# OPPRESSION OF SHAREHOLDERS — THE AUSTRALIAN REMEDY

By R. BAXT*

*This article is an interesting and new analysis of section* 186 *of the Uniform Companies Act in the light of two recent Victorian decisions: both the* Bright Pine Mills *case and the* Ma Dalley *case are lucidly considered and criticized. In conclusion, the author points out that, as a result of a more liberal interpretation, minority shareholders should find it simpler to obtain a remedy against oppressive conduct.*

Section 186 of the Companies Act 1961[1] which has been modelled in some respects on the English provision[2] has been the subject of two interesting, and it will be shown, important, Victorian cases, one of which has just been reported,[3] the other remaining unreported[4] but having been upheld, on the issue of oppression, in the High Court of Australia.[5] The significance of the decisions is partly because they illustrate the ambit of the remedy available under the section and because they contain important statements on the way in which the Australian provision is distinguishable from the Companies Act (U.K.), section 210.

Apart from these two decisions there have been two other reported Australian decisions. The first—*Re Associated Tool Industries Limited*[6] is significant for the fact that an order under section 186 was made where minority shareholders were shown to have oppressed majority shareholders, and for the fact that Joske J. misconstrued, it is respectfully suggested, the operation of section 186. *Re Broadcasting Station 2GB Pty Ltd*[7] is in many ways an unsatisfactory decision for the facts as revealed show how inadequate the remedy under section 186 can prove to be.[8] Some of the later English decisions reveal the same 'deficiency' in the equivalent section.

It will not be my intention in this article to deal at any length with the earlier cases decided in Australia, or those decided in England[9] except

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1 The section is uniform, for the purposes of this article, in all respects through the states. There are some verbal differences from State to State.

2 S. 210 of the Companies Act 1948 (U.K.) as amended in some respects by the 1967 Act.

3 *Re Bright Pine Mills Pty Ltd* [1969] V.R. 1002.

4 *Re M. Dalley & Co. Ltd* (1968). Decision of Lush J. in the Supreme Court of Victoria. (Unreported.)

5 *M. Dalley & Co. Pty Ltd v. Simms* (1969) 43 A.L.J.R. 19.

6 (1964) 5 F.L.R. 54.

7 [1964-65] N.S.W.R. 1648.

8 See Gower, *The Principles of Modern Company Law* (3rd ed. 1969) 602-3.

9 *Ibid.* 598 ff. for a full list of decisions, the more important ones being *Scottish Co-operative Wholesale Society Ltd v. Meyer* [1959] A.C. 324; *Re H. R. Harmer Ltd* [1959] 1 W.L.R. 62; *Elder v. Elder & Watson* [1952] S.C. 49; *Re Five Minute Car Wash Service Ltd* [1966] 1 W.L.R. 745; and *Re Lundie Bros Ltd* [1965] 1 W.L.R. 1051. In particular the *Car Wash* case and *Re Lundie Bros Ltd* are disappointing decisions in view of the earlier successes. See Gower, *op. cit.* 602-3.

insofar as some reference to them is necessary to explain a point being made. It is appropriate at the start of this article to set out the terms of the Australian provision (only the relevant sub-section). In the accompanying footnote[10] the corresponding English provision is set out. The main differences between the sections is in sub-section (2).

> 186. (1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to one or more of the members including himself may, or, following on a report by an inspector under this Act, the Minister may apply to the Court for an order under this section.
>
> (2) If the Court is of opinion that the company's affairs are being so conducted the Court may, with a view to bringing to an end the matters complained of—
>
> (a) except where paragraph (b) of this sub-section applies — make an order that the company be wound up; or
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> (b) where the Court is of opinion that to wind up the company would unfairly prejudice the member or the members referred to in sub-section (1) of this section, but otherwise the facts would justify the making of a winding up order on the grounds that it is just and equitable that the company be wound up, or that, for any reason it is just and equitable to make an order (other than a winding up order) under this section — make such order as it thinks fit whether for regulating the conduct of the company's affairs in future or for the purchase of the shares of any members by other members or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

Many detailed treatments of the elements of the section (or its equivalent) have been published,[11] and it will therefore be unnecessary to travel over this familiar ground. It will be apparent from the fact situations in

[10] The Companies Act 1948 (U.K.), s. 210:

