IN THE SUPREME COURT OF QUEENSLAND No. 11148 of 1997

Brisbane

IN THE MATTER OF THE CORPORATIONS LAW

-and-

IN THE MATTER OF POLYRESINS PTY LIMITED (ACN 069 066 575)

REASONS FOR JUDGMENT - CHESTERMAN J.

Judgment Delivered 25 May, 1998

CATCHWORDS:

Corporations - section 260 *Corporations Law* - whether relief may be granted to an applicant having the majority of voting share capital in the company - whether the Court should exercise discretion in favour of such an applicant - effect of the phrase "acts or omissions...contrary to the interests of the members as a whole"

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	1 May, 1998
	5 May, 1998

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In 1995 the share capital of Polyresins Pty Limited ("the company" or "Polyresins") was acquired by the applicant Mr Christopher Hartley, the respondents Mr John Galea and his wife Mrs Barbara Galea and Satinover Pty Ltd, a company owned and controlled by Mr Michael Gocher from its subscribing shareholders. The issued share capital in the company consists of eighteen ordinary shares. Prior to the acquisition Mr Galea was employed by a South African company, Bondtite, which imported glues and adhesives for sale in Australia to companies engaged in manufacturing timber products for use in construction. Mr Hartley and Mr Gocher also had some knowledge of the business of supplying adhesives to manufacturers of timber products. Bondtite intended to discontinue its business and offered to sell out for a modest price representing the value of its stock in trade with, perhaps, a small premium for good will. Mr Galea faced the prospect of unemployment upon Bondtite's retreat from business activity in this country. He engaged Mr Gocher and, through him, Mr Hartley in conversation with a view to their joint acquisition of Bondtite's business and his employment in the new venture in which he would perform essentially the same functions he had carried out for Bondtite. The talks resulted in the acquisition of the shares in the company I have mentioned. An agreement was made that each of Messrs Hartley, Gocher and Galea should be equal shareholders. To that end Mr Hartley was allotted six shares; and Mr Galea's entitlement of six shares was divided between him and his wife and Mr Gocher's shares were taken by his company Satinover Pty Ltd.

Mr Galea was unable to provide any capital to the company to enable it to buy Bondtite's business. As it turned out so was Mr Gocher. Mr Hartley provided all the funds putting in $50,000.00 for himself and lending $50,000.00 to Mr Gocher which he in turn lent to the company. The three men agreed upon a division of the

company's profits. Up to a certain value of sales turnover (which has never been reached) Mr Galea was to receive 50% of the profits and Mr Hartley and Mr Gocher 25% each. Mr Galea was to be employed by the company in return for a salary and allowances.

Initially the directors of the company were to be Messrs Hartley, Galea and Gocher. In fact, Mrs Galea was also appointed a director, though this fact was kept from Mr Hartley for some time. This was possible because Mr Hartley lived and worked in Brisbane while Mr and Mrs Galea and Mr Gocher all live in Sydney. Mr Hartley initially played little part in the affairs of the company leaving Messrs Galea and Gocher to run the company.

Late in 1996 Mr Gocher expressed a desire to quit his shareholding in the company. He still owed Mr Hartley the amount of the initial advance made to enable him to became a participant in the company's business. As part of the arrangement by which Mr Hartley had lent him money, Mr Gocher had granted to Mr Hartley an option to buy his shareholding. A price was agreed and on 26 February, 1997 the directors of the company resolved to approve the transfers of six ordinary shares from Satinover Pty Ltd to Mr Hartley. On the same day Mr Gocher resigned as a director of Polyresins.

Mr Galea had been inclined to contest the validity of the agreement between Mr Hartley and Satinover Pty Ltd, on the ground that he had an agreement with Mr Hartley that, should any of the three dispose of their shareholding in the company, it would be offered to and acquired by the others equally so that the remaining two shareholders would hold the capital of the company in equal portions. Mr Galea complained that Mr Hartley had broken this agreement and that he should transfer to him three of the shares acquired from Satinover Pty Ltd. Despite his dissatisfaction Mr Galea now accepts that the Satinover Pty Ltd shareholding has been transferred to Mr Hartley who has become the

lawful owner of the shares and the company's records correctly show this to be so.

Mr Hartley claims that on 5 April, 1997 the company's directors approved a transfer of one of his shares to Mrs Barbara Fielding. There is a minute to that effect and the company's register shows Mrs Fielding to be a shareholder. Mr Galea disputes that the directors met on 5 April, 1987 and denies that the directors resolved to approve the transfer.

Be this as it may, the applicant is the holder of at least eleven of the eighteen issued shares in the company.

The company's Articles of Association are conventional in their terms. The capital is divided into subscriber shares, ordinary shares, and nine separate classes of shares identified respectively as A to I. The two subscriber shares have been cancelled. The only other shares issued have all been ordinary shares. They confer on the holders the right:-

- to receive notice of and to attend any general meeting;
- to exercise one vote for every share held;
- to participate in dividends declared; and
- to participate in the distribution of the assets of the company on a winding up (see Article 4).

With an irrelevant exception the company (ie. in general meeting) may increase or reduce the number of directors and may at any time appoint additional directors or remove any director (Articles 60(2) and 62). The directors may appoint other directors to fill a vacancy or as an addition to existing directors (Article 61). Management of the company's business is conferred upon the directors who may exercise all powers of the company as are

not required to be exercised in general meeting (Article 67).

