

**MINORITY PROTECTION AND
SECTION 181 OF THE COMPANIES ACT 1965**

By

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SYNOPSIS

The present century has witnessed the immense growth and power of companies registered under the Companies Act. Investment in companies has increased by leaps and bounds and the number of persons holding shares in companies has increased tremendously. Many of these investors are minority shareholders who are vulnerable to oppression, discrimination and prejudicial conduct by the majority shareholders. Company Law therefore has a duty to ensure that the minority is adequately protected.

The courts generally have been very reluctant to interfere in the management of companies owing to the fact that it is a separate legal entity with its own board of directors. This judicial reluctance of the courts to interfere with the management of companies began with the notorious case of *Foss v Harbottle* (1843) 2 Hare 461. This reluctance of the courts led to abuses of power by those having a controlling stake, either directly or indirectly, in the company. Ultimately it was the minority shareholders in the company who were disadvantaged.

It is the purpose of this dissertation to focus on the general development of the company law with respect to the protection of minority shareholders. The study will cover both the common law and the legislative endeavours made to provide adequate protection to minority shareholders. In this respect comparison will be made with other jurisdictions, especially with the United Kingdom and the Australian legislative provisions. The study is divided into the following chapters. Chapter 1 is the

Introduction chapter dealing with the object and the scope of the study. Chapter 2 will focus on the common law rule in *Foss v Harbottle* (1843) 2 Hare 461, its exceptions and limitations. Chapter 3 will trace the historical development of minority statutory protection. Chapter 4 will focus on the persons who may seek relief under section 181 Companies Act 1965. Chapter 5 will be based on the specific elements of section 181 and how the courts have interpreted the elements. Chapter 6 will focus on the remedies available to a member or debenture holder under section 181. Chapter 7 is the Conclusion chapter summarising the main limitations of the common law fraud on the minority exception, the strengths and weaknesses of section 181 and suggested reforms to section 181 to make it more effective.

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CHAPTER 1

INTRODUCTION

One of the major problems in the Company Law is the control of the power wielded by the majority shareholders. The majority use their power to control and direct the company's affairs. They can decide who sits on the board of directors and what resolutions are passed. If the board does not toe the line of the majority, the majority can dismiss the board and replace it with new members.

In the management of a company's affairs the majority is greatly assisted by the notorious rule in *Foss v Harbottle*¹ which prevents a company's members from suing to correct a wrong done to the company or in respect of an irregularity of the company's officers which can be regularised by the passing of a resolution at a general meeting. The rule in *Foss v Harbottle* was a major obstacle to minority protection. Although the courts developed a number of exceptions to the rule, the exceptions were inadequate to provide effective protection to the minority.

Company Law witnessed a rapid development in the second-half of the nineteenth century and in early part of the twentieth century. It was clear during this development that the courts cannot be relied upon to develop effective principles of minority protection. Judges were reluctant to interfere with the internal administration of companies. It was therefore necessary to Parliament to step in and enact legislation to control the exercise of the majority's power to provide weapons for the minority by

¹ (1843) 2 Hare 461

which the minority could battle oppression, discrimination, unfair and prejudicial conduct.

In Malaysia the new legislative spirit is enshrined in section 181 of the Companies Act 1965. Section 181 is one of the most important developments of modern Company Law. Its role in relation to the management of companies cannot be over emphasised. In this minor dissertation the writer makes a modest attempt to study its scope, strength and weaknesses.

In the light of the above, the present study will focus on the limitations of the common law, the development of the minority statutory provisions in the other jurisdictions and will specifically focus on section 181 Companies Act 1965 of Malaysia.

I. Objectives

The objective of this study is to examine briefly the historical development of minority shareholders protection in companies, the main limitations of the common law rule in *Foss v Harbottle* and the limitations of the early minority shareholders statutory protection provisions. However, the main objective of the study is to focus and examine the significance and the impact of section 181 Companies Act 1965 on protection of shareholders and debenture holders in Malaysia. In this respect, comparisons will be made with the equivalent provisions in other Commonwealth Countries with specific reference to the United Kingdom section 459 Companies Act 1985 and the Australian section 260 Corporations Act 1989 and how the courts have applied and interpreted the

various provisions in order to protect the rights of those entitled to protection under their respective legislations.

II. Scope and Outline of the Study

This study will be confined mostly to the statutory provisions and how the judiciary had interpreted the various elements in the statutes, persons entitled to seek relief under the provisions and to what extent the courts are able to provide a suitable remedy to them.

The study will mainly focus section 181 Companies Act 1965 and how the Malaysian courts have responded in applying and interpreting the section and the difficulties faced by them. This study will not extent to other provisions in the Companies Act 1965 which may be available to minority shareholders or debenture holders for protection of their rights, although certain sections may be briefly mentioned in the course of this study.

This dissertation is divided into the following chapters :

- i) Chapter 2 will focus on the common law rule of *Foss v Harbottle*, its exceptions and the limitations of the rule.
- ii) Chapter 3 will focus on the historical development of the statutory minority provisions especially section 210 Companies Act 1948, United Kingdom and its adaptation in other Commonwealth Countries, its limitations and restriction in providing an effective remedy. The chapter will also introduce the new

legislative provisions in the Commonwealth countries showing how the legislatures have widened the scope of minority shareholders protection tremendously.

- iii) Chapter 4 will focus on persons who can obtain a relief under section 181 Companies Act 1965 to protect their rights. Comparisons will be made with similar provisions in other Commonwealth countries.
- iv) Chapter 5 will focus on the elements of section 181 Companies Act 1965 and how they have been interpreted by the courts. Comparisons will be made with similar provisions in other Commonwealth countries.
- v) Chapter 6 will focus specifically on the wide remedies available under section 181 Companies Act 1965 and the discretion given to the courts in providing whatever remedy they may deem fit in bringing to an end the matters complained of.
- vi) Chapter 7 will be the conclusion chapter and in this chapter the writer will summarise and focus on the main exception to the rule in *Foss v Harbottle*, namely the fraud on the minority exception and highlight its limitations. Thereafter, a brief summary of the advantages and weaknesses of section 181 as an effective remedy will be looked at. Finally, the writer will provide some general recommendations and suggestions to further improve the effectiveness of section 181 Companies Act 1965.

III. **Research Methodology**

The research methodology for the purposes of this study was library research based at the University of Malaya Law Library. The materials in this study were obtained from relevant text books, local and international law reports, statutes, reviews, articles and law journals.

The writing of this dissertation involved an in depth study and reading of cases and the resources mentioned above for the purposes of comparative studies between the Malaysian minority provision and the other Commonwealth provisions, especially England and Australia.

The extensive reading of case law was necessary to provide a clear understanding as to how the local courts applied and interpreted section 181 Companies Act 1965. However, constant reference had to be made of foreign cases because of the limited amount of reported cases under section 181 Companies Act 1965.

IV. **Problems and Limitations**

The main problem and limitation faced by the writer is the extent and the depth to which each chapter in the dissertation had to be covered. Given the broad and general nature of the topic, the writer had to endeavour not to elaborate too much on each chapter of the study but rather provide a general study of the development of minority protection and to

focus on the significance of section 181 Companies Act 1965 as a powerful tool to a shareholder or a debenture holder in the Malaysian context.

Although there was an abundance of written materials covering the topic of minority protection in the library but then most of these materials were by foreign writers based on foreign minority protection provisions. There were only a few articles on section 181 Companies Act 1965 written by local writers and the contents were rather inchoate in relation to the scope of this study.

However, with the valuable assistance and guidance of the supervisor, Professor P.Balan, the writer managed to overcome the limitations and cover each chapter of the study satisfactorily and effectively for the purposes of this study.

CHAPTER 2

THE RULE IN FOSS V HARBOTTLE

I. Introduction

Much of the development of the present company law regarding majority rule is attributable to the law of partnership which had its humble beginning in England in the mid-nineteenth century.¹ Investors and businessmen had to raise capital and the only possible means was to pull their resources and skills together and slowly these led to expansion of businesses. However the success of these partnerships depended on the close co-operation of the partners. In the course of the development of the law of partnership, the Chancellor generally would not intervene in the affairs or matters pertaining to the internal regulation of the partnership except with a view of dissolution. It is interesting to note that during this period, no mention of the principle of majority rule was ever made, nonetheless the majority was considered as having a right to jurisdiction over internal disputes.² In fact, later, when companies were incorporated, the principle of non-intervention in their internal affairs became a norm, therefore basically leaving their management to those appointed or elected as directors by the members or shareholders of the companies concerned. Lord Eldon is reported to have said in *Carlen v Drury*:³ "This Court is not required on every

¹ Boyle AJ, 'The Minority Shareholder in the Nineteenth Century: A study in Anglo-American Legal History' (1965) 28 MLR 317

² *Ibid* at p 318

³ (1812) 1 Ves & B 154

Occasion to take the Management of Every Playhouse and Brewhouse in the Kingdom". This principle of majority rule which developed from the law of partnership, later became entrenched in modern company law under the concept known as "The Rule in *Foss v Harbottle*".⁴

In *Edwards v Halliwell*,⁵ Jenkins L.J. gave his "classic definition"⁶ of the *Foss v Harbottle* rule as follows:

The rule in *Foss v Harbottle* comes to no more than this. First, the proper plaintiff in respect of a wrong alleged to be done to a company is prima facie the company itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company is in favour of what has been done, then cadet quaestio.

In *MacDougall v Gardiner*⁷ Mellish L.J. referred to the second limb of the rule and said:

In my opinion, if the thing complained is a thing which, in substance, the majority of the company are entitled to do, or something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes.

⁴ (1843) 2 Hare 461

⁵ [1950] 2 All ER 1064

⁶ So described by the Court of Appeal in *Prudential Assurance v Newman Industries* [1982] Ch 224

⁷ (1875) 1 Ch.D.13

In *Burland v Earle*,⁸ Lord Davey summarised the rule as follows:

It is elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself. These cardinal principles are laid down in the well known cases of *Foss v Harbottle* [(1843) 2 Hare 461] and *Mozley v Alston* [(1847) 1 Ph. 790] and in numerous later cases which it is unnecessary to cite.

The importance of the rule in *Foss v Harbottle* rests on the fact that it eliminates multiplicity of legal actions being brought by individual disgruntled shareholders. This would save the company from wasting its valuable time and money in defending frivolous and vexatious actions brought by some troublesome minority. In a public company this is important because shareholders would have invested their money in the company and the directors are accountable as to how the monies are spent. The existence of the rule in *Foss v Harbottle* therefore helps the directors to spend more time in managing the company's business. This in turn will bring better returns to all the shareholders of the company. The Company's reputation will also be protected. There will be more public confidence in the company.

The rule in *Foss v Harbottle* recognises one of the most important principles of company law, that the company is a separate legal entity as enshrined in

⁸

[1902] AC 83

*Salomon v Salomon & Co Ltd.*⁹ Therefore, if any wrong is done to the company, it is the company which should bring an action.

The rule can cause severe hardship to the minority. They are not only prevented from seeking redress to an alleged wrong to the company but are prevented from complaining about internal irregularities. The minorities position is further made difficult by the rule in *Percival v Wright*¹⁰ whereby the courts have held that directors owe duties only to the company and not to individual shareholders.¹¹ In this case the directors of a company purchased some shares from a member without revealing that negotiations were in progress for the sale of all shares in the company at a higher price. In fact no sale ever took place. The member concerned sought to have his sale to the directors set aside for non-disclosure. It was held that the sale should not be set aside since the directors owed no fiduciary duties to individual members.

However, where it can be shown that the directors had undertaken to act as the shareholders agents in the transaction, then, the directors will owe them the ordinary fiduciary duties arising from that agency relationship.¹² In situations

⁹ [1897] AC 22. See also *Lee v Lee's Air Farming Ltd* [1961] A.C. 12, *Macaura v Northern Assurance Co. Ltd* [1925] AC 619

¹⁰ [1902] 2 Ch 421.

¹¹ See also *Dawson International Plc v Coats Patons Plc* (1989) 5 BCC 405.

¹² *Allen v Hyatt* (1914) 30 TLR 444; *Briess v Woolley* [1954] AC 333

involving takeover bids, directors generally owe a duty to act in good faith and in the best interest of the company. However, the courts have held that in advising members of the company, whose shares are to be sold in a takeover bid, the directors do owe a duty to the shareholders to be honest and not to mislead them.¹³

The articles of most companies usually vest the power of management with the directors. An example of such an article is Article 73 of Table A. Article 73 reads as follows:

The business of the company shall be managed by the directors who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of directors which would have been valid if that regulation had not been made.

Articles such as Article 73 bestow tremendous power on the board and takeaway managerial powers from the general meeting.¹⁴ The power to sue or not to sue in the company's name would be decided by the board of directors. At one time it was believed that as a result of *Marshall Valve Gear Co Ltd v Manning, Wardle &*

¹³ *Gething v Kilner* [1972] 1 All ER 1166; *Heron International Ltd v Lord Grade and Associated Communications Corporation Plc* [1983] BCLC 244; *Coleman v Myers* [1977] 2 NZLR 225

¹⁴ *Automatic Self-Cleansing Filter Syndicate Co v Cuninghame* [1906] 2 Ch.34; *Quin & Axtens v Salmon* [1909] AC 442. But for contrary views see Goldberg (1970) 33 MLR 177; Blackman (1975) 92 S.A.L.J 286 and Sullivan (1977) 93 LQR S69.

Co. Ltd,¹⁵ the general meeting can commence an action without the approval of the board, despite an article similar to Article 73. However in a recent case, *Breckland Group Holdings Ltd v London & Suffolk Properties Ltd*,¹⁶ Harman J indicated that he considered *Marshall's Valve Gear Co Ltd v Manning, Wardle & Co Ltd* was "overwhelmed by the weight of authorities" against it. An article similar to Article 73 prevents shareholder intervention in matters relating to management and can put immense power in the hands of the board and it is obvious therefore the rule in *Foss v Harbottle* when added to the force of Article 73 can work as a severe setback for the minority. Again, where the wrongdoers control the majority votes at a general meeting, irregularity in the operation of the company may be made binding on the majority by the passing of a simple majority vote. Such is the severity of the rule that the minority in a company will be completely be in the hands of the majority if there were no exceptions to the rule. However four exceptions have been evolved by the courts to protect the minority in the company but as Professor Farrar, has remarked this is an area of the law "where obscurity and inconsistency are the order of the day" and the latest judicial pronouncements, instead of providing clarification have in fact "further confused an already blurred picture".¹⁷

¹⁵ [1909] 1 Ch 267.

¹⁶ [1989] BCLC 100.

¹⁷ J.H Farrar, N.E Furey & B.M.Hannigan, *Farrar's Company Law*, 3rd ed. London, Butterworths, 1991 p 445.

A. The Exceptions in general

- i) Ultra vires acts: in cases where the acts complained of are wholly ultra vires the company or association, the rule has no application because there is no question of the transaction being confirmed by any majority;
- ii) Personal rights: where the personal and individual rights of the shareholders have been invaded, the rule has no application at all.
- iii) Special majorities: an individual member is not prevented from suing if the matter is one which could be validly be done or sanctioned, not by simple majority of the members but only by some special majority;
- iv) Fraud on the minority: where what has been done amounts to what is generally called in the cases as “a fraud on the minority” and the wrongdoers themselves are in control of the company, the rule is relaxed in favour of the majority shareholders’ action on behalf of themselves and all others;

Before studying the impact of s 181 of the Companies Act 1965, it is necessary to see the extent to which the four exceptions protect the minority at common law. The exceptions appear to be compartmentalised and unless the minority finds himself within the confines of one compartment, he may not succeed. A closer look at the exceptions will show that there are some major limitations:

- i) The ultra vires exception in a true sense is not an exception to the rule in *Foss v Harbottle* because if a company does not have the power to carry out certain transactions, then the transactions cannot be ratified by the majority. At common law, the company cannot enforce nor can its members ratify an ultra

vires¹⁸ transaction and any shareholder may apply for an injunction to restrain the company from proceeding with the transaction. At common law where a company or its officers enter into an ultra vires act or transaction the minority are not prevented in suing either the company or the board. Section 20 of the Malaysian Companies Act 1965 has changed the common law position to a large extent. Section 20(1) deals with acts of the company in excess of the powers conferred by the objects clause in its Memorandum. It provides in effect that neither a company nor a third party may rely on the ultra vires doctrine to avoid any act, transaction or conveyance. However by virtue of section 20(2)(b), any member of the company may rely on the company's lack of capacity or power in a suit against the company's officers. This in effect makes the common law exception irrelevant and a member can sue relying on section 20(2). The member's action under section 20(2) must be in the derivative form..¹⁹ It is subject to the tedious procedure and the rules of the derivative action.

- ii) It may be a personal right of a member is infringed. Personal rights may be conferred by the Companies Act, the constitutional documents or in a separate contract. The member when enforcing such a right is enforcing a right personal to him. Classic personal rights are voting rights and rights to

¹⁸ *Ashbury Railway Carriage & Iron Co v Riche* (1875) L.R. 7 H.L 653; *Re Jon Beauforte (London) Ltd* [1953] Ch. 131.

¹⁹ *Smith v Croft (No.2)* [1988] Ch 114.

dividends as provided in the company's articles.²⁰ Personal rights are not in the true sense an exception to the rule in *Foss v Harbottle*. In *Residues Treatment and Trading Co Ltd v Southern Resources Ltd*²¹, King CJ of the Supreme Court of South Australia stated:

A member's voting rights and the rights of participation which they provide in the decision making of the company are a fundamental attribute of membership and are rights which the member should be able to protect by legal action against improper diminution. The rule in *Foss v Harbottle* has no application where individual membership rights as opposed to corporate rights are involved.

Sometimes it is not clear whether an infringement is a personal right or a corporate right or both. Where doubts of this nature arise this exception is not an effective remedy for the members. The orthodox view is that a member cannot enforce rights enshrined in the articles, unless they are "membership rights" that is affecting him personally. In 1957, Lord Wedderburn in his seminal article²² on *Foss v Harbottle* pointed to *Quin & Axtens Ltd v Salmon*²³ where the House of Lords appeared to uphold the principle that a member could enforce rights in the articles even though it was not a membership right. Despite Lord Wedderburn's strong arguments the orthodox

²⁰ According to *Pender v Lushington* (1877) 6 (Ch.D.70), members have the right to enforce provisions in Articles entitling them to have their votes counted at a general meeting. Similarly they have the right to enforce payment of a declared dividend: *Wood v Odessa Waterwork Co.* (1889) 42 Ch.D.636.

²¹ (1988) 14 ACLR 375

²² Wedderburn KW, "Shareholders' right and the Rule in *Foss v Harbottle*" (1957) CLJ 194 and (1958) CLJ 993.

²³ [1909] AC 442.

view is generally accepted as prevailing and continues to be espoused in the leading texts on Company Law.²⁴ This controversy²⁵ is not in the minorities interest and the difficulty that sometimes arises in distinguishing membership rights and outsider rights can cause hardship to the minority. This problem is to an extent overcome by section 181 though the section creates its own difficulties. This will be discussed at a later stage.

- iii) The rule does not apply where the matter in question requires not a simple majority but some special majority or some special procedure. The only option for the majority in such cases is either to follow strictly the articles or to alter the articles. Ratification by an ordinary resolution will be ineffective. Thus in *Edwards v Halliwell*,²⁶ the minority successfully restrained an attempt by the majority to increase member's contribution without obtaining the two thirds majority as required under the rule. Again in *Quin & Axtens Ltd v Salmon*, the articles required specific transactions to have the consent of both Managing Directors. A transaction which did not satisfy the above requirement was held to be non-ratifiable by the majority. As a measure of minority protection, this exception will be unable to render protection to the

²⁴ L.C.B Gower, *Principles of Modern Company Law*, 5th ed. London, Sweet & Maxwell, 1922, p 286-287; J.H Farrar, N.E Furey & B.M Hannigan, *Farrar's Company Law*, 3rd ed. London, Butterworths, 1991, p 126 – 127.

²⁵ See Goldberg (1970) 33 MLR 177; (1972) 35 MLR 362; (1985) 48 MLR 158 Blackman (1975) 92 S.A.L.J 286; Sullivan (1977) 93 LQR 569; Drury, R.R., [1986] CLJ 219; Gregory, Roger (1981) 44 MLR 526

²⁶ [1950] 2 All ER 1064.

minority where the majority are able to achieve the majority required for the particular resolution. Again if the majority could control at least 75% of the votes they can alter the articles.

iv) In respect of minority protection the most important exception of the *Foss v Harbottle* rule is where there is fraud on the minority and the wrongdoers are in control. This exception which is in fact the true exception to the rule in *Foss v Harbottle* has caused the most amount of litigation and also caused many other problems. Under this exception when a wrong amounting to a fraud on the minority is done to the company, a shareholder may bring an action on behalf of the company. Such an action is known as a derivative action. However to bring a derivative action, the shareholder must satisfy the following requirements:

a) the acts complained of amount to a fraud on the minority and the plaintiff must establish a prima facie case of fraud on the minority before he is allowed to proceed.

b) the shareholder must establish that the wrongdoers control the company and refuse to remedy a wrong done to the company. This is generally the case where the general meeting or the board of directors have control over the votes actually cast by the wrongdoers.

The main problems associated with the above requirements are the meaning and interpretation given to the two words 'fraud' and 'control', the issue of locus standi or standing to bring a derivative action and the issue of indemnity for the costs of a derivative action. The law on these issues are very uncertain and ambiguous and can cause hardship to the minority.

B. Concept of fraud

As to the concept of fraud, it is categorised as either common law fraud or equitable fraud. Common law fraud involves actual deceit or dishonesty. Equitable fraud is an application of a broader principle developed by the courts of equity which prevented the holders of various types of powers from exercising their powers improperly. 'Fraud' in the context of 'fraud on the minority shareholders of a company' means an abuse of power whereby the majority secures an unfair gain at the expense of the minority. In fact in certain circumstances the company itself can be the injured party instead of the minority. Fraud has been given a wide meaning and the following examples prove to that effect:

- i) Where the majority usurp the corporate property or opportunities to themselves or to some other person. In *Cook v Deeks*,²⁷ the directors of a company negotiated a contract on behalf of the company and then diverted it to another company they had formed for this purpose. The directors who were

²⁷ [1916] 1 AC 554.

also the majority shareholders wrongfully ratified their expropriation of the company's property.

- ii) Where the majority expropriate the minority's shareholdings. In *Brown v British Abrasive Wheel Co*,²⁸ a company required further capital. The majority shareholders held 98% of the issued capital but would only provide further capital if they could buy up the remaining issued shares. The minority shareholders refused. A special resolution to alter the articles was passed permitting the majority shareholders to expropriate the shares of the minority. It was held that the alteration was a fraud on the minority.
- iii) Where the majority use their controlling power to prevent an action being brought against themselves. In *Estmanco (Kilner House) Ltd v Great London Council*,²⁹ the Council formed a company which owned a block of flats. The company decided to sell long leases to the flats. The purchasers of each flat were given one share which carried no vote until all the flats were sold. In the meantime, the Council retained the sole voting rights. Before all the flats were sold, political control of the Council changed. The Council refused to sell the flats. The company then brought an action against the Council to prevent it from pursuing the changed policy. The Council by using its voting rights at a meeting of the company instructed the directors to discontinue the action. A

²⁸ [1919] 1 Ch 290.

²⁹ [1982] 1 All ER 437.

minority shareholder attempted to carry on the action in the name of the company and the court held that there was fraud on the minority. *Megarry V-C* said:

I feel little doubt that the Council had used its voting power not in order to promote the best interests of the company but in order to bring advantage to itself and disadvantage to the minority.

- iv) Where a majority member has obtained a benefit at the expense of the company. In *Daniels v Daniels*,³⁰ the plaintiffs were minority shareholders in the third defendant company. The first and second defendants were majority shareholders and directors, upon whose instructions the company sold certain land to the second defendant below its market value. The plaintiffs brought an action against the defendants for this alleged breach. The defendants applied to strike out the statement of claim as disclosing no cause of action because no fraud was alleged against the defendants concerned. Templeman J nevertheless allowed the minority shareholder to maintain the action on the basis that 'a minority shareholder who has no other remedy may sue where directors use their powers intentionally or unintentionally, fraudulently or negligently in a manner which benefits themselves at the expense of the company.'

and Ors,³¹ Gopal Sri Ram JCA considered the cases and held that:

Although the real meaning of the phrase is unclear in the sense that one is unable as yet to determine its boundaries with any precision, an examination of the authorities leaves us to conclude that the following propositions may be taken as settled and beyond question:

(1) the expression 'fraud on the minority' is a term of art and has absolutely nothing whatsoever to do with actual fraud or deception at common law;

(2) lack of probity comes within the ambit of the expression. But it is not necessary to prove dishonesty before a minority shareholder may claim relief under the doctrine; and

(3) it is sufficient for the plaintiff in an action grounded upon the doctrine to show that those wielding majority control abused the powers vested in them in the sense that they used or omitted to use their powers for an oblique or collateral motive or purpose and not for the true purpose for which the power was entrusted to them either by the memorandum and articles of association, by statute or the general law.

Generally, it is difficult to define precisely the concept of fraud and this is an obstacle for the minority shareholder. The courts would have to rely on the facts before them to establish whether there was fraud. The courts must be careful because by giving too wide an interpretation to the word 'fraud', they may be encroaching on a shareholder's right to vote in whatsoever manner he wishes. This is because the right to vote is a proprietary right³²

³¹ [1995] 3 MLJ 417

³² *North-West Transportation Co Ltd and Beatty v Beatty* (1887) 12 App Cas 589; *Peter's American Delicacy Co Ltd v Heath* (1939) 61 CLR 457; *Mills v Mills* (1938) 60 CLR 150.

C. Wrongdoer control

Then there is the issue of proving 'wrongdoer control', before the minority shareholder can bring a successful derivative action. Again, there is no clear authority on what 'wrongdoer control' means and the law is in a state of authoritative chaos.³³

One major hurdle faced by minority shareholders, arising from the concept of 'control' and which clearly shows the reluctance of the courts to intervene in a company's affairs is the case of *Smith v Croft (No.2)*.³⁴ In this case, the plaintiff shareholders brought an action against the directors of the company on the grounds that they had acted ultra vires or had breached their fiduciary duties by paying themselves excessive salaries, had made improper payments to management companies they were associated with and also had entered into transactions involving the provision of financial assistance by the company in connection with the acquisitions of its shares in contravention of section 42 of the U.K Companies Act 1981 (now sections 151 - 152 of the Companies Act 1985). In *Smith v Croft (No.2)*, Knox J was of the view that if the majority of the shareholders who were independent of the wrongdoers decided not to pursue with the legal suit, then the plaintiff minority shareholder, even though he may have locus standi to sue, must not be allowed to proceed with the suit. However, the difficulty the courts would face is trying to establish who the 'appropriate independent organ' is. Knox J stated in the above case that the 'appropriate independent organ' would vary according to the constitution of

³³ Loh Siew Cheang, *Corporate Powers: Controls, Remedies and Decision Making*, Malayan Law Journal, Kuala Lumpur, 1996, p 592.

³⁴ [1988] Ch 114.

the company concerned and the identity of the defendants. This would mean that in certain situations a preliminary hearing has to be carried out to establish who the 'independent organ' is. At times this might lead to lengthy and complicated trial. At most, the *Smith v Croft (No.2)* procedure will only be applicable in cases where the issue of an independent organ can be easily assessed and it can be shown that the minority shareholder has the backing of the majority of the independent shareholders, that is all those not in the alleged wrongdoers' camp.³⁵ Then there is the issue of what test to apply to determine shareholder independence. Most probably a test similar to that postulated for alteration of articles in *Allen v Gold Reefs of West Africa Ltd*,³⁶ that is whether there was a substantial risk of the votes having being cast in order to support the defendant wrongdoers as opposed to obtaining a benefit for the company.³⁷

Other than determining shareholder independence, there is the question of burden of proof that is required of minority shareholders to establish the lack of independence of the particular 'independent organ' concerned. Unless the minority shareholders can satisfy the burden of proof by producing sufficient evidence on the balance of probabilities to show that the votes of the 'independent

³⁵ Prentice DD, 'Shareholder Actions: The rule in *Foss v Harbottle*' (1988) 104 LQR 341 at p 345.

³⁶ [1900] 1 Ch 656.

³⁷ Stamp M, 'Minority Shareholders: another nail in the coffin' (1988) 9 Co Law 134 at p 135

organ' were cast to support the wrongdoers, they would not be able to succeed in their derivative action.³⁸

It is obvious that by leaving the decision to the independent organ, there is the danger that even if fraud is proven and wrongdoers are in control, no action can be taken if the majority of the independent shareholders refuse to do so. This could result if the majority shareholders of the company manage to persuade or convince the independent shareholders that it is not in the best interest of the company for them to pursue their action. This makes the law absurd because it seems to recognise that whenever fraud on the minority is alleged, it is better at the initial stage of the action itself, for the independent shareholders to decide whether a fraud has been committed.³⁹

Further, as was rightly pointed out by D.D.Prentice,⁴⁰ the reasoning of Knox J would most probably also apply to ultra vires or illegal transactions. Therefore even though these transactions cannot be ratified by the shareholders, the shareholders may resolve not to pursue a right of action arising out of them. This, D.D.Prentice points out, is equivalent to ratification, that is indirectly allowing or permitting shareholders to vote that no minority shareholder's action should be

³⁸ *Ibid* at p 135

³⁹ *Ibid*

⁴⁰ Prentice, *Supra* n 35 at p 344

brought. A learned writer, L.S.Seally says,⁴¹

Has company law really been brought to this level of absurdity? What advantage is there to anyone in pretending that the real issues do not matter, and requiring the judge to speculate, on the sketchiest of evidence, about where "control" lies, which shareholders can be supposed "independent," and how such shareholders might be likely to vote at a hypothetical meeting which might itself have to reach decisions on no better evidence? If the Court of Appeal in *Prudential* thought that their ruling would shorten and simplify litigation and reduce costs, the sorry history of *Smith v Croft* suggests otherwise.

The courts would also have to contend with the question of whether control means 'de facto' or 'de jure' control. Here again the opinion of judges and the courts vary. Vinelott J in *Prudential Assurance Co Ltd v Newman Industries Ltd (No2)*⁴² was prepared to accept that control existed where there was no real possibility that the issue would be put to the shareholders in a way which would enable them to exercise a proper judgment on the issue. In his opinion, the exception would apply whenever the defendants were shown to be able by means of their manipulation of their position in the company to ensure that an action was not brought by the company. Vinelott J pointed out to a number of cases wherein the above situation had arisen.⁴³ However, in the Court of Appeal, the Lord Justices did not accept this view. The Court of Appeal took a conservative view of control. The Court of Appeal criticised Vinelott J's definition of de facto control and said that

⁴¹ Sealy LS, 'More Bleak News for the Minority Shareholder' (1987) CLJ 46 at p 400

⁴² [1981] 1 Ch 257

⁴³ *Pavlides v Jensen* [1956] 1 Ch 565; *Atwool v Merryweather*, 37 LJ Ch 35, *Kerry v Maori Dream Gold Mines Ltd* (1898) 14 TLR 402

because of that definition , he had to hear the thirty day action before deciding whether the exception applied. Tremendous cost was involved and in fact at the end of the thirty days the substantive matter had in actual fact been heard. The Court of Appeal however said that control embraces a broad spectrum extending from an overall absolute majority of votes at one end to a majority of votes at the other end made up of those likely to be cast by the delinquent plus those voting with him as a result of influence and apathy.⁴⁴

Further, the Court of Appeal was of the opinion that when the issue of control or no control is raised as a preliminary point to decide whether it is a case which should proceed to full trial of the alleged misconduct by the majority, the court will not be in a position to investigate the misinformation of shareholders by the wrongdoers. The court should therefore adjourn the case so that a general meeting of shareholders may be held to investigate the allegations of misinformation of shareholders. The main problem here is that the general meeting may not be in a position to investigate and verify disputed facts. Basically, what the Court of Appeal's decision seems to establish is that control means having a firm majority of votes.⁴⁵

Then, there is the issue of where fraud is pleaded but control is equally held between the plaintiff and the defendant. In *Ting Chong Maa v Chor Sek*

⁴⁴ [1982] Ch 204 at p 219 per Cumming - Bruce, Templeman and Brightman LJ.