> (1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or, in a case falling within . . . [s. 35(2) of the Act of 1967] The Board of Trade may make an application to the court by petition for an order under this section.
>
> (2) If on any such petition the court is of opinion—
>
> (a) that the company's affairs are being conducted as aforesaid; and
>
> (b) that to wind up the company would unfairly prejudice part of the members, but otherwise the facts would justify the making of a winding up order on the ground that it was 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, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

[11] See McPherson, 'Oppression of Minority Shareholders' (1963) 36 *Australian Law Journal* 427; Heerey, 'The Shareholder's Petition in Cases of Oppression' (1962) 36 *Australian Law Journal* 187; Wedderburn, 'Oppression of Minority Shareholders' (1966) 29 *Modern Law Review* 653; Afterman, 'Statutory Protection for Oppressed Minority Shareholders' (1966) 55 *Virginia Law Review* 1043; Afterman, *Company Directors and Controllers* (1970), ch. IV *passim;* and various notes in the *Modern Law Review* noted in Gower, *op. cit.* 598 ff.

the two cases, the subject of this article, that all of the elements of the section, other than that relating to the oppressive conduct, are clearly present. The question of oppression, together with the issue of the remedy, are the central matters for consideration.

## *THE BRIGHT PINE MILLS* CASE[12]—THE OPPRESSIVE CONDUCT

Bright Pine Mills Pty Ltd (referred to as the company) was managed by the appellant in the case, Swallow, and the petitioner respondent, Denton, became secretary of it in 1942 some five years after its incorporation. Shortly after this appointment he purchased 250 shares in the company; later he acquired a further 1,000 shares. He became a director of the company in 1945 and held that position until he was voted off the board in 1961.

At all material times there were only two other shareholders in the company, Swallow and one Macrae, who sold his shares in 1962 to one Bolitho. The company conducted a sawmilling business and in 1953 a firm under the name of Monterey Pine Company was registered with the three shareholders in the company as partners in it. It was established for the purpose of distributing the company's products. Swallow Pty Ltd, a company formed by Swallow, also distributed the company's products. During the next ten years Swallow's share in Monterey was transferred to his daughter to be transferred to Swallow Holdings Pty Ltd. Macrae's interest was eventually transferred to Bolitho. These facts are given in the light of the contention that Monterey was at all times in effect a subsidiary of the company. The Full Court of Victoria expressed some doubt about the difficulty in maintaining this allegation.

Some of the by-products of the company's business were sawdust, edgings and shavings. These were useful as fuel. Prior to 1959 any excess of these by-products was disposed of by the company. The petitioner alleged that he suggested that the company might set up an operation for the conversion of this waste into wood flour. Independently, Swallow decided that the company would not have the technical ability to handle such an operation and a partnership was established to handle this new line. The petitioner was not included despite his protests. It was alleged by Swallow that his legal adviser had indicated that Swallow was under no legal obligation to take Denton in. In 1959 Pine Processing Company, (Pine), a partnership between Swallow's daughter and Bolitho's wife, was formed to conduct the business of manufacturing wood flour. Mrs Swallow soon retired, being replaced by her father.

The activities of Pine were carried out on land owned by the company which constructed a building which it leased to Pine. Pine purchased the waste product and it was processed by plant which had been installed

[12] [1969] V.R. 1002. The case was decided in 1963. The reported decision is that of the Full Court comprising O'Bryan, Smith and Pape JJ. The judgment is a single one affirming the decision of Herring C.J.

in the premises by employees of the company. There was a constant interchange of employees between the company and the firm with charges being entered into appropriate books of account. The question of the 'charges' was not discussed by the court although it was alleged that the company was not receiving enough.

In 1960 Bolitho and Swallow negotiated with the Forest Commission of Victoria the opportunity of obtaining logs from it for conversion into veneer. All negotiations were conducted on the basis that the company should apply for the licence and a written application was made on behalf of it. Later the Commission was advised that a subsidiary 'company', Pine, was to establish and run the veneer conversion plant. The licence was granted to the company but later it was agreed to allow the company to transfer the logs to Pine where the conversion would take place. Premises were established by the company for this purpose and leased to Pine for an annual rental of £52, and a substantial amount of timber was sold to Pine for conversion.

In summary, the company had a valuable licence which it resolved to use for the purposes of the firm. The petitioner complained that the veneer panelling business and the wood flour business could and should have been undertaken by the company 'and that this was not done so that he as a shareholder in the company should be prevented from participating in the profits derived therefrom'.[13]

## THE FINDINGS OF OPPRESSIVE CONDUCT

In reply to these allegations the directors argued that the businesses had been properly set up separately. The Chief Justice of Victoria who heard the petition denied this defence.