By application dated 9 December, 1997 the applicant sought an order that the company be wound up pursuant to section 260 or 462 of the *Corporations Law*. On 25 February, 1998 the applicant, who was then acting for himself, filed a fresh application by which he sought an order that Mr and Mrs Galea "purchase all the shares held by the applicant and the one share held by Barbara Anne Fielding in the capital of the company at a price to be determined by the court or through independent valuation" and an order "that the appropriate date for such valuation be 1 December, 1997 when the applicant would not have suffered the negative effects of the oppressive behaviour of John Galea and Barbara Galea."

The second application identified section 260 as the source of the power to make the orders sought.

At trial, the applicant (who had become represented by counsel very shortly before the hearing commenced) contended that the court should make an order that his shares be bought by the respondents, Mr and Mrs Galea. The applicant did not lead any evidence of the value of the company nor the basis on which the court could determine a fair price for its shares. The applicant sought to defer considerations of such matters until after the court had determined whether he was entitled to relief of the kind he claimed. This piecemeal approach is unsatisfactory but I agreed to it because the court had, at the applicant's urging, given the matter an expedited hearing; the applicant had been unrepresented until shortly before the trial commenced; and the respondents did not object to that course. I indicated that I would proceed as though pursuant to 39 r12 of the *Supreme Court Rules* and try as a separate question whether the applicant was entitled to an order that his shares be bought by the respondents. If the applicant is successful on the first question, directions will be given for the trial of the remaining questions.

The question that arises immediately is whether the court can grant relief pursuant to section 260 to an applicant who controls a majority of the voting share capital in a company, the conduct of whose affairs is said to be the occasion for the court's intervention. The section provides:—

> "**260(1) [Application to Court]** An application to the Court for an order under this section in relation to a company may be made:
>
> (a) by a member who believes:
>
> "(i) that affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members, or in a manner that is contrary to the interests of the members as a whole; or
>
> (ii) that an act or omission, or a proposed act or omission, by or on behalf of the company, or a resolution, or a proposed resolution, of a class of members, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be contrary to the interests of the members as a whole; or
>
> (b) by the Commission, in a case where it has investigated, under Division 1 of Part 3 of the ASC Law:
>
> (i) matters being, or connected with, affairs of the company; or
>
> (ii) matters including such matters.
>
> **260(2) [Orders that Court may make]** If the court is of the opinion:
>
> (a) that affairs of a company are being conducted in a manager that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members (in this section called the "**oppressed member or members**" or in a manner that is contrary to the interests of the members as a whole; or

(b) that an act or omission, or a proposed act or omission, by or on behalf of a company, or resolution, or a proposed resolution, of a class of members of a company, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members (in this section also called the "**oppressed member or members**") or was or would be contrary to the interests of the members as a whole;

the court may, subject to subsection (4), make such order or orders as it thinks fit..."

The jurisdiction of the court may be invoked by a member of the company who holds the belief described in section 260(1). The belief must, of course, be genuine (see *Re Spargos Mining NL* (1990) 8 ACLC 1,218 at 1,222-3.) It is evident that a belief which is not genuine is not a belief. The power of the court to make such orders as it thinks fit is predicated upon the court being of the opinion specified in section 260(2)(a) or (b). It goes without saying the court must come to the requisite opinion on admissible evidence and upon the balance of probability. Before it can act, the court must form the opinion that affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to or unfairly discriminatory against a member or in a manner that is contrary to the interests of the members as a whole or that an act or omission by or on behalf of the company or a resolution by a class of members was or would be oppressive or unfairly prejudicial to or unfairly discriminatory against a member or contrary to the interests of the members as a whole.

It seems to me doubtful, at least, that the affairs of a company can be conducted in the manner proscribed, that is, in a manner which is oppressive or unfairly prejudicial to or unfairly discriminatory against a member who has the majority of voting capital in the company (I omit, at present, consideration of acts or conduct contrary to the interests of the company as a whole). The "oppressive" or "unfair" conduct of a company's affairs described in section 260 (2)(a) involves conduct continuous in nature. See *Re Weedmans Ltd* [1974] QdR 377 at 394. It is

unrealistic to suppose that a company's affairs may be conducted in a manner that is oppressive or which unfairly prejudices or discriminates against a member who controls a majority of votes that may be cast at a general meeting and who can thereby remove directors and appoint others in their stead. Not only it is unlikely, as a matter of practicality, that the company could conduct its affairs in such a manner, there is an extreme unlikelihood that, once commenced, the conduct would be allowed to continue so as to satisfy this aspect of section 260 (2)(a).

Slightly different considerations apply in relation to section 260(2)(b). Here there is no requirement for continuity of conduct but only that an act or omission, or a proposed act or omission, or a resolution or proposed resolution be, actually or prospectively, in consequence oppressive or unfairly prejudicial to or discriminatory against a member. It is possible to image circumstances in which those charged with the management of a company might act in such a way as to hurt or prejudice or discriminate against a member of the company but it is not, I think, possible to imagine circumstances in which the hurt or prejudice or discrimination can amount to oppression or unfair prejudice or discrimination when the victim is the controlling shareholder. In other words the conduct will lack the requisite character because the person or persons affected by it can act to prevent it having the character of unfairness.

Regard has so far been focussed on that part of section 260 which refers to oppression or unfair prejudice or unfair discrimination. There is a further phrase to be found in the section: that the affairs of the company are being conducted in a manner contrary to the interests of the members as a whole or that acts or omissions or resolutions were or would be contrary to the interests of the members as a whole. If this phrase confers a separate basis for the court's intervention the difficulty of a majority shareholder persuading the court to form the requisite opinion may not exist.

