Shew & Ors v Police and Citizens Youth Club & Ors [2013] NTSC 15

PARTIES:	PETER BARRY SHEW
	KIMBERLEY SHEW
	MICHAEL MCMAHON
	EMMA FISHER
	MICHELLE FISHER
	DAVID HIRST
	BRETT LEWIS
	JOSH PHILLIPS
	DONNA SCHAKELAAR
	CRAIG BROWN
	MATEJ BISEVAC
	v
	POLICE AND CITIZENS YOUTH CLUB
	PUBLIC OFFICER AND MANAGEMENT COMMITTEE OF POLICE AND CITIZENS YOUTH CLUB
	GLEN LYNCH
	MICHAEL ORDELMAN
	WARD TUCKER

TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	132 of 2011 (21102004)
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JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Practice and procedure – Summary judgment – Applicable principles – Application of the principles in cases where discretionary relief is sought.

Practice and Procedure – Pleadings – Requirements for pleadings in terms of relief sought – Party not entitled to relief not specifically claimed in the pleadings.

Associations – Oppression – Unfairness.

Associations Act ss 34, 104, 106, 107, 109, 112;
Corporations Act ss 232, 233;
Supreme Court Rules O 13.02, 13.07, 22.02, 23

Sperrer v Rasla Pty Ltd [2011] NTSC 02;
Nibbs v Australian Broadcasting Corporation [2010] NTSC 52;
Sportsbet Pty Ltd v Moraitis [2010] NTSC 24;
General Steel Industries Inc v Commissioner of Railways (NSW) (1964) 112 CLR 125;
Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87;
Civil & Civic Pty Ltd v Pioneer Concrete (NT) Pty Ltd (1991) 1 NTLR 43;
Territory Loans Management v Turner (1992) 110 FLR 341;

Hibiscus Shoppingtown Pty Ltd v Woolworths (Q'Land) Ltd (1993) 113 FLR 106;
Pettit v South Australian Harness Racing Club Inc & Ors [2006] SASC 306;
Popovic & Ors v Tanasijevic & Ors (No 5) (2000) 34 ACSR 1;
Millar v Houghton Table Tennis & Sports Club Inc [2003] SASC 1;
ASC v Multiple Sclerosis Society of Tas (1993) 10 ACSR 489;
Morgan v 45 Flers Avenue Pty Ltd (1986) 10 ACLR 692;
John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'asia) Pty Ltd (1991) 6 ACSR 63;
Wayde v New South Wales Rugby League Ltd (1985) 180 CLR 459;
Tomanovic v Global Mortgage Equity Corp Pty Ltd (2011) 84 ACSR 121;
Thomas v H W Thomas Limited [1984] 1 NZLR 686;
Lucy v Lomas [2002] NSWSC 448;
Pine Rivers, Caboolture and Redcliffe Group Training Scheme Inc v Group Training Association Qld [2013 QSC 31;
Kovacic v Australian Karting Association (Qld) Inc [2008] QSC 344;
Noble Investments Pty Ltd & Ors v The Southern Cross Exploration NL (2008) 174 FLR 301;
Re Spargos Mining NL (1990) 3 ACSR 1

REPRESENTATION:

Counsel:

Plaintiff:	Mr Loizou
Defendant:	Mr Young

Solicitors:

Plaintiff:	Robert Welfare & Associates
Defendant:	Minter Ellison Lawyers

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Shew & Ors v Police and Citizens Youth Club & Ors [2013] NTSC 15
No. 132 of 2011 (21102004)

BETWEEN:

PETER BARRY SHEW
First Plaintiff

AND

KIMBERLEY SHEW
Second Plaintiff

AND

MICHAEL MCMAHON
Third Plaintiff

AND

EMMA FISHER
Fourth Plaintiff

AND

MICHELLE FISHER
Fifth Plaintiff

AND

DAVID HIRST
Sixth Plaintiff

AND

BRETT LEWIS
Seventh Plaintiff

AND

JOSH PHILLIPS
Eighth Plaintiff

AND

DONNA SCHAKELAAR
Ninth Plaintiff

AND

CRAIG BROWN
Tenth Plaintiff

AND

MATEJ BISEVAC
Eleventh Plaintiff

v

POLICE AND CITIZENS YOUTH CLUB
First Defendant

AND

PUBLIC OFFICER AND MANAGEMENT COMMITTEE OF POLICE AND CITIZENS YOUTH CLUB
Second Defendant

AND

GLEN LYNCH
Third Defendant

AND

MICHAEL ORDELMAN
Fourth Defendant

AND

WARD TUCKER
Fifth Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 26 March 2013)

[1] This is an application by the Plaintiffs seeking various orders pursuant to the *Associations Act* ('the Act') by way of summary judgment pursuant to Order 22.02 of the *Supreme Court Rules* ('the Rules').