> One has to look also, I think, at the business realities and I think it is clear from the evidence that the business carried on by the partnership was really inextricably comingled with that of the company. All the activities of the firm were activities of a kind, to perform which the company was formed. The firm depended upon the company carrying on its activities to provide the raw material that it was to convert into wood flour . . . Swallow, by his control of the company, was able to make the exploitation of [the valuable] licence over to the firm for his own personal advantage.[14]

His Honour found that in the circumstances Swallow was benefiting himself and hurting the petitioner (and the company). He held that his conduct was oppressive which he equated with the words burdensome, harsh and wrongful.[15] He felt that conduct whereby 'an asset of the company [was being] used for [the director's] profit and not for the profit of the company' was oppressive.[16]

[13] [1969] V.R. 1002, 1008.
[14] *Ibid.* 1008-9.
[15] The 'dictionary' meaning of the phrase. His Honour could not find, nor could counsel, the source of this definition. *Ibid.* 1009.
[16] *Ibid.*

It was from this finding and the subsequent order for the purchase of Denton's shares at a value which required an assessment of the profits of Pine, that the appeal to the Full Court came. In support of their claim, the appellants relied on allegations that the petitioner had not devoted his full time to the company but these allegations came to nought.

More interesting challenges were made with respect to the meaning of the term 'oppression' and the ambit of the remedy under section 186. It is amusing to note that the famous dictionary meaning of the word 'oppressive' (burdensome, harsh and wrongful) could not be traced.[17] However, the court accepted that the 'definitions' given in the three decided United Kingdom cases (*Scottish Co-operative* v. *Meyer, Elder's* case and *Re Harmer*[18]) were all acceptable—for example: 'unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted . . . a visible departure from the standards of fair dealing . . .'[19] The court held that the directors' conduct was furthermore burdensome, harsh and wrongful in the instant case.

Counsel for the appellant contended that what was really complained of was the 'inaction of the directors in not arranging that the company undertake the manufacture of wood flour and veneers' and that this inactivity could not be said to amount to oppression. A similar bout of inactivity on the part of controllers in *Meyer's* case[20] was held to amount to oppressive conduct and the Full Court would not place an 'unwarrantedly restrictive meaning' on the section. Negative conduct could amount to oppressive conduct: 'to hold otherwise would be to shut one's eyes to the realities of the situation'.[21] Here the directors, however, did more than do nothing. They converted an advantage that was available to the company to the use of a firm in which they were financially interested.

Apart from affirming that the court should give the section 'a liberal interpretation'[22] the Full Court also denied the contention put by counsel for the appellants that section 186 was 'designed to do no more than give a new remedy in respect of conduct which previous to its enactment was remediable in some other way and that the word "oppressive" connotes in its context conduct which was hitherto treated by the law as wrongful in the sense that it is conduct for which a remedy was already provided to a member or members. . . .'[23]

[17] See n. 15 *supra.*

[18] See n. 9 *supra.*

[19] [1969] V.R. 1002, 1012 quoting from Lord Cooper in *Elder's* case [1959] S.C. 49, 55.

[20] [1959] A.C. 324.

[21] [1969] V.R. 1002, 1013.

[22] *Ibid.* 1012.

[23] *Ibid.* 1011-2.

One final shot, and an ingenious one, was tried by counsel. Article 44(f) of the company's articles of association[24] permitted directors to be financially interested in contracts made with the company provided they declared their interest to the board. It was contended that this enabled the directors to form Pine and carry business through it. However, as the Full Court so succinctly put it, such a clause did not derogate in any way from the principle 'that a director . . . is obliged at all times to act in the company's affairs in what he conceives to be the best interests of the company and its shareholders . . .'[25] Here the real purpose of their action was to divert from the company a profitable enterprise which it could conduct, their action being prompted by the desire to prevent the minority shareholder from participating in that profitable enterprise.