Does the phrase constitute a separate basis? Young J thought not in *Morgan v. 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692. His Honour said at 704:—

> "It was first put by counsel for the plaintiff that the section involves four elements and that the plaintiff can succeed if he shows the company's affairs are being conducted (a) oppressively (b) unfairly, (c) in a discriminatory way and (d) in a manner which is contrary to the interests of the members at a whole...In my view...it has been accepted that one.... no longer looks at the word "oppressive" in isolation but rather asks whether objectively in the eyes of a commercial bystander, there has been unfairness, namely conduct that is so unfair that reasonable directors who consider the matter would not have thought the decision fair: see *Wayde's* case per Brennan J...In my view a court now looks at subsection 2(1)(a) as a composite whole and the individual elements mentioned in the section should be considered merely as different aspects of the essential criterion, namely commercial unfairness".

I respectfully agree with this approach though its acceptance involves an obstacle. The Court of Appeal of the Supreme Court of *New South Wales in New South Wales Rugby League v. Wayde & Anor* (1985) 1 NSWLR 86 said (at 96), having referred to the judgment of Richardson J in *Thomas v. HW Thomas Ltd* 1984 1 NZLR 687:—

> "The Australian provision contains an additional statutory basis for curial intervention to those in the New Zealand legislation. Section 320 also permits the court to intervene where the act or omission "was or would be contrary to the interests of the members as a whole". This reflects recognition of a long established principle of company law."

Section 209 of the New Zealand *Companies Act* 1955 empowered the court to intervene where what was complained of was oppressive, unfairly discriminatory or unfairly prejudicial. Of those words, the court did not read the subsection as referring to three distinct alternatives which are to be considered separately in water-tight compartments but thought that the three expressions

overlap. Each in a sense helps to explain the others. Read together, they reflect the underlying concern of the subsection that conduct of the company which is unjustly detrimental to a member of the company whatever form it takes and whether it adversely affects all members alike or some only is a legitimate foundation of invoking the section. I have, of course, paraphrased part of the judgment of Richardson J which is set out later in these reasons. The Australian legislation adds to the three expressions found in the New Zealand Act the further expression, "contrary to the interests of the members as a whole."

The structure of section 260 appears to me to be against the notion that the last mentioned phrase gives rise to a wholly separate statutory basis for the court's jurisdiction. If the first three expressions overlap and are to be read together to express one underlying concern it is difficult to see why the fourth is excluded. I would have thought that the subsection gave rise to four distinct grounds or one composite one. There seems to me nothing in the mode of expression of the section which allows one to amalgamate three of the four "concepts" but not the fourth.

The treatment of the matter by the majority judgment in the High Court does not seem to lend support to there being separate categories of "unfairness" constituted by the three overlapping expressions and a separate category of repugnance to the interests of the whole company. Rather, the majority proceeded on the basis that the two were interrelated. They said (at (1985) 180 CLR 467-8):—

> "...the appellants faced a difficult task in seeking to prove that the decisions in question were unfairly prejudicial to Wests and <u>therefore</u> not in the overall interests of the members as a whole." (second emphasis added).

Another indication that the fourth "concern" is not a separate statutory basis for intervention is that, quite apart from statute, things done by those controlling a

company that are not for the benefit of the company as a whole are ineffectual and void as being beyond power. The phrase means only that things done by or on behalf of a company that do not further its legitimate purposes or are not legitimately connected with its business or affairs are not lawful exercises of its powers and are therefore invalid. See *Allen* v. *Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 at 671; *Peters' American Delicacy Co. Ltd* v. *Heath* (1938-1939) 61 CLR 457 at 480-1 and 512-3. So conduct by a company that is extraneous or foreign to the execution or achievement of its operations or affairs is not for the benefit of the company as a whole nor is it in the interests of the company as a whole. There is no difference between the two expressions. See *Wayde* (1985) 1 NSWLR 96.

If the expression is a separate basis for jurisdiction all that has been achieved by including it in section 260 is that the court may make any of the orders allowed by section 260(2), whereas formerly the court would merely have declared the impugned conduct to be invalid and perhaps have gone on to make injunctions. It seems unlikely that the section should have this effect. If what was intended was to provide additional statutory remedies for a ground on which the court would always grant relief independently of the companies legislation section 260 is a curious place to find the extended remedies.

With appropriate deference I think it is more likely that the phrase "contrary to the interests of the members as a whole" is another expression overlapping "oppression, unfair prejudice and unfair discrimination" to provide a further element in the understanding of "commercial unfairness".

No authority has considered the question whether section 260 may be invoked by a majority shareholder. Is there anything in the cases which have discussed the fundament of section 260 which might assist in the resolution of the question? The authority to which one usually turns is the decision of the New Zealand Court of

Appeal in *Thomas* v. *H W Thomas Ltd* [1984] 1 NZLR 687. The applicant there held one-third of the shares in a private company, all of whose members belonged to the extended family of its founder. The company was successful but the very conservative dividend policy of the directors meant that it provided a poor return on capital. The applicant applied under the New Zealand equivalent of section 260 for an order enabling him to sell his shares to the company or one or more of its members. Section 209 of the New Zealand *Companies Act* provided:—

> "(1) Any member of a company who complains that the affairs of the company have been or are being or are likely to be conducted in a manner that is, or any act or acts of the company have been or are or are unlikely to be, oppressive, unfairly discriminatory, or unfairly prejudicial, to him...may make an application to the court for an order under this section.
>
> (2) If on any such application the court is of the opinion that it is just and equitable to do, the court may make such order as it thinks fit..."

