NOTES OF CASES

COMPANY LAW — STATUTORY RELIEF FROM OPPRESSION

Re Chi Liung and Son Ltd.[1]

Re Chi Liung and Son Ltd. is the first reported case on section 181 of the Malaysian Companies Act 1965; in Singapore, section 181 of the Companies Act 1967 is identical with the Malaysian section. This extremely interesting provision has its origin in section 210 of the Companies Act 1948 in the United Kingdom which was an innovation intended to give the Court power to remedy cases of oppression (particularly, though not exclusively, in private companies) without the need to resort to winding the company up. The scope of section 181 in the Malaysian and Singapore Companies Acts is, however, far wider than that of section 210 and indeed of the corresponding provision (section 186) in the Australian Companies Acts. Relief from oppression is one of the matters on which the draftsman has departed from his usual pattern of following the Australian Acts closely and has instead decided to deal with it afresh. This decision is greatly to be welcomed.

Under the United Kingdom provision, the only person[2] who can present a petition is a member of the company and there is only one ground on which he can petition, namely, 'that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself)'. Thus, section 210 provides no remedy where a single act of oppression, however grave, is alleged and, even where it is a course of conduct which is being alleged, there is considerable uncertainty as to what conduct is sufficient to constitute oppression. There is the further limitation that the petitioner must show that the circumstances are such that the Court would be justified in making a winding-up order on the 'just and equitable' ground but that to do so would unfairly prejudice those members alleging oppression. It is thus perhaps no surprise that section 210 has not proved very effective in the twenty years that it has existed.[3] Furthermore, there are others, besides members, who may be vitally affected by what is going on in a company (e.g. debenture holders) but they are outside the purview of section 210.

Section 181 of the Malaysian and Singapore Companies Acts is likely to prove a much more potent weapon in the hands of the courts in protecting minorities than section 210 has done. The draftsman seems deliberately to have tried to avoid most, if not all, of the drawbacks found in section 210. Thus, the right to petition is given not only to members of the company but also to debenture holders.[4] The petitioner is not required to show that the circumstances would justify a winding-up petition. The petition may be based on any one of the grounds set out in section 181 (1) (a) and (b).[5]

Section 181 (1) (a) deals with situations in which what the petitioner is complaining about is a continuing course of conduct. The grounds on which he can base his petition are (a) that the affairs of the company are being conducted *or*

1. [1968] 1 M.L.J. 97.
2. The Board of Trade, the Government Department responsible for the administration of the companies legislation, also has power to present a petition under s. 210 in the circumstances set out in s. 35 of the Companies Act 1967.
3. In paragraphs 199 to 212 of its Report in 1962, the Jenkins Committee discussed s. 210 and made various recommendations aimed at widening its scope but none of these has yet been implemented.
4. The Minister may also petition in the case of a 'declared company' i.e. a company the affairs of which are being investigated under ss. 195 and 196.
5. Although the reference in s.181(2) to 'either of such grounds' implies that there are only two grounds on which a petition may be brought, s.181(l) (a) and (b) contain, as a result of the repeated use of 'or', about ten different allegations on whieh a petition may be based as can be seen from the following two paragraphs in the text above.

(b) that the powers of the directors are being exercised *either* (1) in a manner oppressive to one or more of the members or holders of debentures including himself *or* (2) in disregard of his or their interests as members, shareholders[6] or holders of debentures of the company. The single ground which exists under s. 210 in the United Kingdom ('affairs of the company are being conducted in a manner oppressive') is thus retained but it is now only one among a number of grounds on which a petition can be based under section 181 (1) (a) quite apart from those provided by section 181 (1) (b).

Section 181 (1) (b) deals with the situation where what is complained about is a single occurrence; as has been noted, such a situation would fall outside section 210 of the United Kingdom Act. The petitioner will bring himself within section 181 (1) (b) if he can show that (a) some act of the company *or* (b) some resolution of the members, holders of debentures or any class of them *either* (1) unfairly discriminates *or* (2) is otherwise prejudicial to one or more of the members or holders of debentures (including himself). Furthermore, section 181 (1) (b) covers not only acts already done or resolutions already passed but also threatened acts and proposed resolutions.