## THE AMBIT OF THE AUSTRALIAN PROVISION

Prior to the reported decision in *Re Bright Pine Mills Pty Ltd*[25A] (but actually since it in point of time, as the two other reported cases were decided in 1963-1964) there was expressed some doubt as to how far our section 186 differed from the Companies Act 1948 (U.K.), section 210. Joske J. in the *Associated Tool* case[26] clearly misconstrued the requirements of section 186. The conduct complained of in that case was, unusually, alleged oppression by a minority shareholder of the majority. On the evidence his Honour was satisfied that the conduct amounted to oppressive conduct on the part of the minority; it was further clearly shown by the evidence that the petitioners would be unfairly prejudiced by a winding up order; but despite this, his Honour held that it was necessary under section 186 to show that the facts would justify the making of a winding up order on the just and equitable ground.[27] Having reached this conclusion on the question of principle, his Honour did go on to find that this remedy would have been unsatisfactory to the petitioners and therefore ordered the purchase of the petitioner's shares. His Honour relied, in reaching his conclusion, on *Re Wondoflex Textiles Pty Ltd.*[28] However, it is clear that this case is relevant only in respect of petitions to wind up a company and that section 186 does not require the preliminary finding as in the Companies Act 1948 (U.K.), section 210.

Jacobs J. in the *2GB* case[29] did not criticise this ruling, and whilst he stated what I believe to be an accurate summation of the interpretation of the section, his statement does not carry conviction. In the *2GB* case the oppressive conduct complained of was the failure of the majority

[24] For a corresponding provision, see Companies Act 1961, Fourth Schedule, Table A, art. 72(h) and note as to voting, art. 81.
[25] [1969] V.R. 1002, 1013.
[25A] [1969] V.R. 1002.
[26] (1963) 5 F.L.R. 55.
[27] *Ibid.* 69.
[28] [1951] V.R. 458.
[29] [1964] N.S.W.R. 1648.

of the board of directors to negotiate, to the satisfaction of the minority directors, certain matters with the Commonwealth Postmaster-General. In addition, the minority had not been consulted in certain board decisions. Jacobs J. was not satisfied that this conduct amounted to what he understood was oppressive conduct. He referred to all the catch phrases used in earlier decisions[30]—'[w]as the conduct complained of a result of a "visible departure from the standard of fair dealing", "a lack of probity", "burdensome, harsh and wrongful" . . .' and so on. His Honour went on to consider the onus imposed on the petitioner under section 186.[31]

> Prior to the introduction of s. 186, if the complaint really related to a course of conduct, or if for some other reason the matter could not be remedied by a suit for injunction, the only course open to the aggrieved shareholder was a petition to wind up the company on the ground that it was just and equitable that it should be wound up. Since the introduction of s. 186, an alternative to the winding up of the company is provided. There is, however, the same necessity of proving oppression, and the same necessity of proving that the granting of relief would be just and equitable, although under the New South Wales provision, it is not necessary to prove that relief by way of winding up would be just and equitable.

In the *Bright Pine Mills* case, any doubt as to the requirement to show that the facts complained of would have justified a winding up order on the just and equitable ground was removed.[32]

> In the first place, we think that it is clear that an order may be made under the second part of sub-section (2) when for any reason it is just and equitable to make an order whether the facts would or would not justify the making of a winding up order on the ground that it is just and equitable that the company be wound up.
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> The section is not in the same form as its counterpart in English legislation —see Companies Act 1948, s. 210—or as its predecessor in Victorian legislation, viz. Companies Act 1958, s. 94. Section 94 was plainly not limited [nor is section 186] to conduct which was of such an oppressive character as would make it just and equitable that a winding up order should be made. The format of s. 94(2)(b) shows that its operation did not require proof of facts which would justify the making of a winding up order. It required simply that for some other reason it was just and equitable to make an order under the section. The various kinds of orders that may be made under the section also indicate that the section is not limited to oppressive conduct which would justify the making of a winding up order.

## THE REMEDY IN THE *BRIGHT PINE* CASE

The order made by the Chief Justice was for the purchase of the petitioner's shares in the company. The question of valuation, however, caused the Full Court some concern.

[30] *Ibid.* 1662 referring to *Elder's* case and *Scottish Co-op. v. Meyer.*
[31] *Ibid.*
[32] [1969] V.R. 1002, 1011.

> It may be that the Master should, in ascertaining the value of the petitioner's shares in the company, treat (with some allowance as to capital) the Pine Processing Co. as though it were a wholly owned subsidiary of [the company] and it may be contended or it may be agreed that in some way Monterey's assets or profits should be taken into account or be had regard to in ascertaining the value of the . . . shares.[33]

No further information is available in the report as to whether this was the form of the order as made; but it is likely that only if it could be shown that Monterey was conducted as though it were *not* a subsidiary of the company would its profits have been relevant. The petitioner was a partner in that firm and presumably would have had to show evidence that the majority partners were purposely restricting that firm's activities in favour of Swallow Pty Ltd.

