OPPRESSION OF MINORITY SHAREHOLDERS: THE SINGAPORE AND MALAYSIAN EXPERIENCE

Minority shareholder action and oppression represent areas of company law wherein the balance between majority rule and the abuse of power at the expense of the minority has not yet been clearly struck. Legislative intervention in the form of section 181 of the Companies Act[1] represents a progressive effort in this direction, although it does not represent the highwater mark of such efforts. The culmination of such efforts would be to allow, under judicial control, minority shareholders to institute action to right corporate wrongs in the name of the company even when the company and its controllers are reluctant to do so. Both Acts were drafted with full cognisance[2] of the inherent limitations of the models[3] which they parallel and the recommendations of the Jenkins Committee,[4] and were designed to remove much of the difficulties of their historical antecedents.

An outline of the types of conduct which have been sought to be remedied at the instance of minority shareholders serves to indicate the parameters and limitations of section 181. Where minority shareholders have personal rights that have been infringed which the courts have not allowed the majority to put right, such rights have been enforced as exceptions to the *Foss* v. *Harbottle*[5] rule of the proper corporate plaintiff. Where the right to be enforced is really a corporate right which the minority shareholder is enforcing derivatively, *e.g.,* enforcement of directors' duties to the company, only on narrow occasions have they been allowed to do so by way of exception to the *Foss* v. *Harbottle* rule. The legislative "oppression" remedy has been successfully invoked on few occasions: *e.g.,* where a parent company managed the affairs of one of its subsidiaries deliberately to ruin it[6]; and where a small family company was dictatorially managed by its founder in disregard of the Act and the company's articles.[7] In Malaysia, it has been successfully invoked on two occasions: where a managing director was removed from office and some of his shares were re-registered in the name of the respondent,[8] and where the controlling shareholder managed the company dictatorially and obtained loans and salaries from the company even when he was

1 S. 181 of Companies Act, A125, (Malaysia) and Companies Act Cap. 185 (Singapore Statutes Rev. 1970 ed.) are identically worded.
2 Malaysian Companies Bill No. 12 of 1965. Singapore Companies Bill No. 55 of 1966.
3 S.210 Companies Act 1948 (11 Eliz. Geo. 6, s. 38) (U.K.) and s. 186 of the Uniform Companies Act 1961 (Australia).
4 Report of the Company Law Committee (1962) Cmnd. 1749 H.M.S.O.
5 (1843) 2 Hare 461.
6 *Scottish Cooperative Wholesale Society Ltd.* v. *Meyer* [1958] 3 All E.R. 66.
7 *Re Harmer* [1959] 1 W.L.R. 62.
8 *Re Chi Liung & Son Ltd.* [1968] 1 M.L.J. 97.

abroad.[9] The "oppression" remedy has been held to be unavailable if the complaint is the directors' lack of business acumen, inefficiency or carelessness in conducting the company's business[10] or self-aggrandizement through the payment of excessive remuneration.[11]

Hadden[12] has identified situations in which minority shareholders ought to be protected at their own initiative: where the directors expropriate corporate assets or opportunities,[13] where they use their control to ensure excessive remuneration or perks[14] where they unreasonably reinvest profits instead of distributing dividends,[15] and where they entrench themselves by special voting rights or life directorships.[16] This is not to suggest that the legislative "oppression" remedy is the sole avenue of redress of these wrongs. Indeed the experience thus far has been to the contrary.

In Singapore and Malaysia, several perennial issues have been raised which constitute the occasion for this review. Section 181 contains several recurring elements of past, present and future continuing acts of the company or its directors which are either oppressive, in disregard of the interests of members, unfairly discriminatory or prejudicial. Are these elements to be construed cumulatively or disjunctively, and if the latter, in what combinations? The tendency hitherto has been to gloss over the elements and use the "oppression" label widely. How does section 181 fit in with minority shareholder actions and the exceptions to *Foss* v. *Harbottle?* What are the points of contact and dissimilarities of section 181 to its United Kingdom section 210 antecedent? Under what conditions may section 181 be invoked to enforce breaches of directors' duties to the company? What is "oppression" and how does it differ from "disregard of interest"? What are the limits to the potential remedies the courts may impose and specifically when will the court order a winding-up to remedy oppression?

9 *Re Coliseum Stand Car Service Ltd.* [1972] 1 M.L.J. 109.
10 *Re Five Minute Car Wash* [1966] 1 W.L.R. 745.
11 *Re Jermyn Street Turkish Baths Ltd.* [1971] 2 All E.R. 184.
12 *Company Law and Capitalism* (2nd ed. 1977) p. 240.
13 Generally it is the company that is competent to commence action against them, see *Regal (Hastings)* v. *Gulliver* [1942] 1 All E.R. 378 unless the expropriation can be characterised as a fraud on the minority in which case the individual shareholder may sue: *Cook* v. *Decks* [1916] A.C. 554. This is fraught with the procedural difficulties of *Foss* v. *Harbottle* particularly when the delinquent directors themselves control the share voting power in the company, which thus removes any real chance of corporate recovery.
14 Held in *Jermyn Street Turkish Baths Ltd. supra,* not to amount *per se* to oppression unless the directors additionally wield their voting power to retain such remuneration or stifle proceedings by the company or shareholders in relation to it. See however *Re National Building Maintenance Ltd.* [1971] 1 W.W.R. 8, affirmed [1972] 5 W.W.R. 410 where secret excessive management fees obtained by the majority shareholder was held to be oppressive.
15 This device is usually used in a squeeze out together with the removal of the minority shareholder from his directorship and the existence of share transfer restrictions in the company. Ironically, while this conduct does not attract the oppression remedy as the oppression is held to affect the minority shareholder in his capacity as a director and not as a shareholder, the winding up remedy on the just and equitable ground is available. See *Ebrahimi* v. *Westbourne Galleries* [1973] A.C. 360.
16 In spite of s. 128 which permits removal by the shareholders in public companies regardless of contract rights, *Bushell* v. *Faith* [1969] 2 W.L.R. 1067 appears to allow entrenchment by weighted voting.

