OPPRESSIVE CONDUCT OF A COMPANY'S AFFAIRS

Re Chi Liung & Sons Ltd. and *Re Kong Thai Sawmill (Miri) Sdn. Bhd.*

Oppressive conduct of a company's affairs may be remedied by either bringing an action in common law or under section 181 of the Companies Act.[1] The action under section 181 has been frequently invoked in the past and may be considered very useful. Although it has been successfully applied in Malaysia on several occasions a recent decision of the Privy Council[2] has prompted the writer to elucidate the manner in which the courts have applied the provisions of section 181. In doing this the writer shall consider the oppressive nature of the conduct that has to be established in a successful action and then critically analyse the decision of the High Court in *Re Chi Liung & Sons Ltd.*[3] and the decision of the Privy Council in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.*[4]

An applicant for relief under section 181 must establish that the matters complained of were "oppressive". Section 181(l)(a) states:

> that the affairs of the company are being conducted or... in a manner oppressive to one or more of the members....[5]

The Companies Act has not however defined "oppression" or what amounts to "oppressive conduct".[6] This task was left to the Courts. In *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer*[7] Viscount Simonds defined it as:

> ... burdensome, harsh and wrongful to the other members of the company or some of them, and lacks the degree of probity which they are entitled to expect in the conduct of the company's affairs.[8]

1 Australia — s. 186 U.C.A., U.K. — s. 210 Companies Act.
2 *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1978] 2 M.L.J. 227.
3 [1963] 1 M.L.J. 97.
4 [1978] 2 M.L.J. 227.
5 Australian s. 186 and U.K. s. 210 also requires "Oppression".
6 No definition in Australian and U.K. section.
7 [1959] AC. 324.
8 *Id.* 342. See also *Re Jermyn Street Turkish Bath Ltd.* [1971] 1 W.L.R. 1042; *Re Harmer (H.R.) Ltd.* [1959] 1 W.L.R. 62.

The Malaysian Courts have adopted and applied this definition. The Federal Court in *Ling Beng Siong* v. *Kong Thai Sawmill*[9] said:

> ... the jurisdiction of the court arises if it is shown that the powers of the directors are being exercised in a manner oppressive.... The word "oppressive" was defined in re R.H. Harmer Ltd. to mean....[10]

In *Jermyn Street Turkish Baths*[11] it was noted that a universal definition was dangerous. This is important especially in countries where the section refers not just to "oppression" or "oppressive conduct" but also to other forms of conduct. The Malaysian Act provides for:

a) Oppression.
b) Disregard of interest.
c) Unfair discrimination.
d) Prejudice.

1. *Re Chi Liung & Sons Ltd.*[12]

The facts related to a company owned by a family. All the shares were held by the estate of Madam Chi Liung and her decendents. The petition was brought by one of Madam Chi's grandsons. Alleged acts of oppression were:

a) The dismissal of the petitioner from his position as a company director.
b) The appointment of the first and second respondents as managing and assistant managing director under circumstances unauthorised by the Company's Articles of Association.
c) The registration of 325 shares belonging to the petitioner into the name of the first respondent.

It was claimed that the dismissal of the petitioner and the appointment of the respondents were *ultra vires* the Articles. The transfer of the shares was alleged to have been done fraudulently.

The respondents argued that as the allegations indicated acts of an *"ultra vires"* and "fraudulent" nature, the right remedy was to bring an action and not a petition under section 181. To be successful under section 181 (the respondent contended) the petitioner had to establish "oppression" and the facts complained of did not amount to such oppression. Gill J. however disagreed.

> 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. 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.[13]

Although the final outcome of the decision seems acceptable there were many doubts created in Gill J.'s judgment. It was opined that an *ultra vires* act amounted to "oppression" within section 181.

