



## Précis Paper

### Re JSSP Holdings Pty Ltd [2021] VSC 33 – Corporations - Remedies

Abstract – The court's remedy under the *Corporations Act* 2001 (Cth) to wind up a company if it determines that it is just and equitable to do so is applied in the recent case in the Supreme Court of Victoria in *Re JSSP Holdings Pty Ltd* [2021] VSC 33.

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## Précis Paper

### Re JSSP Holdings Pty Ltd [2021] VSC 33 – Corporations – Remedies

1. In this edition of BenchTV, Michael Galvin QC, barrister, and Lionel Wirth, barrister, discuss the court's remedy under the *Corporations Act* 2001 (Cth) ('the Act') to wind up a company if it is of the opinion that it is just and equitable to do so, in conjunction with the recent case *Re JSSP Holdings Pty Ltd* [2021] VSC 33.

#### Origins

2. In Australia, the court can order the winding up of a company under s 461(1)(k) of the Act if it is of the opinion that it is just and equitable to do so. This remedy is founded upon the law of partnerships and the equitable remedies concerning their termination.
3. In the corporate sphere, the use of the phrase partnership can be linked back to the *Companies Act* 1862 (UK), and the winding up remedy back to the *Joint Stock Companies Winding-Up Act* 1848 (UK). The winding up remedy has subsequently remained relatively unchanged and is commonly recognised for its use in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 ('*Ebrahimi*').
4. In *Ebrahimim* His Lordship affirmed that the superimposition of equitable considerations requires one of the following three elements; firstly, an association developed or continued based on a personal relationship involving mutual confidence; secondly, an understanding or agreement that some or all shareholders will take part in the business dealings; thirdly, a restriction on the transfer of a member's interest to prevent a removed member from taking out their shares.

#### Re IPO Wealth Holdings

5. In *Re IPO Wealth Holdings No 2 Pty Ltd (No 2)* [2020] VSC 733 members of the public invested more than \$80,000,000 in what was known as the "IPO Wealth Fund". The money was lent on an unsecured basis to sixteen unprofitable subsidiary companies, eventually leading to the appointment of liquidators.
6. Consequently, Robb J ordered the winding up of the sixteen subsidiaries pursuant to the just and equitable grounds. There were several reasons for this, including accounting irregularities, inappropriate capitalisation of expenses, the accounts were generally a shambles, failing to register security interests, and the insolvency of the companies.

#### Winding Up, Oppression and Insolvency Grounds

7. Insolvency is the most common reason for the application of the winding up remedy.

8. Winding up on the grounds of oppression is a more common avenue to get smaller company disputes into court.
9. The court can make an order under s 232 of the Act if the conduct of a company's affairs is contrary to the members' interests or are oppressive, unfairly prejudicial, or unfairly discriminatory against a member or members.
10. Section 233 of the Act then empowers the court to make any order it thinks fit in the circumstances, including a compulsory sale or purchase or a winding up order as if made under s 461.
11. An application under the oppressive provisions will allow either a buyout, a sale, or in the alternative, the company be wound up. Under s 232 of the Act, the oppression action is only available to members, expanded somewhat in s 234 of the Act.
12. There is a larger pool of candidates with standing under s 461 of the Act; ASIC; a creditor; a contributory; or the company itself.
13. Insolvency is one of the relevant considerations under s461(1)(k) of the Act.

#### JSSP Holdings

14. In *Re JSSP Holdings Pty Ltd* [2021] VSC, Mr Lee, the plaintiff, was a minority shareholder in a business project which created, a major play centre in Oakley. To make his dream a reality, Mr Lee sought wealthy Chinese investors to invest in his company. Mr Liang and Mr Shi, the defendants, invested in Mr Lee's project as the majority shareholders, and the labour for the project was imported from China.
15. As the project progressed, Mr Lee became concerned about cutting corners in construction and quality standards falling short. Mr Lee insisted that the centre was not ready due to safety concerns as there were numerous Australian safety standards and fire standards that were not met.
16. There was also no certificate of electrical safety regarding the lighting installation.
17. Because Mr Lee had such concerns, he resigned as company secretary, as he had no control over whether the company's obligations were adequately discharged.

#### Just and Equitable Grounds

18. If a company is deadlocked and cannot function, make decisions, or pass resolutions, it would seem grounds for the court to grant the winding up of a company on just and equitable grounds. However, in *JSSP Holdings*, it appears to be a situation in which a major shareholder, and director, is exerting domination and control over the company to the exclusion of others. The real observation is that Mr Liang, as a director, has engaged in gross dereliction of duty as a director.
19. The initial claim was an application for payment of Mr Lee's work and time, or for the compulsory acquisition of the majority shareholders shares, not a compulsory sale.

20. The Supreme Court of Victoria Practice Note SC CC 8 provides that there should be an affidavit no more than three pages, no more than a single exhibit, which is a company extract from ASIC. In the affidavit, you are to set out succinctly, what the ground of oppression are, or the facts giving rise to it. There is no limitation on pages of the respondent's affidavit.
21. Under the practice note, the judge in charge of the corporations list will review the affidavit and determine whether it will be referred under the oppressive conduct proceeding program.