The interesting feature of the order as contemplated is the direction that Pine should be treated as a subsidiary of the company. This implies that the petitioner would have been entitled as of right (subject to the articles of association) to a share of the profits distributed by it to the company. The fact that so much of the company's resources and capital were in some way tied in with Pine make this conclusion quite acceptable; added to this was, of course, the holding out by the directors that Pine was a subsidiary to the Forestry Commission of Victoria.

As an alternative to this finding, the court would have been justified in making a winding up order against the company. It is my view that not only was the conduct complained of commensurate to conduct caught under the 'just and equitable ground',[34] but that section 222(1)(f) of the Act could have been relied on by the petitioner. It is clear that the directors were, in the terms of that ground for winding up, acting in 'the affairs of the company in their own interests rather than in the interests of the members as a whole. . . .' This ground has only been used successfully twice.[35] The alternative sub-ground in section 222(1)(f) appears to be akin to the 'just and equitable' grounds—*i.e.* their (*i.e.* the directors') conduct amounts to conduct 'which appears to be unfair or unjust to other members'.

An order to wind up the company would have been unwarranted.[36] The interests of creditors no doubt must be considered, as well as employees and the other shareholders. No order could have been made whereby Denton would have become a partner of Pine. In any event, such an order would have only perpetuated the conflict between the combatants.

[33] *Ibid.* 1013-4.
[34] Companies Act 1961, s. 221(1)(h).
[35] See *Re National Discounts Ltd* (1952) 52 S.R. (N.S.W.) 244. The remedy here is an addition to the just and equitable ground. *Cf. Re William Brooks and Co. Ltd* (1962) 79 W.N. (N.S.W.) 354.
[36] Note the wide discretion in the court.

## THE *MA DALLEY* CASE[37]—THE OPPRESSIVE CONDUCT

The petition claiming relief under section 186 was presented by Muriel Josephine Sims. Mrs Sims was the executrix of the will of her sister, Dorothy d'Arcy. Both were at one time employees of the company and it was alleged by the petition that both were members of the company by virtue of certain shares issued to them. The question of whether these shares were employee or ordinary shares was a vital issue in the dispute. Whilst the finding as to the class of shares that they held is important and indeed vital to the question of whether oppression could be proved, it is unnecessary to detail the rather complicated and technical arguments as to whether the shares were employee or ordinary shares.[38]

Under the articles of association, it was possible for the company to issue employee shares which, at the termination of the employment of the holder, became transferable at the direction of the directors for a consideration nominated by the directors. In 1940 both Mrs Sims and Mrs d'Arcy became owners of 500 shares in the company which it was alleged by the company were employee shares. In 1962 bonus shares were issued to all shareholders of the company including the petitioner and her sister. Again it was contended that these were employee shares.[38] Mrs Sims contended that both issues were of ordinary shares. The importance of this question was that if the company was correct, the directors were empowered to 'call up' the shares at a price nominated by them at the termination of the employment. The company had terminated Mrs Sims' employment; Mrs d'Arcy had, of course, died.

Lush J. held that the first issue was of employee shares; the bonus issue comprised ordinary shares. The High Court reversed him on both conclusions but did not in any other significant way depart from his findings.[39]

A preliminary point raised by counsel for the company was that, as the shares were employee shares, and as the directors had validly directed the transfer of them under the terms of the articles of association, the petitioner was no longer a member. Lush J. rejected this point for he treated the objection as equivalent to a demurrer requiring him to consider the very issue of whether the shares were employee shares or not.

Having concluded that the bonus shares issued in 1962 were ordinary shares, the attempt by the directors to 'acquire' failed. In addition, he held that their refusal to provide information to Mrs Sims, to enable an

[37] The company was known as M. Dalley Co Pty Ltd. The summary and quotations are taken from an unreported decision of Lush J.

[38] Or a third class of shares which carried with them similar limited rights equivalent to those attached to employee shares.

[39] (1962) 43 A.L.J.R. 19, 24. The final order was of course dependent on these findings.

assessment to be made of the value of the ordinary shares for probate purposes, amounted in the circumstances, to oppressive conduct by the directors.