Richardson J, in reviewing the history of statutory enactments enabling the court to provide a remedy to shareholders whose interests were overborne referred to the earlier, more limited basis on which the court could interfere and said:—

> "... oppression must import that the oppressed are being constrained to submit to something which is unfair to them as a result of some arbitrary act or attitude on the part of the oppressor..." (at 693).

Note the reference to constraint. The concept scarcely applies to someone who has the power to appoint and remove directors and commands the passage of resolutions at a general meeting. Having discussed the shortcomings of the legislation in its original form and the changes wrought by

the enactment of section 209, Richardson J said (at 694-5):—

> "Fairness cannot be assessed in a vacuum or simply from one member's point of view. It will often depend on weighing conflicting interests of different groups within the company. It is a matter of balancing all the interests involved in terms of the policies underlying the companies legislation in general and section 209 in particular: thus to have regard to the principles governing the duties of a director in the conduct of the affairs of a company and the rights and duties of a majority shareholder in relation to the minority; but to recognise at section 209 is a remedial provision designed to allow the court to intervene where there is a visible departure from the standards of fair dealing..."

The reference to the principles governing the rights and duties of a majority shareholder in relation to a minority is, I think, helpful. The passage is not, however, decisive because the point presently under discussion was not considered. It is, though, instructive that in discussing the section Richardson J referred to the protection of a minority shareholder. The third member of the Court, Sir Thaddeus McCarthy, said, perhaps more emphatically, (at 697):—

> "...but the powers given by section 209 are ones which in my view should be not be likely exercised, especially so when a lack of probity or want of good faith is not established. These powers can invade the traditional rights of the shareholders to determine the management of their company according to their shareholding, and while few would deny a necessity for such provisions as those of section 209 in the interests of minorities, the danger of allowing minority interests to inflict serious damage to a company's structure can be quite real".

In a passage which has often been quoted and always with approval, Richardson J said (at 693):—

> "I do not read the subsection as referring to three distinct alternatives which are to be considered separately in water-tight compartments. The three expressions overlap, each in the sense helps to explain

> the other, and read together they reflect the underlying concern of the subsection that conduct of the company which is unjustly detrimental to any member of the company whatever form it takes and whether it adversely affects all members alike or discriminates against some only, is a legitimate foundation for a complaint under section 209. The statutory concern is directed to incidences or courses of conduct amounting to an unjust detriment to the interests of a member or members of the company" (emphasis added).

The passage underlined might suggest that the section is not limited to protecting minorities but that there may be oppression or unfair prejudice or discrimination to or against a majority shareholder or all shareholders.

New South Wales Rugby League Ltd v *Wayde & Anor* (1985) 180 CLR 459 is the only occasion on which the High Court has considered the section. Mr Wayde represented the only member of the respondent company which was affected by the decision of the respondent's board called into question in the proceedings. He was in a minority. The point of immediate concern was not discussed. Remarks of present relevance were made by Mason ACJ, Wilson, Deane and Dawson JJ in their joint judgment at 466:—

> "It is a point of great importance that the decisions were made in exercise of a power that is expressly conferred on the Board, a power to determine the nature and extent of the competition that was to take place in 1985 and the clubs that were to be permitted to participate in it. It is not a case where the directors of a company, in the exercise of the general powers of management of the company, might bona fide adopt a policy or decide upon a course of action which is alleged to be unfairly prejudicial to a minority of the members of the company. In that kind of case it may well be appropriate for the court, on an application for relief under section 320, to examine the policy which has been pursued or the proposed course of action in order to determine the fairness or unfairness of the course which has been taken by those in control of the company" (emphasis added).

On the other hand Brennan J who delivered separate reasons said (at 471):—

> " Clearly the legislature intends to provide a greater measure of curial protection to members of a company, especially if they be in a minority, than the protection afforded under earlier companies acts."

Brennan J's judgment contains no elucidation of the circumstances in which the applicant for relief may not be a minority shareholder.

With the exception of the brief passage from the judgment of Brennan J and perhaps that from Richardson J judicial opinion in these cases seems to favour the view that the section operates for the protection of minority interests. I emphasise again that the point was not an issue and no attention was paid to the exegesis of section 260 with the present problem in mind.

Counsel for the applicant argued that three authorities established the proposition that the court could act under section 260 to protect a majority shareholder.

The first is *Re Associated Tool Industries Ltd* (1963) 5 FLR 55. The passage relied on is at 66-7:—

> "It was submitted...that section 186 can only be invoked against a controlling majority, that is, a majority which controls a general meeting of the companies. It was said that at no stage were the three individual respondents such a controlling majority...In Gower's *Modem Company Law* (2nd ed.), at p. 542, the following passage appears: "...It seems clear, therefore, that the draftsman has rightly recognised the oppression may be exercised by those in control even though they lack majority holding, and that the section affords protection in such a case. It has even been held that the remedy may be invoked notwithstanding that all of the shareholders are equally damnified by what has been done."

The facts of the case were that each of the three respondents owned one of the four issued shares in a company, the business of which was intimately connected to the business of the company in respect of whose affairs

relief was sought. Each of the respondents was a director of the latter company whose interests would have been advanced by the acquisition of the first company. The respondents refused to allow this to happen except on conditions that enriched them. It is not possible from the reasons for judgment to determine the precise shareholding in the company but it does not appear that the petitioners between them had a controlling interest. The share capital of the company was 35,000.00 pounds and the petitioners appeared to have no more than 9,225.00 pounds of the capital. The shareholding of the respondents is not disclosed nor are any other shareholders identified. It would seem likely that the applicant could not persuade a majority of shareholders to take his view about the directors' conduct. The judgment is silent on the point.