⁴⁵ Chris Shepherd, *Company Law Textbook*, 7th ed. London, HLT Publications, 1995, at p.249

Choon,⁴⁶ the plaintiff and the defendant had owned the issued share capital of the company in equal shares. The plaintiff had alleged that the defendant had obtained secret profits by diverting the company's customers to another firm. The plaintiff sued on behalf of the company, the director for accounts and inquiries and payments of sums of money. The defendant had applied for the statement of claim to be struck on the ground that plaintiff had no locus standi. The court held that there had been no clear majority so that the plaintiff could not be a minority shareholder or the defendant the majority shareholder. However, the court said that the action should be allowed to proceed because the defendant being the managing director and all things being equal, he would prima facie have had de facto control of the company.

Similarly, later in England, in the case of *Barrett v Duckett & Ors*,⁴⁷ Sir Mervyn Davies held that a fifty per cent shareholder who was complaining about the behaviour of the other fifty per cent shareholder cum director, was a minority shareholder for the purposes of a derivative action.

The above two cases show the inconsistency of the courts as far as the requirement of wrongdoer control with regard to the fraud exception to the rule in *Foss v Harbottle*. But then they seem to support the view of Jessel M.R. in *Russell v*

⁴⁶ [1989] 1 MLJ 477

⁴⁷ [1993] BCC 778

Wakefield Waterworks Co.,⁴⁸ where he suggested that the rule in *Foss v Harbottle* is a “general one and does not apply to a case where the interests of justice require the rule to be dispensed with”. The view of Jessel M.R. can be appreciated too in situations where a minority fails to plead fraud, as in the case of *Daniels v Daniels*. The court recognised the fact that sometimes fraud is hard to plead and difficult to prove but nonetheless allowed the minority shareholder’s action on the grounds of wrongdoer control. In a nutshell, ‘it is better to run the risk of interfering with the internal management of a company than to run the risk of denying justice to a party by refusing to hear his case’.⁴⁹

D. Locus standi

Another debatable issue with the derivative action, is the question of whether the minority shareholder has a standing or locus standi to bring an action alleging fraud on the minority. The law is not clear on this and the courts are divided in their opinion. In *Regina v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Business Ltd*⁵⁰ the Court of Appeal stated that the issue of locus standi should be decided in isolation before the full trial of the matter. However, on appeal, the House of Lords overruled the decision of the Court of Appeal and said that it was wrong to treat the question of locus standi as a threshold issue. However, later, a differently constituted Court of Appeal in the case of

⁴⁸ (1875) LR 20 Eq 474

⁴⁹ *Peck v Russel* (1923) 4 FMSLR 32 per Reay, J.C. at p 46

⁵⁰ [1982] AC 617

Prudential Assurance Co Ltd v Newman Industries Ltd (No 2), was of the view that to allow the minority to pursue a derivative action on the grounds of fraud on the minority would be wrong and unjust because it will involve a lengthy trial. It is therefore best that the question of standing be decided as a preliminary issue. This will save the company being involved in unnecessary legal action and save time and expense. The other view is that in allowing the minority to prove that they have locus standi to bring an action, the law might deprive them of remedying a wrong done to the company. This is because the preliminary trial itself may be time consuming and very expensive for the minority shareholders concerned.

Although subsequent English cases like *Smith v Croft and Estmanco (Kilner House) Ltd v Greater London Council* have followed the principle as stated in *Prudential Assurance Co Ltd v Newman Industries Ltd*, the courts in Australia have refused to accept the view postulated by the English Court of Appeal as laying down an universal principle. In *Hurley and Anor v BGH Nominees Pty Ltd and Ors*,⁵¹ King CJ said:

I do not think that the procedure suggested in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 could be applied in all cases. In many cases a hearing to determine whether there was a prima facie case would be almost as long as a full trial and a good deal less satisfactory. In such cases the only reasonable course may be to determine the issue of standing, if raised as a preliminary issue, on the assumption that the allegations in the statement of claim are correct. Even on the basis it may be desirable in certain cases to distinguish sharply between the issue whether the allegations in the statement of claim, if true, disclose legal liability to the company and the issue whether the plaintiff has standing to enforce any liability which

⁵¹ (1983) 2 ACLR 497

might be disclosed. It seems to me that the procedure for the determination of the issue of locus standi ought to be determined in each individual case according to what appears to be just and convenient in the circumstances of that case.

The above approach has been consistently followed in other Australian cases. In *Eromanga Hydrocarbons NL v Australis Mining NL & Ors*⁵² and *Biala Pty Ltd v Mallina Holdings Ltd*,⁵³ the courts held that the plaintiff need only show a prima facie case and there was no necessity of determining the question of locus standi.

Malaysian cases decided after *Prudential Assurance Co Ltd v Newman Industries Ltd* appear to show a leaning towards a preliminary hearing as stated by the Court of Appeal in the *Prudential Assurance Co Ltd v Newman Industries Ltd* case. *Huang Ee Hoe & Ors v Tiong Thai King & Ors*⁵⁴ is one such case. The preliminary hearing point was also dealt with by Jemuri Serjan CJ (Borneo) in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors*⁵⁵. His Lordship said:⁵⁶

Lord Templeman's observations [in the *Prudential Assurance* case] clearly enjoin the courts in such cases as the present that this crucial issue must first be determined at a preliminary hearing so that if the plaintiffs fail then *cadit quaestio*. What happened before Vinelott J's court happened also in the instant case though, admittedly, there was a hearing on a point of law on a different issue altogether and there was no argument and no direction by the

⁵² (1988) 14 ACLR 486

⁵³ (1988) 6 ACLC 1138

⁵⁴ [1991] 2 MLJ 51

⁵⁵ [1995] 1 MLJ 241

⁵⁶ *Ibid* at p 255

learned judge to have this crucial issue argued and witnesses examined before him in order to determine that issue.

His Lordship further said.⁵⁷

...we are satisfied in our own minds that the learned judge had erred in the same way as Vinelott J in [the *Prudential Assurance* case] in not dealing with the question whether the plaintiffs' case comes within the exception to the rule in *Foss v Harbottle*'s case. His Lordship's decision on the locus standi, therefore, is not definitive and conclusive as there were no adequate and comprehensive arguments on that issue to enable him to do so.

At least one Malaysian judge has expressed support for Vinelott J. In

Tan Guan Eng & Anor v Ng Kweng Hee & Ors,⁵⁸ Edgar Joseph Jr J said obiter.⁵⁹

For myself, I would respectfully agree with the view of Vinelott J for, to quote Mr Walter Woon in his admirable work in Company Law at p 240, 'There seems nothing wrong in principle with Vinelott J's reasoning in this respect. After all, if the wrongdoers manage to obtain the approval of the majority by fraud or duress, it should surely be necessary to allow a minority member to bring an action against them even if the company will not.'

In this context it is pertinent to refer to an old Malaysian case, *Peck v Russel*⁶⁰ decided more than 50 years before the Court of Appeal decision in *Prudential Assurance Co Ltd v Newman Industries Ltd (No.2)*. In that case the Court

⁵⁷ *Ibid* at p 258

⁵⁸ [1992] 1 MLJ 487

⁵⁹ *Ibid* at p 500

⁶⁰ (1923) 4 FMSLR 32

of Appeal of the Malay States ordered that there should be a trial of all the facts before the question of locus standi was decided. Woodward CJC held:⁶¹

I do not think a difficult point like this should be decided at this stage. I think it would be much safer to decide it after all the facts have been investigated. The court will then be in a better position to judge whether the rule in *Foss v Harbottle* should be applied, or whether the case is one of the exceptions.

E. Costs

Another limitation for the minority shareholder, is the cost of bringing a derivative action. In *Wallersteiner v Moir*,⁶² the English Court of Appeal held that it was open to the court in a minority shareholders action to order that the company should indemnify against the costs incurred in the action even if the action was unsuccessful. The Court of Appeal's reasoning was based on the fact that trustees⁶³ or agents⁶⁴ who pursue a legal action on behalf of their trusts or principals respectively are generally indemnified for the costs involved in bringing any action to protect the trust or the interest of the principals. Buckley L.J. in the Court of Appeal stated:⁶⁵

... where a shareholder has in good faith and on reasonable grounds sued as plaintiff in a minority shareholder's action, the benefit of which, if successful, will accrue to the company and only indirectly to the plaintiff as a member of the company and which it would have been reasonable for an independent board of directors to bring in the company's name, it would, I think, clearly

⁶¹ *Ibid* at p 45

⁶² [1975] 2 WLR 389

⁶³ In *re Beddoe* (1893) 1 Ch 547

⁶⁴ *Pettman v Keble* (1850) 9 C. B 547

⁶⁵ *Supra* n 58 at p 407H

be a proper exercise of judicial discretion to order the company to pay the plaintiff's costs.

But, in *Smith v Croft*, Walton J considered that this would impose an unfair burden on a company. The judge was of the view that it was necessary for the plaintiff to show that he lacked the resources to finance the actions. If he was in reality a 'nominal plaintiff' representing a group of shareholders then the resources of these shareholders should be taken into account. He also said that normally only a percentage of these costs should be paid as this would provide the plaintiff with the incentive to pursue the matter diligently to recover the balance.

Although both the above cases seem to suggest that some sort of compensation or indemnity should be provided for minority shareholders, there are still many other problems that a court would encounter in trying to establish a procedure whereby a proper system of compensation or indemnity could be set up to help minority shareholders. In the writer's opinion this would lead to preliminary trials similar to the issues of establishing locus standi or independent shareholder control. The very fact of holding a preliminary trial and establishing whether a minority shareholder is entitled to costs may discourage the minority shareholders from pursuing a derivative action. They may not be in a position or have the means to pay for the cost of the preliminary trial and may not stand to gain much at the end of the day. However, much would depend on the facts of each case.

Lord Denning M.R.⁶⁶ in the Court of Appeal did propose a procedure whereby the minority shareholder can apply ex parte to the master for directions with the support of a counsel's opinion as to whether there is a reasonable case or not. He said that this preliminary application should be simple and inexpensive and must not lead to a mini trial. But then this is only a general statement, because there is no assurance that every application will be simple and inexpensive.

Then there is the issue of how the costs is to be imputed. Nothing concrete was put forward by the Court of Appeal, although Lord Denning M.R. and Buckley LJ suggested that costs should be allowed at least on a common fund basis. Buckley LJ went further and said that where necessary the costs should be given on an indemnity basis.

It is obvious from the above discussion that the lack of clear authority on the question of indemnity for costs may be a real hindrance for a minority shareholder to bring an action under the rule in *Foss v Harbottle*.

F. Ratifiable and non-ratifiable wrongs

An unresolved problem in relation to the derivative action is the question of ratifiable and non -ratifiable wrongs. Ratification would basically exonerate or relieve wrongdoers, generally the directors, from being made liable for breach of their duties

⁶⁶ *Supra* n 58 at p 397D-E

towards the company.⁶⁷ Illegal or ultra vires acts, however, are non-ratifiable. The question of ratification has given rise to many difficult debatable issues. The general principle is ratification of any act done by wrongdoers by the general meeting would prevent the general body of shareholders later from bringing a derivative action.⁶⁸ However, whether the general meeting can ratify such a wrong or not is questionable. Given that companies are generally managed by the board of directors, would it not be proper for the board of directors to ratify any act done?

The questions to be addressed here is, what are the limits on the majority's power to ratify breach of directors duties, when would this ratification be considered a fraud on the minority and which of the shareholders of the company are entitled to vote in a meeting for ratification of the breach of the directors duties. The writer will endeavour to answer these questions through some of the following case examples. A classic case example is the case of *North-West Transportation Co. Ltd v Beatty*,⁶⁹ wherein one of the company's directors sold a ship he owned to the company at a profit. Here there was a clear conflict of interest between the director's personal interest and his duties to the company. A minority shareholder took an action to set aside the transaction. However, a shareholders' meeting was convened and the majority shareholders voted and ratified the contract. The Privy Council

⁶⁷ This is especially true in small private companies. In this type of companies the directors are generally the majority shareholders.

⁶⁸ *MacDougall v Gardiner* (No.2) (1875) 1 Ch.D 13; *Burland V Earle* [1902]. AC 94.

⁶⁹ (1887) 12 App Cas 589.

stated that a resolution of the shareholders, passed by a simple majority, was sufficient to render the contract between the director and the company non-voidable.

The above case raises the question as to whether the director, who held a sufficient number of shares to control the general meeting, was entitled to vote. The Privy Council was of the opinion that every shareholder has a perfect right to vote upon any question even though he may have a personal interest in the subject matter of the resolution.⁷⁰

The *North-West Transportation Co Ltd v Beatty* case clearly shows the potential of interested parties (like the director) to easily use the general meeting to control any act of ratification. This control may of course arise, either by way of actual votes or the use of the proxy system or by way of manipulation or use of pressure on shareholders.⁷¹

⁷⁰ This is consistent with longstanding authority that a shareholder's right to vote is a proprietary right: *Pender v Lushington* (1877) 5 Ch D 70.

⁷¹ However, there are now provisions in the Companies Act 1965 to protect the manipulation of corporate control and decision making. Some of the provisions are as follows:

- i) S 69E – Substantial shareholder to notify company of his interests.
- ii) S 69F – Substantial shareholder to notify company of change in his interests.
- iii) S 69G – Person who ceases to be substantial shareholder to notify company.
- iv) S 69L – Company to keep register of substantial shareholders.
- v) S 69O – Power of company to require disclosure of beneficial in its voting shares.
- vi) For the purposes of the above sections, s 6A defines what is meant by “Interests in shares”.

Although the law imposes strict fiduciary duties on the directors,⁷² the mere fact of allowing directors to vote in a general meeting would at times allow them to be absolved from any wrongdoing to the company. If such be the case, the very purpose of the formulation of the fiduciary duties on directors to act in the best interest of the company is a waste of taxpayers' money.

Generally, if the directors have acted in their own interests rather than the interests of the company, then any ratification by the majority shareholders can be challenged by the minority shareholders: *Ngurli Ltd v McCann*.⁷³ In *Bamford v Bamford*,⁷⁴ the court held that the general meeting can ratify an improper exercise of powers by directors provided the directors honestly believed that their actions are in the best interest of the company. The problem in this case was that the court failed to consider the fact that the majority may be committing a fraud on the minority by ratifying the directors improper exercise of power.

⁷² Duty to act honestly duty to exercise powers for a proper purpose, duty to retain discretion duty to avoid conflict of interest duty to act with care and diligence.

⁷³ (1953) 90 CLR 425

⁷⁴ [1970] Ch 212. In this case, the directors of Bamfords Ltd allotted shares to Burgers for the purpose of preventing a takeover of the company. Shareholders in favour of the takeover applied to court for a declaration that the allotment to Burgers was invalid. A general meeting of Bamford's Ltd was called to pass a resolution ratifying and approving the allotment of shares. The Court of Appeal held that the directors had made full disclosure of all the circumstances relating to the share issue to the general meeting and therefore their actions were capable of being ratified by it and the directors excused from liability.

In *Winthrop Investments Ltd v Winns Ltd*,⁷⁵ the New South Wales Court of Appeal, in considering the effect of a resolution of the general meeting of shareholders, dealing with an improper exercise of powers by directors, was of the opinion that ratification of such a transaction was possible provided full and frank disclosure of all material facts, including the fact that there is a breach of duty, had been made to the shareholders.

The above position is further fortified in the case of *Residues Treatment and Trading Co Ltd v Southern Resources Ltd*,⁷⁶ wherein King CJ by way of obiter dictum stated that shareholders have a personal right against the dilution of voting power by the issue of shares to achieve an improper purpose and reiterating that the voting power of the majority may not be exercised in a way which is oppressive of or in fraud of minority shareholders.

There are also conflicting authorities as to whether the majority in general meeting can ratify a director's breach of duty in not exercising proper skill and care (negligence of the director). In *Pavlides v Jensen*,⁷⁷ the court held that since negligence does not fall under any of the exceptions in the rule in *Foss v Harbottle*, therefore no action can be brought against the directors by the majority shareholders.

⁷⁵ [1975] 2 NSWLR 666. The facts of this case were similar to *Bamford v Bamford*, except that the directors in *Winthrop Investments Ltd* sought approval from the general meeting before actually issuing the shares.

⁷⁶ (1988) 14 ACLR 569.

⁷⁷ [1956] Ch 565

But then later in the case of *Daniels v Daniels*,⁷⁸ the court held that even though there is no fraud, the directors cannot be allowed to benefit from their negligence. The court distinguished the case of *Pavlides v Jensen* on the basis that in *Pavlides v Jensen*, the directors did not make any profit from their negligence. Templeman J in *Daniels v Daniels* stated:

The authorities which deal with simple fraud on the one hand and gross negligence on the other do not cover the situation which arises where, without fraud, the directors and majority shareholders are guilty of a breach of duty which they owe to the company, and that breach of that duty not only harms the company but benefits the directors. In that case it seems to me that different considerations apply. If minority shareholders can sue if there is fraud, I see no reason why they cannot sue where the action of the majority and the directors, though without fraud, confers some benefit on those directors and majority shareholders themselves. It would seem to me quite monstrous- particularly as fraud is so hard to plead and difficult to prove- if the confines of the exception to *Foss v Harbottle*, were drawn so narrowly that directors could make a profit out of their negligence.

The above case illustrations no doubt show that the courts do impose certain limitations on the shareholders power to ratify and prevent abuse of power. This is important, otherwise, the power of ratification combined with the rule in *Foss v Harbottle* will result in the creation of a legal regime that would perpetuate injustice toward minority shareholders.⁷⁹

⁷⁸ [1978] 2 W.L.R 73 at p 79-80

⁷⁹ Friedman S, 'Ratification of Directors' Breaches' (1992) 10 C and SLJ 252 at p 255.

G. Director's breach of fiduciary duties

As to which is the right organ of the company to ratify any act done, the problem can be seen with reference to directors breach of fiduciary duty in misappropriating corporate opportunities. The fiduciary duty imposed here is rather strict. In *Regal Hastings Ltd v Gulliver*,⁸⁰ the court held that the directors could protect themselves if they had obtained the approval of the company's shareholders in a general meeting. But then, there seem to be conflicting authorities on this issue. For instance, in *Pesos Silver Mines v Cropper*,⁸¹ the court was of the opinion that where the board of directors decide not to pursue a business venture, then it was open to an individual director to take the business venture for himself. It is argued that by refusing or rejecting the corporate opportunity in good faith, the board had removed it from the scope of the defendant's fiduciary duties.

A similar situation arose in the case of *Queensland Mines Ltd v Hudson*,⁸² wherein the board of directors of Queensland Mines Ltd (a joint venture between two companies) decided not to take a valuable iron ore exploration license from the Tasmanian Government owing to financial constraints. The license was then taken over by Hudson who controlled one of the companies holding shares in Queensland Mines Ltd. Later Hudson was sued by Queensland Mines Ltd on account for the profits he made from the license. The Privy Council held that once the board

⁸⁰ [1967] 2 AC 134

⁸¹ (1966) 58 DLR (2d) 1

⁸² (1978) 18 ALR 1

was fully informed and had rejected the license, it was open to Hudson to do whatever he wanted.

It is argued that although the decision in *Pesos Silver Mines* can be justified on the grounds that the director who took the corporate opportunity, took it on the basis of information acquired by him on his private capacity, the same cannot be said in the case of Queensland Mines Ltd because Hudson was acting ostensibly on behalf of Queensland Mines Ltd at the time he acquired the license concerned. Nevertheless, both the case seem to suggest that in certain circumstances, the board of directors may override the requirement of ratification by the general meeting of shareholders, thus leaving an undue concentration of powers in the hands of directors, and thus allowing the directors effectively to act as judges in their own cause.⁸³ This would mean that minority shareholders would not even have a chance to vote and decide on this matters at a properly convened meeting of shareholders.

The only solution to the above difficulty is to treat the shareholders as the appropriate organ for ratification. But then, there will be the problem of what is the appropriate majority of shareholders required to ratify any act in any particular given situation.

However, this may not be a practicable solution. Certain decisions may have to be made by the board of directors for commercial reasons. Therefore, it

⁸³ Friedman S, *Supra* n 76 at p 266

may be necessary for the proper functioning of the company to define which matters should be ratified by the general meeting or by the board of directors and who are the parties who are entitled to vote in either situation. This is important because in situations where there is a breach of duty by directors, the general meeting cannot ratify such breach of directors' duties, where it can be shown that the majority in ratifying, had failed to act in the best interest of the company.⁸⁴ In situations where the directors are also the majority shareholders and are able to control the majority votes at the general meeting of shareholders, any exercise of power of the directors to ratify a breach of their duty would be a fraud on the minority and therefore would be invalid.⁸⁵

H. Should there be a fifth exception?

It has been suggested in some cases that a minority action may be permitted where justice requires that the court should intervene to assist an otherwise helpless minority. This is sometimes known as the 'fifth exception' to the rule in *Foss v Harbottle*. Since the other exceptions in many ways limit an action to be brought by a minority shareholder, therefore this exception would be relevant and useful for a minority shareholder. This exception allows the court to use its discretion and based on equitable principles, the court may decide whether a minority shareholder is entitled to bring a personal or a derivative action. In *Heyting v Dupont*,⁸⁶ Russel, L.J.,

⁸⁴ *Winthrop Investments Ltd v Winns Ltd* [1975] 2 N.S.W.L.R 666.

⁸⁵ *Cook v Deeks* [1916] 1 AC 554.

⁸⁶ [1964] 2 All ER 273.

said (obiter).⁸⁷

I am prepared to assume for the purposes of this case (though I must not be understood as accepting it as a proposition of law) that there may be occasions in which justice requires departure from the rule when all that is asserted is damage to the company arising from misfeasance in withholding an asset of the company, without fraud or ultra vires. To my mind, however, it is quite plain that justice does not require it in the present case”.

In *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* and *Estmanco (Kilner House) Ltd v Greater London Council*, the Court of Appeal in England was not in favour of the concept of justice because it was an impractical test. However, Sir Robert Megarry VC, in *Eastmanco v Greater London Council* did recognize the fact that although the concept of justice is not the test, it is an important reason for making exceptions from the rule.

Although in England, this exception has never been given due recognition, the same cannot be said of other commonwealth countries. In Nigeria, the Supreme Court in *Edokpolo and Co Ltd v Sem-Edo Wire Ind Ltd and Ors*⁸⁸ held that a minority shareholder can rely on the fifth exception to bring an action against the majority shareholders. In Australia in *Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd*,⁸⁹ the court recognised the fact that it is useful not to limit the exceptions in the rule in *Foss v Harbottle* and keep the door open lest in some extreme unusual circumstance injustice may result from applying the rule. Although

⁸⁷ *Ibid* at p 279

⁸⁸ [1984] NSCC 553

⁸⁹ [1969] 2 NSWLR 782

later, in two other Australian case , the courts doubted the existence of the fifth exception but the recent decision in *Biala Pty Ltd & Anor v Mallina Holdings & Ors*⁹⁰ clearly shows the significance and the usefulness of the fifth exception in Australia.

In *Biala Pty Ltd & Anor v Mallina Holdings Ltd & Ors*, there was a clear fraud on the minority shareholders. However before the date of the trial the defendants were no more in control of the company. This made it difficult for the plaintiffs to satisfy the wrongdoer control element for proving fraud on the minorities. However, the court by looking at all the facts and the circumstances of the case came to the conclusion that for justice to be done, the plaintiffs should be allowed to proceed with the claim. Ipp J said:

The circumstances of modern commercial life are very different to those which existed when *Foss v Harbottle* was decided. The body of shareholders of a public company is ordinarily far greater in number, and the controlling minds of individual shareholders are far more difficult to identify than was the case with the relatively small corporations that existed 150 years ago. These developments and the complexities and sophistication of modern shareholding make it often very difficult to bring derivative claims within the established exceptions. To the extent that policy may be relevant in determining whether a fifth and general exception to the rule should be recognized, I consider it to be desirable to allow a minority shareholder to bring a derivative claim where the justice of the case clearly demands that such a claim be brought, irrespective of whether the claim falls within the confines of the established exceptions.

In Malaysia although the courts have not clearly endorsed the rule but

Gopal Sri Ram JCA in the Court of Appeal in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd*⁹¹ and in the Federal Court in *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd*⁹² expressed his preference to the fifth exception. The importance of the recognition of the rule in Malaysia can be seen in *Ting Chong Maa v Chor Sek Choon*, where a situation of equal shareholding arose and the issue as to whether the plaintiff was a minority shareholder was questioned. Peh Swee Chin J (as he then was) rightly recognised the fact that being a majority or minority shareholder is not a conclusive test and it is therefore important to take into consideration de facto control. It is common in modern day companies that mere shareholding is not enough for one to maintain control of a company but rather on how much influence, power and money one has to manipulate decision making.

II. Conclusion

The *Foss v Harbottle* Rule is a major obstacle for the minority and their only hope lies in its exceptions. But the exceptions are subject to intricate rules and procedures. It is surprising that such an important area of company law should be subject to many obscure and inconsistent rules. It is regretted that the latest judicial pronouncements, like the *Prudential Assurance Co Ltd v Newman Industries Ltd (No.2)* and *Smith v Croft (No.2)* have increased the obscurity and have created further obstacles for the minority.

⁹¹ [1995] 3 MLJ 417

⁹² [1996] 2 AMR 2477

It is obvious that some other means have to be devised by company law to protect the interest of minorities. A minority member may complain of improper dealings, harassment, oppression, discrimination, prejudice and other forms of unfair conduct. The legislature has responded by creating statutory remedies. The principal remedy is s 181 of the Companies Act 1965, which has its genesis in s 186 of Uniform Companies Act 1961 of Australia. The Australian section can be traced to s 210 of the Companies Act 1948 of United Kingdom. Section 210 broke new grounds in 1948 by providing to an oppressed shareholder an alternate remedy to winding up and also a hope of overcoming (in appropriate circumstances) the rigours of the *Foss v Harbottle* Rule. To these matters, this dissertation will now turn.

CHAPTER 3

HISTORY OF MINORITY PROTECTION UNDER COMPANIES LEGISLATION

I. Introduction

The many obstacles and restrictions facing a minority shareholder relying on the exceptions to the rule in *Foss v Harbottle*, supposedly came to an end when section 210 of the Companies Act 1948, United Kingdom was passed by the United Kingdom Parliament. Section 210 was the result of the recommendations of the Cohen Committee.¹ The Cohen Committee was concerned with the wide scale abuses of power especially in private companies whereby shareholders were locked into the company because of the refusal of the directors to register transfer of their shares. Shareholders in private companies are generally not able to dispose of their shares in the market easily. Further, the committee was aware of the fact that directors paid excessive remuneration to themselves, thus preventing shareholders from getting reasonable dividends for their investments.

The introduction of section 210 was also timely because of the harshness of the just and equitable ground of winding up remedy that was available to a minority shareholder.² For instance in *Re Yenidje Tobacco Co.*,³ it was held that

¹ Report on Company Law Reform 1945 (Cmnd.6659).

² Now s 122 (1) (g) Insolvency Act, 1986, U.K; s 218(i) Companies Act 1965, Malaysia.

³ [1916] 2 Ch 426

where two principal directors and shareholders were in complete deadlock, it would be just and equitable to wind up the company even though the company was a viable and profitable company.

In situations like this, it is obvious that the remedy was ineffective, in the sense that the company had to be wound up to bring to an end a dispute between shareholders.

Section 210 of the Companies Act 1948 reads as follows:

“(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.169 (3)⁴ of this Act, 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 the opinion – (a) that the company’s affairs are being conducted as aforesaid: and (b) that to wind-up the company could unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound-up; the court may, with a view to bringing to an end the matter 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.”

The most significant point about section 210, is that, it enabled the court to provide whatever remedy it thought fit. However, the effectiveness of the

⁴ S 169(3) gives the Board of Trade power to petition for a winding up or for an order under s 210 if it appears from the report of an inspector that the company’s business is being conducted with an intent to defraud creditors or if there has been misconduct and misfeasance in the formation or management of the company.

section was rather minimal because between 1948 and 1980, only two petitions were brought under the section successfully.⁵ The following factors contributed to its ineffectiveness:

a) petitioner had to prove oppression qua member.

It was held in *Elder v Elder & Watson*,⁶ that the petitioner must show oppression of him or her in his capacity as a member and not in any other capacity, such as a director or an officer of the company. In this case, the petitioner brought an action against the company for removing him as a director and secretary of the company. He failed on the ground that he was not able to prove that the oppression against him was in his capacity as a shareholder.

The same position was taken in *Re Lundie Brothers Ltd*,⁷ where a minority shareholder was removed from his office as a working director and the court refused an application under section 210. In *Re Jermyn Street Turkish Baths Ltd*,⁸ a personal representative who was refused registration was held not to be a member and therefore could not petition under section 210. Although the court in *Scottish Cooperative Wholesale Society v Meyer*⁹ was of

⁵ *Scottish Corporate Wholesale Society Ltd v Meyer* [1959] AC 324 and *Re HR Harmer Ltd* [1959] 1 W.L.R. 62.

⁶ [1952] S.C 429.

⁷ [1965] 1 W.L.R 1051.

⁸ [1971] 1 WLR 1042; [1971] 3 All ER 184.

⁹ [1959] AC 324.

the opinion that the courts should have regard to business realities and not legal technicalities but the weight of authorities construing section 210 seem to support the requirement that the petitioner can only bring an action in his capacity as a member.¹⁰

b) Petitioner must prove that the oppression would justify winding up.

This requirement was one of the major causes for the failure of section 210 because the petitioner had to prove that the affairs of the company are being conducted in an oppressive manner to himself¹¹ and at the same time prove that it was just and equitable to wind up the company. Furthermore, he had to prove that there will be surplus of assets left after the winding up and that he had a tangible interest in those assets.¹²

One striking effect of the above onus of proof required of a petitioner, is that, it limits many of the grounds on which a winding up on the just and equitable ground could be made.¹³ This is because under section 210, to justify winding up, the court must be satisfied that there was oppression

¹⁰ *Re HR Harmer Ltd; Re Bellador Silk Ltd* [1965] 1 All ER 667.

¹¹ *Re Lundie Bros Ltd* [1965] 2 All ER 693.

¹² *Re Bellador Silk Ltd* [1965] 1 All ER 667; *Re Rica Gold Washing Co Ltd* (1979) 11 Ch.D.36;

¹³ Breakdown of mutual trust and confidence : *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360; deadlock : *Re Yenidje Tobacco Co Ltd* [1912] 2 Ch 426; failure of substratum : *Re Tivoli Freeholds Ltd* [1972] VR 445.

which was serious, persistent and likely to continue¹⁴ and that there was no misconduct on the part of the petitioning shareholder.¹⁵

Since most private companies are established on the basis of quasi-partnership principles, where members are also directors the strict requirement of oppression and the narrow definitions given to the word 'oppression' would prevent members in such companies from obtaining an appropriate remedy, other than winding up on the just and equitable principle.¹⁶

It is obvious that the just and equitable jurisdiction and section 210 will only be applicable simultaneously in situations where oppression can be proven to exist in those situations. Further, the requirement to prove that there will be surplus assets after winding up suggested that section 210 was very much allied to the rules governing liquidation. This would require the courts to make inquiries and cross examinations as in a winding up petition of a company. This process may be time consuming and costly for all parties concerned.