Section 181 (1) is thus clearly widely drawn but the question which must be examined further is 'what type of conduct is encompassed by it?'. The first point to note is that probably only conduct which affects the member (or debenture holder) in his capacity as such can found a petition under section 181. There is nothing in the section which obviates the effect of the decisions in the United Kingdom[7] that a member's complaints about conduct which affects him as, for example, an employee or a director of the company are outside the scope of the statutory protection given to the minority. It accordingly seems likely that both section 181 (1) (a) and (b) will be interpreted in the same way and, indeed, in *Re Chi Liung and Son Ltd.* the judge appears to have assumed that this would be so.

In *Re Chi Liung and Son Ltd.* the ground in section 181 (1) with which the Court (Gill J.) was concerned was that the affairs of the company were being conducted in an oppressive manner i.e. the ground which does exist in the United Kingdom Act. The company involved was a family concern which had been built up by one Madam Chi Liung who, by the articles, had what the judge described as dictatorial powers. These included the power to provide by will that the powers she enjoyed should be exercised by a person of her choice. It was after the death of Madam Chi Liung and while a suit was pending to determine which of her three — conflicting — wills should be admitted to probate that the conduct of which the petitioner complained occurred. This was, principally, that a managing director and an assistant managing director had been appointed other than as provided in the articles though there was also a connected allegation that the petitioner's own appointment, by Madam Chi Liung in her lifetime, as managing director had never been validly terminated. The petitioner also alleged that the person appointed as managing director had procured the registration in his own name of certain shares in the company which had previously been in the name of the petitioner; the circumstances of the transfer were in dispute but, at the trial, the transferee admitted that at least some of the shares were not intended for him.

6. The addition of 'shareholders' to 'members' and 'holders of debentures' is puzzling. What interests can a petitioning member have as a shareholder which are not already covered by his interests as a member? It may be that the use of 'shareholders' was aimed at dealing with cases where shares are held by the personal representatives of a deceased member. Is it, however, correct to describe them as 'shareholders' ? of. *s.* 163. Even if it is correct so to describe them, s. 181 does not give personal representatives the right to present a petition (as the Jenkins Committee recommended they should have in the United Kingdom). May it possibly be that, in a company which has adopted the set of articles set out in the Fourth Schedule (i.e. Table A), the right to present a petition under s. 181 is a right of a deceased member to which his personal representatives are entitled by virtue of article 27 ? *Quaere* whether this can be right? What about those companies which (as is often preferable) have chosen not to adopt Table A? The difficulties of construction to which this footnote draws attention are less (though not entirely absent) in the rather special circumstances of a petition by the Minister in the case of a declared company.

7. e.g. *Re Lundie Brothers Ltd.* [1965] 1 W.L.R. 1051; [1965] 2 All E.R. 692. The result is that a complainant can be without redress even though he has lost what, particularly in a company 'in the nature of a partnership', was probably the reason why he became a member at all i.e. the prospect of full-time employment by the company.

The question which the judge had to decide was whether the conduct alleged amounted to oppression. He held that it did. In view of his finding that the purported appointments were in breach of the company's articles, his conclusion that there had been oppression followed from the authorities.[8] The judge also stigmatised what had happened with regard to the share transfer as oppression. What of the requirement in section 181 (1) (a) that the affairs of the company *are being conducted* in an oppressive manner (i.e. that there be an element of continuity) ? Looking at the circumstances as a whole, the judge regarded this requirement as having been met though, with respect, it does seem as if he was on less sure ground here than in his finding of oppression with regard to the purported appointments.[9]