[2] Some discussion of the background facts is necessary to put the issues on the application into context. The Plaintiffs are members of the First Defendant ('the PCYC') which is an incorporated association regulated by the Act. It is an association which has a long standing connection with the Northern Territory Police. That connection is recognised in its constitution. For example the constitution provides that the President is to be a commissioned officer of the Northern Territory Police appointed by the Commissioner of Police and that the Club Manager is to be a constable in the Northern Territory Police. Both are ex officio members of the Management Committee.

[3] The PCYC's objects have a focus on youth development and discouraging juvenile delinquency. The objects have been sought to be achieved by the establishment of various disciplines within the PCYC. Those disciplines are in the nature of sporting or recreational activities, for example judo, which is of particular relevance to the current proceedings.

[4] The membership structure of the PCYC is that members are identified as being members associated with a specific discipline. The Plaintiffs were at all relevant times members of the PCYC as members of the judo discipline. The PCYC owned a number of assets which were specifically acquired for the purposes of the judo discipline such as score boards, special floor mats and the like.

[5] Following an annual general meeting of the PCYC on 24 November 2010 a significant change in the membership of the Management Committee resulted. Relevantly some of the Plaintiffs, who were members of the Management Committee before that annual general meeting, were not re-elected. Sometime thereafter the Management Committee of the PCYC resolved to close the judo discipline citing financial viability as the reason.

[6] The Plaintiffs, being aggrieved by the closure of the judo discipline, then commenced the current proceedings. The relief sought in the Statement of Claim as last amended ('the SOC') is firstly, for damages generally. Secondly, orders are sought pursuant to section 109 of the Act including orders for injunctions, the regulation of the future affairs of the PCYC,

altering the constitution of the PCYC, and the re-instatement of expelled members. Thirdly, for equitable damages. Fourthly, for the return of property. Fifthly, for orders in respect of breach of fiduciary and equitable duties. Lastly for orders in respect of breach of contract and conversion of property.

[7] The application for summary judgment has two alternative bases. The first stems from an allegation of invalidity of the election of certain members of the Management Committee at the annual general meeting of the PCYC held on 24 November 2010. The second is based on conduct of the Management Committee and remedial orders available under section 109 of the Act.

[8] The application is made pursuant of Order 22.02 of the Rules which provides:-

> **22.02 Application for judgment**
>
> (1) Where the defendant has filed an appearance, the plaintiff may at any time apply to the Court for judgment against the defendant on the ground that the defendant has no defence to the whole or part of a claim included in the writ or statement of claim, or no defence except as to the amount of a claim.
>
> (2) Subrule (1) does not apply to a claim for defamation malicious prosecution, false imprisonment or seduction or to a claim based on an allegation of fraud.
>
> (3) Where the writ or statement of claim includes a claim within subrule (2), the plaintiff may apply for judgment in respect of any other claim and continue the proceeding for the first-mentioned claim.
>
> (4) Except by order of the Court, the plaintiff shall make only one application for judgment under this Order.

[9] The legal principles in relation to applications for summary judgment are well established. I discussed the authorities in detail in *Sperrer v Rasla Pty Ltd*[1] and *Nibbs v Australian Broadcasting Corporation*.[2] The principles were also neatly summarised by Southwood J in *Sportsbet Pty Ltd v Moraitis.*[3] As his Honour pointed out, the substance of the criterion to be applied is whether there is a real uncertainty as to the plaintiff's right to judgment. The power to order summary judgment should never be exercised unless it is clear that there is no real question to be tried. A burden is cast on the defendant of satisfying the Court that there ought to be a trial. The provisions of Order 22 of the Rules apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment. A defendant will be allowed to defend a case if there are facts which, if true, would constitute a defence to the plaintiff's claim. The Court is reluctant to try a case on affidavit where there are facts in dispute. An important issue is whether the defendant's account of the facts has sufficient prima facie plausibility to merit further investigation.