Analysis of section 181

Section 181 when analysed to its basic elements, provides twelve separate *independent* grounds of action:

A member,[17] debenture-holder[18] or the Minister (when the company is a declared company under Part (9)) may apply to the court for an order on the following grounds:

A. *Present Continuing Oppression* [s. 181(1)(a)]

Alternative 1:
the affairs of the company are being conducted in a manner oppressive to one or more members or holders of debentures including himself.

Alternative 2:
the affairs of the company are being conducted in disregard of his or their interests as members, shareholders or debenture holders of the company.

Alternative 3:
the powers of the directors are being exercised in a manner oppressive to one or more members or debenture holders including himself.

Alternative 4:
the powers of the directors are being exercised in disregard of his or their interests or members or debenture holders including himself.

B. *Isolated Past Acts or Future Threatened Acts:* [section 181(1)(*b*)]

Alternative 5:
Some act of the company has been done which unfairly discriminates against one or more of the members or debenture holders including himself.

Alternative 6:
Some act of the company has been done which is otherwise prejudicial to one or more members or debenture holders including himself.

Alternative 7:
Some act of the company is threatened which unfairly discriminates against one or more members or debenture holders including himself.

Alternative 8:
Some act of the company is threatened which is otherwise prejudicial to one or more members or debenture holders including himself.

Alternative 9:
Some resolution of the members, debenture holders or any class of them has been passed which unfairly discriminates against one or more members or debenture holders including himself.

Alternative 10:
Some resolution of the members, debenture holders or any class of them has been passed which is otherwise prejudicial to one or more members or debenture holders including himself.

Alternative 11:
Some resolution of the members, debenture holders or any class of them is proposed which unfairly discriminates against one or more members or debenture holders including himself.

Alternative 12:
Some resolution of the members, debenture holders or any class of them is proposed which is otherwise prejudicial to one or more members or debenture holders including himself.

[17] By s. 16(5) it includes either a subscriber or one who agrees to become a member of the company and whose name is entered in the company's register of members. A person claiming an equitable interest in shares held by some other member may not invoke s. 181: *Yeng Hing Enterprise Sdn. Bhd.* v. *Liow Su Fah* (1979) Malaysian Federal Court, Civil Appeal No. 181 of 1979 (Unreported).

[18] 'Debenture' in s. 4 is defined to 'include debenture stock, bonds, notes and any other securities of a corporation whether constituting a charge on the assets of the corporation or not'. Thus other sundry creditors may not avail themselves of this remedy although they have standing to petition for a winding up under s. 217(1)(b). Neither a trustee in bankruptcy nor a personal representative may utilise the section unless they have themselves become registered as members: *Re Meyer Douglas Pty. Ltd.* [1965] V.R. 638 but *contra: dicta* in *Re Jermyn Street Turkish Baths Ltd.* [1970] 1 W.L.R. 1194 at first instance.

This analysis is borne out by the phrasing of the section itself, its historical antecedents[19] and the Ghanaian case of *Okudjeto* v. *Irani Brothers*[20]

> "To succeed in an application under section 218 of the Act 179 Companies Act the applicant must establish some oppressive conduct or conduct on the part of the directors (who are responsible for the management) which disregards his interests *or* some resolution either passed or proposed *or* act done which is discriminatory or otherwise prejudicial to one or more of the members."

This analysis, first tendered elsewhere,[21] now finds support in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.*[22]

> "But section 181 is in important respects different from both its predecessors and is notably wider in scope than the United Kingdom section. In sub-section (1)(*a*) it adds disregard of the interests of members etc. to oppression as a ground for relief in this respect making explicit what was already inherent in the section... it introduces a new ground in subsection (1)(*b*) …."

Relationship of section 181 to Foss v. *Harbottle*[23]

Since there appears to be some overlapping between minority shareholder actions which are conditioned by the rule in *Foss* v. *Harbottle* and section 181, the exact points of contact and divergence have been unclear. *Foss* v. *Harbottle* decided the following:

> "First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members 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 members of the company or association is in favour of what has been done, then *cadit quaestio*"[24]

The philosophical basis of judicial non-intervention in corporate affairs is the principle of majority rule. By becoming a member of a company, one agrees to submit to majority rule unless the Act or the memorandum or articles otherwise provide. This is designed to prevent a multiplicity of actions by aggrieved shareholders. It is also an expression of judicial reluctance to intervene in business

19 The Jenkins Committee, *op. cit.* and Ghana, 'Final Report of the Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana' 1961 drafted by L.C.B. Gower. S. 217 para. 6 is similar to s. 181:

> "In this Code … 'oppression' is supplemented by further words designed to make the ambit of the section wider and clearer... also covers the situation where there has been a disregard of the proper interests of members or debenture holders whether in their capacity of members, debenture holders or officers."

A similar approach has been suggested in the United Kingdom "Changes In Company Law" White Paper 1978, Cmnd. 7291, H.M.S.O., para. 65.

20 Emphasis added [1974] 1 G.L.R. 374, at pp. 383-384, *per* Hayfron-Benjamin, J. Reversed on other grounds by the Court of Appeal in [1975] 1 G.L.R. 96. See A.K. Fiadjoe 'Shareholders and the Oppression Remedy' 7 Rev. of Ghana Law 136.