Re Chi Liung and Son Ltd. would naturally have been of greater interest had it dealt with one of the grounds set out in section 181 (1) other than the one taken over from section 210 of the United Kingdom Act. Guidance as to what is embraced by that ground can be found in the United Kingdom and Australian cases and company law books.[10] What of the other grounds? Any views put forward must inevitably be rather tentative. The first matter to consider is the alternative to oppression provided in section 181 (1) (a) namely disregard of the petitioner's interests as a member, shareholder or debenture holder. Precisely what conduct does amount to oppression is uncertain[11] and, in particular, it does not seem to be definitively established whether there can be oppression unless there has been a breach of the articles, a breach of the directors' duties or some other legal impropriety. The Jenkins Committee in the United Kingdom recommended that a petitioner should be able to get relief in the case of conduct which was reprehensible but not legally improper and it might be that the draftsman was seeking to bring that about under section 181.[12] Might it be, for instance, that a policy in a small company of paying high remuneration to those members who worked for the company thus reducing the amount available to those who did not would be held to be 'in disregard of the interests of the latter'?

What of section 181 (1) (b)? What must a petitioner show? He need be complaining only of a particular act or resolution. One of the purposes of this provision appears to be to deal with situations in which, at common law, the minority would be faced with the task of proving 'fraud on the minority' if they are to get relief? The difficulty of that task is considerable since, as the Jenkins Committee acknowledge, 'fraud on the minority' is a notoriously vague concept. In *Greenhalgh* v. *Arderne Cinemas* Ltd.[13] the plaintiff failed to do so but Evershed M.R. did suggest that the position might have been different had the resolution complained of removed the right of pre-emption previously enjoyed by all members not from all of them but, instead, only from some while leaving the rest still enjoying that right. Is not such a resolution just the type of resolution which a

8. *Be H.R. Harmer Ltd.* [1959] 1 W.L.R. 62; [1958] 3 All E.R. 689.

9. There are two further points in the judgment in *Re Chi Liung and Son Ltd.* which perhaps merit comment:

   (i) the judge seems to have been in error when he said (at p. 101) '...whether there is, has been or is threatened the sort of oppression which is contemplated by section 181 of the Companies Act 1965'. Oppression is dealt with in *s.* 181(1) (a) and that provision, like s. 210 in the United Kingdom, does not cover future conduct. Future conduct can fall within s. 181(1) (b) but, to do so, it must be either a threatened act of the company or a proposed resolution of the members, debenture holders or any class of them.

   (ii) the judge's discussion (also at p. 101) of the power of a company to remove a director must be read as referring only to private companies. S. 128 of the Malaysian and Singapore Companies Acts gives a public company power to remove a director by ordinary resolution at any time notwithstanding anything in its memorandum or articles or any agreement between the company and the director. Chi Liung and Son Ltd. appears to have been a private company; the absence of any indication to that effect in its name (together with the use of Ltd. rather than Bhd.) was probably because the two year period allowed by *B.* 23(5) of the Malaysian Companies Act 1965 before a company had to stop using 'Ltd.' had not expired when the petition was brought.

10. For useful discussions of the statutory provisions in the United Kingdom and Australia, see also McPherson, (1963) 36 *Auttralian Law Journal* 427 and Wedderburn, (1966) 29 *Modern Law Review* 321.

11. See, particularly, the articles cited in the preceding footnote.

12. It is instructive to compare the provisions of s. 181(1) (a) so far as they relate to the exercise of the powers of the directors with s. 218(1) (f). This latter provision makes certain conduct of the directors a ground for winding a company up; the conduct of directors covered by s. 218(1)(f) seems to be much wider than that which would fall within s. 181(l)(a). S. 218(l)(f) is identical with s. 222(1) (f) of the Australian Companies Acts; on what is covered by this provision see McPherson. *The Law of Company Liquidation* at p.116.

