is unnecessary to set out here each of the grounds. The single point is this : "even on [the] findings of fact and conclusions concerning credibility, her Honour erred in law in [refusing] to characterise the restructure and its effect on the appellant as oppressive pursuant to s 232 of the *Corporations Act*."[53]

[37] Counsel did not take issue with the approach taken by the learned trial judge to ascertain whether there had been oppression. Her Honour identified commercial unfairness as a criterion essential to each of the elements of oppression, unfair prejudice and unfair discrimination referred to in the statutory formulation.[54] She adopted an objective test to determine whether there had been unfairness, a test well established by a number of authorities as the appropriate one to adopt.[55]

[38] The learned trial judge concluded that there had been no oppression either as a result of the restructure[56] or in directorship changes in Organic[57] or in relation to the non-acquisition, compulsorily or otherwise, of the appellant's shares in Organic.[58] Addressing the totality of the conduct on which the appellant relied for oppression, her Honour observed:

> "[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.[59]
>
> [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

---

52 AB 4428.
53 Tr1-37 LL34-37.
54 Cf *Byrne v A J Byrne Pty Ltd* [2012] NSWSC 667 at [44].
55 See *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304 at [176]; *Harding Investments Pty Ltd v PMP Shareholdings Pty Ltd (No 2)* [2011] FCA 567 at [10]; and *Byrne* at [45].
56 Reasons [101]-[120].
57 Reasons [121]-[129].
58 Reasons [130]-[139].
59 *Lucy v Lomas* [2002] NSWSC 448, [45] and the authorities cited there.

> 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."[60]

[39] Conformably with these findings, her Honour refused relief under s 233 or s 461(1)(f) of the *Corporations Act* for oppression. She also refused relief under the other paragraphs in s 461(1) which the appellant had sought to invoke. She did not make any factual findings from which it could be concluded that the directors of Organic had acted unjustly or in their own interests: para (e).[61] She did not consider it just and equitable to wind up the company: para (k).[62] This ground of appeal is based solely upon the rejection of the appellant's claim of oppression. It does not call into question her Honour's refusal of relief under paragraphs (e) and (k) of s 461(1).

[40] To advance the argument that the refusal to characterise the restructure as oppressive was an error, counsel referred to a number of findings made by the learned trial judge, namely:

- that the assets of Organic were transferred to a trust structure that had been created (the ADE Unit Trust);[63]
- that the appellant had no interest in the new trust structure other than as a discretionary beneficiary of a Hunter family trust (of which Mironesco, a company in which she held no shares and of which she was, at the highest, a director by virtue of the extended definition of that term in s 9 of the *Corporations Act*);[64]
- that Mr Hunter's shareholding in Mironesco was held absolutely for himself;[65]
- that the 33 of the 100 issued shares in Organic that had been issued to the appellant were held by her on trust for herself and Mr Hunter and, thus, she had a beneficial ownership of approximately one-sixth of the issued shares of Organic;[66]
- that as a consequence of the restructure, the appellant had suffered financially because the economic value of her approximate one-sixth interest in Organic had become worthless; and
- that the appellant signed the documents necessary to be signed by her to effectuate the restructure in the belief that the overall scheme was to her financial advantage.[67]

---

60 AB 4452.
61 Reasons [144].
62 Reasons [145]-[150].
63 Reasons [10]; AB 4425.
64 Reasons [11]; AB 4426.
65 Reasons [28]; AB 4430.
66 *Ibid*.
67 Reasons [45]; AB 4433.

[41] The appellant's submission proposes that these circumstances compel a conclusion that there was oppression. That proposition is itself severely flawed. The errors in it are manifest. Firstly, it urges that solely from a resultant state of affairs, namely, that the appellant had lost economic value, and perhaps, also from a circumstance that she thought that the restructure was to her financial advantage, a conclusion is to be drawn that there was oppression on the part of the individual respondents in conducting the affairs of Organic. There is no reason in logic why that result and that circumstance ought warrant, let alone compel, any conclusion with respect to the characterisation of conduct on the part of the others. Secondly, and reciprocally, the proposition not merely diverts attention from, but also ignores, the process of considering, from an objective stand point, their conduct. Such a process is central to determining whether or not there had been oppression.

[42] The learned trial judge reached the conclusion that there had been no oppression by virtue of the implementation of the restructure. Her reasoning towards that conclusion involved detailed consideration of the conduct of the individual respondents. She also had regard to the behaviour of the appellant from time to time as it may have influenced that conduct.[68]

[43] It is unnecessary to set out all of the factual findings made by her Honour or the totality of her reasoning with respect to them on this issue. It is sufficient to refer to the following paragraphs from her reasons in order to gain an appreciation of why she arrived at the conclusion she did with respect to the restructure.

> "[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.[69]
>
> [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

---

68 Cf *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97, per Spigelman CJ at [90].

69 AB 4439

chose not to. In those circumstances the other principals can hardly be criticised for not adverting to the potential issues.[70]

…

[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 in 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 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 or 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.[71]

[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,

---

70 AB 4440.

71 AB 4445-4446.

> 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."[72]

[44] In my view, the relevant considerations of which her Honour took account, compelled the conclusion that she reached. I am wholly unpersuaded that the appellant has identified any legal error which attends her conclusion that the restructure was not oppressive to, unfairly prejudicial to, or unfairly discriminatory against, the appellant. These grounds of appeal, too, must fail.

Disposition

[45] Since none of the grounds of appeal advanced at the hearing has succeeded, this appeal must be dismissed with costs.

[46] It remains to note that the circumstance that the appellant now has no vested beneficial interest in the business or property that had its origins in the business and property of Organic prior to the restructure, stems principally from the Hunter family arrangements with respect to Mironesco and the Hunter Family Trust of which it is trustee. As noted both by her Honour and during the course of argument of the appeal, the appellant is at liberty to continue with her proceedings in the Family Court of Australia to obtain relief with respect to those arrangements, relief which is not available to her in the jurisdiction she has sought to invoke in these proceedings.

Orders

[47] I would propose the following orders:

1. Appeal dismissed.
2. Appellant to pay the respondents' costs of the appeal on the standard basis.

[48] **ATKINSON J:** I agree with the reasons for judgment of Gotterson JA and the orders proposed by his Honour.

[49] **BODDICE J:** I have had the opportunity to read the reasons for judgment of Gotterson JA. I agree with those reasons and the proposed orders.

---

72 AB 4446.