[10] To this I would add that to the extent that discretionary relief is sought, it may be inappropriate to grant that on a summary judgment application because all evidence may need to be heard before the Court can decide whether the grant of discretionary relief is appropriate.

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[1] [2011] NTSC 02
[2] [2010] NTSC 52
[3] [2010] NTSC 24

[11] The cases also demonstrate that caution should be exercised when dealing with applications for summary judgment.[4] Specifically in *Fancourt v Mercantile Credits Ltd*[5] the High Court said:

> The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried.[6]

[12] The test of whether there is a real or serious question to be tried has been accepted in the Northern Territory as the appropriate test in applications under Order 22.02 of the Rules.[7] Where discretionary relief is sought it will often be difficult to determine that there is no real or serious question to be tried absent hearing the evidence in its entirety.

[13] The Plaintiffs' interlocutory summons as initially filed was unclear as to what orders were sought by way of summary judgment. The wording suggested that orders in the nature of declarations were sought which is problematic given the limitation on my authority to make declarations.

[14] Moreover some orders, for example the orders sought pursuant to section 34, effectively sought declarations that criminal offences had been committed. The Act has a pre-requisite before a prosecution for an offence under the Act may be commenced, namely that such a prosecution can only be commenced by either the Commissioner of Consumer Affairs or

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[4] *General Steel Industries Inc v Commissioner of Railways (NSW)* (1964) 112 CLR 125
[5] (1983) 154 CLR 87
[6] (1983) 154 CLR 87 at 99
[7] See *Civil & Civic Pty Ltd v Pioneer Concrete (NT) Pty Ltd* (1991) 1 NTLR 43, *Territory Loans Management v Turner* (1992) 110 FLR 341 and *Hibiscus Shoppingtown Pty Ltd v Woolworths (Q'Land) Ltd* (1993) 113 FLR 106

alternatively a person authorised by either the Commissioner or the responsible Minister.[8] I do not see that any useful purpose can be served by seeking a declaration as to the commission of an offence under the specified sections of the Act, whether on a summary judgment application or on a full hearing, unless it can separately be shown to be relevant to the civil cause of action. That has not been demonstrated to be so in the current case. On that basis alone I think it is inappropriate that such an order be made by way of summary judgment.

[15] Mr Loizou, counsel for the Plaintiffs, pressed his application for those orders but confirmed that the application did not purport to be a prosecution for offences or to seek findings as to the commission of offences under the Act. That however did not adequately clarify things as that stated purpose appeared inconsistent with the wording of the orders sought. Therefore I ordered the summons to be amended. However, the amended summons was still unclear.

[16] The current application was filed shortly after another application by the Plaintiffs in the nature of summary judgment seeking orders pursuant to Order 23 of the Rules. That application was heard by Barr J who dismissed the application but granted the Plaintiffs leave to further amend their Statement of Claim.

[8] See s 112

[17] Pursuant to that grant of leave, on 4 December 2012 the Plaintiffs filed and served the SOC. As best I have been able to determine, that leave was given *inter alia* to enable the Plaintiffs to plead the material facts to support the relief the Plaintiffs sought. Subsequent to the filing of the SOC the Plaintiffs made the current application by summons filed 11 December 2012. The final version of the summons presently before the Court following the amendments previously referred to is the Third Amended Summons filed on 7 March 2013 ('the Summons').

[18] Comparing the Summons and the SOC reveals that, despite the recent amendments, the Summons seeks relief which is not sought in the SOC, nor does the SOC plead material facts to support that relief. The general rule is that the relief that a party is entitled to is confined to the relief that is available on the pleadings.[9] Rule 13.02(1)(c) of the Rules requires a Plaintiff to set out in the Statement of Claim the relief that it claims against the Defendants. The requirement is sufficiently complied with if it states the relief claimed without necessarily setting out the precise orders sought.[10]

[19] The orders sought in paragraphs 1 to 9 inclusive of the Summons are orders pursuant to specified sections of the Act, specifically sections 34, 104, 106, and 107. Without setting out the specific orders sought in full, (they are not brief), they can be summarised as orders seeking declarations or findings as

[9] *Dare v Pulham* (1982) 148 CLR 658
[10] *Benfield v Farebrother* [2012] NTSC 65

to the conduct of the Management Committee and/or the Defendants which is said to contravene either the Act or the PCYC constitution.