21 By this writer in 'Enforcement of Directors' Duties and Oppression' [1976] 1 M.L.J. lxxii.

22 *Per* Lord Wilberforce, [1978] 2 M.L.J. 227 at pp. 228-9, (Privy Council) and see also *Yeng Hing Enterprise Sdn. Bhd.* v. *Liow Su Fah supra.*

23 *Supra.*

24 *Per* Jenkins L.J. in *Edwards* v. *Halliwell* [1950] 2 All E.R. 1064 at p. 1066.

disputes,[25] presumably because of a sense of inadequacy on the part of judges to resolve such disputes. The reluctance to intervene may however cause injustice and encourage the abuse of corporate power by the majority and when there is a serious departure from fair play, both judicial and legislative intervention are to be found. Chronologically, the first inroads were made by the courts, into what were self-created limitations.[26] The exceptions and consequently circumstances where an individual shareholder could initiate an action against wrongdoers, without having to rely on corporate action are:

i. Where the act complained of is wholly *ultra vires* the company,[27]

ii. Where there is fraud on the minority and the wrongdoers are in control of the company,[28]

iii. Where an individual member may sue if the matter in respect of which he was suing was one which could validly be done or sanctioned, not by a simple majority of the company but only by some majority *e.g.* a special resolution duly passed as such. Otherwise the company would breach its articles *de facto* by ordinary resolution where the articles require a special resolution,[29]

iv. Where the individual members who are suing are not suing in the right of the company but in their own right to protect from invasion their own individual rights as members,[30]

v. In any case where the claims of justice require that an action in which the company is not plaintiff should nevertheless be entertained.[31]

A local variant is to be found in *Federal Transport Service Co. Ltd.* v. *Abdul Malik & Others*[32] where a representative action was

[25] This rule is developed from judicial non-intervention in partnerships. In the latter case, the existence of dispute settlement clauses in most partnership deeds, justified judicial non-intervention. See A.J. Boyle 'The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History (1965) 28 M.L.R. 317.

[26] The rule, its origins and exceptions are analysed in some detail by K.W. Wedderburn in 'Shareholders' Rights and the Rule in *Foss* v. *Horbottle'* (1957) C.L.J. 194.

[27] See s. 20(2) of the Companies Act which, while curtailing the ramifications of *ultra vires* generally, preserves its full force in actions brought by members against the company or its officers.

[28] See for example *Cook* v. *Deeks supra,* and see the Malaysian cases of *Peck* v. *Russell* (1924) 4 F.M.S.L.R. 32 and *Paidah Genganaidu* v. *Lower Perak Syndicate Sdn. Bhd.* [1974] 1 M.L.J. 220. The fraud on the minority exception is a label which subsumes instances where the controllers expropriate corporate property or opportunity as in *Cook* v. *Deeks,* where there is an attempt to release directors from their duties of good faith, *Bamford* v. *Bamford* [1969] 1 All E.R. 969 and where minority shareholdings are sought to be expropriated by alteration of the articles, *Sidebottom* v. *Kershaw, Lease & Co.* [1920] 1 Ch. 154. See A. Afterman, *Company Directors and Controllers* (1970) p. 148 *et.seq.*

[29] *Edwards* v. *Halliwell, op. cit.*

[30] See *Pavlides* v. *Jensen* [1956] 2 All E.R. 51 and see now *Daniels* v. *Daniels* [1978] 2 W.L.R. 73.

[31] *Heyting* v. *Dupont* [1964] 2 All E.R. 273.

[32] [1973] 1 M.L.J. 216. See Wong Weng Kwai 'Minority Shareholder's Action: A Commentary on *Federal Transport Service Co. Ltd.* v. *Abdul Malik & Others'* [1974] 2 M.L.J. xxxiv.

initiated for an injunction against directors exercising their powers on the grounds that they had been removed from office by the general meeting. The substance of the complaint was irresponsible and unsatisfactory management causing the company to sustain heavy losses. In a novel judgment, the Malaysian court appointed a receiver and manager pending the final settlement of the company's directorships on the grounds that the company's assets were in jeopardy and that there were serious disputes amongst the shareholders which made this the only way to save the company and to ensure its continued operation.

The doctrine itself has not remained static but has been subject to judicial redefinition and extension.[33] In *Wallersteiner* v. *Moir (No. 2)* Lord Denning, albeit alone, was inclined to extend the doctrine to allow minority shareholder action.

> "Where the wrongdoers themselves control the company, an action can be brought on behalf of the company by the minority shareholders on the footing that they are its representatives to obtain redress on its behalf."[34]

and proceeded to suggest consequently that

> "the minority shareholder, being an agent acting on behalf of the company, is entitled to be indemnified by the company against all costs and expenses reasonably incurred by him in the course of his agency."[35]

In all the above areas, the individual shareholder is seen as having sufficient personal interests that may be protected by allowing direct enforcement by him, without requiring recourse to be made either by actions to be resolved to be taken by the general meeting of shareholders or by the company itself. But for these exceptions, it is the company or its controllers who determine whether it should commence legal action.

The unsatisfactory limitations of this doctrine have led to legislative intervention in the form of section 181 and its historical antecedents as well as the more radical remedy of winding up.[36] The relationship between *Foss* v. *Harbottle* and section 181 has often been confused, but it has been finally properly clarified by *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* The Federal Court[37] held the doctrine to be no bar to a section 181 action and that the section should be interpreted in a liberal spirit in order to carry out the intention of Parliament, which designed the remedy in order to suppress an acknowledged mischief. The Privy Council delineated the relationship thus:

33 See Minority Shareholders and Directors' Duties (1979) 41 N.L.R. 569 and *Daniels* v. *Daniels op. cit.* where although there was no fraud on the minority there were allegations of negligence and personal benefit by the directors, a minority shareholder's action was permitted, and see *Clemens* v. *Clemens* [1976] 2 All E.R. 179 where the majority's attempt to further dilute the minority's veto power over amendments to the company's memorandum and articles was restrained as oppressive and consequently an exception to *Foss* v. *Harbottle.*

34 [1975] 2 W.L.R. 389 at p. 396.

35 *Ibid.*

36 Under s. 218(l)(f) Malaysia and Singapore Companies Acts on the grounds that '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" or under s. 218(l)(j) on the just and equitable ground.

37 [1976] 1 M.L.J. 59 at p. 74.