When Mrs d'Arcy died, the solicitors for Mrs Sims wrote to the solicitors for Mrs Dalley to ascertain the value of the shares held by Mrs d'Arcy. No reply was received for three months at which time they were told that, as all the shares were employee shares, their value was £1 each. The letter further offered to purchase the shares. In a letter two months later, it was again asserted that the shares were employee shares. No reasons were given for this conclusion. Further requests were made for a statement of the value of the shares and in November 1965 the same assertion was made by the respondent's solicitors. In May 1966, action was threatened. In July the solicitors sought permission to inspect the register of members. No register was produced nor any reason given for this inaction. Further requests were made and finally on 28 September 1966 the respondent's solicitors wrote: '[u]pon thorough investigation of the facts, it is our confirmed opinion that the shares in question are employee shares within the meaning of the articles of association'.

No facts or reasons supporting this conclusion were given. Nothing further occurred for nine months when Mrs Sims received a transfer form in respect of the shares. The solicitors for Mrs Sims wrote to the respondent's solicitors protesting at the value placed on the shares[40] and protesting at the failure of the addressees to provide information. It was alleged that it was either 'deliberate' or that the efforts 'have been rendered fruitless by reason of the absence of records involving serious breaches of the provisions of the Companies Act by officers of your client'.

No reply was received for over a month, when the solicitors for the company advised that the directors were satisfied that the shares were employee shares. The share register was now, however, said to be available for inspection.

On 30 August 1967 the petitioner's (and her sister's) name was removed from the register. On the same day they presented their petition.[41] Next day a cheque for the shares, valued at $1, together with a dividend was received by Mrs Sims' solicitors. The cheque was returned and a request made for a separate cheque in respect of the dividend. The solicitors for the company then renewed the offer to inspect the register explaining that, at the time of the first request for the register, no register existed.

[40] $1 per share. No explanation was given for the drop from £1 ($2) to $1; the shares were £1 shares; the value shown in the probate papers was $8.

[41] Some argument was raised as to the point of time the shares were acquired by the directors. This matter did not unduly trouble Lush J.

## THE FINDINGS IN THE VICTORIAN SUPREME COURT

Lush J. held that the directors acted oppressively in expropriating the 1962 shares at an under value. They had wrongly acted on the assumption that these were employee shares. It was alleged that as the directors had acted on the advice of solicitors and accountants, they were not guilty of oppressive conduct. Lush J. rejected this defence. He further held that the 'affairs of the company' included the internal relationship of the shareholders and directors of a company in its administration and government.

His Honour referred to a number of cases in which the worst oppression was 'defined'.[42] He suggested that an additional definition should be the one from the Oxford Dictionary: 'govern tyrannically, subject to continual injustice.'[43] In this particular case, the petitioner was a minority shareholder at the 'mercy' of the directors. The directors had continually refused to give her or her solicitors any reasons for concluding that the relevant shares were employee shares. In addition, the question of the existence of the share register was a matter which pointed at least to an attempt by the directors to frustrate the enquiries of the petitioner.

Whilst it was true that there was a dispute between the parties as to the nature of the petitioner's shares (and those of her sister), it was clear that the respondents were fixed in their determination to classify the disputed shares as employee shares and to remove the petitioner from the company at relatively small cost to the company (and therefore at an advantageous cost to them).

With respect to the argument that they relied on legal advice in maintaining their stand, Lush J. noted that a person may continue to act unjustly towards another, by insisting

> however honestly, on a proposition that is wrong or by using his strength to maintain, however honestly, a position unjustified by law . . . Section 186 is, upon the authorities, a wide remedial section not to be narrowed . . . by an interpretation of the first judicial observations made upon it. . . . It speaks of oppression in terms of its impact on the oppressed, not in terms of the intention of the oppressor . . .

The remedy was that all the transfers effected by the directors should be set aside; the 1940 shares should be transferred in accordance with the company's articles of association (as employee shares); the 1962 issue was to be valued by the Master.

## *MA DALLEY* IN THE HIGH COURT[44]

It was not surprising that the respondents appealed. Despite the fact that the question of oppression was argued extensively and for a lengthy period of time in the High Court, Their Honours dismissed the appeal on the question of oppression with hardly a reference to it.

[42] In particular the *Car Wash* case (loss of confidence in a director was insufficient), *Elder's* case, *Harmer's* case and *Scottish Co-op. v. Meyer.*
[43] The fourth group of meanings.
[44] (1969) 43 A.L.J.R. 19.