[20] Although the SOC contains many references to sections of the Act, with one exception, there are no references to the sections of the Act pursuant to which the relief is sought, or to allegations of breach of the specified sections of the Act. The exception is in paragraph 8 of the SOC which pleads the obligation on the PCYC to comply with section 34 of the Act. That is a bare assertion and an unnecessary pleading in any case as all that appears to do is to restate section 34 of the Act. It is self-evidently the case that the PCYC must comply with that section as a matter of law. That allegation is not disputed by the Defendants and it has been admitted on the pleadings, hence in the end that adds nothing useful to the debate.

[21] Mr Loizou argued that paragraph 11 of the SOC indirectly relates to an allegation of breach of one of those nominated sections. That paragraph pleads the election of members to the PCYC Management Committee at the annual general meeting referred to and asserts '*…Only five (5) of those elected were Members of the PCYC in accordance with the terms of the Agreement.*' The 'Agreement' refers to the constitution. That then does not clearly identify any the nominated sections of the Act.

[22] However if, as argued, that is the intended effect of that paragraph, then that paragraph fails the test of the sufficiency of pleadings in a number of respects. In general terms, the object of pleadings is to ensure that the other

party has notice of the case it has to meet. A vague or ambiguous pleading cannot achieve that. In terms of specific pleadings rules, Rule 13.02(1)(b) requires a pleading to identify the specific provision of any act which is relied on and Rule 13.07 requires a party to plead any matter which would take the other party by surprise if that matter were not pleaded specifically. Even if I were to accept Mr Loizou's argument, it is clear to me that by pleading indirectly, that would have the effect of taking the Defendants by surprise.

[23] Hence the position is that despite a very recent and late amendment to the SOC and apparently specifically permitted to address these issues, the Plaintiffs still seek relief by way of summary judgment that they have not sought in the SOC. As the Plaintiffs are not entitled to that relief, the application for the orders sought in paragraphs 1 to 9 of the Summons is dismissed.

[24] That leaves the application for the orders sought in paragraph 10 of the Summons. That is based on the alleged invalidity of the election of certain members of the Management Committee and in the alternative the order also seeks relief pursuant to section 109 of the Act.

[25] The Plaintiffs' contention is based on an alleged irregularity in the qualifications for membership of the Management Committee set out in the PCYC constitution. To put the argument into context it is necessary to consider the relevant provisions of constitution which are:-

9. Application for membership

To apply to become a member of the Association a person must –

(a) Submit a written application for membership to the Committee –

(i) in a form approved by the Committee; and

(b) Ordinary Members being persons who have attained the age of eighteen (18) years, who reside in the Northern Territory and who have paid the prescribed fee. *(Emphasis added)*

(c) Student members being persons who are full time students and who have attained the age of eighteen (18) years, who have paid the prescribed fee *(emphasis added)* and who wish to avail themselves of club facilities.

(d) Junior members being children less than the age of eighteen (18) years, who reside in the Northern Territory, and who have paid the prescribed fee *(emphasis added)* (providing that Junior members shall have no entitlement to be eligible for nomination or election or to vote in an election for any position or office or to vote at any Special or Annual General Meeting).

10. Membership fee

(1) An application for membership is granted on payment of the membership fee *(emphasis added)* and submission of the application form.

(2) The joining fee is either –

(a) a pro rata annual fee *(emphasis added)* based on the remaining part of the financial year; or

(b) the amount determined from time to time by resolution at a general meeting.

(3) Subscription is valid for either a 6 month or 12 month period from payment date of membership fee. *(Emphasis added)*

(4) *Omitted*

23. Eligibility of committee members

(1) A committee member must be a member who is 18 years or over.