> If the 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... .[14]

[9] [1976] 1 M.L.J. 59.
[10] *Id. per* Gill J. at p. 62.
[11] [1971] 1 W.L.R. 1042 at p. 1060.
[12] [1963] 1 M.L.J. 97.
[13] *Id.* at p. 102.
[14] *Id.* at p. 101.

Would an *"ultra vires"* act by itself amount to an act of oppression within section 181? The judge seems to have thought so but the writer respectfully disagrees. *Ultra vires* acts ought to be remediable under section 181 if it could also be shown to be oppressive within the meaning of "oppression". In this respect the court should have only addressed itself to the question whether the acts complained of amounted to "oppression" *i.e.* burdensome, harsh or wrongful.

"Fraud" was also in the opinion of the judge remediable under section 181.[15] It is respectfully submitted that section 181 has not been in any way connected with fraudulent or *ultra vires* acts of the company. The proper remedy for such acts would have been by way of an action and not a petition under the section.

2. *Re Kong Thai Sawmill (Miri) Sdn. Bhd.*[16]

The company, as its name indicates, was concerned with timber milling. It was basically a family concern except for the fact that some outsiders held 21.31% of the shares. The remaining 78.69% were held by six brothers. Out of the six, Beng Siew held 55.75%. The applicant Beng Siong held 2.43%. The number of reliefs claimed were 60. The matters complained arose from alleged breaches of directors powers. Briefly they related to:

a) The purchase and outfitting by the Company of a motor yacht, Berjaya Malaysia.
b) Loan by the Company to Harun Ariffin.
c) Company donations to political parties.
d) Drawings by the second and third appellants from the Company's funds.
e) Advances and investments in joint ventures.
f) Remuneration paid to the second appellant as managing director.

It was an established fact[17] that during the years 1966 to 1970 the company made a nett profit of $8,765,000. $2,224,000 was used for entertainment, bonuses and travelling expenses. Donations mainly to political parties totalled $2,018,000. The nett amount paid to share-holders was $2,298,400.

The Federal Court, reversing the decision of the High Court, held "oppression" was established and made a total of 10 orders.[18]

The respondent opposed the application on three main grounds:

a) The applicant was alleged to have been motivated by malice in bringing the action. The malice was said to have arisen from family differences.
b) The acts complained of were authorised or approved by the directors including the applicant.
c) It was argued that the complaints were not oppressive and as they could have been breaches of the Companies Act for which there were certain specified remedies, section 181 was therefore wrongly used. It was also contented that the appropriate remedy was a shareholders action as an exception to the rule in *Foss* v. *Harbottle.*

[15] *Id.* at p. 102.
[16] [1978] 2 M.L.J. 227.
[17] [1976] 1 M.L.J. 59, 61.
[18] *Id.* 75-76.

The Federal Court rejected the respondents contentions and said:

> In my judgment the whole argument about malice was another red herring....[19]

The contention that the acts were ratified was rejected on the ground that the approval was obtained only after the applicant had brought the petition under section 181. The applicant was held not to have taken part in any ratification. As to the question whether a petition or action was the right remedy (raised in the third contention of the respondent) the Court said:

> ... the rules in *Foss* v. *Harbottle* in my opinion, is no bar to an individual shareholder making an application to the Court under section 181 of the Companies Act.[20]

The Court finally ruled that there was "oppression" and "disregard". The drawings made by the respondent were held to be oppressive conduct.

> In my judgment the evidence with regard to drawings by Beng Siew and Beng Siong by itself constituted oppression. I do not think that 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.[21]

The purchase of the luxury boat was heavily criticised. Although the respondent had general approval to buy machinery and other equipments he had no such power to buy a luxury yacht:

> For the company to have a boat costing more than half a million dollars merely for the purpose of entertaining customers is the height of absurdity, even if it can afford it.[22]

Throughout the judgment it was detectable that the Court was rather unhappy in the alleged approval obtained by the respondent. Most of it was done *ex post facto* on June 10, 1970 when 24 resolutions were put through in 90 minutes. All this was done after the applicant had started to make enquiries. This is an important fact. The Federal Court looked at it in a manner favourable to the applicant. It was however the reverse in the Privy Council where *ex post facto* approvals were held valid and the Federal Court decision set aside.