Barwick C.J. did not allude to the question; Kitto J. did not either. Menzies J. failed to mention the point. In fact, this was central to the whole case. At no stage did the appellants assume that if any of the shares were employee shares the question of oppression was no longer necessary to be discussed. Barwick C.J. did not mention whether the appellants had even raised this as an issue.[45] The whole argument in the High Court was whether the 1940 shares were employee shares and whether the bonus issue was either bonus shares or an ineffective issue. Barwick C.J. (and the court agreed with him) held that the 1940 issue was employee shares (thus reversing Lush J.); he further ruled that the bonus shares could not be regarded as employee shares.[46]

As shall be emphasised again later in this article, the failure of the High Court to consider the issue of oppression has robbed the Australian company lawyer of what should have been a detailed consideration of this important section of the Act by our highest court.

## THE REMEDY IN *MA DALLEY*

Lush J. having found that the directors had acted oppressively towards both Mrs Sims and her sister, ruled that the employee shares should be transferred to the directors pursuant to the articles of association and that as far as the ordinary shares were concerned (*viz* the 1962 issue), they were to be purchased 'at a price to be fixed by reference to the master's answers to the questions being the higher of the two accounts stated by the master' in his answers. The questions relevant to the exercise were:

(i) what amount would the petitioner have received in respect of the 1962 shares in a winding up to date from the date of the section 186 order, and

(ii) what was the fair value of the said shares?

The High Court in dealing with the question did not in any way upset the basis of the calculation of the shares' value[47]—although the order made by it varied that of Lush J. with respect to the classification of the shares.[48]

The remedy that may be given by the court is usually one for the purchase of shares. In *Harmer's* case,[49] the court did take the unusual step of restraining Harmer senior from continuing to act 'tyrannically' and with no regard to the wishes and directions of his children. If the

[45] *Ibid.* 21-2.
[46] *Ibid.* 22. There was substantial argument on the question of whether the 1962 issue was valid at all! The court held that it was not. Note the comments of Barwick C.J.
[47] *Ibid.* 24.
[48] The order was further varied by declaring the 1962 issue void.
[49] [1959] 1 W.L.R. 62.

petitioner had been successful in the *2GB* case,[50] the court no doubt would have reached a similar result. But the basis of the valuation makes a significant departure from that in the leading English case of *Scottish Co-operative v. Meyer*.[51] It will be recalled that in that case Meyer sought an order for the purchase of his shares. At the time the appellant company became involved in the activities of his company, the shares were valued at £6.0.11. This was the price Meyer originally sought in negotiations. The price of £3.15.0 was reached by considering 'what would have been the value of the shares at the commencement of the proceedings had it not been for the effect of the oppressive conduct on which complaint was made. This clearly is not a matter on which a calculation can be made with mathematical accuracy or by the application of strict accounting principles . . .'[52] Lord Keith noted that the price was well below the figures quoted earlier.

The only asset owned by the Ma Dalley Company was a very valuable piece of real estate. The company had been in the business of conducting a scrap metal yard. This had long been defunct. To give the petitioners a share in this highly valuable piece of property which had appreciated over a considerable period of time was to treat them in effect as original subscribers to the capital of the company which had purchased the land. The remedy seems inappropriate in the light of the oppressive conduct complained of! At the time the oppression was 'started', the company's land would have been valued at a far smaller figure—it was then running a scrap metal yard. This was a business with a limited market and no doubt was worth far less than the land on which the business had been carried on by the company.

## THE IMPORTANCE OF THE *MA DALLEY* JUDGMENTS

Apart from the question of what amounts to oppression, two other matters are relevant from this decision. The first is the finding by Lush J. that a petition under section 186 may be combined with a petition for winding up.[53] The second is that the section is apparently to be looked at in terms of its impact on the oppressed rather than in terms of the intention of the oppressor 'except to the extent that the word itself has some moral or emotional content'.