(2)-(3) *Omitted*

[26] The relevant background facts are that in 1983, i.e. some 27 years before the annual general meeting referred to, the Management Committee enabled membership subscriptions to be deducted from the pay of PCYC members who were Northern Territory Police officers. The evidence is scant however what seems to have occurred was that an amount representing the fortnightly equivalent of the subscriptions otherwise payable was deducted from salaries by the Northern Territory Police and paid to the PCYC. Members paying their subscriptions in this way have been known as payroll deduction ('PRD') members. The evidence reveals that despite there being many members of the PCYC who currently pay their subscriptions by way of payroll deductions, this was apparently not commonly known amongst other members of the PCYC who were not Northern Territory Police officers. This includes other members who were Northern Territory Government employees who presumably could have had payroll deductions made in the same way.

[27] The Plaintiffs' argument is that PRD membership is not permitted by the constitution because it only permits payment of subscriptions by a lump sum, in advance and for a period of membership of either six or twelve months. The argument is based on the interpretation of paragraphs 9 and 10 of the constitution. Those paragraphs are poorly drafted. They lack consistent use of terminology. Paragraphs 9(b),(c) and (d) refer to payment of a '*prescribed fee*' but nowhere is it specified what this means or how it is prescribed. Presumably it must be done either by a resolution at an annual

general meeting or of the Management Committee. Paragraph 10(1) refers to '*membership fee*', again without defining that. Although it is not clear, I think that must be the same fee as the prescribed fee. Paragraph 10(2) then seems to describe the same fee by another description namely, an '*annual fee*' and refers to its payment on a pro rata basis in specified instances. However paragraph 10(3) says that the '*subscription*' (presumably another interchangeable reference to the membership fee, or to the prescribed fee, or the annual fee) is '*valid*' for either six or twelve months. The option of a six month membership renders the pro rata payment of an annual fee confusing. Also paragraph 10(3) then describes that fee as a '*membership fee*'.

[28] Mr Loizou, relying mainly on paragraph 10(3), argues that the combined effect is that membership can only be for either six or twelve months and cannot be fortnightly. He also submits that membership can only be paid by a lump sum and, as the '*subscription*' is said to be '*valid*' from the '*payment date*', that must mean that payment must be in advance. As a result it is argued that PRD membership is not valid and that as PRD members are not valid members of the PCYC, they cannot be elected to the Management Committee.

[29] I do not agree that the relevant paragraphs mandate only for lump sum payment of subscriptions. Nothing in the wording suggests that. I do not read those paragraphs as precluding the Management Committee, or the annual general meeting, from fixing other payment methods. I think that in setting a membership fee, the Management Committee could also validly set

a payment frequency provided that the frequency did not exceed an annual frequency. It then follows that upon payment of the first instalment as so determined, '*membership is granted*' at that time. The '*payment date*' in paragraph 10(3) must then refer to the date of payment of the first instalment. I therefore conclude that the relevant persons were PCYC members and consequently, their election to the Management Committee is valid.

[30] For completeness I will discuss an alternative interpretation, one which I think would represent the high water mark for the Plaintiffs. It is arguable that the membership of persons paying by instalments of less than six months would not commence until after at least six months of instalments were paid. On this scenario, the evidence shows that of the persons elected at the relevant annual general meeting, two persons were PRD members who had commenced payments less than six months before that meeting.

[31] I have no evidence of actual voting at all Management Committee meetings since the annual general meeting and therefore I cannot determine the effect of voting by those members. Obviously, their votes could only make a difference in respect of resolutions decided by a majority of two or less. If one of those members voted for a particular resolution and one against then it would not make any difference at all. The lack of evidence about this leaves that unresolved and, to the extent that discretionary relief is sought, that impacts on the ability of the Court to properly consider its discretion.

[32] The constitution does not set a fixed number of elected Management Committee members but only a maximum (21) and a minimum (3) number. If I were to interpret the constitution in this way, and if, for example, the relief to be ordered under section 109 of the Act were to be the making of orders having the effect of removing those persons from the Management Committee,[11] then the removal of those two members would still leave the Management Committee constitutionally valid. There is no evidence to contradict that. I acknowledge that if the nominations for the election of those persons to the Management Committee had been rejected then two other persons would have been elected in their stead. The evidence supports this possibility[12]. However if two other persons had been elected, it could be inferred that it would not have made any difference to the decisions of the Management Committee given the numbers involved. Hence, even if I were to interpret the constitution in that way, I would not be inclined to make an order under section 109 of the Act.