The case is authority for the proposition that the court may intervene pursuant to section 260 where the interests of all members of the company are equally effected by the actions complained of and where the respondents do not own a controlling shareholding. It says nothing of the case where the applicant controls a majority of voting shares.

The next case comes from South Africa: *Benjamin* v. *Elysium Investments (Pty) Ltd & Anor* 1960 (3) SA 467. Section 111 of the South African *Companies Act* 1926 provided that:

> "(1) Any member of a company who complains the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) may make an application to the court...for an order under the section...
>
> (2) If on any such petition the court is of the opinion -
>
> (a) that the company's affairs are being conducted as aforesaid; and

(b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding up order on the ground that it just and equitable that the company should be wound up,

the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit...".

The case involved a company in classic deadlock. There were two shareholders with equal holdings both of whom were directors. They disagreed about making a payment to a company which was associated with one of them. They could not resolve their difficulty and took to squabbling.

O'Hagan J records a submission that section 111:—

> "...has no application where the control of the company's affairs is not vested in the person or persons who is or are alleged to have acted oppressively...section 111 can be invoked by an oppressed minority, but not by a member who shares the control equally with another" (at 475).

His Honour went on (at 476-7):—

> "I can find nothing in the authorities which appears to hold that the words "conducted in a manner oppressive" refer only to conduct of a member vested with the power to override a minority vote. The section does not use the word "minority" and there is no reason for giving a narrow meaning to the phrase...in every instance it is a question of fact whether the affairs of the company are being conducted in a manner oppressive to some part of the members... I am consequently unable to accept the argument that section 111 cannot be invoked by a member..who shares the voting control equally with another. In my view the remedy is open to a shareholder <u>who does not possess the power of control</u>" (emphasis added).

The case therefore stands on the same footing as *Re Associated Tool Industries Ltd.* Relief may be given where the respondent does not possess a controlling block of

shares as where the shares are equally divided between applicant and respondent. It does not address the present problem of an applicant who has control. O'Hagan J doubted the court would have power to act in such a case. His Honour said (at 476):—

> "It is reasonable to assume that a case could not arise where section 111 would be invoked by those in whose hands the voting control lies; but on principle I cannot see why the remedy provided by the section should not be available to a member of the company who can show that he does not enjoy voting control."

The third case is *Re HR Harmer Ltd* [1958] 3 All ER 689. The ordinary shares in the company were divided into two classes, "A" and "B". The "B" shares carried the whole of the voting power and the "A" shares conferred an entitlement to dividends. The majority of the "A" class shares were held by two brothers. The majority of the "B" class shares were held by their father. All three were directors but the elder Harmer who had formed the company retained authoritarian views and acted in disregard of resolutions of the board and outside the authority reposed in him as governing director. His sons petitioned for relief on the ground that their father was conducting the affairs of the company in a manner oppressive to them.

Counsel for the applicant relies upon a passage in the judgment of Jenkins LJ (at 696):—

> "...the phrase...is wide enough to cover oppression by anyone who was taking part in the conduct of the affairs of the company, whether de facto or de jure".

From this it is argued that *Re H R Harmer Ltd* is authority for the proposition that control of shareholding in a company is not necessarily fatal to the court's forming the requisite opinion. So long as those actually running the company act oppressively (or unfairly) the jurisdiction of the court is enlivened whatever be its shareholding. The submission loses its force when one has

regard to the judgment of the trial judge in a passage set out and expressly approved by Jenkins LJ at 705:—

> "I think the point about the word "minorities" is that it is only where the voting control is elsewhere that a case for the application of the section arises. To take this case, if the voting control had resided where the beneficial interest in the ordinary shares resides, there would have been no need to invoke the section...The father would have been eradicated root and branch by this time. It is only because of...his having voting control that it is necessary to invoke the section at all. I cannot think of any case where it would be possible to invoke the section if the voting control was in the hands of the persons who are alleged to have been oppressed..." (emphasis added).

The reason for this conclusion is, I think, the one I expressed earlier. It is not possible for the company or its directors to act so as to oppress or unfairly prejudice or discriminate against those who can command a majority of votes. If they should so act and take the majority shareholder by surprise their conduct will still lack the requisite characteristic because the majority shareholder can act to eradicate that which would give rise to unfairness.

The cases establish that it is not necessary that those against whom an order pursuant to section 260 is sought be in control of a majority of shares. Nor is it necessary that only a minority of shareholders be affected by the impugned conduct. It is enough that conduct of the type described in the section is unfair to some or all of the company's members. It is, however, necessary that the applicant not be the controlling shareholder. In those, surely rare, cases where the respondents are not controlling shareholders, the applicant must be unable to gain the support of sufficient shareholders to command a majority.

A court will not be able to form the opinion that the affairs of a company are being conducted unfairly in the relevant sense, or that acts or omissions of the company or

resolutions of the company are unfair in the relevant sense vis a vis a member who holds a controlling interest in the voting shares of the company. This conclusion derives from a consideration of the section and is supported by the *dicta* I have identified. The analysis accommodates the remarks of Brennan J in *Wayde* and those of Richardson J in *Thomas* which appear to me, with respect, to have been directed at the instance of acts of unfairness which may affect the interests of all shareholders. The remarks were not directed at the question whether relief is available to a majority shareholder.

I conclude, therefore, that the applicant does not make out a case for relief under section 260(2).