> "Relief cannot be sought under section 181 merely because facts are established which would found a minority shareholder's action: the section requires (relevantly) 'oppression' or 'disregard' to be shown, and these are not necessary elements in the action referred to. But if a case of 'oppression' or 'disregard' is made out, the section applies and it is no answer to say that relief might also have been obtained in a minority shareholder's action."[38]

Once the elements of section 181 can be established, the procedurally simpler action should proceed without the inherent difficulties of *Foss* v. *Harbottle, viz., locus standi.* It is submitted that in the reverse case *i.e.*, where the elements of section 181 cannot be established, then the minority shareholder is thrust back to the full rigours of the *Foss* v. *Harbottle* doctrine. This is all the more evident in the context of such action being used to enforce directors' duties to the company. In the ordinary course of events, such breaches may either be actionable at the instance of the company in general meeting[39] or ratified by it.[40] Only where they amount to a fraud on the minority, a minority shareholder action avails.[41] Similarly, if such action can be placed within the framework of section 181, then indirectly, the director's breach of duty may be remedied at the instance of minority shareholder action. This is indirect because what is being remedied is oppression which incidentally is also a breach of directors' duties. While this is conceptually permissible, it would be anomalous for directors' duties to be so enforced if the action cannot be founded within the context of section 181.[42] While section 181 makes significant legislative inroads towards enabling minority shareholders to right corporate wrongs, it does so only when it can be established, *inter alia,* that such wrongs are additionally either "oppressive" or in "disregard of their interests." The next stage of law reform would be either the approach of allowing a court on application to authorise civil proceedings to be brought in the name and on behalf of the company by any person[43] or to specifically provide for action by the company or by any member to enforce directors' breaches of duty and to recover corporate property.[44] This stage has not yet been reached either in Singapore or Malaysia

38 *Per* Lord Wilberforce *supra,* note 22 at p. 229.

39 See *Regal (Hastings)* v. *Gulliver, contra Cook* v. *Deeks supra.*

40 See *Bamford* v. *Bamford supra* and *Hogg* v. *Cramphorn* [1966] 3 All **E.R.** 420.

41 *Cook* v. *Deeks supra.*

42 This approach taken by the Federal Court in *Re Kong Thai Sawmill (Miri) Sdn. Bhd. supra* is criticised by the writer in 'Enforcement of Directors' Duties and Oppression; *In re Kong Thai Sawmill (Miri) Sdn. Bhd.'* [1978] 1 M.L.J. lxxii but supported by M.H.K. Lim in [1976] 3 **J.M.C.L.** 101. The latter writer appears to labour under the view that s. 181 is a *carte blanche* minority shareholder's weapon to remedy all corporate ills. The Privy Council, although not directly posing the question reversed the Federal Court decision by concluding that the acts complained for were a matter within the company's discretion to act on or to ratify. "And if it was true that Beng Siew lacked prior; authority for some or indeed most of the donation made this, is a matter within the company's power, could be, (as it was) validated by the Board and the company in general meeting." *Per* Lord Wilberforce at p. 232.

43 As suggested in the U.K. White Paper 'Changes in Company Law' 1978 *op. cit.* para. 65. This would be one of the remedies that could be ordered by the Court under s. 181(2) but this remedy would be contingent of an initial finding of oppression.

44 As is the case in s. 210 of the Ghana Companies Act 1961, where such actions are specifically permitted in addition to the general oppression remedy. In the first case, it being specifically acknowledged that the real plaintiff is the company.

and whatever its desirability section 181 does not extend as far in all cases.

Distinction between section 181 and the United Kingdom section 210

Because of the tendency to use English texts and cases in construing similar local provisions, several limitations expressed or implied in the United Kingdom section 210 may sometimes be unwittingly introduced in construing section 181. The approach is quite properly abjured by the Privy Council thus:

> "But section 181 is in important respects different from both its predecessors and is notably wider in scope than the United Kingdom section.
>
> Section 210 is differently constructed. Under it, the court is required to find that the facts would justify the making of a winding-up order under the "just and equitable" provision in the Act, but also that to wind up the company would unfairly prejudice the 'oppressed' minority. The Malaysian section, on the other hand, requires (under section 1(a)) a finding of 'oppression' or 'disregard' and then leaves to the court a wide discretion as to the relief which it may grant including among the options that of winding up the company. That option ranks equally with the others, so that it is incorrect to say that the primary remedy is winding up.
>
> Their Lordships consider it important that courts applying section 181 should do so according to its terms and purpose and should not regard themselves as necessarily bound by United Kingdom decisions which are based upon a different section, and in some cases restrictive. The same applies, though less force, to reliance upon Australian decisions upon section 186."[45]

The linkage to the 'just and equitable' ground of winding up[46] in the United Kingdom means also that the courts would not grant a winding up order and hence an oppression order, if the company were insolvent or if the petitioner's shares are not fully paid up,[47] an approach which has been criticised.[48] The position in Singapore and Malaysia bears no similar constraints. Even in the case of a winding up, section 221(1) expressly permits the court to make a winding up order even when the assets of the company are fully mortgaged or that the company has no assets or where the petition is by a contributory, with the effect that there will be no assets for distribution amongst contributories. The absence of any direct linkage to the just and equitable ground for winding up and the fact that winding up is but one possible remedy under section 181 make these constraints inapplicable.

The other differences are that the United Kingdom provision allows an action only by a member while section 181 permits a debenture holder and in some cases the Minister to do so. While section 210 provides relief for currently continuing acts of oppression,[49] section 181 (1)(*b*) also allows relief for past acts or future threatened isolated acts. Even with this limitation, the courts have now recognised

[45] *Per* Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn. Bhd. supra* note 22, at p. 229.

[46] For a short account of its historical development see P. Mooney 'Section 181 of the Companies Act 1965' [1977] 2 M.L.J. xxii.

[47] *Re S.A. Hawker* [1950] 2 All **E.R.** 408.