[33] Mr Loizou also put an evidentiary argument to challenge the membership status of some of the elected persons. The argument is based on section 34 of the Act which provides as follows:-

> 34 Register of members
>
> (1) An incorporated association must establish and maintain a register of its members and enter in the register:

[11] That could be achieved by orders pursuant to section 109(2)(e) and (f).
[12] Affidavit of Carrolyn Anne Lynch sworn 16 January 2013, paras 5,7 and 8

(a) the date on which each member of the association became a member; and

(b) if a person ceases to be a member of the association – the date of ceasing to be a member; and

(c) the prescribed particulars, if any.

Maximum penalty: 20 penalty units.

(2) *Omitted*

[34] The argument commences with the proposition that only members of the PCYC were eligible to be elected to the Management Committee. That is clearly correct according to the constitution (see paragraph 23(1) of the constitution which is reproduced above). The argument is that as the Register of Members must specify the name of the member, the date they became a member and, if applicable, the date they ceased to be a member, the absence of the name of a person on the Register of Members conclusively establishes that they were therefore not members and not eligible for election to the Management Committee.

[35] I disagree with the submission. Although it appears clear there are deficiencies in compliance with section 34 of the Act by the PCYC, that section only sets out obligations to keep records and creates an offence if that is not complied with. It does not contain any deeming provisions to give those records any particular evidentiary value or to operate as a statutory aid to proof.

[36] Mr Loizou was relying on a Register of Members apparently obtained from the Defendants through discovery which did not name the relevant persons as members of the PCYC. However there is also evidence of the Defendants which establishes that the relevant persons were members of the PCYC at the time they were elected, notwithstanding the discrepancies in the Register of Members. At the very least this points to a dispute of facts sufficient to render an application for summary judgment inappropriate but even leaving that aside, I think Mr Loizou's argument is untenable and that disposes of the constitutional basis of the challenge.

[37] The alternative basis for relief is that, as only members of the PCYC who were members of the Northern Territory Police were permitted to pay membership by way of payroll deductions, this amounts to conduct which is '*oppressive or unfairly prejudicial to, or unfairly discriminatory against*' non-Northern Territory Police members within the meaning of a section 109(1)(a) and (b) of the Act.

[38] Section 109 of the Act provides as follows:-

> **109 Oppressive or unreasonable acts**
>
> (1) An application to the Local Court or Supreme Court for a particular order or orders specified in subsection (2) may be made by a member of an incorporated association or former member expelled from the association (provided the application is made within 6 months after the expulsion) who believes that:
>
> (a) the affairs of the association are being conducted in a way that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member (***the oppressed member***) or in

a way that is contrary to the interests of the members as a whole; or

(b) an act or omission, or a proposed act or omission, by or on behalf of the association was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member (also ***the oppressed member***) or was or would be contrary to the interests of the members as a whole; or

(c) the constitution of the association contains provisions that are oppressive or unreasonable; or

(d) the expulsion of the member was oppressive or unreasonable.

(2) For subsection (1), the orders are as follows:

(a) an order that the association be wound up;

(b) an order regulating the future conduct of the association's affairs;

(c) an order directing the association to institute, prosecute, defend or discontinue specified proceedings, or authorising a member of the association to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the association;

(d) an order appointing a receiver or a receiver and manager of the property of the incorporated association;

(e) an order restraining a person from engaging in specified conduct or from doing a specified act;

(f) an order requiring a person to do a specified act;

(g) an order altering the constitution of the association;

(h) an order that the member expelled be reinstated as a member of the association;

(i) an order consequential on or ancillary to an order mentioned in paragraphs (a) to (h).

[39] Section 109 of the Act has parallels in sections 232 and 233 of the *Corporations Act*. Authorities relevant to the oppression provisions in the

Corporations Act, and its predecessors, have been relied on in respect of parallel provisions in legislation regulating incorporated associations.[13]

[40] The provisions of the *Corporations Act*, like those in section 109 of the Act, in specifying conduct as a prerequisite to relief, commonly refer to conduct or acts or omissions which are '*oppressive*' or '*unfairly prejudicial*' or '*unfairly discriminatory*'. The common approach taken to the interpretation of that provision is that each element is not an alternative. The three phrases overlap and help to explain each other.[14] The three different elements are considered to be different aspects of the essential criteria which is '*unfairness*'.[15] This is apparent from *Wayde v New South Wales Rugby League Ltd*[16] ('*Wayde*'), where Brennan J said that the acts omissions or behaviour complained of must not just be discriminatory or prejudicial to the complainant but they must also be unfair.

