

# GREENS LIST

BARRISTERS

## Oppressive Conduct of the Affairs of a Company - Applications Under Section 233 Corporations Act

PETER CAILLARD  
Barrister

# About the presenter

- ▶ Mr Caillard is a barrister practicing exclusively in commercial law. He commenced practice at Allens Arthur Robinson (now Alens Linklaters); Group General Counsel and Head of Strategy of top 30 ASX listed company; Chief Executive of Tabcorp's Media Division (including Sky Racing).
- ▶ Honours and Masters Degrees in Law; Post Graduate qualifications from Harvard Business School and Nanjing University.
- ▶ Member of Council of Law Institute for approximately five years (including ethics committee) and a regular lecturer in ethics at Leo Cussen Institute.
- ▶ He is a Fellow of Leadership Victoria and the Governance Institute of Victoria.

# Section 232

The Court may make an order under section 233 if:

- a. the conduct of a company's affairs; or
- b. an actual or proposed act or omission by or on behalf of a company; or
- c. a resolution, or a proposed resolution, of members or a class of members of a company;
- d. is either:
- e. contrary to the interests of the members as a whole; or
- f. oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

# Observations...

- ▶ Test of oppression is an objective one of unfairness (*Wayde v NSW Rugby League Ltd*). On the balance of probabilities, would the objective commercial bystander be satisfied that the affairs were conducted unfairly (*Campbell v Backoffice Investments Pty Ltd*).
- ▶ Unlawfulness or breach of fiduciary duty is not a necessary precondition to a court's interventions, though it may more readily justify intervention.
- ▶ Can apply to a single act or omission but not if it is relatively minor (*Donaldson v Natural Springs Australia Ltd* [2015] FCA 498 at [249]).

# More observations...

- ▶ A shareholder of 50 per cent can seek relief for oppressive conduct as they do not have control in the form of power to prevent oppression (*Patterson v Humfrey*)
- ▶ Relief may be granted even if the conduct has ceased at the time of trial. However, this is relevant to determining whether and to what extent orders should be made. *Peter Exton & Extons Pty Ltd* [2017] VSC 14

# Section 233

The Court has a broad discretion. Remedies include:

- ▶ That the company be wound up;
- ▶ An order regulating the conduct of the company's affairs in the future;
- ▶ Buy out;
- ▶ Appointment of a receiver; or
- ▶ An order restraining a person from engaging in specified conduct or from doing a specified act

# Observations on remedies

- ▶ Nature of the remedy will depend on the conclusions drawn as to the type of oppression and the Court (*Re Enterprise Gold Mines NL*)
- ▶ The aim of any order is to end the oppression (*Nassar v. Innovative Precasters Group Pty Ltd*)
- ▶ Winding up is a “last resort” (*Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd*)

# Examples

- ▶ Exclusion from management.
- ▶ Preventing minority shareholders from participating in management.
- ▶ Failure to share information.
- ▶ Misconduct such as misappropriating a business opportunity or company funds.
- ▶ Failure to pay dividends in certain circumstances.



# Supreme Court Practice Note SC CC 8 overview

- ▶ Commenced as a pilot program.
- ▶ Fast.
- ▶ Cost effective.
- ▶ According to Sifris J at recent Bar presentation, of the 99 oppression cases filed since 2017, approximately 63% have settled. More?
- ▶ Forces parties to communicate at an early stage.

# Oppression Proceeding Program

- ▶ Originating process supported by an affidavit
- ▶ Affidavit to be:
  - ▶ No more than three pages (leniency if particularly complicated structure)
  - ▶ Clear and succinct summary of facts alleged to constitute oppression
  - ▶ Estimate of the value of the shares (where practicable)
  - ▶ Exhibits current ASIC search of the company - no other exhibits.

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL COURT  
CORPORATIONS LIST

IN THE MATTER OF CAILLARD PTY LTD

No.

BETWEEN:

PIPPA CATHERINE (and others according to the Schedule)

Plaintiffs

and

CHARLES HENRY (and others according to the Schedule)

Defendants

ORIGINATING MOTION

Date of document:	10 August 2018
Filed on behalf of: The Plaintiff	Solicitor's Code: 666
Prepared by	Tel: (03) 9123 4567
Henry's Pty Ltd	Fax: (03) 9123 9876
Solicitors	DX 1234
205 William Street	Email: pcaillard@greenslist.com.
MELBOURNE VIC 3000	Ref: PHC 1608

A. DETAILS OF APPLICATION

This application is made under sections 232, 233, 247A and 461 of the *Corporations Act 2001* (Cth) (the Act) and section 37(1) of the *Supreme Court Act 1986*, and/or the inherent jurisdiction of the court.

Application for relief in respect of oppressive conduct of affairs.

On the facts stated in the supporting affidavit, the Plaintiff claims:

1. An order pursuant to section 247A of the Act:
  - (a) that the Plaintiffs and/or their nominated legal and accounting advisers be authorised to inspect the books of account and financial records of the First Defendant on behalf of the Plaintiffs;
  - (b) such further orders pursuant to section 247B of the Act as the Court shall consider appropriate.

2. An order pursuant to section 233 of the Act:
  - (a) that the Plaintiffs' shares in the First Defendant be purchased by the Second Defendant; and/or
  - (b) such further or other orders pursuant to section 233 of the Act as the Court deems appropriate.
3. Further and in the alternative, that a receiver and/or receiver and manager be appointed to the First Defendant.
4. Costs.
5. Such further or other relief or order as the Court deems appropriate.