In case my view be wrong I intend to review the facts brought forward by the applicant to see whether, if the precondition had been satisfied, the court would make an order for the purchase of the applicant's shares.

In this regard it is important to note that the court has a discretion whether or not to make an order in those cases where the court does come to the requisite opinion. Courts have frequently cautioned against intervening in the affairs of companies save where it is necessary to do so to relieve against the consequences of unfairness. The remarks of Sir Thaddeus McCarthy which I have already noticed were adopted by the Court of Appeal in Wayde ((1985) 1 NSWLR 102), the court going on to say:—

> "... courts exercise care invading the traditional roles of directors and shareholders of the companies to determine management of the corporation."

In the High Court, the majority referred to (at (1985) 180 CLR 467):—

> "...the caution which a court must exercise in determining an application under section 320 of the code in order to avoid an unwarranted assumption of the responsibility for management of the company...".

The intervention by the court pursuant to section 260 is to be seen as an exception to the premise that companies conduct their affairs in accordance with their articles of association and the rule of majority decision making. It is a compelling reason for the court not to intervene that the person particularly affected by the alleged unfairness is the majority shareholder who can act properly and decisively to abate the wrongs of which he complains. If such an applicant declines to act to protect his own interests the court should be reluctant to do so.

In a helpful written submission counsel for the applicant has summarised the matters which he argues constitute "commercial unfairness". The first of these is the applicant's exclusion from participation in the management and direction of Polyresins. I think there is substance in this complaint. Mr Galea's attitude is exemplified in his correspondence. In a letter dated 14 October, 1997 to the applicant Mr Galea wrote:—

> "As I have mentioned to you several times in the past, you were invited to become a partner because of your experience in the industry and contribution you were to make toward helping the company to grow...I'm sure that you don't need reminding that I'm running this company that was and still is part of our original agreement...".

In a letter of 1 December, 1997 from Mr Galea's solicitors to the applicant's solicitors it was said:—

> "Our instructions are that Messrs Hartley and Gocher were intended at all times only to be passive investors and to provide funding for what was, in reality, our client's business."

On 9 February, 1998 Mr Galea's solicitors wrote to a judge of this court (for reasons never explained and into which it is probably tactful not to inquire) in these terms:—

> "In effect, the company was established as "their business" with some funding from two outsiders, including Christopher Hartley."

Mr Galea's resentment at the applicant's attempt to share in the direction of Polyresins is obvious as is his attitude that the applicant's only role was to provide money to allow him (Mr Galea) to conduct the business without supervision or even enquiry. The third letter is significant in another respect. On 15 December, 1997 the court ordered Mr and Mrs Galea to produce for inspection to the applicant all of Polyresin's business records from 3 June, 1996 to 15 December, 1997. The order was not complied with. In the letter of 9 February, 1998 the solicitor said that Mr and Mrs Galea were "prepared to hand over the business records of the company to the liquidator. They are not prepared to hand over business records to Christopher Hartley..."

The respondents may have been justified in thinking that the appointment of a liquidator was imminent but they had no justification for refusing to obey the order. Indeed, it was only after contempt proceedings were initiated that they produced the documents. The applicant at all times was a director. He was the only person who had provided it with money. The respondents' conduct is only explicable on the basis that they intended to exclude the applicant from knowledge of Polyresin's affairs and its decision making processes.

In an important aspect Mr Galea deceived the applicant. Mrs Galea had been authorised to operate Polyresin's bank account. She was a director and there was no reason why she should not have been an authorised signatory. She and her husband lived in Sydney where the company principally carried on business. The applicant lived in Brisbane. It was obviously convenient to have two cheque signatories in the one place. However Mr Galea did not tell the applicant that his wife had become a cheque signatory. When the applicant asked for a copy of the bank authorisation Mr Galea sent him one only of the two pages of the document neglecting to send that page on which Mrs Galea was named. The applicant's conversations with officers of Polyresin's bank after he learnt the truth

about who could sign cheques led the bank to stop trading on the account. This would have posed obvious difficulties for the conduct of Polyresin's business. Mr Galea opened a new bank account without informing the applicant.

A number of requests for information about Polyresin's affairs from the applicant to Mr Galea were ignored or over looked. The difficulty with obtaining documents on disclosure has been referred to.

Between April, 1995 and February, 1997, meetings of directors and/or shareholders were held without notice having been given to the applicant. To add insult to injury the minutes of some of those meetings recorded him as having been present when he was not.

Polyresin's statutory records were kept by a firm of accountants who had been engaged by Mr Gocher to perform work for him personally as well as for the company. They declined to make the records available to Polyresins unless outstanding fees were paid. Some of the fees were in respect of work done for Mr Gocher. Mr Galea obstructed the applicant's attempt to recover the records from the accountant and, when he had done so, accused him of having misappropriated company funds.

I have said enough, I think, to indicate that, were the applicant not the majority shareholder, he had substantial grounds for complaining that Mr Galea, with the support of his wife, used his directorship to act oppressively or in a manner unfairly discriminatory of the applicant.

The short answer to these matters is that Mr Hartley has already taken effective measures to gain control of the board of directors. 5 April, 1997 is the disputed occasion on which Mr Hartley asserts and Mr Galea denies that they met to transact Polyresin's business. I have already referred to the contentious approval of a transfer of a share from the applicant to Mrs Fielding. The applicant further asserts that at that meeting Mrs Fielding was

appointed a director of the company. There is in Exhibit 4 a minute of a meeting of the company held on 13 January, 1998 at which Patricia Ash was appointed a director. As she was appointed on the vote of Mr Hartley and Mrs Fielding it is to be presumed she is sympathetic to their interests. If Mrs Fielding's appointment is valid the applicant commands the votes of three of the five directors. Mrs Ash's directorship was not the subject of any evidence; the respondents did not indicate that they disputed her position. They did dispute Mrs Fielding's. Although I was not bothered with much detail about this part of the dispute I am inclined to prefer the evidence of Mr Hartley. Though obviously emotional I thought he gave his evidence honestly to the best of his recollection. I have reservations about accepting Mr Galea's evidence where it conflicts with Mr Hartley's. I thought he was, on occasions, deliberately evasive.