[41] A number of principles relevant to the current case can be distilled from the cases. The first is that the question is whether objectively in the eyes of a commercial bystander there has conduct that is so unfair that reasonable directors, (in respect of associations this should be read as referring to

[13] See *Pettit v South Australian Harness Racing Club Inc & Ors* [2006] SASC 306; *Popovic & Ors v Tanasijevic & Ors (No 5)* (2000) 34 ACSR 1; *Millar v Houghton Table Tennis & Sports Club Inc* [2003] SASC 1
[14] *ASC v Multiple Sclerosis Society of Tas* (1993) 10 ACSR 489
[15] *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692
[16] (1985) 180 CLR 459

reasonable committee members), who consider the matter would not have thought the decision fair.[17]

[42] Secondly, the conduct need not be illegal or fraudulent to constitute oppression or that the decision of the association was invalid.[18] Conduct may still be oppressive even if the conduct is committed in good faith.[19]

[43] Thirdly, conduct by a management committee of an association will be contrary to the interest of members as a whole if no committee acting reasonably could have engaged in that conduct.[20]

[44] Fourthly, proof of invalidity or non-compliance with an association's rules may indicate that a decision is contrary to the interest of the members as a whole.[21] This is because the failure to observe the provisions of the constitution has the effect of depriving members of their right as members to have the affairs of the association conducted in accordance with the constitution of the association.[22]

[45] Fifthly, courts are not concerned with reviewing the underlying merits of a decision and the courts do not substitute their discretion for the discretion exercised in good faith by the management of the association.[23] It is not

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[17] *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692; *ASC v Multiple Sclerosis Society of Tas* (1993) 10 ACSR 489
[18] *Wayde v New South Wales Rugby League Ltd (1985) 180 CLR 459; Pettit v South Australian Harness Racing Club Inc & Ors [2006] SASC 306*
[19] *Tomanovic v Global Mortgage Equity Corp Pty Ltd (2011) 84 ACSR 121*
[20] *Wayde v New South Wales Rugby League Ltd (1985) 180 CLR 459*
[21] *Pettit v South Australian Harness Racing Club Inc & Ors [2006] SASC 306*
[22] *Popovic & Ors v Tanasijevic & Ors (No 5) (2000) 34 ACSR 1*
[23] *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459; *Pettit v South Australian Harness Racing Club Inc & Ors* [2006] SASC 306

assessed simply from one member's point of view.[24] Moreover the courts' approach is to regard the circumstances of a particular case as a whole and will assess the cumulative effect of the conduct complained of in that context.[25]

[46] Lastly, courts are reluctant to interfere in the internal management of an association and will only do so in limited circumstances, which most notably is where a member's proprietary rights have been adversely and unfairly affected by a decision.[26]

[47] The grant of relief under section 109 of the Act is discretionary. As is the case with relief under section 234 of the *Corporations Act,* courts can make a wide range of orders. In *Noble Investments Pty Ltd & Ors v The Southern Cross Exploration NL*[27] it was observed that a court usually fashions an appropriate remedy for the particular circumstances proved at trial. Unless all evidence is called on a summary judgment application, a court may have an insufficient basis to determine an appropriate order, assuming the threshold is attained.