[48] R. Pennington, *Company Law* (4th ed. 1979) pp. 605-606.

[49] "The affairs of the company are being conducted" — s. 210. See *In re Jermyn Street Turkish Baths Ltd. supra.*

that 'oppression' may still exist even though the offending act may have been discontinued:

> "What is attacked by sub-section (l)(a) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be 'oppressive' or 'in disregard' even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open, a finding that, as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section."[50]

There are, additionally, two judicially introduced limitations in construing section 210. An action under section 210 will not be entertained if the real object of it is to achieve a collateral purpose *e.g.* to force the company to repay a loan owed to another company controlled by the section 210 applicant.[51] Relief is available not just to a member of the company but only if he can establish that the oppressive conduct affects his rights as a member and not in any other capacity.[52] Thus if a minority shareholder is subjected to a 'freeze-out' by which he is removed from his directorship in a small company which does not pay dividends but relies on director's fees and service contracts to remunerate its majority shareholders, he cannot avail himself of a section 210 action as the conduct complained of affects him in his capacity as a director and not as a member. It should be stated however that the mere fact that a member is a director or holds any other position in addition to membership does not *per se* prevent him from invoking the section.[53] There is nothing in section 181 to suggest that these limitations do not continue. In the first case, the court in the exercise of its wide discretion would probably similarly rule in a case brought under section 181. In the second case, the section itself uses the phrase "as members, shareholders or holders of debentures" and thus presumably reinforces the same limitation.[54]

The final point of distinction is one of procedure. The United Kingdom section 210 requires the action to be by way of petition, while section 181 is silent. An action is conceivably therefore to be commenced by originating motion in Malaysia.[55] However, in a recent case *Re Lee Mah Realty Sdn. Bhd.* Harun J. notwithstanding Order 53B Rule 15 which requires a summons proceeding where no other form is prescribed held:

> "Section 181 of the Companies Act, 1965 deals with remedies in cases of oppression of shareholders by the directors of a company. By its very nature, it is contentious and such an application seeking remedies

[50] *Per* Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn. Bhd. supra* at p. 229. See also *Re Bright Pine Mills Pty. Ltd.* [1969] V.R. 1002.

[51] *Re Bellador Silk Ltd.* [1965] 1 All E.R. 667. So also will delay in the action be treated as acquiescence and thus bar the action. *Re Jermyn Street Turkish Baths Ltd. supra.*

[52] *Re Lundie Bros. Ltd.* [1965] 1 W.L.R. 1051 and *Elder* v. *Elder & Watson Ltd.*, (1952) S.C. 49. This limitation was applied by the Malaysian Court in *Re Chi Liung & Son Ltd.* [1968] 1 M.L.J. 97.

[53] *Re Harmer* [1959] 1 W.L.R. 62.

[54] Note section 218 of the Ghana Companies Code 1961 which extends the phrase to include "as members, shareholders, officers or debenture-holders'.

[55] See *Re Coliseum Stand Car Service Ltd.* [1972] 1 M.L.J. 109 and *Re Kong Thai Sawmill (Miri) Sdn. Bhd. op. cit.* This is suggested by P. Mooney in 'Section 181 of the Companies Act, 1965, *op. cit.* at p. xxvii.

> should set out the acts of oppression complained of. This is achieved if the Originating Petition is used whereas the Originating Motion procedure is only a licence to embark on a fishing expedition."[56]

In yet another recent case, *Yeng Hing Enterprise Sdn. Bhd.* v. *Liow Su Fah, dicta* of Abdoolcader J. reiterated the previous position that

> "Proceedings under section 181 should be by way of originating motion, the procedure accepted by the Privy Council to be in accordance with our law *(Re Kong Thai Sawmill (Miri) Sdn. Bhd.)* or perhaps even by originating summons in the light of the provisions of Order 53B rule 15 of the Rules of the High Court, but not by writ, and the Motion or summons should specify clearly the grievance alleged and the relief bought under that provision."[57]

While in most of the cases mentioned the point was assumed or accepted without further investigation, in *Re Lee Mah Realty Sdn. Bhd.*[58] the issue was squarely posed and fully investigated and its *ratio,* albeit of the High Court, stands. In view of such procedural wrangling, it is perhaps an understatement to suggest an amendment to the Rules of the High Court to put the matter beyond doubt.

In Singapore, however, Order 88 Rule 5(h) Rules of Supreme Court 1970 specifically requires a section 181 action to be commenced by petition. This is probably the unwitting result of the rules having being directly borrowed from the United Kingdom Rules of Supreme Court.

Oppression and the enforcement of directors' duties:

It has been said of section 181 that

> "it is so broad and open ended that it is difficult if not impossible, to anticipate what type of actions would fall under the categories of "oppression", "disregard of interests," "unfair discrimination", and "prejudice". The fact that all four of these terms have been used in the same section indicates that they are to be interpreted separately. Under S.C.A. s. 181 (i.e. Singapore Companies Act) therefore almost all internal corporate disputes are judicially cognizable and almost any remedy is permissible."[59]

That reading is, it is submitted, not borne out by its history and the interpretation given to it by the courts.

It is clear that internal disagreements are not cognisable in the absence of an abuse of power.

> "It was not intended by section 186 or section 94 to give jurisdiction to the Court (a jurisdiction which the Courts have always been loathe to assume) to interfere with the internal management of a company by directors who in exercise of the powers conferred upon them by the memorandum and articles of association are acting honestly and without any purpose of advancing the interest of themselves or others of their choice at the expense of the company or contrary to the interests of other shareholders."[60]

56 1979 (unreported) Originating Petition No. 8 of 1979, High Court of Malaya.
57 *Supra,* note 17.
58 *Supra.* See also a short note by L.K.C. in [1979] 1 M.L.J. lxx who criticises the originating motion procedure in actions where the facts are in dispute and involves witnesses.
59 A. Afterman *Company Directors and Controllers,* p. 222.
60 *Per* O'Bryan, J. in *Bright Pines Mills Pty. Ltd.* [1969] V.R. 1002 at p. 1011.