Date: August 2018

Henry Pty Ltd  
Solicitors for the Plaintiffs

This application will be heard by the Honourable Associate Justice \_\_\_\_\_ in the Supreme Court at \_\_\_\_\_ on \_\_\_\_\_ 2018 at \_\_\_\_\_ am or so soon afterwards as the business of the Court allows.

B. NOTICE TO DEFENDANTS

TO: ABC Corporation Pty Ltd  
207 William Street  
Melbourne Vic 3000

AND TO: John Smith  
209 William Street  
Melbourne Vic 3000

If you or your legal practitioner do not appear before the Court at the time shown above, the application may be dealt with, and an order made, in your absence. As soon after that time as the business of the Court will allow, any of the following may happen:

- (a) The application may be heard and final relief given;
- (b) Directions may be given for the future conduct of the proceedings;
- (c) Any interlocutory application be heard.

Before appearing before the Court, you must file a notice of appearance, in the prescribed form, in the office of the Prothonotary and serve a copy of it on the Plaintiff.

Note: Except with the leave of the Court, a defendant that is a corporation cannot appear at a hearing otherwise than by a legal practitioner.

C. APPLICATION FOR WINDING UP ON GROUND OF INSOLVENCY

Not applicable.

D. FILING

Date of filing: August 2018

Prothonotary

This originating process is filed by Henry's Pty Ltd, Solicitors for the Plaintiffs.

E. SERVICE

The Plaintiff's address for service is c/- Henry's Pty Ltd, 205 William Street, Melbourne 3000.

It is intended to serve a copy of this originating process on each Defendant.

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COMMERCIAL COURT  
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IN THE MATTER OF CAILLARD PTY LTD

No.

BETWEEN:

PIPPA CATHERINE (and others according to the Schedule)

Plaintiffs

and

CHARLES HENRY (and others according to the Schedule)

Defendants

AFFIDAVIT OF PIPPA CATHERINE

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Date of document:	10 August 2018
Filed on behalf of: The Plaintiff	Solicitor's Code: 3145
Prepared by	Tel: (03) 9123 456700
Henry's Pty Ltd	Fax: (03) 9123 987604
Solicitors	DX 12345D
205 William Street	Email: pcaillard@greenslist.com.au
MELBOURNE VIC 3000	Ref: PHC 160848

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I, Pippa Catherine of [ ] in the state of Victoria, make oath and say as follows:

1. That I make this affidavit from my own knowledge unless otherwise stated. I make this affidavit in support of the orders sought in the originating process filed in this proceeding.

**Background**

2. [Company structure – e.g. On or about 30 December 1967, Caillard Pty Ltd (“the Company”) was incorporated to [describe business]. The Plaintiffs acquired shares in the Company on or about [ ]. Since that date, the Company has had [ ] ordinary shares on issue, owned as follows:
  - (a) [DESCRIBE STRUCTURE – CHART?]
  - (b)
3. The Company’s two directors are [ ] (“Charles Henry”) and me.
4. Now produced and shown to me and marked with the letters “PCC-1” is a Company search for the Company.

5. [What the company does etc.]

**Oppressive conduct**

6. [Succinct summary of facts e.g.]
  - (a) Charles was ignoring my business communications and was working without any consultation with me. I was excluded from management.
  - (b) There have been financial discrepancies that I could not explain, including work done by Company employees that had not been invoiced to the Company. When I attempted to raise these matters with Charles, he became very angry and would not discuss the financial records with me.
  - (c) I have been denied access to the Company’s books and records and financial information.
  - (d) Redirection of Company’s business etc.

**Valuation**

7. [Insert valuation of shares. Note strategic considerations]

**Conclusion**

8. The events described above show the parties have lost trust and confidence in one another. The relationship has deteriorated to the extent that it is now irreparable.

SWORN at in the State of Victoria this 10th day )  
of August 2018. )

Before me: .....

# Initial Conference

- ▶ Corporations List Judge to determine whether it is suitable for management under the Program or to be managed/determined by a Judge (e.g. more likely if publicly listed or involves complex trust structures)
- ▶ Matter is returnable before an Associate Judge. Likely orders;
  - ▶ Defendant to file a responding affidavit
  - ▶ Valuation of the company
  - ▶ Order for access to documents and inspection of the books
  - ▶ Mediation

# Matters to consider early...

- ▶ Choice of Counsel is important - matters with “commercial” advisers (almost) always resolve.
- ▶ What are the client’s objectives.
- ▶ A finding of oppression does not mean that a court will necessarily grant relief (e.g. laches, estoppel or acquiescence)
- ▶ Clearly advise them that there is no certainty and the final outcome may not be what they want. Document that advice.
- ▶ Despite what you are told, it IS personal. Take out the emotion. It can be embarrassing to stand before the Court if the solicitors have joined the fray.

# Valuation of Shares

- ▶ Experienced.
- ▶ The Act does not identify the basis upon which the price is to be fixed for a compulsory purchase. Frustration and uncertainty.
- ▶ The task is to fix a price that represents a fair value in all the circumstances. As stated in *Smith Martis Cork & Rajan Pty Ltd v Benjamin Corp Pty Ltd (2004) 207 ALR 136*:  
*“It is not just a question of value; it is a matter of fixing a price that should be paid.”*
- ▶ What would the value of the shares have been but for the oppressive conduct (*Rankine v Rankine (1995) 124 FLR 340*).

# Valuation of Shares (cont)...

- ▶ There is no definitive rule regarding the appropriate date for determining the value of shares (*Harding Investments Pty Ltd v PMP Shareholding Pty Ltd (No 3)* [2011] FCA 1370 at [12])
- ▶ Minority discount? Net tangible assets valuation?



# Questions?

Any questions before “winding-up”?