¹⁴ *Re Newbridge Steam Laundry* (1917) 11.R. 67.

¹⁵ Lord Cross said in *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All E.R. 492 at p 507 :

A petitioner who relies on the just and equitable clause must come to court with clean hands, and if the breakdown in confidence between him and the other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being wound up if they wish to continue.

¹⁶ *Ebrahimi v Re Westbourne Galleries Ltd.*

The above emphasis on the solvency of a company seemed to defeat the importance of section 210 as an alternative remedy. It was suggested by N.A. Bastin that the correct interpretation of section 210 involved reading the two requirements together and thus, "the facts would justify the making of a winding-up order" refers to "the affairs of the company are being conducted in a manner oppressive to some part of the members." He suggested that a petitioner has to show not that the facts of the whole case would justify the making of a winding up order but that the way in which the business is being conducted is of a type that would warrant such an order.¹⁷ He referred to Pennington's *Company Law*¹⁸ and stated that the reference to the just and equitable jurisdiction must simply be a criterion by which to assess the conduct of the oppressors.

c) Petitioner cannot rely on mere negligence and mismanagement.

The strictness and narrowness of the interpretation of the word 'oppression' by the courts, had made it more difficult for section 210 to be used in many circumstances where the position of the minority shareholders were undermined in the company. In *Re Five Minute Car Wash Ltd*,¹⁹ the majority shareholder had grossly mismanaged the company. Buckley J held

¹⁷ Bastin NA, '*Minority Protection in Company*' (1968) JBL, at p 323.

¹⁸ RR Pennington, *Company Law*, 6th ed. London/Edinburgh, Butterworths, 1990 at p 552

¹⁹ [1966] 1 W.L.R 745.

that although the majority shareholder was “unwise, inefficient and careless in the performance of his duties” but there was nothing to suggest that he had acted unscrupulously, unfairly, or with any lack of probity towards the petitioner or any other member of the company, or that he has overborne or disregarded the wishes of the board of the directors or that his conduct could be characterized as harsh or burdensome or wrongful towards any member of the company.²⁰

Referring to the above case, Professor Wedderburn expressed his opinion in an article²¹ that to prove oppression, an independent element of unlawfulness must be present. He referred to *Scottish Cooperative Wholesale Society v Meyer* case where there was a breach of fiduciary duty by nominee directors and also to the case of *Re HR Harmer Ltd*, where there was a breach of the articles by the autocratic father.²²

It was apparent from the above cases that unless there was some sort of legal impropriety, the courts were not willing to interfere in the management decision of the companies, no matter how bad the effect of the decision may have on the shareholders.

²⁰ *Ibid* at p 751.

²¹ Wedderburn KW, ‘*Oppression of Minority Shareholders*’ (1966) 29 MLR 320.

²² *Ibid* at p 324.

- d) Petitioner must prove that to wind up the company would unfairly prejudice him.

In most instances, especially if the company is a going concern, it would be inequitable, if the court were to make an order to wind up the company if there is some other alternative remedy to bring to an end a matter complained of. In such a situation, the court should at all cost preserve the existence of the company because a petitioner's interest would be better protected. The petitioner will be able to realise a better return by selling his shares in the company rather than rely on the break up value of the shares in a winding up. In *Scottish Cooperative Wholesale Society Ltd v Meyer* for instance an order was made for the petitioner's shares to be bought by the oppressors as though no oppressive conduct had taken place.

- e) Petitioner must prove oppressive conduct complained of is of a continuous nature.

The use of the words "affairs of the company" connotes that section 210 only applied to conduct which was continuous in nature. This in itself was a drawback of section 210 because it prevented isolated acts from being caught under the section.²³

In *Re Westbourne Galleries Ltd*, at first instance Plowman J referring to the conduct of the directors in setting aside a resolution of the

²³

In a similar provision in Australia (s 186 Uniform Companies Act 1961) in the case of *Re Broadcasting Station 2 GB Pty Ltd* [1964-1965] NSW 1648, it

shareholders in general meeting to sell a lease which the company possessed, stated that this does not amount to oppression because section 210 required a course of conduct up to date of oppression. It was also a requirement under section 210 that the process of oppression must be continuing when the application for relief was presented. This was because of the use of the words "are being conducted" in section 210.²⁴

Although D.D.Prentice²⁵ was of the opinion that the failure of the company to set aside any isolated act, for example improper allotment of shares would itself be of a continuing nature of conduct but the decided cases under section 210, however, seemed to state that the failure on the part of the company to rectify the isolated act or conduct is not sufficient.

II. Jenkins Committee Recommendations

Because of the many shortcomings of section 210, the Jenkins Committee on Company Law Reform²⁶ recommended the reform of section 210. This brought about the enactment of a new section, that is section 75 of the Companies Act 1980 (UK) which is now found in sections 459 - 461 of the Companies Act 1985 (UK). Some of

was held that courts are prevented from anticipating oppression and threatened oppression could not fall under the section.

²⁴ *Re Five Minutes Car Wash Service Ltd* [1966] 1 WLR 745;
Re Jermyn Street Turkish Baths Ltd [1971] 3 All ER 184.

²⁵ Prentice DD, 'Protection of minority shareholders: s 210 of the Companies Act 1948', (1972) Current Legal Problems 124 at p 135.

²⁶ *Report of the Company Law Committee* (Cmnd.1749) (1962).

the main recommendations of the Jenkins Committee were:

- (i) for the extension of section 210 to include legal personal representatives and others to whom shares are transmitted by process of law.²⁷
- (ii) the repeal of the requirement contained in section 210(2)(b), namely that the petitioner must show facts which would justify the winding up of the company on the grounds that it is just and equitable.
- (iii) that section 210 should extend to cover isolated acts as well as a course of conduct. However, the committee failed to provide any criteria as to what acts these should be or by what criteria they are to be judged.²⁸

Most of the recommendations of the Jenkins Committee were adopted and now a remedy may be obtained without showing grounds for winding up of a company. The petition may be based upon a single act or omission as well as a course of conduct. An isolated past act or omission²⁹ or a proposed future act or omission³⁰ can also be remedied by the court. However, the most far reaching change brought about by the Jenkins Committee under the new section 459 is the replacement of the concept 'oppression' with 'unfairly prejudicial'. Unfair prejudice has been given a wider interpretation by the courts compared to oppression. Under the new provision both unfairness and prejudice must be established. However, there is no necessity that

²⁷ *Ibid* at para 209 and 212 (f).

²⁸ Rajak H, 'The Oppression of Minority Shareholders' (1972) 35 MLR 156.

²⁹ *Scottish Cooperative Wholesale Society v Meyer* [1959] AC 342.

³⁰ *Re Kenyon Swansea Ltd* (1987) 3 BCC 259.

the act complained of is improper or illegal and an exercise of a legal right may have an unfairly prejudicial effect. In the later chapters, a more detailed discussion will be made with respect to the above concepts.

III. Statutory Protection in England

The present section 459(1) Companies Act (U.K.) 1985 as amended by s 145 of Companies Act (U.K.) 1989 (Schedule 19, para 11) reads as follows:

A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

Even though section 459 of the Companies Act 1985, United Kingdom had removed most of the problems encountered under section 210 of the Companies Act 1948 but unfortunately there was still one main teething problem under the 1985 Companies Act provision. Before the amendment in 1989, section 459 required the petitioner to demonstrate prejudice 'to the interests of some part of the members (including at least himself)'. The use of the above words resulted in conflicting decisions by the courts.

In *Re A Company (No 0070 of 1987) exp. Glossop*,³¹ a petitioner alleged that the director had not declared a reasonable dividend and therefore the petitioner was deprived from participating in the company's profits. Harman J held

³¹ [1988] BCLC 570;

that a petition under section 459 required the prejudicial conduct to be directed against 'some part of members' and since the failure to declare dividends affected all the members, the petitioner's action failed.

However, in *Re Sam Weller & Sons Ltd*,³² where the facts of the case were similar to *Re A Company (No 0070 of 1987)*, *exp. Glossop*, the court held that a minority shareholder could rely on s 459 even though the rights of the minority shareholder and the majority shareholders were the same with regards to the declaration of dividends. The reasoning of the court was based on the fact that the minority shareholder would not be able to procure a passing of a resolution for payment of a reasonable dividend compared to the majority shareholders, who had the power to grant or withhold such a dividend. This would therefore unfairly prejudice the position of the minority shareholder if the majority shareholders decide not to pay any dividend at all or to pay a dividend which was substantially less than the company could reasonably be expected to pay.³³

However, the passing of section 145 of the Companies Act 1989 and the inclusion of the words "members generally" in section 459 of the Companies Act 1985, has helped to resolve much of the uncertainties and confusion surrounding the application of section 459 in situations like *Re A Company (No 0070 of 1987)*, *exp. Glossop* and *Re Sam Weller & Sons Ltd*. It is obvious now that section 459 is

³² [1990] BCLC 801; (1989) 5 BCC 810.

³³ See RR Pennington, *Company Law*, 6th ed London, Dublin and Edinburgh, Butterworths, 1990 at p 673.

applicable even where all the members interests are affected equally.

IV. Statutory Protection in Australia

To understand the development of the minority protection provision in Australia, it is necessary to have a brief idea as to the development of the law in Australia. Foremost, all Australian colonies acquired their own constitutions based on the Westminster system and received representative and responsible government between 1855 and 1890. The colonial parliaments had power under their constitutions to make laws with respect to the formation and regulation of companies. Each colonial parliament based its companies legislation on that in force in England at the time that they received government of their own affairs. The Companies Acts were administered by the respective Registrar of Companies and later, after federation by the State Corporate Affairs Offices or Commissions. Although the legislation had a common source, each colony (State after federation) developed its law differently with the consequence that there was no uniformity in the law.³⁴

To overcome the above problem, several attempts were made by the States and the Commonwealth to ensure that the law was uniform nationally. This led to the Uniform Companies Act 1961 which was adopted by all the States and Territories and which incidentally formed the model for Malaysia's Companies Act 1965.

³⁴

Ruth E. Ruane, *Corporation Law : Law (Corporation) 224 Guide*, 3rd ed. Perth, Curtin Univeristy of Technology, Western Australia.

Thereafter, there were various attempts by the legislature to have uniform system of law in Australia, which finally resulted in the Corporation Act 1989 (Cth). This Act was adopted by the other States³⁵ and Territories. Section 210 Companies Act 1948 (UK) in a modified form was adopted in the various States in Australia. This provisions were later referred to as section 186 Uniform Companies Act 1961, which provided as follows :

186. Remedy in cases of Oppressions –

(1) Any member of a company who complains that the affairs of the company are being conducted in manner oppressive to one 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 the 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 subsection applies, make an order that the company be wound up; or

(b) where the Court is of opinion that to wind up the company would unfairly prejudice the member or the members referred to in subsection (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 other 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.

3) Where an order that the company be wound up is made pursuant to paragraph (a) of subsection (2) of this section the provisions of this Act relating to winding up of company shall,

³⁵

S 94 Companies Act 1958 (Victoria); s 379 A Companies Act 1955 (Queensland).

with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company.

4) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act, but subject to the provisions of the order, the company concerned shall not have power without the leave of the Court to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order; but subject to the foregoing provisions of this subsections the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.

5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days after the making of the order.

(6) If default is made in complying with subsection (5) of this section the company and every officer of the company who is in default shall be guilty of an offence against this Act.

Section 186 was wider than the English provision in the sense that it need not require proof of facts which would justify the making of a winding up order. It simply required that for some reason it is just and equitable to make an order under the section. Section 186 was not much different from its English counterpart and faced the same drawbacks faced by the English courts. The problems were highlighted in the Australian case of *Re Tivoli Freeholds Ltd.*³⁶ Briefly the Supreme Court of Victoria in construing section 186 stated the following :

- (a) those alleging that the affairs of the company have been conducted in a manner oppressive to them must establish, as one element, conduct

which is unfair, or burdensome, harsh and wrongful or lacks probity, or is persistently illegal and dictated by self interest.³⁷

- (b) the oppression must be of members on their capacity as shareholders.³⁸
- (c) there must be something adverse or detrimental to the members' financial interests as shareholders.³⁹
- (d) the affairs of the company must be being conducted in a manner oppressive to members when the petition is presented.⁴⁰
- (e) the oppression must result from some overbearing act or attitude on the part of the oppressor.⁴¹

Later section 186 was replaced by s 320 of the Companies Code 1982.

When the Jenkins Committee recommendations were adopted in the United Kingdom in 1980, Australia followed suit. This resulted in s 320 being amended

³⁷ *Scottish Cooperative Wholesale Society Ltd v Meyer* [1959] A.C. 324; *Elder v Elder and Watson Ltd* [1952] S.C. 49; *Re Harmer Ltd* [1959] 1 W.L.R. 62; *Re Jermyn Street Turkish Baths Ltd* [1971] 1 W.L.R. 1042; and *M. Dalley & Co. Ltd v Sims* (1968) 43 A.L.J.R. 19.

³⁸ *Re Harmer Ltd* [1959] 1 W.L.R. 62 at p 75 and *Re Bright Pine Mills Pty Ltd* [1969] V.R. 1002 at p 1012.

³⁹ *Re Broadcasting Station 2 GB Pty Ltd* [1964-65] N.S.W.R. 1648 at p 1662.

⁴⁰ *Re Jermyn Street Turkish Baths Ltd* [1971] 1 W.L.R. 1042 at p 1059.

⁴¹ *Re Jermyn Turkish Baths Ltd* and *Re Bright Pine Mills Pty Ltd* at p 1102.

substantially in 1983 with the introduction of the Companies and Securities Legislation (Miscellaneous Amendments) Act 1983, whereby s 320 not only applied to the affairs of the company but also to acts and omissions. This was reflected under s 320 (1) (a) (ii) which stated that “an act or omission, or a proposed act or omission, by or on behalf of the company, or a resolution, or a proposed resolution, of a class of members, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be contrary to the interests of the members as a whole”. It is obvious that, other than oppressive conduct, the amended section also included unfairly prejudicial and unfairly discriminatory conduct.

Further, a new sub-section (4A)(b) [now sub-section (5) of section 260 of the Corporations Act 1989] was incorporated and this recognised that a member can sue if he is oppressed, unfairly prejudiced or unfairly discriminated in any other capacity other than that of a member. The Explanatory Memorandum to the Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983 noted the plight of members in small partnership companies where their interest are affected as directors and shareholders. The Bill recognised that in these type of companies members usually derive their benefit by being paid as directors and employees.⁴² Even though the new sub-section (4A)(b) is desirable and the courts are able to

⁴² Corkery JF, *‘Oppression or Unfairness by Controllers – What can a shareholder do about it? An analysis of s 320 of the Companies Code’* (1983-1985) 9 Adelaide Law Review 437.

control any abuse of the provision by applicants, nonetheless the potential is there for section 320 to be used for non corporate or for non-financial ends.⁴³

The full text of the present section 260 Corporations Act 1989, Australia reads as follows:

Remedy in cases of oppression or injustice

260. (1) An application to the Court for an order under this section in relation to a company may be made :

- (a) by a member who believes:
 - (i) that affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members, or in a manner that is contrary to the interests of the members as a whole ;or
 - (ii) that an act or omission, or a proposed act or omission, by or on behalf of the company, or a resolution, of a class of members, was or would be oppressive or unfairly prejudicial to or unfairly discriminatory against, a member or members or was or would be contrary to the interests of the members as a whole; or
- (a) by the Commission, in a case where it has investigated, under Division 1 of Part 3 of the Commission Act:
 - (i) matters being, or connected with, affairs of the company; or
 - (ii) matters including such matters.

(2) If the Court is of the opinion:

- (a) that affairs of a company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members (in this section called the "oppressed member or members") or in manner that is contrary to the interests of the members as a whole; or

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

the court may, subject to subsection (4), make such order or orders as it thinks fit, including, but not limited to, one or more of the following:

- (c) an order that the company be wound up;
- (d) an order for regulating the conduct of affairs of the company in the future;
- (e) an order for the purchase of the shares of any member by other members;
- (f) an order for the purchase of the shares of any member by the company and for the reduction accordingly of the company's capital;
- (g) an order directing the company to institute, prosecute, defend or discontinue specified proceedings, or authorising a member or members of the company to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;
- (h) an order appointing a receiver or a receiver and manager of property of the company;
- (i) an order restraining a person from engaging in specified conduct or from doing a specified act or thing;
- (j) an order requiring a person to do a specified act or thing.

(3) A person shall not contravene an order made under subsection (2) that is applicable to the person.

(4) The Court shall not make an order under subsection (2) for the winding up of a company if it is of the opinion that the winding up of the company would unfairly prejudice the oppressed member or members.

(5) In this section and in paragraphs 461 (1) (f), (g) and (h):

- (a) a reference to a member, in relation to a company, includes, in the case of a company limited by shares, or a company limited both by shares and by guarantee, a reference to a person to whom a share in the company has been transmitted by will or by operation of law;
- (b) a reference to affairs of a company being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member is a reference to affairs of a company being conducted in a manner that is oppressive or unfairly prejudicial to or unfairly discriminatory against, a person who is a member, whether in his capacity as a member or in any other capacity; and
- (c) a reference to an act or omission by or behalf of a company or a resolution of a class of members of a company being oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member is a reference to an act or omission by or on behalf of a company or a resolution of a class of members of a company being oppressive or unfairly prejudicial to, or unfairly discriminatory against, a person who is a member, whether in the person's capacity as a member or in any other capacity.

(6) Where an order that a company be wound up is made under this section, the provisions of this Act relating to the winding up of companies apply, with such adaptations as are necessary, as if the order had been made upon an application duly filed in the Court by the company.

(7) Where an order under this section makes an alteration in or addition to the constitution of a company, then, despite anything else in this Act but subject to the order:

- (a) the company does not have power, without the leave of the Court, to make any further alteration in or addition to the memorandum and articles inconsistent with the provisions of the order; and
- (b) subject to this subsection, the alteration has effect as if it has been duly made by resolution of the company.

(8) An office copy of any order made under this section pursuant to an application by a member of the company shall be lodged by the applicant with the Commission within 14 days after the making of the order.

(9) If default is made in complying with subsection (8), the applicant is guilty of an offence.

V) Statutory Protection in Other jurisdictions

Without going into much detail, other jurisdictions which adopted section 210 of the UK Companies Act 1948 faced similar problems as those faced by the English and Australian courts.

A. New Zealand

In New Zealand the minority provision was reflected in section 209 of the New Zealand Companies Act 1955. The section reads as follows:

209. **Remedy in cases of oppression.** Alteration of memorandum or articles- (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 subsection three of section one hundred and seventy-three of this Act, the Attorney-General, may make an application to the Court for an order under this section.

(2) If on any such application the Court is of opinion that the company's affairs are being conducted as aforesaid, and-

(a) That to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would

justify the making up of a winding-up order on the ground that it was just and equitable that the company should be wound up; or

(b) That, in any other case, it is just and equitable to make an order under this section, 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, for the reduction accordingly of the company's capital, or otherwise.

(5) In relation to an application under this section, section three hundred and forty-one of this Act shall apply as it applies in relation to a winding-up petition.

The main difference of the section compared to its English equivalent was that under the New Zealand section there was no necessity for the facts to justify a winding up order on the 'just and equitable ground'. This basically freed the section from technicalities of the winding up jurisdiction.

In fact, throughout its existence and until the Companies Amendments Act 1980, only one case⁴⁴ was brought to the court. In this case, the applicant was not

⁴⁴ *Re Empire Building Ltd* [1972] NZLR 683.

successful because the New Zealand court followed the restrictive attitude of the English courts in interpreting the word 'oppression'. Just as in the United Kingdom and Australia, section 209 of the New Zealand Act did not really serve its purpose in protecting minority shareholders.

Only in 1980 pursuant to the Final Report of the Macarthur Committee in March 1973 was section 209 amended. The Committee relied to a certain extent on the 1962 Report of the Jenkins Committee in England and to the provisions of the Australian Uniform Companies legislation.⁴⁵ Section 209 of the principal Act was amended by repealing subsections (1) and (2) and substituting the following subsections (1) and (2) and by further inserting a new subsection (6): The new amended provisions read as follows:

**Section 209 Companies Act 1955 (as amended by Companies
Amendment Act 1980)**

- (1) Any member of the company who complains that the affairs of the company have been or are being or are likely to be conducted in a manner that is, or any act or acts of the company have been or are or likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial, to him (whether in his capacity as a member or in any other capacity) or, in a case falling within

section 173(3)⁴⁶ of this Act, the Attorney-General, may make an application to the Court for an order under this section.

(2) If on any such application the Court is of the opinion that it is just and equitable to do so, the Court may make such order as it thinks fit, whether for –

- a) Regulating the conduct of the company's affairs in future; or
- b) Restricting or forbidding the carrying out of any proposed act; or
- c) 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
- d) Directing the company to institute, prosecute, defend, or discontinue Court proceedings, or authorising a member or members of the company to institute, prosecute, defend or discontinue Court proceedings in the name and on behalf of the company –

or otherwise.

- 6) In this section the term 'member' includes the legal personal representative of a deceased member, and every person to whom shares of a member have been transferred by operation of law.

In a nutshell the main effect of the amendments to section 209 are as follows :-

- (a) the requirement that the member should be affected in his capacity as member was removed.

⁴⁶ S 173(3) is similar to s 169(3) of the English Companies Act 1948. See *supra* n 4.

- (b) the amended section allows a single member to petition where the acts complained of affect only himself.
- (c) it is no longer necessary that there should be a continuing course of conduct, as opposed to isolated acts.
- (d) a remedy is available not only for oppressive conducts but also for conduct which is unfairly discriminating or unfairly prejudicial.
- (e) the section now provides that a 'member' includes the legal personal representative of a deceased member, and any person to whom shares of a member have been transferred by operation of law.

Later with the introduction of the Companies Act 1993 in New Zealand, the minority protection provision was amended further and was reflected in sections 174-176 of the new Act. The sections read as follows:

174. Prejudiced shareholders – (1) A shareholder or former shareholder of a company, or any other entitled person, who considers that the affairs of a company have been, or are being, or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial to him or her in that capacity or in any other capacity, may apply to the Court for an order under this section.

(2) If, on an application under this section, the Court considers that it is just and equitable to do so, it may make such order as it thinks fit including, without limiting the generality of this subsection, an order -

- (a) Requiring the company or any other person to acquire the shareholder's shares; or
- (b) Requiring the company or any other person to pay compensation to a person; or
- (c) Regulating the future conduct of the company's affairs; or
- (b) Altering or adding to the company's constitution; or

- (c) Appointing a receiver of the company; or
- (d) Directing the rectification of the records of the company; or
- (e) Putting the company into liquidation; or
- (f) Setting aside action taken by the company or the board in breach of this Act or the constitution of the company.

(3) No order may be made against the company or any other person under subsection (2) of this section unless the company or that person is a party to the proceedings in which the application is made.

175. Certain conduct deemed prejudicial – (1) failure to comply with any of the following sections of this Act is conduct which is unfairly prejudicial for the purpose of section 174 of this Act:

- (a) Section 45 (which relates to pre-emptive rights to the issue of shares):
 - (b) Section 47 (which relates to the consideration for which shares are issued):
 - (c) Section 3 (which relates to dividends)
 - (d) Section 60 (which relates to offers by a company acquire its own shares):
 - (e) Section 61 (which relates to special offers to acquire shares):
 - (f) Section 63 (which relates to stock exchange acquisitions subject to prior notice to shareholders):
 - (g) Section 65 (which relates to stock exchange acquisitions not subject to prior notice to shareholders);
 - (h) Section 76 (which relates to the provision of financial assistance by a company to acquire its own shares):
 - (i) Section 78 (which relates to special financial assistance);
 - (j) Section 80 (which relates to financial assistance not exceeding 5 percent of shareholders' funds):
 - (k) Section 117 (which relates to the alteration of shareholder rights)
 - (l) Section 129 (which relates to major transactions).
- (2) The signing by the directors of a company of a certificate required by this Act without reasonable grounds existing for an opinion set out in its conduct that is unfairly prejudicial for the purposes of section 174 of this Act.

176. **Alteration to constitution** – (1) Notwithstanding anything in this Act, but subject to the order,, where the Court makes an order under section 174 of this Act altering or adding to the constitution of a company, the constitution must not, to the extent that it has been altered or added to by the court, again be altered or added to without the leave of the Court.

(2) Any alteration of addition to the constitution of a company made by an order under section 174 of this Act has the same effect as if it had been made by the shareholders of the company pursuant to section 32 of this Act and the provisions of this Act shall apply to he constitution as altered or added to.

(3) Within 10 working days of the making of an order under section 174 of this Act altering or adding to the constitution of a company, the board of the company must ensure that a copy of the order and the constitution as altered or added to is delivered to the Registrar for registration.

(4) If the board of a company fails to comply with subsection (3) of this section, every director of the company commits an offence and is liable, on conviction, to the penalty set our in section 374 (2) of this Act.

B. Canada

In Canada, the minority oppression provision as a ground for relief originated from the English Companies Act 1948 (U.K.). The oppression remedy was made available in Canada with the passing of the Canadian Business Corporations Act, 1974-75-76 (Can), C.33 (the "CBCA") (proclaimed in force on December 15, 1975). The Federal Parliament relied to a certain extent on the 1962 report of the Jenkins Committee on section 210 of the Companies Act 1948 (UK). The provisions of the CBCA, S.C. 1974-75-76, C.33, as amended (now R.S.C 1985, C. C-444, S.241) is as follows :

234 (1) *Application to court re oppression.* A complainant may apply to a court for an order under this section.

(2) *Grounds.* If, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

- (a) any act or omission of the corporation or any of its affiliates effects a result,
- (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
- (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

(3) *Powers of court.* In connection with an application under this section the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing.

- (a) an order restraining the conduct complained of;
- (b) an order appointing a receiver or receiver-manager,
- (c) an order to regulate a corporation's affairs by amending the articles or bylaws or creating or amending a unanimous shareholder agreement;
- (d) an order directing an issue or exchange of securities;
- (e) an order appointing directors in place of or in addition to all or any of the directors then in office;
- (f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
- (g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the moneys paid by him for securities;
- (h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
- (i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements on the form required by section 149 or an accounting in such other form as the court may determine
- (j) an order compensating an aggrieved person;
- (k) an order directing rectification of the registers or other records of a corporation under section 236.
- (l) an order liquidating and dissolving the corporation;
- (m) order directing an investigation under Part XVIII to be made;
- (n) an order requiring the trial of any issue.

The Canadian provision seems to be identical to the present English counterpart, that is, it covers isolated acts as well as a course of conduct and provides that a court can grant relief for unfairly prejudicial conduct but it is apparent that section 241 CBCA is wider in a number of ways. It still retains the word 'oppression' and further section 241 provides that if the interests of any security holder, creditor, director or officer are unfairly disregarded, a court can grant a remedy. No such provision is available under section 459 of the English provision. This will be discussed further in the next chapter of this dissertation.

However, for now it is worth noting that section 238 specifically allows directors and officers to bring an action under section 241. Therefore there will be no problem on the issue of a member suing qua member as opposed to some other capacity. There is no such clear provision in section 459 of the English provision.

VI) Statutory Protection in Malaysia

In Malaysia, "the Companies Ordinances 1940, of the Straits Settlements which was extended to the Malayan Union and later to the then Federation of Malaya did not contain any provision resembling the United Kingdom section 210. This is not surprising because the Ordinance was based on the Companies Act 1929 of England. Malaysian courts have consistently applied the rule in *Foss v Harbottle* and have

denied relief to a minority shareholder who was unable to bring himself within any one of the exceptions to the rule".⁴⁷

The statutory provision for minority protection was introduced into Malaysia with the passing of the Companies Act 1965 and it is obvious that on a general comparison of all the other sections in the other countries, section 181 is much more comprehensive in its wordings. The statutory provision is as follows:

181. Remedy in cases of an oppression

- (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground –
 - (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
 - (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).
- (2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks for and without prejudiced to the generally of the foregoing the order may –
 - (a) direct or prohibit any act or cancel or vary any transaction or resolution;

⁴⁷

Gopal Sri Ram, JCA in *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd and Anor* [1996] 2 AMR 2477, 2495. See also *Peck v Russel* (1924) 4 FMSLR 94.

- (b) regulate the conduct of the affairs of the company in future;
- (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
- (d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
- (e) provide that the company be wound up.

Section 181 to a certain extent reflects the English provision. In the case of *Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd*,⁴⁸ Shankar JCA said:

What is important from the Malaysian view point is that whereas prior to section 75 of the 1980 Act the English court were concerned under section 210 with the breaches of legal rights, the scope is now enlarged to provide relief for conduct unfairly to the interests of members as members. Under our law 'interest of members' is covered by section 181(a) and conduct which is 'unfairly prejudicial' is covered by section 181 (b). In other words section 75 and section 459 of the English Act cover the same ground as our section 181(1).

Section 181 will be examined in detail in Chapter 5.

VII. Conclusion

Even though section 210 was widely adopted by other countries in the Commonwealth, it is obvious that owing to its narrow and restrictive nature in providing an effective remedy, it faced the same fate as in England. However, it cannot be denied that section 210 did provide the impetus and stepping stone for the many legislative reforms in this complex area of minority protection. The new legislations and the vast amount of reported cases in recent years in the

Commonwealth countries clearly show the significance and the seriousness of the legislatures and the courts in providing, assisting and remedying minority grievances.

It is to be noted that the legislatures have departed from relying solely on the concept of 'oppression' and have introduced wider concepts into their minority provisions. Depending on the statute referred to, remedies are now available for acts which are 'unfairly prejudicial', 'unfairly discriminatory' and also in circumstances where 'the companies affairs are being conducted or directors' powers are being exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of one or more shareholders'. Further, the remedy is not only available to acts which have been effected but also to those acts which are 'threatened' to be effected. Some of the statutes in fact, allow creditors, debenture holders, directors and others to rely on the minority provisions to obtain a remedy. Most significantly, the statutes spell out wide remedies and provide the courts with a very wide discretion in providing an appropriate remedy to an aggrieved shareholder or whoever having a right under the particular statute concerned.

CHAPTER 4

APPLICANTS FOR RELIEF UNDER SECTION 181 OF THE COMPANIES ACT 1965

I. Applicants under section 181

Under section 181, any member or holder of a debenture of a company or the Minister who has received a report by an inspector appointed pursuant to Part IX of the Act, may apply to the court under this section for relief.

A. Members

A member is a person who is registered as such in the register of members: section 16(6) Companies Act 1965. In the case of companies whose shares are traded scripless, depositors who appear in the record of depositors have all the rights of membership: Securities Industry (Central Depositories) Act 1991 (Act 453), section 35.