That the section should not be read as qualified by the boundaries of interpretation of the first judicial observations on it is indeed to be supported. Apart from two early cases in which the section was used successfully,[54] it has not been blessed with happy results for petitioners. It is

[50] [1964] N.S.W.R. 1648.
[51] [1959] A.C. 324.
[52] [1959] A.C. 324, 348 ff. *Per* Lord Keith.
[53] See also *Re Meyer Douglas Pty Ltd* [1965] V.R. 638.
[54] *Scottish Co-op. v. Meyer* [1959] A.C. 324, and *Harmer's* case [1959] 1 W.L.R. 62. Note also the Australian successes in the *Associated Tool* case (1963) 5 F.L.R. 54, and, of course, *Bright Pine Mills.*

clear to my mind that unless some more liberal interpretation is given to the section it will lose most of its impact, although it is true that the threat of winding up which so often hangs over a company which is involved in a petition often leads to settlement.[55] Despite the fact that the decision of Lush J. may therefore be looked upon as an important breakthrough, it is felt that in this particular case the decision goes too far.

It will be increasingly difficult, if not impossible, for directors to take any action of a controversial nature which may be 'detrimental' to minority shareholders if they are to be subject to a petition under section 186 when they are proved to be wrong, even though they may act throughout on legal advice. It is obvious that parties should not be free to hide behind 'legal advice' at all stages; but on the other hand, in a case of this nature, the matter was of some doubt, and this particular feature was clearly illustrated by the fact that the High Court of Australia reversed the ruling of Lush J. as to the classification of the shares.

Let us assume for one moment that the directors had acted on the basis that the 1940 shares were ordinary shares and had supplied information about the valuation of these, but had maintained a view that the 1962 shares were employee shares and refused to make available documents and information about these. The High Court ruled that the 1940 shares were ordinary shares and in this result the directors could not be said to have acted oppressively (using the reasoning of Lush J. in the Supreme Court) because their interpretation of the articles of association would have been proved right.

Another example may be taken. Assume the question in dispute involved inspection of documents of the company which were the subject of a difficult and delicate negotiation which would ultimately benefit all shareholders. Would it be right to force directors to reveal detailed information which might prejudice the fate of the negotiations? In the *Ma Dalley* case, the failure of the directors to keep a proper register of members was a technical breach of the legislation. Would it be reasonable in these circumstances to expect them to lay themselves open to a possible prosecution as a result of making the 'information' available?

So often, clauses in the articles of association, or the memorandum of association, are open to more than one interpretation. It is hardly to be expected that each time a shareholder challenges an interpretation, the directors must specify at length the reasons for their interpretation, or to be safer, seek legal advice.

[55] Gower, 'Oppression of Minorities' (1958) 21 *Modern Law Review* 653. The writer has been acquainted in a number of cases in which petitions were withdrawn and disputes settled after 'threat' of winding up made by the court.

A more disturbing feature of the case was the failure of the High Court to deal with the very important issue of oppression. As pointed out earlier, the matter was argued; and despite the fact that the High Court upheld the directors' interpretation of the bonus share issue, in the sense that the shares were held to be *not* employee shares, they made no comment on the question of their oppressive conduct.

One finds little sympathy with the directors in their attitude over the share register. It is clear that this action, standing by itself, would have been subject to criticism and if the shareholders' rights or standing turned on their failure to make the register available, then no doubt a petition under section 186 may well have been sustained. However, in this case their attitude was coupled with advice that the petitioner was demanding much more than she was entitled to—she had received a substantial bonus issue and to allege that these were entitled to participate in the winding up of the company beyond the par value was indeed tantamount to striking the hand . . . Be that as it may, the decision marks a very important high water mark for section 186.

## SOME CONCLUSIONS

There is no doubt that the *Bright Pine* and *Ma Dalley* cases taken together may be said to represent the most liberal interpretation of section 186. By itself, *Bright Pine* does not appear to take us very much further on the question of what amounts to oppressive conduct, than the *Scottish Co-operative* case, and perhaps *Harmer*. It does, of course, clarify the ambit of section 186 as contrasted to section 210 of the English Act. *Ma Dalley,* on the other hand, is a vitally significant decision. It should be reported for it will tend, if it is regarded as correct, to give section 186 far more 'bite' than it has had in the past. I have made my criticisms of it on its facts—I would agree that section 186 has not been as successful, in the decided cases, as it might have been. However, to give it, or rather the term oppressive conduct, too liberal an interpretation may lead to a severe outbreak of actions by disillusioned shareholders against their company directors. The ease with which individuals may sue companies in the United States is not a feature of their legal system that should be actively encouraged to develop here. Perhaps the Eggleston Committee on Company Law Reform will examine the provision in the light of the *Ma Dalley* decision and in the light of the comments and recommendations made by the Jenkins Committee.