Further,

> "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 nor mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or efficiency, however well founded."[61]

This is amply illustrated by *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* where the dispute and matters alleged to be oppressive included the corporate purchase and maintenance for the managing director's use of a yacht, his causing the company to make political donations, his excessive drawings and advances to other companies in which he had an interest. On the question of the yacht, the Privy Council held that the decision to 'approve expenditure of a doubtful value and even a degree of extravagance' was that of the members, who in this case did not complain when the expenditure was incurred. As for the political donations, the issue was whether they were made *bona fide* and in the belief that they were in the interests of the company. Here it was open to the directors to take the view that since the company was dependent on government licences or concessions, such corporate interest in making donations could be established. The advances in question had been repaid, and was thus a spent issue, but they nevertheless were relevant to the issue of 'oppression/disregard.' It is also clear that if a company is being mismanaged through inefficiency or failure of care on the part of its directors, no action *per se* is available under section 181.[62]

Occasionally, attempts may be made to utilise section 181 to enforce directors' duties. This, it is submitted, is only possible where the breach of directors' duties is such as to justify such conduct being characterised as 'oppression/disregard.' A quick reference back to the breakdown of the elements of section 181 reveals that, in Alternatives 3 and 4, they extend to exercises of the powers of directors which are 'oppressive disregard' of their interests.

In *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* the Federal Court took this view:

> "First they [directors] are trustees of the company's money and property in the sense that they must account for all the company's money and property over which they exercise control, and must refund to the company any of its money or property which they have improperly paid away. Secondly, they are trustees of the powers entrusted to them in the sense that they must exercise their powers honestly and in the interests of the company and the shareholders and not in their own interests, failing which they may render themselves liable for their misuse of such powers. Bearing those principles in mind, I am of the opinion that the purchase by Beng Siew of Berjaya Malaysia was misuse of the company's funds and that the moneys which he paid out or for which he had himself reimbursed from the company's funds in respect of donations to S.C.A. and S.N.A.P. in the year 1968/69 were improperly paid away. He must therefore take over Berjaya Malaysia and pay to the company all the money spent on it and also pay the company the amount of the donations paid to those two political parties."[63]

61 *Per* Buckley J. in *Re Five Minutes Car Wash Service Ltd. supra* at p. 751.
62 *Ibid.*
63 [1976] 1 M.L.J. 59 F.C. *Per* Gill C.J. at p. 74.

This approach, without the express finding that the effect of such exercise of directors' powers is oppressive or in disregard of their interests has been criticised as being erroneous.[64] Directors' duties generally may be enforced in the following ways: the company itself in general meeting may in all cases institute recovery action against the delinquent directors.[65] Secondly, action may be brought by minority shareholders against directors on any of the exceptions to *Foss* v. *Harbottle,* particularly on the fraud on the minority exception.[66] Thirdly, under section 218 (1)(*f*) a winding up may be ordered on the grounds that 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".[67] Fourthly, winding up on the just and equitable ground in section 218(1)(;) may be invoked to remedy a breach of directors' duties.[68] Fifthly, in the case of class rights being subjected to variation, section 65 proceedings may sometimes avail. Sixthly, section 305 may be invoked against any person or officer who has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust or duty in relation to the company, for the Court to compel, in the course of a winding up restitution, repayment or compensation to be made.[69] Finally, it may be the subject of an investigation under sections 194 and 195. Section 181 is but an alternative that may be invoked, but only if additionally the breach

64 By the writer in 'Enforcement of Directors' Duties and Oppression': *Re Kong Thai Sawmill (Miri) Sdn. Bhd. op. cit.*

65 See for example *Regal (Hastings)* v. *Gulliver, supra* where the action against the former directors was brought by the company by its new controllers and shareholders.

66 *Cooks* v. *Deeks supra.*

67 In *Re Cumberland Holdings Ltd.* [1976] 1 A.C.L.R. 361 the lower court reversed by the Privy Council on the facts in (1976-77) 13 A.L.R. 561, construed this section thus: "(1) when it refers to 'directors' it does not limit its application to the case where the whole board acts unanimously, it will be met where it is shown that the effective majority has acted in its own interests or in the interests of one or has caused his will to be carried into effect by the board with the result that his personal interest has been preferred .... (3) The words "the 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 takeover offers, and indeed all matters which may come before the board for consideration. (4) Directors may be held to have acted in their "own interest" when they have acted in the interests of another company of which they are also directors and shareholders ... (5) ... the first limb of par. (f) applies where the directors are shown to have preferred their own interests to the interests of one or more perhaps some significant section of the members ... the action of directors may be open to challenge notwithstanding it coincides with the interests of the majority shareholder... (6) under the second limb the conduct does not have to be shown to be unfair or unjust to the members as a whole; it is sufficient... if it is shown that the conduct is unfair or unjust at least to any significant body of other members, and perhaps to any member." *Per* Bowen C.J. at pp. 374-375. The Privy Council allowed the appeal, *inter alia,* on the ground that to wind up a successful and prosperous company which was properly managed was an extreme step and required a strong case to be made, which was not done here.