(i) unregistered members

Therefore strictly construed unregistered purchasers would lack standing as was in the case of *Niord Pty Ltd v Adelaide Petroleum NL*,¹ where the court held that an unregistered transferee of shares lacked locus standi because he had not been registered as a member at the time when the proceedings were commenced. It suffices that he or she is a member at the time of application: *Re Spargos Mining NL*.²

¹ (1990) 8 ACLC 684

² (1991) 3 ACSR 1 at p 6

(ii) member suing in some other capacity

Under section 181, applicants must be a member or debenture-holder of the particular company and the conduct of which they complain must affect them in their capacity as a member or debenture holder. However, in *Re Chi Liung & Sons Ltd*,³ it was held that if a person is oppressed in his capacity as a member, he may get relief in respect of acts that affect him in some other capacity as well.⁴ In *Re Chi Liung & Sons Ltd*, the articles empowered only the governing director to appoint a managing director. Madam Chi Liung, the governing director appointed the petitioner, a member, as managing director and empowered him to exercise all powers as governing director on her behalf. However, when she passed away, there was a power struggle and at an extraordinary general meeting, the petitioner was removed as managing director by the respondents in this case. In an action under section 181, the petitioner argued that his appointment as managing director was never terminated and the resolution passed at the extraordinary general meeting was void. Gill J referring to *Re HR Harmer Ltd*,⁵ held that once it was shown that the acts complained of were oppressive to the petitioners as members of the company it was irrelevant that the petitioners were also directors, for oppressed members who were also directors were not, by virtue of holding such office, disqualified from obtaining relief.

³ (1968) 1 MLJ 97

⁴ Walter Woon and Andrew Hicks, *The Companies Act of Malaysia, An Annotation*, Malaysia, Butterworths Asia 1997, p 284

⁵ (1958) 3 All ER 689

In Australia, the legislation now applies whether the member is affected in his or her "capacity as a member or in any other capacity": section 260(5)(b) and (c). The Australian provision does not mention debenture holders compared to the Malaysian section 181 but it is obvious that section 260(5)(b) and (c) would appear to enable a member to bring an application when the member is affected in a non-corporate capacity, such as a creditor, although the court would take into consideration the main motive of the creditor in bringing the action, for if the action is merely brought to put pressure on the company to repay a loan, then the application will be dismissed as an abuse of process.⁶ *Re Bellador Silk Ltd.*⁷

In the United Kingdom, the courts have said that an applicant can only bring an action if the conduct complained of affects the applicant in his capacity as a member. In *Lundie Bros Ltd*,⁸ a director cum shareholder of the company was removed as a director and excluded from the management of the company. He brought an action under the equivalent of section 181 but the court held that he had no locus standi because his position as a director was only affected. This position of the courts in the United Kingdom was further confirmed in the case of *Re HR Harmer Ltd*.

⁶ Walter Woon and Andrew Hicks, *The Companies Act of Malaysia, An Annotation*, Malaysia, Butterworths Asia, 1997, p292

⁷ [1965] 1 All ER 667

⁸ (1965) 1 WLR 1051

The above position of the courts in *Re HR Harmer Ltd* and *Lundie Bros Ltd* remained unchanged, even with the introduction of section 75 Companies Act 1980 (UK) (now Companies Act 1985, section 459(1), as amended by Companies Act 1989.) It was held in *Re A Company*,⁹ the first decision of the court under section 75 Companies Act 1980 (UK), that the member must prove that he has been or will be unfairly prejudiced in his capacity as a member of the company. However, recent cases¹⁰ under the above new English provisions seem to have discarded the requirement that members must be affected qua members. It has been held that if a member is admitted to membership on the understanding that he will share in management his interests are prejudiced if he is ousted from management.¹¹

(iii) majority shareholders

The Malaysian, Australian and English provisions seem to clearly allow any member or members to rely on section 181, section 260 and section 459 respectively to bring an action. Therefore in certain circumstances the majority members or shareholders can take an action under the above provisions. In *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor*,¹² Gopal Sri Ram, JCA stated:

⁹ [1983] Ch 178

¹⁰ *Re A Company* (No. 002567 of 1982) [1983] 1 W.L.R. 927; *Virdi v Abbey Leisure Ltd* [1990] BCLC 342

¹¹ L.C.B. Gower, *Principles of Modern Company Law*, 5th ed London, Sweet & Maxwell, 1992 at p 664.

¹² [1996] 2 AMR 2477, 2505

It must not be forgotten that s 210 of United Kingdom Companies Act 1948 was placed under the [heading] "Minorities", clearly indicating that those who could seek relief must be in the minority. There is no such classification in the [Malaysian] Act. Consequently, relief under s 181 may be had by a majority of shareholders in circumstances where they are unable for any reason to exert their will at a general meeting of their company

In Kumagai-Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & 2 Ors,¹³

Anuar J (as he then was) held that it is not essential that oppressors should have a controlling interest in the company.¹⁴ The learned judge stated that section 181 is directed against conduct by those in control of the company and that it is not always necessary that those in control must hold the majority interest. The learned judge further stated that the local provision falls under a different statutory heading.¹⁵

In Ramashankar Prosad & Ors v Sindri Iron Foundry (P) Ltd & Ors [AIR 1966 Cal 512] when dealing with the Indian provision which is equivalent of s 210 of the UK Act, it was held that the Indian section was not limited to minority shareholders. The reasoning is interesting. The UK s 210 falls under the statutory heading written into the Companies Act 1948 entitled 'Minorities'. Such a heading is absent in the Indian provision and equally in our own provision. I would therefore agree with the view expressed by Mitter J in *Ramashankar Prosad* and hold that relief under s 181 is available to majority shareholders who are not in control of the management of the company and who, for any given reason, are unable to control the board, eg because they have agreed to a management power sharing formula in a separate agreement among the shareholders.

¹³ [1994] 2 MLJ 789

¹⁴ *Ibid* at p 807

¹⁵ *Ibid* at p 802

(iv) legal personal representatives and rights of members arising by operation of law

The right to apply for a remedy extends to a legal personal representative of a member and to a person to whom a share in the company has been transmitted by will or operation of law: *Re A Company*.¹⁶ Section 459(2) of the English Act provides that a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law may rely on the section. In Australia section 260 (1)(a)(i) and section 260(5)(a) clearly provide that a member, including a person who became a member by means of transmission of shares can apply for a remedy under the section.

However, section 181, unlike the Australia or English provisions, does not clearly state the above proposition of law. In *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd*, Gopal Sri Ram JCA said:¹⁷

A reading of s 181 reveals that in the latter part of paragraph (a) of subsection (1) to that section the legislature has used the expression "members, shareholders... of the company". However, it does not require much intellectual exercise to realise that the sub-section, read as a whole, when using the term "member" and "shareholder" refers to the same category of persons within the company. The result, therefore, is that, as a general rule, only one who comes within the terms of s 16(6) of the Act may present a petition under s 181. Put another way, in general, a petitioner who applies under the section must be able to demonstrate that his name appears on a company's register of members at the date of presentation of the petition: if he is unable to do so, then he has no standing to invoke the jurisdiction conferred upon the court by the section.

¹⁶ [1983] 2 All ER 36

¹⁷ *supra* n 12 at p 2506

However, the Court of Appeal did recognise that the above simplistic approach to section 181 would be inequitable in certain circumstances. The Court of Appeal stated that what was expressed under section 181 is only a general rule and not a universal rule and there may be cases where an application of the general rule would be unfair and unjust.¹⁸

Therefore in certain circumstances a respondent who is guilty of unconscionable or inequitable conduct will be estopped from relying upon the requirement of membership in order to defeat a petitioner's standing as this would amount to his using statute as an engine of fraud.¹⁹ For example, in a situation where a person has agreed to become a member and has always been treated as such by the company or the board as a member, it would be wrong later in an application under section 181 for the company or the board to assert that the petitioning member lacked locus standi on the basis that the name of the member has been omitted from the register of members.²⁰

In *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd*, the appellant was a registered shareholder of a company. The company wrote to the appellant alleging that he owed the company a sum of money. The appellant denied the allegation and the company's board sold the appellant's shares to satisfy the alleged

¹⁸ *Ibid* at p 2507

¹⁹ *Ibid* at p 2509

²⁰ *Ibid* at p 2507

debt owed by the appellant to the company. The appellant presented a petition under section 181 alleging oppressive or unfairly prejudicial or unfairly discriminatory conduct of the company against him. The company took out a notice of motion to strike out the petition and the trial judge struck out the action based on three grounds. One of the grounds being that section 181(1)(b) of the Act could only be invoked by a *member* of a company and not by a *shareholder in the strict sense*. On appeal by the appellant, the Court of Appeal based on the reasoning that the application of the general rule would be unfair or unjust to the appellant and relying on authorities²¹ on the doctrine of estoppel allowed the appellants appeal. The Court of Appeal stated that it does not lie in the mouth of the alleged wrongdoers to say that the appellant has no grounds to stand on after having cut the very ground from under his feet.²²

B. Debenture –holders

One of the major differences between the Malaysian section 181 and the counterparts in Australia and the United Kingdom, is that the Malaysian provision provides a debenture holder a right to bring proceedings under section 181.

Whether inclusion of debenture holders under the section is desirable or not is questionable because the legislature had indirectly allowed or

²¹ *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202; *West v Pollack & Freemantle* (1937) TPD (SA) 64; *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Berhad* [1995] 3 AMR 49: 2871; [1995] 3 MLJ 331

²² *supra* n 15 at p 2507 & 2508

permitted creditors to interfere in the management of companies when it is a generally accepted principle in company law that management of companies should be in the hands of the board of directors.²³

In fact creditors dealing in arms length with the company will have obtained security by way of a fixed or floating charge over the assets of the company and would have obtained personal guarantees from the directors. Even if a creditor is not provided with security or sufficient security, the creditor may rely on the courts and commence legal proceedings to recover monies owing or rely on the winding up provisions to wind up the company to recover any debts owing to him by the company.

Compared to shareholders, more often than not, creditors who provide loan capital to companies are very well advised by their accountants, financial advisors or lawyers and large institutional creditors would have generally protected their interests by taking insurance cover. Therefore by allowing debenture holders a right to bring an action may lead to unnecessary interference in the management of the company.

(i) **Debentures**

There is also the problem of defining who is a debenture holder. To date, there is

²³ *John Shaw & Sons (Salford) Ltd v John Shaw* [1935] 2 K.B. 113

no precise legal meaning of the word “debenture”. Section 4 of the Act defines a “debenture” as follows:

“includes debenture stock, bonds, notes and any other securities of a corporation whether constituting a charge on the assets of the corporation or not”

It is obvious that the above definition is not exhaustive and may cover many other documents not specifically mentioned. Chitty J said in *Levy v Abercorris Slate and Slab Co.*²⁴

In my opinion a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a ‘debenture’. I cannot find any precise legal definition of the term, it is not either in law or commerce a strictly technical term, or what is called a term of art.

In *British India Steam Navigation Co v Inland Revenue Commissioners*,²⁵ Lindley J said:

... what the correct meaning of ‘debenture’ is I do not know. I do not find anywhere any precise definition of it. We know that there are various kinds of instruments commonly called debentures. You may have mortgage debentures, which are charges of some kind on property. You may have debentures which are bonds ... You may have a debenture which is nothing more than an acknowledgement of indebtedness. And you may have a thing like this, which is something more; it is a statement by two directors that the company will pay a certain sum of money on a given day, and will also pay interests half-yearly at certain times and at a certain place, upon production of certain coupons by the holder of the instrument.

²⁴ (1887) 37 Ch D 260

²⁵ (1881) 7 QBD 165

(ii) In *Bensa Sdn Bhd v Malayan Banking Bhd*²⁶ James Foong J in referring to Chitty's definition of a debenture above, stated that a more liberal outlook should be given to the term 'debenture' owing to the wide range of forms and instruments that are being introduced to meet the ever changing needs of modern day commerce. James Foong J stated that the term 'debenture' should include besides "debt", any obligation, covenant, undertaking or guarantee to pay or any acknowledgement thereof.

Given such a wide definition of 'debenture', any person can rely on section 181 and bring an action against a company. In fact, the court at the commencement of the hearing of the application would have to decide whether the applicant is a debenture holder or not.

There is a high likelihood that many might claim to be a debenture holder and abuse section 181 by unnecessarily bringing an action which may be frivolous and vexatious. Although a company may be able to set aside such an action but it will still cost the company its valuable management time and resources in appointing, instructing and liaising with its lawyers and attending court proceedings. Such litigation might even damage the reputation of the company, if it is brought to the attention of the public by the media. Therefore, those managing a

²⁶

[1993] 1 MLJ 119

(ii) **Shadow directors**

Section 4 Companies Act 1965 defines a 'director' as follows:

includes any person occupying the position of a director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director

It is known fact that in many circumstances, company directors rely and act in accordance with the directions or instructions of debenture holders who have advanced loans to the companies. Without the assistance and cooperation of these debenture holders it is difficult for the companies to embark on many promising projects or business adventures. Many companies do survive on these financial assistance, otherwise they would be out of business. In such a situation, the Board of Directors may be compelled to allow these debenture holders either orally, contractually or through the Articles of Association to participate directly or indirectly in the management and running of the company. There may be circumstances where these debenture holders would be able to influence decisions made by the Board of Directors of the company, even though the Board of Directors had been elected by the general meeting of shareholders to manage the company. Owing to the wide definition of 'directors' in section 4 of the Companies Act, the debenture holders may fall under the category of those persons commonly called the 'shadow directors' and therefore are able to run the company indirectly.

The mere existence of the above situation would allow the debenture holders to easily commence an action under section 181 to protect and safeguard their loan capital. Even though the debenture holders may be aware of the significance and requirement of proving the elements of section 181 in the court of law, however, such requirement may not hinder them from pursuing against or pressuring the Board of Directors of the company to settle their debts. Most companies are very concerned about their public image and reputation in the business world and would at all cost avoid any legal suits being brought against them, especially by creditors. Therefore, in the process of trying to protect their credibility, there would be a strong tendency on the part of the Board of Directors to end up compromising their management decisions to please their creditors. It is on these grounds that the writer strongly suggests that debenture holders should not be included in the provisions of section 181.

There are in fact other sufficient safeguards for the debenture holders. Public companies cannot issue debentures to raise money from the public unless such invitations to the public comply with the strict provisions of the Companies Act with regards to prospectuses.²⁷ Generally, a debenture would include a covenant to pay, accompanied by some charge or security. The most common charge or security obtained by a debenture holder against the company would be a fixed or floating charge over the assets, property and undertaking of the

²⁷ See ss 37 – 47B, Division 1, Part iv, Companies Act 1965

common charge or security obtained by a debenture holder against the company would be a fixed or floating charge over the assets, property and undertaking of the company. However, it is to be noted that a debenture can be given without there being any charge over the company's property. This type of debenture is commonly known as an unsecured note or naked debenture. In fact, section 38(3) Companies Act 1965 requires that the acknowledgement of debt issued pursuant to section 38 be described as an "unsecured note" or "unsecured deposit note" unless security of the kind specified in section 38(4) or (5) does in fact exist, in which case the word "debenture" may be used..

Further, public companies cannot issue debentures to raise money from the public unless a trustee corporation is appointed for the holders of the debentures. Section 74(1) Companies Act 1965 provides:

Subject to this section every corporation which offers debentures to the public for subscription or purchase in Malaysia after the commencement of this Act shall make provision in those debentures or in a trust deed relating to those debentures for the appointment of a trustee corporation as trustee for the holders of the debentures.

Further section 78(2) – (5) and s 79 give trustees wide powers to protect the interest of debenture holders by making application to the courts whenever the trustees are of the opinion that the interest of the debenture holders will be prejudiced by the acts of the company and the court has wide discretionary powers to provide the appropriate remedies.

Although the prohibitions and restrictions with regard to public offerings of debentures do not apply to private companies, nevertheless, the private debentures usually adopt similar restrictions as required by the Companies Act. Further, a charge created by a private debenture must be registered under section 108(1) Companies Act 1965 so as to protect the debenture holder in recovering his loan capital.

Given that there are adequate protection for debenture holders, it is suggested that the legislature should not have included debenture holders in section 181. It is arguable that, it is for these reasons that the legislatures in the equivalent English and Australian provisions did not include debenture holders.

The legislature gives a special position to debenture holders. Their position is more secure than those creditors (especially suppliers of goods or those who may have provided other valuable services) who do not have any documents which may be categorised as a debenture. They would expect that the company would pay them too. The section itself seems to be unfairly prejudicial and unfairly discriminatory in this context.

In this respect and given the elusive nature of the definition of what a debenture means, Parliament would need to amend the present section 181. It has to either define precisely who the category of persons falling under the context of

The provisions of the Canada Business Corporations Act, S.C 1974-75-76, C.33, (now R.S.C 1985, C.C-44,), which are relevant for the present discussion are set out below:

- S234(1) A complainant may apply to a court for an order under this section.
- (2) If, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates:
- (a) any act or omission of the corporation or any of its affiliates effects a result;
 - (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner; or
 - (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner;

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

In the Canadian Act, the term 'creditor' is not defined. However, the broad definition of 'complainant' in the Act purportedly allows creditors to have standing to bring an action under the above provisions. Referring to the Canadian cases, much depends on a case to case basis. The following cases show the position of the Canadian courts: *Re Daon Development Corp.*²⁸ (debenture holder seeking leave to bring a derivative action not qualified as complainant); *R v The Sands Motor Hotel Ltd*²⁹ (federal Crown as creditor qualified as complainant pursuant to

²⁸ (1984), 54 B.C.L.R 235 (S.C)

²⁹ [1985] 1 W.W.R 59 (Sask. Q.B)

the oppression provisions); *Bank of Montreal v Dome Petroleum Ltd.*³⁰ (creditor qualified as complainant); *Tsuru v Montpetit*³¹ (creditor qualified as complainant); *Canadian Opera Co. v 670800 Ont. Inc.*³² (creditor qualified as complainant); *First Edmonton Place v 315888 Alta. Ltd.*³³ (creditor had status as a complainant but unable to bring oppression remedy because not a creditor at time of oppression); *Lloyds Bank Canada v Canada Life Assurance Co.*³⁴ (assignee of creditor entitled to bring claim for oppression remedy in respect of assignor's loan to debtor corporation) and *Prime Computer of Canada Ltd v Jeffrey & Robinson & Jeffrey Ltd.*³⁵ (the vendor of computer equipment to which the defendant corporation owed payment for purchases was permitted to bring an action alleging that the stripping of corporate assets was oppressive or unfairly prejudicial to the interests of the judgment creditor).

Further, there was the issue of whether the term "creditor" should be restricted to persons to whom a debt is owing, or whether it should have an

³⁰ (1987), 67 C.B.R. (N.S) 296 (Alta Q.B)

³¹ [1989] R.J.Q. 2452 (C.S)

³² (1990), 75 O.R. (2d) 720 (Div. Ct)

³³ (1988), 40 B.L.R. 28 (Alta Q.B), revd [1990] 2 W.W.R. 670 (Alta C.A)

³⁴ (unreported) (June 5, 1990), Doc. Toronto 18929/87, Van Camp J (Ont.H.C)

³⁵ (1991), 6 O.R. (3d) 733 (Gen. Div)

extended meaning to include persons with unliquidated claims for damages.³⁶ This issue was resolved in *G.T Campbell & Associates Ltd v Hugh Carson Co.*,³⁷ where the Court of Appeal considered the provisions of the 1970 Ontario Act which provided for the commencement of actions against the corporation and its shareholders within two years of dissolution. In interpreting the meaning of “creditor” in the relevant section of the Ontario Act, a majority of court was of the view that to ascribe the common law meaning to the word, that is restricting claims to persons to whom liquidated amounts are owing, would lead to an unjust and unreasonable result, in that otherwise, persons with unliquidated claims against the corporation would be unable to satisfy their judgment as against the shareholders to whom the property of the corporation had been distributed. The court was of the opinion that it would be impossible to obtain judgment against the corporation, commence an action against the shareholders and obtain judgment within the two-year period required by the Ontario Act.³⁸ Therefore, for the purpose of those provisions, ‘creditor’ included persons with unliquidated claims for damages.

It is no doubt that the inclusion of the term ‘creditor’ would lead to a floodgate of legal suits against companies. Possibly to curtail such actions being brought, the Malaysian courts should be given a wide discretion as to whether the

³⁶ Harry Sutherland, Q.C., David B. Horsley, Q.C., Graham Turner, Christopher D. Woodbury and Shona Bradley, *Fraser & Stewart Company Law of Canada*, 6th Ed. Carswell, 1993, p 715

³⁷ (1979), 24 O.R (2d) 758 (C.A)

³⁸ *supra* n 40 at p 715

creditors concerned have a cause of action under section 181. Then again, this may lead to unnecessary and protracted legal actions which would not be in the best interest of the company.

One important principle of company law is that the Memorandum of Association and the Articles of Association are statutory contracts between the company and the shareholders or members. Companies must be governed by these constitutional documents and shareholders have the right to ensure that the board of directors manage and run the companies in accordance with the provisions of those documents. In a way these documents give shareholders and members a sense of importance that at least they have some control as to how companies are run and at the same time make those elected directors accountable to them.

By allowing debenture holders a right to make use of section 181, the legislature has indirectly weakened the position of the shareholders and the significance of the statutory contracts between the shareholders and the company. This is obvious by the wide variety of orders that a court could make pursuant to section 181(2) of the Act. The situation would be made worse if section 181 is amended to include the term "creditors".

C. The Minister

Finally the Minister, in the case of a declared company under Part IX of the Act, can commence an action under section 181. In section 194 a declared company is

defined as meaning a company or foreign company to which Part IX applies, that is a company the affairs of which are being investigated under sections 195 and 196. However to date no application has been made in Malaysia by the Minister under section 181.

II. **Conditions applicants need to prove under section 181**

Finally, it should be noted that an applicant under section 181 must prove one of the following conditions to establish a case:

- (i) the affairs of the company are being conducted in a manner oppressive to one or more of the members, shareholders or debenture holders of the company; or
- (ii) the powers of the directors are being exercised in a manner oppressive to one or more members shareholders or debenture holders of the company; or
- (iii) the affairs of the company are being conducted in disregard of the interests of one or more of the members shareholders or debenture holders of the company; or
- (iv) the powers of the directors are being exercised in disregard of the interests of one or more of the members shareholders or debenture holders of the company; or
- (v) some act of the company have been done or is threatened to be done which unfairly discriminates against one or more of the members or debenture holders of the company; or

- (vi) some resolution of the members (or any class of them) has been passed or is proposed which unfairly discriminates against one or more of the members or debenture holders of the company; or
- (vii) some act of the company has been done or is threatened which is otherwise prejudicial to one or more of the members or debenture holders of the company; or
- (viii) some resolution of the members (or any class of them) has been passed or is proposed which is otherwise prejudicial to one or more of the members or debenture holders of the company.

In Chapter 5, the writer will examine some of the important elements of section 181(1) which the petitioner has to prove before the court can provide an appropriate remedy.

CHAPTER 5

ELEMENTS THAT CONSTITUTE SECTION 181(1) OF THE COMPANIES ACT 1965

I. Affairs of the company

A. Definition

One of the requirements of section 181(a) of the Companies Act 1965 is the need by the applicant to prove that the affairs of the company are being conducted in a manner oppressive to one or more of the members or in disregard of his or their interests as members, shareholders or holders of debentures of the company. Section 181 Companies Act 1965 does not define what is meant by 'affairs of the company'. However, it is a fact that in the great majority of cases it would be clear that the conduct complained of is conduct of the company's affairs and any attempt to define what constitutes conduct of the affairs of the company is bound to be largely tautologous'.¹

"Affairs of the company" was broadly defined by Bowen CJ in *Re Cumberland Holdings*:²

The words 'affairs of the company' are as wide as one could well have. They are not limited to business or trade matters, but encompass capital structure, dividend policy, voting rights, consideration of take-over offers, and indeed, all matters which may come before the board for consideration.

¹ Robin Hollington: *Minority Shareholders' Rights*, 2nd ed London, Sweet & Maxwell, 1994, p 58.

² [1976] ACLR 361 at p 374-375.

In section 53 of the Australian Corporations Law, this expression was defined in broad terms and in relation to a body corporate it included reference to:³

- i) the promotion, formation, membership, control, business, trading, transaction and dealings, property, liabilities, profits and the income, receipts, losses, outgoings and expenditure;
- ii) the internal management and proceedings; and
- iii) the power of persons to exercise, or to control the exercise of, the rights to vote attached to shares in the body corporate or to dispose of, or to exercise control over the disposal of, such shares.

In *Re a Company* (No. 001761 of 1986)⁴ Harman J held:⁵

Thus one must always analyse very carefully... what is the conduct in the company itself or by the company itself (whether it be a single act or whether it be a course of conduct matters not) to see that there was conduct in the company's own affairs ...(T)he conduct complained of must be in the affairs of the very company in respect of which the petition is presented.

Re a Company (NO. 001761 of 1986) is important in the sense that it illustrates the distinction between conduct "in the company" and conduct "dehors

³ P.Lipton and A.Herzberg, *Understanding Company Law*, 4th ed, Sydney, The Law Book Company Limited, 1992, p 449.

⁴ [1987] BCLC 141

⁵ *Ibid* at p 144 f-g

the company”.⁶ Conduct “in the company” is illustrated by the facts of the well-known case of *Scottish Co-operative Wholesale Society v Meyer*.⁷ Here the petitioners were minority shareholders in a subsidiary company formed by Scottish Co-operative Wholesale Society (SCWS). The subsidiary had five directors, three were nominees of SCWS and the petitioners were the other two directors. The subsidiary and SCWS carried on the same business. The subsidiary, however depended on SCWS for its supplies. Later, SCWS deliberately refused to supply the subsidiary with supplies with the intention of ruining the subsidiary. The three nominee directors did not intervene to prevent SCWS from ruining the subsidiary’s business. It was held that the action of the Board of SCWS and the majority shareholders constituted conduct in the affairs of the company and therefore was oppressive.

On the other hand conduct such as being ‘rude, domineering, disruptive and aggressive towards [customers] and members of the staff of the company at the [company] premises’; trying ‘to get more money for the company in a somewhat abrasive fashion’; asking ‘the secretary to park the director’s car; ...in her personal interest asking the others in a board meeting, in their personal and individual capacity, to transfer their shares to her and resign as directors, have been

⁶ *Ibid* at p 148a

⁷ (1959) AC 324

held not to be 'conduct of or in the company'.⁸ These acts are considered acts done by the director in his or her personal capacity and are examples of conduct 'dehors the company'.

B. Related companies and the position of nominee directors

The concept of separate legal entity and the principle that directors only owe fiduciary duties to their own company, may give rise to difficulties in circumstances where directors are appointed as nominee directors. Nominee directors are generally appointed to represent the appointer in the board of another company. It is common for holding companies to appoint nominees as directors of its subsidiaries. Where the subsidiary is wholly-owned by the holding company, nominee directors will be required to act in the best interests of the group of companies, whereas, if it's a non-wholly owned subsidiary, the nominee directors must balance the interests of the group with the interests of the shareholders generally including the minority shareholders.⁹ However, the fact still remains that the nominee directors must act in the best interest of the company of which he or she is the director and not act in disregard of the interests of the company. The nominee director must give due regard to the interests of the members of the company he is appointed to. There is

⁸ *Supra* at n 4 at 145-6.

⁹ P.Lipton and A.Herzberg, *Supra* n 3 at p 301

also authority that in certain circumstances the interests of its creditors must be taken into account especially when the company is insolvent.¹⁰

It is to be noted that the above view expressed would be commercially unrealistic as most company's affairs are managed on a group basis and it would be impossible to clearly specify the affairs of each company in the group of companies as they would generally tend to overlap. It has been suggested that the 'economic reality of group activity should be recognised and the manner in which the affairs of one member of the group are conducted should, in most circumstances, be treated as part of the affairs of other group members'.¹¹

Therefore, in conducting the affairs of the company there is a high possibility that nominee directors may be in a position of conflict of duty in exercising their powers as directors. In such circumstances, they may be vulnerable to section 181 actions by minority shareholders.

¹⁰ *Walker v Wimborne* (1976) 137 CLR 1 at 6-7; *Nicholson v Permakraft (NZ) Ltd* (1985) 3 ACLC 453.

¹¹ S.H.Goo, *Minority Shareholders' Protection: A Study of S 459 of the Companies Act 1985*, London, Cavendish Publishing Limited, 1994, p26.

In *Nicholas v Soundcraft Electronics Ltd*,¹² the petitioner, a minority shareholder in Soundcraft Magnetics Ltd (the company) brought an action under the equivalent of section 181 of the Companies Act 1965. The company had three shareholders. 75% of the shares were held by Soundcraft Electronics Ltd (the parent company) and the remainder was divided equally between the petitioner and another. The company had a board of four, the petitioner and another and two others who represented the parent company. The parent company was to support the company but owing to its own financial difficulties, it withheld sums due to the company.

One of the issues before the Court of Appeal was whether the withholding of the sums constituted acts done in the conduct of the affairs of the company. It was held that the parent company exercised detailed control over the affairs of the company and when it withheld payments to the company it was doing so as part of the general control that it exercised over the affairs of the company. Therefore, the non-payments of the sums due to the company did relate to the manner in which the affairs of the company were conducted. However, it was further held on the facts that the parent company's conduct of the company's affairs did not constitute unfair prejudice.

¹² [1993] BCLC 360

In *Scottish Co-operative Wholesale Society Ltd v Meyer*, the facts of which were stated earlier, Lord Keith in the House of Lords held:¹³

The only question is: was it oppressive in the affairs of the company? At a previous stage of this case when relevancy was under consideration the late Lord President Cooper said: "The truth is that, whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with its subsidiary." I would adopt this statement with this expansion, that conducting what are in a sense its own affairs may amount to misconducting the affairs of the subsidiary. It is difficult to say that misconduct in the affairs of the subsidiary is not conduct in the affairs of the subsidiary and that, I think, is what Lord Cooper had in mind. Misconduct in the affairs of the company may be passive conduct, neglect of its interests, concealment from the minority of knowledge that it is material for the company to know. That, in my opinion, is what happened here.

In *Morgan v 45 Flers Avenue Pty Ltd*,¹⁴ the plaintiff and the second defendant were brothers. They acquired shares in 45 Flers Avenue Pty Ltd which in turn held shares in Metal Recyclers Pty Ltd. The second defendant represented 45 Flers Avenue Pty Ltd in the board of Metal Recyclers Pty Ltd. Later there was a dispute between the brothers and the plaintiff began to trade in competition with Metal Recyclers Pty Ltd. Metal Recyclers Pty Ltd resolved to pay large directors fees and bonuses to the second defendant at the expense of 45 Flers Avenue Pty Ltd. The plaintiff, sought an order under the equivalent of section 181 for the

¹³ *Supra* n 7 at p 362.

¹⁴ (1986) 10 ACLR 692

compulsory purchase of his shares. The main allegation of the plaintiff was that, in exercising his votes as a member of the board of *Metal Recyclers Pty Ltd*, the second defendant was acting in the affairs of the company which appointed him to that position. Young J held:¹⁵

In general where a person is serving on a board of directors, he is dealing with the affairs of the company that is being controlled by the board and whilst he is so acting he is not, and should not, be also involved in the affairs of some other entity. This principle seems to me also to underline the decision in *Molomby v Whitehead* (1985) 63 ALR 282. A board member can look at all papers that he wants to see, even though he may be appointed to represent a special interest group because when acting for the board it is assumed unless the contrary is proved the director is acting in the affairs of the board and not in conflict with them.

It is of course true that a person who is what might be called a nominee director, may legitimately exercise his votes on a board in the interests of the person who appointed him without being in breach of a fiduciary duty to the company on whose board he sits: see eg the judgements of Jacobs J on *Levin v Clark* [1962] NSW 686; 80 WN (NSW) 85 and *Re Broadcasting Station 2GB Pty Ltd* [1964-5] NSW 1648. However, I do not consider that this state of affairs is sufficient for one to conclude that when so taking part in a board meeting of a company one is acting in the affairs of the appointor company.

In the instant case, on the facts Young J held that the second defendant was not acting in the affairs of the appointing company when voting at a meeting of the board of the company to which he had been appointed.