13. [1961] Ch. 286; [1960] 2 All E.R. 1120.

petitioner under section 181 (1) (b) might allege 'unfairly discriminates' against him?_ Or, again, what about a resolution expropriating a member's shares? Whether this is 'fraud on the minority' at common law is less than clear[14] but could it not be said to be 'prejudicial' to the member concerned? As well as dealing with 'fraud on the minority' situations, section 181 (1) (b) would seem to provide a basis for a petition by a member in the case of *ultra vires* acts by the company; an individual member does have a right, at common law, to bring an action in such circumstances notwithstanding the rule in *Foss* v. *Harbattle* but proceeding under the statute is likely to prove more attractive because of the width of the powers the Court has, as noted below, when dealing with a petition under section 181.

It will be most interesting to see what effect the enactment of section 181 (1) (b) has in relation to objections to resolutions varyingi[15] class rights. In the United Kingdom Act section 72 gives those opposed to such a resolution the right to apply to the Court to have the variation cancelled and section 65 of the Malaysian and Singapore Acts contains a provision in similar, though rather wider, terms. It is, however, difficult to see why the minority should ever want to avail itself of section 65 once the Acts contain section 181 (1) (b). Under section 65 the holders of at least ten per cent of the shares of the class affected must apply to the Court and can do so only once the resolution has been passed; under section 181 (1) (b), a single member can apply and, then too, a petition can be brought in respect of a proposed resolution. Under section 65 the Court must confirm the variation unless it is satisfied that it would 'unfairly prejudice the shareholders of the class'; under section 181 (1) (b), the burden on the petitioner seems to be less in that all he need show is that the resolution is 'prejudicial to one or more of the members (including himself)'. Furthermore, under section 65, the Court's power is either to disallow the variation or to confirm it; under section 181, the Court can, as will be seen, make 'such order as it thinks fit'. It is of importance to note that section 65 (8) specifically provides that nothing in section 65 limits the rights given by section 181; this disposes of the possible argument that section 65 is exhaustive of the rights given by the Act to those opposing a variation of class rights.

If a petitioner can show that what he is complaining about does fall within either section 181 (1) (a) or 181 (1) (b) and he succeeds in satisfying the Court on the facts, the Court has power to 'make such order as it thinks fit'.[16] The position under section 210 in the United Kingdom Act is the same and, as with those listed in section 210, the powers listed in section 181 (2) should be regarded as no more than examples of what the Court can do since it is in no way limited to them.[17] It is, nonetheless, a pity that the powers of the Court which are actually listed in section 181 (2) do not include the potentially very useful power to authorize proceedings to be brought in the name of the company against a third party;[18] it may well be that the Court can do so under the section as it now stands but it would have been preferable had the matter been put beyond doubt in the Malaysian and Singapore Acts as the Jenkins Committee recommended should be done in the United Kingdom. *Re Chi Liung and Son Ltd.* is a good example of how the Court can exercise its powers under section 181 (2); in that case, it cancelled the resolution complained of, deleted the disputed transfer from the share register and gave instructions as to the management of the company pending settlement of the probate suit.

KENNETH POLACK

14. See Gower, Modern Company Law (3rd ed.) at p. 567.

15. The discussion which follows in the text above relates to the abrogation of class rights as well as to the variation of them.

16. This power is expressed to be 'with the view to bringing to an end or remedying the matters complained of. S. 181 also contains another example of incorrect use of English; the marginal note (and the corresponding entry in the index) reads 'Remedy in cases of an oppression'.

17. The reference in s. 181 (2) (e) to the power of the Court to provide that the company be wound-up and the consequential provision in s. 181(3) are interesting in view of the origin of s.181 as a provision intended to give the Court power to put matters right without resorting to winding-up. Presumably the Court would wind a company up on a petition under s. 181 only if there appeared to be no other way of dealing with the matters complained of.

18. S. 198(4) gives the Minister power to bring proceedings in the name of the company if it appears from the report of an inspector appointed by him that proceedings ought in the public interest to be brought in respect of any of the matters set out in that sub-section (e.g. damages for misconduct in the management of the company; recovery of property of the company which has been misapplied).