68 *Ebrahimi* v. *Westbourne Galleries supra.*

69 Section 304 may also be invoked if there has been trading with an intent to defraud creditors or for any fraudulent purpose to render any person to be declared to be personally liable without limit for the debts or liabilities of the company.

of directors' duties can be characterised as oppressive/in disregard of their interests.[70]

The Privy Council, in reversing the decision of the Federal Court lent some support to this reading:

> "Secondly, for the case to be brought within section 181(1) (a) at all, the complaint must identify and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority or in disregard of their interests, that the section can be invoked."[71]

The validity of this approach is further illustrated by section 210 of the Ghana Companies Act 1961.[72] This section is posited in addition to an extended oppression remedy provided by section 218. It renders directors' duties more readily enforceable by making it easier for actions to be brought in the name of the company and by allowing individual members to institute proceedings more readily. In the earlier case, proceedings may be instituted in the name of the company on authority of the board, the receiver or manager, the liquidator or the general meeting. In a resolution of the general meeting of the shareholders, however, the delinquent directors are barred from voting thus ensuring an independent shareholders' decision. In the latter case an individual member may institute proceedings in the name of the company provided he sues in a representative capacity, joins the company in the action, is allowed to do so by the Court in its discretion and provides security for costs if so ordered. The immediate juxtaposition of the oppression remedy together with this novel provision designed to enable shareholders' actions to enforce directors' duties indicates the conceptual distinction between the two remedies. It postulates situations where such breach of directors' duties, while not amounting to oppression nevertheless should be actionable at the instance of the individual shareholders on behalf of the company without the procedural difficulties of *Foss* v. *Harbottle.*

Meaning of "oppression" and "in disregard of their interests"

The term 'oppression' has been the subject of several characterisation. While it has been characterised by the phrase "burdensome, harsh and wrongful"[73], the preferred description is that it involves "at least a *visible* departure from the standards of fair dealing and a violation

[70] See again M. Lim 'Oppression of Minority: s. 181 Companies Act 1965 *Re Kong Thai Sawmill (Miri) Sdn. Bhd.' op. cit.* where a false point of contention with this view is recurrently raised. A close reading of the above note and the writer's 'Enforcement of Directors Duties and Oppression' *op. cit.* reveals no serious disagreement on this precise point. See also P. Mooney "Section 181 of the Companies Act, 1965" *op. cit.* at pp. xxiv and xxv who erroneously raises the question of directors duties and concludes without argument that since section 218(l)(f) talks about directors duties, the same must also apply to section 181.

[71] *Per* Lord Wilberforce *op. cit* at p. 229.

[72] See Professor Gower's Commentary in the 'Final Report of the Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana' 1961.

[73] *Per* Lord Simonds in *Scottish Cooperative Wholesale Society Ltd.* v. *Meyer supra* at p. 71.

of the conditions of fair play upon which every shareholder who entrusts his money to a company is entitled to rely."[74] The abuse of power inherent in the concept is underlined by the following description:

> "Oppression must, I think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressors."[75]

Further it is evident that to be oppression there must be something adverse or detrimental to the members' financial interests as a shareholder.[76] The Jenkins Committee viewed section 210 to have the following implications:

> "Does it postulate actual illegality or invasion of legal rights or is it satisfied by conduct which without being actually illegal could nevertheless be justly described as reprehensible? The outcome of *Meyer's Case* indicates the broader view. And in our view, if the section is to afford effective protection, it must extend to cases in which the acts complained of fall short of actual illegality."[77]

In citing with approval Lord Cooper's characterisations of oppression, it added that:

> "This statement accords with our own view as to the intentions underlying s. 210 as originally framed, namely that it was meant to cover complaints not only to the effect that the affairs of the company were being conducted in a manner oppressive (in the narrower sense) to the members concerned but also to the effect that those affairs were being conducted in a manner unfairly prejudicial to the interests of those members."[78]

Both terms "oppressive" and "in disregard" were consistently construed by the Privy Council in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.*

> "... there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made... their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure.... Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line."[79]

[74] *Per* Lord in *Elder* v. *Elder and Watson Ltd. supra* at p. 55.
[75] *Per* Buckley L.J. in *Re Jermyn Street Turkish Baths Ltd. supra* at p. 1060.
[76] *Re Tivoli Freeholds Ltd.* [1972] V.R. 445.
[77] Report of the Company Law Committee 1962 Cmnd. 1749 paras. 203, 204.
[78] *Ibid.* Section 181(l)(b) of both the Malaysian and Singapore Acts are thus specifically worded to implement this recommendation.
[79] *Op. cit. Per* Lord Wilberforce at page 229. For examples of the blurred analysis of the elements of the section 181 see *Re Coliseum Stand Car Services Ltd. supra* "the first respondent had conducted the affairs of the company without proper regard to his (applicant's) interests. To my mind it is not unreasonable to hold that it constituted an oppression on minority shareholders" *Per* Abdul Hamid J. *supra* at p. 112. And see *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1976] 1 M.L.J. 59 (F.C.): "In my judgment the evidence with regard to drawings by Beng Siew and Beng Siong by itself constituted oppression. I do not think it can possibly be said that these drawings were not in disregard of the interests of the applicant as shareholder or those of the other minority shareholders." *Per* Gill C.J. at p. 73.

Beyond expounding the possible ambit of 'disregard', the Privy Council avoided this opportunity to consider additionally the implications of the term 'unfairly prejudicial' or 'unfairly discriminates'. This is probably the result of its having decided that neither of the elements of oppression were to be found in the instant case to justify such an exercise.

What then is the record of the use of the section? In only two Malaysian cases has it been successfully invoked. Firstly in *Re Chi Liung & Son Ltd.*[80] the applicant, the former managing director was replaced at an extraordinary general meeting and he claimed that his removal and the new appointments, as well as the re-registration of some of his shares in the name of the respondent, was oppressive. The Court had no hesitation in finding a lack of probity and fair dealing in the affairs of the company to the prejudice of some members of the company. In *Re Coliseum Stand Car Service Ltd.*[81] the applicant minority shareholder complained that the controlling shareholder and director managed the company as though he were sole shareholder, *to wit,* that he obtained a monthly salary even for some years when he was abroad, that he allowed his son to manage the company on a salary and that he and his son obtained loans from the company. Finally, although the company was successful, no dividends were declared until shortly before the action was commenced. The Court concluded that the affairs of the company were being conducted without proper regard to the applicant's interests.