¹⁵ *Ibid* at p 705

A similar situation arose in case of *Re Norvabron Pty Ltd* (No 2).¹⁶

Here the oppression complained occurred in Transfield (Qld) Pty Ltd, which was a wholly owned subsidiary of Norvabron Pty Ltd. The petitioner sought an order requesting the respondents to purchase his shares. It was argued that the conduct complained of related to the affairs of the subsidiary and therefore, the applicant had no right to bring an action against the parent company, Norvabron Pty Ltd. However, the court rejected the argument of the respondents that the applicant's case was on its facts limited to the subsidiary, whereas the application was made in respect of the parent company. The court held such an approach is artificial in the extreme. The court said that the directors of Norvabron Pty Ltd were aware of the happenings in the subsidiary because they were personally involved and they omitted to act in relation to those happenings even though it was their duty to do so. It was held that their omission to act was relevant under the equivalent of section 181 proceedings.

Therefore in situations as above, the important fact to take into consideration is whether one is dealing with a wholly or majority owned subsidiary of a company. In *Scottish Cooperative Wholesale Society Ltd v Meyer and Re Norvabron Pty Ltd* it was held that the parent company was in a position to control the affairs of the subsidiary whereas in *Morgan v 45 Flers Avenue Pty Ltd*, the company in question only controlled 50 per cent of the voting power and there were

¹⁶ 1986) 11 ACLR 279

provisions in the articles of association requiring all directors to agree to certain matters.¹⁷ Although the law is uncertain with respect to the position of such nominee directors but the following Australian authorities seem to provide protection to nominee directors from being sued under section 181.

In *Re Broadcasting Station 2 GB Ltd*,¹⁸ Jacobs J of the Supreme Court of New South Wales thought that nominee directors who acted in the interests of their principals would not be in breach of duty unless it could be inferred that they would still have acted that way if they were of the view that their acts were not in the interests of the company. That approach was approved in *Berlei Hestia (NZ) Ltd*¹⁹ as being appropriate to a joint venture company.²⁰

In *Levin v Clark*,²¹ two directors were nominated to the board to exercise their powers only if the terms of a security over the company's assets were

¹⁷ Peter G. Wilcocks, *Shareholders' Rights and Remedies*, The Federation Press, 1991, p 30.

¹⁸ [1964-5] NSW 1648

¹⁹ [1980] 2 NZLR 150

²⁰ HAJ Ford, *Principles of Company Law*, 5th ed, Sydney, Butterworths, 1990, p 425.

²¹ [1962] NSW 686

broken by the company. Jacobs J held that they were not in breach of their fiduciary duty to the company when they acted to enforce the security. He said.²²

It may be in the interest of the company that there be upon its board of directors one who will represent these other interests and who will be acting solely in the interests of such a third party and who may in that way be properly regarded as acting in the interests of the company as a whole.

In *Levin v Clark* the articles allowed the creditor to nominate directors and thus the members could be taken to have waived any supposed right to have a board which considered only their interests (and, where appropriate, the interests of creditors generally) to the extent that the board could consider the particular secured creditor's special interest. But even if, in the absence of relevant articles, the creditor's right to representation vested on only a board resolution, the issue would seem to be whether the board resolution was in the interests of the company.²³ In *Whitehouse v Carlton Hotel Pty Ltd*,²⁴ the High Court of Australia held that the articles may determine the legitimate parameters of directors' behaviour.²⁵ Therefore, with properly drafted articles, nominee directors may act in the interests of their appointor without breaching their fiduciary duty to act in the best interest of the company.²⁶

²² *Ibid* at p 700.

²³ *Supra* at n 20 at p 424-425.

²⁴ (1987) 5 ACLC 421

²⁵ *Supra* at n 3 at p 302.

²⁶ *Ibid* at p 302-303.

Therefore, it may be concluded that if the articles expressly authorise the appointment of directors by outsiders, then power to do so is undoubtedly valid and if the company refuses to accept the outsider's nominees, the court will compel it to do so by injunction unless the nominee is unfit to act.

C. Continuing state of affairs

The words "affairs of the company are being conducted" in section 181(1)(a) of the Companies Act 1965 relates to a continuing state of affairs. Therefore, where a petition is presented on the ground of oppression or disregard of a member's interests, the acts complained of must be continuing at the time the action is brought. This implies that a member is not entitled to relief if the oppression has stopped. *In Re Kong Thai Sawmills (Miri) Sdn Bhd*,²⁷ the Privy Council refused to provide relief in respect of acts of oppression or disregard that had ceased at the time of the action, therefore preventing a member complaining against an isolated act or completed transaction which has no enduring results; he must show a continuing state of affairs in order to justify relief.²⁸ On the other hand, in the case of an act or resolution that unfairly discriminates against a member or is otherwise prejudicial to him, the

²⁷ (1978) 2 MLJ 227

²⁸ Walter Woon and Andrew Hicks, *The Companies Act of Malaysia, An Annotation*, Butterworths Asia, 1997 at VII (83).

wording of the section suggests that relief may be obtained even if the act has already been done or the resolution has been passed.²⁹

However, what is important to note, is that, the oppression remedy is directed against the effects of the oppressive conduct and not just the oppressive conduct itself, otherwise it would render the effectiveness of the remedy in section 181(1)(a) meaningless.³⁰ This point was made clear in the case of *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd and Anor*³¹ where the court rejected an argument that the act was not continuing because it was fiat accompli at the date of the hearing of the petition.³² Gopal Sri Ram JCA held:³³

Now, it is inaccurate to state as a proposition of law that because of the present tense of the language appearing in s 181(1)(a) the oppression complained of must in every case continue up to the date of the presentation of the petition. Indeed, Lord Wilberforce [in *Re Khong Thai Sawmill (Miri) Sdn Bhd*] himself recognised this when he referred to a last minute correction as not having the effect of avoiding an inference of a propensity to oppress. But the reference by his Lordship to a last minute correction is but a mere illustration of a much wider principle. It is this.

Paragraph (a) to the first sub-section 181 is not, as observed by Lord Wilberforce [in *Re Khong Thai Sawmill (Miri) Sdn Bhd*], directed at specific or particular acts or omissions. It is directed at the nature of the conduct complained of. And where attention is called to particular

²⁹ *Ibid*

³⁰ Loh Siew Cheang, *Corporate Powers: Controls, Remedies and Decision Making*, *Malayan Law Journal*, Kuala Lumpur, 1996, p 149.

³¹ [1996] 2 AMR 2477

³² Loh Siew Cheang, *Supra* n 30 at p 149.

³³ *Supra* n 31 at p 2500

acts or omissions, it is the effect of these which has to be considered. It is not and has never been the law that the section does not bite where what is complained of is but a single act or omission on the part of wrongdoers.

A single act or omission may, by its very nature, have so devastating or far reaching a consequence upon the rights of a member that its effects may be permanently felt. For the purposes of s181(1) it is sufficient that the effects of a single act or omission are such that they persist at the date of the presentation of the petition. It is no answer, in those circumstances, for the perpetrators of the act or omission to allege that there was no continuous oppressive conduct up to the date of presentation of the petition.

In Australia, for instance, before 1983 it was a requirement that the affairs of the company must be conducted in a manner oppressive to some member or members at the time when the petition was presented.³⁴ The present Australian section 260 (1)(a)(i) contains a reference to “are being conducted” in relation to the affairs of the company and accordingly on the basis of past authority it would not be possible to allege that the “affairs of the company” are being conducted in an oppressive manner if such conduct has ceased and under those circumstances it would be necessary to rely on the provisions of section 260(1)(a)(ii) in relation to an act or omission.³⁵ This basically implies that no member can bring an action by relying on past conduct of the affairs of the company, where it is a combination of acts or omissions which creates the oppression and where each single act or

³⁴ Peter G. Wilcocks, *Supra* n 17 at p 27

³⁵ *Ibid*

omission taken alone is not oppressive.³⁶ The present position in Australia is stated in *Norvabron Pty Ltd*(No. 2):³⁷

It should first be noted that one branch of the qualification for relief involves the continuing conduct of any affairs of the company that involve oppression, unfair prejudice or discrimination, while in respect of the second branch, a single past act of that description is sufficient. Obviously, in order to invoke the exercise of the court's discretion, the single past act would need to be so serious as to equate to a continuing present state of affairs, but a series of past acts may be cumulative and may be considered in respect of their present and future effect. A single act in the past may not be so serious as to support the remedy or having been corrected may not support it, but of course everything depends upon the circumstances of the particular case.

In an earlier Australian case, *Anti-Corrosive Treatments Ltd & The Companies Act*,³⁸ the court made it clear for the purposes of the equivalent of section 181, that intention of the oppressor to carry through an act is paramount in establishing whether there was oppression or not. In that case, the majority shareholder who was also the governing director had called for a general meeting to alter the articles of association, so as to enable him to acquire the shares of the petitioner and get rid of the petitioner. It was held that as long as an act is oppressive and the oppressor shows an intention to carry through with the act, there is a

³⁶ *Ibid*

³⁷ *Supra* n 16 at 289

³⁸ (1980) ACLC, 34165

continuing process of oppression.³⁹ White J held:⁴⁰

The conclusion I have reached is that in the present case an attempt was made to commit a breach of the membership rights under the articles followed by a damaging course of conduct set in motion to avoid a breach of the existing membership rights under the articles. That, in my view, must be regarded as a continuing process of oppression.

Referring to the Malaysian case of *Owen Sim Liang Khui* and the Australian cases of *Re Norvabron Pty Ltd* and *Anti-Corrosive Treatments Ltd*, the words ‘affairs of the company are being conducted’ and ‘powers of the directors are being exercised’ (only in the Malaysian section), does not mean the conduct or act must be of a continuing nature and persist at the date of hearing of the petition. It is generally a question of fact and as stated in *Re Norvabron Pty Ltd*, it would depend on the seriousness of the act and on the circumstances of each case.

Therefore looking at section 181(1)(b) and also section 260(1)(b)(ii) of the Australian s 260, whereby Parliament seems to have recognised past single acts or omissions, it is the writer’s opinion that it would not have been the intention of Parliament not to recognise past conduct of the affairs of the company for the purposes of section 181(1)(a) and under the circumstances the decisions of the Malaysian courts in relying on the effect of the conduct should be appreciated. Nevertheless, it is suggested by the writer, that the legislature should have included

³⁹ Loh Siew Cheang, *Supra* n 30 at p 148.

⁴⁰ *Supra* n 38 at 34172

the words 'have been conducted' and 'have been exercised' in section 181(1)(a). In section 459 of the English Act, the section reads '...company's affairs are being or have been conducted...'. The inclusion of the above words would have solved the problems faced by the courts in interpreting the actual scope of section 181(1)(a).

II. Oppression

A. Definitions

In United Kingdom, the introduction of section 210 Companies Act 1948 was the first step of the legislature to provide protection to minority interest in a company, however it is obvious that the section 210 remedy was defective especially in the way the courts interpreted the meaning of the word "oppression". The courts were very rigid and defined the word in a very restrictive manner. In *Scottish Cooperative Wholesale Society v Meyer*, Lord Simonds defined the term "oppression" to mean "burdensome, harsh and wrongful". In fact how these words are to be further interpreted and applied in a particular fact situation will always be a major hurdle for the courts. It is obvious that the definition stated by Lord Simonds did not help minority litigants because there were only two successful actions brought under section 210 of the English Act.⁴¹ However, some courts, recognising the restrictiveness of the meaning of the word 'oppression' had endeavoured to provide broader definitions so as to protect minority shareholders. The definitions had received different interpretations and criticisms by different courts.

⁴¹ *Scottish Cooperative Wholesale Society v Meyer* (1959) AC 324 and *Re HR Harmer* [1959] 1 WLR 62

In the United Kingdom with the passing of the section 75 of the Companies Act 1980 the word “oppression” was replaced with that of unfairly prejudicial conduct. But then, some countries like Australia, Malaysia, India and Ghana have still retained the word “oppression” in their statutes. However, as will be noted in a later part of this chapter, the courts in these countries have given a much more liberal interpretation to the word ‘oppression’. Buckley LJ defined oppression in *Re Jermyn Street Turkish Baths Ltd*.⁴²

In our judgement, oppression occurs when shareholders, having a dominant power in a company, either (1) exercise that power to procure that something is done or not done in the conduct of the company’s affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company’s affairs; and when such conduct is unfair...to the other members of the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the company’s affairs.

In *Gidwitz v Lanzit Corrugated Box Co*, Justice Hershey said:⁴³

The word does not necessarily savor of fraud, and the absence of ‘mismanagement, or misapplication of assets’, does not prevent a finding that the conduct of the dominant directors or officers has been oppressive. It is not synonymous with ‘illegal’ and ‘fraudulent’.

In *Elder v Elder and Watson Ltd*,⁴⁴ Lord Cooper gave a broader and

⁴² [1971] 3 All ER 184

⁴³ 170 NE 2d 131 at p 135

⁴⁴ [1952] SC 49

more liberal definition.⁴⁵

The essence of the matter seems to be that the conduct complained of should at the lowest involve departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.

Lord Keith in *Elder v Elder and Watson Ltd* stated the test of oppression to be "lack of probity or fair dealing"; whereas Lush J in *Re Dalley and Co Pty Ltd*⁴⁶ took a broader view.⁴⁷

In my opinion want of probity is only one of the ways in which oppression can manifest itself, as indeed the use of the alternative 'lack of probity or fair dealing' by Lord Keith [in *Elder's* case] indicates. One person may subject another to continual injustice by insisting, however honestly, on a proposition that is wrong or by using his strength to maintain, however honestly, a position unjustified in law.

In Malaysia the court in the case of *Re Kong Thai Sawmill (Miri) Sdn Bhd* had preferred the view as expressed in *Elder v Elder and Watson Ltd* and again recently in the case of *Jaya Medical Consultants Sdn Bhd v Island and Peninsular Bhd and 13 Ors*,⁴⁸ Siti Norma J (as she then was) held:⁴⁹

...oppression does not necessarily mean illegal or fraudulent nor does it require fraud. For there to be oppression, there must be visible departure from the standard of fair dealing or fair play and where the

⁴⁵ *Ibid* at p 55

⁴⁶ (1968) 1 ACLR 489

⁴⁷ *Ibid* at 492

⁴⁸ [1994] 1 MLJ 520

⁴⁹ *Ibid* at p 536

oppressed is constrained to submit to some overbearing act or attitude on the part of the oppressor.

In India, the meaning of the term “oppression” as explained by Lord Cooper was cited with approval by Wanchoo J of the Supreme Court of India in *Shanti Prasad Jain v Kalinga Tubes*.⁵⁰

It is obvious from the various definitions postulated by the courts, that no single explicit definition can be given to the word ‘oppression’. The most the courts could do is to define the word “oppression” as broadly as possible in order to protect minority shareholders in any given fact situation. In *H.R. Harmer Ltd*,⁵¹ it was stated:

The result of applications under [the equivalent of s 181] in different cases must depend on the particular facts of each case, the circumstances in which oppression may arise being so infinitely various that it is impossible to define them with precision.

B. Lack of probity

One of the important issues faced by the courts in establishing “oppression” was whether there was a necessity to prove lack of probity to establish oppressive

⁵⁰ (1965) 1 Comp LJ 193, 204

⁵¹ [1959] 1 WLR 62

conduct. Here again the courts seem to defer in their views as is apparent from the following cases. *In Re Chi Liung and Sons Ltd*,⁵² Gill J seem to support the requirement of lack of probity.⁵³

Looking at the circumstances as a whole, I do not see how I can resist the conclusion that there has been a lack of probity and fair dealing in the affairs of the company to the prejudice of at least some of the members of the company. I have therefore come to the conclusion that the affairs of the company are being conducted in a manner oppressive to one or more of its members.

In Re Jermyn Turkish Baths Ltd, Buckley LJ held that lack of probity must be shown.⁵⁴

...is unfair or, to use the expression adopted by Viscount Simonds in *Scottish Cooperative Wholesale Society Ltd v Meyer* ...' burdensome, harsh and wrongful'...and lacks that degree of probity which [complaining members] are entitled to expect in the conduct of the company's affairs...

However, comparatively, the weight of authorities do not seem to support the above proposition of law postulated by Gill J and Buckley LJ. This is obvious from the following statements of law made by judges in other courts. In *Re Dalley(M) and Co. Ltd*, Lush J stated that lack of probity was not essential in proving oppression.⁵⁵

⁵² [1968] 1 MLJ 97

⁵³ *Ibid* at p 102

⁵⁴ *Supra* n 42 at p 199

⁵⁵ *Supra* n 46 at p 492

...want of probity is only one of the ways in which oppression can manifest itself, as indeed the use of the alternative 'lack of probity or fair dealing' by Lord Keith indicates.

Recently, in the case of *Residues Treatment and Trading Co Ltd and Anor v Southern Resources Ltd and Anor* (No.2),⁵⁶ Perry J held:⁵⁷

The fact that lack of probity is not an essential element in a breach of [the equivalent of s 181], does not mean that where it exists it is not relevant...In the absence of lack of probity, the application of the 'internal management' rule is likely to provide a substantial hurdle....

It is also clear from the definitions stated earlier especially in *Gidwitz v Lanzit Corrugated Box Co*, *Elder v Elder and Watson Ltd* and which was accepted by the courts in *Re Kong Thai Sawmill (Miri) Sdn Bhd* and *Jaya Medical Consultants*, that the meaning of 'oppression' does not in any way relate to the concept of 'illegality' or 'fraud'. Fraud and illegality are not essential or required to be proved in establishing whether there is oppression of minority shareholders.

C. Motive and effect of conduct

Further, the courts in deciding whether there was oppression or not in a particular situation are not concerned with the intentions, purpose or object of the oppressor but rather on the actions of the oppressor and the consequences and effects of the actions. Basically, the courts are not concerned with the motive of the oppressor,

⁵⁶ (1989) 7 ACLC 1130

⁵⁷ *Ibid* at p 1153

although it is an important factor when the court is considering an appropriate remedy in a proven case of oppression. In *Re HR Harmer Ltd*, Jenkins LJ said:⁵⁸

Finally, counsel submitted that the father got no pecuniary benefit out of what he did. That is not literally true, but even if it were, I do not think that it is essential to a case of oppression that the alleged oppressor is oppressing in order to obtain pecuniary benefit. If there is oppression, it remains oppression even though the oppression is due simply to the controlling shareholder's overwhelming desire for power and control and not with a view to his own pecuniary advantage. The result rather than the motive is the material thing.

In *Re Dalley & Co Pty Ltd*, the directors had insisted that the petitioner's shares were not ordinary shares but employee shares. This classification of the shares was important because employee shares could be expropriated by the company at the discretion of the board of directors, whereas the ordinary shares could not. The directors 'were fixed in their determination to classify the petitioner's shares as employee shares and so to remove her from the company at relatively small cost and to their own and for their children's advantage.' It was held by Lush J that the directors acted oppressively in expropriating the petitioner's shares at an undervalue. Lush J held:⁵⁹

[The equivalent of section 181] is, upon the authorities a wide remedial section not to be narrowed ... it speaks of oppression in terms of its impact on the oppressed, not in terms of the intention of the oppressor...

As far as applications under section 181 are concerned, the courts

⁵⁸ *Supra* n 51 at p 84

⁵⁹ *Supra* n 46 at p 492

position in Malaysia is clear, that is motive is not a material consideration. This aspect has been discussed by the writer earlier when dealing with 'affairs of the company' under the sub-heading 'continuing state of affairs'.

D. Passive conduct

It is well established in the case of *Scottish Cooperative Wholesale Society Ltd v Meyer*, that passive conduct by controllers of companies may give rise to oppression. Lord Keith referred to some of the statements made by Lord Russel and Lord Sorn in the Court of Session.⁶⁰

Lord Russel held that they "acted in the interests of the society and against the interests of the company by adopting a policy of masterly inactivity and allowing the company's trading activities to decline to vanishing point. Lord Sorn's view was that the society as majority shareholders controlling the company made use of its control to ensure that the company remained passive under the attack and did not have the opportunity to struggle for its existence; that they failed in their duty of raising the question of looking for another source of supply as an urgent question of policy and that, when the policy of liquidation had been expressly approved by the society's board, the nominee directors still did nothing and let the company drift towards the rocks.

After stating the above, Lord Keith made the following statement.⁶¹

My Lords, these views indicate that the conduct of the society on the company's affairs was negative conduct. That, in a sense, is true, for it is just the other side of the shield from that which displayed the society acting positively to destroy the company. But I cannot think that where directors, having power to do something to save a company, lie back and do nothing, they are not conducting the affairs

⁶⁰ *Supra* n 7 at p 362 – 363

⁶¹ *Ibid* at p 363

of the company, perhaps foolishly, perhaps negligently, perhaps with some ulterior object in view. They are certainly conducting the affairs of the company in breach of their duty as directors.

Lord Denning held:⁶²

It is said that these three directors were at most only guilty of inaction - of doing nothing to protect the Textile Company. But the affairs of the company can, in my opinion, be conducted oppressively by the directors doing nothing to defend its interests when they ought to do something - just as they can conduct its affairs oppressively by doing something injurious to its interests when they ought not to do it.

Similarly in *Ng Chee Keong v Ng Teong Kiat Highlands Plantations Ltd*,⁶³ the board of directors left a tea estate to deteriorate and did not pay the quit rent, hence risking the estate lands being forfeited. There Mohd Azmi J (as he then was) held that the failure or omission on the part of the directors to exercise reasonable care and skill in conducting the business was oppressive in nature.⁶⁴

E. Mismanagement

A question usually asked is whether the word 'oppression' covers mismanagement in companies. Generally, courts are very reluctant to interfere in the management of the companies and given the strict and narrow definition to the word 'oppression', minority shareholders were deprived in circumstances where there was

⁶² *Ibid* at p 367

⁶³ [1980] 1 MLJ 45

⁶⁴ Loh Siew Cheang, *Supra* n 30 at p 136 - 137

mismanagement by the directors and those in control of companies. In *Re Five Minute Car Wash Service Ltd*,⁶⁵ the petitioner applied to the court under the equivalent of section 181, alleging that Evison, a large shareholder, managing director of the company and chairman of the board, had conducted the affairs of the company in a manner oppressive of the minority shareholders by disregarding the interests of those other than himself and his wife. Some of the alleged acts of oppression related to differences of opinion between the petitioner and Evison on matters of policy, some mere allegations of inefficiency by Evison, some related to projects of Evison's which never came to fruition and some others. It was held that the conduct of Evison did not amount to oppression on the grounds that the allegations did not suggest that Evison acted unfairly, harshly or with any lack of probity towards any member of the company and that the allegations that Evison was unwise, inefficient and careless in the performance of his duties as managing director did not amount to oppressive conduct under the equivalent of section 181.

In the Indian case of *Lalita Rajya Lakshmi v Indian Motor Co.*,⁶⁶ the petitioner alleged that the board of directors were guilty of certain acts detrimental to the minority shareholders. The allegations were that the income of the company was deliberately shown less by excessive expenditure; that passengers travelling without ticket on the company's buses were not checked; that petrol consumption was not

⁶⁵ [1966] 1 All ER 242

⁶⁶ AIR 1962 Cal 127; (1962) 32 Comp Cas 207

properly checked; that second hand buses of the company had been disposed of at low cost, that dividends were being declared at too low a figure. It was held that even if each of these allegations were proved to the satisfaction of the Court, there would have been no oppression.

In *Re Van-Tel T.V. Ltd.*,⁶⁷ the company was owned by the petitioner and the respondent, each having one share each in the company. The petitioner brought an action under the equivalent of section 181 claiming that the affairs of the company were conducted in a manner oppressive to her. The petitioner alleged that there were no meetings of directors or shareholders of the company held since its incorporation, the petitioner's request for meetings were denied, her accountant was denied access to the company's financial records; financial statements were not prepared and there were no sales records at all, there was evidence of misappropriation of loans to the company by the respondent, tax on sales has been assessed wrongly and that dealings with the company's customers was unsatisfactory. MacDonald J of the British Columbia Supreme Court held on the facts that the respondent was conducting the affairs of the company in a manner oppressive to the petitioner.

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(1974) 44 DLR (3d) 146

The recent case of *Re Macro (Ipswich) Ltd*,⁶⁸ supports the stand taken in *Re Van-Tel T.V. Ltd* and recognises the fact that courts are willing to rely on the equivalent of section 181 in circumstances where there is serious mismanagement on the part of controllers of the company. Here, a Mr Thompson was the sole director and majority shareholder of two companies. The business of the companies was that of landlords of residential property and garages. The petitioners basically alleged mismanagement by Thompson and sought an order requiring Thompson to purchase their shares. The petitioners alleged that Thompson failed to attend to the companies' affairs while abroad, wasted money on building repairs, allowed employees to charge 'key money' for granting lettings of company properties, left property management to an inexperienced person, failed to inspect the properties regularly and charged excessive management fee. Arden J held that the conduct of the companies affairs by Mr Thompson was prejudicial and that since the conduct is prejudicial in a financial sense to the companies, it must also be prejudicial to the interests of the plaintiffs as holders of its shares.⁶⁹ Arden J further said:⁷⁰

To this I would add that the jurisdiction under [the equivalent of s 181] has an elastic quality which enables the courts to mould the concepts of unfair prejudice according to the circumstances of the case.

With respect to alleged mismanagement, the court does not interfere in questions of commercial judgment, such as would arise here if (for example) it were alleged that the companies should invest in commercial properties rather than residential properties. However, in cases where what is shown is mismanagement, rather than a difference of opinion on the desirability of particular commercial decisions, and

⁶⁸ [1994] 2 BCLC 354

⁶⁹ *Ibid* at p 404

⁷⁰ *Ibid* at p 404 - 405

the mismanagement is sufficiently serious to justify the intervention of the court, a remedy is available under [the equivalent of section 181].

Arden J's statement that only in situations where mismanagement is sufficiently serious will it justify the court to intervene was stated in the earlier case of *Re Elgindata Ltd.*⁷¹ In this case the petitioner under the equivalent of section 181 alleged unfair prejudice on the grounds that he had not been consulted with respect to policy decisions, that the affairs of Elgindata were managed incompetently and that there was misuse of the assets of the company. The court held that although on the facts there was evidence of mismanagement and a lack of managerial purposefulness this did not constitute conduct that was unfairly prejudicial. Warner J held that in an appropriate case it was open to the court to find that serious mismanagement could constitute unfairly prejudicial conduct but normally the court would be reluctant to find that mismanagement as such would amount to unfairly prejudicial conduct.

In Malaysia, in the case of *Chiew Sze Sun & Anor v Cast Iron Products Sdn Bhd & 4 Ors*,⁷² the petitioners brought an action under section 181 complaining that the respondents have mismanaged the affairs of the first respondent and that the exercise of the powers of the respondents has been oppressive and in disregard of the interest of the petitioners under section 181 (1) of the Companies

⁷¹ [1991] BCLC 959

⁷² [1993] 2 AMR 3173

Act 1965. The complaints related mainly to lack of proper accounting, misappropriation of company funds by directors, unauthorised disposal of assets of the company by the directors, tax mismanagement, loss of assets and absence of declaration of dividends. It was held by Zakaria M Yatim J that there was mismanagement of the financial affairs of the company and on the facts the respondents' actions had been in total disregard to the interest of the petitioners and was oppressive.

In *Re Coliseum Stand Car Service Ltd*,⁷³ the respondent was the majority shareholder in the company and the applicant a minority shareholder. The company was incorporated in 1939. The respondent ran the company as though he was the sole shareholder. The applicant was deprived of his directorship. No dividends were declared until 1965 although the company showed a credit balance in the years 1959 to 1963. The respondent was receiving a regular monthly salary for managing the company even during his three and a half year absence. The respondent appointed his own son as manager as if he was the only shareholder of the company. He made loans to himself and his son for purposes unconnected with the company's affairs. Rent from letting of premises was not accounted for. The High Court held that the respondent had conducted the affairs of the company without proper regard to the applicant's interest and the acts constituted an oppression on minority shareholders.

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[1972] 1 MLJ 109

In view of the above authorities, it is apparent that the courts would have to walk on a tight rope in deciding, what "degree of mismanagement is required to convince the court"⁷⁴ to provide a remedy under section 181. In trying to decide the courts would have to keep in mind the fact that those managing companies are free to make managerial decisions, that those decisions may be incompetently made and that a shareholder acquiring shares should be aware that the share value depends to a certain extent on managerial competence. It is obvious then, that unless the circumstances are extreme, the courts will be very reluctant to intervene in the internal affairs of a company whether [under section 181] or for that matter in any of the other minority provisions in the other jurisdictions. In *Tri-Circle Investment Pte Ltd*,⁷⁵ Prakash JC held:⁷⁶

The court, however, is not here to second guess management decisions of corporations. As long as such decisions are taken honestly and in good faith the fact that they are wrong decisions does not entitle disgruntled shareholders to apply for relief under [the equivalent of section 181].

It is suggested that since directors owe a duty of care and skill to the company and that the members have a legitimate expectation that the directors will act with due care in running the company's business, therefore, the courts should be

⁷⁴ K.W. Wedderburn, *Oppression of Minority Shareholders*, 29 MLR 321, p325

⁷⁵ [1993] 2 SLR 523

⁷⁶ *Ibid* at p 534

able to hold that serious mismanagement causing real economic harm to the company's business⁷⁷ should be actionable under s 181.

In concluding, it is obvious that there is no one clear meaning given to the expression "oppression". However, the courts have done their best to provide as broad a meaning as possible in the interests of justice and the Malaysian legislature has rightly introduced broader terms like prejudice, discrimination and disregard of interests of members in section 181 to protect the minority shareholders. The Malaysian legislature should have spelt out generally the requirements for the proving of oppression but then it is the writer's opinion that the existence or the retention by the legislature of the word "oppression" is superfluous given the other broad words in the provision which may allow any conduct or fact situation to fall within the minority provision.

III. Disregard of interests

A. Legitimate Expectations

One of the perplexities faced with regards to the minority protection provisions is the inclusion of the word "interests of members". The legislatures in the Commonwealth countries seem to have worded the expression in a slightly different manner and the question one would ask is whether they all mean the same. In England, section 459(1) (as amended by the Companies Act 1989) reads:

⁷⁷ S.H. Goo, *Supra* n11 at p 84

A member of a company may apply to the court by petition for an order...on the ground the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of the members generally or of some part of its members(including himself) or that any actual or proposed act or omission on the part of the company (including an act or omission on its behalf) is or would be prejudicial.

In Australia, section 260 of the Corporations Law 1991 reads:

A member who believes that the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members, or in a manner that is contrary to the interests of the members as a whole...

Whereas in section 216 of the Singapore Companies Act and s 181 of the Malaysian Companies Act, the sections use the expression:

“... that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive... or in disregard of his or their interests as members ...”

Although the Malaysian section includes debentureholders, however for comparison purposes, the writer would confine the expression to members only. Even though the provisions are worded differently the expression “membership interests” is generally confined to the two main constitutional documents (the Memorandum of Association and the Article of Associations) and to the other rights provided in the respective companies legislation. Strictly speaking, the constitutional documents and the legislation provide certain rights to all the members so as to protect their interests in the company concerned. The documents act as statutory contracts between the members themselves and the members and the company. The

documents spell out clearly the rights and obligations of all the parties including those managing the company, that is the board of directors. However, there has been much controversy as to why the legislatures mentioned above have used the expression "interests of members" rather than "rights of members". It has been argued that the expression "interests of members" is wider than the expression "rights of members", in the sense that "interests of members" encompasses other equitable rights or legitimate expectations of members.