The appeal to the Privy Council consisted of a cross appeal as well. The original applicant cross appealed for an order to wind up the company. The decision was delivered by Lord Wilberforce and the findings were:

> (1) The courts in Malaysia should not regard themselves as necessarily bound by the decisions both in U.K. and Australia. In the case of Australia this was applicable with less force.

It should be noted that the Federal Court also expressed a similar opinion:[23]

> (2) If the facts of the allegations supported a minority shareholders action, it did not necessarily follow that relief under section 181 should be given. It was imperative that "oppression" or "dis-

[19] *Id. per* Gill J. at p. 72.
[20] *Id.* 74.
[21] *Id.* 73.
[22] *Id.* 68.
[23] [1976] 1 M.L.J. 59 at p. 68.

regard" be shown under section 181 which was not necessary in a minority shareholders action. Once "oppression" or "disregard" was established section 181 would apply.

> … and it is no answer to say that the relief might also have been obtained in a minority shareholders' action.[24]

(3) Policy or executive decisions made by those managing the company with which the complainant disagreed was not enough.

> There must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder was entitled to expect before a case of oppression could be made out.[25]

The word "disregard" in section 181 was explained to mean,

> … 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.[26]

(4) Section 181(1)(a) was said to be not concerned with particular acts.

(5) None of the complaints by the petitioner were substantiated and the relief granted by the Federal Court were not justified.

(6) The order for a winding of the company was within the discretionary powers of the court, but the applicant respondent had failed to make out a case.

(7) Remunerations regularly voted and approved by shareholders were not to be interfered.

General Criticism

Apart from (1), (2) and (6) the writer respectfully disagrees with the other findings of the court.

Although the court was right in holding that mere disagreement with policy or executive decisions (see 3 above) was not enough for a case under section 181, the facts however revealed more than just "mere disagreement". The policy decisions made to donate almost 1/3 of the nett profits of the company were not insignificant acts. These decisions (which the Privy Council took note of) were only approved *ex post facto*. The donations were made at a time when one of the respondents (Beng Siong) took part in the elections. The purchase of the luxury boat involved a very large sum of money. It was found as a fact that the boat was unnecessary. It was initially registered in the name of one respondent and was in the opinion of the Federal Court, "a white elephant."[27] The Privy Council however dismissed it in a simple manner:

> "… if they chose to approve expenditure of doubtful value and even a degree of extravagance, that was their choice."[28]

The same form of reasoning was applied by their Lordships to justify the political contributions. It was very unclear whether their Lordships considered the amount of contribution to be irrelevant as long as it was approved. In this respect it is important to note that the

[24] [1978] 2 M.L.J. 227.
[25] *Ibid.*
[26] *Ibid.*
[27] [1976] 1 M.L.J. at p. 69.
[28] [1978] 2 M.L.J. 227, 230.

contributions in this case came from the shareholder's funds. Would their Lordships have approved had the appellants contributed all the profits? If not where would they have drawn the line? This question was well evaded by the court to the dissatisfaction of the reader:

> Their Lordships do not need in this appeal to enter upon the wider question whether, in what circumstances, and on what scale, it may be proper for a company to make, out of shareholders' funds donations for political purposes.[29]

As it was in this case, out of a nett profit of $8,765,000, $2,018,000 was given away. Was this not oppressive, disregard of interest or unfair discrimination of the petitioner whose share of the profits was minimised by this extravagant contribution?