### Inspection of the Books

22. What happens in conferences such as *JSSP Holdings* is that the orders for oppression are outlined, and there will be an order for the inspection of the company's books under s 247A of the Act, then orders are made for the appointment of a jointly appointed valuer, and a referral to judicial mediation.
23. Under s 290 of the Act, a director is entitled to inspect the books at all times. Yet, under s 198F of the Act, a director can inspect the books if they are involved in litigation or expects to be in litigation. However, the director under those two sections does not have an ongoing right to access the books generally.
24. Books are defined in s 9 of the Act very broadly and include documents. The courts prefer to make this type of order as it is much easier than an order for discovery.
25. Once an order had been made under s 247A, if a company has a document, it is within the scope of the order. They are entitled to gain access to any documents that the company has.
26. Because of cloud-based storage difficulties, electronic access is often granted to make the whole process work properly. Lawyers will usually request access to certain documents, and it can then appear to be similar to a discovery.
27. It can be seen in cases, such as the *Re IPO Wealth Holdings No 2 Pty Ltd (No 2)* [2020] VSC 733, the electronic records, being all of the records, are stored alongside other records irrelevant to the company. Thus, the court has had to facilitate a tech expert filtering through the online files.

### Just and Equitable Grounds in JSSP Holdings

28. *JSSP Holdings* started as an application to acquire the other members' shares. An expert valuer was appointed to produce a report on the company's financial position, which concluded that the share had no commercial value. There were also several observations made about the omissions and other issues with the financial records.
29. Instead of Mr Lee putting together a case that establishes all of the ills of the company's affairs, it appeared that the winding up of the company was the most logical claim to make.
30. Mr Lee's legal team requested certain documents that were not provided, and His Honour made another order under s 247A of the Act. Some of the documents were produced, but it was evident that some were missing. No proof of insurance for public liability was produced, which was a significant issue.

31. Mr Lee put forward his intentions to make an application to wind up the company on just and equitable grounds, and His Honour made an order for the amendment of the originating process.
32. If an application is made directly under s 461 of the Act, one only needs to prove that they are a contributory, and then provide evidence about all the things that make it just and equitable.

#### Major Reasons for Winding Up in JSSP Holdings

33. The major reasons for *JSSP Holding* winding up are; firstly, the company was cash flow and balance sheet insolvent for quite some time, which was apparent from the expert evaluation; secondly, the books of the company were materially unreliable; thirdly for public interest and public morality.
34. In the judgement, Hetyey AsJ stated that the main ground was a lack of confidence in the conduct and management of the company's affairs, which arose out of the intrinsic unreliability of the financial records.
35. The final ground was that once all of the points have been made, the court needs to weigh up the evidence, synthesise it, and determine whether the company should be wound up.
36. Also, whether the company has complied with its statutory obligations, including tax

#### Can Insufficient Books Warrant The Winding Up of a Company?

37. Section 286 of the Act requires that a company maintains books to a certain standard. In *JSSP Holdings*, there was no evidence of loans to the principal shareholders of the company. It appeared as though a majority of money invested should have been share capital. Also, there were payments to the major shareholders labelled repayment of investments, which seemed like taking back money that was not theirs to take. It came to more than \$500,000.
38. The clawback provisions are contained in pt 5.7B of the Act, and are applied by liquidators where a company is wound up due to insolvency.
39. However, if a company is insolvent and wound up under s 461(1)(k), nothing stops the liquidator from challenging unreliable transactions.

#### The Availability of Alternative Remedies.

40. Under s 467(4) of the Act, the starting point is; whether it was an application made by a contributory; second is the company being wound up on one of two grounds, one being the just and equitable grounds. It essentially states that if the court could make the order, they must make the order unless there is another remedy available, and the applicant is acting unreasonably. The other remedy does not necessarily need to be a legal remedy.

41. In *JSSP Holdings* the defendants stated that Mr Lee was acting unreasonably as he would not accept a buyout offer greater than his contribution. However, buying out the other shareholder is not a solution where public safety is an issue.

## **BIOGRAPHY**

### Michael Galvin QC

Barrister, Frederick Jordan Chambers, Sydney

Mr Galvin practises in a wide variety of areas but primarily in technology and construction cases and commercial and equity matters. He has experience in large commercial and building matters and appeals before the Court of Appeal. He frequently appears in the New South Wales Supreme Court, District Court and the New South Wales Civil and Administrative Tribunal.

### Lionel Wirth

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Mr Wirth has a broad commercial practice, including in insolvency, building and construction disputes and property disputes. Other general matters in which he has been briefed include contract disputes, professional negligence claims, banking and finance disputes, partnership disputes and claims of oppressive conduct in corporate affairs.

## **BIBLIOGRAPHY**

### Focus Case

*Re JSSP Holdings Pty Ltd* [2021] VSC 33

### Benchmark Link

[https://benchmarkinc.com.au/benchmark/weekly\\_corporate\\_governance/benchmark\\_12-02-2021\\_weekly\\_corporate\\_governance.pdf](https://benchmarkinc.com.au/benchmark/weekly_corporate_governance/benchmark_12-02-2021_weekly_corporate_governance.pdf)

### Judgment Link

[http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2021/33.html?context=1;query=Re%20JSSP%20Holdings%20Pty%20Ltd%20\[2021\]%20VSC%2033;mask\\_path=](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2021/33.html?context=1;query=Re%20JSSP%20Holdings%20Pty%20Ltd%20[2021]%20VSC%2033;mask_path=)

### Cases

*Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360

*Re IPO Wealth Holdings No 2 Pty Ltd (No 2)* [2020] VSC 733

### Legislation

*Companies Act 1862* (UK).

*Corporations Act 2001* (Cth)

*Joint Stock Companies Winding-Up Act 1848* (UK).

*Supreme Court (Corporations) Rules 2013* (Vic)