Generally, the question of equitable rights or legitimate expectations usually arise in small private owned companies compared to public companies. In public companies a shareholder who is unhappy or discontented with the way the company is managed can realise his investment by selling his shares in the securities market. However this may not be the case in private companies because in most private companies the shareholders are small in number and the company is more in the nature of a partnership. The famous case where the court recognised equitable considerations is the case of *Ebrahimi v Westbourne Galleries Ltd.*⁷⁸ In this case, E and N had been business partners and later decided to form a private company with each holding equal shares and were also the company's directors. Later, E and N transferred some shares to N's son, G and made him a director. The company was very profitable and all profits were distributed as directors remuneration. However, after a disagreement, N and G removed E as a director and excluded him from

management. E petitioned on the 'just and equitable' ground to wind up the company. The House of Lords held that the company be wound up because when E and N formed the company it was clear that their personal business relationship would remain the same. In the circumstances, N and G were not entitled, in equity, to use their statutory power to remove a director.

However, Lord Wilberforce in the above case suggested that one or more of the following factors should be present before equitable considerations come into play:

- a) an association formed or continued on the basis of a personal relationship, involving mutual confidence.
- b) That there be restrictions on the transfer of members interests in the company.
- c) That there was an agreement that some or all of the shareholders shall participate in the management of the business.

The case *Re a Company*,⁷⁹ seems to support that equitable considerations considered in the *Ebrahimi* case do apply in section 459 petitions in the United Kingdom.⁸⁰ In *Re a Company*, two competing take-over bids were made for the shares of a private company. The directors of the company in a circular

⁷⁹ (1986) BCLC 382

⁸⁰ D.D Prentice, 'The Theory of the Firm: Minority Shareholders Oppression: Sections 459 – 461 of the Companies Act 1985', 8 Oxford Journal of Legal Studies 55 at p 73.

advised the shareholders to take up the lower bid, made by a company which was set up by the directors of the target company. The petitioners alleged that the directors, the respondents had breached their duty to the shareholders by preventing them from selling their shares to the highest bidder. The petitioners alleged that their interests as members had been unfairly prejudiced by the action of the directors. One of the arguments by the respondents was that the petitioners' interest as shareholders comprised a 'bundle of rights and obligations' and that unless they could show some infringement of rights (other than those conferred by section 459 itself), their interests as shareholders could not be said to have been prejudiced within the meaning of section 459. The respondents said that failure to take steps which would result in the petitioners being able to accept the better offer did not infringe any of the rights attached to their shares. Hoffman J rejected this argument and said that this is too restrictive an interpretation of the section. Hoffman J held:⁸¹

The concept of fairness which was chosen by Parliament as the basis of the jurisdiction under s.459 in my judgement cuts across the distinction between acts which do or do not infringe the rights attached to the shares by the constitution of the company... Unfairness is a familiar concept employed in ordinary speech, often by way of contrast to infringement of legal right. It was intended to confer a very wide jurisdiction upon the court and I think it would be wrong to restrict that jurisdiction by adding any gloss to the ordinary meaning of the words.

It is to be noted from the above statement by Hoffman J, that the interests of a member would basically depend on each individual case. Other than ensuring the constitution is complied with, the shareholder may thus have an interest

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Supra n 79 at p 387f – 388b.

in the competent management of the company, its profitability and dividend policy, its policy of rewarding directors, and its policy in relation to trading or other dealing with any associated companies or persons all of which may have a direct effect on the shareholder's financial interests or value of his shares.⁸² Nonetheless, it is generally accepted and presumed that all the rights of a member is fully and completely laid down in the articles and therefore a petitioner claiming any other rights other than those set out in the company's documents will have to prove to the court that there was some special arrangement or understanding between the parties outside those documents.⁸³ The courts are usually careful not to cross their boundaries and do recognise for a fact that where matters complained of are within the powers of the directors in the articles, there is no equitable obligations to the shareholders, that the directors must obtain the approval of the shareholders when exercising management powers⁸⁴: *Re Postgate and Denby (Agencies Ltd)*.⁸⁵ In *Re Elgindata Ltd*, Warner J said:⁸⁶

It was common ground between counsel that, even in the absence of a quasi-partnership, the interests of a member that are relevant for the purposes of [the equivalent of s 181] are not necessarily confined to his legal rights. They extend to any legitimate expectations he may have.

Where counsel differed was on the question whether in this case [the petitioner] had any legitimate expectation going beyond his legal

⁸² Robin Hollington, *Supra* n1 at p 62

⁸³ D.D.Prentice, *Supra* n 80 at p 75

⁸⁴ *Ibid* at p 76

⁸⁵ [1987] BCLC 8

⁸⁶ *Supra* n 71 at p 985

rights. [Counsel for the Respondent] referred me to *Re Posgate & Denby (Agencies) Ltd.* [1987] B.C.L.C. 667 and *Re A Company* (No.005685 of 1988), *ex p. Schwarcz* (No.2) [1989] B.C.L.C. 427. From those authorities I derive the following propositions. In general members of a company have no legitimate expectations going beyond the legal rights conferred on them by the constitution of the company, that is to say its memorandum and articles of association. None the less, legitimate expectations superimposed on a member's legal rights may arise from agreements or understandings between the members. Where, however, the acquisition of shares in a company is one of the results of a complex set of formal written agreements it is a question of construction of those agreements whether any such superimposed legitimate expectations can arise.

Further, given the broad meaning of the "interests of the members", it must be borne in mind that a membership interest although variable in nature should be strictly confined to the interests in the affairs of the company depending upon the shareholders position, involvement and financial stake in the company. The above propositions of law on the meaning of 'interests of members' has been judicially recognised by the Malaysian courts. In the case of *George Ting Yew Tong and Ors v Leong Hup Holdings Bhd*,⁸⁷ the Court of Appeal endorsed that legitimate expectations are within section 181.⁸⁸ In *Jaya Medical Consultants Sdn Bhd v Island and Peninsula Bhd and Ors*, Siti Norma J (now JCA) in interpreting section 181(b) clearly recognised the importance of equitable considerations:⁸⁹

...[the] concept of unfair discrimination or prejudice...enables the court to take into consideration not only the rights of the members under the company's constitution but also their legitimate expectations arising from the agreements and understanding of the members among themselves.

⁸⁷ unreported judgement dated 23 November 1995.

⁸⁸ Loh Siew Cheang, *Supra* n 30 at p 153

⁸⁹ *Supra* n 48 at pp 536 - 537

B. Interests of members

The courts have also struggled with the terms “interests of the members generally or some of its members”(U.K), “the interests of the members as a whole”(Australia) and “his or their interests as members” (Malaysia). In U.K., the use of the word “generally” in s 459 has been commented as being an imprecise concept because if it was the intention of the legislature to cover the whole membership, then why was the word “whole” not used as in Australia.⁹⁰ The basis of this argument rest on the fact that the phrase “members generally” may be construed as involving the whole or entire membership or it could be contended that the conduct affects a majority of interests, therefore in a way implying only a part of the membership is affected.⁹¹ In Australia, the wording of s 260 “contrary to the interests of the members as a whole” has given rise to many judicial interpretations as to what it really means or as to its scope. The words seem to be very wide covering all conducts which are prejudicial or discriminatory. This would mean that negligence and breaches of fiduciary duty by directors are indirectly covered by the words. Such a view would conflict with the general principle of company law that directors only owe a duty to the company and

⁹⁰ Stephen Griffin, ‘The Statutory Protection of Minority Shareholders: s 459 of Companies Act 1985’, The Company Lawyer Vol 13 No.5, p 87.

⁹¹ *Ibid* at p 86

not the shareholders.⁹² In *Wayde v New South Wales Rugby League Ltd*,⁹³ the New South Wales Court of Appeal (later confirmed by the High Court of Australia) interpreted the meaning of “contrary to the interests of members as a whole” as corresponding in meaning to “bona fide for the benefit of the company as a whole” as expounded by Lord Lindley in *Allen v Gold Reefs of West Africa*.⁹⁴ Street CJ, Kirby P and Hope JA stated:⁹⁵

The Australian provision contains an additional statutory basis for curial intervention to those in New Zealand legislation. [The equivalent of section 181] also permits the court to intervene where the act or omission ‘was or would be contrary to the interests of the members as a whole’. This reflects recognition of a long established principle of company law. In the present case, for example, as his Honour pointed out, the object in cl 3(b) of the memorandum of association to foster and control the game of rugby league football throughout the State does not override the basic requirement that pervades all aspects of company law, namely that the corporate decisions whether at director or at shareholder level must be made ‘bona fide for the benefit of the company as a whole’: *Allen v Gold Reefs of West Africa Ltd* [1900] 1 ch 656 at 671 per Lord Lindley. The phrase used in [the equivalent of s 181] is ‘the interests of the members as a whole’. This phrase in the statute has not, so far as we are aware, been the subject of reported judicial consideration since its insertion in 1983, but as present advised, it seems difficult to place any meaning on ‘the interests of the members as a whole’ that differs from ‘the benefit of the company as a whole’. The only legitimate interests of the members would be their interests as corporators. As corporators, considered as a whole, their legitimate interests must be circumscribed by, and found within, the constituting documents of the company. The legitimate benefit of the company to which Lord

⁹² J.F Corkery, “Oppression or unfairness by Controllers – What can a shareholder do about it? An analysis of S 320 of the Companies Code” (1983 – 1985) 9 Adelaide Law Review 437, p 447.

⁹³ (1985) 3 ACLC 177 at p 186

⁹⁴ [1900] 1 Ch 656

⁹⁵ *Supra* n 93

Lindley referred must likewise be circumscribed by, and found within, the constituting documents of the company. It follows that the principles that have been evolved in development of Lord Lindley's basic requirement of 'the benefit of the company as a whole' are equally applicable to the statutory element in [the equivalent of section 181] of 'the interests of the members as a whole'."

The problem here is what is the meaning of the phrases 'bona fide for the benefit of the company as a whole' or 'bona fide in the best interests of the company'. To date the courts have failed to clearly define what the concepts or phrases actually mean. Lord Evershed MR, in *Greenhalgh v Ardenne Cinemas Ltd* stated:⁹⁶

It is now plain that 'bona fide for the company as a whole' means not two things but one thing. It means that the shareholder must proceed on what, in his honest opinion, is for the benefit of the company as a whole. Secondly, the phrase, 'the company as a whole' does not (at any rate in such a case as the present) mean the company as a commercial entity as distinct from the corporators: it means the corporators as a general body. That is to say, the case may be taken of an individual hypothetical member and it may be asked whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit.

However, Lord Evershed's attempt to distinguish the above phrases in the quotation did not clear the doubts because where the interests of the majority were in conflict it was difficult to see what common 'benefit' they shared as

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[1951] Ch 286 at 291

'corporators' other than that they share in the company as a 'commercial entity'.⁹⁷ This is apparent in situations where for example there is evidence to prove malice or discrimination in the alteration of articles, therefore making the act far from being bona fide.⁹⁸ Ultimately, the only possible solution in a dilemma like this is to rely on a reasonableman test, that is the benefit accruing to the company must be sufficiently real to satisfy the test.⁹⁹ This is important because the phrase 'members as a whole' may operate restrictively if it was interpreted to mean that the behaviour must detrimentally affect all the members.¹

With regards to the Malaysian s 181, the setbacks faced by other jurisdictions by using words like "generally" or "contrary to the interests of members as a whole" does not arise because of the use of the words "his or their interests as members". This provides that any one member or if necessary all the members whose interests are disregarded can rely on the section for a remedy.

C. Disregard of interests

In the Singapore and Malaysian provisions the expression "disregard of interests" is

⁹⁷ S.H. Goo, *Supra* n 11 at p 74

⁹⁸ *Ibid* at pp 74 – 75

⁹⁹ *Ibid* at p 75

¹ J.F Corkery, "Oppression or unfairness by Controllers – What can a shareholder do about it? An analysis of S 320 of the Companies Code" (1983-1985) 9 Adelaide Law Review 437, p 447.

used. There is no statutory concept of conduct in 'disregard of interests' in England, Australia or New Zealand.² In *Re Kong Thai Sawmills (Miri) Sdn Bhd*, Lord Wilberforce in the Privy Council in interpreting section 181, said that conduct in disregard of interests:³

...involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident intention to override it or brush it aside or set at naught the proper company procedure...

The only limitation in section 181 is the way the word "disregard of interest" has been interpreted by the Privy Council in *Re Kong Thai Sawmill (Miri) Ltd*. The court said that there must be awareness and an evident intention to override it or brush it aside. The court did not go further and explain what "awareness of that interest" means. Since the constitutional documents of the company are considered a statutory contract between the members inter se, it could be argued that all members should therefore be aware of each others interests. But then the existence of other equitable rights which are not embodied in the constitutional documents may give rise to problems. The problem would be apparent especially in companies having large number of members with different expectations. In a section 181 action the court would have to decide the question of whether the defendant was aware of the interests of the plaintiff. Even if it is proven that the defendant was aware, the next problem that would be faced by the plaintiff is the question of proving intention. The

² Loh Siew Cheang, *Corporate Powers. Controls, Remedies and Decision Making*, Malayan Law Journal, Kuala Lumpur, 1996, p 149.

³ (1978) 2 MLJ 227 at p 229

words “evident intention” used by the court in *Re Kong Thai Sawmills (Miri) Ltd* indicate clearly the requirement of proof that the defendant ‘intended’ to disregard the interests of the plaintiff. Such requirement seems to also indirectly cast a some sort of fiduciary duty on members when exercising their interests or rights. In the writer’s opinion, even though the requirement of awareness and intention would severely restrict the effectiveness of section 181(1)(a) as a remedy for disgruntled members, nevertheless it is obvious that the existence of the element ‘disregard of his or their interests as members’ in section 181(1)(a) and the interpretation given to the word ‘interests of members’ would capture many fact situations, which under the old English section 210 would not have been possible. It is well recognised now that members have a legitimate expectation that the company would be managed in the best interest of all members and not for any specific person.⁴ Depending on the facts and circumstances, generally in a family company or an incorporated partnership, the minority shareholder would have a legitimate expectation that he would be allowed to participate in the management of the company to protect his interests.⁵ Members would expect that directors will act responsibly and be accountable to the company by ensuring annual general meetings and annual accounts are held and submitted respectively each year.⁶ In a joint venture, a member of the joint venture company

4 *Re Harmer Ltd* [1958] 3 All ER 689; *Re Five Minute Car Wash Service Ltd* [1966] 1 All ER 242; *Re Coliseum Car Stand Service Ltd* [1972] 1 MLJ 109

5 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360; *Tay Bok Choon v Tahansan Sdn Bhd* [1985] 1 MLJ 58; [1987] 1 MLJ 433.

6 *Guan Seng Co Sdn Bhd & Ors v Tan Hock Chuan & Ors* (1990) 1 MSCLC 90,551.

would expect that the joint venture will be conducted on mutual trust and respect without disregarding the interest of the other members.⁷

IV. Unfairly Discriminatory and Unfairly Prejudicial

A. Concept of fairness

Under section 181(1)(b) of the Malaysian Companies Act 1965, where any act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself), then an application can be made to the court for a remedy under section 181(2). Unlike the English and Australian provisions wherein the expression “unfairly prejudicial” is used, in the Malaysian provision, the word ‘unfair’ is excluded. But then it is submitted that only an unjustifiable detriment caused to a member will entitle him to relief. The term “prejudice” in the English provision has been defined to mean “causing prejudice, detrimental to rights or interests”.⁸

⁷ *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors* [1994] 2 MLJ 789.

⁸ Walter Woon and Andrew Hicks, *The Companies Act of Malaysia, An Annotation*, Malaysia, Butterworths Asia 1997, at p VII 50 – 80.

The importance of the concept of “unfairness” in section 181(1)(b) was succinctly stated by Siti Norma J (now JCA) in *Jaya Medical Consultants Sdn Bhd v Peninsular Bhd & 13 Ors*.⁹

The essence of the wrong done to the minority member under s 181(1)(b) is the ‘unfairness’ of the discrimination or prejudice suffered by the member resulting from some act of the company in the advancement of its objectives. Mere discrimination against or prejudice to such a member is insufficient to attract the court’s jurisdiction to intervene.

In fact, in the case of *Wayde & Anor v New South Wales Rugby League Ltd*, Brennan J dealt with the essentiality of ‘unfairness’ under [the equivalent of section 181] of the Australian Companies Act. His Honour stated:¹⁰

Where the directors of a company are empowered to discriminate among its members and to prejudice the interests of one of them, the adoption of a resolution which has the effect and which is made in good faith and for a purpose within the power is not, without more ‘oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member’. [The equivalent of section 181] requires proof of oppression or proof of unfairness: proof of mere prejudice to or discrimination against a member is insufficient to attract the court’s jurisdiction to intervene. In the case of some discretionary powers, any prejudice to a member or any discrimination against him may be a badge of unfairness in the exercise of the power but not when the discretionary power contemplates the effecting of prejudice or discrimination.

However, what is fair or unfair will usually depend on the facts of each situation and therefore not in every situation can a member rely on the section

⁹ [1994] 1 MLJ 520 at p 536.

¹⁰ (1985) 3 ACLC 799 at p 806.

[section 181(1)(b)] because the courts would have to do a balancing exercise between the petitioner who is affected and the interest of the company as a whole. In *Thomas v HW Thomas Ltd*,¹¹ Richardson J dealing with [the equivalent of section 181] of the New Zealand Act said:¹²

Fairness cannot be assessed in a vacuum or simply from one member's point of view. It will often depend on weighing conflicting interests of different groups within the company. It is matter of balancing all the interests involved in terms of the policies underlying the companies legislation in general and [the equivalent of section 181] in particular: thus to have regard to the principles governing the duties of a director in the conduct of the affairs of the company and the rights and duties of a majority shareholder in relation to the minority; but to recognise that [the equivalent of section 181] is a remedial provision designed to allow the court to intervene where there is a visible departure from the standards of fair dealing; and in the light of the history and structure of the particular company and the reasonable expectations of the members to determine whether the detriment occasioned to the complaining member's interests arising from the acts or conduct in that way is justifiable.

When we analyse the case law of the various jurisdictions and the statements made by the judges it is obvious that underlying the concepts of 'oppression', 'unfairly prejudicial' and 'unfairly discriminatory' is the question of fairness and the courts have found it difficult to identify each concept separately in any given circumstance. In *Re Thomas v HW Thomas Ltd*, Richardson J stated:¹³

¹¹ (1984) 2 ACLC 610

¹² *Ibid* at p 618

¹³ *Ibid* at p 617

I do not read the subsection as referring to three distinct alternatives which are to be considered separately in watertight compartments. The three expressions overlap, each in a sense helps to explain the other, and read together they reflect the underlying concern of the subsection that conduct of the company which is unjustly detrimental to any member of the company whatever form it takes and whether it adversely affects all members alike or discriminates against some only is a legitimate foundation for a complaint under [the equivalent of s 181]. The statutory concern is directed to instances or courses of conduct amounting to unjust detriment to the interests of a member or members of the company. It follows that it is not necessary for a complainant to point to any actual irregularity or to an invasion of his legal rights or to a lack of probity or want of good faith toward him on the part of those in control of the company.

In Morgan v 45 Fleurs Avenue Pty Ltd, Young J held:¹⁴

In my view a court now looks at [the equivalent of s 181] as a composite whole and the individual elements mentioned in that section should be considered merely as different aspects of the essential criterion, namely, commercial unfairness.

With reference to the above statements and section 181, it cannot be denied that the genus of the concept of oppression, disregard of interests and unfairly discriminatory or unfairly prejudicial conduct is unfair conduct.¹⁵

B. Discrimination

It is to be noted that the English section 459 does not include the word “unfairly discriminatory” compared to the Malaysian and Australian provisions.

¹⁴ (1986) 10 ACLR 692 at p 704

¹⁵ Loh Siew Cheang, *Supra* n 2 at p 127.

Discrimination occurs when “one group of members do not have or where one group of members is subject to some detriment or liability to which others are not subject.”¹⁶ In section 181(1)(b) and also in section 260(1)(a)(i) of the Australian provision, the use of the expression “unfairly discriminates” denotes the fact that in certain situations discrimination may be fair. For instance in the case of *Wayde v New South Wales Rugby League Ltd*, the League decided at a meeting to reduce the number of clubs participating in the premiership competition from 13 to 12. The League’s Article of Association conferred power on the League to determine which clubs should and which clubs should not be entitled to participate in the premiership competition. In this regard, a club, Wests was excluded from the competition. Wests brought an action under the equivalent of section 181 to restrain the League from implementing its decisions, on the grounds that the decisions were oppressive. It was held by the High Court of Australia that given the special expertise and experience of the League and the bona fide and proper exercise of the power conferred upon it to foster the game of rugby, the decision reached by the League was one a reasonable League could have made. Wests could not prove that the actions of the League were oppressive, unfairly prejudicial or unfairly discriminatory.

In fact there are numerous cases decided in England under their section 459 and it is obvious from those cases that the expression ‘unfairly prejudicial’ includes conduct which is ‘unfairly discriminatory’. This can be seen in

¹⁶

Walter Woon and Andrew Hicks, *Supra* n 8 at p VII 50 – 80.

the case of *Re a Company (No.002612)*.¹⁷ Here, S and A and two others set up a joint venture company. The shares were held equally between them. There was an alteration in the shareholdings of the company with the result that A became the majority shareholder. Relations between A and S deteriorated and eventually S resigned as a director. Later, the company proposed to make a rights issue, and the shares not taken up according to the offer were to be offered to other shareholders. S claimed that he had neither the resources nor the desire to take up his allocation of the shares and that if it is taken up by the other shareholders his interest would be reduced from 25% to 0.125%. S petitioned for relief under the equivalent of section 181. One of his grounds is that the proposed rights issue constituted unfairly prejudicial treatment. It was held on the facts that the rights issue was motivated by a bona fide desire to raise needed capital and was not aimed at prejudicing the petitioner. The petition was dismissed. Hoffman J said:¹⁸

Nevertheless, I do not think that the bona fides of the decision or the fact that the petitioner was offered shares on the same terms as other shareholders necessarily means that the rights issue could not have been unfairly prejudicial to his interests. If the majority know that the petitioner does not have the money to take up his rights and the offer is made at par when the shares are plainly worth a great deal more than par as part of a majority holding (but very little as minority shareholding), it seems to me arguable that carrying the transaction in that form could, viewed objectively, constitute unfairly prejudicial conduct. In this case, however, it seems to me that the petitioner, if he lacks the resources or inclination to contribute *pari passu* to the company, could protect his interests by offering to sell his existing holding to the majority. Indeed, if the company needs funds and he does not want to pay his share, it seems to me only fair that he should offer to sell out.

¹⁷ [1986] BCLC 362

¹⁸ *Ibid* at p 367

It is obvious from the above statement that the courts do recognise that any act of the company and its controllers which affects all the shareholders equally, may at times be unfair to some others or unfairly discriminatory them. Therefore, even though the English provision does not include the word 'unfairly discriminatory', it is understood that the word 'unfairly prejudicial' would cover circumstances where there is unfair discrimination.

C. Principles and factors for interpreting 'fairness'

Given that not many cases have been litigated or reported in Malaysia under section 181, one has to glean from the other jurisdictions certain principles or factors that the courts have taken into consideration in interpreting 'fairness'. In assessing fairness the courts have generally applied an objective test. In *Re Bovey Hotels Ventures Ltd*,¹⁹ Slade J said:²⁰

The test of unfairness must, I think, be an objective, not a subjective, one. In other words it is not necessary for the petitioner to show that the persons who have had de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test, I think, is whether a reasonable person bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interests.

¹⁹ unreported judgement of Slade J dated 31 July 1981

²⁰ *Ibid* at p 50

In Jaya Medical Consultants Sdn Bhd v Island & Peninsular Bhd &

13 Ors, Siti Norma J (as she then was) adopted the objective test laid down in Wayde

*& Anor v New South Wales Rugby League Ltd.*²¹

The test of unfairness is objective and it is necessary, though difficult, to postulate a standard of reasonable directors possessed of any special skill, knowledge or acumen possessed by the directors. The test assumes (whether it be the fact or not) that reasonable directors weigh the furthering of the corporate object against the disadvantage, disability or burden which their decision will impose, and address their minds to the question whether a proposed decision is unfair.

In England, the courts have well defined the concept of 'unfairly prejudicial' in section 459 and the requirements to prove it. In *Re a Company (No. 005134 of 1986), ex P Harris*,²² Peter Gibson J said:²³

- (1) The test of unfair prejudice is objective.
- (2) It is not necessary for the petitioner to show bad faith.
- (3) It is not necessary for the petitioner to show a conscious intention to prejudice the petitioner.
- (4) The test is one of unfairness, not unlawfulness.

Again in *Re Ringtower Holdings Plc*,²⁴ Peter Gibson J referring to section 459 of the English provision stated the following four points.²⁵

²¹ *Supra* at p 806

²² (1989) BCLC 383

²³ *Ibid* at p 389 - 390

²⁴ (1989) 5 BCC 82

²⁵ *Ibid* at p 90

- (1) the relevant conduct (of commission or omission) must relate to the affairs of the company of which the petitioners are members;
- (2) the conduct must be both prejudicial (in the sense of causing prejudice or harm) to the relevant interests and also unfairly so: conduct may be unfair without being prejudicial or prejudicial without being unfair and in neither case would the section be satisfied;
- (3) the test is of unfair prejudice, not of unlawfulness, and conduct may be lawful but unfairly prejudicial;
- (4) the relevant interests are interests of members (including the petitioners) as members, but such interests are not necessarily limited to strict legal rights under the company's constitution, and the court may take into account wider equitable considerations such as any legitimate expectation which a member has which go beyond his legal rights.

D. Conclusion

Although the English cases seem to assist in expounding the words 'unfairly prejudicial' and 'fairness' but then in the context of the Malaysian section 181 problems may arise because section 181(1)(a) only deals with affairs of company or powers of directors being exercised in a manner oppressive or in disregard of interests of member(s), shareholder(s) or holder(s) of debentures of the company and section 181(1)(b) only deals with unfairly prejudicial and unfairly discriminatory conduct with regards to acts and resolutions of the company which affects members or debenture holders. This division of section 181(1) into two parts means that we have to be careful in applying the interpretations given by the courts in other jurisdictions. This is obvious by the fact that under section 459(1)[U.K.], affairs of

the company and any actual act or proposed act or omission of the company are based on the only criteria of 'unfairly prejudicial'. The same is true for section 260(1)(a)[Australia] wherein the affairs of the company or any act or omission or a proposed act or omission or a resolution or a proposed resolution is based on the criteria of 'unfairly prejudicial', 'unfairly discriminatory', or 'oppressive'.

Whatever it is, the core of section 181 is 'unfairness' and as stated earlier the courts are more concerned with the effect of the conduct on the petitioners rather than the motive. In the circumstances the specific division of the elements in section 181(1)(a) and (b) may not be desirable. For instance, in section 181(1)(b), the 'acts or resolutions' mentioned would easily fall under 'affairs of the company' in section 181(1)(a). Further, it would be difficult for the courts to attempt to formulate a clear and comprehensive definition of the elements so that any fact situation could be categorised under that specific element and in the specific provision concerned. In categorising the conduct the courts would also have to take into consideration any conflicts that may arise between the memorandum and articles as agreements and strictly rely on the principle of non-interference in the internal management of the company. In the writer's opinion, it would have been much better if a similar approach as in England or Australia had been taken as that would allow the Malaysian courts a wider discretion to deal easily with any fact situation.

CHAPTER 6

REMEDIES UNDER SECTION 181 COMPANIES ACT 1965

I. Introduction

The main significance of the statutory remedy under section 181(2) is the wide variety of remedies that the court is able to grant. Section 181(2) reads as follows:

S181(2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may-

- (a) direct or prohibit any act or cancel any transaction or resolution;
- (b) regulate the conduct of the affairs of the company in future;
- (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
- (d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
- (e) provide for the company be wound up.

The remedies granted in section 181(2) are very similar to the remedies granted in section 260(2) and section 461(2) of the Australian and UK provisions respectively. They read as follows:

Australia

S260(2) :the Court may, subject to subsection (4), make such order or orders as it thinks fit, including, but not limited to, one or more of the following:

- (c) an order that the company be wound up;
- (d) an order for the regulating the conduct of the affairs of the company in the future;
- (e) an order for the purchase of the shares of any member by other members;

- (e) an order for the purchase of the shares of any member by other members;
- (f) an order for the purchase of the shares of any member by the company and for the reduction accordingly of the company's capital;
- (g) an order directing the company to institute, prosecute, defend or discontinue specified proceedings, or authorising a member or members of the company to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company; in the name and on behalf of the company;
- (h) an order appointing a receiver or a receiver and manager of property of the company;
- (j) an order restraining a person from engaging in specified conduct or from doing a specified act or thing.
- (k) an order requiring a person to do a specified act or thing.

United Kingdom

S 461. Provisions as to petitions and orders under this Part

- (1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.
- (2) Without prejudice to the generality of subsection (1), the court's order may-
 - (a) regulate the conduct of the company's affairs in the future,
 - (b) enquire the company to restrain from doing or continuing an act complained of by the petitioner or to do an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do,
 - (c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct,
 - (d) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

It is to be noted that all the provisions do state that the remedies are not exhaustive by the use of the words “without prejudice to the generality of the foregoing/subsection”¹ or “but not limited to”.² Further the provisions empower the court with a wide discretion to make whatever “orders it thinks fit”³ to remedy the matters complained of.

However there are some differences in the above provisions. Section 181(2) does not have similar provisions as provided for in section 260(2)(g),(h),(j) and (k), although it is suggested that section 260(2)(j) and (k) would presumably fall under section 181(2)(a) of the Malaysian section. Another difference between section 181(2) and the other two provisions is that section 181(2) does not provide for civil proceedings to be brought in the name or on behalf of the company. Section 260(2)(g) and section 461(2)(c) of the Australian and UK sections respectively recognise the concept of derivative actions.⁴ One may argue that section 181(2)(b) which allows a court to make an order to ‘regulate the conduct of the affairs of the company in future’ covers this situation.

¹ The Malaysian and UK sections

² The Australian section

³ The Australian and UK sections

⁴ In Singapore, s 216 of the Companies Act does not provide for civil proceedings to be brought in the name and on behalf of the company. However, s 216A of the Companies Act provides for a derivative action. This special provision does not apply to listed public companies since shareholders in such companies can always sell their shares in the open market if they are not happy with the company.

It is apparent that under section 461 of the UK section, there is no provision made expressly allowing the court to make a winding up order, whereas in section 181(2)(e) and section 260(2)(c), winding up is provided for expressly. On the other hand, in the Australian section 260(4), there is a provision prohibiting the court from making a winding up order if it is of the opinion that the winding up of the company would unfairly prejudice the oppressed member or members. This implies that under section 260(4) the court must take due care in granting winding up orders and possibly treat it as a last resort remedy. There is no similar provision to section 260(4) in section 181 of the Malaysian Act.. This aspect of winding up will be discussed in greater detail when the writer deals with the remedy of winding up later.

One feature of the remedies in all the jurisdictions stated above is that, there is no requirement or expectation that the remedies must rank in a certain order.⁵ Very often, based on the facts, the remedies overlap.

II. Remedies under section 181(2) Companies Act 1965

The remedies under the Malaysian section 181(2) are discussed in detail below.