There is no doubt that the applicant and Mr Galea spent hours together on the 5 April, 1997 and no doubt that they discussed the company's affairs. They were particularly concerned about the validity of a unit trust (about which more will be said later) and whether Polyresins was committed to acting as a trustee. I cannot accept that in view of his expressed concerns about the company's affairs and his remoteness from them that he did not discuss with Mr Galea his desire that Mrs Fielding become a director and shareholder. If the directors did not meet and resolve as the minutes indicate then the preparation of the minute and its authentication by the applicant's signature was the formulation of a deliberate lie which Mr Hartley knew would be discovered. Although such things are not unheard of, in my view it is more likely that the directors met on 5 April, 1997 as Mr Hartley and Mrs Fielding assert.

The result is that whatever past hurts there may have been, the applicant, the controlling shareholder, is now firmly in control of the board as well as the company. He can no longer be excluded from its management and decision

making. He can command access to the company's books and records.

In these circumstances to ask the court to order that his share be bought by the respondents is not to seek relief against oppression but to seek the court's aid in facilitating the liquidation of his investment and the return of his capital. This is not a proper use of the section. See *Kizquari Pty Ltd* v. *Prestoo Pty Ltd* (1993) 10 ACSR 606 at 612; *Re H W Thomas Ltd* (1983) 1 ACLC 1256 at 1262 (at first instance); *Re G Jeffery (Men's Store) Pty Ltd* (1984) 9 ACLR 193 at 198-9.

There is a hint that Mr and Mrs Galea may refuse to attend meetings of the company of which they are duly notified. If they do not attend and persist in their claim that Mrs Fielding is not a shareholder they may seek to frustrate the applicant's control of Polyresins because a quorum for any general meeting is two persons each being present in person or by proxy. It was, I suspect, for that reason that Mr Hartley moved to make Mrs Fielding a shareholder. The Galeas may think that if the only shareholders are the two of them and Mr Hartley they can frustrate Polyresin's meeting and the conduct of its affairs. I have already found that Mrs Fielding is a member of the company and the stratagem (if there be such) will not work. In any event Mr and Mrs Galea cannot frustrate the company's desire to meet by deliberately refusing to attend. In such a case the meeting may proceed without a quorum. See Ford's *Principles of Corporations Law*, 6th edition, paragraph 1807.

The applicant does not need the court's assistance to overcome such obstruction.

The next matter relied upon concerns the unit trust mentioned earlier. The Polyresins Unit Trust appears to have been constituted on 13 April, 1995, the day on which the company was incorporated. Its seal was affixed to the deed which was then signed by Messrs Gocher and Galea. The deed allows, in the usual form, for trust assets to be

represented by units, 25 of which were each allotted to Mr Hartley, Mrs Galea and Satinover Pty Ltd. The company's records do not include any hint of a resolution that Polyresins act as trustee nor that it hold all or any of its property or undertaking on trust. For some years the company's accounts were prepared on the basis that it was a bare trustee and that all assets and income were trust property.

There seems no doubt that Mr Gocher instigated the setting up of the trust and the compilation of the accounts which were prepared by his accountants. The arrangement appears to have conferred fiscal benefits on Satinover Pty Ltd and/or Mr Gocher. They either conferred no benefit on the others or exposed them to additional income tax.

The applicant's complaints about the trust are twofold. Firstly, he complains that he was not informed that the trust had been constituted and that Polyresins became a bare trustee of all its assets and undertaking. Secondly, he complains that Polyresins becoming a trustee and giving away its property was oppressive or unfairly prejudicial to him.

It is far from clear that the company in fact held or holds its undertaking on trust. The only documentary evidence in support of this view is the preparation of the accounts indicating a trust but this loses force when it is realised that the instructions for their preparation did not come from the company but only from Gocher. Although the matter was not canvassed at any length there appear to be serious discrepancies in the treatment of the company's capital and loan accounts in the financial statements prepared by the accountants. Neither Mr Hartley or Mr Galea contends that the company is a trustee and its most recent accounts appear to have been prepared on the basis that it trades for its own benefit.

In view of the economical way in which the case was conducted I am unable to find whether Polyresins became a trustee. Even if it did I do not think that the court would

be justified in providing relief pursuant to section 260(2). The relief sought is that Mr and Mrs Galea buy the applicant's shares. This could never be an appropriate order because they were not responsible for the installation of Polyresins as trustee if such a thing happened. Mr Galea scarcely knew what he was doing when he affixed the seal to the trust deed and signed his name. It is Mr Hartley's case that Mr Galea thought he was merely witnessing Mr Gocher's signature.

If no valid trust has been constituted then, obviously, no harm has been done and the relief sought is not necessary. If the trust has been validly constituted then the shares in the company are worth no more than their face value and it is inappropriate for the court to direct a compulsory purchase. I accept the submissions that in an application under section 260 the court cannot deal with equitable interests conferred by a trust of which a company is trustee. Nor can it value the shares in the company by reference to the assets held on trust. See *Kizquari Pty Ltd v. Prestoo Pty Ltd* (1993) 10 ACSR 606; *Re Bountiful Pty Ltd* (1994) 12 ACLC 902.