With due respect to their Lordships the writer disagrees with their findings. It may be true that mere disagreement on executive or policy decisions should not give rise to a valid complaint. This however must be a general rule. Otherwise it would be impossible to prevent the majority approving improper *(i.e.* acts of oppression) under the guise of policy decisions. The spending by the appellants of huge sums of money on an unwanted luxury boat and on political donations was not something to be brushed aside simply as "executive decisions". Depleting the company's funds in a manner described in this case could be very concerning to a shareholder. It is possible that the respondents' allegations may not have amounted to "oppression" within the meaning given to the word by the courts. The Malaysian Act however provides for more than "oppression".[30] It provides for "disregard" of a member's interest. Let us look at the dictionary meaning of the word "disregard". The Shorter Oxford Dictionary[31] states: "to treat as of no importance, to pay no attention to." To the writer there seems to be a significant difference between this and "burdensome, harsh and wrongful." Surely an objective analysis of the appellants acts amounted to "disregard" of the respondents' interest as a shareholder? "Disregard" in their Lordships opinion:

> ... involved something more than a failure to take account of the minority's interest; there must be awareness of the interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure.[32]

This seems to be a harsher definition than "oppression". Intentional overriding of the petitioner's interest is harder to establish than,

> ... a visible departure from the standards of fair dealing and a violation of the conditions of fair play....[33]

Does this mean that unintentional *i.e.* negligent acts that affect the interests of shareholders do not amount to "disregard"? If they are the writer respectfully submits this to be wrong. In *Scottish Wholesale Co-operative Society* v. *Meyer*[34] the dictionary meaning

[29] *Id.* 232.
[30] See above p. 2.
[31] Third Edition.
[32] [1978] 2 M.L.J. 227.
[33] *Ibid.*
[34] [1959] A.C. 324.

of "oppression" was adopted. There seemed to be no apparent reason why the same was not done in this case to the word "disregard".

Executive or policy decisions should only as a general rule be ratifiable by the majority. If the decisions or acts were wanton in nature as in this case, ratification should never be permitted as a defence. Their Lordships seemed to be concerned that the respondent failed to complain during the occurrence of the various events. They therefore seem to have indirectly drawn an adverse inference against the respondent. It is respectfully submitted that to do so it ought to have been established that the respondent was aware of the acts. There was however no evidence to this effect. In fact it was clear that the respondent seemed to be unaware and in the dark until he obtained answers through an Order of Court dated 18th November 1970. His letters dated 27th April 1970 and 14th May 1970 to the company received no reply.[35] Why was not any inference drawn or why was not any importance given by their Lordships to this failure by the appellant to reply to those letters?

In England it is a fact that petitioners have been unsuccessful on many occasions due to harsh interpretations of the section[36] by the Courts. An oppressed minority shareholder has therefore been bogged down by technicalities from invoking a useful remedy. Their Lordships did recognise that the Malaysian section is wider than its counterpart in U.K.[37] Nevertheless they have failed to apply the facts of this case in the spirit of the Malaysian section. Their definition of "disregard" and the general application of the facts have given rise to an undesired restricted interpretation of the section. The ultimate victor seems to be political organisations which can now be rest assured of continued financial aid from their corporate friends. Needless to say corporations may without undue concern advance loans and purchase any form of luxury items as long as the company approves it. These actions furthermore could be approved *ex post facto.*

Surely this should not be the permitted state of affairs. It is hoped that the judiciary in Malaysia would somehow be able to cushion the restricting effect of this decision. Wider interpretation of section 181 which is apparent in its wordings should be recognised. To do otherwise would only stifle its purpose. The decision of the Privy Council is therefore not welcome and the Federal Court's decision is preferred. On the whole the Malaysian Courts have applied the law in the right spirit envisaged by the section. This gives rise to the question whether it is of any benefit to maintain appeals to the Privy Council in future.

Finally it is hoped that the practitioners and the Courts would refrain from just relating the facts of a case to "oppression" alone but apply them to "disregard", "unfairly discriminates" and "prejudicial".

J. VELUPILLAI

35 [1976] 1 M.L.J. 59 at p. 61.
36 S. 210.
37 [1978] 2 M.L.J. 227, 229.