A. Section 181(2)(a): an order directing or prohibiting any act or to cancel or vary a transaction or resolution.

Under this heading the court would be able to require the company, the directors or any other person managing the company to carry out specific work or prevent from

⁵ In *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] 2 MLJ 129 at p 131 the court reiterated the statement made by Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 220 and said ' All these reliefs rank equally and it is not correct to say that the primary remedy under this section is winding up'.

carrying out that work. Indirectly the provision seems to imply that the court can impose some sort of mandatory or prohibitory injunctions or impose specific performance of any contracts or transactions. The following cases do highlight the circumstances where the court had or had possibly relied on section 181(2)(a).

In the Singapore case of *Re S.Q. Wong Holdings (Pte) Ltd*,⁶ the petitioners were successful in an action brought under the Malaysian equivalent of section 181(1)(a) and (b). The facts were as follows:

The company in this case was incorporated by Dato S.Q. Wong, a wealthy man, on May 18, 1973. The nominal capital was \$100,000 divided into 100,000 shares of \$1.00 each. On March 31, 1976, Dato Wong owned all the issued preference shares (90,002) and the children and grand children together owned all the issued ordinary shares (48) of the company. On July 1, 1978, Dato Wong made his last will and testament whereby he appointed Hongkong and Shanghai Bank (Singapore) Trustee Ltd, as the sole executor and trustee and he bequeathed his residuary estate to Mabel Hudson (which included the 90,002 preference shares). On July 8, 1978, Dato Wong in exercise of his powers as Governing Director removed Alan Wong and Joyce Liu as directors and appointed Wong Peng Tuck (WPT), Mabel Hudson and Benjamin Wong as directors with WPT as his deputy. Dato Wong died on October 11, 1980, and WPT succeeded to the position of Governing Director of the Company. On October 20, 1980, WPT ceased to be the Governing Director when he resigned as a director. On February 4, 1983, the Hongkong and Shanghai Bank (Singapore) Trustee Ltd, was granted probate of the will of Dato Wong. The Grant of Probate was not extracted and

the 90,002 preference shares remained registered in the name of Dato Wong until September 14, 1985. On July 31, 1985, the petitioners requisitioned the extraordinary general meeting of the company with a view to removing Mabel Hudson and Benjamin Wong as directors and appointing Joyce Liu and Wong Hong Ching in their place. The petitioners contended that (a) the 90,002 preference shares could not be voted as they were not registered in the name of Mabel Hudson; (b) as directors, Mabel Hudson and Benjamin Wong ought to have paid the accumulated dividend on those preference shares; (c) they deliberately withheld doing so in breach of the Articles of Association with the collateral purpose of ensuring that the preference shares had voting rights and using such rights to defeat the voting rights of the majority of the ordinary shares held by the petitioners; and (d) therefore the affairs of the company or the powers of the directors are being exercised in a manner oppressive to the petitioners as members or in disregard of their interests as shareholders. The respondents denied allegations of oppression and said that they had managed the company well and had paid dividends on the ordinary shares.

Although Chan Sek Keong J.C when delivering the judgement did not specify under which paragraph of the Singapore equivalent of section 181(2) he was relying on, it appears that the orders granted by the court fell under section 181(2)(a).

The orders were as follows:

- (a) the company must forthwith pay all unpaid dividends payable on the cumulative preference shares of the company.

(b) the directors must convene within 7 days from the date of judgement an Extraordinary General Meeting of the company to be held not later than 21 days therefrom for the election of new directors.

(c) the respondents were to continue as directors until the date of the Extraordinary General Meeting of the company.

Other than the above mentioned Singapore case, it is suggested that many Australian and English cases decided under the equivalent of section 181, would have attracted the remedy as provided for in section 181(1)(a) if they had been decided in Malaysia.

In *McGuinness & Anor, Petitioners*,⁷ the court directed the directors of a public company to convene an extraordinary general meeting on a certain date and to appoint a firm of accountants as independent scrutineers. In *Hannes v MJH Ltd*,⁸ where a governing director breached his fiduciary duty to act for a proper purpose, the court gave an order setting aside a service contract and an allotment of shares to the director concerned. In *Whyte, Petitioner*,⁹ a court order restrained a company from holding a meeting and from passing a resolution removing a director and replacing him with another, and restrained two shareholders from moving or voting in favour of such resolutions.

⁷ [1988] BCLC 673

⁸ (1992) 10 ACLC 400

⁹ 1984 S.L.T. 330

In fact many of the following common law cases, although not decided under the minority provisions would, it is suggested, be actionable under the present equivalent of section 181 and would attract the remedy under section 181(2)(a). The cases generally involve circumstances where the majority shareholders use their voting power to pass resolutions which are oppressive in nature or in disregard of the interests of the minorities.

In *Ngurli v McCann*¹⁰ the court said that the majority of shareholders in exercising their voting power in general meeting must not commit a fraud by exercising their vote to appropriate to themselves or to some of themselves property, advantages or rights which belong to the company. In *Winthrop Investments Ltd v Winns Ltd*,¹¹ the court held that a resolution of a general meeting approving a transaction which the directors had entered into with an improper object in mind would be ineffective. In *Clemens v Clemens Bros Ltd*,¹² Foster J set aside resolutions of general meeting to approve the setting up of a trust for employees, to increase the capital and to provide for new allotment of shares. The main purpose of the allotments in this case was to reduce the plaintiff's share holdings so that the plaintiff could not block a special resolution. This was clear case of abuse of power. In *Brown*

¹⁰ (1953) 90 CLR 425 at p 439

¹¹ [1975] 2 NSWLR 666

¹² [1976] 2 All ER 268

*v British Abrasive Wheel Co*¹³ and *Dafen Tinplate Co Ltd v Llanelly Steel Co*,¹⁴ it was held that an attempted expropriation of a member's property by an unjustified alteration of the articles was not for the benefit of the company but merely for the benefit of the majority shareholders. In both the cases, the resolutions were set aside by the courts.

Given the vague concepts and the imprecise tests formulated by the common law courts that the majority shareholders must exercise their powers in the best interest of the company and that any alteration of the articles must be 'bona fide for the benefit of the company as a whole', it is suggested that the wide ambit of section 181 and the remedies provided therein would solve much of the problems encountered by the courts previously.

B. **Section 181(2)(b): regulate the conduct of the affairs of the company in future**

This remedy in section 181(2)(b) has a contrary effect to the general principle of judicial non-interference in management decisions established in *Foss v Harbottle*.¹⁵ But then under section 181(2)(b), Parliament has given the courts every right and liberty to intervene in the management of the companies provided the elements under section 181(1) are proven. The major drawback here, is that Parliament has failed to

¹³ [1919] 1 Ch. 290

¹⁴ [1920] 2 Ch. 124

¹⁵ (1843) 2 Hare 461; 67 ER 189

provide any specific or general guidelines as to the manner or to the limits of the courts powers to regulate the affairs of a company, other than to bring to an end or remedy the matters complained of under section 181(1).

The well known case of *Re HR Harmer Ltd*,¹⁶ decided under section 210 Companies Act (UK), and the remedies provided in that case for 'oppression', would clearly fall under section 181(2)(b). In *Re HR Harmer Ltd*, a company was founded by Mr Harmer. He was 88 years old at the time the court action was commenced. Mr Harmer controlled the company as a life director and majority shareholder. Mr Harmer's two sons were also life directors and members of the company. The affairs of the company were conducted in a very dictatorial manner. He ignored board resolutions, did not consult the other directors (his sons) and exercised powers which he did not have.

The court found that the father's conduct was oppressive and ordered that he be removed from office and restrained from interfering in the company's affairs unless invited by the board to do so. The court ordered that the father should enter into a contract with the company as a consultant with a fixed salary.

A similar situation arose in the Malaysian case of *Re Coliseum Stand*

*Car Service Ltd.*¹⁷ The applicant petitioner relying under section 181(1) averred that the company was solely run by the first respondent, that he was not given proper notices of meetings and that many of the affairs of the company were conducted in an oppressive manner because of the majority voting power of the respondent.¹⁸ In this case the applicant was seeking relief from the court to order the first respondent to transfer to him and another the whole of the shares held by the first respondent. But the court held that it was not justified to order that the whole of the shares held by the respondent be purchased by the minority shareholders. The court said that the applicant was entitled to relief but that relief should be aimed at bringing to an end or remedying the matters complained of.¹⁹ The court ordered that some shares to be transferred to the applicant and some of the other respondents so as to effect a joint management of the affairs of the company.

In *Re Spargos Mining NL*,²⁰ a member brought an action against the board of directors with regards to transactions benefiting other members in a group of companies. The action was brought under section 320, the predecessor of section 260 of the Australian Corporations Act. The Supreme Court of Western Australia ordered the existing board of the company be replaced by a board of the court's choosing, comprising of people who were independent of the controlling shareholders.

¹⁷ [1972] 1 MLJ 109

¹⁸ *Ibid* at p 112B

¹⁹ *Ibid* at p 112C

²⁰ (1990) 8 ACLC 1218

Further, even though there is no provision in section 181(2) giving powers to the court to appoint a receiver or a receiver and manager,²¹ given the wide and general ambit of section 181(2)(b) and the discretion of the court to provide a remedy, in an appropriate circumstance, the court may do so. The Full Court of the Supreme Court of Western Australia in *Jenkins v Enterprise Gold Mines NL*,²² in interpreting section 320, the equivalent of the Malaysian section 181, rejected the argument that the courts should not interfere with the internal administration of the company and held that there was nothing in the legislation to prevent it from interfering in the internal administration. In the joint judgement of Malcolm CJ, Rowland and Franklyn JJ, it was held:²³

There is nothing in any of the authorities, however, which would tend to place a limit on the grant by the court of an appropriate remedy once it is found that the conduct complained of is oppressive, unfairly prejudicial, or unfairly discriminatory.

The powers given to the court are extremely wide. They include the powers to make orders regulating the conduct of the affairs of the company in the future. This necessarily involves the court making orders which may interfere with the internal administration of the company. There is nothing in the language of s 320 which suggests that the court should be reluctant to interfere where that is necessary or desirable to give effective relief...

The court there appointed a receiver and manager to investigate certain

²¹ Under s 260(2)(h) of the present Australian provision, a receiver or a receiver and manager can be appointed.

²² (1992) 10 ACLC 136

²³ *Ibid* at p 155

transactions involving a breach of fiduciaries duties and to take the appropriate legal proceedings against them. In the recent Australian case of *Re Back 2 Pay 6 Pty Ltd*²⁴, where a petition for oppression was filed under s 260 of the Corporations Act 1989, the court appointed a provisional liquidator to carry out independent supervision of the company's affairs to protect the petitioner's interest.

Although in section 181(2), the remedies are listed out, it is apparent that when the remedies in section 181(2)(a) or (b) or both are given, the courts do not specifically mention whether they are dealing with section 181(2)(a) or (b) or both together. This is owing to the nature of the facts before the courts which in most instances cover many issues. Therefore most remedies under section 181(2)(a) or (b) tend to overlap. This is quite obvious when one looks at the facts and remedies given in the cases of *Re Chi Liung Ltd*²⁵ and *Re Kong Thai Sawmill(Miri) Sdn Bhd.*²⁶ In *Re Chi Liung & Sons Ltd*, the court cancelled offending resolutions appointing the respondents as managing director and assistant director, granted an injunction restraining the managing director and assistant managing director as such, cancelled the offending registration of share transfers and restored the former managers, confined all developments until the settlement of a probate action, restricted the duties of managers to collecting the income of company and paying all salaries of the

²⁴ (1994) 12 ACLC 253

²⁵ [1968] 1 MLJ 97

²⁶ [1978] 2 MLJ 227

employees and directed the directors not to embark on any major policy with regard to management of the company.

Similarly, in *Re Kong Thai Sawmill (Miri) Sdn Bhd*, the Federal Court made orders appointing a watch dog director, imposed conditions on the operation of the company's bank accounts, fixed the ceiling for directors bonuses, cancelled the powers of the managing director to make donations and investments without full board approval and required the managing director to purchase the yacht from the company and restore to the company the political donations.

It is therefore difficult for the courts in cases involving complex fact situations to specify whether a remedy falls under section 181(2)(a) or (b). This is made worst by the fact that before a remedy is given, the elements in section 181(1), "oppression" or "in disregard of interest" of members need to be proven by the applicant or petitioner. Mr Pillai in an article²⁷ has pointed out the difficulties that a court would face in remedying breaches of duties of directors. In referring to *Re Kong Thai Sawmill (Miri) Sdn Bhd*, he was of the opinion that the Federal Court was wrong in making the two orders with respect to:

- (i) one Beng Siew, the managing director to purchase the yacht (Berjaya Malaysia); and
- (ii) that Beng Siew would pay the company the amount of donations paid to the

political parties.

Mr Pillai argues that the Federal Court was wrong in granting the above remedies because the remedies in section 181(2) is contingent upon whether 'oppression'²⁸ or acts were done in 'disregard of interest' of members were proven under section 181(1). Under the circumstances, he felt that it was wrong to generally equate any breaches of directors duties as oppression falling under section 181. In such cases, involving breach of directors duties, he stated that there could be some other remedy available to the company shareholder.²⁹

Therefore on a strict interpretation of section 181, one has to be careful not to confuse the elements in section 181(1) with those of the duties of directors because most cases under section 181 involve small private companies where the

²⁸ Buckley J in *Re Five Minutes Car Wash Service Ltd* [1966] 1 WLR 745 at page 751: The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed. Nor can resentment at being outvoted; or mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or to efficiency, however well founded. Those who are alleged to have acted oppressively must be shown to have acted at least unfairly towards those who claim to have been oppressed.

²⁹ Buckley LJ in *Re Jermyn Streets Turkish Bath Ltd* [1971] 3 All ER 184 at page 199: If a director of a company were to draw remuneration to which he was not legally entitled in excess of the remuneration he was legally entitled, this might not doubt found misfeasance proceedings or proceedings for some other kind of relief, but it would not, in our judgement, of itself amount to oppression. Nor would the fact that the director was a majority shareholder in the company make any difference, unless he had used his majority voting powers to retain the remuneration or to stifle proceedings by the company or other shareholders in relation to it.

majority shareholders are also the directors. The courts may unwittingly remedy all breaches of duties that may incidentally come to light.³⁰

This confusion could be further exacerbated if the courts do not take the effort or trouble to scrutinize the facts of a particular case before them so as to ensure that the minority action falls under section 181(1)(a) or (b) or both. This is apparent in *Re Chi Liung & Son Ltd*, where Gill J did not differentiate section 181(1)(a) and (b) when he said:³¹

The question which I had to consider in the determination of these proceedings is whether there is, has been or is threatened the sort of oppression which is contemplated by section 181(1) of the Companies Act 1965.

It cannot be denied that he failed to realise that in section 181(1)(a) the words 'are being conducted' and 'are being exercised' imply that something had been done in the past. On the other hand in section 181(1)(b) the words 'is threatened' or 'is proposed' connotes some future conduct. The courts would have to be careful because the appropriate remedy to be granted in a particular fact situation would depend on their right interpretation of section 181(1).

³⁰ *Supra* n 22 at lxxvi

³¹ *Supra* n 24 at p 100-101

C. Section 181(2)(c): purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself

Generally in large public companies, the only remedy for a disgruntled shareholder would be for him or her to sell the shares and leave the company. It is difficult in public companies for shareholders to exercise their rights because of the wide spread of shareholdings and the easy availability of markets for their shares. It is only in the small private companies that the application of the section 181 minority provision would become useful and effective. The reason being that in private companies shares are usually closely held and members have the expectation to participate in the management of the company. This is provided that there are no clear restrictive provisions in the Articles of Association preventing members from being involved in management decisions.

It is common in most applications under section 181 for the courts to order for the aggrieved party's shares to be bought by other members of the company or the company itself. This is so where the court is unable to make any other order under section 181(2), other than to make an order that the petitioner's shares be bought over. This would thus prevent the petitioner being 'locked in' as a minority in the company.³² It is interesting to note that in the English case of *Re Little Olympian Each-Ways Ltd*,³³ the court relying on the equivalent of section 181(2)(c), made an order against a constructive trustee to purchase the shares of a petitioner in the

³² *Re Elgindata Ltd* [1991] BCLC 959 at 1005

³³ [1995] 1 BCLC 636

company from which assets were transferred at a gross undervalue to the constructive trustee.³⁴

Even though the order to purchase the shares seems to be the best and convenient remedy but a look at the volume of case law in the area of valuation of shares, suggests that aggrieved shareholders may not obtain what they were hoping for. They have to put their faith on the courts for a fair monetary compensation for their shares.

The main problem encountered by the local courts in valuing shares of a company is due to the lack of any guidelines in the Companies Act 1965 as to the proper and fair method for the valuation of shares. Owing to the lack of authorities, the Malaysian courts will have to rely on principles established by the courts, especially in UK and Australia, on their equivalents of section 181.

In granting an order to purchase the shares, the courts generally have a very wide discretion in determining the value of the shares. The main questions that would confront a court is how the shares are to be valued and on what date? The factors that a court might consider in valuing the shares are the company's net asset value and profits, the nature of the business and the period of its operation.³⁵ The

³⁴ Loh Siew Cheang, *Corporate Powers: Controls, Remedies and Decision Making*, Kuala Lumpur, Malayan Law Journal, 1996 at p 168

³⁵ S.H.Goo, *Minority Shareholders' Protection: A study of Section 459 of the Companies Act 1985*, London, Cavendish Publishing Limited, 1994

value of the shares are basically determined by attributing to them the proportion of the total asset value of the company ("net tangible assets" or NTA) that they represent, with no discount for a minority stake,³⁶ based on the price/earnings ratio (P/E ratio), with a discount for a minority shareholding, the unsaleability of a private company's shares³⁷ and many other factors. Further, the court would also have to consider the basis of the valuation of the shares, that is whether on a pro rata³⁸ or discount basis³⁹ or by taking a pragmatic approach.⁴⁰ However, the biggest obstacle for the court is the date the shares are to be valued. Earlier authorities suggest that the date of commencement of the proceedings is the proper date,⁴¹ some prior to the

³⁶ *Re Bird Precision Bellows Ltd* [1984] BCLC 195, 201-202

³⁷ *Re A Company* [1986] BCLC 362, 368

³⁸ This approach is relevant in a quasi partnership type of relationship between members where each would have to participate in the management of the company. Therefore when a member is forced out of the company, it would be unfair to have the member's shares disposed at a discounted price: *Re Bird Precision Bellows Ltd* [1984] BCLC 195

³⁹ This approach is common where shares are acquired for investment purposes and as in a quasi-partnership type of situation. It is therefore fair to have the shares discounted to reflect the minority shareholding: *Elgindata Ltd* [1991] BCLC 959

⁴⁰ In this approach the courts do not rely specifically on any particular basis of valuation but rather rely on the circumstances or facts of each case to ascertain a fair value: *Re A Company* (no. 007623 of 1984) [1986] BCLC 362

⁴¹ Per Lord Sorn in *Meyer v Scottish Cooperative Wholesale Society* (1957) SC 110; *Re Golden Bread Pty Ltd* [1977] Qd R 44; *Guan Seng Co Sdn Bhd v Tan Hock Chuan* [1990] 2 CLJ 761

petition,⁴² others the date the order was made⁴³ or some other date which the court considers appropriate.⁴⁴

It is obvious that the factors mentioned in the preceding paragraph are very technical in nature and the court would have to depend on experts especially accountants to assist them in valuing the shares of the company. Ultimately it is up to the court to make the final decision as to the fairness of the valuation under any given fact situation. The court is generally not bound by any accounting rules or business rules as long as the value attributed to the share is fair and proper in the circumstances before the court.⁴⁵

Whatever may be the factors that the court would have to consider, what is most important is for the court to arrive at a value which is fair in all the circumstances and to disregard the effect of any oppressive conduct which may have

⁴² *Re Cumana Ltd* [1986] BCLC 430. The Court of Appeal at p 436 stated that a prior date before the petition would arise in situations where the majority shareholders deliberately took steps to depreciate the value of shares in anticipation of a petition being presented.

⁴³ *Re A Company* (No 005134 of 1986), ex p Harries [1989] BCLC 383399; *Re Novabron Pty Ltd* (No 2) (1986) 11 ACLR 279,296; *Re Dalkeith Investments Pty Ltd* (1984) ACLR 247,255; *Re Elgindata Ltd* [1991] BCLC 959, 1006-7; *Re London School of Electronics Ltd* [1985] 3 WLR 474,484

⁴⁴ *Re A Company* (No 003843 of 1986) [1987] BCLC 562,572

⁴⁵ *Scottish Cooperative Wholesale Society v Meyer* [1959] AC 324 at p 369

occurred.⁴⁶ This view was held by the Singapore Court of Appeal in *Planeta Tullio v Andrea G Maoro*⁴⁷ where the court held that the value at which the shares ought to be repurchased must be fair and reasonable based on the circumstances of each case. For instance to ensure fairness the court in *The Matter of Asahi Metal Pte Ltd*,⁴⁸ in granting an order to purchase the shares, appointed an independent auditor to be agreed between the parties to assess their value.

The importance of this remedy under section 181 can be seen in the case of *In The Matter of Cast Iron Products*,⁴⁹ where an application under section 181 was made by shareholders. In this case there was serious mismanagement of the company's affairs. There was no proper accounting for the company, funds were misappropriated by the directors, the directors disposed of property without authorisation and there was loss of assets and tax mismanagement. The audited accounts of the company for the year 1981 was only provided to the shareholders in 1987 and the company failed to submit accounts for the years 1981 to 1986. The company also failed to take legal action against a director for unauthorised disposal of the company's car to a third party. The company also failed to pay dividends from 1971 to the date of petition. The High Court held that the affairs of the company were

⁴⁶ Waddell CJ in *Sanford v Sanford Courier Service Pty Ltd* (1986) 10 ACLR 549,562 and Mcpherson J in *Re Dalkeith Investments Pty Ltd* (1984) 9 ACLR 247,255

⁴⁷ (1994) 4 MSCLC 96093

⁴⁸ (1995) 4 MSCLC 96317

⁴⁹ (1993) 3 MSCLC 91039

being conducted and the powers of the directors were being exercised in a manner oppressive and in disregard of the interests of the shareholders. Although there was serious mismanagement and the facts would justify a winding up order, the court nevertheless declined to make the drastic order of winding up as the company was a going concern and instead made an order for the shares of the petitioners to be bought by the respondents (excluding the respondent company).

D. **Section 181(2)(d): in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital.**

In the writer's opinion section 181(2)(d) is not actually a specific remedy but rather a superfluous provision. Section 181(2)(d) merely shows the effect of the company purchasing the shares of the member. It is obvious that under such a circumstance the company has to reduce its capital accordingly. Under section 181(2)(c) the remedy allowing the company to purchase its shares has already been mentioned and it is not necessary for Parliament to repeat it in section 181(2)(d). Parliament should have actually split section 181(2)(c) and worded it as provided for in section 260(2)(e) and (f) of the Australian provision. Section 260(2)(f) provides for an order for the purchase of the shares of any member by the company and for the reduction accordingly of the company's capital.⁵⁰

It is important to note that it is a long established rule at common law that companies may not purchase their own shares. This rule was established in

⁵⁰ S 461(2)(d) of the UK provision is similarly worded.

Trevor v Whitworth.⁵¹ The main purpose of this rule is to protect the creditors of the company who would have given loans to the company based on the issued share capital of the company. Therefore, in the case of the court contemplating to make an order to acquire its shares, it must give due consideration to creditors.⁵² This rule is now entrenched in section 67(1) of the Companies Act 1965. However, following the introduction of section 67A by Companies (Amendment) Act 1997, which came into effect on the 1 September 1997, a public company is now allowed to purchase its own shares as well as provide financial assistance for the purchase of shares in the company. The purchase or the giving of financial assistance must be from distributable reserves which would otherwise be available for dividends. In the case of purchase of its own shares, the company's issued capital shall be diminished by the cancellation of the shares so purchased and the amount must be transferred to a capital redemption reserve. The cancellation of shares so purchased shall not be deemed to be a reduction of capital within the meaning of the Companies Act 1965

Under the Companies Act 1965, the only normal manner by which a company can reduce its capital is by following the procedures as stated in s 64. Under section 64, the articles must provide for the reduction of capital, a special resolution must be passed by the members and the court need to confirm such reduction. Therefore under the Act, it is not easy for a company to reduce its capital because 75% of the majority of shareholders having voting rights must agree to such reduction

⁵¹ (1887) 12 App Cas 409

⁵² *Quinlan v Fiboze Pty Ltd* (1988) 14 ACLR 312

and the court must be satisfied that the reduction is fair and does not prejudice unfairly any party, especially the creditors. Generally the application of the section 64 involves a time consuming and a cumbersome procedure.

Given the difficulties of an application under section 64, it would seem that shareholders who are aggrieved and disappointed with the manner the affairs of the company are managed, could rely on section 181(2)(c) to have their shares bought over by the other members or the company itself. This is subject to the shareholders concerned being able to bring an action within section 181(1). Whether they would succeed or not is another question but the very existence of the section 181 remedy is a tool for any member for relief. There is no necessity for a special resolution.

Since in most cases, the courts approach is to have the petitioner's shares bought by the other members or the company itself (rather than take the drastic step of winding up) it would be crucial for the court to take cognisance of the existence of other class shares. The court must ensure that the rights of other classes of shareholders are not affected. It would be rather unfair in an application under section 181 if the view of different class shareholders are not taken into consideration. Table A Article 4 provides that the rights of particular class shareholders cannot be altered unless they themselves do so. So Article 4 requires the holders of three quarters of the issued shares of a class of shares, to consent in writing to or pass a special resolution at a separate meeting of holders of the shares of the class, approving a variation of their rights. It would be a difficult task for the courts

to provide an appropriate remedy under section 181(2)(c) when there are class rights involved.

E. **Section 181(2)(e): provide that the company be wound up.**

Other than winding up a company by the court under section 181(2)(e), a company can also be wound up by the court under the various grounds as provided for in section 218(1) Companies Act 1965. For the purposes of the present discussion, section 218(1)(f) and (i) would be relevant and for convenience they are stated herein below:

S 218(1)- The Court may order the winding up if -

- (f) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members.
- (i) the Court is of the opinion that it is just and equitable that the company be wound up.

Courts are generally very reluctant to take a drastic step and wind up a company because it may adversely affect the members, the creditors and employees of the company. Therefore it is arguable whether section 218(1)(f) and (i) would be of any significance given that section 181 would be a better provision for members and debenture holders to rely on for an effective remedy.⁵³ Section 181(2) gives the court

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In Australia, s 461 of the Australian Corporation Law is similar to the Malaysian s 218. S 461(e),(f) and (g) of the Australian provision is very similar to the Malaysian s 181(1). S 461(k) is similar to the Malaysian s 218(1)(i). In Australia s 461 would be important because it is only through that provision that creditors can obtain a winding up order. However in the Malaysian s 181, debenture holders can apply for any of the remedies. It cannot be denied that if s 181 elements cannot be proven, then s 218(1)(i)

wide discretion in granting a suitable remedy which in its opinion would bring to an end or remedy any matters complained of. There are a vast number of case authorities to show the courts reluctance in winding up a company if there is some other suitable alternative remedy.

In *Re Dalkeith Investments Pty Ltd*,⁵⁴ a divorce between two major shareholders resulted in a breakdown in the mutual trust and confidence between the members. Although the applicant shareholder was entitled to wind up the company under the equivalent Australian section 218(1)(i), the court was of the opinion that winding up will only be granted if there is no other less drastic form of relief available. Therefore a remedy under the equivalent section 181 was granted for the purchase of the minority member's shares by the majority.

In *Morgan v 45 Flers Avenue Pty Ltd*,⁵⁵ the court said that it will not make an order under the equivalent section 218(1)(f) or (i), if it is of the opinion that the applicants have some other remedy or that they are acting unreasonably in seeking the winding up order instead of pursuing some other less drastic remedies possibly under section 181 or other common law remedies.

would be very important to creditors because the words 'just and equitable' are very wide and do not limit the jurisdiction of the court to any particular case. It is a question of fact, and each case depends on its own circumstances: *Re Bleriot Manufacturing Aircraft Company Ltd* (1916) 32 TLR 253

⁵⁴ (1985) 3 ACLC 74

⁵⁵ (1987) 5 ACLC 222

In *Re SG White Pty Ltd*,⁵⁶ the court refused to order that the company be wound up even though there were grounds under the Australian Uniform Companies Act's equivalent of both section 181 and section 218(1)(f) and (i) because the company had a good and profitable business. The court ordered the company to purchase the shares of the member concerned. As mentioned earlier, a similar position was taken by the High Court of Malaya in *In The Matter of Cast Iron Products*.

However, it is interesting to compare the Australian cases with some local cases. In Singapore, in the case of *Kuah Kok Kim v Chong Lee Leong Seng Co(Pte) Ltd*,⁵⁷ the court in construing section 216(2) of the Singapore Companies Act said that it was not right to say that winding up would only be granted only if all the other reliefs specified in section 216(2) were inadequate or ineffective for the purposes of remedying the matters complained of.⁵⁸ The courts reasoning was based on the fact that section 216 confers on the court an unfettered discretion and therefore it would be wrong to lay down any general rule which would operate to limit or restrict the exercise of the court's discretion.

Although the court acknowledged that winding up was a drastic remedy as stated by Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn Bhd*⁵⁹ at p

⁵⁶ (1982) 1 ACLC 254

⁵⁷ [1991] 2 MLJ 129

⁵⁸ *Ibid* at p 131E

⁵⁹ [1978] 2 MLJ 229

233⁶⁰ it nevertheless went on to say that winding up would be a more appropriate remedy in certain circumstances even though relief other than winding up would put an end to the oppression. The above statement made by Lord Wilberforce was reiterated in *Gee Hoe Chan Trading Co Pte Ltd*.⁶¹ Here the majority shareholders of a company petitioned under section 216 Singapore Companies Act claiming that the majority shareholders had conducted the affairs of the company in a manner oppressive to the minority shareholders. The minority shareholders were seeking relief for proportional representation on the company's board of directors, the purchase of their shares by the majority shareholders or the winding up of the company.

Chao Hick Tin J after being satisfied that the petitioners had made their case under section 216(1)(a) said at p 95576:

I was inclined to give the respondents the option of purchasing the shares of the petitioners at a price to be determined by the auditors based on the accounts; and if the respondents should fail to exercise the option within a reasonable time, I would then order the company be wound up. I did not think it was practical, having regard to the fact that the parties were at logger heads and mutual trust and confidence were no longer there, to order that

⁶⁰ Winding up is specifically mentioned in s 181(2)(e) of the Companies Act [the equivalent of s 216(2)(f) of the Singapore Companies Act] as a head of relief which the court may grant. No limiting conditions are imposed, so that the granting of it is in the discretion of the court. In exercising this discretion the court will have in mind the drastic character, of this remedy, if sought to be applied to a company which is a going concern; it will take into account (a statement which is not exhaustive) the gravity of the case made out under s 181(1); the possibility of remedying the complaints proved in other ways than by winding the company up; the interests of other members of the company not involved in the proceedings

⁶¹ (1991) 1 MSCLC 95576

the company should continue with proper representation on the board for the petitioners. This would only cause further deadlocks. However, on my indication to the parties at the conclusion of the hearing that the petitioners had made out a case for reliefs, the respondents' counsel, after consulting the respondents who were present in Court, told this court that the respondents would not be able to purchase the shares and that in the circumstances, the company be wound up. I accordingly ordered that the company be wound up.

Further, the Singapore Court of Appeal in *Kuah Kok Kim v Chong Lee Leong Seng Co(Pte) Ltd*, compared section 216 with section 186 of the Australian Companies Act. Section 186(2) reads as follows:

S186(2) If the Court is of the 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 subsection applies, make an order that the company be wound up; or
- (b) where the Court is of opinion that to wind up the company would unfairly prejudice the member or the members referred to in subsection (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.