One section 181 action has also been held to be misconceived. In *Yeng Hing Enterprise Sdn. Bhd.* v. *Liow Su Fah*[82] the plaintiff sued to recover a loan made to a company to enable it to purchase some land, in return for which by an agreement to which the company was not a party he was to have been issued with the company's shares. This issue never took place and the company in general meeting resolved later to sell the land at what was alleged to be below the best price obtainable. The plaintiff sought either a recovery of the sum lent or the issue of the shares to him and an injunction to restrain the company from selling the land. In failing to satisfy the Court of the existence of a cause of action against the company, section 181 was raised as an alternative, although no such claim was made in the writ. This attempt was rejected as misconceived on three grounds. The action was wrongly initiated and it ought to have specified clearly the grievance alleged and the relief sought. The plaintiff holding only one share could not be said to have been prejudiced as a member holding only one share by reason of the company not having issued share certificates in favour of another member, although he had a beneficial interest in such shares when issued. The general meeting resolution to sell the land was regular and no objection to the sale had been passed by the plaintiff there.

The problems left unresolved by the courts so far are many. Still unresolved is the suggestion that the 'fraud on the minority' situations and more are subsumed under the catch-all wording of

80 *Supra,* note 8.
81 *Supra,* note 9.
82 *Supra,* note 17.

section 181(1)(*b*) as 'unfairly discriminatory/prejudicial'.[83] That majority conduct by way of excessive remuneration and consequent non-declaration of dividends, while not necessarily oppressive, nevertheless amounts to being in 'disregard of their interests' is conceivable within the construction given to the latter phrase by the Privy Council. Whether an individual shareholder may invoke section 181(1)(*b*) rather than the *Foss* v. *Harbottle* exception, where the action complained of is *ultra vires* is another open issue. There appear to be *dicta* which are unclear in *Re Chi Liung & Son Ltd.* in support of this view.

> "If a company is doing something which is *ultra vires* its powers, then there is oppression because it deprives the minority of shareholders of their rights as members of the company to have its affairs conducted in accordance with its articles of association."[84]

Remedies

The remedies available once a finding of "oppression/disregard" has been made are enumerated in section 181(2). With a view to bringing to an end or remedying the matters complained of, or making such order as it thinks fit, the Court may, without prejudice to the generality of the foregoing: (a) direct or prohibit any act or cancel or vary any transaction or resolution; (b) regulate the conduct of the affairs of the company in the future; (c) provide for the purchase of shares on debentures of the company by other members or holders of debentures of the company or by the company itself;[85] (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.

It is clear that the section does not exhaustively enumerate all the possible remedies available. The Court is empowered to make such order as it thinks fit provided only if it is made 'with a view to bringing to an end or remedying the matters complained of. The enumeration provides merely examples of the types of orders it could make. The listed powers exclude the useful remedy of compelling or authorising the company to bring proceedings against third parties.[86] It may be argued however, that the Court has this power inherent in the jurisdiction conferred on it by the general preamble to section 181(2).[87]

The local courts have revealed some creativity in the exercise of the powers conferred on them. In *Re Chi Liung & Son Ltd.*[88] the Court cancelled offending resolutions appointing the managing director, granted an injunction restraining them from acting in such position, cancelled the offending registration of share transfer and restored the former managers, confining all developments to be contingent upon

83 See Gower's comments on a similarly worded section 218 Ghana Companies Code *supra.*
84 [1967] 1 M.L.J. 97 *Per* Gill J. at pp. 101-102.
85 Notwithstanding the otherwise general prohibition against such ownership in section 67.
86 See section 198(4) which so empowers the Minister acting on an Inspector's Report.
87 See Kenneth Polack 'Statutory Relief from Oppression: *Re Chi Liung & Son Ltd.*' (1969) 11 Mal. L.R. 345.
88 *Supra.*

the final settlement of a pending probate action. In *Re Coliseum Stand Car Service*[89] the Court ordered the sale of shares owned by one party to another to effect the joint management of the company. In *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* the Federal Court, although later reversed on the finding of oppression by the Privy Council, was most creative. It refused to order a compulsory purchase of the minority shares without the consent of the minority shareholder even in the light of existing family antagonisms. The Court quite appropriately ordered the appointment of a watch-dog director, which was a useful remedy in this case, as otherwise the younger brothers without board representation would have been deprived of any corporate information is essential to protecting their interests. Moreover, while refusing to remove the incumbent managing director, the Court imposed conditions on the operation of the company's bank accounts fixed the ceiling for directors bonuses and cancelled his powers to make donations and investments without full board approval. It also required the managing director to purchase the yacht from the company and restore to the company the political donations he caused it to make.[90]

On the winding up remedy in section 181(2), the Privy Council, in the same case, enumerated the conditions governing its exercise.

> "Winding-up is specifically mentioned in section 181 (2) (e) of the 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 section 181(1); the possibility of remedying the complaints proved in other ways than by winding the company up; the interest of the applicant in the company; the interests of other members of the company not involved in the company."[91]

The above review and analysis of the Malaysian and Singapore experience with oppression reveals some of the continuing shackles of its historical antecedents even though the local draftsman intended otherwise. A differing approach however appears in the local courts, readiness to find oppression on the facts as opposed to the stricter construction imposed by the Privy Council in construing the same provision.

P.N. PILLAI*

89 *Supra.*

90 This latter remedy has been criticised by the writer in 'Enforcement of Directors Duties and Oppression' *op. cit.* at page lxxvi on the ground that if they did not constitute oppression/disregard, section 181(2) as wide as it is, does not empower the court to remedy all other wrongs which incidentally come to light.

91 *Re Kong Thai Sawmill (Miri) Sdn. Bhd., supra, per* Lord Wilberforce at page 233. See also *Cumberland Holdings Ltd.* v. *Washington H. Soul Pattinson & Co. Ltd.* (1976-77) 13 A.L.R. 561 where equally the Privy Council was not inclined to wind up a successful and prosperous company and one which was properly managed unless it was an extreme case.

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