[48] What I think is apparent from the available evidence is that the arrangement for PRD payment of subscriptions was not intended to give an advantage to a member. It was therefore bona fide. Nor is the arrangement prohibited by the constitution. Any advantage that it gives appears inconsequential. It has

[24] *Thomas v H W Thomas Limited* [1984] 1 NZLR 686
[25] *Lucy v Lomas* [2002] NSWSC 448
[26] *Pine Rivers, Caboolture and Redcliffe Group Training Scheme Inc v Group Training Association Qld* [2013 QSC 31; *Kovacic v Australian Karting Association (Qld) Inc* [2008] QSC 344
[27] (2008) 174 FLR 301

not been shown to be unreasonable. It was submitted by Mr Loizou that the advantage the arrangement gave PRD members was increased affordability, presumably in a budgeting sense, and the convenience of paying a fortnightly sum as opposed to a lump sum. The latter is very intangible and may not truly be an advantage in any relevant sense. As the lump sum is of the order of approximately $55.00 representing a six monthly payment, in the overall scheme of things I consider that any such advantage overall is nominal, such that it cannot meet the threshold necessary to establish unfairness. Mr Loizou acknowledged the advantage was tenuous and with that I agree. That must also be the case for any prejudice flowing from that. I doubt that the arrangement can be said to be '*unfair*' given that all it does is facilitates, albeit for some members and not others, the payment of subscriptions.

[49] Although the arrangement is one of long standing, other than that, there is very little evidence concerning the arrangement. Before being able to properly exercise a discretion if it came to that, I think it is imperative that more evidence on a number of issues would be necessary, such as how the arrangement for payroll deduction payments came about, how it has been applied since then, whether it is offered to members on application for membership, whether there is any reason why it is not offered to non-Police members, whether it has been specifically denied to any members, what fees

have been prescribed, whether any other payment arrangements have been allowed or whether there have been any waiver of fees.[28]

[50] In addition I think that evidence as to whether the non-Northern Territory Government employers of members of the PCYC are able to, and willing to, accommodate payment of subscriptions by payroll deductions is required. There is no evidence that members not utilising the payroll deductions have sought to pay subscriptions that way or that they have been denied use of that payment method. All that is relevant to the source of the discrimination and whether it is unfair. In other words, it may not be unfair discrimination if the PCYC allows members to pay subscriptions by payroll deductions where it does not deny certain members that service but where those members are not able to take advantage of that facility because of other reasons.

[51] Although Mr Loizou claimed that the evidence established that payroll deduction payments were not offered to all members, that does not properly characterise the evidence in my assessment. At best the Plaintiffs' evidence establishes that not all members were aware that payment of subscriptions by payroll deductions was available. The threshold for unfairness at least requires evidence that some members were denied the facility. All that is very relevant to the determination of unfairness and, if it is appropriate to

[28] Paragraph 30(3)(h) of the PCYC constitution enables the Management Committee to waive subscriptions or other payments

make an order under section 109 of the Act, as to the nature of the order to be made.

[52] I think the position would have been different if there was evidence which showed that the exclusion of non-Northern Territory Police members from the arrangement was deliberate or that, for example, PRD members received an additional benefit such as a discount for paying by salary deduction.

[53] Other than the advantage which Mr Loizou conceded was tenuous, there is no evidence of any unfairness in the sense that any harm has been suffered by those members not utilising the payment arrangement, or that there was any flaw in the decision making process when the arrangement was first permitted or that a commercial justification for the decision is lacking.[29]

[54] Although the arrangement is obviously discriminatory in effect, the authorities say that cannot be looked at in isolation. It is not discrimination *per se* which enlivens section 109. It must also be unfair. In *Wayde*, Brennan J said, in reference to the section which was the precursor of section 233 of the *Corporations Act*:-

> Section 320 requires proof of oppression or proof of unfairness: proof of mere prejudice to or discrimination against the member is insufficient to attract the Court's jurisdiction to intervene.[30]

[55] Applying the principles from the authorities discussed above, I am of the view that, in cases where remedial orders pursuant to section 109 of the Act

[29] *Re Spargos Mining NL* (1990) 3 ACSR 1
[30] (1985) 180 CLR 459 at p 472

are sought, it is imperative that there be sufficient evidence to enable the Court to consider the position in the context of all relevant circumstances. In the current case, had the threshold been achieved, I think that evidence necessary to enable me to properly apply section 109 of the Act is lacking.

[56] The net result is that the Plaintiffs have failed to show that the election of the members of the Management Committee complained of was unconstitutional or that there has been oppression, unfair prejudice or unfair discrimination within the meaning of section 109 of the Act.

[57] The application for the order in paragraph 10 of the Summons is therefore also dismissed.

[58] I will hear the parties as to any consequential orders and as to the costs of the current application.