It is obvious that looking at section 186(2), the legislature intended that the remedy of winding up is to be granted only as a remedy of last resort. Section 186(2) is reflected under the present section 260 of the Australian Corporations Act:

S260(2) : ...the Court may, subject to subsection(4), make such order or orders as it thinks fit,....

S260(4) : The Court shall not make an order under subsection (2) for the winding up of a company if it is of the opinion that the winding up of the company would unfairly prejudice the oppressed member or members

Since there is no equivalent Australian provision in the Malaysian and Singapore Acts, therefore the Courts in Malaysia and Singapore do not have to rely on the Australian court decisions which are based on a differently worded provision.

In Malaysia in the recent case of *Tien Ik Enterprise Sdn Bhd & Ors v Woodsville Sdn Bhd*,⁶² the then Supreme Court by comparing the various UK and Australian provisions⁶³ came to the conclusion that under the Malaysian Act there was no obligation for the Malaysian courts to consider the availability of alternative remedies before making a winding up order under section 218(1)(i) of the Companies Act.⁶⁴ In *Tien Ik Enterprises Sdn Bhd v Woodsville Sdn Bhd*, the Supreme Court referred to the Singapore case of *Tang Choon Keng Realty (Pte) Ltd v Tang Wee Cheng*⁶⁵ where Chan Sek Keong J said:⁶⁶

⁶² [1995] 1 MLJ 769

⁶³ S 225(2)(b) English Companies Act 1948 and s 367(3) Australian Companies Act 1981

⁶⁴ *Supra* n 64 at p 779C

⁶⁵ [1992] 2 SLR 1114

⁶⁶ *Ibid* at p 1137B

Having considered the authorities ...it was no answer to say that relief might also have been obtained in a minority shareholders' action.

A similar position was taken by the Singapore Court of Appeal in *Chong Choon Chai & Anor v Tan Gee Cheng & Anor*.⁶⁷ In this case the appellants were both shareholders and directors of Kim Heng Glass(Pte) Ltd ('the company') each holding 39300 shares. The other directors were the respondents, who were the majority shareholders owning 81300 shares each. On 3 August 1992, the appellants filed a petition for the winding up of the company under section 254 of the Singapore Companies Act on the following grounds:

- a) that they were denied equal participation in the management of the companies although they joined the company on the basis that they would be involved in the management.
- b) there were malpractices by the respondents and there was discrimination against the appellants.
- c) the respondents under declared the company's stocks and therefore the appellants were not able to sell their shares to the respondents.

The High Court by relying on the case of *Kuah Kim Kok v Chong Lee Leong Seng Co (Pte) Ltd*, amended the heading of the winding up proceedings to that of originating petition on the premise that the appellants were actually seeking a remedy under section 216 of the Singapore Companies Act. However, the Singapore

Court of Appeal in *Chong Choon Chai & Anor v Tan Gee Cheng & Anor* distinguished *Kuah Kim Kok v Chong Lee Leong Seng Co (Pte) Ltd* on the grounds that in *Kuah Kim Kok*, the actual relief sought was under section 216 but the proceedings were brought mistakenly by way of a winding up petition.

In *Chong Choon Chai & Anor*, the intention of the appellants was all along to seek a winding up order against the company under section 254 and not section 216. Therefore the court was of the opinion that there was no cause of any amendment to the form of proceedings.⁶⁸

The *Chong Choon Chai* case also shows that the position taken by the Singapore courts are different from the Australian courts. The Singapore Court of Appeal recognised that a litigant is completely free to pursue his claim under either section 254 or section 216 and the court does not have a right to compel a person to consider alternative remedies. This is obvious from the fact that the Court of Appeal refused to strike out the winding up petition which was based on valid grounds.⁶⁹

With due regard to the above propositions of law as to granting of winding up orders the court in *Tang Choon Keng Realty (Pte) Ltd v Tang Wee Cheng* recognised that such an order would not however be made if it can be shown that the

⁶⁸ *Ibid* at p 5. The confusion that arose here which most probably misled the High Court was the choice of the words. The petitioner by the use of the word 'oppression' instead of 'unfair or unjust' as provided for in s 254(f) had given the impression that he was seeking a remedy under s 216. However, the Court of Appeal stated that both the expressions were not terms of art and were also not statutorily defined but in the ordinary sense capable of a broad definition.

⁶⁹ *Ibid* at p 7

member does not really seek the remedy but is using the process of the court for a collateral object. The courts will not grant any remedy if the petitioner is trying to abuse the process of the court so as to force the other party to adhere to the demands of the petitioner.

III. General conclusions

Finally the impact of the section 181 remedies can be seen in section 181(4), where the court is allowed to make an order to alter or make additions to the company's memorandum or articles and such alterations or additions shall have the same effect as if duly made by a resolution of the company. Under the Act the Memorandum and the Articles constitute a statutory contract between the company and the members and between the members themselves. The Act also provides that the Memorandum and the Articles can only be altered by following the procedures as stated in the Act. However the alteration of the two important constitutional documents is further subject to the alteration being made bona fide and in the best interest of the members as a whole. Of course what is in the best interest of the members as a whole has been a moot point. It seems that by relying on section 181, less than the requisite majority may be able to convince the court to have the above documents altered.

In this writer's opinion whether such a remedy should be permitted is questionable because Parliament has not only allowed the courts to interfere with the internal management of the companies but also had interfered with the concept of

majority rule. Now even a single member may exercise his or her's authority in an appropriate case.

The ability of the courts to interfere in the internal management of the company is well reflected in *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors*⁷⁰ where the court said that once a case has been made out under either paragraph (a) or (b) of subsection (1) of section 181, it is clear that the court can make an order altering the memorandum or the articles of the company. The power to alter the constitutional documents by the courts means that the courts could impose their own opinion as to how the company should be run or managed. In fact debenture holders themselves through the courts would be able indirectly to interfere in the internal management of the company.

It is surprising to note that section 181(2) does not mention specifically the authority to commence civil proceedings as provided in the equivalent provisions in UK and Australia. It is a known fact in law that it is better to specify certain matters expressly so as to avoid any element of doubt. Could it be implied then that Parliament did not have the intention to provide such powers to the courts? But then this argument would seem to be rather academic because section 181(2) provides that the court may make any order as it thinks fit without in any way limiting the scope of the remedies that it can provide. Therefore, it is the writer's opinion that under section 181(2), the courts would have the authority to compel the company to commence, institute, prosecute, defend or discontinue specified proceedings.

⁷⁰ [1995] 2 SLR 297

It may be concluded that by providing such wide remedies under section 181(2) which allows the courts to interfere in the internal management of the companies, most of the powers of members in companies are now indirectly subject to the opinion of the courts. It could be argued that whatever powers or rights, Parliament had given to members of the company under the Companies Act it has indirectly removed them. It is made worse by the fact that even debenture holders can possibly use the courts to have the companies managed in a certain manner.

Given the wide ambit of section 181 and the vast number of cases decided under similar provisions in other jurisdictions, it is only a matter of time that the Malaysian courts will be inundated with many section 181 applications. As more and more companies are being formed and more shareholders being aware of their rights and powers as shareholders, there would be an increase of litigation in this area of the law. It is therefore important for the courts and also Parliament to set clear precedents in this area. There should also be some restrictions on how the courts exercise their discretions in granting remedies. This is important because appellate courts are very reluctant to interfere with how the lower courts had exercised their discretion unless there is clear abuse of the discretionary power.

CHAPTER 7

CONCLUSION

The avowed principle of company law is majority rule. The minority must submit to the wishes of the majority. The majority have risked their money and have invested it in a business venture and it would be unfair to put restraints in their way.

The principle of majority rule is enshrined in the *Foss v Harbottle*¹ rule. The rule is very severe on the minority and the minority would completely be in the hands of the majority if there are no exceptions to the rule. Over the years a cautious judiciary has developed a number of exceptions to the rule. The most important of these is the exception commonly called the 'fraud on the minority exception'. This exception became one of the major vehicles of minority protection. The minority could assert their right as well as seek remedies for an alleged wrong to the company by way of an action which came to be known as the derivative action.

I. Limitations of the fraud on the minority exception

In theory the derivative action appeared attractive but in practice it proved to be complex, hazardous and frustrating. To bring an action under the fraud on the minority exception, the minority had to prove that the acts of the wrongdoers amounted to fraud and that the wrongdoers were in control. The main obstacle faced by the courts was in trying to provide a clear and precise definition to the meaning of 'fraud'. The concept of fraud on

¹ (1843) 2 Hare 461

the minority was a very vague concept and different courts gave different interpretations as to what it actually meant. In *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd and Ors*,² it was held that the expression 'fraud on the minority' was a term of art and was not concerned with the actual fraud or deception at common law but rather on the abuse of power by those in control of companies.

The proper plaintiff rule and the internal management rule underlying the rule in *Foss v Harbottle* gave rise to abuse of corporate powers by those in control of the companies. The problem is exacerbated by the fact that it is difficult to prove wrongdoer control under the fraud on the minority exception. There is no clear authority as to what wrongdoer control means. There is also the unsettled question as to whether control means 'de facto' or 'de jure'.

Knox J in the case of *Smith v Croft (No.2)*³ added to the confusion by introducing an exception to the exception. By virtue of *Smith v Croft (No.2)*, notwithstanding "fraud" and "wrongdoer control", a derivative action will be stayed if an "independent organ" of the company is able to prove that it does not wish to continue with the legal suit. In such a situation, the plaintiff minority shareholder could not proceed with the suit. However, this noble idea postulated by Knox J is full of ambiguities in the sense that it is difficult to establish who the "independent organ" is

² [1995] 3 MLJ 417

³ [1988] Ch 114

going to be and what test is to be applied to determine shareholder independence. The minority shareholders, to overcome the new obstacle, must satisfy the burden of proof that the votes of the "independent organ" is cast to support the wrongdoers. The obstacle created by *Smith v Croft (No.2)* would deter minority shareholders from considering any legal action on behalf of the company.

In fact given the present corporate culture and the complexities and sophistication of modern shareholding, it will be extremely difficult to prove manipulation or that the new shareholders are nominees of the wrongdoers or that they are not truly independent. It is to be noted that even though the above decision of Knox J has its attractions, it does not seem to enhance the proper governance of companies as it provides a license to the majority of the independent shareholders to decide whether it is legitimate for a company to be deprived of its title to property in cases of fraudulent breaches of duties.⁴

The rule in *Foss v Harbottle* being based on the principle of majority rule has also given rise to problems when dealing with the issue of ratification of directors acts in relation to the company. There is the problem of identifying the category of shareholders who are entitled to vote on a ratification exercise and the circumstances under which a derivative action may be precluded in respect of a non-ratifiable transaction.⁵ This a major problem in situations where the wrongdoers are shareholders

⁴ Loh Siew Cheang, *Corporate Powers: Controls, Remedies and Decision Making*, Kuala Lumpur, Malayan Law Journal, 1996, p 601

⁵ Loh Siew Cheang, *Supra* n 4 p 610

and are also the directors of the company. It generally gives rise to conflicts of interest in addressing ratification issues. The 'independent organ' formula mentioned earlier may not be of any assistance in the ratification process owing to the many unresolved ambiguities surrounding it.

Then there is the issue of whether the member has *locus standi* to bring a derivative action. Here again the courts do not seem to be in one accord as to the exact position of the law. There is likelihood that any litigation involving a derivative action may lead to a lengthy and costly battle between the parties concerned, especially if the issue of *locus standi* is decided as a preliminary point. It cannot be denied that in any legal action involving companies, there will always be numerous parties, witnesses and documents that would need to be brought and tendered before the court and in such a situation it will be an impossible task for the courts on a cursory examination of the witnesses or documents to conclude whether a particular member has a *locus standi* to bring a derivative action. Much has been said on this issues in the many cases reported⁶ but it is the writer's opinion that none of the cases provide a clear solution concerning the issue of *locus standi*.

The inconsistency of the courts in applying the fraud on the minority exception in certain cases shows the uncertainty and the ambiguity surrounding the rule

⁶ *Prudential Assurance Co Ltd v Newman Industries Ltd & Ors* [1981] 1 Ch 257; *Smith v Croft (No.2)* [1987] BCLC 206; *Hurley & Anor v BGH Nominees Pty Ltd & Ors* (1982) 6 ACLR 791; *Biala Pty Ltd v Mallina Holdings Ltd & Ors* (1993) 11 ACSR 785; *Alor Janggus Soon Seng Trading Sdn Bhd & Ors* [1995] 1 MLJ 241; *Tan Guan Eng & Anor v Ng Kweng Hee & Ors* [1992] 1 MLJ 487

in *Foss v Harbottle* and its exceptions. One of the major problems facing the minority shareholder is that the rule in *Foss v Harbottle* prevents him from suing the company's officers where it is alleged that they were negligent in conducting the company's affairs.⁷ This is unfortunate as negligence may sometimes cause enormous loss to a company. Although there is dicta that the suit may be possible where gross negligence by the company's officers is alleged⁸ and although self serving negligence may give rise to a derivative action as in *Daniels v Daniels*,⁹ the position of the minority shareholder is still weak where he alleges negligence.

In the writer's opinion these problems could have been addressed if the courts had given due recognition to a fifth exception, namely the 'in the interest of justice' exception. However, as discussed by the writer earlier in the dissertation, the courts in the various jurisdictions seem to differ in their views as to the application of the fifth exception. Although the Court of Appeal in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* and the Federal Court in *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor*¹⁰ expressed the view that the existence of the fifth exception as recognised in Australia is to be preferred but then there is no decision in Malaysia which has decided whether the fifth exception does or does not exist.¹¹

⁷ *Pavlides v Jensen* [1956] 1 Ch 565

⁸ *Multinational Gas & Petrochemical Co. v Multinational Gas & Petrochemical Services Ltd* [1983] Ch 258

⁹ [1978] 2 All ER 89

¹⁰ [1996] 2 AMR 2477

¹¹ Loh Siew Cheang, *Supra* n 4 p 601

It was also established in *Nurcombe v Nurcombe*¹² that a member bringing a derivative action must come to court with clean hands or where he has been guilty of an unreasonable delay, he would be precluded from bringing such an action. In this case, a wife obtained maintenance in a divorce proceedings against the husband. Thereafter, she proceeded as a member of a company of which she and her husband were the only shareholders, to bring a derivative action against him to recover company moneys which she alleged that he had misappropriated from the company and which she knew about at the time of divorce. The court held that it would be inequitable to allow a plaintiff minority shareholder to continue an action where the plaintiff minority shareholder had been aware of the defendant's wrongful conduct. In the recent case of *Barrett v Duckett*, again involving a family dispute, the minority shareholder, the widow of the founder of the company, brought a derivative action on the grounds that the management and control of the company had passed to her son-in-law and his second wife, to the exclusion of the founder's family and in particular his daughter (the ex-wife of the son-in-law). The court held that the widow did not have standing to sue in a derivative action because her main motive was to secure something of the family inheritance for her daughter rather than correct wrongs done to the company. It was also held in this case, that a plaintiff would only be allowed to bring a derivative action, if he or she has no other alternative remedy available. Yet, another hurdle for a minority shareholder to contend with.

¹² [1985] 1 All ER 65

Then there is also the issue of cost. In *Wallersteiner v Moir*,¹³ the English Court of Appeal held that in appropriate cases the court may order the company to indemnify against the costs incurred in an action. However, in *Smith v Croft*,¹⁴ Walton J held that this would impose an unfair burden on the company and that only a percentage of the costs should be paid. Other than the differing views of the courts on this issue, there are further problems as to establishing a proper system or procedure for indemnifying the minority shareholder and how the costs are to be imputed by the courts. These are matters which cannot be easily resolved by the courts themselves.

It is to be noted that there is no specific procedure in Malaysia for commencement and prosecution of derivative actions. In England, there is Order 15 Rule 12A of the Rules of the Supreme Court. There is no equivalent to Order 15 Rule 12A in the Malaysian High Court Rules. In Malaysia, therefore the action has to be in the form of a representative action under Order 15, rule 12 of the Rules of the High Court 1980. The plaintiff is the shareholder and the company is added to the action as a nominal defendant, so that any decision made by the court would be binding on the company.¹⁵ Order 15, rule 12A which has been included in the English Supreme Court Rules introduces a special interlocutory procedure for derivative actions. It basically reinforces the ruling in the *Prudential* case, that is the question of the plaintiff's standing to bring an action should be settled before the substantive issues are heard. Order 15, rule 12A

¹³ [1975] 2 WLR 389

¹⁴ [1986] 1 WLR 580

¹⁵ *Spokes v Grosvenor & West End Rly Terminus Hotel Co Ltd* [1897] 2 QB 14, 128 per Chitty LJ

provides that where a defendant (it appears any defendant – either the company or an alleged wrongdoer) has given notice of intention to defend, the plaintiff must apply to the court for leave to continue the action and will not be allowed to take any further steps in the case unless such leave is given. However, this new rule has been criticised on the grounds that it does not provide any guidance as to the criteria which must be adhered to by the courts when granting or withholding such leave.¹⁶ It is hoped that the Malaysian High Court Rules will be amended to provide a suitable efficient and speedy procedure for derivative actions. It may not be wise to blindly copy the English rules in view of the many short comings.

It is therefore apparent that the common law has failed to develop a positive doctrine of minority shareholders. The range of wrongs for which a shareholder could sue under the rule in *Foss v Harbottle* is severely restricted. Fortunately for the minority shareholder, the legislature has provided another vehicle for the minority shareholder to seek relief in the form of section 181 Companies Act 1965. Section 181 overcomes many of the problems of derivative action, in that it is not restricted to fraud, illegality and *ultra vires*. Where section 181 applies, it is not necessary :

- a) to join the company as co-defendant.
- b) for preliminary issue for locus standi to be tried.
- c) for wrongdoer control to be proved.

¹⁶ LS Sealy, *Cases & Materials in Company Law*, 6th ed. London, Butterworths, 1996, p 534

Also the “exception to the exception” principle illustrated in *Smith v Croft* (No.2) is irrelevant. Furthermore, the requirement of clean hands as stated in *Nurcombe v Nurcombe* and the new obstacle created by *Barrett v Duckett & Ors*, namely that the derivative action is not possible if an alternative remedy is available are irrelevant in a petition based on section 181. Therefore section 181 is a great boon to minority shareholders because of its wider scope and the unlimited relief that can be provided by the courts at their discretion to the minority shareholders. Section 181 comes into play when one of the following conditions are satisfied:

- 1) the affairs of the company are being conducted in a manner oppressive to one or more of the members, shareholders or debenture holders of the company; or
- 2) the powers of the directors are being exercised in a manner oppressive to one or more members shareholders or debenture holders of the company; or
- 3) the affairs of the company are being conducted in disregard of the interests of one or more of the members shareholders or debenture holders of the company; or
- 4) the powers of the directors are being exercised in disregard of the interests of one or more of the members shareholders or debenture holders of the company; or
- 5) some act of the company have been done or is threatened to be done which unfairly discriminates against one or more of the members or debenture holders of the company; or
- 6) some resolution of the members (or any class of them) has been passed or is proposed which unfairly discriminates against one or more of the members or debenture holders off the company; or

- 7) some act of the company has been done or is threatened which is otherwise prejudicial to one or more of the members or debenture holders of the company;
or
- 8) some resolution of the members (or any class of them) has been passed or is proposed which is otherwise prejudicial to one or more of the members or debenture holders of the company.

II. Advantages of applications under Section 181 Companies Act 1965

Section 181 is more flexible and allows the courts to play an important role in the protection of minority shareholders and debenture holders. Such a role bestowed upon the courts indirectly enhances the proper management of companies, lead to better accountability of those managing companies and prevent abuse of powers by directors and those in control of companies. This in turn leads to proper and effective use of the resources of the company, especially the capital raised from shareholders and debenture holders.

The remedies provided in section 181(2) are non exhaustive and it is to be noted that the remedies provided in section 181(2)(a) and (b) show the wide extent of the power of the courts to interfere in the management of the companies. The courts are not only able to direct or prohibit any act or cancel any transaction or resolution but most importantly are able to regulate the conduct of the affairs of the company in the future. This remedies basically allow the courts to cast aside the internal management rule

entrenched under the rule in *Foss v Harbottle*. The wide discretionary powers given and exercised by the courts can be seen in the cases.¹⁷

One significant achievement of section 181(1) is that it allows for managerial misconduct or mismanagement to be actionable by the minority.. Therefore in situations involving continuous breach of duties by directors, even though the breaches are based namely on negligence, a petition under section 181 would be appropriate. In the Australian cases of *Re Spargos Mining NL*¹⁸ and *Re Enterprise Gold Mines NL*,¹⁹ which were based on the equivalent of the Malaysian section 181, corporate reliefs were granted where the petitioners complained of breaches of fiduciary duties and managerial misconduct. Further, the significance of section 181 in comparison to the common law can be seen in the context of exclusion of a member from management of a company in breach of an express or implied understanding that the member would be allowed to participate in the management of the company. In common law, such a member could apply to wind the company on the 'just and equitable' ground.²⁰ In fact in *Re Tivoli*

¹⁷ *Re Coliseum Stand Car Service Ltd* [1972] 1 MLJ 109; *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors* [1994] 2 MLJ 789; *Chiew Sze Sun & Anor v Cast Iron Products Sdn Bhd & Ors* [1993] 2 AMR 3173; *Re SQ Wong Hong Holdings Pte Ltd* [1987] 1 MLJ 298

¹⁸ (1990) 3 ACSR 1

¹⁹ (1991) 9 ACLC 168

²⁰ *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360; *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433

*Freeholds Ltd*²¹ and *Ebrahimi v Westbourne Galleries Ltd*,²² winding up was ordered even though oppression was not proved. It is obvious that under section 181, the court in exercising its discretion, would be able to provide an appropriate remedy rather than take the drastic step of winding up the company, especially if it is a well established and a profitable going concern. Generally, winding up would have too far an implication, not only on the shareholders but also on the creditors and the employees of the company. Therefore, the availability of wide remedies under section 181(2) provides a proper avenue for shareholders and debenture holders to obtain a suitable remedy rather rely on the drastic remedy of winding up under the present section 218 Companies Act 1965.

It cannot be doubted that the wide ambit of discretion granted to the courts under section 181(2) would possibly allow the courts to provide remedies that are not clearly specified or mentioned in the section. An order similar to that made in the English case of *Re Little Olympian Each-Ways Ltd*²³ could possibly be made in Malaysia. In that case, the court relying on the equivalent of section 181(2)(c), made an order against a constructive trustee to purchase the shares of a petitioner in the company from which assets were transferred at a gross undervalue to the constructive trustee.²⁴ Also in appropriate situations, a receiver and manager or a provisional liquidator could be

²¹ [1972] V.R. 488

²² [1973] AC 360

²³ [1995] 1 BCLC 636

²⁴ Loh Siew Cheang, *Supra* n 4 at 168

appointed by the courts. In *Jenkins v Enterprise Gold Mines NL* and *Re Back 2 Pay 6 Pty Ltd*,²⁵ the courts made such appointments respectively when dealing with the equivalent of section 181.

III. Limitations of applications under Section 181 Companies Act 1965

One of the major limitations of section 181, is that the legislature has failed to provide any definitions or guidelines as to the meaning of the words 'oppression', 'discrimination', 'prejudice' and 'disregard of interests'. It was completely left in the hands of the judiciary and this led to various interpretations being given by the courts. Owing to the lack of clear and precise definitions or guidelines, the courts have faced and will continue to face a great burden in trying to balance the competing interests of both the majority and the minority and to ensure that the parties are treated fairly. But then the concept of fairness, which is the underlying factor in the above elements is itself a vague term. What is fairness in a particular case may vary between the judges sitting in the same court or between a judge sitting in the High Court and a judge sitting in a Supreme Court. The minority would have to rely on the wisdom and the ability of the judges to apply the facts in relation to the above vague elements. What is important is that a judge must consider the spirit of the legislation rather than the individual elements as such. In the writer's opinion it is essential for a judge to be more concerned in addressing the facts and the substantial issues rather than to be tied down with what the 'elements' actually mean. In a way the vagueness of the elements do provide the courts room to apply the elements in a wide range of circumstances. Nevertheless the courts must be careful, so as

²⁵ (1994) 12 ACLC 253

not to treat applicants under section 181 too favourably as it may hinder the companies' businesses and trade and may give rise to unnecessary litigation costs to the companies. In the long run the whole general body of shareholders are the ones who will suffer. The courts must therefore ensure that section 181 is not blatantly abused by those who are entitled to rely on it.

It is to be noted that the minority provision still lacks protection to shareholders in public companies. In this type of companies, shareholders are merely investors and hardly play an important role in the management and running of the company. As individuals they do not have the voting power to decide issues because of the wide spread of the shareholdings in this type of companies. Members are not locked into the company and the free transferability of the shares would allow the shareholders to exit the company. On the other hand, in private companies the importance of the minority protection cannot be undermined. In private companies the interests of members are paramount and the courts take into account equitable considerations in ensuring that the minority rights are protected.

An important reform that could be introduced in the Companies Act 1965, is the 'Appraisal Remedy' which is available in the Canadian jurisdiction. This remedy is especially important in public companies, where minority shareholders may not be happy with the running of the company. Since it is rather difficult for them to invoke section 181, it is suggested that in such circumstances they be given the option to sell their shares to the corporation or other members at a fair value. In Canada, section 190, Canada

Business Corporation Act, RSC 1985, cc-44 provides that a shareholder may apply to the court to fix a fair value for the shares of any dissenting shareholder. A similar provision should be incorporated in the Malaysian legislation.

In section 181(2), the legislature did not specifically provide for a statutory derivative action as is provided in section 216(c) of the Singapore Companies Act 1967. Thus, it is arguable that where directors or members have committed a wrong against the company and refuse to bring an action against themselves, members may not have a remedy under section 181. This argument is based on the fact that section 181 is concerned with personal rights and not corporate actions. In *Foo Ban Nyen v Foo Yet Kai*,²⁶ it was held that the section did not allow a derivative action and further in *Re Tong Eng Sdn Bhd*,²⁷ the petition was dismissed on the grounds that the petitioner was not personally oppressed or unfairly treated. However, in *Peugeot SA v Asia Automobile Industries Sdn Bhd*,²⁸ Siti Norma Yaakob J suggested that section 181 could be used by members to bring an action on behalf of the company. In view of the above controversies, it is suggested that the legislature should include in section 181(2) a remedy authorising a member to bring civil proceedings on behalf of the company as is provided in the other jurisdictions like Singapore, United Kingdom and Australia.

Further, what probably needs to be done is the inclusion of directors, officers and other persons as persons entitled to petition in section 181. This is important because

²⁶ [1991] 2 CLJ 1364

²⁷ [1994] 1 MLJ 451

²⁸ [1988] 3 MLJ 209

directors and officers of a company are usually well informed on the management and operation of the companies and are therefore in a better position to institute and commence legal proceedings against those managing or conducting the affairs of the company in a wrongful manner. Discretion can be given to the courts in allowing any other person to pursue an action under section 181. In fact, the remedies under section 181(2)(a) and (b) seem to provide wide powers to the courts to remedy breaches of directors fiduciary duties.

It is suggested by the writer that a provision similar to the Australian section 260(4) be included in section 181. Section 260(4) prohibits the court from making a winding up order if it is of the opinion that the winding up of the company would unfairly prejudice the oppressed member or members. Although there is no similar Australian provision in the United Kingdom but it is to be noted that section 461, Companies Act 1985 (U.K) does not specifically mention winding up as a remedy.

However, it is arguable that the court may do so owing to the fact that the provision states that the remedies are not exhaustive. Nevertheless, it is the writer's opinion that the inclusion of a similar Australian section would clearly highlight to the courts and the applicants under section 181 that it is the legislature's intention that the remedy of winding up should only be resorted to if there is no other suitable remedy available under the circumstances. If the applicant's primary intention is to wind up the company, then the applicant should pursue an action under section 218(f) of the Companies Act 1965, which is almost similar to section 181(1)(a).

With respect to section 181(2)(d) it is suggested by the writer that the section does not reflect a specific remedy and it would be advisable to have the section removed. However, in doing so, section 181(2)(c) has to be amended accordingly. It is suggested that section 181(c) and (d) be replaced with a similar provision as provided for in section 260(2)(e) and (f) of the Australian provision. Moreover in dealing with the remedy on the purchase of shares, it is suggested that a proper mechanism for the valuation of shares be put into place. Possibly a body of professionals who are experts in the area of valuation of shares can be referred to by the courts in circumstances involving the purchase of shares by other members or the company itself. This is important rather than to solely rely on the ability of judges to do so. With the increasing number of cases under section 181, it would be important in the long run to have such a body set up, so as to handle remedies involving valuation of shares.

Notwithstanding the fact that the legislature has used the words 'otherwise prejudicial' in section 181(1)(b) and the accepted fact that only an unjustifiable detriment caused to a member will entitle him to relief, it is suggested by the writer that for the purposes of clarity of law, the words 'unfairly prejudicial' be included in section 181 instead of the words 'otherwise prejudicial'. Moreover, such an inclusion would be consistent with the words 'unfairly discriminatory' in the section.

With regards to persons seeking relief under section 181, it is the opinion of the writer that the section is very restrictive in the sense that only members, debenture holders or the Minister may make an application. It has been seen that the narrow and

strict categorisation of persons being able to seek relief may deprive certain groups of people from obtaining a relief under section 181. In this respect, one possible reform to section 181, that would be necessary for the sake of clarity of law is the inclusion of a provision similar to the Australian sections 260(5)(b) and (c). Such a provision would clearly allow a member to bring an action if the member is affected in some other capacity than as a member. Even though the case authorities in Malaysia²⁹ and the United Kingdom³⁰ seem to support that a member would be entitled to bring such an action but there is no authoritative statement of law endorsing as such.

It is also suggested further that a provision similar to section 459(2) of the English Act or section 260(1)(a)(i) and section 260(5)(a) of the Australian Act, recognising and giving a right to a legal personal representative and to a person to whom a share in the company has been transmitted by will or operation of law, be included in the Malaysian section. The non existence of such a provision may give rise to injustice in certain circumstances and it is only fair that this persons be allowed to rely on section 181 to protect their rights. Although the Court of Appeal in *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd* had stated that the strict interpretation of section 181, allowing only registered members to seek a remedy under section 181 is too simplistic an approach and would be inequitable in certain circumstances, it is suggested that the legislature should have a wider provision to at least protect the legal personal representative and to those to whom the shares are transmitted by operation of law.

²⁹ *Re Chi Liung & Sons Ltd* [1968] 1 MLJ 97

³⁰ *Re A Company* (No. 002567 of 1982) [1983] 1 WLR 927; *Virdi v Abbey Leisure Ltd* [1990] BCLC 342

Lastly, it is suggested that section 181 should also include 'creditors' rather than just 'debenture holders' as persons entitled to petition. The term debenture being not clearly defined would only lead to confusion and lead to an increase in litigation costs. This is due to the fact that the courts would have to establish whether a particular person is a debenture holder for the purposes of the section. It is the opinion of the writer that all creditors of a company, should be fairly treated and protected. In this respect the legislature can provide the courts discretionary powers to decide in any application, whether a particular creditor is entitled to a remedy under section 181. It is also essential for the legislature to clearly specify and define the category of creditors who are entitled to bring an action under section 181. Is it creditors to whom a debt is owing or does it include persons to whom unliquidated claims for damages are due? With regards to the position of creditors, it is suggested by the writer that the Malaysian legislature could obtain much assistance by referring to the respective Canadian provisions and case authorities which had been briefly highlighted in this dissertation.

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