I express no concluded view because the matter was not explored much in argument but it seems more than possible that for the company to constitute itself a bare trustee of all its property and prospects of income for no consideration would not be a proper exercise of the powers conferred on the directors to manage Polyresins for the benefit of the company as a whole. If the company has gratuitously parted with the whole of its business, those responsible can be made liable to compensate the company in a suit brought against the directors and/or former directors. The applicant is now in a position to cause the company to bring such an action if so advised.

The next matter relied upon was the payment to Mr Galea of a car allowance and associated expenses. I do not think that there is any substance in this complaint.

Another complaint that does have substance is that Mr Galea paid his and his wife's legal fees incurred in defending the application out of Polyresins' funds. This was a misuse of the company's monies that conferred a distinct financial advantage on those in control of its affairs. It prejudiced and discriminated against the applicant who had to pay his legal costs out of his own pocket. Such conduct has been held to be unfair detriment within the ambit of section 260, allowing the court to make appropriate orders. See *Re D G Brims & Sons Pty Ltd* (1995) 16 ACSR 559; *Re Norvabron Pty Ltd (No. 2)* (1986) 11 ACLR 279.

In this case, however, the respondents' misconduct does not justify the order sought by the applicant. Mr Galea admits he is liable to refund the amount spent by the company for his defence of the proceedings. If he does not make full recompense Mr Hartley can cause the company to bring proceedings against him for the recovery of the money wrongly paid away.

The two cases referred to were both instances of majority shareholders causing the company to pay their legal costs of defending “oppression” proceedings while leaving the minority to fund their action against the majority. The applicants were unable, without the aid of the court, to overcome the detriment caused by the majority's decision or to recoup the money for the benefit of the company.

This case does not stand on the same footing.

The last matter is that Mr Galea contrived to “split” his income, derived from salary, director's remuneration and trust distributions, with his wife and daughter so as to reduce his liability to pay income tax. The substance of the complaint is that he did so by means which implicated Polyresins and make it liable to prosecution.

I am not satisfied that there is any substance in this complaint. It is a fair inference that Mr Galea has

arranged his affairs to reduce income tax but it is not apparent that he has done so in such a way as to implicate Polyresins. My attention was not directed to any legislative provision relevant to a conclusion that his conduct exposes the company to criminal or civil liability. Not all of what Mr Galea did can be criticised. For present purposes one proceeds on the basis that there was a validly constituted trust and that Mrs Galea was entitled to a third of the distributions declared by the trustee. To this extent the income "diverted" to Mrs Galea cannot give rise to liability. Questionably, however, Mrs Galea and her daughter were paid wages far in excess of the value of any work they performed for the company and Mrs Galea was paid $13,000.00 per annum as directors fees when she scarcely attended to Polyresins' affairs. The applicant does not point to any basis on which Polyresins could be implicated in any liability that might be imposed upon Mr Galea or members of his family arising out of their financial adjustments. I do not intend to embark upon the task myself. Nor has it been shown that Mr Galea may be liable to anything more than a re-assessment of his income tax. The authority relied upon by counsel of the applicant for the proposition that conduct by an officer which exposes his company to liability for income not properly returned, *Martin v. Australian Squash Club* (1986) 14 ACLC 452, does no more than suggest that such conduct where it exposes the plaintiff to liability may be oppression for the purposes of section 260. There is no suggestion of such a result here.

I am not satisfied that this complaint would justify an order pursuant to the section. If it did the appropriate order would not be for compulsory acquisition of shares but for the respondents to reimburse the company any amount it had to pay by way of pecuniary penalty to the tax office.

In the result, the matters complained of would not justify making an order for the compulsory purchase of the applicant's shares. In this event, the respondents sought an order that Polyresins be wound up. There is an

application for winding up before the court and the respondents seek to be substituted as applicants to claim that relief. The basis for the order is the breakdown in the relationship between Messrs Hartley and Galea and their inability to co-operate in the conduct of the company's affairs. There is no doubt that the relationship at present is hostile. It is unlikely that at present they can meet civilly to discuss the company's affairs or give it coherent direction.

Nevertheless I am not disposed to order that Polyresins be wound up. Such a course will in all likelihood result in the applicant recovering nothing of his investment save what has been paid to date and will allow the respondents to set up a like business without perceptible delay and to enjoy its benefits exclusively. I suspect that this may be behind the request for a winding up.

On the evidence, scant though it was, the company has value as a going concern. It is also established that Mr Galea is proficient in his role and is important, if not essential, to Polyresin's success. Moreover the company has provided him with secure employment for almost four years. The business is stable and has perhaps expanded.

I would be hopeful that, when the dust of this conflict settles, Mr Hartley and Mr Galea both come to see that, with minimal good will and co-operation between them, Mr Galea can continue to run the business while keeping Mr Hartley informed of progress via periodic management accounts and regular directors' meetings. There is no need for Mr Hartley to be involved in day to day activity but if each understands and respects the other's role I see no reason why the company cannot continue. It is in both their interests to allow it to do so.

My inclination is to make no order as to costs, notwithstanding that the applicant has been unsuccessful. The respondents have also failed in their bid to have the company wound up. More importantly, I think it was Mr

Galea's ill-considered treatment of Mr Hartley's position as director and majority shareholder which was, in large part, responsible for the dispute resulting in litigation.

I will not make an order as to costs until I have heard submissions from the parties.